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MASCULINITY & LAW

Dylan A. Yaeger

Fordham University School of Law, S.J.D. Dissertation – March 28, 2019

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ABSTRACT

The relationship between the law and masculinity has not been as thoroughly examined as the relationship between the law and feminism or, more generally, between the law and gender. Yet, the reach of masculinity stretches deep into the very fiber of the law. Masculinity has for too long served as an invisible bedrock on which the law founded both its substance and method. The struggle for formal equality during the last half century sought the elimination of the masculinist bias, but only has exposed the extent of the entrenchment. The popular idea is that the law exists in a removed and exalted position where it sits in judgement of a pre-existing and fully formed masculinity. The principal argument in this paper, however, is that the law serves as a "technology of sex" that actively produces fixed gender identities and reifies sexual difference. Indeed, much of the internal coherence of the law is premised on the integrity of the subject and the propagation of sexual difference. Thus, the law is precluded from acknowledging or engaging with its own productive power and vacuously characterizes itself as a neutral arbiter. To advance this critique, the paper analyzes underlying arguments that support the power of law based in classic liberal political theory. It employs recurrent critiques of the law, and of liberalism more generally, found in Feminist Legal Theory, Critical Race Theory, Queer Theory, and Critical Legal Studies to reveal the law as always already intertwined with masculinity.

I. INTRODUCTION

I was a college student during Quebec's 1995 sovereignty referendum. It was my first exposure to significant discontent with the liberal world order. A little over twenty years later, the western world has seen this dissatisfaction boil over. The conventional left/right political spectrum that had been internalized by many has been drastically re-arranged—writ small on college campuses and writ large in the corridors of western liberal democracies. Whether the challenge to liberalism is sustained or whether it is consumed by the larger liberal social order—as has happened in Quebec, resulting in a satisfied Canada that today serves as a model of a western liberal democracy that withstood the rise of populism—remains to be seen. Given this challenge, it feels prudent to reconsider how liberalism has created the conditions that have led to this boiling over. Arguably, the core of the liberal[1] project remains the integrity of the subject. The gendering of this subject, and the law's role in the process, as understood within the larger space of ongoing critiques of liberalism, serves as the impetus for this paper.

Decades after having become the subject of serious study in its own right, masculinity remains a shifting and conflicted idea, or, stated slightly less cautiously, what masculinity means today is more confusing than it has ever been. Masculinity is something acquired over time, ushered into, and earned. Yet it is also the most natural of things, something one is born with, something defining, irreducible, and constitutive. Masculinity is something to be freed and unmoored, but is also elusive and contradictory. For Freud, masculinity and femininity were

[1] Raymond Williams offers a helpful definition of liberal: "liberal" began "in a specific social distinction to refer to a class of free men as distinct from others who were not free." "Liberal" is related to liberty, which, "though having an early general sense of freedom, had a strong sense from [the 15th century] of formal permission or privilege." While Liberalism is a doctrine of certain necessary kinds of freedoms, it is also essentially a doctrine of possessive individualism. Williams also highlights Shakespeare's use of liberal as close to licentious: "Who hath indeed most like a liberall villaine / Confest the vile encounters they have had." RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 130–31 (2015) (quoting WILLIAM SHAKESPEARE, MUCH ADO ABOUT NOTHING act 4, sc. 1).

among the most confused concepts in science.[2] And today, while popular culture perpetuates the idea that, beneath the ebb and flow of daily life, there exists a fixed and true masculinity, simultaneously there is a recognition that masculinity is not singular, homogenous, or unchanging.

This tension between a fixed, pre-discursive masculinity and a cultural/ideological one was on the front pages of the nation's newspapers in the summer of 2015, when the story of Owen Labrie made headlines. Labrie, at the time an eighteen-year-old senior at the St. Paul's School, was accused of sexually assaulting a fifteen-year-old as part of the school's "senior salute," a ritual in which male students propositioned female classmates for as much sexual activity as permitted. The New York Times said the case was "at its core, … about an intimate encounter … between a 15-year-old girl and an 18-year-old acquaintance, and whether she consented as it escalated."[3] Ultimately, Labrie was found not guilty of felony sexual assault charges, but was convicted of having sex with a person who was below the age of consent.

As the Times highlighted, the legal issues in the case boiled down to a question of consent or, as Jeannie Suk Gersen asked in The New Yorker, "what makes sex rape?"[4] What made the case front page material—the secret sex rites of an elite prep school—was cast as a red herring that distracted from the real issues at stake. This was about rape, not senior salutes. As the prosecutors repeatedly reminded the jury, the culture of St. Paul's School was not on trial,

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[2] Sigmund Freud, *Three Essays on the Theory of Sexuality*, *in* THE STANDARD EDITION OF THE COMPLETE PSYCOLOGICAL WORKS OF SIGMUND FREUD, VOLUME VII: A CASE OF HYSTERIA, THREE ESSAYS ON SEXUALITY AND OTHER WORKS 219 (1905).

[3] Jess Bidgood, *Owen Labrie of St. Paul's School Is Found Not Guilty of Main Rape Charge*, N.Y. TIMES, Aug. 28, 2015, http://www.nytimes.com/2015/08/29/us/st-pauls-school-rape-trial-owen-labrie.html.

[4] Jeannie Suk Gersen, *St. Paul's School and a New Definition of Rape*, THE NEW YORKER, Nov. 3, 2015, http://www.newyorker.com/news/news-desk/st-pauls-school-and-a-new-definition-of-rape.

Owen Labrie was. Notwithstanding this framing, the case was very much about masculinity, specifically, about how boys "become men" and our culture's role in that process.

In the eyes of the law, this case dealt with the legal definition of rape and of consent, and the factual question of whether consent existed. But the law does not think about the worth of the idea of consent as an indicator of the legality of sexual relations; instead, it single-mindedly focuses on whether or not consent exists. The law does not engage with the question of whether the legalization of consent has played a role in legitimizing subordination. The law has so thoroughly coopted the idea of consent that any public discussion about consent is almost universally confined to the legal parameters that define it.[5] The law takes the possibility of consent as its starting position, in that it assumes that as long as certain conditions are met (*e.g.*, age requirements) consent is possible, that relations of power and inequality can be overcome, and thus consent is not a hollow concept. But this presumption of consent as the starting point is not without criticism. Catharine MacKinnon herself questioned the value of consent as a key to emancipation: "If sex is normally something men do to women, the issue is less whether there was force and more whether consent is a meaningful concept."[6]

The premise behind the liberal idea of consent is that the default position is one of freedom, from which some semblance of actual consent is feasible, yet the legitimacy of consent, it can be argued, "is always instrumentalized in the name of coercion, and that consent is

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[5] "To think about the problem of consent outside of the legal frameworks that tend to dominate public discussions is difficult. At least within public debate, the problem of consent in conjunction with sexuality is usually understood to be a legal problem." Judith Butler, *Sexual Consent: Some Thoughts on Psychoanalysis and Law*, 21 Colum. J. Gender & L. 3, 5 (2012).

[6] Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, SIGNS Vol. 8, No. 4, 650 (Summer 1983). *See also* CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 260 (2005) (describing the beginnings of the feminist movement: "This movement was not taken in by concepts like consent. It knew that when force is a normalized part of sex, when no is taken to mean yes, when fear and despair produce acquiescence and acquiescence is taken to mean consent, consent is not a meaningful concept.").

therefore actually subjugation, and freedom, if it exists, is something wholly different from the discourse of consent."[7] Or, as the radical feminists who followed MacKinnon have claimed, consent in a world of male domination is essentially meaningless.[8] Unlike contract, for instance, in which both parties have supposedly had a voice in creating the arrangement, consent consists of submitting to an arrangement that someone else has created. The legalization of consent however has included attempts to render sexual relations contractual, furthering the proposition that a rigidly legal framework is the most effective means of protecting (usually heterosexual) women. This trend of hyper legalization is perhaps most prevalent in the move towards affirmative consent on college campuses in America.[9] However, as has been pointed out by those critical of this legalization, consent often serves as a tool for the law to simply legitimate the submission of the submitting party.[10]

The law focuses on liberal constructions like consent because it is structurally predisposed to set itself outside of the social order. In addition, the law is predisposed to disqualify certain types of knowledge, particularly those that fail to propagate the legal order. Given the law's inability and/or unwillingness to speak to questions concerning rites of passage into manhood, the issues permeating the case are narrowed to ones of consent. This emphasis on consent suggests that consent is a more objective concept that warrants engagement as opposed to less serious cultural components. This prioritization of consent ignores the ways in which

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[7] Butler, *supra* note 5, at 8.

[8] Janet Halley, *The Move to Affirmative Consent*, SIGNS, Vol. 42, No. 1, 259 (Autumn 2016).

[9] *Id.*

[10] *See* WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 163 (1995) ("If, in rape law, men are seen to *do* sex while women *consent* to it, if the measure of rape is not whether a woman sought or desired sex but whether she acceded to it or refused it when it was pressed upon her, then consent operates both as a sign of subordination and a means of its legitimation. Consent is thus a response to power—it adds or withdraws legitimacy—but is not a mode of enacting or sharing power.").

consent is manufactured by pre-existing power relations: "power precedes consent and orchestrates the terms in which we encounter moral or practical dilemmas of consent. Thus, the law fails in its bid for neutrality, and continues to privilege and perpetuate a particular way of doing masculinity, which both undermines its claim to be above the fray and reveals a narrow grasp of the mechanics of its power.[11]

* * *

I will suggest in this paper that the law acts as a "technology of sex"[12] that plays a substantial role in the construction of masculinity in our society, yet it perpetually disavows culpability and attempts to situate itself as a neutral arbiter that rationally and compassionately oversees some unadulterated raw masculinity, while and through fulfilling its task of defining rights and wrongs. I will examine the nature of the law's power as it pertains to the construction of masculinity. I will suggest that the law functions as if masculinity exists outside of culture, and therefore of patriarchy (*e.g.*, in the realm of sexuality, the law forms and perpetuates the idea that men have uncontrollable urges and natural desires that transcend culture). It situates masculinity as something that exists prior to the law and culture, something to be reined in and controlled. I will explain what I mean by a technology of sex and lay out the reasons why the law

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[11] In any attempt at a progressive politics, the nature of the law and its effectiveness as a tool for change must be analyzed. Mary Jane Mossman, in her assessment of the compatibility of progressive feminist politics and the law, suggests that law, specifically the legal method, is impervious to feminist challenge. *See generally* Mary Jane Mossman, *Feminism and Legal Method: The Difference it Makes*, WISC. WOMEN'S L.J. 3 (1987). More recently, advocating for the importance of administrative law in a progressive trans politics, Dean Spade observed: "To practice this politics we have to tackle some big questions about what law is, what power is, how legal systems are part of the distribution of life chances, and what role changing laws can and cannot have in changing the arrangements that cause such harm to trans people." DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 2 (2015).

[12] By "technology of sex"—borrowing here from Teresa de Lauretis, *The Technology of Gender*, *in* TECHNOLOGIES OF GENDER (1987)—I mean the way in which the law acts as a creator of norms, standards, rules, techniques, and discourses that govern—in a specific way that emphasizes a particular relationship between power, truth, and knowledge—how we think about sex.

is able to maintain this space of professed but chimerical exteriority. The law bases its claim to truth on the pre-ideological nature of its method[13]—that, methodologically, the law is founded on objectivity and rationality and, thus, is free of human interpretation or ideological stimulus. In this way, masculinity and the law share in the aspiration of occupying a space devoid of interpretation, culture, ideology, whim, or fashion.

The critique that I am putting forth regarding the relationship between law and masculinity shares a foundation with the work of Legal Realists, Critical Legal Studies, Critical Race Theory, and Feminist Legal Theory—this foundation being a fundamental critique of liberalism. The Legal Realists argued that legal formalism's claims to neutrality and objectivity were simply politics by another name and, in fact, "hidden and often inarticulate judgments of social policy."[14] Critical Legal Studies attacked the idea of law found in traditional liberal political theory: that it existed in a space devoid of ideology.[15] Feminists suggested that the law was not only a tool to fight patriarchy, but a part of it.[16] Critical Race Theorists argued that racism did not exist in a space removed from the law, but was rather inherent to it.[17] The recurring theme is that the law does not exist solely within its own walls; there is no "out there;"

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[13] As discussed below, the claimed pre-ideological nature of the law's method was part of the foundation of much of the criticism directed at this liberal conception of law and served to create and mobilize Critical Legal Theorists who "contended that liberal and conservative legal scholarship operated in the narrow ideological channel within which law was understood as qualitatively different from politics. … Law was, in the conventional wisdom, distinguished from politics because politics was open-ended, subjective, discretionary, and ideological, whereas law was determinate, objective, bounded, and neutral." Kimberlé Crenshaw, Neil Gotanda, Gary Peller, & Kendall Thomas, *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xviii (Crenshaw et al eds., 1995).

[14] *Id.* (quoting Oliver Wendell Holmes).

[15] *See generally* ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK (2015); DUNCAN KENNEDY, *The Stakes of the Law, or Hale and Foucault!*, *in* SEXY DRESSING ETC. (1993).

[16] *See generally* CAROL SMART, FEMINISM AND THE POWER OF LAW 5 (1989); MacKinnon, *supra* note 6, at 635-658.

[17] *See generally* Crenshaw et al, *supra* note 13.

there is no exit. Contrarily, Formalists argued that there was a rational, principled place beyond the reach of politics. Mainstream civil rights discourse suggested that the law could be used as tool in the racist and sexist "real world." Even Marxists saw the law as simply reflecting—not serving to construct—the class relations that existed outside of the law.

In a similar way to how mainstream civil rights activists saw the law as a progressive tool to use in the struggle for civil rights—a tool that existed "outside" of the struggle, which was to be acquired and then brought back to the struggle—the men's movement[18] saw the law as something that existed "outside" of masculinity, that served to stifle its "essence," and, thus, sought to free masculinity from the constraining effects of the law. In the former example, the ends are progressive, whereas, in the latter, they are exceptionally conservative; yet both posit the law as something *exterior* and, thus, are two sides of the same liberal coin. In each, the law occupies an exalted space crucially removed from the problems identified by the respective analyses. Fundamental to situating the law—that is, locating its place in the larger social order—is an examination of the law's power and the relationship between its power and society as a whole. Thinking through these issues with respect to the role played by power, and the critiques of liberalism mentioned above, reveals the law and masculinity as concomitant and co-dependent.

The law views itself as removed from politics and issues of class and race, similar to how power, in conventional liberal political theory, has been viewed as removed from truth and knowledge. Liberalism rigidly compartmentalizes power, law, class, race, and politics, in an attempt (albeit futile) to uncover an objective, independent truth. Yet "the idea of liberating truth

[18] The men's movement, discussed below, began in the late 1980s with the goal of reclaiming manhood from the emasculating effects of industrial society, feminism, and consumer culture.

is a profound illusion. There is no truth which can be espoused, defended, rescued against systems of power. On the contrary, each such system defines its own variant of truth. And there is no escape from power into freedom, for such systems of power are co-extensive with human society."[19] Similarly, there is no outside for the law. The law is implicated in creating the society which it judges despite its attempts to position itself above the fray. The law, when viewed through this "systems of power" lens, is necessarily political and part of the problem of racism and patriarchy. How, though, has this manifested in how the law's relationship with masculinity is understood? Has the law tried to characterize masculinity as something that exists removed from the law, something that the law engages with only from a removed, exterior place? Is there a "true" masculinity that exists beyond the reach of power, beyond the influence of the law, untouched by patriarchy, for which the law helps find liberation?

Legal discourse serves as a crucial site for the production of ideology and the perpetuation of social power. In the context of Critical Race Theory, theorists have described their project "as uncovering how law was a constitutive element of race itself,"—*e.g.*, "how law *constructed* race."[20] Yet the parallel question is rarely asked about masculinity. It seems reasonable that masculinity studies should be engaged with asking to what extent is the law implicated in the construction of masculinity. Masculinity studies is heavily engaged in determining how the law controls, guides, regulates, views, understands, and manipulates men, but it rarely sees the law as a constitutive element of what masculinity is. There are many reasons for this, notably, an uncertainty over what masculinity actually *is*; how is it possible to define the building blocks of something without knowing what that something is? The relationship

[19] Charles Taylor, *Foucault on Freedom and Truth*, 12 Political Theory 152, 153 (1984).

[20] Crenshaw et al, *supra* note 13, at xxv.

between the law and men (distinguished from masculinity), however, presents something observable and tangible, and possibly a good starting place for inquiry, but ultimately not a substitute for also engaging with the question of masculinity and law.

The law remains mired in its liberal identity, incapable of functioning without resort to a legal order focused almost exclusively on consent, intent, and volition. The problem has to do with the nature of power, knowledge, and truth as they pertain to the law, and with the continuing fallacy perpetuated by the law that its power is wielded strictly in a juridical, negative sense. The nature of power that the law insists on is one that intimates a top-down, repressive, negative force dealing with rights, freedom, censorship, prohibitions, regulations, and punishment, rather than a productive force constructive of norms, techniques, and control.[21]

The law may or may not be substantively progressive, in the sense that the content of particular laws appear to serve progressive ends, but, methodologically, the law is stuck in a liberal method referred to as "reasoned elaboration." One characteristic of reasoned elaboration is that the principles of the law are to be found internally, that they are contained in the law itself.[22] Were reasoned elaboration thought of differently—as not self-contained—the legal cornerstone that jurists apply laws, while legislators create them would be undermined. The deal-making inherent in the construction of laws is a feasible and palatable way to understand the legislative process, but the interpretative component of legal methodology is only acceptable if veiled in the language of principle and neutrality, rather than negotiations, interest-group

[21] "Law can also function by formulating norms, thus becoming part of a different sort of power that 'has to qualify, measure, appraise, and hierarchize rather than display itself in its murderous splendor.'" François Ewald, *Norms, Discipline, and the Law*, REPRESENTATIONS 3, 138 (Spring 1990).

[22] "To a large extent the guiding conceptions of policy and principle that enabled the interpreter to make sense of law and that guided him in his practical work were supposed to be already latent in the extant law, waiting to be revealed by the legal analyst." Unger, *supra* note 15, at 6.

pluralism, and compromise. But, of course, the law is produced, as Roberto Unger described, "through conflict among interests and among ideology" and, thus, like legislation, has not been conceived by a single mind or will.[23]

Fundamentally, this paper will address the relationship between the law and masculinity, specifically how the law contributes to the formation of masculinity. To better understand this relationship, I will rely substantially on an analytical framework grounded in the notions of power, truth, and knowledge, described in Section II. In Section III, I will examine insights gleaned predominantly from feminist legal theory regarding the subject and subjectivity. In Section IV, I will examine what exactly we mean by masculinity, the shifting terrain that this idea occupies, and how masculinity studies has developed over the last several decades. In Sections V and VI, I will explain how the law serves as a technology of sex that produces fixed gendered identities and furthers sexual difference in both explicit and implicit ways. Finally, in Section VII, I will ask why masculinity studies has failed to consider, let alone apply, certain insights from feminist legal theory when addressing foundational issues like sexual difference, and suggest opportunities for these insights to render masculinity studies more nuanced and effectual.

* * *

The relationship between power/truth/knowledge and masculinity forms the foundation of the critique I apply to masculinity studies. If the power of law continues to be thought about in a strictly juridical sense, the full scope of its impact will remain elusive. This is not about granting more influence to the law, but to suggest that its power manifests in different ways than traditionally conceived. As I will explain in Section II, my project is not about diminishing or

[23] *Id.* at 11–12.

devaluing the importance of the juridical power of the law, but rather about exploring how thinking about the power of the law in a strictly juridical sense fails to grasp many components central to how the law's power is employed and its effects. Often, the argument about the power of law focuses on whether the law, and its juridical, negative, repressive power, actually represents the way power manifests. If, in contrast, power is more accurately represented by the creation of norms and the productive deployment of disciplinary techniques, then the law is easily dismissed as a residual accessory to the predominant powers of modernity. The problem with this characterization, though, is that the power of the law is not only prohibitive, but that there is also a norm-creating, expansive, cultural component to the power of law. Equating the power of law with repression, fails to account for all the ways that the law's power functions productively to create norms and form cultures—it "excludes a richer consideration of the law's constitutive capacities"[24]—which are the predominant powers of modernity. It is not that the law is no longer powerful, or that the power to prohibit or repress is no longer consequential, but rather that its power manifests in different ways.[25]

In Section III, I will review insights gleaned from work on sex/gender, specifically from Feminist and Queer Theory. The work I will look at contends that sex and sexuality are "unfixed and constructed entities," and that subject formation "must be placed within specific historical and discursive contexts in order to be understood."[26] Feminist Theory generally works from a

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[24] BEN GOLDER & PETER FITZPATRICK, FOUCAULT'S LAW 17 (2009).

[25] This view of the law has been attributed to Foucault by many commentators. Duncan Kennedy, for instance, labelled Foucault a "criminalist" for thinking about law only in a "juridico discursive" way and for ignoring how the law functions in different contexts. Kennedy, *supra* note 15, at 119. For Foucault, "power acts by laying down the rule…through the act of discourse that creates, from the very fact that it is articulated, a rule of law." MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION, VOLUME I 83 (Vintage Books 1990) (1976).

[26] SARA SALIH, JUDITH BUTLER 5 (2002).

space where the existence of a subject is *sine qua non*,[27] while, in contrast, Queer Theory highlights the indeterminacy of all gendered identities. Nevertheless they both provide powerful critiques of gender normativity.[28] Specifically, I will examine the destabilization of the subject, the body as a fractured and disjointed site of ideological contestation, and the untangling of the sex/gender distinction and the nature of sexual difference.

The destabilization of the subject represents a foundational challenge to the transcendence of man. An undivided subject is pivotal in Western metaphysics. To suggest that the subject is a performative construct rather than a "pre-existing metaphysical journeyer"—that there is "no doer behind the deed"[29]—radically challenges the most prevalent conceptions of the subject in Western philosophy and, indeed, the very rationale, upon which masculinity is grounded. There exists a fundamental interdependence between the disembodied man and the corporeally bound female; man's consciousness both pre-exists and outlives his body, on the condition that women's occupation of their bodies remains essential to their identity.[30] Masculinity is, in many ways, premised on this pursuit of disembodiment. Instability in the way sex and gender are thought about in society creates ontological fractures to our social order that implicate many tenets of liberalism, including, importantly, the space occupied by the law.

The body is often viewed as a self-evident entity—as material and empirical. In this paper, I will argue that, rather than being a pre-discursive category, the body is a fragmented and

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[27] There are, of course, critiques of this position within feminist theory itself. Feminist anti-essentialism, for instance, attempts to destabilize the integrity of the subject and challenge its position as the focal point of the analysis: "The most important premise of this view is that the sex/gender system is substantially a product of culture rather than divine will, human biology or natural selection." Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 Harvard Women's Law Journal 89, 114 (1996).

[28] Salih, *supra* note 26, at 5, 9.

[29] *Id.* at 44–45.

[30] Judith Butler, *Sex and Gender in Simone de Beauvoir's* Second Sex, 72 Yale French Studies 35, 43 (1986).

disjointed site of contestation where materiality is unstable and contingent. The body is continually crafted and re-crafted by language; the body is literally articulated into being. Anne Fausto Sterling has asserted "As we grow and develop, we literally, not just "discursively" (that is, through language and cultural practices), construct our bodies, incorporating experience into our very flesh."[31] But, not all bodies are created, or rather constructed, equal. Within Western, liberal thought, the body has been constructed as inferior to the mind. Not surprisingly, white, Western, male, and heterosexual persons are seen as superior within these discourses because their bodies are constructed as fully subordinate and subservient to their minds. Racialized, female, and queer people, for example, are viewed as less evolved, are infantilized and animalized because their bodies are portrayed as controlling their minds. In other words, for marginalized people, the hierarchical mind/body dualism is inverted. These persons have bodies that dominate or even vitiate their minds. The motifs of the hysterical woman, the promiscuous homosexual, the fanatical Arab, and the lawless immigrant exemplify bodies that are out of control. These motifs serve misogynist, homophobic, and racist ideological agendas.

The biological foundation of the body is invested with a set of essentialist truths which end up grounding normative claims about gender and law. Critics of the fictional body theory argue that, if the body loses its claim to realness, then the body is de-politicized and bodily experiences of suffering and oppression lose any moral authority. The presumption is that if the body is revealed to be a discursive construction, then its inviolability as a guiding normative principle is challenged. However, this presumption posits that anything constructed is somehow artificial or of a dispensable character and that to base normative judgements on a "mere"

[31] ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 20 (2000).

construction is untenable. Is it possible for a construction to not only be constitutive, but to be imperative as well? I will attempt to illustrate that the body, rather than being the material given from which to found normative claims, is a site of contestation upon which many ideological struggles are waged. Indeed, contrary to suggesting that viewing the body as a construction provides less certainty or inhibits the relevance of normative claims, I am suggesting that understanding the body as a construction legitimates struggles against patriarchy.

Finally, I will explore the concept of sexual difference, the distinction between sex and gender, and the still counterintuitive notion that sex itself is discursively constructed. The term "gender" began as a political maneuver in the 1970s, allowing feminists to argue that the space women had come to occupy was a cultural construction and not biologically determined. Yet, over a quarter century ago, the multiple effects of this strategy were already being considered. Carol Smart described the repercussions of the maneuver:

> Having drawn a distinction between sex and gender in the 1970s, feminists were largely willing to see gender as something to do with culture and sex as something to do with nature (biology). The main debate was over which element had pre-eminence. But this apparently clear-cut distinction is now being rethought to the extent that it is increasingly argued that sex is a discursive construct just as much as gender. This has in turn given rise to reinterpretation of the apparently self-evident categories of woman and man. Where once we could see the limitations of being consigned to a feminine gender, we now know that escaping these trappings does not mean we escape the female body and meanings which are associated with it.[32]

In 1986, Butler explained the sex/gender distinction as "crucial to the long-standing feminist effort to debunk the claim that anatomy is destiny," continuing "sex is understood to be the invariant, anatomically distinct, and factic aspects of the female body, whereas gender is the cultural meaning and form that the body acquires, the variable modes of that body's

[32] Carol Smart, *Law's Power, the Sexed Body, and Feminist Discourse*, 17 J.L. & SOC'Y 203 (1990).

acculturation."[33] Butler, however, later defines sex as a fictional heuristic[34] that is always already gendered. Butler explains how gender is something grown into, but not from a gender-less space. "We become our genders, but we become them from a place which cannot be found and which, strictly speaking, cannot be said to exist."[35] Gender, as understood by Wendy Brown, is "a human affair, a protean arrangement of meanings, values, and activities born of human mind and endeavor, yet so thoroughly 'naturalized' over time that the constructed character of the arrangement has been lost upon most of Western history's inhabitants."[36]

Next, in Section IV, I will explain how thinking about masculinity has changed over the course of the past half century or so. I will review the scholarship that placed men at the center of an analysis, and the problems that subsequently arose—including, transcending the patriarchal biases which had characterized previous studies of men and the difficulties tied to distinguishing the study of masculinity from the study of men. The section will be informed by work in feminist legal theory, which provided the basis for much of the work done by masculinity studies scholars.

The study of masculinity has taken two distinct, and often antagonistic, trajectories: masculinity studies and the men's movement. While both assert that masculinity is a particular phenomenon that should be investigated in its own right, they emerged out of very different political arenas. Masculinity studies emerged from a foundation of feminist theory, while at the same time being a response to the men's movement—a political undertaking that began in the 1980s to "reclaim manhood" from the purported emasculating effects of industrial society,

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[33] JUDITH BUTLER, BODIES THAT MATTER 35 (1993).

[34] *Id.* at 39.

[35] *Id.*

[36] WENDY BROWN, MANHOOD AND POLITICS: A FEMINIST READING IN POLITICAL THEORY 1 (1988).

feminism, and consumer culture.[37] While the men's movement is quite variegated, one thread that runs through its various manifestations is the search for an essence of masculinity. In contrast to the men's movement's essentialism, masculinity studies generally views manliness, and masculinity itself, as a social construction and "situate[s] masculinities as objects of study on par with femininities, instead of elevating them to universal norms."[38]

Historically, the masculine subject position has been the default. It wasn't until the mid-1990s that scholars even decided that men also had a gender. To the surprise of many, not only were men also gendered, but so too were structures, institutions, relationships, and discourses. The invisible but ever-present subject (never the object) refused to be named, thus rendering male domination even more insidious. Since then, a rich history of scholarship has emerged dealing with the relationship between masculinity and law, from varied perspectives and ideological viewpoints.[39] A substantial component of masculinity studies consists of using feminist and queer theory to explore variations and dynamics among masculinities. Indeed, feminist theory has provided the foundation, both analytically, theoretically, and historically, upon which masculinity studies is based. Yet, the critical study of masculinity within a legal context remains woefully marginal to mainstream legal study.

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[37] As Robert Bly suggests in the opening lines of his quintessential men's movement book: "We are living at an important and fruitful moment now, for it is clear to men that the images of adult manhood given by popular culture are worn out; a man can no longer depend on them. By the time a man is thirty-five he knows that the images of the right man, the tough man, the true man which he received in high school do not work in life. Such a man is open to new visions of what a man is or could be." ROBERT BLY, IRON JOHN: A BOOK ABOUT MEN ix (1990).

[38] Harry Brod, *Introduction: Themes and Theses of Men's Studies*, *in* THE MAKING OF MASCULINITIES: THE NEW MEN'S STUDIES 2 (1987).

[39] *See, e.g.*, R.W. CONNELL, MASCULINITIES (2005); JACK S. KAHN, AN INTRODUCTION TO MASCULINITIES (2009); MICHAEL S. KIMMEL, THE GENDERED SOCIETY (2000); RICHARD COLLIER, MEN, LAW AND GENDER: ESSAYS ON THE 'MAN' OF LAW (2010).

While feminism has had a discernable impact on history, politics, philosophy, sociology, economics, and law, masculinity is most marked by its absence, its invisibility.[40] Masculinity is simultaneously nowhere and everywhere; as Richard Dyer has commented, it is a bit like air: you breathe it in all the time, but you aren't aware of it much.[41] In much the same way that heterosexuality, in contrast to homosexuality, is constructed as not being historically contingent—masculinity, until recently, has been thought of as a more self-evident, natural, and stable category than femininity. The overseeing and invisible subject—as de Beauvoir has called masculinity[42]—however, is now the object of study.[43]

In Sections V and VI, I will consider the ways in which the law creates and recreates masculinity. This entails looking at the characteristics of power, generally, as introduced above, but it also entails looking specifically at the juridical power of the law. The prohibitive nature of the law's juridical power contrasts sharply to a Foucauldian notion of a productive power, a power that creates rather than represses.[44] The law is accorded a particular position within the reproduction of gender relations within the social structure, and, with respect to the sex/gender distinction, for instance, the law views sex and gender as conceptually different. Sex is "of the body" while gender is associated with characteristics culturally associated with the sex of the person.[45]

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[40] RICHARD COLLIER, MASCULINITY, LAW AND THE FAMILY 4 (1995).

[41] Richard Dyer, *Male Sexuality in the Media*, *in* THE SEXUALITY OF MEN (Andy Metcalf & Martin Humphries eds., 1985).

[42] SIMONE DE BEAUVOIR, THE SECOND SEX (1972).

[43] *Id*.

[44] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 194 (1995) ("We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth.").

[45] RICHARD COLLIER, MEN, LAW AND GENDER: ESSAYS ON THE 'MAN' OF LAW 9 (2010).

The way sexual difference is predominantly thought about—binaried and natural—props up a legal order that struggles to think about power in any non-juridical sense. Productive legal power, on the other hand, would affect a sex considered fluid and dynamic, and thus the legal order would be in some sense accountable. This reluctance to take accountability compels the law to maintain essentialist understandings of masculinity which, along with the dawning of masculinity studies, exacerbate sexual difference. The law ultimately serves as a technology of sex that perpetuates a hegemonic masculinity, yet fails to take any culpability when that masculinity acts out in ways it was always inevitably going to.

This discussion of the law's productive power and tendency to create masculinity in both explicit and implicit ways presents a question for legal and masculinity studies scholars: namely, what lessons from the rich history of feminist legal theory are useful in confronting this perpetual creation of masculinity? In Section VII, I will identify and discuss four areas where such insights could be applied. When looking at the naturalization of the sex/gender divide, for example, and the resulting discursive force it deploys across western culture, particularly within the law, it is useful to explore how recent changes in thinking about sexual difference affect or are affected by the relationship between the law and masculinity. The reluctance of the law to move beyond a conception of sex rooted in biological determinants reiterates its failure to exist in a pre-ideological terrain. The law is a discourse unwilling to move beyond its rigid, dualistic conception of the meanings of masculine and feminine, or to try to conceive of one of them not in relation to the other (which, after all, makes sense since one does not exist without the other), and therefore is constantly in the process of [re]producing the sexed bodies that it judges.

When something like the media circus that surrounded Owen Labrie occurs, one's initial thought is to hope that the law does not perseverate on the idea of "boys being boys." There is a

fear that, as a culture, we will fall into silly stereotypes about masculinity; that we will accept "frat boy" behavior out of young men; that we will perpetuate outdated ideas about what it means to be a man and about the rituals that make boys men. But this should not be the only concern. There are equally important questions about masculinity regarding more than just falling into stereotypical and essentialized ideas about masculinity. No longer does the major challenge—although it remains part of the challenge—only entail suggesting that masculinity comes in different shapes and sizes and that there is more than one way to be a man. It is no longer enough for critiques of masculinity to problematize sex roles and power imbalances, to highlight experiences of injustice, and to offer easy solutions that provide superficial critiques of patriarchy that resort back to an imaginary origin where equality was ubiquitous. Masculinity studies is in danger of turning clinical to avoid the uncertainty and agnosticism pivotal to an honest study of masculinity. Masculinity and the law remain pieces in a liberal puzzle that not only continues to re-articulate patriarchal relations in ever new ways, but falsely promises an illusory cohesiveness and an emancipation that is both inapt and misdirected.

II. Power, Truth, and Knowledge

The interdependent structures of power, truth, and knowledge underlie the connections between law and masculinity. In this section, I will examine how these structures together form a base that sheds light on the relationship between law and masculinity. I will distinguish between two overarching theories of power—juridical and productive—and explain how the distinction between these theories affects how the impact of the law on masculinity is comprehended. I will distinguish between an objective model of knowledge and one that recognizes its political and historical dimensions; too often knowledge is constructed as ahistorical and neutral, thus obscuring the political motives behind conclusions constructed as common sensical or natural. While it is very popular to consider issues of power when considering gender relations, too often what power actually means and how it relates to sex equality is taken for granted. Time and again it has proven insufficient and inaccurate to glibly claim that equalizing power between men and women will lead to sex equality.

A. Power

How does power impact the relationship between law and masculinity? Is it that the law is regulating what it means to be a man? Is it that men are determining what the law is? Is there a causal relationship in one direction or the other? The popular understanding—that men are the ones who make law, and, thus, the law is made in masculinity's image—reflects a unidirectional, all or nothing, conception of power. Instead, the dynamic between masculinity and law is relational, with power flowing between them.[46] Indeed, the law is not simply a passive bystander

[46] In Foucault's articulation: "Should it be said that one is always "inside" power, there is no "escaping" it, there is no absolute outside where it is concerned, because one is subject to the law in any case? Or that, history being the ruse of reason, power is the ruse of history, always emerging the winner? This would be to misunderstand the strictly relational character of power relationships." Foucault, *supra* note 25, at 95.

constructed in the image of the men who create it, but an active participant engaged in forging the identities of those men whom it regulates.

The more conventional understanding of power—as held by specific individuals who craft laws—results from a fetishization of the liberal conception of volition and of a particular form of subjectivity grounded in intentionality. The law once crafted, though, develops beyond the intention of its creators and has an impact above and beyond however it was first conceptualized. Power does not simply exist in one place (nor does it exist in opposition to powerlessness), with one individual or group holding it, like a commodity,[47] but rather is perpetually flowing and infusing the relationship in question.[48] Power is not something that one person wields over others; it circulates, always part of a network; not exercised on individuals, but passing through them; individuals are not inert or consenting targets of power but rather intermediaries.[49] Thus, Foucault cautions against focusing on the intention of the individual or institution that appears to wield power, explaining that the problem is not one of the "central soul," and recommends, instead, studying "the multiple peripheral bodies, the bodies that are

[47] MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE 13 (1997) ("a right which can be possessed in the way one possesses a commodity, and which can therefore be transferred or alienated, either completely or partly, through a juridical act or an act that founds a right … thanks to the surrender of something or thanks to a contract"); Foucault, *supra* note 77, at 88.

[48] In 1978 Pierre Boncenne asked Foucault: "All your analyses tend to show that there is power everywhere, even in the fibers of our bodies, for example, in sexuality. Marxism has been criticized for analyzing everything in terms of economics and even of reducing everything, in the final analysis, to an economic problem. Can you, too, not be criticized for seeing power everywhere and, in the final analysis, of reducing everything to power?" Interview with Michel Foucault (1978), *in* MICHEL FOUCAULT: POLITICS, PHILOSOPHY, CULTURE 104 (Lawrence D. Kritzman ed., 1988) (hereinafter "Boncenne-Foucault Interview").

[49] Foucault, *supra* note 47, at 29.

constituted as subjects by power-effects."[50] Indeed, power is "the operation of political technologies throughout the social body."[51]

The determination of where power exists is part of the inquiry,[52] but it does not address the more interesting question of *how* power works. To Foucault, this is the central question: "what exactly happens when someone exercises power over another."[53] In any political struggle, change is only possible when considering the nature of how power is exercised. "Thinking about power only as top/down, oppressor/oppressed, dominator/dominated can cause us to miss opportunities for intervention and pick targets for change that are not the most strategic."[54] Thus, when looking at power, one must consider the mechanisms, networks, strategies, and techniques that lead to a particular outcome.[55] The question becomes less about the justification for the use of power, but rather about the process through which power is exercised. In fact, part of the problem when grappling with the overarching notion of power, according to Foucault, is that we only know how to think about it in terms of justifying its use, since the justification question is one that we already have a framework for engagement.[56]

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[50] *Id.* at 29.

[51] *Power and Truth*, *in* MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 185 (Hubert L. Dreyfus & Paul Rabinow eds., 1982).

[52] "Who makes decisions for me? Who is preventing me from doing this and telling me to do that? Who is programming my movements and activities? Who is forcing me to live in a particular place when I work in another? How are these decisions on which my life is completely articulated taken? All these questions seem to me to be fundamental one today. And I don't believe that this question "who exercises power?" can be resolved unless that other question "how does it happen?" is resolved at the same time." Boncenne-Foucault Interview, *supra* note 48, at 103.

[53] *Id.* at 102.

[54] Spade, *supra* note 11, at 6.

[55] Boncenne-Foucault Interview, *supra* note 48, at 104.

[56] "We had recourse only to ways of thinking about power based on legal models, that is: what legitimates power." Michel Foucault, *Afterward: The Subject and Power*, *in* MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 209 (Hubert L. Dreyfus & Paul Rabinow eds., 1982).

Power functions in two distinct ways: on the one hand, power is juridical, it represses, prohibits, and censors; on the other hand, power is productive, positive, and constitutive. In its juridical formation, "power has the essential function of prohibiting, preventing, and isolating rather than allowing the circulation, change, and multiple combination of elements."[57] The law exhibits both of these forms of power, yet it rarely considers its power beyond its juridical components.[58] Indeed, given this positive and productive nature of the law's power, suggesting that the law is capable of acting as some sort of passive umpire makes little sense.

Foucault draws this distinction between the juridical and the productive: "Do not concentrate the study of the punitive mechanisms on their "repressive" effects alone, on their "punishment" aspects alone, but situate them in a whole series of their possible positive effects, even if these seem marginal at first sight."[59] Crucial in this formulation is that the positive aspects may seem "marginal at first sight;" the process of identifying and pinpointing the repressive components of power is a much cleaner task, and one which yields tangible results. The productive effects, on the other hand, appear marginal, are more difficult to identify, yet ultimately prove the most insidious.

In the juridical characterization, the law is seen as an impediment to freedom: but for the restrictive laws, freedom could exist. Indeed, this characterization recalls the male outlaw hero whose freedom and masculinity are suffocated by legal regulation.[60] But freedom is not only

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[57] MICHEL FOUCAULT, ABNORMAL: LECTURES AT THE COLLÈGE DE FRANCE 50–51 (1999).

[58] For a discussion of one of the rare instances where the law articulates an awareness of its productive power—Justice Brennan's dissent in *General Electric Co. v. Gilbert*—see *supra* Section V.

[59] Foucault, *supra* note 44, at 23.

[60] Saul Levmore & Martha C. Nussbaum, *Introduction* to AMERICAN GUY: MASCULINITY IN LAW AND LITERATURE 3–4, 7 (Levmore & Nussbaum eds., 2014); DRUCILLA CORNELL, CLINT EASTWOOD AND ISSUES OF AMERICAN MASCULINITY (2009).

something that is restricted; it is affected both by rules of prohibition and rules of permission, particularly with respect to the social distribution of goods (including, of course, income, wealth, power, and knowledge).[61] In Duncan Kennedy's formulation, "the invisibility of legal ground rules comes from the fact that when lawmakers do nothing, they appear to have nothing to do with the outcome . . . but the question of intrusiveness is different from that of causal responsibility."[62] In the context of racial justice, for instance, the questions should not be limited to what type of prohibitions are in place to achieve justice (laws prohibiting intentional discrimination based on race), but should also consider what behavior is being permitted (disparate impact permitted due to business freedoms). The power of law is not binaried, in the sense that there exist things that are legal and things that are illegal, and the law exercises its power only on or against those illegal things but has no impact on those that are legal.[63] The opposite of having laws is not freedom, but rather lawlessness. Power, therefore, should be considered with respect to its permissiveness as well as its prohibitory characteristics.

An analysis adhering to an understanding of power that followed the conventional juridical conception would look at the institution of the law and try to understand what the law was invested in, what overarching interests it was serving, whether the institution was independent enough of corporate interests, whether the law was representative of the community it served, whether the judiciary was independent from the legislative and executive branches of

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[61] Kennedy, *supra* note 15, at 90.

[62] *Id.* at 91–92 (in the example of a homeowner being permitted to block the light of neighboring buildings with impunity, "[t]his is not a 'gap' in the law, but a conscious decision that it is better to let builders have their way, and make victims buy them out if they care that much about their view").

[63] Foucault, *supra* note 25, at 83–84. Vikki Bell persuasively explains this dynamic "power works not by a binary system, in which power's efforts are concentrated on attempting to repress the illicit whilst the licit are ignored, but by a process of normalization. Normalization works not on the illicit side of the binary but everywhere." VIKKI BELL, INTERROGATING INCEST: FEMINISM, FOUCAULT AND THE LAW 30 (1993).

government. The analysis would be top-down, in that it would be looking at the law as something with an articulable interest, with intentions and desires, it would look at the specific interest in suppressing something and ask what interest is being served by the law suppressing this freedom. The analysis would consist of thinking about power as a commodity that the judiciary possessed and would analyze how they came to possess it, how they utilized it, and why they utilized in the way that they did. But such an analysis would fail to consider the relationality of all power dynamics, the de-centeredness of power, and how it is not guided solely by the will of individual subjects. This is not to suggest that power is never exercised through a "series of aims and objectives,"[64] for it always is in micro-practices, but, rather, that a search for a consistency and coherent logic to the manner in which power is exercised suggest a nonexistent rationality.

Historically, the West has insisted on seeing the power the law exercises as juridical and negative, in part, because the political theories of the west are based on the problem of sovereignty and, therefore, on prohibition.[65] The idea that the law functions in a solely juridical manner has become internalized to the extent that thinking about productive power is counterintuitive.[66] Carol Smart recommends thinking about power, and specifically the power of law, in terms of two parallel mechanisms: the discourse of rights and the discourse of

[64] Foucault, *supra* note 25, at 95 ("[T]here is no power that is exercised without a series of aims and objectives. But this does not mean that it results from the choice or decision of an individual subject.").

[65] Foucault, *supra* note 77, at 121.

[66] Smart, *supra* note 16, at 75 (citing Charles Taylor, *Foucault on Freedom and Truth*, POL. THEORY, Vol. 12, No. 2 (1984)) ("Foucault's thesis is that, while we have not ceased talking and thinking in terms of this model (*i.e.*, power as a system of commands and obedience), we actually live in relations of power which are quite different, and which cannot be properly described in its terms. What is wielded through the modern technologies of control is something quite different, in that it is not concerned with law but with normalization.").

normalization.[67] Through this conceptualization, the productive form of power does not replace conventional juridical power, but rather, adds an element that requires a different mode of analysis. The discourse of normalization is more creative and less explicit and, thus, often more difficult to locate. To François Ewald, an associate of Foucault, "the norm emerges conceptually not only as a particular variety of rules, but also as a way of producing them, and as a principle of valorization . . . it transforms the negative restraints of the juridical into the more positive controls of normalization; thus the norm performs the transformative function."[68] Ewald's "principle of valorization" establishes the critical contrast: for the norm to exist at all, the *abnormal* must also exist. Rules that exist simply to identify who is in conformity with them, are replaced by norms which are defined by the average and in contrast to the pathological. The emphasis on the average creates a homogenous social space, one dependent on its outliers for its existence.[69]

The ways in which the law uses its juridical power to police the boundaries of sex are numerous. The law is a prime participant in explicitly demarcating the boundaries of sex, in determining what makes a man or a woman or what prohibits an individual from being a man or a woman. Indeed, the legal and medical professions—often the medical profession with the law's blessing—play the largest roles in determining a "true" sex, when the question is at issue.[70] The

[67] Smart, *supra* note 16, at 8.

[68] François, Ewald, *Norms, Discipline and the Law*, REPRESENTATIONS 30 (Spring 1990), 138–61, 140.

[69] *Id.*

[70] Whenever a conflict arises between the choice of the individual and that of society, a combination of legal and medical forces are used to usurp the choice of the individual. While Foucault does not often talk about sexual difference, in his introduction to Herculine Barbin, a case study regarding a 19th century hermaphrodite, he addresses the issue sex determination and choice: "From the legal point of view, this obviously implied the disappearance of free choice. It was no longer up to the individual to decide which sex he wished to belong to, juridically or socially. Rather, it was up to the expert to say which sex nature had chosen for him and to which society must consequently ask him to adhere." MICHEL FOUCAULT, HERCULINE BARBIN ix (2010).

law also involves itself in policing the boundaries of sex identification by explaining what is reasonable behavior for the average man. For example, in the context of criminal law, the "in the heat of passion" defense to homicide, whereby a charge can be reduced if a defendant shows his was a "reasonable" response to "adequate provocation," is based on a conception of masculinity that views violence as a natural response to provocation.[71] Similarly, the law utilizes what can be termed masculinist definitions to demarcate the boundaries of certain crimes—*e.g.*, rape—thus perpetuating a male understanding of the sexual sphere.[72] Finally, as is discussed in detail below, in antidiscrimination law judges are engaged in establishing how gender is allowed to be performed to be considered legitimate in the eyes of the law—both explicitly, in cases like *Jespersen v. Harrah's Operating Co., Inc.*, and implicitly, in cases like *Ricci v. DeStefano*, both discussed in Section V).

In addition to such relative explicit policing of sexual difference, whenever the law is working from an assumption of a difference in sex between persons, it demarcates the borders of sexual difference. Even when it does not speak explicitly to any difference in sex, the law may be, in some way, reinforcing sexual difference. As Martha Fineman has argued, the realm of family law has been marked by gendered ideas of self-sufficiency and moral independence, self-

[71] Levmore & Nussbaum, *supra* note 60, at 3. Ironically, in a contribution to this anthology the former judge Howard Matz, in an essay about the Wallace Stegner novel *Angle of Repose*, suggests that judges, when provoked by a lawyer or witness, occasionally fail to exercise judicial power with restraint and respond to misbehavior "with typically masculine aggressiveness: shouting, issuing threats, slamming the gavel, directing the marshals to silence or remove the miscreant," rather than using words. Referring to reconciliatory or calming words a judge could use instead Matz says "They are words that most judges find exceedingly difficult to express, because to voice them could be inconsistent with the need to project power, that quintessentially "manly" attribute." *Id.* at 144. Responding in a "manly" manner, it appears, matters to judges as well.

[72] *See* Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 409 (Toni Morrison ed., 1992) ("Even the legal definitions of the crime of rape itself are inscribed with male visions of the sexual sphere—the focus on penetration, the definitions of consent (with the once-conventional requirement of "utmost resistance"), the images of female provocation and spiteful false accusation, and the links between desirability, purity, chastity, and value.").

governance and liberty, which are culturally encoded as masculine and permeate assumptions about the family made by the law. Thus, the law's power stretches beyond the judicial pronouncement and into areas of norm creation.[73] Similarly, administrative systems and the laws that govern them, rather than simply sorting and managing what "naturally" exists, actually create categories into which people are classified.[74] Thus, an understanding of power that goes beyond juridical power reveals the broader extent of the law's influence.[75] And distinguishing between the law's juridical and productive power allows for a better appreciation of the impact and role that the law has in creating the parameters of masculinity.[76]

B. Truth and Knowledge

For Foucault, power is exercised through the production of truth.[77] And, as with his focus on how power works, as opposed to where it lies, Foucault found the process through which a fact became accepted as a fact and the mechanisms at play that led to the creation of knowledge

[73] MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH (2004). In the context of autonomy one is also reminded of the spatial component of autonomy/privacy and the gendered foundations of antiquated maxims such as "a man's home is one's castle." Yet, we see a recent push to strengthen "stand your ground" laws, justifying the use of deadly force without first attempting retreat where one believes one's life is threatened. Lizette Alvarez, *Florida Poised to Strengthen 'Stand Your Ground' Defense*, N.Y. TIMES, Mar. 15, 2017 https://www.nytimes.com/2017/03/15/us/stand-your-ground-florida.html?_r=0. Similarly, Colorado has "make my day laws" that give gun owners the right to shoot and kill an intruder if they believe the person intends to commit a crime and use physical force, no matter how slight. These laws are named after a line uttered by Clint Eastwood's character Dirty Harry in the 1983 movie *Sudden Impact*. *How does Colorado's "Make My Day" law work?*, THE DENVER POST, Jan. 31, 2017, http://www.denverpost.com/2017/01/31/colorado-make-my-day-law/. These examples illustrate the infusion of conventional ideas about masculinity into apparently objective and gender-neutral laws.

[74] Spade, *supra* note 11, at 11. Spade specifies three areas where this administrative classification render people's lives impossible: gender classification on ID, rules that govern sex-segregation of key institutions (shelters, group homes, jails, prisons, bathrooms) and rules that govern gender-confirming health care for trans people.

[75] Spade, *supra* note 11, at 73 (in speaking about administrative law: "However, when we shift our understanding of power and examine where and how harm and vulnerability operate and are distributed, it is this area of law that comes to the fore.").

[76] JUDITH BUTLER, THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION 84 (1997); MARK. G.E. KELLY, THE POLITICAL PHILOSOPHY OF MICHEL FOUCAULT 37 (2009).

[77] "There can be no possible exercise of power without a certain economy of discourse of truth which operate through which operates through and on the basis of this association. We are subjected to the production of truth through power and we cannot exercise power except through the production of truth." MICHEL FOUCAULT, POWER/KNOWLEDGE 92 (Colin Gordon ed., 1980).

and truths to be more insightful than thinking of the establishment of facts as uncovering some sort of pre-existing truth.[78] For Foucault, truth and knowledge were not apolitical ideas; they had a history and a perspective; they were a product of struggle, of political economic, and institutional regimes,[79] not foundational suppositions from which to base political movements. While it may be true that today we live in a post-truth world, and while this can remind us of a better time when facts mattered, it does not justify returning to a world where facts were considered apolitical and unquestioned. The existence of the post-truth world, perhaps, has highlighted how truth has never been an idea beyond clever manipulation or not so clever tweets.

There is an obvious disconnect between Foucault's conception of truth (something political and not existing pre-power) and the law's understanding of truth (something pre-existing that must be uncovered). The law positions itself as an instrument to be used to cut through the forest of untruths in order to uncover what actually occurred, to let the facts speak for themselves. While the law questions the truth, and even often replaces one truth with a new, more authentic truth, the idea of there being one truth perseveres.

Claims to truth are buttressed within a discursive field that structures the beliefs, terms, and categories that influence the construction of truth. The validity and force of scientific and expert knowledge today illustrate an overarching discourse that structures the manner in which truths are legitimized. Each one of these respective fields of knowledge contains its own discourse which contains within it a set of rules that exist independently of the worth of the statements themselves. Such discursive requirements structure the way we perceive reality. This is not to say that discursive requirements obscure one's access to reality. There is no pre-

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[78] Michel Foucault, *Truth and Power*, *in* POWER 133 (James D. Faubion ed., 1994).
[79] *Id.*

discursive reality; there is no way to see the world that is not structured by and within particular discursive fields. In contrast, a Marxist understanding of truth, for instance, conceives of an ideology imposing its own conception of reality and obscuring a hidden, true, reality.[80] In this sense, discourse is free of the normative baggage that ideology contains. The idea of discourse id more fluid and less nefarious than that of ideology.

Discourse, like power, is both productive and repressive. Suggesting that nothing is pre-discursive is not the equivalent of dismissing materiality. Instead, one must question the structural and discursive configurations in spaces that are generally considered commonsensical. For instance, the manner in which we experience our bodily existence is structured discursively: we feel pain, but we interpret what that pain means only through discursive fields, and, specifically, we decide whether the pain is legitimate and true. The point of thinking about what we experience as true as being, to some extent, discursively constructed is not to close off agency, in the sense of suggesting that a larger structural field is determining how we experience something as palpable as corporeal pain. It does not mean that as individuals we do not have the power to engage with ideas and make determinations as to their validity. In fact, an engagement with discursive fields is intended to provide a more comprehensive understanding of ideas that are too often accepted as true due to the power of the imposed discursive restrictions. Looking at the rules of how the knowledge is produced, as well as the knowledge itself, allows for a more thought-through determination of whether or not to accept said knowledge.

[80] Discourse can be distinguished from ideology in that the subject exists outside of the ideology imposed, whereas the individual is never outside of discourse: "In contrast to notions of ideology, these regimes of power are not the product of individuals external to discourse, but they may indeed come to serve the interests of political categories such as men, though the predictability of this is not given." STEPHEN M. WHITEHEAD, MEN AND MASCULINITIES 104 (2002).

An understanding of discursive fields is helpful when thinking about the truths produced by the law. These truths, more than most others, are assigned an objective status that is only challengeable by those with resources and power. The law is structured antagonistically—pitting one side against another with a winner and loser—and ostensibly grants each side equal say. A discursive analysis illuminates the shared assumptions that shape the respective arguments and structure the manner in which the arguments are conceptualized and presented. A discursive analysis exposes the structures beneath the surface, the unwritten rules, that construct the façade of objectivity and justice around the law.

C. Power and Knowledge

Fundamental to the conception of the law's power as productive is its inseparability from and interdependent relationship to knowledge; it is not possible for power to be exercised without knowledge, nor can knowledge not engender power.[81] Power, thus, is not juridical in the sense that it acts upon something pre-existing, but, instead, always is partly constitutive of that upon which it is acting. As Vikki Bell has noted: "power is productive in the sense of 'producing domains of objects and rituals of truth,' knowledges and 'individuals' that are known through those knowledges."[82]

It is one thing to talk about power being productive and another to answer what it is productive *of*. Bell highlights how this productivity functions on both a corporeal and ideological level. Power forcibly dictates where individuals can physically be, controls what they can do, determines what they can say, and generates what they think about, amongst other things, masculinity, but perhaps most importantly, it ultimately discursively crafts masculine subjects

[81] Foucault, *supra* note 77, at 52.

[82] Bell, *supra* note 63, at 35.

into being. So while the tendency is to think about power as functioning on a physical plane only when its juridical components are being considered, even its productive characteristics manifest physically. Power does not function solely on some ideological level nor is it predominantly about the struggle for the minds of people. While ideology does have a place in Foucault's thinking,[83] outright physicality is not belittled. In fact, "nothing is more material, physical, corporal than the exercise of power."[84] While perhaps less intuitive than the idea of power as ideological, as a tool used to manipulate, fundamental to a conception of power as productive is a recognition of its uncontrollability, yet simultaneous tangible, corporeal impact. Productive power not only informs subjectivity, but forms subjects themselves.

Foucault maintained that "[t]he subject of knowledge itself has a history; the relation of the subject to the object—or, more clearly—to truth itself has a history."[85] Knowledge, thus, becomes something to be examined in and of itself. Not the substance of the knowledge, but knowledge as an historical and political mechanism, devoid of its substance. In today's political climate, where consensus on the most foundational components of our existences is difficult to come by, thinking about the nature of knowledge, as opposed to its substance, seems all the more

[83] Many of Foucault's ideas on the subject stem from his former professor Louis Althusser—particularly, from Althusser's *Ideology and Ideological State Apparatuses*. Althusser is obviously addressing ideological questions from a Marxist perspective, and this is a conversation that Foucault clearly engages in. The ideological component of this argument, as it infuses masculinity and law, will be addressed more specifically in the section below on subjectivity and the enlightenment. Questions about ideology are also very present in the context of knowledge and truth, particularly vis-à-vis issues of false/consciousness. Generally, though, the concept of ideology is unsatisfactory to Foucault for precisely the reasons articulated in this essay; ideology posits power as only functioning as a top-down repressive force. It is for this reason that Foucault focuses on the micro-practices exercised on the level of daily life rather than on the state apparatuses, which he does not claim are unimportant but rather that if changes at the state level are not accompanied by changes at the micro-level the state changes will be for not and run into the ground. "Foucault's bottom-up model of power…enables an account of the mundane and daily ways in which power is enacted and contested, and allows an analysis which focuses on individuals as active subjects, as agents rather than as passive dupes." SARA MILLS, MICHEL FOUCAULT 34 (2003). This distinction is present in the rubric I describe below mostly in the fifth component regarding power being something that is a strategy and performed, rather than possessed.

[84] Foucault, *supra* note 77, at 57–58.

[85] Michel Foucault, *Truth and Juridical Forms*, *in* POWER 2. (Faubion ed., 1994) (emphasis added).

necessary. Depending on one's perspective, either the vacuous nature of truth has been revealed or power has escaped and usurped the moorings of knowledge. But, regardless of perspective, the connection between knowledge and power is clear; "the exercise of power perpetually creates knowledge and, conversely, knowledge constantly induces effects of power."[86]

Knowledge serves to reinforce and support the use of power, providing a justification for power to be exercised. Thus, the relationship between knowledge and power is interdependent and mutually reinforcing, where knowledge justifies the use of juridical power, and power, in turn, produces the knowledge that justifies its own use. Indeed, if, therefore, truth cannot be separated from power, does it make sense that truth serves as a moral signpost? The notion that the truth ultimately serves as a check on power feels fairly antiquated. Similarly, credos such as "knowledge for knowledge's sake," have given way to notions of monetizing and leveraging knowledge for capital gain. When thinking about power in a productive sense, the attempt to separate knowledge from power appears misguided; power is everywhere "not because it embraces everything but because it comes from everywhere"[87] Thus, regardless of how persuasive or inscrutable certain truths appear they will always be political. This is not suggest that certain things are not true, it is not to claim a flimsy, relativistic perspective where every perspective is equal, but rather that all truths are both a function of power and politics.

According to a conventional liberal reading, knowledge is incompatible with power and exists in the domain of truth and freedom, from which power is dissociated.[88] Exposing the connection between the discursive order and the institution that produces it highlights the

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[86] Foucault, *supra* note 77, at 52.

[87] Foucault, *supra* note 25, at 93.

[88] Boncenne-Foucault Interview, *supra* note 48, at 106.

inherently political character of knowledge. Foucault has called the production of knowledge a central strategy of power and has challenged the idea that knowledge can exist only where and when power relations are suspended.[89] This conventional understanding of knowledge—described as "a series of isolated creative geniuses"[90] or a "history of ideas" with specific individuals who revolutionized thinking on a particular subject—is a conception of history that Foucault was skeptical of.[91] This image of the solitary genius dominates both popular culture and liberal thought. When combined with the conventional understanding of power described above, the tension between the two concepts is clear: one the one hand, power supposedly supports entrenched interests with an agenda to perpetuate the status quo, conservative in the sense of maintaining power in the hands of those who have it, and on the other hand, knowledge exists supposedly "in the domain of freedom," invested in the pursuit of truth, unrestrained by any ulterior concern (*e.g.*, the intellectually independent and economically uncompromised university). In this conventional characterization, power and knowledge are at odds, with the purity of knowledge pushing against the entrenched interests of power. The conventional understanding eschews the idea that power and knowledge perpetuate themselves, or work in tandem, but rather suggests that truth and knowledge almost serve as a check on power.[92] However, the Foucauldian understanding of power, instead, emphasizes the interdependence and

[89] Foucault, *supra* note 44, at 27.

[90] Mills, *supra* note 83, at 66.

[91] Mills refers to Einstein and Louis Pasteur in the natural sciences and Kant and Wittgenstein in philosophy, but the examples are countless. Mills, *supra* note 83, at 67–68. See also Thomas Kuhn's *The Structure of Scientific Revolutions* (1962) for discussion of scientific revolutions occurring through "paradigm shifts" prompted not necessarily by genius, but by specific, individualized events. Foucault, in contrast, is not attempting to contribute to this history of ideas, but is interested in creating an "archaeology of knowledge" that addresses the material conditions allowing for the reification of these truths.

[92] One need only think of the current political climate in America where the truth and knowledge are explicitly characterized by the left as the check on the power of the government.

inseparability of power and knowledge (for Foucault, "Power/Knowledge" are inseparable). Foucault stresses that knowledge cannot exist in a place exterior to power, for knowledge is always already an effect of power:

> Modern humanism is therefore mistaken in drawing this line between knowledge and power. Knowledge and power are integrated with one another, and there is no point in dreaming of a time when knowledge will cease to depend on power; this is just a way of reviving humanism in a utopian guise. It is not possible for power to be exercised without knowledge, it is impossible for knowledge not to engender power.[93]

D. Critical Race Theory, Critical Legal Studies, and Feminist Legal Theory

The inevitable intertwining of knowledge, power, and politics also played a major role in other influential critiques of liberalism like Critical Race Theory, Critical Legal Studies, and Feminism Legal Theory. These critiques were seen as corrosive to the rule of law due to their hostility to certain components of the modernist project. For instance, student protests and the organization of an alternative course on race and the law at Harvard Law School in 1981 following the school's failure to hire a black professor to replace Derrick Bell symbolized Critical Race Theory's "oppositional posture vis-a-vis the liberal mainstream"[94] and exemplified the political nature of dominant legal discourse. The law school came to be seen as a site where power and knowledge are connected and political—no longer an ivory tower that exists "exterior" to the messy reality of race relations, but rather a political space where struggles over power/knowledge are waged.

Contrast this to the idea of knowledge as removed from politics and power—as apolitical and free. In this notion of knowledge, even amongst progressive law students, structural injustices exist in the world that contain a legal dimension and a legal education is a necessary

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[93] Foucault, *supra* note 77, at 52.

[94] Crenshaw et al, *supra* note 13, at xix.

tool for righting those wrongs. The "knowledge" imparted during that education is not thought of as having anything to do with the injustices. The problem is not with the law itself, but rather how courts are interpreting the law, how the courts are privileging, for instance, property rights over human rights, how existing lawyers are not advocating forcefully enough; the structure works, but the application is questioned. The law is predominantly a tool used to bring progressive change rather than an institution change needs to be brought to.

In another law-school-related example of a critique of the conventional understanding of power and knowledge, Duncan Kennedy published *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, identifying the power dynamics that created hierarchies in law school and in legal practice and exposing the political economy of a legal education.[95] It described two attitudes which left-leaning incoming law students had of the law: that the law was a useful tool for progressive change (the "left liberal rights analysis"); and that the law itself was super-structurally skewed to favor the elite (the "instrumental Marxist approach").[96] The "useful tool for progressive change" recalls the position described above and central to mainstream civil rights discourse, while the more radical "instrumental Marxist view" sees "every judicial action as the expression of class interest."[97] This second view reduces the law to a function of class power, rather than seeing it as one part of the equation, and in doing so diminishes the complex functioning of the totality of the social world to being regimented by the legal order in a way that presupposes a logic that the law does not contain. By reducing the law

[95] DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 169 (2004).

[96] *Id*.

[97] *Id.* at 40 (24).

to simply a reflection of class interests, this view ignores the rules and rhetoric of the law that those who see the law as a tool for progressive change prioritize.

Indeed, in this characterization, one sees similarities to ill-conceived conceptions of law as independent of the rest of the social world, as well as, in contrast, allusions to the impact cultural studies has had on the law.[98] The law is either too important (the tool for achieving justice that only it can) or not important enough (simply reflective of societal power relationships). What is needed, according to Kennedy, is a way to "think about law in a way that will allow one to enter into it, to criticize without utterly rejecting it, and to manipulate it without self-abandonment to *their* system of thinking and doing."[99] This evidences the ambivalence of the space occupied by the law; the law is not neutral, yet nor can it, on its own, serve as a successful tool to protect subordinated groups.[100] Indeed, the law may, in fact, also have negative effects on the subordinated groups, what Carol Smart has called juridogenic—the harm that law

[98] Kennedy describes this difficulty: "Legal rules the state enforces, and legal concepts that permeate all aspects of social thought, constitute capitalism as well as responding to the interests that operate within it. *Law is an aspect of the social totality, not just the tail of the dog.* The rules in force are a factor in the power or impotence of all social actors (though they certainly do not determine outcomes in the way liberal legalists sometimes suggest they do). *Id.* (emphasis added).

[99] *Id.* at 42 (26).

[100] In their accompanying essay to the re-publication of the *Polemic*, Angela Harris and Donna Maeda write: "Both the liberal and radical stances Kennedy describes understand the law as the law understands itself: as, for good or ill, the foundation of the house of power. This view, however, sustains power relations by appealing only to the realm of law itself for resistance. The belief that law school, the legal profession, and the more generally are the sole, or even key, places for reproducing or undoing hierarchy sets up this realm as the most significant place for work confronting power, so that people with legal skills continue to be held up as the most important actors for social change." *Power and Resistance in Contemporary Legal Education*, *in* LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY 181 (2004). This argument parallels Carol Smart's account that, by holding itself out as the de facto problem solving mechanism, the law reinforces its own power, and that granting the law *more* power may not be in the best interests of already subordinated groups; however: "[i]t is a dilemma that all radical political movements face, namely the problem of challenging a form of power without accepting its own terms of reference and hence losing the battle before it has begun. . . . not suggesting we can simply abolish law, but we can resist the move towards more law and the creeping hegemony of the legal order." Smart, *supra* note 16, at 5.

may generate as a consequence of its operations.[101] Thus, employing the law is not always the solution that results in the least harm. This position exists in contrast to the perennial optimists who may see some problems with the law but see law reform as a cure for whatever ails it. This highlights the law's own over-valuation of its importance and underscores how part of the way this importance is achieved is through the laws own self-advertising. While in the Critical Legal Studies position described above, the law is perpetually either over-valuing or under-valuing itself, Smart is acutely aware that the law usually over values itself and employs techniques that further its claim to truth and in the process disqualifies others, notably, to Smart, female experience. The echoes to Foucault's power/knowledge are prevalent throughout this line of thought, particularly with respect to the ubiquity of power (and its resistance) and failures of compartmentalization: "What has happened is a simultaneous blurring of lines between classes and institutions that were once distinct (at least in theory) and a diffusion of social power through the hierarchy that has made it, paradoxically, at once more stable and more vulnerable."[102] In each example the attempt to conceive of the law as an institution without its own agenda is exposed as a frivolous exercise.

Knowledge, truth, and power factor significantly in Feminist Legal Theory, as well. At first glance, a Foucauldian notion of power might appear incompatible with many feminist critiques of power, which tend to view power in a more juridical sense, as binaried with men possessing power and wielding it over women. Feminist theorists have pointed to the fact that the law's attempt to speak from a universal, neutral, and objective perspective is not a perspective

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[101] *Id.* at 12. The possibility of this juridogenic harm highlights the consideration that needs to be given to how much society as a whole looks to the law to rectify social problems.

[102] Kennedy, *supra* note 95, at 106 (90).

that includes women.[103] Further, knowledge and truth themselves have been problematized as gendered terms; again, here, we see these terms, which liberal discourse characterizes as apolitical, as, in fact, highly political. Feminism has long been engaged in attempting to find an alternative jurisprudence, a way of doing law grounded not in the individualistic moralism of liberalism but rather in the truth of women's experience. Margaret Thornton has described the law as the "paradigmatic modernist discourse, as universality, objectivity, neutrality and truth feature among its central norms. In contrast, particularity, discretion, permeability and uncertainty are regarded with suspicion within the dominant philosophy of legal positivism because such values are corrosive to the rule of law."[104]

In her attempt to create a grand feminist jurisprudence Catharine MacKinnon stated: "Radical feminism—after this, feminism unmodified—is methodologically post-Marxist. It moves to resolve the Marxist-feminist problematic on the level of method. Because its method emerges from the concrete conditions of all women as a sex, it dissolves the individualist, naturalist, moralist structure of liberalism, the politics of which science is epistemology."[105] This version of "standpoint feminism" articulated by MacKinnon is similar to the positions advocated by mainstream civil rights activists articulated above. The issue becomes one, not of law per se, not of the methodology itself, but rather of the "Truth" that it is relying on to ground it. Replace the liberal male truth grounded in concepts that are always already gendered, with the truths found in female experience, and then one is left with an effective and just jurisprudence. The truth of female experience, in contrast to male experience—always shrouded in neutrality—

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[103] These critiques are addressed in further detail below, in the context of masculinity studies. *See* Section IV.

[104] Margaret Thornton, *Neoliberal Melancholia: The Case of Feminist Legal Scholarship*, 20 AUSTRALIAN FEM. L. J. 7, 9 (2004).

[105] MacKinnon, *supra* note 6, at 639–40 (emphasis added).

becomes the method of the jurisprudence and the heart of the epistemology. MacKinnon continues: "When [the state] is most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most blind to the sex of the standard being applied….Once masculinity appears as a specific position, not just the way things are, its judgements will be revealed in process and procedure, as well as adjudication and legislation…However autonomous of class the liberal stance may appear, it is not autonomous of sex."[106]

MacKinnon's argument, however, has been criticized as making a positivistic claim to a specific truth. Her theorizing makes universalizing claims when, even at the time, universalizing claims were losing their allure, "in arguing that all women are subordinated by virtue of their sex, her thesis constitutes a form of modernist grand theorizing that sought to construct new universals in the liberal mold at the very moment postmodern theory was seeking to destabilize them."[107] The alternative method it is proposing is not any more contingent or less objective than the liberal model it is seeking to replace; it is only replacing one standard with the other. Again, the hegemonic power of the law remains in place, and, as Smart has pointed out, the worth of its method is characterized as existing independent of the world around it: "The idea of a feminist jurisprudence also seems to imply that law can remain a discrete area of activity, detached and somehow superior to 'society'"[108] The problem is twofold: on the one hand feminist jurisprudence positions itself *outside* society and thus exacerbates the already encompassing power of the law, and, on the other, feminism positions itself *within* the law in an equally dogmatic position as the one it is attempting to replace.

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[106] *Id.* at 658.

[107] Thornton, *supra* note 104, at 10.

[108] Smart, *supra* note 16, at 69.

The reason for this dogmatism, according to Smart, has to do with the nature of the law: "It is unfortunate that working within the discourse of law seems to produce such—it is as if the law's claim to truth is so legitimate that feminists can only challenge and maintain credibility within the law by positing an equally positivist alternative."[109] Indeed, perhaps also in an attempt to take up space appropriately within a juridical framework, feminism generally disavows more nuanced and fluid relations of power. The relationship between the law and feminism, in this sense, struggles due to the law's necessity to speak univocally. The law is only capable of articulating one truth, which it gnostically posits to be *the* truth. The law forces on feminism an essentialism that it is perpetually struggling with. Whether truth is determined through subjective, experiential accounts or through objective, logical accounts each alternative insists on one truth.

When looking at the similarities between Critical Legal Studies and Feminist jurisprudence vis-à-vis the issue of "experience," the inside/outside issue appears again. Critical Legal Studies has argued against the law existing outside of the larger social/political order, whereas feminism suggests that female experience should serve as the truth on which to construct its jurisprudence. Female experience thus gives rise to a truth that exists *outside* of the existing ideological systems. However, when keeping in mind the fluidity of a Foucauldian understanding of power, the power relations between the existing ideological system and female experience are not static nor are they wholly hierarchical. All "experience," is generated within a larger social context. The compartmentalization of female experience as independent of the existing structure fails to recognize the multidirectionality of power.

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[109] *Id.* at 71.

The idea of "freeing" female experience from the ideological restraints of the existing patriarchal superstructure implies the potentiality of some sort of "real" female experience. As Joan Scott has stated: "To put it another way, the evidence of experience, whether conceived through a metaphor of visibility or in any other way that takes meaning as transparent, *reproduces rather than contests given ideological systems*—those that assume that the facts of history speak for themselves . . . ."[110] In this way, the emphasis on "experience" *within* the ideological system precludes any "critical examination of the workings of the ideological system itself."[111] The experience is made visible but the categories themselves remain ahistorical, as Anne Fausto-Sterling observed "what we conclude about people's past experiences depends to a large extent on how much we believe that our categories of analysis transcend time and place."[112] The relationship that is obscured is how the ideological system positions subjects and produces their experiences: "It is not individuals who have experience, but subjects who are constituted through experience. Experience in this definition then becomes not the origin of our explanation, not the authoritative evidence that grounds what is known, but rather that which we seek to explain, that about which knowledge is produced."[113]

This particular relationship—between the production of knowledge and experience—is similarly not one-directional. The liberal conception of how history is produced—or stated differently, the process from which experience becomes knowledge, in conventional historiographical terms, consists of historians using documents (personal testimonies, private

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[110] Joan Scott, *The Evidence of Experience*, *in* THE LESBIAN AND GAY STUDIES READER 400 (Henry Abelove et al eds., 1993) (emphasis added).

[111] *Id*.

[112] ANNE FAUSTO-STERLING, SEXING THE BODY 15 (2000).

[113] Scott, *supra* note 110, at 401.

journals, letters, etc.) to uncover the "truth" of an experience in the past. In her essay Scott refers to Gayatri Spivak's characterization of the work of a historian as being to help us understand "the social and structural positions of people" in new terms that define a "collective identity with potential political effects."[114] Due, in part, to the complexity of using "experience" to get at the "truth" of the past Foucault describes what he is engaged in not as uncovering a history but as creating an archaeology which, in contrast to history's gathering of experiences, is a "set of rules which at a given period and for a given society define: the limits and forms of the sayable."[115] Indeed, Scott uses this same template to refine the task of the historian: "It ought to be possible for historians . . . to "make visible the assignment of subject-positions," not in the sense of capturing the reality of the objects seen, but of trying to understand the operations of the complex and changing discursive processes by which identities are ascribed, resisted, or embraced, and which processes themselves are unremarked and indeed achieve their effect because they are not noticed."[116]

Lynne Huffer discusses two problems that Foucault identifies in this relationship between experience and truth, and the attempt to use experience as a tool to get to truth. Foucault addresses the issue in the context of the mad and of sexual deviants and makes two complaints. First, the experiences of the marginalized have not been documented to the extent of those not marginalized; "the voiced of the mad have, for the most part, been lost to us—we have very few documents in which they speak for themselves and in their own words—the problem of

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[114] *Id.* at 408.

[115] Michel Foucault, *Politics and the study of discourse*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 59 (Graham Burchell et al eds., 1991).

[116] Scott, *supra* note 110, at 408.

accessing the "reality" of their experience is compounded."[117] Second, Foucault explains that the rendering and capturing of the experiences (of the mad in his case) objectifies the subject. The anti-historical solution that Foucault suggests is, in effect, to get at "madness" prior to it being captured by knowledge. It is therefore not a "history of knowledge, but of the rudimentary movements of an experience. A history not of psychiatry, but of madness itself, in all its vivacity, before it is captured by knowledge."[118] Huffer points out how Foucault is obviously not trying to find a "true" experience that exists prior to knowledge; in other words, a pure, real, free, true experience that precedes knowledge is not the object of the analysis. But rather to account for the fact that he is "working from the perspective of the present, from *within* a knowledge that knows too much and therefore misses experience itself."[119] The corrupting effect of "knowledge" therefore, is not to suggest that there exists a prior, purer, experience, but rather the search should consider the effects of the capture –the impact on experience once it is becomes *knowledge* –and strive to understand those movements. With respect to masculinity, the question is what impact did becoming—going from something natural and thus invisible –an object of study have on it, how was it changed by becoming a *knowledge*? In other words, rather than thinking about knowledge reflecting a truth about masculinity that precedes it becoming knowledge, think about the relationship being less static and more fluid. In particular, when masculinity goes from being something ubiquitous but invisible to an object of study, what are the unwritten rules that lead to the universe of discursive formations which circulate around it at any given time?

[117] Lynne Huffer, *Foucault and Feminism's Prodigal Children*, *in* THE QUESTION OF GENDER 265 (Judith Butler & Elizabeth Weed eds., 2011).

[118] MICHEL FOUCAULT, HISTORY OF MADNESS xxxii–xxxiii (2006).

[119] Huffer, *supra* note 117, at 265.

When thinking about the relationship between masculinity and the law, what is the process through which ideas about masculinity get established as fact? A crucial distinction to be made is between thinking about truths regarding masculinity as *revealing* themselves to us—the distinction is between the pre-existing fact being uncovered and the fact itself being a product of a process—and how certain institutional processes establish what comes to be known as a fact about masculinity. Indeed, the institutional processes impact the nature of the fact itself. In other words, one may ask what happens to masculinity itself once it becomes subject to a "will to truth," once it is viewed as something that contains knowledge. How is the nature of masculinity impacted by its exposure to the institutional processes? And is it even possible/insightful to distinguish between a "pre-institutional process" and "post-institutional process" masculinity? The departure point for this inquiry is the moment when masculinity went from something invisible but ubiquitous to a legitimate object of study. Masculinity abruptly was subjected to a set of rules and procedures that created new terrain governing how knowledge was formed and produced within the discourses that surrounded it.[120] The explicit intent of Masculinity Studies was to render masculinity contingent and to expose it as simply one subjectivity amongst others. But, as feminist scholars have been highlighting for decades, the entirety of the human world is already a gendered construction.[121] Thus, the aspiration to think about masculinity in a genderless space is from the outset an ill-fated endeavor.

This objectification of masculinity, resulting, in part, from the creation of Masculinity Studies, itself a product of a will to truth, has multiple effects. Until relatively recently, masculinity has been noticeably under-theorized. The male subject position has dominated the

[120] *See* Section IV, *infra*.

[121] Brown, *supra* note 36, at ix.

fields of literature, philosophy, sociology, and law, amongst others. It has done so under the guise of "mankind" being the universal prototype from which objective truths can be extracted. Masculinity shifted from something that more or less just existed, to something that contained truths, something that held answers that were worth knowing. Foucault, in what he called a "principle of reversal,"[122] explained how the will to truth, rather than enlarging a discourse, as one intuits it would, actually has the reverse effect. Rather than promoting "swarming abundance and … continuity,"[123] the will to truth leads to a "cutting-up" of the discourse. Foucault's genealogy seeks out difference and heterogeneity to overthrow what he labels the "rancorous will to knowledge,"[124] knowledge which is malicious and rests on injustice.[125] The will to truth limits the voices that can speak authoritatively on the subject. The will to truth leads to self-regulating that narrows the range and diversity of voices. The form knowledge takes shifts to something more governmental, because as Margaret Thornton has pointed out, there has been a "resiling from theory, reflexivity and critique in favour of applied and technocratic knowledge because the latter are valued more highly within the market."[126] Foucault calls this process "rarefication," and it is one of the internal exclusions he describes which limit the production of discourse.[127] Rarefication does not mean that the quantity of speech acts on a subject are impacted, but that a hierarchy is created amongst them. Some voices are heard and rendered authoritative, while others disappear as quickly as they were uttered. Once masculinity becomes

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[122] Michel Foucault, *The Order of Discourse*, *in* UNTYING THE TEXT: A POST-STRUCTURALIST READER 67 (Robert Young ed., 1981).

[123] *Id.*

[124] Michel Foucault, *Nietzsche, Genealogy, History*, *in* THE FOUCAULT READER 95 (Paul Rabinow ed., 1984).

[125] *Id.*

[126] Thornton, *supra* note 104, at 8.

[127] MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 221 (1972).

an object of study, with experts in the field, the variety of voices that contribute to the discourses that create it are reduced.

Discourse is controlled, selected, organized, and redistributed. Due to the procedures for exclusion being so well known, namely those of prohibition and censorship, society tends to fixate on the elimination of repression and on overcoming external controls on discourse, rather than thinking through the internal procedures that delineate discourse. One of these internal procedures is disciplinary boundedness. Masculinity becomes a subject, a finite category, that is then necessarily restricted in some senses. Certain methodological and theoretical tools become *de rigueur* in the discipline. The variety of the ways about which the subject is spoken is reduced. This limits the perspectives being brought to bear on a particular subject—one can think of other subjects that have been subjected to a dominant methodological perspective (*e.g.*, empirical and positivistic turns in the social sciences in the last half century). This limiting of methodological perspectives is combined with a drastic lessening of the particular voices that will be heard on a subject. Only "expert" voices are able to speak authoritatively about the subject; their voices contain truths ungraspable by anyone but themselves. With respect to masculinity, the processes of disciplinary boundedness and rarefication reduce the voices and perspectives that are heard and promote the continuation down a phallocentric and patriarchal path.

Furthermore, experts see explanations and answers in and through their field—*i.e.*, masculinity studies, infused by science/medicine/law/sociology/psychology—similar to how lawyers look to the law to find solutions to problems. Many categories serve as both a discipline and a lens; for example, one often hears about rewriting history from a feminist perspective or about analyzing a film from a sociological perspective. The objectification of masculinity

therefore renders it a discipline capable of providing explanations and answers. One of the founding texts of Masculinity Studies states in its first paragraph that it will "discuss the implications of masculinity research for understanding current world issues."[128] Masculinity now provides an analysis of lived events, and each time it is employed its status as a discipline is furthered, its use as a category perpetuated, its importance questioned less.

Finally, let us return to the questions posed by the Owen Labrie case. How would that case look differently were the law to take seriously the ideas about power, law, and knowledge introduced above? Is it feasible for the law to be multivocal and to move beyond liberal ideas of consent and volition? Should we think about how the law has created the *rules of the game* that govern the interaction between Labrie and the 15-year-old girl with whom he had sex. The conditions that govern the interaction are both the "crystallization of processes of power that take place at a distance from legal institutions,"[129] in that they reflect power dynamics that exist beyond the law and that were, however, nonetheless established in a pre-existing legal context. There is, obviously, a social power dynamic which engages other factors beyond the law, but there is no pre-existing social context in which the law plays no role. Robert Hale describes the laws role in such a dynamic as creating the conditions of the play of forces that lead to the crystallization. Thus, there is a clear legal context that frames the interaction between Labrie and the 15-year-old—laws governing sexual assault and rape, for instance—which can be thought of as the culmination of the social power dynamics between men and women, and the end result of a type of negotiation. Any interaction like the one in question is framed and qualified by its legal

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[128] Connell, *supra* note 39, at xi.

[129] Kennedy, *supra* note 15, at 120 (describing the manner in which Foucault characterizes the role of the law). The idea of examining the rules of the game established by the law is a methodology attributed by Kennedy to the Legal Realists, particularly Robert Hale.

context. It is self-evident that all interactions are impacted by the legal context but the pervasiveness of that impact requires further upacking.

The problem with thinking about a pre-legal negotiation is that it supposes the possibility of a negotiation transpiring beyond the spectra of a legal context. This argument anticipates the most obvious objection to suggesting that the law plays a productive role in the construction of masculinity—that the law is simply a medium that reflects a popular consensus about what masculinity means. This notion of the law—as simply a reflector of popular consensus—supposes a clear divide between the law and the social forces at play, and supposes the existence of a pre-legal context. It supposes a context in which there was a negotiation between man and woman and the law was not implicated in determining their relative bargaining power. It supposes that the law was introduced at the later context to affect the relative bargaining power but was not implicated at the outset in creating it, in creating the initial rules of the game that determined the bargaining strength.

The distinction between the prohibitive and permissive roles of the law is helpful here. For instance, in the context of a negotiation between a man and a woman, we can think of prohibitions against abortion existing that would worsen the harm caused by rape and thus changing the relative bargaining power in favor of the male would be rapist; the threat of rape which the man possesses would now be worth more and in exchange for not raping the man could expect more in return. Therefore, the prohibition-free legal context is actually not a context in which only social forces beyond the law are determining the power dynamics, but rather a legal context greatly influenced by what the law is permitting.

Is it then even a reasonable question considering that the question itself suggests a disconnect between the law and the regime it regulates –in that it compartmentalizes the law –

and presents it as removed from the social and political worlds? The analysis takes two distinct tracks, on the one hand, the argument is that the law is implicated in the determination of social power throughout the negotiation process and not only in its terminal form, and on the other hand, the argument is that there are two distinct forms of power at play. What is being asked is for the law to recognize, in itself, the functioning of two distinct forms of power; the law is the quintessential example of the juridico-institutional model, but the ask of the law is for it to recognize how it also is part and parcel of the concrete ways in which power penetrates subjects' very bodies and forms of life, from the outset. The law is both the juridical model *par excellence* and part of the bio-political model of power—not disciplinary alone, not solely functioning on the level of the individual body, but on the species as a whole. The power of the law manifests both juridically, and is always there in this sense, but also contains within it the regulatory technologies of life *and* the disciplinary controls of the body.

The law engages in creating truth and controlling bodies, not only through institutions like prisons, which are engaged in disciplinary control of individual bodies, but what Foucault describes as "State control of the biological."[130] In biopolitics there are mechanisms whose purpose is to intervene at the level at which general phenomena are determined, to intervene at the level of their generality[131] . . . not to directly impact specific individuals but rather to function on a macro level—"it is, in a word, a matter of taking control of life and the biological processes of man-as-species and of ensuring that they are not disciplined, but regularized."[132] Biopower manifests through centralizing information and normalizing knowledge; control over life through

[130] Foucault, *supra* note 47, at 240.

[131] *Id.* at 246.

[132] *Id.* at 246–47.

the control of man, not as an individual but as a species. It is through the use of its biopower that the law is tacitly engaged in crafting the parameters of masculinity; less about the power of the law as prohibitive, or even permissive, less about discipline and less about the direct control of life and death by the State and sovereign, and more about the normalization of truths and knowledge, about regulatory controls of life.

The law contributes to the creation of the norms not primarily through the enunciation of a sovereign, in the sense that the parameters are determined and subsequently imposed in a top down manner. It is a process by which normativity is produced; a production "which is mediated by institutions of the state and elite specialists."[133] When one considers juridical power, it is easy to locate, associated with hierarchy and bureaucracy, identifiable, relatively transparent in its structural arrangements. This is not the case for the production of norms, which remains difficult to pinpoint. Due to this, the tendency is often to distinguish the process of norm production from the conventional juridical functioning of the law. Normativity is not an imposition but rather a process—"produced by experts acting upon populations: examining, interrogating, incarcerating, curing, passifying (sic), exciting and regimenting."[134] Thus, when the parameters of masculinity are challenged, when the borders are threatened, the threat is viewed as a deviation or an irregularity (from a norm), not as a violation of an injunction; the law, however, is just as implicated in the process of norm production as it is in the imposition of sovereign power, or the disciplinary control of bodies.

[133] Al Katz, Foucault for Lawyers, http://www.alkatzwritings.com/Foucault-power.htm (1982) (explaining the "movement of the norm"—"it originates at multiple points of application, around localized relations of power . . . the education of a child, the treatment of a disease, the imposition of punishment, the mode of satisfaction in an economy of desire").

[134] *Id.*

The idea is to move beyond the juridical and toward an analytic of power that does not take the law as its model, but that examines technologies of the self as well—processes of subjectivization which lead an individual to bind oneself to his identity and consciousness—and thus recognize the interdependence between the two analytics. Giorgio Agamben goes as far as arguing that "the production of the biopolitcal body is the original activity of sovereign power,"[135] but my point is solely that when reflecting on the manner in which the law exercises its power the idea is to both recognize its juridical power, but also to analyze the manner in which the law uses its biopolitical power—both disciplinary and regulatory—and the relationship between those two usages. This complex coexistence of different elements that come together to form the law in Foucault's thinking has been described by Alan Hunt as "juridical assemblage"—Foucault's "focus on the interaction between different fields of power, knowledge and governance manifested itself in his substantive preoccupation with the ways in which forms of law interact with mechanisms of discipline and with strategies and techniques of governance."[136] The crucial connection is between the law and legal processes in place and the inventions of new fields of knowledge. In other words, how the law interacts with new forms of demographic and macro, regulatory knowledges that did not exist prior. The next step is to look at these technologies of the self, or the processes of subjectivization, that occur.

[135] GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 6 (1995).

[136] Alan Hunt, *Encounters with juridical assemblages: reflections on Foucault, law and the juridical*, *in* RE-READING FOUCAULT: ON LAW, POWER AND RIGHTS 81 (Ben Golder ed., 2013).

III. The Female Subject

In this section I will look at the formation of the subject, and how critiques of liberalism have destabilized it. I will then examine how the construction of the body within liberalism posits it as something pre-ideological and points to its corporeality as evidence of its naturalness, suggesting that "nature"—whatever that means—is apolitical. I will look at prominent issues in feminist legal theory surrounding subjectivity, like difference, substantial equality, essentialism, embodiment, and experience. I will explore certain ideas about non-normative subjectivities and examine how these ideas contribute to our understanding of normative subjectivities. These issues, I argue, demonstrate how the law engages with masculinity (applying these insights to masculinity will be looked at in Section VII). I will revisit questions surrounding the sex/gender divide, where there remains a large disconnect between conventional thinking about sexual difference and how it is considered in feminist/gender theory. While challenges to traditional ideas about sex and gender, and sexual difference more broadly (*i.e.*, that sex does not exist on a binary; that our traditional gender categories do not apply to all subjects) have made some inroads, sex/gender remains a politically troubling hegemonic discourse, particularly within popular culture, and still informs how the law addresses questions of masculinity (*e.g.*, recent controversy regarding gender designations of public restrooms).

A. The Search for Origins

Is it feasible for the law to adopt a different approach when dealing with questions of sex and gender? Is it possible for the law to remain true to its liberal identity (*i.e.*, rule of law, freedom of speech, individual rights, liberty, freedom) and think about sexual difference differently? Or is sexual difference so foundational to liberalism (and thus our legal system) that liberalism would be unrecognizable and self-contradictory without sexual difference?

Subjects do not pre-exist our social world, but are fashioned within it, constituted by formations of power and regimes of truth.[137] Specifically, subjects cannot exist in the world unproblematically and wholly opposed to formations of power that exist outside of them; there is no pre-ideological or apolitical subject. If this point is taken seriously, then there are evidently not conceptions of femininity or masculinity that exist outside of power. Rather, "subjects and power relations are imbricated and co-constitutive,"[138] and so, masculinity and femininity are never simply constrained or freed by the law, but rather formed by it. True equality, beyond either formal or substantive models, will only be accessible if power relations are given more than peripheral consideration and seen as both foundational to, and as a producer of, the existing social order.

The effects of this ontological position, however, implicate the law beyond simply how it engages with questions of gender. Indeed, many contemporary arguments supporting universal human rights are premised on the idea that there are forces acting upon pre-existing subjects which require the protection of the law—that rights are needed to protect those subjects from power, not that those subjects are created by and through the power dynamics. To suggest that there is no subject that pre-exists these rights undermines the core conception of liberal rights theory, and, consequently, the aspirational concepts of liberty and freedom. This dynamic exists because humanist notions of autonomy, reciprocity, mutual recognition and dignity derive their normative force from a metaphysics of subjectivity.[139] Without a pre-existing subject there is no humanism. Critical Race Theorists, for instance, have highlighted the futility of searching for an

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[137] Ben Golder, *Introduction*, *in* RE-READING FOUCAULT: ON LAW, POWER AND RIGHTS 8.
[138] *Id.* at 9.
[139] Nancy Fraser, *Foucault's Body Language: A Post Humanist Political Rhetoric?* 61 SALMAGUNDI 55, 56 (1983).

original position and criticized efforts of liberal civil rights advocates who sought to identify events that created the white supremacist culture within that very culture. For Foucault, there is no space beyond power relations, no liberation, no pre-power desire, no free subject—*i.e.*, no origin. While liberalism imagines a complete subject upon whom the world acts, that subject is never whole, never pure or "natural," always "post" something.

The problems with any "search for origins" have been well examined (most notably, by Judith Butler).[140] Such an endeavor risks reifying an authentic, pre-patriarchal femininity that fails to "formulate an account of gender as a complex cultural construction"[141] and should "be cautious to not promote a politically problematic reification of women's experience."[142] Despite a praiseworthy goal of repudiating theories that characterize the subordination of women as natural or universal, a search for origins—"efforts to locate moments or structures within history or culture that establish gender hierarchy"[143]—has the effect of trivializing the power of patriarchy. If one seeks to show that women's subordination is not natural, the implication is that *something* is; that there is a "natural" position without gender hierarchies, there is an origin, there is a pre-cultural subject. In fact, gender is a cultural construction created in order to debunk the idea that sex roles are somehow a product of biology. But if the natural, pre-patriarchy position doesn't exist, how can one disrupt the claim that gender itself is natural? In other words, how is the "naturalness" of gender challenged without recourse to a pre-patriarchal position? Is it useful

[140] See JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990). The "search for origins" means the search for a female subject that pre-exists what Butler talks about as "the law." "The law" in this context refers to the law of the father or of patriarchy. So the "search for origins" is the search for a pre-patriarchal female subject. The "search for origins" though, also addresses a search for a place that is pre-desire, pre-power relations, or pre-racism. Each of these searches is for a subject that pre-exists the culture it exists within, and one in which cultural events can be pinpointed that are responsible for the present situation.

[141] *Id.* at 36.

[142] *Id.* at 35.

[143] *Id.* at 36.

to employ this idea strategically to highlight the social constructiveness of gender, or is it ultimately a better strategy to resist any recourse to a pre-patriarchal position?

The idea of a "natural" body that existed before patriarchy and oppression, that some search for, sits in stark contrast to the idea of a body invoked by Monique Wittig: "we have been compelled in our bodies and in our minds to correspond, feature by feature, to the *idea* of nature that has been established for us. Distorted to such an extent that our deformed body is what they call 'natural,' what is supposed to exist as such before oppression."[144] To Wittig, the natural body is itself a distortion, not an idyllic pre-oppression entity, but instead a thing that corresponds to an idea (nature) that has been created within the parameters of the law.[145]

In psychoanalytic language, the question to ask is what the subject looks like in its pre-oedipal phase. As Butler states, "Do we need recourse to a happier state before the law in order to maintain that contemporary gender relations and the punitive production of gender identities are oppressive?"[146] Butler ultimately claims that this narrative strategy makes "…all effort at recovering that origin in the name of subversion inevitably belated."[147] The idea that this attempt at subversion inevitably fails, if even only deployed strategically, appears to run counter to many struggles for equality undertaken in certain progressive circles, specifically many feminist groups, who have foregrounded the female subject as the centerpiece of equality struggles. Feminism, with this apparently strategically misguided struggle has, in Joan Scott's words "produced the "sexual difference" it sought to eliminate."[148] Thus, when, in the alternative

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[144] Monique Wittig, *One Is Not Born a Woman, in* THE STRAIGHT MIND AND OTHER ESSAYS 9 (Wittig 1992).

[145] *Id.*

[146] Butler, *supra* note 140, at 75.

[147] *Id.* at 78.

[148] JOAN W. SCOTT, ONLY PARADOXES TO OFFER: FRENCH FEMINISTS AND THE RIGHTS OF MAN 3-4 (1996).

strategy, the challenge to patriarchy is tied inextricably to the instability and indeterminacy of all gender identities and to the deconstruction of the categories themselves, is it feasible nonetheless to foreground a female subject in the struggle for equality? The switch in strategy moves from identity to direction or, to paraphrase Paul Gilroy, from roots to routes.[149]

B. Difference and Equality

Prior to the switch from looking backwards for a pre-patriarchal female subject to looking forward toward a space without gender categories, the debate within feminist circles was not about the integrity of the subject (for that was taken for granted), or whether a subject existed prior to patriarchy, but rather about struggles for equality based on the sameness or difference between men and women. Importantly, the decision to switch focus exists within a historical framework constituted "by universalist discourses of individualism (with their theories of rights and citizenship) that evoke 'sexual difference' to naturalize the exclusion of women."[150] The interconnectedness of sexual difference and liberalism is here foregrounded. The debate is about how to address differences between women and men and where these differences came from. On the one hand, the debates focus on the question of whether differences between men and women are biological or socially constructed,[151] and, on the other, on how the differences between men and women ought to be addressed legally and politically.

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[149] PAUL GILROY, THE BLACK ATLANTIC: MODERNITY AND DOUBLE-CONSCIOUSNESS (1993).

[150] Scott, *supra* note 148, at 16.

[151] While this debate/controversy has been central in feminist circles in many respects, some commentators have suggested that ultimately the debate may be less important than it seems: "For feminist legal theory, a lot less turns on the essentialist/social constructionist controversy in cultural feminism than you would suppose from the amazing amount of ink that has been spilled on the question. We can have a sensible policy agenda for or against human activities and attitudes that are biological; for instance we are against death and have many policies that push against this inevitable, gruesomely embodied, natural event." JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 59 (2006).

The debate manifests most markedly when addressing issues of public policy.[152] On the one side, there are those who argue that sexual difference should be irrelevant and on the other those who insist that appeals of women ought to be made in terms of the needs, interests, and characteristics of women as a group.[153] Each of these positions affirms a cultural component to women's identity, a specific women's culture, and assumes that sexual difference is an immutable, apolitical fact. Indeed, the terms of the argument incredulously suggest that to be treated equally women need to be the same as men. Joan Scott has described the manner in which the terms of debate get framed:

> Are women the same as men? And is this sameness the only basis upon which equality can be claimed? Or are they different and, because or in spite of their difference, entitled to equal treatment? Either position attributes fixed and opposing identities to women and men, implicitly endorsing the premise that there can be an authoritative definition for sexual difference.[154]

The debate is often characterized as being between cultural feminists and liberal feminists, with the cultural feminists suggesting a change to society in which character traits labelled female (*e.g.*, compassion, empathy, and collaboration) are revalued and treated as at least on par with those masculine traits which are so valued by society (*e.g.*, aggression, competitiveness and ambition) and the liberal feminists arguing that, but for the lack of power and resources resulting from a lack of opportunity, women would not be subordinate to men. For liberal feminists, sex equality is an attainable end, achieved by correcting the imbalance of power and resources between women and men, which is at the root of sex inequality and discrimination. With the focus on equality of opportunity, the law is ideally situated to help achieve sex equality;

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[152] For example, ought sexual difference be a relevant consideration in schools and employment?

[153] Joan Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, *in* FEMINIST SOCIAL THOUGHT: A READER 761 (Diana T. Meyers ed., 1997).

[154] Scott, *supra* note 150, at x.

a vital tool for accessing power and resources and achieving more opportunity; an inherent part of the solution, not of the problem. Thus, the overarching structure is not questioned; the world is fine, the rules of the game are fine, except for the fact that women are underrepresented in all positions of power. For liberal feminists the law is undoubtedly a tool to be used to access sex equality.

Furthermore, the issue of what constitutes difference or sameness for women, invites the almost rhetorical question: the same or different from what? The answer being, of course, the same or different from men. So, beyond the incomprehensiveness of the question itself, the overarching structure it exists within has already subordinated women's story, constructed it as dependent on man's story; in the words of Janet Halley:

> The very idea that justice for women depends on a comparison of their life situation with that of men limits equality theories to the terms set by male dominance; and indeed, the oscillation from equal to special treatment and back again is a classic symptom not of women's interests but of the way in which they are trapped within the double binds of feminine subordination within abstract justice."[155]

What is exactly abstract about the justice framing the double bind? The law likes palatable and implementable solutions, problems that are resolvable. The law is not in the business of empathy or compassion; the law is a problem solver. The justice that the law likes is not abstract. Nonetheless, justice is abstract in that it is not attainable in such straight forward a way. The sameness/difference paradigm suggests that one of the two alternatives contains a solution; the search for justice becomes simply a question of deciding upon the correct

[155] Halley, *supra* note 151, at 80.

strategy.[156] The idea is that justice is attainable, potentially imminent, if only practitioners are able to set on the right strategy, implying that there is a right and a wrong decision. Implying that there are not systemic impediments to the attainment of sex equality, nor alternative methods to attaining equality beyond the sameness/difference model. The idea that to attain equality a decision must be made with respect to sameness/difference is a false choice that hinders creativity.[157]

The reification of a male/female binary also serves to eliminate or, at best, to reduce in significance differences that exist between individuals on each side of the duality. Within this dualist paradigm women and men tend to be constructed in more absolutist terms, in which differences within the groups give way to differences between the groups. Resisting essentialist categories of sexual difference, does not deny sexual difference per se, but does suggest that normative rules based on sexual difference are unhelpful and misguided.[158]

The struggle remains one of resisting categorical constructions of women that aspire for some ultimate truth. This disavowal of categorical truths, however, does not mean an uncritical embrace of what Joan Scott called "happy pluralism"[159] that replaces the unhappy dualism, but rather a questioning and rethinking of the relationship between equality and difference. It means

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[156] Scott, *supra* note 150, at 17 ("By writing the history of feminism as if it were simply a matter of choosing the right strategy—equality or difference—we imply that one or another of these options was actually available, that closure or resolution was and is ultimately attainable.").

[157] Diana Tietjens Meyers, *Introduction to* Joan Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism, in* FEMINIST SOCIAL THOUGHT: A READER 757.

[158] Scott, *supra* note 153, at 767 ("An insistence on differences undercuts the tendency to absolutist and, in the case of sexual difference, essentialist categories. In contrast, absolutist categorizations of difference end up always enforcing normative rules.").

[159] *Id.* at 768.

striving to loosen the "double binds of female subordination within abstract justice."[160] Resisting categorical differences does not mean one is saying that men and women are the same.

C. Substantive Equality/Radical Feminism

Feminist legal theorists have long debated the most effective strategy for achieving equality for women. Liberal feminists traditionally have supported an equal treatment model that seeks formal equality before the law. Formal equality means that the law treats similarly situated people exactly the same; one's sex should not determine how one is treated. A formal equality model emphasizes the similarities between men and women and views special treatment of women as patronizing and paternalistic. Liberal feminists argue that, in all ways that should matter legally, particularly with respect to employment, women do not differ from men. Thus, formal equality means treating men and women the same.

Cultural feminists, on the other hand, have argued that equal opportunities have not led to equal results, because men and women are different in foundational ways. Because the rules of the game were established by men, success for women has been measured by women's ability to achieve male norms. Moreover, biological differences between men and women—particularly with respect to pregnancy[161]—suggest that equality can only be achieved with special treatment in certain circumstances. Cultural feminists also have underscored the different emotional and cognitive traits observed in men and women, in general—*e.g.*, men as aggressive and competitive; women as caring and compassionate. Given these cultural and biological factors,

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[160] Halley, *supra* note 151, at 80.

[161] The formal/substantive equality debate manifested in a number of cases dealing with pregnancy in the employment context, *see infra* Section V.A, and in the so-called "lack of interest" cases dealing with women's supposed partiality to less competitive professional positions, *see infra* Section V.B.

cultural feminists argue, substantive equality can only be achieved when such differences are recognized and accommodated by the law.

While both sameness (formal equality) and difference (substantive equality) deal with comparisons to a male norm and are relational concepts to a male referent, feminist thinkers like Catharine MacKinnnon viewed true substantive equality not as achieving equality to a male norm but rather as liberation from male domination.[162] MacKinnon's work was a radical attack on the liberal feminists of the time and rejected the notion of encouraging special treatment for women when they are not "like men" and equal treatment when they are.[163] For liberal feminists, sex equality is an attainable end, achieved by correcting the imbalance of power and resources between women and men, which is at the root of sex inequality and discrimination. With the focus on equality of opportunity, the law is ideally situated to help achieve sex equality; a vital tool for accessing power and resources and achieving more opportunity; an inherent part of the solution, not of the problem. Thus, the overarching structure is not questioned; the world is fine, the rules of the game are fine, except for the fact that women are underrepresented in all positions of power. Radical feminism, however, suggests that the defining characteristic of struggles for equality is not the lack of equivalent social and political opportunities, but rather the pervasiveness of male domination.

To be a woman, in MacKinnon's view, was to be known by men through institutions (*e.g.*, the law) and ideas designed from a male point of view; thus, there is no pre-patriarchal space. The echoes of Foucault who, as discussed above, explained no space is not already

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[162] CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES AND LIFE AND LAW 34 ("Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure…under the difference standard, we are measured according to our lack of correspondence with him.").

[163] DAVID KENNEDY, THE CANON OF AMERICAN LEGAL THOUGHT 833 (2006).

infused by power, are clear.[164] Importantly, MacKinnon emphasizes the component of power that serves to produce sexual difference.[165] Male domination—exercised through sexuality and embodied in gender[166]—both represses women and creates sexual difference, exhibiting the productive nature of power. This reversal of the causal connection—taking sexuality (power) as a starting point, which causes gender, which causes sexual difference rather than starting with sexual difference—was a radical step which named sexual difference as not natural or inevitable, but an effect of power.[167]

Sexual subordination, in this paradigm, leads to sexual difference, and not vice versa. In this way, MacKinnon's theory of how female identity is created—within the confines of the structures of male domination—closely resembles Foucault's understanding of the discursive processes through which identities are constructed.[168] Both attempt to make visible the process by which subject positions are constructed, and challenge to varying extents the authority of

[164] Foucault is often criticized for not considering sex/gender in his theories, yet, as is shown, there are many similarities in his thinking and the feminist ideas discussed in this paper.

[165] MacKinnon refers to Foucault in a footnote: "Although Foucault understands that sexuality must be discussed at the same time as method, power, class, and the law, he does not systematically comprehend the specificity of gender—women's and men's relation to these factors—as a primary category for comprehending them. As one result, he cannot distinguish between the silence about sexuality that Victorianism has made into a noisy discourse and the silence that has *been* women's sexuality under conditions of subordination by and to men." Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, SIGNS Vol. 7, No. 3, 515-544, 526, n.22 (Spring 1982).

[166] *Id.* at 533 ("Sexuality, then, is a form of power. Gender, as socially constructed, embodies it, not the reverse.").

[167] Halley, *supra* note 151, at 42. Halley's argument is that under the auspice of it being a reflection of sexual difference men, in fact, use sexuality to render them dominant and thus create the very sexual difference they claim sexuality is only reflecting.

[168] JUDITH BUTLER, UNDOING GENDER 50 (2004) ("This then returns us to the question not only of how discourse might be said to produce a subject (something everywhere assumed in cultural studies but rarely investigated in its own right), but, more precisely, what in discourse effects that production. When Foucault claims that discipline "produces" individuals, he means not only that disciplinary discourse *manages and makes use of them* but that it also *actively constitutes them*.") (emphasis in original). Whitehead explains the centrality of discourse to the production of selves because of its importance in untangling the social web: "Discourses are the means by which we come to 'know ourselves'; perform or identity work; exercise power (in contrast to 'holding power'); exercise resistance; pronounce or deny the validity of knowledges and 'truths'; communicate with others and 'our selves' through the reflexive process; and subjectively engage with the world around us." Whitehead, *supra* note 80, at 103–04.

experience, experience in the sense of consideration or reflection of observed events by an individual. Both speak to the restrictions on fully comprehending the make-up of identity imposed by liberalism. Both speak to the search for origins that characterizes liberalism, the attempt by the individual to transcend the boundaries of social reality.

Both offer scathing critiques of liberal humanism: MacKinnon: "Because its method emerges from the concrete conditions of all women as a sex, it dissolves the individualist, naturalist, idealist, moralist structure of liberalism, the politics of which science is the epistemology;"[169] Foucault: "our task at the moment is to completely free ourselves from humanism and in that sense our work is political work."[170] MacKinnon challenged the intuitive worth and attainability of the founding principles of liberalism such as individualism, rationalism, and equality, particularly as these manifested in the law. While liberal political thought conceives of the subject as ontologically prior to and separate from relations of power, Foucault viewed the subject as produced by relations of power, with nothing existing prior.[171] Similarly, MacKinnon's subject is a product of male domination and power: "true feminism sees the male point of view as fundamental to the male power to create the world in its own image."[172] The pervasiveness and all-encompassing nature of patriarchy makes the sex hierarchy "ontologically and epistemologically nearly perfect."[173]

The two also share ideas about the relationship between truth and power. For instance, to MacKinnon: "[f]eminism distinctively as such comprehends that what counts as truth is

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[169] MacKinnon, *supra* note 165, at 640.

[170] Mills, *supra* note 83, at 26.

[171] BEN GOLDER, FOUCAULT AND THE POLITICS OF RIGHTS 10 (2015).

[172] MacKinnon, *supra* note 165, at 640.

[173] Halley, *supra* note 151, at 43.

produced in the interest of those with power to shape reality, and that this process is as pervasive as it is necessary as it is changeable."[174] Similarly, according to Foucault: "[i]t's not a matter of emancipating truth from every system of power (which would be a chimera, for truth is already power) but of detaching the power of truth from the forms of hegemony, social, economic and cultural, within which it operates at the present time."[175] MacKinnon would be quick to add that the most ubiquitous "form of hegemony" is patriarchy, and that patriarchy is the power that forms truth.

But what of MacKinnon's promises of emancipation? Here, we see an important distinction between MacKinnon and Foucault. For Foucault, there is never any possibility of escape, no getting beyond the power that forms truth to find some purer truth; resistance itself arises from the power dynamics at play. But MacKinnon conceives of a method to move closer to a "truer" truth as well as the existence of an actual (albeit, not universal) truth;[176] the *raison d'être* of MacKinnon's theory is an attainable liberation.[177]

Through this theory, alternatively called radical or power feminism, MacKinnon offers a blueprint of sorts to move beyond patriarchy, but it is not easy to step outside the existing

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[174] MacKinnon, *supra* note 165, at 640; *see also* Halley, *supra* note 151, at 45 (on the relationship MacKinnon's method to truth: "feminism does not have the truth of women, but rather seeks an unprecedented disruption in the conceptual social order by untying women's experience from the subject/object, objectivity/subjectivity, truth/feeling dyads that are the epistemology of male power.").

[175] Foucault, *supra* note 77, at 133.

[176] That Foucault never identified an actual truth beyond power—a reality that would exist but for the construction of truth by the powers in play—alienated his theories from both progressive feminist causes, and notably, post-colonial theorists who refused to accepted that what colonized peoples were "really" like was equally fictional and constructed.

[177] Halley describes the predicament that arises due to this difference well: "But where power is productive rather than repressive, and transmits in myriad ways among social entities of highly contingent and evolving kinds, producing them and arranging them with equal though ever variable force—if relations of power are inevitable, and to be productively engaged with them is to resist, not to liberate—then it does not make sense to presume that one will carry a brief for f (Halley's language for fighting against the subordination of women) or even think about resistance in terms of subordination of groups." Halley, *supra* note 8, at 237.

framework or even conceptualize an alternative women's point of view. "Feminism criticizes this male totality without an account of our capacity to do so or to imagine or realize a more whole truth. Feminism affirms women's point of view by revealing, criticizing, and explaining its impossibility. This is not a dialectical paradox. It is a methodological expression of women's situation, in which the struggle for consciousness is a struggle for world: for a sexuality, a history, a culture, a community, a form of power, an experience of the sacred."[178] For MacKinnon, the key to that transcendence is a foregrounding of women's experience.[179] Through what she labelled "consciousness raising,"[180] emancipation from patriarchy is possible through a transformation of consciousness of women, by women, and for women working utterly without leverage from any "outside."[181] However, the consciousness being used to identify shared experience is itself a product of male domination—"the practice of a politics of all women in the face of its theoretical impossibility is creating a new process of theorizing and a new form of theory."[182] Nevertheless, emancipation from the hegemony of masculine epistemology remains the goal—to find a way of thinking about women's experience, and a way to think, that is not subject to the same epistemology of male power. Experience, and the way experience is interpreted, becomes central to the political project of feminism, "women's distinctive

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[178] MacKinnon, *supra* note 6, at 637.

[179] MacKinnon's famous articulation of the relationship between sexuality and gender inequality: "Sexuality, then, is a form of power. Gender as socially constructed, embodies it, not the reverse. Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of gender inequality." MacKinnon, *supra* note 165, at 533.

[180] MacKinnon describes consciousness raising as: "the major technique of analysis, structure of organization, method of practice, and theory of social change of the women's movement. In consciousness raising, often in groups, the impact of male dominance is concretely uncovered and analyzed through the collective speaking of women's experience, from the perspective of that experience." *Id.* at 519–20.

[181] Halley, *supra* note 151, at 43.

[182] MacKinnon, *supra* note 6, at 638.

experience as women occurs within that sphere that has been socially lived as the personal—private, emotional, interiorized, particular, individuated, intimate—so that what it is to *know* the *politics* of woman's situation is to know women's personal lives."[183]

D. Experience

The concept of experience, therefore, develops a vital importance in feminist politics. As Teresa de Laurentis has observed: "the notion of experience seems to me to be crucially important to feminist theory in that it bears directly on the major issues that have emerged from the women's movement—subjectivity, sexuality, the body, and feminist political practice."[184] For MacKinnon, the importance lies in finding a commonality between female experience—not in finding truth in all female experience, but rather in finding a truth that runs through all female experience. Experience becomes an uncontestable piece of evidence, yet, obviously, women experience the world—and patriarchy—very differently. Indeed, "not all women agree with the feminist account of women's situation, nor do all feminists agree with any single rendition of feminism. Authority of interpretation—the claim to speak as a woman—thus becomes methodologically complex and politically crucial for the same reasons."[185] As MacKinnon asks, "How can patriarchy be diminishing to women when women embrace and defend their place in it?"[186] Experience matters because it opens a space to hear stories that the mainstream has not told, to give a voice to those who have been marginalized and silenced. Yet, because experience

[183] MacKinnon, *supra* note 165, at 535.

[184] TERESA DE LAURENTIS, ALICE DOESN'T 159 (1984).

[185] MacKinnon, *supra* note 165, at 637, n.5.

[186] *Id.*

brings with it authenticity and authority, is there any way to challenge those who claim truth through their experiences without resorting to a "false consciousness" argument?

The evidence of experience reproduces rather than contests existing ideological systems,[187] and tells truths through the existing lenses. Yet, experience is supposed to provide the antidote to the social regulation that often proscribes the stories that are told. Experience exposes the social regulations and the oppressive mechanisms that are in place to silence voices, but the experiences themselves only exist within the structures in place—they are not somehow removed or free. Thus, what is needed, is not exactly an unveiling of the oppressive mechanisms, because this presupposes that the oppressed exist prior to mechanism, but rather an understanding of how the experiences are formative. What is needed, according to Scott, is an "attend[ing] to the historical processes that, through discourse, position subjects and produce their experiences" because, "[i]t is not individuals who have experience, but subjects who are constituted through experience."[188] Foucault cautions against any search for a pre-existing subject and suggests, instead, that the subject is itself formed *by* the experience. Thus an attempt to isolate and compartmentalize the experience and the subject is destined for failure. The analysis to be undertaken, therefore, becomes not one that focuses on the indisputable authority of the experiences that have not been voiced, but rather an examination of the conditions that led to the creation of the identities and experiences in question. The foundation of the analysis is thus not

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[187] It reproduces existing ideological systems which create, crucially, the categories of interpretation as well. Joan W. Scott, *The Evidence of Experience*, CRITICAL INQUIRY VOL. 17, NO. 4 773, 782 (Summer 1991) ("Talking about experience in these ways leads us to take the existence of individuals for granted (experience is something people have) rather than to ask how conceptions of selves (of subjects and their identities) are produced. It operates within an ideological construction that not only makes individuals the starting point of knowledge, but that also naturalizes categories such as man, woman, black, white, heterosexual, and homosexual by treating them as given characteristics of individuals.").

[188] *Id.* at 779 (emphasis added).

the authority of the evidence of the experience, not the "origin of the explanation,"[189] but rather what is trying to be explained. The analysis extends beyond the mechanisms that have isolated and silenced certain experiences and engages with the explanatory categories themselves.

One complaint often made about MacKinnon's theory of consciousness raising is that certain women have access to the shared women's experience under patriarchy while others do not. Those who do not experience female subordination in the same way, those who experience their sexuality in different ways, are somehow not privy to the truths of sexual subordination in ways that other women are. How is one to simultaneously highlight experience as a tool to give a voice to historically silenced stories and to remain critical of larger structures, since, as Scott has said "the project of making experience visible precludes critical examination of the workings of the ideological system itself, its categories of representation (homosexual/heterosexual, man/woman, black/white as fixed immutable identities), its premises about what these categories mean and how they operate, and of its notions of subjects, origin, and cause."[190] The focus on the explanatory categories, and examining the patriarchal mechanisms that renders "consciousness raising" particularly difficult, because all women don't share identical interpretations of their experience as women, renders MacKinnon's project, like that of Foucault, about both politics and epistemology. MacKinnon explains how the epistemology of patriarchy creates an inevitable dead end when antifeminism appears in female form, and the authority of interpretation becomes an issue.[191] Again, the necessity of thinking within subject/object polarities that lies at the heart

[189] *Id.* at 780.

[190] *Id.* at 778.

[191] MacKinnon, *supra* note 165, at 637 n.5 (So our problem is this: the false consciousness approach cannot explain experience by those who experience it. The alternative can only reiterate the terms of that experience. *This is only one way in which the subject/object split is fatal to the feminist enterprise.*") (emphasis added); *see also* Halley, *supra* note 151, at 43 ("MacKinnon fully embraced the problem that women's knowledge of their reality, their

of male power renders "consciousness raising" almost implausible within the confines of patriarchy.

E. Norms, Essentialism, and Non-Normative Subjectivities

Norms function not to regulate a pre-existing gender, but to reproduce and naturalize the existing categories of interpretation. The norm creates what is intelligible, and what is gender if not a norm—a way that sexual difference is made intelligible. More interesting than how experience shapes gender or how gender is regulated by the law is the question of how the law is normalizing the category itself, a process more insidious than explicit regulatory mechanisms.

In addition to allowing human communication, categorization is necessary for political movement. A world of infinite particulars loses all relevance and prohibits any collective existence. Nonetheless, unpacking the ontological underpinnings that condition the creation of sexual categories and the effects and usefulness of the categories themselves unveils the categorical imperatives and the alterations that can be made to strategically render them either more inclusive or exclusive. In other words, the category "woman" should not be a discourse that perpetuates the invisibility and marginalization of women who experience oppression on different levels. For example, black women experience oppression qualitatively differently than white women because of the intersectional effect of patriarchy and white supremacy. Yet, again, one can never reduce black women's experience to a singular truth either. Thus, to a certain degree, a category is always already a fiction with boundaries that can never be fixed. Yet,

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ability to see male dominance and to object to it for themselves, was relentlessly situated *in* male dominance. Boldly, she refused to explain the problem away on grounds of false consciousness ("my consciousness is true, yours false, never mind why") or the verity of any biological woman's experience ("I know I am right because it feels right to me, never mind why"), attributing the paired objections to the object/subject polarity that feminism detects at the heart of male power.").

identifying within a category and working and organizing within a category remain powerful tools for social justice.[192]

Angela Harris called gender essentialism the notion that a unitary, "essential" women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.[193] Essentialism, though, is not confined to gender. Essentialism is most commonly understood "as a belief in the real, true essence of things, the invariability and fixed properties which define the "whatness" of a given entity." The true "essence" that essentialism espouses is that which is most irreducible, unchanging and therefore constitutive of a person or a thing. Importantly, essentialism is typically defined in opposition to difference; the doctrine of essence is precisely that which seeks to deny or annul the very radicality of difference. Difference is trumped by sameness as essentialist discourses struggle to discern an overarching sameness that enables and allows for social and moral behavior that is responsible and creates order in the world. Without the annulment of differences, this argument suggests social order is unattainable.

Harris uses the example of Jorge Luis Borges's character Ireneo Funes, to illustrate the shortcomings of particularism.[194] Funes was an ordinary young man until the age of nineteen, when he was thrown by a horse and left paralyzed, but possessed with perfect perception and a perfect memory. Funes's perfect memory and perfect perception granted him a life filled with an infinite number of unique experiences, but also left him with an inability to categorize: "To think is to ignore (or forget) differences, to generalize, to abstract. In the teeming world of Ireneo

[192] Angela Harris, Race and Essentialism in Legal Theory, 42 STAN. L. REV. 581, 583 (1990).
[193] *Id.*
[194] *Id.* at 583.

Funes, there was nothing but particulars"[195] In the context of Funes, the inability to generalize is constructed as a limitation. Funes is trapped within walls of particularity that foreclose any possible dialogue with others, for there is not only a lack of common language, there is a lack of commonality in all details of life. The ability to overlook difference and to make abstractions, to generalize and to categorize, allows for a world in which shared thought is possible. To Funes, language is only a private system of classification. The notion that it can serve to create and reinforce a community is incomprehensible to him. Thus, while any process of categorization will privilege certain voices and silence others, categorization is necessary for both human communication and social progress. To be adversely critical of all forms of categorization because they fail to take into account difference disregards any of the potential benefits of "generalized" or "essentialist" discourses.

Essentialism is not, in and of itself, good or bad, progressive or reactionary, beneficial or dangerous. Indeed, MacKinnon highlights this point with respect to those who argue that her work is essentialist, and as part of the larger criticism that charges of essentialism are often veiled methods of perpetuating the status quo/male domination: "'Anti-essentialism' as practiced, thus, corrodes group identification and solidarity and leaves us with a one-at-a-time personhood: Liberal individualism."[196] Discourses which fail to account for differences and use language to categorize should not be ignored or rejected simply because they hark back to essentialist constructions of gender. Further, simply employing the category "women" does not render the category necessarily essentialist. It is possible to use the category without falling into the pitfalls of essentialism: "Analyzing women 'as women' says nothing about whether an

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[195] *Id.*

[196] CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 90 (2005).

analysis is essentialist. It all depends on *how* you analyze them 'as women': on whether what makes a woman be a woman, analytically, is deemed inherent in their bodies or is produced through their socially lived conditions."[197]

The need to categorize compels the re-examination of the rationales and epistemological building blocks that justify the use of the categories themselves. Categories are useful, effective and necessary, but they should be "explicitly tentative, relational, and unstable,"[198] which is all the more important in a discipline like law, where "abstraction and frozen categories are the norm."[199] The project becomes one, not of simply deconstructing categories and highlighting the contingency, fictionality, and historical inconsistency of their boundaries, but of reshaping and altering categories to recognizing their potential usefulness. The basis of the knowledge that provides strength and naturalizes the innateness of the category should be re-evaluated and problematized. Unpacking the foundations of these categories enables one to recraft them, or at least offers insight into how to approach the problem of interrogating the cultural category of gender, for example, so it becomes more accommodating to and less oppressive of already marginalized individuals.

The point of this inquiry is not to cast aside the use of categories, or even, necessarily, the use of gender categories, but to struggle to make sexual categorizations less dogmatic, and more inclusive, contingent and tentative. Categories must be employed to enable communication and facilitate social change, but the innateness of the categories ought to be challenged. The boundaries of the categories must be denaturalized and manipulated to be more inclusive, and the

[197] *Id.* at 86 (emphasis in original).

[198] Harris, *supra* note 192, at 586.

[199] *Id.* at 587.

use of the category must be considered in and of itself. Rather than focusing on how the substance of the category subjugates others, we should evaluate the usefulness of the analytical category in the first place. What process, though, should be undertaken to destabilize the solidity of sex categories? Unveiling what is accepted as *natural* in the construction of gender allows for these premises to be challenged and for the category to be manipulated so that marginalized subject positions will gain membership into the category. The innateness and stability of gender categories cannot be untangled and disrupted unless the theories of knowledge and underlying assumptions which legitimize them are contested. Constructions of gender that perpetuate essentialist systems of knowledge necessarily exclude certain voices and privilege others. Thus, recognizing which voices are privileged and which are silenced is vital for the pursuit of equality since categorization always entails some degree of generalizing. The voices silenced within the category of "woman" "turn out to be the same voices silenced by the mainstream legal voice:"[200] people of color, working class people, and queer and gender nonconforming folks. These subject positions are further entrenched as *particular* voices, which are subjective and irrational and therefore not reliable.

The intersectionality of oppression, first articulated by Kimberlé Crenshaw, reveals the inadequacy of essentialist paradigms in the context of race and sex. Crenshaw explains that the way in which racism and sexism affect a black woman's life "cannot be captured wholly by looking at the race or gender dimensions of those experiences separately."[201] Crenshaw's intersectional framework interrogates both the usefulness and accuracy of reverting to a monolithic women's experience and challenges the authority of any essentialist claim by

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[200] *Id.* at 586.

[201] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Ideology, Politics, and Violence Against Women of Colour*, 43 STAN. L. REV. 1241 (1991).

illustrating that a black women's experience cannot be understood simply as "racism plus sexism equal (straight) black women's experience," but that the straight black women's experience is qualitatively different. The process of reverting back to any monolithic "essential" women's experience, be it that of black women, lesbian women, or transsexual women, abstracts from the actual experience of women and results in a silencing of voices that often are marginalized already. Gender categorizations are themselves exclusionary and often disempowering. Yet, these problematic aspects of gender categorizations must be balanced with strategic goals of achieving social justice for women, goals which are unattainable devoid of the existence of the categories. The need to struggle with these tensions—to balance the universal/particular, objective/subjective, mind/body, culture/natural, and reason/emotion dichotomies; to understand the ontological and epistemological premises that grant these theories authority; to gauge and measure the effects of the categorical imperatives; to unveil what ideological agendas are furthered through the rigidity of the gender binaries; and finally to account for the subject positions that are further marginalized and oppressed by the imposition of these gender binaries—is paramount if progressive social advocacy is to disrupt naturalized and hegemonic discursive categories.

When thinking about the authority of experience and of interpretation, similar dynamics are at play in feminist theory and masculinity studies. The essentializing that has been the subject of much scrutiny in feminist studies is equally ubiquitous in masculinity studies. For example, consider the way in which men (and gay men in particular) have been essentialized and stereotyped as rabidly sexual. In an otherwise progressive article examining the struggle for marriage equality through the lens of the institution of marriage as being an inherently oppressive one, Fenton Johnson invokes this stereotype when describing a proposed "morning

masturbation meditation" at a retreat intended to clear the testosterone from the air; unless uncontrollable sexual urges are dealt with, men will be unable to participate productively.[202] The problem here is not with the essentializing of gay male masculinity per se (gay male men are too pre-occupied with sex to function productively), but with the essentializing of masculinity in a particular way. A way which does not questions the stability or origins of the stereotype but rather thinks of it as something pre-discursive and existing outside of patriarchy.

The law, similarly, perpetuates the idea that masculinity inherently contains uncontrollable urges and natural desires. The question is one of whether the problem is with the category itself or with the substance of the category. Is it the way in which masculinity itself is characterized—culturally, socially, legally—or is the problem the unreflectedness and perceived naturalness of the category itself? Our legal system continues to see itself as a discoverer of truth, of a reality that existed prior to its interventions, and views the stories it engages with through foundational categories that it takes as pre-discursive. It is the questioning of the foundational status of the categories of representation themselves that is rarely engaged in; the law must examine its analytical frame as well as examining the events that are its object of study.

With respect to gender, the law is ubiquitous in regulating it—one can think of numerous rules, laws, policies and legal instruments through which, in the words of Judith Butler, "persons are made regular"—yet, when it comes to these regulations, the questions asked tend to be about how they are incorporated into the lives of the subjects imposed upon.[203] The legal analysis is one which usually tries to reduce the impact of the exterior force imposed on the subject. From this Butler asks: "is there a gender that preexists its regulation, or is it the case that, in being

[202] Fenton Johnson, *The Future of Queer: A Manifesto*, Harper's Magazine 34 (January 2018), *available at* https://harpers.org/archive/2018/01/the-future-of-queer/.

[203] Butler, *supra* note 168, at 40.

subject to regulation, the gendered subject emerges, produced through that particular form of subjection? Is subjection not the process by which regulations produce gender?"[204] Here Butler references specifically a productive form of judicial power that forms the subject, and, indeed, references how a particular regulation plays a productive role in creating the subject, yet Butler also distinguishes between regulations/laws and norms, which function more implicitly and behave more like a discursive field.[205]

This discussion about nature vis-à-vis culture parallels the sex/gender distinction. Firstly, the popular understanding of the sex/gender distinction emerged after and has been crucial to "the long-standing feminist effort to debunk the claim that anatomy is destiny."[206] Gender was initially used by American feminists who sought to highlight the fundamentally social quality of distinctions based on sex.[207] The very distinction between sex and gender served as a powerful tool in feminist struggles; and has been most famously articulated by Simone de Beauvoir; "One is not born, but rather becomes a woman."[208] Importantly, using the term "gender" also held with it the promise of a reworking of disciplinary formations.

The introduction of gender as an analytical tool, held the promise of a new history, a history in which different voices are heard and different stories are dominant. The introduction of gender as a term of analysis expanded the types of knowledges that were allowed entry into the business of creating truths. Not only was new subject matter being added (women) but a critical

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[204] *Id.* at 41.

[205] *Id.* ("Norms may or may not be explicit, and when they operate as the normalizing principle in social practice, they usually remain implicit, difficult to read, discernible most clearly and dramatically in the effects that they produce.").

[206] Butler, *supra* note 30, at 35.

[207] Joan W. Scott, *Gender: A Useful Category for Historical Analysis*, AMER. HIST. REV. VOL. 91, NO. 5, 1053–1075, 1054 (1986).

[208] de Beauvoir, *supra* note 42, at 301.

reexamination of the premises and standards of existing scholarly work was being imposed. Gender became an analytic category, gender informed many disciplines in some peripheral sense. Gender became an object of study, yet the relational component of its introduction; the notion that gender was going to, not create a new discipline, but rather, reshape existing disciplines has failed to materialize. Joan Scott described the introduction of gender not only as a tool to study women as women necessarily but also "stressed the relational aspect of normative definitions of femininity. Those who worried that women's studies scholarship focused too narrowly and separately on women used the term "gender" to introduce a relational notion into our analytic vocabulary."[209] The idea that "gender" was going to, not only introduce a new category for analysis, but rather reshape the manner in which existing categories are analyzed today seems more far-fetched than ever. In law schools, for instance, the disconnect between those teaching black letter law or anything beholden to big firm (corporate) interests, and those whose methodologies have been impacted by gender seems as wide as ever.[210]

Indeed, the impact of the introduction of "gender" as an analytical construct was supposed to be two prong: first, as a way to talk about women, about women's lives, about women's history; a way to talk about stories that had been invisible for years because, for a whole source of reasons, they had been thought about as not meriting inclusion. Either being too subjective—not neutral enough; gender was initially used to create a sheen of objectivity and neutrality that had hitherto been unavailable to scholarship that was about "women." Gender

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[209] Scott, *supra* note 207, at 1054.

[210] There are exceptions to this rule. A good example, involving the incorporation of insights from Critical Race Theory (as opposed to Gender), but still illustrative of the mainstream being infiltrated by a progressive methodological approach, would be the Constitutional Law Course taught by Derek Bell at Harvard and later NYU. Unfortunately, however, this example has not served as a trend. Indeed, the ability to incorporate the insights from Critical Race Theory or Gender Studies or Queer Theory, into mainstream law classes is a luxury that is only available to the top few law schools in America; with a degree of economic independence comes the ability to alienate certain interests.

represented "the quest of feminist scholarship for feminist legitimacy in the 1980s." Secondly, gender is supposed to be more than a synonym for women—it is supposed to represent a relationship, and be equally about men, yet this is not the case—if a subject is not explicitly about the relations between the sexes then gender is not thought to be an issue. Rather than being simply about women, the use of gender was supposed to "emphasize[s] an entire system of relationships that include sex, but is not directly determined by sex or directly determining of sexuality."[211] Theories of patriarchy do not explain how gender affects those areas of life that do not seem connected to it. Partly due to the fact that much of the work in gender studies, particularly in its early phases, was associated with reproduction, family division of labor, and sexual division of labor under capitalism, other social systems and disciplines—notably the law (beyond family law and a select few other areas)—were left without a connection to gender, in that an analysis of gender was not seen as something that could contribute to the system in question. Gender was seen as a new paradigm from within which one could choose to see the world but was not seen as having the power to change existing, historically entrenched, paradigms.

F. Sexual Difference and Embodiment

The importance of sexual difference in the creation of subjectivities is both indeterminate and variable. Any subjectivity itself entails a process that necessitates emphasizing and focusing on certain things and de-emphasizing others. An identity necessarily entails an element of generalization, in order to provide some illusion of wholeness.[212] The law appears fundamentally

[211] Scott, *supra* note 207, at 1057.

[212] *See also* Scott, *supra* note 207, at 1064 ("This kind of interpretation makes the categories of "man" and "woman" problematic by suggesting that masculine and feminine are not inherent characteristics but subjective (or fictional) constructs. This interpretation also implies that the subject is in a constant process of construction . . . .").

unable to cope with the idea that sexual difference may be tenuous. Tenuous both in that it is not grounded, sturdily, in nature, or that, if it is, that fact is not germane. The law, as shown in the previous section bases its authority predominantly on claims to truth today, as opposed to force or consent, as it had in the past, thus the truth of sex, of sexual difference, provides a pivotal tool in the laws ability to contribute to the crafting of masculine and feminine identities. The truth of sex buttresses itself within the borders of science (biology) and nature, which manifests in two ways; the truth of sex is that sex is found in nature and thus not, in any way, a construction, and every individual is one true, definite, unchangeable sex. This attempted reification of sexual difference is grounded in a devoutness to the existence of a Cartesian subject and in a very particular understanding of embodiment.

The relationship between the mind and body is always already constructed in language, and the exclusivity of the terms is constantly reinforced by the shortcomings of language. By this I mean that language is unable to describe a substance that includes the mind and the body as one. Words like "self" and "person" struggle to fight the inevitability of the distinction in language; speaking of the mind and body as one is impossible without explicitly pointing it out. As Butler has pointed out, "If we are formed in language, then that formative power precedes and conditions any decision we might make about it, insulting us from the start, as it were, by its prior power."[213] The distinction is one that has been reified by modernism and language into the very structure of the social systems within which we exist, including the law. This process of reification has not been as smooth as it might appear; the body continues to be a contested ideological entity which cannot be easily pigeonholed into any conceptual category.

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[213] JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 2 (1997).

Contemporary philosophers and cultural theorists have returned to the body, have theorized “embodiment,” in part because essentialist notions of the body have perpetuated certain hegemonic relations between categories of bodies. The cultural category of the body is a product of western philosophy which predicates, as a starting point, the Cartesian subject, whose rational individual subjectivity is based on the discrete categories of self and other, the insistence on sameness and difference. Western philosophic discourses speak of a mythical disembodied self whose authority as a person is derived from the foregrounding of the mind and the marginalization of the body. Yet the body remains a contentious and highly political idea: “power relations have an immediate hold upon it; they invest it, mark it, train it, torture it, force it to carry out tasks, to perform ceremonies, to emit signs.”[214] One can see how a subject position in tension or conflict with the Cartesian subject is constructed as being unable to produce knowledge. Robyn Longhurst describes how embodiment serves to taint and restrict the production of knowledge: “Only those who conceptually occupy the place of the mind can produce such knowledge. For those people who are constructed by Cartesian philosophy as being tied to their bodies, transcendent visions are not possible. Their knowledge cannot count as knowledge for it is too intimately grounded in, and tainted by, their corporeality.”[215]

Essentialist understandings of the body contribute to its marginalization by positing the body as a pre-discursive given and distinct from the mind. Yet, not even the body is a biological reality outside of history, it is rather “molded by a great many distinct regimes; it is broken down by the rhythms of work, rest and holidays; it is poisoned by food or values, through eating habits

[214] Foucault, *supra* note 44, at 25.

[215] Ruth Holliday and John Hassard, *Contested Bodies: An Introduction*, *in* CONTESTED BODIES 2 (Holliday & Hassard 2001) (citing Robyn Longhurst, *Getting dirty: And I don’t mean fieldwork* (1996)).

or moral laws."[216] The notion that the body can serve as an essential commonality among selves is misplaced for "nothing in man—not even his body—is sufficiently stable to serve as the basis of self-recognition or for understanding other men."[217] Due to its distinctiveness from the mind, differences between bodies are not beheld as viable ways of producing alternate truths. The Cartesian subject strives for certainty, stability, and tangibility that exist outside of the embodied subject. Again, the mythical disembodied self, who implicitly can only be white and male, becomes the sole producer of knowledge and the sole subject able to locate transcendent and objective truths. Ruth Holliday has suggested that the return to the body as a contested theoretical substance is a response to the "crisis of modernity," of universal truth and objective knowledge. The body, Holliday continues, is being reclaimed from the abstract and shifted to the local, specific and phenomenological.[218] The shortcomings of the Cartesian subject in accounting for many individuals' experience of their bodies in the world led to different forms of subjectivity.

This new subject is constituted by the very "fuzziness" of its boundaries and its interdependent subjectivities. This shift was at first undertaken by queer, feminist, and black theorists whose experiences of their bodies placed them on the margins while the disembodied, mythical Cartesian subject occupied the center. That one's experience of the body constitutes knowledge and produces contingent but important truths is in stark contrast to the Cartesian theory which foregrounds the "mind" as the only reliable producer of knowledge and uncoverer of truth. The Cartesian body, as Julia Cream postulates, is not a "biological bedrock upon which

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[216] Michel Foucault, *Nietzsche, Genealogy, History*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE 153 (1977).
[217] *Id.*
[218] Holliday & John Hassard, *supra* note 215, at 3.

we can construct theories of the essences of gender, sexuality, race and disability."[219] Thus, the pre-discursive, Cartesian subject should not be used as a starting point from which to understand deviant bodies, those which threaten categories and blur boundaries. Rather, the project should incorporate knowledge gained through these so-called "deviant" bodies. As the feminist thinker Margrit Shildrick has suggested, "[instead] of spending time refuting the claim that women's bodies leak, ooze, intermingle, and are far from self-contained, we must accept this proposition and theorize from it."[220] But such theorizing must resist letting physical difference become an unchanging or universal component of sexual difference. Patriarchy is not grounded in physical difference, and gender subordination takes on changing forms. As Joan Scott reminds us, history is not epiphenomenal to patriarchy.[221]

In contrast to the archetypal Cartesian subject, the subject positions left unaccounted for are fairly self-evident. For the Cartesian subject, representations of the body do not have an effect on the mind. The mind exists irrespective of the particular type of body—*e.g.*, black bodies, fat bodies, queer bodies, female bodies, disabled bodies, and working class bodies—with which it is paired. The experience of existing as an embodied self can only produce unreliable knowledge, not premised on universal truths and rational objectivity, but contingent on the vagaries of the embodied existence. The viability of the quest for universal truths is dissolved by knowledge premised on a particular bodily existence. The Cartesian tradition privileges the "pure mind" and equates it "with the rational sovereign individual," that is, an "unequivocally white,

[219] *Id.* at 2 (citing Julia Cream, "Out of Place" (1994)).

[220] MARGRIT SHILDRICK, LEAKY BODIES AND BOUNDARIES: FEMINISM, POSTMODERNISM AND (BIO)ETHICS (1997).

[221] Scott, *supra* note 207, at 1059 ("A theory that rests on the single variable of physical difference poses problems for historians: it assumes a consistent or inherent meaning for the human body—outside social or cultural construction—and thus the ahistory of gender itself. History becomes, in a sense, epiphenomenal, providing endless variations on the unchanging theme of fixed gender inequality.").

able-bodied, heterosexual and male" individual.[222] "All 'others' are products of their bodies."[223] The body does not exist as a blank slate. All representations of a body contain some or all of the following; the body is racialized, classed, gendered, nationalized, and hetero-sexualized. Representations of the body are central to the processes by which some groups are denied access to economic and cultural resources because they are not recognized as worthy recipients. Despite modernist attempts to produce all-encompassing theories of the self, all subjectivities are embodied, whether the embodiment is visible or invisible. Thus, the process of making the subjectivity visible—the process of representation—becomes vital to understanding the body's very materiality.

The body's materiality and representation intertwine in complex ways that accentuate the role power plays in constructing the "normal" body. Particular types of bodies are coded as inferior and as lacking, for instance the fat body constructs the self as one lacking in self-control and unable to regulate the body in the face of social and medical pressure. The representation of such bodies as "inferior" contributes to the circular path where the experience of embodiment becomes formative of the mind—a mind, though, which is constructed as being inadequate or at the mercy of the body. In turn, if working-class bodies, female, black, and disabled bodies are all seen as inferior then this produces effects upon those bodies. The materiality of the body is perpetually affected by the manner in which bodies are represented. The representation of the body manifests itself in physical symptoms on those it represents and those it excludes. This cycle highlights the necessity of interrogating the manner by which particular types of bodies are represented in culture. Particularly considering that there is no "real" or "material" body to serve

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[222] Holliday & Hassard, *supra* note 218, at 4.
[223] *Id.*

as a political foundation from which to construct a theory, as Alan Hyde has explained "we have literally no way of grasping cognitively the most intimate aspects of our bodies except through words and images of legal, that is, political discourse, developed to serve political purposes."[224] The mind/body hierarchy of the Cartesian subject is inverted for abject, marginalized bodies. And this inversion has fundamental epistemological effects.

With respect to sexual difference, the discussion of subjectivity and embodiment is revelatory. For Foucault, "the body is not 'sexed' in any significant sense prior to its determination within a discourse through which it becomes invested with an 'idea' of natural or essential sex."[225] The search, which Butler discusses at length in *Gender Trouble*, is for a vision and idea of the body beyond patriarchy; a liberated body.[226] This, though, we know is impossible. That does not mean that subversion is impossible, it solely means that resisting the regulatory structures of patriarchy must occur from within. It also means, recalling Scott, that while historicizing sexual difference the naturalness of the category should not be unchallenged. Indeed, the relatively simple interpretive act of considering sexual difference as part and parcel of patriarchy, and not as a neutral, objective, foundational point of origination, allows for the consideration of masculinity and femininity within a different realm of intelligibility. Following Carol Smart, the category of *woman* is constantly subject to differing constructions and each discourse brings its own *woman* into being and proclaims her to be the natural woman, but this does not mean that women have been "the quintessential cultural dupes of history" but rather have practiced the agency of constructing their subjectivity as well; so *woman* is not merely a

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[224] ALAN HYDE, BODIES OF LAW 4 (1997).

[225] Butler, *supra* note 140, at 92.

[226] In Butler's language it is "necessary to take into account the full complexity of the law and to *cure ourselves of the illusion of a true body beyond the law*." *Id.* at 93 (emphasis added).

category, it is also a subjective positioning within which there is room to maneuver."[227] Indeed, if sexual difference is considered as a point of origin, then the ubiquity of patriarchy, and the relationship between patriarchy and sexual difference, is rendered invisible. A whole series of subsequent connections are naturalized, for instance, the maternal body is constructed as not being discursive nor a product of power relations, but rather the institution of motherhood is constructed as compulsory and natural for women.

Butler describes the approach to sexual difference Foucault undertakes: "In opposition to this false construction of "sex" as both univocal and causal, Foucault engages a reverse-discourse which treats "sex" as an effect rather than an origin. In the place of "sex" as the original and continuous cause and signification of bodily pleasures, he proposes "sexuality" as an open and complex historical system of discourse and power that produces the misnomer of "sex" as part of a strategy to conceal and, hence, to perpetuate power relations."[228] Part of the reason that this occurs, according to Foucault, is, as we have seen above, the way in which power works is misunderstood; power is understood to either liberate or subdue a pre-existing "sex," which is not a historicized category. In this account sexuality stems from sex, and heterosexuality, like the maternal body, are seen as a natural consequence of the natural category of sexual difference.[229] The reverse-discursive argument suggested by Foucault is that the category of sexual difference

[227] Carol Smart, *Disruptive bodies and unruly sex*, *in* REGULATING WOMANHOOD: HISTORICAL ESSAYS ON MARRIAGE, MOTHERHOOD AND SEXUALITY 7–8 (Smart ed., 1992).

[228] Butler, *supra* note 140, at 95.

[229] The construction of the category of "woman" is always interconnected to tropes that prop up the category like marriage, mother hood and sexuality. For instance See Carol Smart's description of an anthology she edited which is "addressed to, or imbued with, concerns over current theoretical debates about the construction of the category "Woman," the various forms of theoretical and political dissent with feminism itself and the ways in which social regulation is productive of both subjects (of regulation) and of resistance . . . . The specific focus is modes of regulation through sexuality, marriage and motherhood. However, the book as a whole does not treat these as discrete entities *but works to show how they interrelate to create a specifically gendered form of social regulation*." Smart, *supra* note 227, at 1 (emphasis added).

is generated by sexuality. "Sex" is a regulatory power which should be critically examined in the same ways as other regulatory powers, historicized, and not thought about as a point of departure.[230] If this is the point, then, feminism ought to be engaged not only in an emancipatory project of liberating women from patriarchy, but equally invested in challenging the category of "sex" from the outset.

The concern with this approach is that feminism loses its subject when the category "women" is exposed as a construction. But, as the sociologist Vikki Bell has stated, the struggle and importance of feminism is no less important if the subject are people continually crafted and constructed as women, as opposed to "straight forwardly women," and in addition "the notion that we each have a "sex" located in the body is the foundation of several discourses that work to the detriment of women, ways of speaking which obscure the social discourses that repeatedly attempt to 'pin' people to a sex (and very often, as a result, to a gender and to a sexuality, *i.e.*, heterosexuality)."[231] Indeed, the idea that founding an argument on the idea of the existence of a pre-discursive category of "women" at the expense of accepting certain discourses that are harmful to those in the category is evidently counter-productive. The category need not be "natural" or pre-discursive to matter. Similarly, the struggle for emancipation, for liberation and freedom, should not be conceptualized as finding a "free" space beyond the reach of power, but rather of finding freedom within power.

Monique Wittig, who has written extensively on sexual difference, takes serious issue with the naturalization of the category "women" and of the maternal body. Wittig has strongly

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[230] Butler, *supra* note 140, at 97 ("In his antijuridical and anti-emancipatory mode, the "official" Foucault argues that sexuality is always situated within matrices of power, that it is always produced or constructed or constructed within specific historical practices, both discursive and institutional, and that recourse to a sexuality before the law is an illusory and complicitous conceit of emancipatory sexual politics.").

[231] Bell, *supra* note 63, at 53.

criticized the "biologizing interpretation of history," the "biological explanation of their [men and women] division, outside of social facts," and this theory's "imprisonment in the categories of sex" and its insistence that the capacity to give birth is what defines a woman: "women will have to abstract themselves from the definition "woman," which is imposed upon them."[232] Wittig challenges the categories themselves, arguing that the categories of man and woman are explicitly political and economic ones. The category of woman itself only exists as an "imaginary formation," which is necessarily always a reinterpretation and the product of a social relationship. Wittig incorporated a linguistic turn to the study of "sex," combining a study of power and discourse, along with a more serious engagement with compulsory heterosexuality and the oppressive nature of that institution, with language. She emphasized the notion of intelligibility, the constraining effects of heterosexuality, and the inability to communicate if not in the terms and categories imposed: "these discourses of heterosexuality oppress us from speaking unless we speak in their terms…these discourses deny us every possibility of creating our own categories" and "sex, under the name of gender, permeates the whole body of language and forces every locator, if she belongs to the oppressed sex, to proclaim it in her speech, that is to appear in language under her proper physical form and not under the abstract form, which every male locator has the unquestioned right to use."[233] Wittig focuses on the particularizing effect of gender, removing the female subject from the realm of the universal. She has described part of her project as being the restoration of the universal point of view to a group condemned to being particular. Today's political climate is similarly engulfed in the politics of pronouns, and while Wittig's suggestion is to use "one" rather than he or her, today we have invented gender-

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[232] Wittig, *supra* note 144, at 10.

[233] Monique Wittig, *The Straight Mind*, *in* THE STRAIGHT MIND AND OTHER ESSAYS 25 (Wittig ed., 1992).

neutral pronouns (ze), often employ a singular they, and use Mx. rather than Ms. or Mr.[234] The combination of language, that from the start directs those belonging to a constructed category, to a subjugated space, a space without access to the universal, emphasizes the contradictoriness of the category itself.

The problem with the category manifests in two ways. First, not all feminine subjectivity is necessarily coterminous with the category in question.[235] This brings up the problem of intersectionality discussed above, specifically the tendency to simply add variables when the inclusiveness of the constructed category is challenged. Second, as Wittig, argued, the category itself is already too particularizing. Even prior to adding variables the category is itself under inclusive. The solution of adding variables, thusly, further particularizes identities which have already been excluded from the universal:

> The result of the imposition of gender, acting as a denial at the very moment when one speaks, is to deprive women of the authority of speech, and to force them to make their entrance in a crablike way, particularizing themselves and apologizing profusely. The result is to deny them any claim to the abstract, philosophical, political discourses that give shape to the social body. Gender then must be destroyed."[236]

Women, in Wittig's construction, through language, are always just a particular interest group. This is part and parcel of the contradictoriness that Smart discusses, part of what makes women "both powerful and powerless, as sexual agents but also as victims, as dangerous but in need of protection."[237]

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[234] Katherine Rosmna, *The Reinvention of Consent*, N.Y. TIMES, Feb. 24, 2018, https://www.nytimes.com/2018/02/24/style/antioch-college-sexual-offense-prevention-policy.html.

[235] Smart, *supra* note 227, at 8.

[236] Monique Wittig, *The Mark of Gender*, *in* THE STRAIGHT MIND 81.

[237] Smart, *supra* note 227, at 8.

Ultimately the insights from feminist legal and social theories discussed above offer a deconstructionist view of the category woman. And, due to the particularized nature of the arguments, these insights are often not considered when thinking about gender in the context of masculinity, that by its very nature tends to focus on the identity of men. In the next section I turn to the study of masculinity, and how incorporating these insights, as well as those about power, discourse, knowledge and the law discussed above, can affect how masculinity is thought about today. Admittedly, the study of masculinity risks particularizing masculinity as a gender, and thus removing it as the universal viewpoint that permeates our social world. Perhaps making masculinity just one perspective among others is the appropriate strategic turn, although it would be the opposite of that proposed by Wittig; rather than rendering each perspective universal the idea would be to particularize each position. The question parallels in certain respects deciding whether the struggle should be for a world of infinite genders or for a world free of gender.

IV. MASCULINITY STUDIES

Masculinity studies is grounded in the idea of finding a space beyond patriarchy. Examining the history of the critical study of masculinity reveals this emancipatory nature; the connection between masculinity studies and freedom. When considered through either an experiential or theoretical lens, masculinity both restrains and shepherds male behavior, thereby limiting an individual's freedom. Like feminist studies, masculinity studies strives to break free from the confines of patriarchy. In addition, and in contrast to the emphasis on freedom, masculinity studies has focused on identity and practice, by exposing what masculinities are and how they function.[238] In this way, masculinity studies is an inquiry into the "nature" of masculinity, but it also, in some ways, is a response to the men's movement and the "crisis" in masculinity which purportedly created it.

Examining the way in which masculinity studies emerged as a response to the men's movement highlights an inherent tension that continues to shape the discipline today. In many ways, feminism led to two ideologically opposite gendered projects (the men's movement and masculinity studies). Masculinity studies is cognizant of the fact that the men's movement was also a response to feminism and is thus in some sense compelled to address its relationship to the men's movement or at least the concerns of the men's movement. The tension results from masculinity studies needing to respond to the men's movement while simultaneously respecting the analytic traditions of feminist theory. So, in addition to the overarching agenda of dismantling patriarchy, masculinity studies responds to the men's movement by attempting to speak to the experiential lives of men (which is what the men's movement maintains it does) without, crucially, suggesting that masculinity contains an *essence*. Whereas the analytical tools

[238] Nancy E. Dowd, Masculinities and Feminist Legal Theory, 23 WIS. J.L. GENDER & SOC'Y 209 (2008).

borrowed from feminist (and queer) theory tend to favor more macro issues—like the existence of gender categories and both epistemological and ontological inquiries into sexual difference and subjectivity—masculinity studies must also respond to the more micro, deep-seated experiential alienation felt by particular men. Indeed, this micro/macro tension within masculinity studies continues to seriously affect the level of nuance and sophistication brought to the critical study of gender today. In addition, the clear need to eradicate the explicit sexism, misogyny, transphobia, and "toxic masculinity" ubiquitous in our present culture—issues that, decades ago, many of the more optimist among us thought would no longer exist today—renders the more macro issues less seemingly urgent.

In its early days, masculinity studies, like the men's movement, appeared relatively self-serving, portraying men as victims of the social construction of masculinity.[239] Masculinity studies represents, simultaneously, a struggle against patriarchy and a response to an experiential crisis felt by many men. In this respect, masculinity studies perpetually searches for a balance between engagement with larger structural issues that perpetuate patriarchy and with more specific experiential conditions which lead to individual men feeling alienated and masculinity as a whole being characterized as in crisis.

The way identity politics have played out is important in this context because of the impact they have ultimately had on masculinity. Feminism has provided the theoretical framework from which to think more profoundly about the role of masculinity within patriarchy *and* served, in some sense, to generate the men's movement that claims a crisis in masculinity.

[239] Whitehead, *supra* note 80, at 48 (describing Susan Faludi's argument "that modern man has been 'betrayed' by a combination of factors, notably a sexist consumer culture that commodifies and objectifies the male; the loss of economic authority; the weakening and reshaping of men's relationship to the world of work; the public exposure of dominant notions of masculinity to ridicule and censure; and the failure of men, as a gender group, to 'rebel' against their emasculization by 'the culture.'").

That feminism has provoked these two hostile (to one another) reactions illustrates how relational identities are and how neither feminine nor masculine identities exist in a vacuum: "feminisms exist precisely because masculine power regimes exist; feminisms are a point of dynamic resistance, providing their own distinct knowledges, truths, practices, not merely as a point of opposition but by offering ontological possibilities through pronouncing and identifying distinct epistemologies."[240] Thus, feminism, while providing the analytical and theoretical foundation for masculinity studies, has undermined male supremacy and contributed to the "crisis" in masculinity.

The men's movement began in the late 1980s to revision and reclaim manhood. At the same time, the burden of the normative constraints of masculinity on men began to intensify. What is distinctive about the "crisis" from the perspective of the men's movement is that it resulted from a tension between men who were still expected to be "at the helm" in a culture that now expected them to be reflective about their masculinity.[241] (In contrast, to better contextually comprehend the presence of the crisis, legal scholar Nancy Dowd has highlighted how the feeling of crisis is itself a characteristic of masculinity and has often been used as a rationale for reinterpreting masculinity in a way that reconstitutes patriarchy.)[242]

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[240] *Id.* at 107.

[241] *Id.* at 48.

[242] Dowd, *supra* note 238, at 208. Further, the men's movement can be distinguished from other rights' movements due to the privilege held by the group seeking recognition. While other rights' movements could point to an oppressor against whom to struggle, not only did white men lack an oppressor, but they themselves were already portrayed as the oppressor of others. This characterization—of men struggling against the requirement that they relinquish a degree of power while continuing to bear the full burden of prior expectations—utilizes a one-dimensional understanding of power that falls into the intuitive trap of thinking of power solely in a judicial sense. The suggestion is that male identity is "in crisis" because some amount of power has been taken away from men; a suggestion that assumes that power is a commodity that transfers between groups and individuals. The unidirectional understanding perpetuates an oppressor-victim dualism fundamental to liberalism, and fails to account for the productive, identity-forming and knowledge-creating component of power. Furthermore, the notion that something is "off" about the way in which gender relations are structured now—as opposed to at some earlier, utopic, more

In response to the perceived crisis, the men's movement sought to identify and reinstitute a singular, unifying essence of masculinity. In contrast, masculinity studies stresses that "masculinity should be seen as always ambivalent, always complicated, always dependent on the exigencies of personal and institutional power."[243] The building blocks of masculinity studies derive from the same ambivalent crises of identities and paradoxes that propelled the rise of the men's movement. While the men's movement addresses these crises by resorting to an essentialized understanding of what it means to be a man in today's world, masculinity studies recognizes the inherent struggles and dichotomies which plague any attempt to bound masculinity.

In the context of the men's movement, masculine identity is very much about loss and lacking.[244] Thus, the men's movement has emphasized the theme of "retrieval" as being critical, psychologically and tangibly, if masculinity is to become whole again. Robert Bly, one of the progenitors of the men's movement, argued that such retrieval can be accomplished once men get in touch with their "true selves" by bonding with other men. Bly suggested that a significant part of adult male pain originates from the lack of a relationship between fathers and sons and that feminism was to blame for the shift in power that left masculinity in crisis. The pride and stoicism prevalent in earlier cultural tropes of ideal manhood found in popular representations like John Wayne or Clint Eastwood have given way to a defensive masculinity that views itself as constantly under threat and wallows in self-pity. Men, the traditional genderless masters of the

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natural time; a pre-feminism time—both suggests that a natural gender order does exist and takes a normative position on what that gender order should look like.

[243] Maurice Berger, et al, *Introduction* to CONSTRUCTING MASCULINITIES 3 (Berger, Wallis, & Watson eds., 1995) (noting the shared conclusion of the collected essays).

[244] FIDELMA ASHE, THE NEW POLITICS OF MASCULINITY: MEN, POWER AND RESISTANCE 1 (2007) ("the key terms that have emerged in popular discourse about the plight of the modern man have been 'crisis', 'loss' and 'change'").

public/political arena, have been branded in certain circles as politically problematic, gendered subjects.[245]

Certain cultural feminist critiques view normative masculinity as a constitutive element of the inequity, violence, and degradation that characterize white, Western, capitalist culture. By critiquing the normative male, feminists have contributed to the disavowal of traditional attributes of manhood such as "self-direction and discipline" and "toughness and autonomy," and have suggested they be replaced by "soft" behavioral traits such as emotional sensitivity and vulnerability. Traits traditionally attributed to women and children are now being ascribed to men. In contrast, the men's movement has sought to find an ahistorical, transcultural, and almost mythological definition of full-fledged masculinity. This goal of the men's movement, believers argue, has been supplanted, eroded, covered over, and destroyed by the tandem of feminism and "the mode of industrial domination."[246] According to men's movement adherents, industrial society and feminism work complicitly to tame the archetypal male; they are not separate and distinct realms, but by-products of one another—equally guilty perpetrators of the castration of the modern man.[247]

While feminist anti-essentialists have criticized the biologistic basis of certain strands of feminism that have a one-dimensional view of women, which present victimhood as an almost

[245] *Id.*

[246] Bly at 98.

[247] Yet, while this occurs there is a sensitive father emerging, struggling and advocating for the right to be the primary caregiver for his children, and "burdened" by having to be his household's primary breadwinner. The father's rights' movement is central to the men's movement, and intricately tied to the liberal conception of the self at the heart of this critique, in the sense that traditional notions of fatherhood have been tied to an individualized notion of autonomy, which, in turn, was associated with a set of beliefs about the nature of masculinity. The evolving nature of the role of the father is the archetypal representation of the crisis and tension in masculinity. When thinking about fathers' rights or the men's movements, or the large swaths of alienated white, rural, working-class men in the 2016 election, the so-called solution cannot be either the outright dismissal of the position nor can it be the full embrace of their experience. It is equally unfeasible to either embrace the experience as true or to dismiss it as untrue.

immutable condition, the similarly reductivist view of men as oppressors has received far less criticism.[248] In response to this idea of men as a monolithic social category of oppressors, masculinities studies argues that the essentializing of men fails to account for the diversity and complexity of men's lives. By denaturalizing the category of "men," masculinity studies has called into question the essentializing of male identity as all-powerful oppressors who benefit equally from patriarchy. Obviously, an essentialized view of men fails to account for differences in race, class, and sexuality that drastically impact the way men experience patriarchy. Nonetheless, while differences exist among men and while certain men benefit from patriarchy more than others, all men do benefit from patriarchy in some sense. This benefit has been called the "patriarchal dividend": the advantage men in general gain from the subordination of women and from being complicit in the hegemonic project without the tensions or risks of being on the front line of patriarchy.[249]

Essentialism also appears under the guise of values and cultural attributes that are encoded as masculine. Autonomy, reason, individualism, aggressiveness, and self-sufficiency serve as the basic tenets of liberal legalism and are generally thought of within western political culture as quintessentially masculine. Thus, while essentialism, on the one hand, reduces the complexity of men's experience, it also genders otherwise gender-neutral cultural characteristics. It is this challenge to naturalistic assumptions about masculinity which recalibrates the debate as being more about politics and less about revealing hidden gendered assumptions that permeate the social world. In other words, when the naturalistic assumptions about masculinity are exposed, the political and ideological components can be challenged. For instance, the task

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[248] Thornton, *supra* note 104, at 10.

[249] R.W. CONNELL, MASCULINITIES 79 (2005).

becomes no longer to locate where in the social world reason is being privileged over emotion, but rather to begin to disentangle the forces that bind masculinity to reason in the first place, and to expose their political nature. Consequentially, connections that appear commonsensical when the naturalistic assumptions are applied are exposed as teleological when they are removed. For instance, Carol Smart deconstructs the connection between rationality, men, and lawyering: "So law is not rational because men *are* rational, but law is constituted as rational as are men, and men as the subjects of the discourse of masculinity come to experience themselves as rational—hence suited to a career in law."[250]

Central to the manner in which essentialism has been dealt with in masculinity studies is the concept of hegemonic masculinity. The concept of hegemonic masculinity helped explain how the diversity of men's lives could be addressed, while at the same time recognizing the existence of a culturally exalted form of masculinity, one that is revered above others.[251] The term suggests that there is a particular way (or ways) of doing masculinity at any particular time in any particular society that is (are) privileged over others. By borrowing the Gramscian term hegemony, the emphasis is put on how the hegemonic ways of doing masculinity become "taken for granted"—the way they get naturalized—and on the cultural and political processes that coerce the doing of masculinity in those particular ways. This hegemonic masculinity, while culturally ubiquitous and exalted, remains inaccessible to the majority of men, and thus creates a certain sense of inadequacy of powerlessness. Michael Kimmel explains what this exalted form of masculinity is: "within the dominant culture, the masculinity that defines white, middle-class, early-middle-aged, heterosexual men is the masculinity that sets the standards for other men,

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[250] CAROL SMART, FEMINISM AND THE POWER OF LAW 87 (1989).

[251] Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J. L. & GENDER 431, 455 (2010).

against which other men are measured and, more often than not, found wanting."[252] The inaccessibility of this standard to many men sheds light on why individual men, while recognizing that as a group men hold power in the world, often feel a sense of powerlessness (whether based on issues of race, class, and/or sexual orientation).

Within feminist theory, there is a symmetry between the way women experience the world both as a group, on a public level, and as individuals, on a private level. Women see a social order that is mostly dominated by men, and this is reflected in how they privately experience the world. There is an expectation that a similar symmetry exists for men, but the experience, in fact, is often asymmetrical. While men recognize the power their group enjoys in the social order, but this often fails to translate to how men feel as individuals. Thus, when men as a group are characterized as "oppressors" and the social order is characterized as patriarchal, it fails to fully resonate with many men. It is this asymmetry/symmetry disconnect between the sexes that leads to communication breakdowns.[253]

The idea of hegemonic masculinity is to account for the ubiquity, persistence and similarities between certain ways of doing masculinity, without backing into the trap of essentializing what it means to be a man. It becomes more difficult to determine what the revered forms of masculinity have in common, and how to account for their hegemonic status, as opposed to recognizing differences among different forms of hegemonic masculinities. For instance, revered forms of masculinity exist within difference communities at the same time—working class masculinity and white-collar masculinity are very different, as are white and black masculinity. What, though, ties these revered forms to one another, because if nothing does, then

[252] MICHAEL S. KIMMEL, THE GENDER OF DESIRE 30 (2005).
[253] *Id.* at 39-42.

is there any point to using the concept at all? Further, this strategy is dubious in the first place because it suggests that there is something within black masculinity or working-class masculinity that is unique to all members of the respective social categories. Important intra-group variations are obscured in favor of attempting to account for difference based on conventional categories of race, sexuality, religion, class. Hegemonic masculinity also has a normative component in that part of the definition is that it legitimates the global subordination of women. The implication here is that there is not a "good" or "progressive" way of doing masculinity that can be part of the struggle against patriarchy. If society reveres a particular form of masculinity, then it necessarily is a form of masculinity that legitimates male supremacy. However, if one of the subordinated forms of masculinity becomes revered and becomes the new hegemonic form, does that new form itself become oppressive? If so, does that mean masculinity is inherently oppressive and, thus, that it has an essence? [254]

Notwithstanding the ostensibly progressive agenda of masculinity studies—particularly in contrast to the men's movement—it undoubtedly has had multiple effects. Masculinity studies has tended to favor a critique of masculinity itself, as opposed to gender categories themselves. And it has tended to favor a relatively narrow critique of patriarchy, without challenging the overarching political and social structures that facilitate patriarchy. While masculinity studies has tended to view itself as emancipatory, in many ways, it simply reifies established ideas about sexual difference. Thus, masculinity studies is often in danger of falling into essentialist rabbit holes and privileging experience over theoretical inquiry, and over a comprehensive critique of

[254] Michael Schwalbe articulates the logical conclusions of the apparent contradictoriness of the concept: "Thus, whatever it is that makes a configuration of practice a masculinity, it is not necessarily body type, gender identity, or oppressive consequences. Neither actor, intention, goal, nor consequences seems to define a practice as a masculinity…But if a masculinity can be all of these things, then it has no clear referent. By pointing to everything, the concept points to nothing in particular." MICHAEL SCHWALBE, MANHOOD ACTS: GENDER AND THE PRACTICES OF DOMINATION 40–41 (2014).

the relationship between masculinity and power. This relationship—between masculinity and power—has always been at the forefront of how the law engages with patriarchy.

Perhaps most important when thinking about the direction of masculinity studies, particularly in the context of its relationship to the law and the history of its relationship with both feminist theory and the men's movement, is the role that power has in masculinity studies. The issue of power has been front and center in both the genesis of the men's movement (arguably the "crisis" in masculinity is most concisely described as the forced relinquishing of power by men and the resulting psycho-social impact) and in feminist theory. Thus, it is no surprise that power (and the power of law) is also a critical issue for masculinity studies. Significantly, though, many of the insights regarding power that were foregrounded in feminist theory and the subsequent work, have either not received the attention they should, or have been too easily dismissed because of what are thought to be more pressing concerns (*e.g.*, dealing with the explicit sexism, discrimination, and misogyny). Ultimately, I am suggesting that a more robust understanding of masculinity requires a return to an engagement with issues surrounding power, notwithstanding such concerns. Absent real engagement with issues of power, today's problems will be exacerbated rather than solved. Masculinity studies seeks to change the misogynistic and sexist behavior of men by highlighting the restrictive and unhealthy components of masculinity. But while it is tempting to simply argue against the naturalness of how masculinity is presented in today's popular social and cultural world, real growth will only occur if a more robust engagement with issues of power is undertaken.

Masculinity studies places great emphasis on issues of power. Indeed, as MacKinnon observed, if masculinity is anything at all it is a system of power.[255] Much work has been done looking at the functioning of power, but power has been considered less as a discursive force and more as the foundation of patriarchy. Power, from the perspective of the law, is often considered as a force to regulate or redistribute, when the law ought to spend more time self-consciously reflecting on the impact of its own power. The law serves as a technology of sex that reifies masculinity and sexual difference by constructing masculinity as a biological given rather than a discursive category that is part of a neoliberal political agenda. Nevertheless, the mainstream understanding of the relationship between the law and masculinity focuses on how the law is needed to control and rein in masculinity. The notion that the law is actually privileging and perpetuating a particular form of masculinity is not taken seriously in mainstream legal analysis.[256]Masculinity studies, on the other hand, opens the door to a view of the law as a contributor to, if not outright creator of, existing power relations and not simply a regulator of pre-existing ones.

[255] Male dominance "is perhaps the most pervasive and tenacious system of power in history." MacKinnon, *supra* note 6, at 638.

[256] It is, though, considered very seriously in masculinities studies. An example of where this dynamic plays out is in criminal law where a "heat of passion" defense reduces a charge of murder to manslaughter, and "heat of passion" involves "men killing women who have bruised their masculine esteem by denigrating their sexual prowess or becoming involved with other partners." As McGinley and Cooper have pointed out "it seems that defending one's masculinity against women is reasonable enough to cut years off your sentence. Here, then is an example of law mirroring, if not reinforcing or even creating, a culture in which we assume 'boys will be boys.'" Ann C. McGinley & Frank Rudy Cooper, *Identities Cubed: Perspectives on Multidimensional Masculinities Theory*, 13 NEV. L.J. 326, 338 (2013).

V. LAW AS A TECHNOLOGY OF SEX: ANTIDISCRIMINATION LAW EXPLICITLY CREATING GENDER CATEGORIES

The law's explicit creation of the boundaries of masculinity, ironically, is exemplified in a collection of cases dealing with discrimination against women in the employment context.[257] Through these cases, the law engages with existence and relevance of group-based (sex) differences. However, the source and stability of such differences has received less attention.[258] An examination of the source of accepted sex differences requires resisting the tenacity and questioning the origins of existing gender stereotypes.

In 1964, Title VII first prohibited employers from discriminating on the basis of sex: "It shall be an unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." But, fifty years later, the meaning of discriminating "because of [an] individual's sex" remains unclear. The intuitive and plain meaning reading of the text suggests a prohibition on inter-sex discrimination (treating men and women differently), but the statute has since been interpreted to also prohibit intra-sex discrimination. The intra-sex struggle for workplace equality has meant wrestling with common sense assumptions about who "women" are. Thus, while the law struggles to end sex discrimination, it is simultaneously engaged in defining who women are, and what femininity and masculinity mean.

[257] *See* Tyson Smith and Michael Kimmel, *The Hidden Discourse of Masculinity in Gender Discrimination Law*, SIGNS, Vol. 30, No. 3, 1827–49 (2005) ("In the United States, the relationship among difference, sameness, and equality has also been the foundation of efforts to rectify discrimination based on race and sex.")

[258] Vicki Schultz has shown how new evidence reveals that many group-based differences typically said to explain and justify inequalities at work are actually produced through institutional practices that foster an unnecessary, negative sense of difference among employees. Schultz, *supra* note 266.

By perpetuating or playing a part in the creation of sexual difference, the law prescribes sex roles, but also tells men and women what they should want: "These phenomena operate on the deepest levels of human consciousness and institutional logic, altering people's perceptions and behavior in fundamental ways that appear to confirm the stereotype's truth."[259] Differences between men and women that are used to justify discrimination are not natural or immutable, but have been created by the employer, society as a whole, including the law. For example, an employer that offers more parental leave to mothers than fathers is incentivizing the mother to be the primary caregiver and thus creating the difference (mother, not fathers, should be or want to be the primary caregivers of children). Arguing that sexual difference is not foundational or immutable does not deny the existence of difference, but rather denaturalizes it by questioning its origins and *raison d'etre*. The discussion of antidiscrimination cases that follows considers whether the differences are the cause of or consequence of the unequal treatment and why it matters when courts decline to question the origins of difference.[260]

A. *Pregnancy Cases*

Laws around pregnancy in the employment sphere serve as a paradigmatic example of fundamental disagreements about accommodating difference. Pregnancy cases—where pregnant women and new mothers brought claims against current or prospective employers for discrimination when they were treated differently from men and non-pregnant women—were the first major area of law that dealt with the intra-gender (as opposed to inter-gender) disparate treatment of women in the realm of Title VII of the Civil Rights Act.

[259] Schultz, *supra* note 266, at 1046.
[260] *Id.* at 1107.

In one early Supreme Court case, plaintiff employees claimed that defendant General Electric violated Title VII by failing to extend disability benefits to women who took time off work on account of pregnancy. The Court concluded that, because GE's benefits plan did not treat *all* women differently than all men, the claim was not actionable as sex discrimination: "[the plan] does not exclude anyone from benefit eligibility because of gender" and there was no showing that "the exclusion of pregnancy disability benefits from [GE's] plan was a pretext for discriminating against women."[261] Two years later in response to the ruling, Congress enacted the Pregnancy Discrimination Act (PDA), which explicitly prohibited sex discrimination on the base of pregnancy.

The question—first before the Court and then before Congress—was framed as whether pregnant women merited special treatment in the workforce. On the one side, cultural feminists argued that biological differences between men and women justified different leave policies and that treating women differently by making accommodations for pregnancy promoted the goal of workplace equality. On the other side, equal treatment proponents argued that special treatment for pregnant women reinforced harmful stereotypes of women needing protective legislation in order to be able to compete with men in the workplace. Others called accommodations for pregnant women reverse discrimination against men.

About a decade after the enactment of the PDA, the Supreme Court again took up the question of pregnancy and sex discrimination. Writing for the Court, Justice Thurgood Marshall rejected a challenge to a California state law that required employers to provide leave and reinstatement to employees disabled by pregnancy, finding that the law "promotes equal employment opportunity" and that "by 'taking pregnancy into account,' California's pregnancy

[261] *General Electric Co. v. Gilbert*, 429 U.S. 125, 125–26 (1976).

disability-leave statute allows women, as well as men, to have families without losing their jobs."[262]

Critics of the California law, including feminists, argued that guaranteeing maternity leave for women did not further equality, but, rather, constituted sex discrimination itself, because if men and women were not treated the same, then they were being treated unequally (and unfairly). Yet, as the Funes parable instructs, no two things are ever exactly the same and the way we categorize things, by identifying similarities and difference, is necessary and matters. Indeed, such categorization is what determines equality. Equality is not the antithesis of difference. "[I]f individuals or groups were identical or the same there would be no need to ask for equality."[263] In this way, difference is a prerequisite of equality. Thus, part of the process that the law engages in when determining whether discrimination occurs is a determination of which differences matter. The law assumes that biological differences exist between men and women, and that, therefore, unlawful discrimination occurs if the differences are immutable and not a product of personal choice.

Under the special treatment model, pregnancy is seen as an immutable difference between men and women. This perspective manifests on both sides of the political spectrum, with opposite outcomes. Conservatives argue that women value family roles over work roles (essentially the reasoning followed by the court in *Gilbert*),[264] while proponents of the special treatment model on the left argue that, while pregnancy and motherhood do not necessarily alter women's work aspirations, they conflict with workplace norms and therefore deserve unique

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[262] *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1978).

[263] Scott, *supra* note 153, at 765.

[264] *See Gilbert,* 429 U.S. 125.

accommodation (essentially the reasoning followed by the court in *Cal Fed*).[265] In both versions pregnant women are viewed as different from other employees: "Conservatives used uniqueness arguments to defend denying pregnant women benefits given other employees, and liberals used them to defend giving pregnant women benefits denied others."[266]

Adherents to the equal treatment model don't necessarily oppose accommodation for pregnant women, but argue that the accommodation should not be granted *based on sex* (a pregnant woman could, for example, receive an accommodation if her pregnancy symptoms were physically debilitating in some way). Pregnancy is not constructed as a foundational difference between men and women, not a difference that in and of itself renders men and women unequal. Rather, the way society and work are structured and the way people think about pregnancy combine to create an environment where pregnant women often are discriminated against in employment contexts. Such discrimination is not based on any immutable or biological difference, but on man-made policies that purport to reflect a natural order, but instead incentivize women to stay home once they become pregnant by, among other things, relegating them to marginal jobs.[267]

The equal treatment model considers the factors that keep a pregnant woman from participating in the labor market—*e.g.*, physical impairments (nausea and fatigue) shared by other medical conditions; a medical event, sometimes involving surgery, that requires a period of

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[265] *See supra* note 262.

[266] Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1082 (2015).

[267] *Id.* at 1071 (referencing Justice Brennan's dissent in *General Electric Co. v. Gilbert*: "Brennan's dissent acknowledged that the interrupted employment patterns exhibited by many American women did not simply reflect a choice to prioritize pregnancy and childbearing over paid work. Instead, those patterns were partly attributable to discriminatory employment policies that pressured or encouraged pregnant women to leave the labor force, thereby creating the very intermittency employers later cited to justify those policies.").

recovery.[268] In this way, the disabling conditions that pregnancy may bring about are treated the same as disabling conditions experienced by any other employees, male or female.[269] There is a reluctance to characterize pregnancy or the resulting symptoms as disabling because this suggests that pregnancy is abnormal. Some criticism of characterizing pregnancy as a disability is based on normative judgments about what "disability" means, suggesting that the characterization implies something negative about pregnant women (and, for that matter, differently abled persons). In this reading, regardless of the problems of its normative assessment, language in and of itself is constructed as performative. In a similar way, if one focuses on the performativity of language, by characterizing pregnancy as a difference based on sex, parents who do not experience pregnancy physically are excluded from the parenting experience. Indeed, pregnancy itself becomes fetishized at the expense of other (adoption, surrogacy, etc.) methods of family creation, which ultimately does a disservice to pregnant women as well.

The debate among feminist theorists regarding which model—equal treatment or special treatment—is a more effective tool in the struggle for equality implicates ideas about masculinity, femininity, and gender roles, and, importantly, how and who we want policing those borders. The uniqueness of pregnancy and what it means to women, and how what it means to women is reflected in women's labor is being decided by judges. When rendering an opinion like

[268] *Id.* at 1067.

[269] Wendy V. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 326–328 (1984–1985) ("On a deeper level, the dispute is about whether pregnancy "naturally" makes women unequal and thus requires special legislative accommodation to it in order to equalize the sexes, or whether pregnancy can or should be visualized as one human experience which in many contexts, most notably the workplace, creates needs and problems similar to those arising from causes other than pregnancy, and which can be handled adequately on the same basis as are other physical conditions of employees. On the deepest level, the debate may reflect a demand by special treatment advocates that the law recognizes and honor a separate identity which women themselves consider special and important and, on the equal treatment side, a commitment to a vision of the human condition which seeks to uncover commonalty rather than difference.").

Gilbert or *Cal Fed*, the court is speaking to what it means to be a woman, because the decision is not only speaking to the parameters of employment for all persons, or about treating men and women equally, but about characterizing and defining the supposed differences between men and women. Considering the personal nature and fluidity of sexual difference and identity, it feels odd to look to a staid and conservative institution like the law for guidance about what differences are foundational to women and how to perform one's gender identity.

The *Gilbert* and *Cal Fed* courts both draw clear demarcations between men and women, emphasize differences they characterize as insurmountable, and downplaying similarities, but these divisions are not necessary. Title VII exists to prevent discrimination, not to create an opportunity for judges to make pronouncements on what constitutes sexual difference. Accepting that there is nothing inherent or "natural" about these differences, the courts are deciding which differences to highlight and which to ignore. They are creating the categories and making decisions about what matters. And, importantly, those decisions are not based on a blank slate, but rather represent an assessment of the categories that litigant employers have decided matter. In this way, employers themselves inform the creation of categories that they then use to justify discriminatory policies.[270] Against this backdrop, "[f]uture progress toward workplace sex equality will require renewed determination to challenge assumptions about difference that justify the status quo—this time, challenging not the reality but the self-reinforcing quality of alleged differences by focusing attention on how employers help *create* the differences they cite to justify discriminatory policies."[271]

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[270] *See infra* discussion about Title VII gender stereotype cases.

[271] Schultz, *supra* note 266, at 1102.

Perhaps most importantly in the context of masculinity studies is how the pregnancy decisions evidence the performative power of the opinions. In his *Gilbert* dissent, Justice Brennan states: "These policy formulations . . . show that pregnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labor force."[272] The focus on how employment policies affect the way women engage with the labor market stands in stark contrast to conservative essentialist arguments that suggest that employment patterns simply reflect women's interests which are "naturally" and immutably different from men's and, thus, justification for policy. Justice Brennan shows that these policies, and the subsequent legitimization of them by the courts, do not merely reflect pre-existing sex differences, but are in fact creating them.

The acceptance by courts of the policies and their sex-based distinctions sends a pro-active signal to future policymakers as well as outlining sex roles for society at large. Thus, we see the law not simply passively gauging the worth of a pre-existing policy that claims to reflect differences between men and women, but rather taking an active part in both creating the differences and suggesting that policy ought to exist in the first place. Challenging the importance of such differences is not the same as denying them; instead, "it means denaturalizing difference by questioning its origins and stability,"[273] nonetheless these pregnancy

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[272] *See General Electric Co. v. Gilbert*, 429 U.S. at 158 (J. Brennan dissent). In discussing this passage in the Brennan's dissent Schultz remarks: "Specifically, the Justices failed to consider whether, regardless of their supporters' good intentions, laws singling out pregnant women for different treatment might lead to increased stereotyping, discrimination, and resentment against them and women generally, *entrenching even more deeply the unequal employment patterns and biased perceptions traditionally used to justify sex discrimination*" (emphasis added). *See also* Schultz, *supra* note 266, at 1108 ("[Justice Brennan] who acknowledged early on that observed differences in women's work patterns or preferences can be produced by the employment disparities they are thought to explain.").

[273] Schultz, *supra* note 266, at 1107.

cases provide important lessons for masculinity studies—namely, the importance of not essentializing male experience and of recognizing the performative power of stereotypes, especially those about masculinity which historically have lurked under the radar and resisted having their naturalness challenged.

B. Lack of Interest Cases

The sameness/difference debate shows up in sex discrimination cases where women have been denied certain types of employment but employers argue that differences between women and men were the cause, not any discrimination. In *Equal Employment Opportunities Commission (EEOC) v. Sears, Roebuck and Co*., the EEOC alleged that Sears had discriminated against women by promoting only men for high-paying commission sales positions; Sears argued that its hiring practices simply reflected the interests of its employees and that, because women were naturally less competitive than men, they lacked interest in certain positions.[274] The court rejected the claim, finding that "women [were] much less interested in commission sales at Sears than men,"[275] and the decision was affirmed by the Court of Appeals for the Seventh Circuit.[276]

Again, the question underlying the case asks whether women's interests are best served and sex equality furthered by policies that treat women and men identically, ignoring the social and cultural differences, or by those that treat them differently.[277] Under this "difference

[274] 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd* 839 F.2d 302 (7th Cir. 1988). Vicki Schultz uses the term "lack of interest" to describe cases like *EEOC v. Sears*. Schultz, *supra* note 266.

[275] 628 F. Supp. at 1324.

[276] 839 F.2d 302, 320–21 (accepting evidence that "women were generally more interested in product lines like clothing, jewelry, and cosmetics that were usually sold on a noncommission basis, than they were in product lines involving commission selling like automotives, roofing, and furnaces. The contrary applied to men. . . . Various reasons for women's lack of interest in commission selling included a fear or dislike of what they perceived as cut-throat competition, and increased pressure and risk associated with commission sales. Noncommission selling, on the other hand, was associated with more social contact and friendship, less pressure and less risk.").

[277] Ruth Milkman, *Women's History and the Sears Case*, FEM. STUDIES, Vol. 12, No. 2 (Summer 1986).

dilemma," as Martha Minnow has labelled it, "both focusing on and ignoring the difference risk recreating it."[278] To escape the dilemma, we need a new way to think about difference that resists the notion that equality and difference are in opposition.

The origins of the supposed differences between men and women claimed by Sears (that women are less competitive and prefer "friendly" noncommission positions) were not questioned by the court. Neither Sears nor the EEOC addressed systemic or structural roots of the differences and focused instead on autonomous individuals making decisions—supervisors deciding who to hire; female employees deciding which jobs to apply for. The fact that values and character traits identified as male (aggressiveness, competitiveness, individualism) are what society prizes and rewards with higher paying jobs is not challenged. Thus, while "the aim is to give women a greater share of the pie, . . . the nature of the pie itself" is not called into question.[279]

Indeed, the reliance on supposed sex differences to justify employment discrimination (as discussed above with respect to the pregnancy context), creates feedback loops that perpetuate and amplify the differences. In *Sears*, the differences (that women are less competitive than men) being relied upon to justify the discrimination are actually created by Sears' own policies; by maintaining an all-male team of commission salespeople and policies (written and unwritten), Sears communicates to women that women are not competitive and wouldn't be interested in the commission jobs. Certainly, women have no inherent interest in lower paying, less challenging,

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[278] Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 160 (Spring 1985).

[279] Elizabeth Comack, *Theoretical Excursions, in* LOCATING LAW: RACE/CLASS/GENDER CONNECTIONS (Comack, ed., 1999).

or more "stable" jobs. Instead, workplace aspirations of both men and women are rooted in responses to signals from the labor market itself.[280]

The framing of the issue in *Sears* as a dichotomous choice without nuance—that the lack of women in commission sales jobs was due either to discrimination by Sears or a lack of interest by women—is one that resonates with the law. Neither the parties nor the court focused on whether the claimed differences in interest between men and women were a cultural creation or whether they were somehow natural and immutable. And if the differences are natural or immutable, the question becomes one of whether employers (and the law) have a duty to accommodate those differences. This question suggests that equality and difference are at odds, and that, in order for two things to be equal, they must be the same. But this formulation presents a false choice—that women can only be entitled to the same high-paying commission jobs at Sears as men if they can show they were the same as men with respect to aggressiveness and competitiveness.

Equality does not mean sameness, and difference does not mean inequality. As Joan Scott has observed: "when equality and difference are paired dichotomously, they structure an impossible choice . . . the only response is a double one: the unmasking of the power relationship constructed by posing equality as the antithesis of difference and the refusal of its consequent dichotomous construction of political choices."[281] In other words, constructing the problem as one of equality versus difference allows for only two alternatives: either men and women are equal, and, thus, no differences exist, or they are different, and men and women are not equal. But, of course, men and women can be both equal *and* different.

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[280] Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

[281] Scott, *supra* note 153, at 765.

In addition, by focusing on whether or not men and women are the same (have the same interests in particular jobs), the two categories are presented as internally homogenous—all women are assumed to share a common set of interests. By ignoring diversity within gender categories themselves, the question of whether men and women are the same or different becomes even more nonsensical. This failure to recognize diversity within a gender category is prevalent in masculinity studies, where there is a concern about men being characterized, within feminist theory, as one dimensional and treated as a monolithic group.

Even in *Sears*, which relied explicitly on a single characterization of women as a group, the court affirmed ideas of masculinity presented in Sears' policies, citing Sears' sales manual which described commission salespeople (who were all men) as "special breed of cat, with a sharper intellect and more powerful personality than most other retail personnel . . . [one who] possesses a lot of drive and physical vigor, is socially dominant, and has an outgoing personality and the ability to approach easily persons they do not know."[282] While this description is not meant to describe all men, it does describe what successful men, those that deserve higher paying jobs, should be like, and creates a caricature of hegemonic masculinity that is alienating and ultimately harmful to individuals of all sexes.

By failing to question the origin of the sex differences at play in *Sears*, the court implicitly accepts those differences as natural. Thus, stereotypes about men—aggressiveness, competitiveness, appetite for risk, a willingness to be away from home for extended periods—are constructed as what men "naturally" are like. Masculinity studies challenges this sort of essentializing of men and explores how such construction of masculinity alienates those men who do not conform to the model. Similarly, the assignment of characteristics like humaneness,

[282] 628 F. Supp. at 1290.

compassion, and nurturing to women results in the idea that these characteristics should be avoided by men, that men who exhibit them are not "real" men. A key part of the project of masculinity studies has been to unpack male identity and look at its origins. What has been determined is that "the two most defining elements of masculinity are imperative negatives: not to be a woman and not to be gay."[283] *Sears*, a decision that, on its face, has little to do with masculinity, thus, lays out a roadmap for how men can "not be a woman"—*i.e.*, be less humane, compassionate, and nurturing.

In the thirty-odd years since *Sears* was decided and affirmed, lack of interest arguments have persisted, sometimes in more amorphous form. The success or failure of lack of interest arguments have tended to fall along political lines, with conservative courts being more receptive and liberal courts rejecting the arguments, resulting in a split in the circuits and a lack of any clear line of precedent.[284] Even when the Supreme Court finally weighed in on a lack of interest case, it sidestepped the fundamental issue.

In 2011, the Supreme Court heard *Wal-Mart Stores, Inc. v. Dukes*,[285] a case with a strikingly similar fact pattern to that of *Sears*. Current and former women employees of Wal-Mart alleged that the discretion exercised by their local supervisors over pay and promotion matters resulted in discrimination against them in violation of Title VII. While the lower ruled in favor of the employees, the Supreme Court ultimately refused to certify the women as a class and, thus, neatly sidestepped the issue of discrimination. In a brilliant sleight of hand, the conservative majority (the opinion was decided 5-4 along party lines) refused to certify the group

[283] Dowd, *supra* note 238, at 232.
[284] Schultz, *supra* note 266, at 1060.
[285] 564 U.S. 338 (2011).

because the various women plaintiffs were not similar enough—turning the traditionally progressive attack on lack of interest arguments for their essentializing of women on its head. The Court, in contrast, suggested that certifying the group was in fact essentializing women's experiences; it found that the proposed class had "little in common but their sex and this lawsuit."[286]

While conservative courts had before found that because women share certain "natural" interests, and different treatment based on those interests was lawful, the Court found the various women all so unique and different from each other and without a shared interest, that class certification couldn't be justified (the court suggested that proof of discrimination at each of 3,400 stores would be needed to illustrate a pattern, notwithstanding evidence of company-wide discrimination).[287] Advocacy work, let alone communication of any sort, is impossible if every experience is considered unique and ungeneralizable (recall Funes).

The Court's decision exemplifies the danger of using claims of essentialism to undercut attempts to deliver justice to women as a group—a critique prevalent in both feminist theory and masculinity studies. As MacKinnon has pointed out, "analyzing women 'as women' says nothing about whether an analysis is essentialist. It all depends on how you analyze them "as women" on whether what makes a woman be a woman, analytically, is deemed inherent in their bodies or is produced through their social lived conditions."[288] In *Sears* women were grouped together and characterized as lacking interest in high-paying jobs because of something that was deemed inherent in their bodies. In *Wal-Mart*, women were grouped together because of the social lived

[286] *Id.* at 359–60.

[287] *Id.* at 358.

[288] MacKinnon, *supra* note 197.

condition that they shared—the experience of having been discriminated against by Wal-Mart due to their sex. Both feminist theory and masculinity studies suggest that an appropriate response to anti-essentialist critiques or critiques of sexual difference more generally is not a retreat from categorizing men and women as groups, but, rather, a recognition of *how* the group is being characterized.

The highly politicized nature of the "lack of interest" opinions highlights the role the law plays in speaking to the question of how to think about the interests of women. Is it really desirable to have judges setting the parameters surrounding what makes a woman a woman? Like the feedback loop described by Justice Brennan in his *Gilbert* dissent, there is a self-reinforcing tendency to recourse to the law being the solution to the problems it encounters. The law insists that it is the way to address the issue and to solve the problem, and points to past successes to illustrate its future potential. However, with respect to defining individuals' interests and desires, in a charged political context that the law has proven time and again to be immersed within, holding out hope in the emancipatory power of the law is perhaps overly ambitious.

C. Gender Stereotyping Cases

Arguably, the area of antidiscrimination law where the parameters of masculinity are being most clearly and explicitly delineated is a collection of cases dealing with Title VII employment discrimination claims relating to gender stereotyping. In 1989, the Supreme Court set forth the gender stereotyping doctrine with its decision in *Price Waterhouse v. Hopkins*.[289] In that case, plaintiff Ann Hopkins claimed that her employer, Price Waterhouse, had denied her partnership because she did not conform to traditional gender stereotypes. An unquestionably qualified candidate, Hopkins was the only woman out of eighty-eight employees up for

[289] 490 U.S. 228 (1989).

partnership. Despite her professional success (securing a multi-million-dollar contract) and assessment of her work as outstanding, she was considered an "overly aggressive…tough talking somewhat masculine hard-nosed" manager.[290] She was characterized by her employer as unduly harsh, difficult to work with, and macho, and was told that she used too much profanity and was seen as overcompensating for being a woman. In performance evaluations, she was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and take a course at charm school."[291]

The Court held that Hopkins had been illegally discriminated against because sexual stereotyping had played a part in Price Waterhouse's evaluation of Hopkin's candidacy for partner—*i.e.*, her behavior resembled what her employer and members of the court considered masculine. Justice Brennan, writing for the majority, declared "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[292] *Price Waterhouse* expanded the scope of Title VII's to prohibit discrimination not only based on a biological (immutable) conception of sex but also to prohibit any discrimination based on a person's nonconformance with gender norms.

In more recent cases dealing with sex stereotyping Title VII claims, litigants have argued that discrimination based on one's sexual orientation, while not a specifically enumerated category in Title VII, should be prohibited as discrimination "because of [an] individual's sex," under the *Price Waterhouse* expansion of the concept to cover sex stereotyping. The resulting

[290] *Id.* at 234–35.
[291] *Id.* at 235.
[292] *Id.* at 251.

jurisprudence has been mixed, with a circuit split[293] that likely will end up at the Supreme Court.[294] While the debate continues as to whether sexual orientation should be included under the sex stereotyping rubric, another series of cases—those dealing with uniforms and personal grooming—cases has resisted finding its way under that umbrella.[295]

In 2000, Darlene Jespersen, a bartender at Harrah's Casino, refused to comply with a company policy that female beverage service employees wear full makeup (*i.e.*, foundation, blush, mascara, and lip color) at all times—and she was fired as a result.[296] Jespersen sued, alleging that the policy and her termination discriminated against her on the basis of sex. The district court rejected the claim, and the Ninth Circuit affirmed, finding that the policy did not create an unequal burden on female bartenders as opposed to male bartenders, who were required to comply with different grooming standards.[297] While the *Price Waterhouse* decision intuitively would seem to govern *Jespersen*, claims involving dress and appearance trigger an inter-gender formal equality unequal burden test. In order to prove discrimination, Jespersen would have had

[293] *See, e.g.*, *Zarda v. Altitude Express, Inc.*, 883 F. 3d 100 (2d Cir. 2018) ("sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination"); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) ("discrimination on the basis of sexual orientation is a form of sex discrimination"), *with Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017) (Title VII does not prohibit discrimination based on sexual orientation); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (same).

[294] Porter Wells, "Courts Weighing LGBT Job Bias Claims While SCOTUS Dallies," BLOOMBERG LAW, Jan. 28, 2019, https://news.bloomberglaw.com/us-law-week/courts-weighing-lgbt-job-bias-claims-while-scotus-dallies.

[295] *See, e.g.*, *Jespersen v. Harrah's Operating Co., Inc.*, 280 F. Supp. 2d 1189 (D.Nev. 2002), *aff'd* 392 F.3d 1076 (9th Cir. 2004), *aff'd en banc* 44 F.3d 1104 (2006); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (enforcing short hair guidelines for men is not discriminatory). See also Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992); Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769 (1987); Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317 (1997).

[296] *Jespersen v. Harrah's Operating Co., Inc.*, 280 F. Supp. 2d 1189, *aff'd* 44 F.3d 1104, *aff'd en banc* 44 F.3d 1104.

[297] *Id.*

to show that the grooming standard imposed a greater burden on women than it did on men.[298] "Notwithstanding the direction in which *Price Waterhouse* seems to urge equality jurisprudence, many courts are reluctant to relinquish the conventions that femininity belongs to women and that masculinity belongs to men."[299]

Ann Hopkins was penalized because her biological sex (female) did not match her behavior (too masculine—according to her employer's standards). Darlene Jespersen was penalized because her biological sex (female) did not match her behavior (not feminine enough—according to her employer's standards). In both instances, a woman failed to conform to the parameters of normative sex roles. As Katherine Franke explains, "the second order question, what does it mean to treat women unfairly, always has buried within it the first order question, what does it mean to be a woman?"[300] While the decisions in these cases have an obvious effect on the women who have suffered discrimination, they also legitimize ideas about normative sex roles and, thus, have an impact on other women, but also on men.

When applying a masculinity studies lens to the cases, we have as a starting point the fact that masculinity is a construct. Masculinity does not belong to either gender, but, as reflected in *Price Waterhouse* and *Jespersen*, as long as traits, attitudes, and behaviors are gendered, then women who are read as "too masculine" will be negatively valued. This characterization is similarly harmful to men because, to be a successful man, according to *Price Waterhouse*, one should be sufficiently aggressive, harsh, profane, and impolite. And men who do not attain or choose to not strive for this type of masculinity also will be negatively valued.

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[298] For a detailed discussion of why grooming policies are not challenged on gender stereotyping grounds see Devon Carbado, *Makeup and Women at Work*, -- HARV. CIV. RTS.-CIV. LIB. L. REV. --- (2006).

[299] Katherine M. Franke, *The Central Mistake of Sex Discrimination Law:The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 96 (1995).

[300] *Id.*

The underlying discriminatory behavior at issue in both *Price Waterhouse* and *Jespersen* was explicit. *Price Waterhouse* is full of smoking guns and outrageous statements by colleagues regarding Ann Hopkins. And *Jespersen* involved a formal policy regulating women's bodies. Antidiscrimination law is well suited to address such exoteric, explicit problems. It is successful at identifying the "bad guy," but is not necessarily in a position to uncover subconscious biases when evidence of malicious intent is not present. When recalling one of the goals of masculinity studies—exposing and interrogating the default subject position held by men—we are reminded to examine what the cases are communicating implicitly and tacitly, to read between the lines, and to interrogate the norms that have been taken for granted. This is a major reason why antidiscrimination law—the blunt instrument that it is—is not ideally situated to address discrimination that is often more systemic than volitional.

When outright and explicit sexism and misogyny shift instead to uneasiness over evolving sexual categories and how masculinity and femininity are being performed differently than in the past, is antidiscrimination law the best way to address these harms? Do we really want judges deciding how we should be expressing our gender?[301] Antidiscrimination law deals with singular and explicit examples of wrong doing dealing with gender categories and roles that are intelligible to it, but, to borrow Franke's language, antidiscrimination law "provides little protection for gender outlaws."[302] An individual only becomes a viable and culturally intelligible

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[301] Devon W. Carbado, *Masculinity by Law, in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 50 (Cooper and McGinley, eds. 2012) ("the entire edifice of sex discrimination law requires judges to make judgments about the extent to which employers can police expressions of gender. The question, then, is not whether we want judges to play a role in constituting gender, but rather how we want them to perform that role.").

[302] Franke, *supra* note 299, at 99.

subject to the extent that one conforms one's gender performance to commonly accepted social norms.[303]

Antidiscrimination law actively creates the parameters of what it means to be a man. In *Jespersen*,[304] the court did not simply legitimize normative gender categories; instead, it explicitly policed the border of gender expression, by finding a requirement to wear make-up reasonable and related to a bartender's employment. And while the court in *Price Waterhouse* did find discrimination, it based its judgment of that discrimination on a particular understanding of masculinity, thus weighing in on what masculinity is. Recalling Justice Brennan's feedback loop, by weighing in on what masculinity *is*, the Court is also taking an implicit stand on what masculinity *ought* to be. When courts continue to trade in sexual stereotypes, individuals of all sexes are harmed.

Masculinity studies has exposed the presence of a hegemonic masculinity: "the configuration of gender practice which embodies the currently accepted answer to the problem of the legitimacy of patriarchy, which guarantees (or is taken to guarantee) the dominant position of men and the subordination of women."[305] Crucially, it is the successful claim to authority, rather than any sense of universalism, in that it is possessed equally by all men, which marks hegemonic masculinity. Hegemonic masculinity is always constructed in relation to various

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[303] *Id.*

[304] Carbado, *supra* note 301, at 55 ("The approach the court took in Jespersen's obscured the fact that Harrah's grooming policy was quite literally producing normative masculinity and femininity and instantiating impermissible sex stereotyping.").

[305] Connell, *supra* note 249, at 77. Stephen Whitehead similarly describes the importance of the concept in terms regarding the balance between agency and essentialism: "The power of the term lies in the fact that the theorist can align themselves with the notion of patriarchy and male dominance, while mitigating any reductionist oversimplifications through the use of a concept that speaks of fluidity, multiplicity, difference and resistance, not only within the category women but also amongst men." STEPHEN M. WHITEHEAD, MEN AND MASCULINITIES 91 (2002).

subordinated masculinities.[306] It is historically dependent and only ever a "currently accepted" strategy as opposed to an essence or truth. The lack of universalism, or stated differently, the rejection of any naturalistic component to masculinity (although society does read the "currently accepted form" of masculinity as "natural" at the time), renders the notion of hegemonic masculinity inherently political. So, while lacking universalism in that sense, hegemonic masculinity is the "currently most honored way of being a man…and legitimates the global subordination of women to men."[307] There is nothing natural or immutable to the forms of masculinity condoned and perpetuated by the law, the law is buying into ideas about what "normal" behavior is for men that simply increase sexual inequality.

When antidiscrimination law explicitly decides whether or not individuals can be terminated from their jobs because of the way they perform their gender, judges are unequivocally policing the borders of gender. In deciding what kind of gender performances are protected by the law, judges are saying what kind of genders are legitimate. If the law continues to legitimize stereotypes (and not recognize that there are multiple ways to perform one's identity) and remains unable adopt a more nuanced understanding of sexual difference, then regardless of whether the legal doctrine employed embraces difference or sameness (substantive or formal equality), the results will continue to re-enforce sexual inequalities.

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[306] R.W. CONNELL, GENDER AND POWER 173 (1987).

[307] R.W. Connell & James M. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC'Y 6, 832 (2005).

VI. LAW AS A TECHNOLOGY OF SEX: THE IMPLICIT CREATION OF MASCULINITY

Masculinity studies allows for a view of the law as a contributor to what masculinity itself is, rather than just a regulator of a pre-existent masculinity. I use the very passive language "allows for" (as opposed to saying that masculinity studies, in fact, is doing something) because while the discursive space is available to masculinity studies due to its theoretical foundations, unfortunately the analysis of power (and specifically the way the power of the law is exercised) it employs is often lacking. While feminist theory was interested in thinking about redistributing power and, significantly, about *how* power operated, masculinity studies often acts as if the "how" question is already answered, and the only remaining issue is redistribution. Like mainstream civil rights advocates, masculinity studies tends to be preoccupied with combating patriarchy through legalistic means, as opposed to thinking about power as relational, productive, and, crucially, not solely held by certain individuals like a commodity. Thus, while the ideas about power discussed above, born in feminist legal theory, have found application in masculinity studies, each have been embraced to varying degrees.

According to a conventional understanding of how power manifests, law is prohibitive and repressive; it exerts its power primarily through domination. Particularly in U.S. Constitutional law, where the charter is conceived of as containing negative liberty rights that protect citizens from the government stepping into their private lives, as opposed to a source of positive liberty rights, the law rarely conceives of its power as productive. If, in contrast, power actually manifests in the creation of norms and the productive deployment of disciplinary techniques, then the juridical power of law is easily dismissed as a residual accessory to the predominant powers of modernity. Equating the power of law exclusively with repression, fails to account for all the ways that the law's power functions productively to create norms and form

cultures—it "excludes a richer consideration of the law's constitutive capacities"[308]—which are the predominant powers of modernity. Due to the combination of repressive and productive powers, the law occupies a unique position with respect to the reproduction of gender relations in our social environment.

To the extent that the law attempts to influence a society, it identifies qualities that can be scaled up from a model individual,[309] and the ultimate society created reflects the qualities that the law has validated and perpetuated in the model individual. Of note, the so-called model individual evidently exists within a patriarchy and, thus, any scaling up from such individual perpetuates a phallocentric culture. Thus, the law creates a structure for society based on an already-adopted theoretical position on the nature of sexual difference and the characteristics of an individual subject that is both formed and dominated by the law. In this way, the law can never be separated from its own understanding of sexual difference, which is forever intertwined with the model of the world the law seeks to create. Therefore, the law is a "technology of sex" in that it is a creator of techniques, norms, standards, rules, and discourses that dominate and govern the way society understands sex and gender.

In the words of James Boyd White, the law is:

> not merely a system of rules (or rules and principles), or reducible to policy choices or class interests, but it is rather what I call a language, by which I do not mean just a set of terms and locutions, but habits of mind and expectations—what might also be called a culture. It is an enormously rich and complex system of thought and expression, of social definitions and practices, which can be learned and mastered, modified or preserved, by the individual mind. The law makes a world.[310]

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[308] Golder & Fitzpatrick, *supra* note 24, at 17.

[309] Levmore & Nussbaum, *supra* note 60, at 1.

[310] JAMES BOYD WHITE, THE LEGAL IMAGINATION xiii (abridged version 1985).

The law is perpetually invested in re-articulating its own world view, resulting in the "creeping hegemony of the legal order."[311] This creeping hegemony matters because it affects the way masculinity is thought about. Indeed, once coopted by the legal order, the study of masculinity becomes another tool with which the law can propagate—implicitly and explicitly, intentionally and unconsciously—a particular form of masculinity and, in the process, further entrench sexual difference. The power of the law, therefore, is continually reinforcing itself, continually re-articulating its own world view, and continues to weigh on society until the perspective it is advocating is internalized. As certain scholars have highlighted, to some extent the law operates in its own realm, but it is also engorged in power struggles over cultural dominance.[312]

If, on the other hand, the power of the law was actually recognized to be productive (*and* if sex was considered fluid and dynamic), then it would be accepted that the law had an impact on sexual difference, and the legal order would be in some sense be accountable. But, since sexual difference is predominantly thought about as binaried and natural, the legal order is rarely considered to have an impact on sexual difference and not held to be responsible—how could the law (something so conceptual) actually affect something like sexual difference (something so corporeal)? The law's reasoning, though, is teleological—in order to not be held responsible for the way masculinity manifests in the world, the law needs to believe in both a particular conception of the power of law *and* a particular idea of sexual difference. The law claims to not have a productive power by pointing to the naturalness of sexual difference which is, from its perspective, clearly beyond the influence of the law. The reluctance to take accountability compels the law to maintain essentialist understandings of masculinity which reinforce its

[311] CAROL SMART, FEMINISM AND THE POWER OF LAW 5 (1989).

[312] LISA DUGGAN & NAN D. HUNTER, SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 206 (2006).

conception of sexual difference, and the cycle begins again. Therefore, the law serves as a technology of sex that perpetuates a hegemonic masculinity, yet it fails to take any culpability when that masculinity manifests in ostensibly undesirable but inevitable ways. Rather than being presented as a fractured and disjointed social construct, sexual categories are presented as resilient and stable, harking back to dated notions of a stable subject, and suggesting that through much trial and error, masculinity will one day find its essence.

A. Ricci v. DeStefano*: About Masculinity, Too*

The 2009 Supreme Court decision in *Ricci v. DeStefano*,[313] ruling on a reverse discrimination (discrimination against traditionally advantaged groups) claim against the City of New Haven, and the subsequent Senate confirmation hearing for then-Judge Sotomayor, provides an example of how the law utilizes its power to creates norms with a scope far greater than the explicit subject matter of any one particular case. In *Ricci*, white firefighters scored higher than their Black and Latino counterparts on written tests for promotion. Given the disparities in exam scores, the city civil service board declined to certify the results. The suit alleged that, by discarding the test results, the City discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

The court concluded that race-based action like the City's is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. According to the Court the City's race-based rejection of the test results could not satisfy the strong-basis-in-evidence standard. The Court found that, because the tests were job related, the City lacked sufficient

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[313] 557 U.S. 557 (2009).

evidence that it would have been liable for disparate impact had it certified the test results. While the Court's opinion explicitly focuses on race, the decision and the spectacle that ensued when two of the plaintiffs testified at the Sotomayor confirmation hearing,[314] which adopted the image of the "firefighter hero"[315] as a white male, feature elements that would benefit from being viewed from a perspective informed by gender.

Applying a masculinity studies lens to *Ricci* reveals how ingrained particular conceptions of masculinity are in our culture in three main ways. (Counterintuitively, the insidiousness of hegemonic masculinity is often most apparent when gender issues are not being addressed directly.) First, *Ricci* highlights the complexities and biases that permeate assessment mechanisms and, more specifically, how internalized, gendered ideas inform the selection of relevant performance criteria. Second, *Ricci* perpetuates a notion of hegemonic masculinity that ultimately results in feelings of powerlessness and inadequacy among young men, who are compelled to prove their manhood in harmful ways. Third, *Ricci* exemplifies how the law decides to see a case from one perspective (the aggrieved white and sometimes Latino firefighter) that both privileges and endorses a specific notion of hegemonic masculinity.

The *Ricci* decision provides a classic example of the law employing its power in a norm-creating, non-juridical manner. The criteria believed to be determinative of character and leadership, which have been internalized by the law and which are endorsed by the Court, exhibit a substantial male bias that render leadership and character more accessible to those who perform masculinity in a conventional manner. At the heart of the *Ricci* decision and the subsequent

[314] Judge Sotomayor was a member of the Second Circuit panel whose affirmance of a district court's decision had been appealed. *See* 264 Fed.Appx. 106 (Feb. 15, 2008).

[315] The decision has been described as an "ahistorical, acontextual victory to the plaintiff-petitioners [who] engaged in the construction of the firefighter hero as white (and on one occasion, Hispanic) and male." Ann C. McGinley, *Ricci v. Destefano: A Masculinities Theory Analysis*, 33 Harv. J. L. & Gender 581, 584 (2010).

questioning of two of the plaintiffs by the Senate Judiciary Committee was the accuracy and fairness of the mechanism by which the City assessed fitness for job promotion.[316]

The Committee Republicans (7 white men) invited plaintiffs Frank Ricci and Ben Vargas to testify. Their questioning touched upon the validity of the firefighter promotion exams. Ricci and Vargas repeatedly noted that the tests were "unquestionably job-related" and stressed their fairness.[317] When asked why the tests were important Ricci answered "over 100 firefighters die in the line of duty each year, an additional 80,000 are injured. You need to have a command of the knowledge in order to make command decisions. . . . Experience is the best teacher, but only a fool learns in that school alone."

The opinion, penned by Justice Kennedy, includes an excerpt of a statement by Ricci: "I don't even know if I made it [b]ut the people who passed should be promoted. When your life's on the line, second best may not be good enough." The second sentence aligns with the Court's focus on the job-relatedness of the tests, but Kennedy's choice to include the first sentence ("I don't know if I made it") is curious. Here, he highlights Ricci's integrity, picking an example of the firefighter's magnanimity—he's here not out of self-interest, but because he cares about the

[316] The court ruled on this issue stating: "There is no genuine dispute that the examinations were job related and consistent with business necessity. The City's assertions to the contrary are "blatantly contradicted by the record." 577 U.S. at 587–88. The Court also cited evidence that showed the opposite—expert testimony that the written exams were not the best way to determine leadership and command presence—the skills necessary to be a good fire officer. *Id.* at 571–72.

[317] The respondents in *Ricci* did not argue that the test was not "job-related." This was a distortion of the issue by the plaintiffs and the questioning Senators. As explained in Justice Ginsburg's dissent, the relevant inquiry is whether there was a more appropriate way to evaluate the relevant skills in applicants and identify the best candidates, not whether the test was job-related. 577 U.S. at 635 (citing *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798, n. 7 (4th Cir. 1971) ("It should go without saying that a practice is hardly 'necessary' if an alternative practice better effectuates its intended purpose or is equally effective but less discriminatory."); *Boston Chapter, NAACP* v. *Beecher*, 504 F. 2d 1017, 1021–1022 (1st Cir. 1974) ("A test fashioned from materials pertaining to the job . . . superficially may seem job-related. But what is at issue is whether it demonstrably selects people who will perform better the required on-the-job behaviors.")). Focusing on job-relatedness eliminates the "business necessity" component of the standard. *Id.* at 636 (citing *Lanning* v. *Southeastern Pa. Transp. Auth.*, 181 F. 3d 478, 489 (3d Cir. 1999)).

profession! The quote does not speak to the value of the assessment mechanism, but rather to Ricci's character—something that, due to its inclusion, we can assume Kennedy found relevant.

The worth of the assessment mechanism can be considered in numerous ways: on the one hand, whether the assessment mechanism in question was discriminatory;[318] on the other, how as a society we assess character and leadership. The Court's conflation of character and competence is exacerbated by the flimsiness of our ways to measure character; as McGinley points out: "No one questioned whether the test results would necessarily locate the persons who would be best for the jobs. All equated test results with merit and with hard work."[319] Indeed, Kennedy noted expert testimony regarding the inadequacy of written tests to assess people,[320] but punted, explaining that the case was concerned only with whether the City could certify the test results.[321]

Almost as if taking a cue from Kennedy's highlighting of character, most of the plaintiff firefighters' time during the confirmation hearing was spent describing the character needed to fight fires. They spoke about fairness and that they had "played by the rules." They spoke about

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[318] The Court addressed the question of whether the promotion test was discriminatory: "Respondents thought about promotion qualifications and relevant experience in neutral ways. They were careful to ensure broad racial participation in the design of the test itself and its administration. As we have discussed at length, the process was open and fair." *Id.* at 592–93. As Justice Ginsburg explained in her dissent, a finding of "good intent or the absence of discriminatory intent" is not relevant to a Title VII analysis; what must be examined is the test's "business necessity." *Id*. at 621–22. The disparate treatment of applicants was not an issue in *Ricci*. No argument was made that there was discriminatory intent or disparate impact.

[319] McGinley, Ricci v. Destefano at 618.

[320] "Janet Helms . . . declined to review the examinations and told the CSB that, as a society, 'we need to develop a new way of assessing people.' That task was beyond the reach of the CSB, which was concerned with the adequacy of the test results before it." 577 U.S. at 592.

[321] Kennedy frames the case as one of determining the legality of the race-based action performed by the city (whether the city's actions in discarding the test results violated Title VII), but this is straightforward legal abstraction. The decision is cloaked in the difference between disparate treatment and disparate impact, but the case is fundamentally about assessing people and the validity of the assessment mechanisms in question. Helms' determination that "we need new ways to assess people in society" is beyond the scope of the case because of how the Court chooses to frame the case. The case, however, communicates quite clearly that the way we currently assess people is perfectly acceptable.

hard work and sacrifices. They spoke about the danger and complexity of their jobs. They spoke about their roles as the heads of their families, as breadwinners, fathers. Senator Lindsey Graham told Ricci that he would "want [him] to come to my house if it was on fire." The Ricci and Vargas were repeatedly thanked for their service, held up as exemplar members of their community, and commended for their courage.

B. Kavanaugh Confirmation Hearings: Scholar-Athletes Don't Rape

That emphasis on the ways to determine character was on display again when then-Judge Brett Kavanaugh testified before the Senate Judiciary Committee at his confirmation hearing in October 2018. Like the firefighters, much of Kavanaugh's testimony,[322] focused on his character; Ricci, Vargas, and Kavanaugh all testified about the characteristics that made them good men and good leaders. According to McGinley and Boyd "The explicit message [from the Senate hearings] was that the nearly-all white plaintiffs were "real men" and "real firefighters" who worked hard and cared for their families."[323] In Justice Kavanaugh's testimony, he repeatedly returned to his athletic prowess in high school as a foundation of his leadership skills and character. As some commentators have pointed out (somewhat flippantly), make it to practice for four years and enjoy the presumption of integrity for the rest of your life.[324]

Like his mentor Kennedy, Kavanaugh recognizes the importance of integrity. The issue here is not whether integrity matters, but rather how we measure it and what we think it consists of. Sports have at least since the industrial revolution been used in schools to build integrity and

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[322] Senate Judiciary Committee Hearing: Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States (Sept. 27, 2018).

[323] Ann C. McGinley, *Ricci v. Destefano: A Masculinities Theory Analysis*, 33 HARV. J. L. & GENDER 581, 584 (2010).

[324] Justice Kavanaugh mentioned sports nearly fifty times in his testimony. *See* Lauren Collins, *Brett Kavanaugh and the Innocence of White Jocks*, THE NEW YORKER (Sept. 28, 2018), https://www.newyorker.com/news/our-columnists/brett-kavanaugh-and-the-innocence-of-white-jocks-christine-blasey-ford.

masculinize men,[325] but the Kavanaugh episode takes this tradition a step further and mixes up character and competition.

While Ricci and Vargas did not explicitly point to sports for their character bona fides, their refrains of hard work, sacrifice, and "playing by the rules"—a sports metaphor—echo precisely Kavanaugh's list of workout sessions, practices, and captaining his athletic teams. In addition, their testimony displayed their conformance with gender norms (as did Kavanaugh's),[326] and all three resort back to patently masculine definitions of character and leadership. Kavanaugh's testimony exploited the American patriarchal fallacy that success in high school sports is tantamount to having integrity, while the plaintiff firefighters' testimony "lionized a particularly traditional form of heterosexual masculinity"[327] which places "men at the head of their families, in the traditional role as breadwinner and protector, doings men work."[328]

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[325] *See* Deborah L. Brake, *Sport and Masculinity: The Promise and Limits of Title IX*, *in* MASCULINITIES AND LAW: A MULTIDIMENSIONAL APPROACH 207 (Cooper & McGinley eds., 2011) ("In the United States, sports were introduced into schools in response to fears that boys were being feminized by the shift from an agrarian to an industrial labor force, leaving boys in the day-to-day care of their mothers.").

[326] From Ricci's testimony: "I studied harder than I ever had before—reading, making flash cards, highlighting, reading again, all my listening to prepared tapes. I went before numerous panels to prepare for the oral assessment. I was a virtual absentee father and husband for months because of it."

Vargas' testimony: "so I spent three months in daily study preparing for an exam that was unquestionably job-related. My wife, a special-education teacher, took time off from work to see me and our children through this process. I knew we would see little of my sons during these months when I studied every day at a desk in our basement, so I placed photographs of my boys in front of me when I would get tired and went to stop—wanted to stop. I would look at the pictures, realize that their own futures depended on mine, and I would keep going. At one point, I packed up and went to a hotel for days to avoid any distractions, and those pictures came with me. I was shocked when I was not rewarded for this hard work and sacrifice, but I actually was penalized for it."

And Kavanaugh: "I was at the top of my class academically, busted my butt in school. Captain of the varsity basketball team. Got in Yale College."

[327] McGinley, *supra* note 323, at 618 ("the promotion process, the lawsuit, the Supreme Court's response, and the Senate Judiciary Committee's hearing, all of which favored the status quo of men living a traditional "manly" lifestyle and doing a traditional "manly" job").

[328] Nancy E. Dowd, et al, *Feminist Legal Theory Meets Masculinities Theory*, *in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 45 (Cooper & McGinley eds., 2012); McGinley, *supra* note 323, at 619 ("Instead of engaging in subversive masculine practices, such as violent forms of hypermasculinity, in order to prove their manhood, Ricci and Vargas adhered to the more acceptable traditional masculine norms which describe men's identities as breadwinners and heads of their families. They got married, had children, and worked hard. We find

Both Kavanaugh and the firefighters articulated definitions of character that are patently masculine and, thus, unavailable to those who don't fit into traditional gender norms, nor, really to women at all.[329]

In many ways the similarities between the testimonies are not surprising; with respect to the construction of masculine identity, the firehouse and the frat house at Yale where the respective masculinities were formed are mirror images. The performances of masculinity in both settings have been known to include verbal harassment and physical hazing purportedly designed to create a strong sense of "brotherhood" that is prioritized above all else. The firehouse and college fraternity both value hard work and dedication, and view outsiders, including and especially women, as lacking the dedication, drive, and ability needed to succeed.

Such articulations of straight, white, male "character" in America today prove dangerous because they reify a conception of character that excludes and alienates non-conforming individuals. Therefore, "character," in practice, ends up privileging a particular type of person (*e.g.*, white, straight, men) and, crucially, does so under the neo-liberal pretenses of objectivity and neutrality. Again, as expert witness Janet Helms testified in *Ricci* (and as Justice Kennedy quoted): "regardless of what kind of written test we give in this country . . . we can just about predict how many people will pass who are members of under-represented groups"[330]—*i.e.*, the white supremacist patriarchy that is America does not provide for anything else. Yet, the

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them sympathetic because they followed the script. But this script is not equally available to women and some men.").

[329] Collins, *supra* note 324 ("Try to imagine a Supreme Court nominee returning fifty times to his or her interest in pottery—you can't . . . it's a pretty good deal [conflating competition/sports and character], one that is obviously more available to men than to women, even those who count sports among their passions.").

[330] 557 U.S. at 571–72.

marginalized are not told that structural barriers are in place or that subjective decisions are being made against them, but rather that they do not measure up on some objective scale.

Once again, the insidious invisibility of masculinity suffocates those who fail to conform. Beneath the surface of the legal argumentation in *Ricci* lies internalized determinations about integrity and character that supersede the persuasiveness of any juridical argument any disagreeing Justice could make. Part of the project of masculinity studies has been to expose and objectify masculinity, to no longer allow it to remain hidden behind the cloak of objectivity and neutrality. While it remains hidden, masculinity takes on deific qualities, ubiquitous in the quotidian. Thus, the imperative of masculinity studies exposing, objectifying and rendering visible the practices of masculinity.

C. *A Vicious Cycle: Notions of Hegemonic Masculinity Leading to Perceived Powerlessness that then Result in Harmful Exhibitions of Masculinity.*

Prior to the Kavanaugh performance, the last time privileged boys' high school behavior received such public and legal scrutiny was the case of Owen Labrie. A masculinity studies analysis of *Ricci* and the picture of Justice Kavanaugh's teenage years presented during his confirmation hearing demonstrates how the identity of men is formed equally by male/male relationships as it is by male/female relationships. It also describes how sex-based harassment frequently results from a desire to prove the perpetrators' masculinity, rather than to pursue sexual pleasure/gratification, and underlines how society and courts ignore that harassing behaviors and the motives behind them are nearly identical in schools and workplaces.[331]

These insights help explain how we got from Labrie to Kavanaugh. The story of Owen Labrie made headlines in the summer of 2015. Labrie, at the time an eighteen-year-old senior at

[331] *See* Ann C. McGinley *The Masculinity Motivation*, 71 STAN. L. REV. ONLINE 99 (2018).

the St. Paul's School, was accused of sexually assaulting a fifteen-year-old as part of the school's "senior salute," a ritual in which male students propositioned female classmates for as much sexual activity as permitted. The New York Times said the case was "at its core, . . . about an intimate encounter . . . between a 15-year-old girl and an 18-year-old acquaintance, and whether she consented as it escalated."[332] Ultimately, Labrie was found not guilty of felony sexual assault charges, but was convicted of having sex with a person who was below the age of consent. The legal issues in the case boiled down to a question of consent. Notwithstanding this framing, the case was very much about masculinity, specifically, about how boys "become men" and our culture's role in that process. In the eyes of the law, this case dealt with the legal definition of rape and of consent, and the factual question of whether consent existed.

In feminist theory, male identity is often viewed as coming from a privileged position of power and defined in contrast to females. However, according to masculinity theory, male identity is often formed by feelings of powerlessness and, in contrast, not to females, but to other men. Patriarchy is not based straightforwardly on misogyny; there is a mimetic component to patriarchal violence, like that inflicted by Owen Labrie, that renders the responsibility collective. Unlike feminist theory, that tends to not think of patriarchy outside of a male/female paradigm, masculinity studies recognizes the impact that competition among men has on patriarchy. The desire for hegemonic masculinity does not come from the deep recesses of male souls, as the men's movement would have us believe, but whether we follow Foucaultian theory of desire (desire dependent on power) or a Giradian theory (we imitate the desires of others), the responsibility for the violence of patriarchy is rendered collective.

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[332] Jess Bidgood, *Owen Labrie of St. Paul's School Is Found Not Guilty of Main Rape Charge*, N.Y. TIMES, Aug. 28, 2015, http://www.nytimes.com/2015/08/29/us/st-pauls-school-rape-trial-owen-labrie.html.

Male identity is as much about relations with other men as it is about relations with women. Males are perpetually competing with one another over who can come closest to achieving the ideal of hegemonic masculinity. Both the plaintiff firefighters and Justice Kavanaugh delivered testimony promoting this ideal of hegemonic masculinity. Nevertheless, it is the rare man that meets the hegemonic masculinity standard.[333] Thus, while men as a group are powerful, individual men do not always or necessarily feel powerful. While the men's movement posits that this powerlessness is a backlash to gains made by women and minorities, masculinity studies suggest that the feeling of powerlessness derives from competition among men to conform to the unattainable hegemonic masculine ideal.[334] Whether stemming from a backlash or a failure to conform to an unattainable standard, the feeling of powerlessness leads to men's rejection of a core claim of feminism—that men are the most powerful social force. It is for this reason that the equality riddle that feminism is perpetually working to solve must almost necessarily include an analysis of relationships solely between males.[335]

When high school males exhibit toxic masculinity that is sometimes written off as "boys being boys," what they are doing is competing with one another over who best achieves the ideal of hegemonic masculinity that has been communicated to them.[336] Masculinity scholars, scrutinizing male initiation rituals, have explained how "boys' masculinities include a process of

[333] Dowd, *supra* note 238, at 231.

[334] Dowd, *supra* note 328, at 44.

[335] Feminist theory has been more concerned with women and has tended to view the construction of male identity as informed predominantly by males' relationship with females/power over females and the patriarchal dynamic of our society. However, masculinity studies has illustrated how male identity and the existence of patriarchy is equally informed by men's relationship with other men. What this highlights is that the gendering process is relational: "understandings of gender solely through feminist theory or masculinities studies are unidimensional, while gendering is a multidimensional, dynamic, and relational process." *Id.* at 37.

[336] Dowd, *supra* note 238, at 233 ("there is also an underlying dynamic in masculinity that pits every man against every man. In addition to being challenged to meet a standard of masculinity that must continuously be performed, masculinity also is a process of comparison, of measuring, that puts each man against all others.").

shutting down emotion and taking risks in order to prove manhood."[337] The initiation ritual responds to the inherent lack of stability in masculinity, ushering its participant into a simpler time, into something untarnished and natural. Claude Lévi-Strauss described such ritual practices "as an expression of the unconscious apprehension of the *truth of determinism*, the mode in which scientific phenomena exist."[338] The ritual is infused with myth and transcendence—with determined truths. It both grounds masculinity and renders it something potently metaphysical. Rituals are the medium through which a shared cultural heritage is transmitted and ultimately serve as the modes of an individual and collective "process of subjectivation;" they are fundamental to the "social and cultural creation of oneself as a subject."[339]

In *Ricci* and in the Kavanaugh testimony, the ideal of hegemonic masculinity that boys strive for is validated and fêted by the law and the Senate Judiciary Committee. Why is it surprising then, that high school boys feel intense pressure to "prove their manhood"? When viewed through a masculinity studies lens, we can understand that Labrie's participation in the "senior salute"—an initiation ritual of there ever was one—has less to do with his relationship with or opinions about women and girls and more to do with his need to compete with his male peers to meet a standard of masculinity that the law acclaimed in *Ricci* and Senators glorified in the Kavanaugh hearing. (Was Kavanaugh's "Devil's Triangle" any different from Labrie's senior salute?)

One potential lesson from masculinity studies is that, when Labrie participates in the senior salute, he is not explicitly brandishing his male power, for he likely feels a certain degree

[337] Dowd, *supra* note 328, at 31.

[338] CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND 11 (1966).

[339] DIDIER ERIBON, RETURNING TO REIMS 211–13 (2013).

of powerlessness—not due to any strides of feminism which have taken any real power from him however, but due to the perpetual cultural, legal, and political veneration that hegemonic masculinity receives in our society.[340] Society continuing to place a particular form of hegemonic masculinity on a pedestal encourages men to engage in a constant struggle with other men to prove their masculinity, and inevitably results in instances of masculinity gone astray like Labrie and Kavanaugh.

D. *Perspective Is Everything: Endorsing a Particular Kind of Masculinity by Pretending it Doesn't Exist*

While the law holds itself out a neutral arbiter, the Kavanaugh and *Ricci* examples reveal the ever-present straight, white, male lens through which the law views disputes before it. The image of the blindfolded, robed woman holding a set of scales might represent, instead, the law's failure to see that which is not male. By continually affirming the validity of a particular male perspective, the non-juridical power of the law propagates a particular form of masculinity. The law repeatedly communicates the reasonableness and fairness of this perspective, without actually addressing it, until ideas like "men should be breadwinners" and "character and competence are interchangeable" become internalized.

Arguably the most important role played by judicial opinions, particularly appellate opinions, is to educate prospective litigants, lawyers, and lower court judges.[341] In *Ricci*, for example, the law is signaling to employers what they can and cannot do in order to render their hiring practices non-discriminatory and, importantly, signaling to employees, potential

[340] The feeling of powerlessness that many men feel is real even if it is not always entirely accurate: "we have long recognized that irrationality sustains much of the unconscious as well as conscious thinking about inequalities of gender, as well as those of race, class, and sexual orientation. What may be most important is to understand that this conviction is real and stands in the way of changing consciousness of men about men, and of women about men so that movement toward equality is possible." Dowd, *supra* note 238, at 233.

[341] *See generally* Mitu Gulati et al., *The New Old Legal Realism*, 105 NW. U. L. REV. 689–735 (2011).

employees, and the larger community whether or not certain hiring practices are acceptable. This educational component of judicial decisions both provides concrete direction that applies to very specific sets of facts and creates structures and systems that suggest legally correct ways of approaching and seeing the world. The educational role of the law consists of disseminating a specific perspective to receptive audiences. There is nothing "natural" or "correct" about seeing the world in the way presented by the law; it is just one way among many to make sense of the world.

The law, with respect to its educational role, is more focused on the reasons why the judgement is made than on the decision itself.[342] The reasons provide guidance and perspective. The reasons are what communicates to the audience the way they should view the world and the principles and values which should form their sensibilities. What the law is ultimately doing here is creating norms and standards that help guide its citizenry; it is exercising its non-juridical power. Indeed, this educational role is a major reason that thinking about the power of the law as being primarily juridical misses its biggest impact.

Two common elements in the *Ricci* and Kavanaugh examples help us understand the law's power to act in this non-juridical capacity. Traditionally, hegemonic masculinity contained an element of stoicism; however, that stoicism was not present in the testimony of Ricci, Vargas, or Kavanaugh. All three presented themselves as victims. This willingness to articulate one's victimhood and explain to crowds of people how wronged one has been is a relatively new component of masculinity. The impetus for this willingness to play the victim is readily traced to

[342] Consider the importance of *Roe v Wade* being decided on privacy grounds rather than equal protection grounds.

the men's movement and its belief in and highlighting of the disempowering effects of the civil rights movement on straight white men.[343]

The victimized white male became the prevailing perspective in each confirmation hearing and in Justice Kennedy's decision.[344] In both hearings, the other side was heard from, but ultimately the alternative perspective was discarded.[345] The three male witnesses were repeatedly congratulated for their hard work, courage, and strength to stand up to the unfairness they were exposed to. During Ricci's confirmation hearing testimony, Senator Lindsey Graham emphasized how Ricci had been wronged: "I appreciate how difficult this must have been for you, to bust your ass and to study so hard and to have it all stripped at the end." Interestingly, it was Senator Graham whose diatribe at the Kavanaugh hearing switched the tenor of the remainder of Committee Republicans' questioning and even the delivery of Kavanaugh's testimony itself from calm and measured to an outrightly hostile and aggressive presentation about how Kavanaugh had been wronged. When given his five minutes, Senator Graham's face reddened and pointing his finger he boomed: "This is the most unethical sham since I've been in

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[343] Indeed, the Senate Judiciary Committee Republicans embraced the narrative of victimhood in order "for white, upper-middle class male senators to confirm to the people back home that they believed in hard work, that they understood the plight of the white working man, and that they did not intend to let him down." McGinley, *supra* note 323, at 584.

[344] While Justice Kennedy never mentions perspectives of those perhaps harmed by the decision, Justice Ginsburg attempts twice to include the perspective of the aggrieved white firefighters in her dissent: "The white firefighters who scored high on New Haven's promotional exams understandably attract this Court's sympathy. But they had no vested right to promotion;" "It is indeed regrettable that the City's noncertification decision would have required all candidates to go through another selection process." 557 U.S. at 644.

[345] During the Sotomayor confirmation hearings, two witnesses testified on behalf of then-Judge Sotomayor's *Ricci* decision. But even those who supported her were less than enthusiastic about the decision: "Judge Sotomayor has participated in thousands of cases and authored hundreds of opinions, but much of the debate about her nomination has concentrated on the difficult case of Ricci v. DeStefano. Whatever one may feel about the facts in this case, we all agree that the Supreme Court in its Ricci decision set a new standard for interpreting Title VII of the 64 Civil Rights Act. Using this one decision to negate Judge Sotomayor's seventeen years on the bench does a disservice to her record and to this country." (Hardly a glowing review.) And while the Committee listened to Dr. Christine Blasey Ford testify about her vivid memory of being sexually assaulted by Justice Kavanaugh, the Republicans on the Committee either did not believe her or did not care about what she had to say.

politics . . . I cannot imagine what you and your family have gone through . . . if you are looking for a fair process, you came to the wrong town at the wrong time my friend." Vargas and Ricci were lauded by the Committee Republicans because they represented right against wrong in the lawsuit.[346] The prevailing narrative in both hearings was that these men had been wronged, they had been treated unfairly, they were victims.

Of course, this white, male victim perspective was not the only one the Court and the Senate Judiciary Committee could have embraced. What about the Black, Latino, and female firefighters who had not succeeded in the exam? What about the Black applicants who did much better in the oral part of the exam?[347] What about the role of the law as educator…what message was being communicated to both the white firefighters and to the female, Black, and Latino firefighters? What message was being communicated about how character is measured? What is being communicated to young girls about their opportunities? The perspective embraced is that of the aggrieved, innocent, white man. The voices of those unable to become firefighters because of the structural and systemic disadvantages they encounter are not heard.

When decisions are rendered that blatantly mischaracterize an existing law or when society must deal with cases of explicit bigotry or sexism, locating and remedying the problem is a more straightforward exercise then when one is dealing with an issue of perspective. Masculinity exerts its power more subtly in this context. Perhaps its most ubiquitous characteristic is its invisibility, which manifests here as an ability to shape the perspective through which issues are viewed. Hidden under the liberal cloaks of neutrality, merit, fairness,

[346] Dowd, *supra* note 328, at 43.

[347] "No one asked why the black men who took the test scored significantly better on the oral part of the test than on the written portion. No one questioned whether the test results would necessarily locate the persons who would be best for the jobs. All equated test results with merit and with hard work." McGinley, *supra* note 323, at 618.

and colorblindness, one perspective is adopted, and others are marginalized. The perspectives adopted and endorsed by the law in the *Ricci* and Kavanaugh examples demonstrate the importance of question framing as opposed to simply arguing the merits. When we ask whether the *Ricci* firefighters merited promotions we have chosen the wrong framing because the validity of the tools that were used to assess merit is itself in question. Similarly, if we ask the question of whether or not Brett Kavanaugh sexually assaulted his teenage peer Christine Blasey, larger systemic issues like how our society defines sexual assault, how it is proved, how victims who speak out are treated, and whether a past assault should disqualify a person from elevation to a seat on the highest court are ignored and voices other than that of the accused are marginalized.

VII. Incorporation of Feminist Theory Insights

As explained above, like feminist theory, masculinity studies is an emancipatory project. Initially, discrimination and patriarchy were conceptualized as problems of *equal treatment*—problems tailor-made for the law to tackle. But once patriarchy emerged as structural and equality not simply as something formal, solutions proved more elusive. The depressing conclusion that patriarchy was built into the discursive arrangements of society complicated the goal of emancipation. However, because the law has historically served as a relatively receptive tool for rights-based arguments and because success can be measured in more tangible ways in the legal arena (after all, one can win a case), the law continues to be viewed by many an attractive avenue for addressing the problems of patriarchy. Notwithstanding ingrained problems of perspective that permeate the law, for advocates it remains a space to fight patriarchy, rather than one that perpetuates it.

Rights-based arguments were, in fact, in many ways, conceptualized to appeal to an individuated, neoliberal, legal system based on the *reasoned elaboration* of principles and

policies. In addition, feminist equality/difference arguments are something that the law is inherently receptive to—particularly in areas of employment law—because the masculine subject position remains the de facto norm against which the alternative position will either be found equal to (with the male remaining the norm) or different from (confirming the inimitableness of masculinity). Equality, or lack thereof, for example, is not the reason that women are paid less for the same work as men; the reason is, rather, that society does not value the work that women do the same way it values the work that men do. As the expert witness in *Ricci*, Janet Helms, pointed out, the table has already been set by the time the guests show up to dinner; racist and patriarchal relations inform the very production of subjects in the first place. Therefore, legal claims of "equality" will never actually threaten the balance of power. Until the production of subjectivity can occur within gender relations that are not patriarchal, we (like Helms) will not need to look at the tests to know what the results will be.

Lip service has been paid to the dependence of masculinity studies on feminist theory, yet not all of the significant insights from feminist theory have received their due consideration. Masculinity studies has succeeded in incorporating certain insights—the import of: essentialism, intersectionality, substantial equality, sex roles, and hegemonic masculinity, while it has been less successful at incorporating others—namely, issues of power, the "search for origins," the authority of experience, and the political nature of sexual difference/categories.

In part, the history of masculinity studies and the presupposition of masculinity as an object of study are responsible for such failure. The framing of masculinity occurs within a white, heteronormative conception of gender that essentializes male-female difference and tends to ignore differences within gender categories. "[T]he concept of masculinity is said to rest logically on a dichotomization of sex (biological) versus gender (cultural) and thus marginalizes

or naturalizes the body."[348] A slight variation to this point is that the importance of focusing on masculinity as its object of study has led masculinity studies to have a sharp disinterest in the female subject; in masculinity studies, "separatism is a hallmark, then of much of masculinities scholarship."[349]

This theoretical foundation has led to segregative thinking when it comes to addressing practical concerns.[350] The assumption of gender difference both creates a disinterest in the other gender among those looking for solutions to problems characterized as only impacting a particular gender, and often contains within it a built-in remedy.[351] The tendency is to make gender analysis a zero sum game; either you analyze the impact on men or the impact on women, or you analyze something other than gender. Thus, incorporating issues and insights that are not specific to masculinity has been something that has had trouble gaining traction in masculinity studies. Masculinity studies should show more of an appetitive for thinking beyond the confines of masculinity.

A. Power Analysis

In many respects, though by no means all, the impetus behind masculinity studies is the existence of patriarchy, and, thus, an understanding of the oppressive power of male supremacy is central to masculinity studies. Patriarchy generally conceptualizes of power as repressive.

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[348] R.W. Connell & James M. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC'Y 6, 836 (2005).

[349] Dowd, *supra* note 328, at 33.

[350] *Id*. at 39 ("segregative thinking—thinking about legal problems as affecting a single sex and requiring a sex-specific remedy"); *see also* David S. Cohen, *Sex Segregation, Masculinities, and Gender-Variant Individuals*, *in* MASCULINITIES AND THE LAW 168 ("Understanding sex segregation should be a vital part of the study of law and masculinity. In fact . . . current-day sex segregation is one of the central ways that law and society define and construct who is a man and what it means to be a man.").

[351] Dowd, *supra* note 328, at 40 (discussing gender-specific education and how researchers looking to solve the "boy crisis" in education, since they have already divided their constituency by gender, end with a sex-segregative remedy).

Masculinities scholars tend to evaluate the ways that conceptions of masculinity are used to produce power. Partly because a so-called "power analysis" remains the centerpiece of feminist advocacy—the struggle to equalize power between the sexes—masculinity studies has been focused on the issue of power within society and within masculinity.[352]

Hegemonic masculinity is founded on the idea that it exerts a normative power on men to conform to its tenets—as discussed above with respect to the Labrie case. Thus power manifests in a juridical manner in two distinct ways; both as contributing to male supremacy over females, and over men who do not conform to conventional gender identities.[353] Male power though, in both of these dynamics, exerts its might in an essentialist manner. In other words, power is more or less characterized as univocal and oppressive, it is one dimensional and focused on men as a group having power over women as a group and over men who "do" masculinity differently.

Masculinity studies scholar Jeff Hearn has posited that "while power functions, flows and re-forms in multiple ways, it is difficult to avoid the fact that in most societies, and certainly those of western, 'advanced' capitalism, men are structurally and interpersonally dominant in most spheres of life."[354] Thus, "looking at gender and power is an important part of the anti-essentialist project, as essentialist notions of gender reinforce power structures."[355] Challenging dominant notions of masculinity has an impact on disrupting the hegemony of men. To Hearn, the project should focus on the hegemony of men, which he defines as "that which sets the

[352] *See* CHRIS WEEDON, FEMINIST PRACTICE AND POSTRUCTURALIST THEORY 1 (1987) ("Feminism is a politics. It is a politics directed at changing existing power relations between women and men in society. These power relations structure all areas of life, the family, education and welfare, the worlds of work and politics, culture and leisure…as feminists we take as our starting point the patriarchal structure of society.").

[353] *See* Cohen, *supra* note 350, at 168 (discussing hegemonic masculinity and the hegemony of men); s*ee also* Jeff Hearn, *From Hegemonic Masculinity to the Hegemony of Men*, FEM. THEORY 5(1), 49 (April 2004).

[354] *Id*. at 51.

[355] Cohen, *supra* note 350, at 173.

agenda for different ways of being men,"[356] rather than on the identification of hegemonic masculinity, and, in this way, have the focus be more individualized.

The analysis of power within masculinity studies has employed various frameworks. Two of the most prevalent are: (1) a capacity to dominate others, and (2) ideological conditioning.[357] The second view directs one to a more structural level. It strays slightly from a juridical understanding of power, yet by emphasizing the ideological components, it nonetheless highlights its agentic components. The analyses of power in masculinity studies, therefore, continually fail to seriously engage with the production of masculinities from a perspective that sees power as productive and, crucially, discursive. Further, if power is recognized as productive, then its ideological components ought not to be the focus of the analysis, as this analysis suggests a misunderstanding of the role played by individual subjects. Individual subjects do not simply own an amount of power which they deploy as they see fit. Power flows between individuals and is thus not wholly subject to the whims of specific individuals. Power, in that sense, is both relational, and dependent on those who have some *and* those who have none. Hearn has suggested that masculinity studies should ask "which men and which men's practices . . . are most powerful in setting those agendas of those systems of differentiations,"[358] here we see, once again, an example of the intentionality only present in a juridical understanding of power being considered.

Masculinity studies gives lip service to the idea that power flows, but continues to paint a picture of it as something that functions juridically. There is the sense of something ideological

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[356] Hearn, *supra* note 353, at 60.

[357] *Id*. at 52.

[358] *Id.* at 60.

going on; dismantling patriarchy *is* conceived of as a political project, yet political in the wrong sense. The fight against patriarchy has emerged as a contest to root out sinister masters of the universe pulling societies levers from some secret location. The focus on hegemony is "about the winning and holding of power and the formation (and destruction) of social groups in that process…hegemony involves persuasion of the greater part of the population, particularly through the media, and the organization of social institutions in ways that appear 'natural,' 'ordinary,' 'normal.'"[359] This operation foregrounds the individual subject and position *him* in a dominating position that again views power as hierarchical rather than circulatory.

Hearn, for instance, while at numerous times suggesting that he thinks about power as something that flows and shouldn't be conceptualized in a unitary sense, distinguishes between men who are both formed in the hegemonic gender order and form the hegemonic gender order, and women who are solely formed in it. This understanding of power is one directional, with women being the passive recipients of the force of power deployed by men. While it is easy to say that "power flows," it is much more difficult to theorize ways of making sense of masculinity while accepting that premise. This is true both because a juridical understanding of power has been internalized by most in our society; it has become common sense. As Butler reminds us, "power is not stable or static, but is remade at various junctures within everyday life; it constitutes our tenuous sense of common sense, and is ensconced as the prevailing episteme of a culture."[360] It is more difficult to find solutions when thinking about power in that sense. It is easier to address and counteract patriarchy when it is conceptualized as something ideological, complete with intentionality and agentic subjects directing it.

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[359] Mike Donaldson, *What Is Hegemonic Masculinity?*, THEORY & SOC'Y 22(5), 645 (Oct. 1993).

[360] JUDITH BUTLER, ERNESTO LACLAU, AND SLAVOJ ZIZEK, CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT 14 (2000).

The concept of hegemonic masculinity provides an analysis of power that is exceedingly helpful to understand the process of male identity creation. For instance, with respect to the Labrie case, this concept renders it easier to comprehend the powerless that is felt by many young men, and that the perpetuation of patriarchy is just as much about competition among men as it is about misogyny. Masculinity studies, however, tends to pinpoint the idea, in the sense that it is very good at locating examples of where hegemonic masculinity appears, yet it is less successful at deconstructing the idea. It tends to characterize hegemonic masculinity as stable, controlled and somewhat self-serving; it is interested in understanding how power dominates, yet understanding the complexities and relationality of power make dealing with hegemonic masculinity much more difficult than locating it.

B. Searching for Origins

A second problem with the current trajectory of masculinity studies is that, because it remains tied to an emancipatory ethos, it therefore is focused on a misguided search for origins. The project remains guided by a search for a freedom beyond patriarchy and, in this way, is always intertwined with liberalism. Masculinity studies is tied to the project of locating masculinity, which involves asking whether masculinity existed prior to its production through social structures, and, if it did, then somehow rendering "the problem" less to do with the action of actual men. The search for origins drowns out the experiences of particular individuals, marginalizes male practices, and "involves an evacuation of questions of responsibility and agency."[361] Thus, on the one hand, masculinity studies remains tied to an idea of power as ideological conditioning, which grants individual subjects too much agency, and on the other, it

[361] Collier, *supra* note 251, at 468.

remains committed to a "search for origins," which takes agency away from individual subjects. Masculinity studies seems to perpetually struggle with this "agency" balance.

In *Ricci*, the search for origins problem manifests quite clearly. Particular in the arguments suggested by the expert witness Janet Helms. Recall that Helms didn't need to look at tests to claim that she knew how minority candidates would perform in it. Equality is impossible in a world where patriarchal relations inform the production of the subjects. It is not possible to reach a pre-patriarchy place. Indeed, even the tools of legal method which had been presumed to be neutral have now been exposed, and ideas like equality itself, are problematic because one is always equal *to* something. A masculinity studies analysis of *Ricci*, therefore, allows one to see that a case that apparently has nothing to do with gender is actually infused with patriarchal ideas, yet it continues to wrongly suggest failed ideas for moving beyond them.

The problems tied to the "search for origins" are one of the reasons that the usefulness of masculinity as an analytical category has been questioned by certain theorists who argue for a shift of attention to men's actual practices. But that shift remains emancipatory and problematically suggests that the problem of patriarchy is solvable by changing the actions of men. The trend in masculinity studies has been to narrow the scope, to move away from grand theories, to focus on the local, where change can be seen and felt, and while this does provide some sense of tangible change, it ultimately suggests that patriarchy is solvable by ridding the world of the "bad" acts of men, *and* that the existence of patriarchy itself is due to these particular "bad" acts of men. This has the effect of ultimately disempowering those subjects who don't identify as men because they are once again characterized as not being a part of or having a role in what has created the social world.

Further, part of the reason that masculinity was initially thought of as being a ripe area of study, in contrast to simply thinking about the actions of men which perpetuate male supremacy, is that there were structural, political, and theoretical impasses identified in feminist theory that were not "solvable" simply by identifying these "patriarchy perpetuating acts." Focusing on the hegemony of men, rather than masculinity, fails to recognize that the category of men is equally problematic, and constructed, as the category masculinity. Trying to move beyond masculinity to men suggests the knowability of some sort of original position, some sort of pre-discursive, pre-gendered position, from which actions were taken which resulted in patriarchy, and that emancipation is possible by re-tracing and reversing those actions.

The insight from feminist theory to be worked from is not identifying the actions of subjects who identify as men which contribute to the domination and subordination of others, but rather to be critical of the existence of the categories in the first place. Each of these tasks appears political, yet the more radical position and the position that offers the least feel-good results is that of critiquing sexual difference/categories as a whole. This is not to suggest, necessarily, that the project should be to dismantle sexual categories (sexual categories are perhaps re-signifiable to serve ends that do not contribute to male supremacy),[362] but that engaging in the process of examining particular acts, rather than holding men accountable, is actually disempowering and perpetuates the system as a whole. In short, the question becomes is it possible to preserve gender without preserving domination?[363]

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[362] Although the idea of any hegemonic masculinity serving progressive ends seems far-fetched. As one commentator has asked: "What exactly does one do nowadays to inhabit a male-positive gendered identity that feels—and is—worthy of respect (by oneself and others)?" John Stoltenberg, *Why Talking about Healthy Masculinity Is like Talking about Healthy Cancer*, FEMINIST CURRENT (Aug. 9, 2013). Stoltenberg argues that attempting to attain a "healthy" masculinity just "reinvigorates the disease." *Id.* Examining how social agents "do" masculinity through a normative lens perpetuates the existence of gendered hierarchies.

[363] MICHAEL SCHWALBE, MANHOOD ACTS: GENDER AND THE PRACTICES OF DOMINATION 170 (2014).

Again, this is not to suggest that in a practical sense these actions should be condoned or ignored, but that the job of masculinity studies should be about addressing the categories themselves, rather than just focusing on the actions, which only serve to reify those categories. When the point of masculinity studies is thought of as being emancipatory, that masculinity studies has a goal and that that goal is equality or freedom or the dismantling of patriarchy, then masculinity studies is expressing its problem with origins, in that the goal itself is political and there is, once again, the suggestion that there is an accessible original position devoid of patriarchy. The concern of disembodying masculinity from men, of divorcing an analysis of masculinity from the "real" impact of the actions of men, suggests that masculinity studies should focus on equalizing power between categories, rather than on the validity of the categories themselves. Collier has cautioned against remaining tied to masculinity and suggested re-theorizing men identities "in ways that might produce a richer, more nuanced conceptual framework in which men's and women's practices, subjectivities, and bodies can be approached."[364] Such an approach would undoubtedly move beyond the actions of those subjects socially categorized as men, while acknowledging men's agency within contexts shaped by power.

C. Authority of Experience

The emphasis on the behavior of particular men also highlights the importance of experience in the context of masculinity studies. Experience, in practice, often becomes the most authentic evidence on which to base claims to truth. Within masculinity studies, when the focus turns to ways of "doing" masculinity, and to an analysis of the actions of men, "truth" is once again being found through experiential claims. The paradigm suggested by turning toward the

[364] Collier, *supra* note 251, at 473.

specific behavior of individuals is one in which the reality of patriarchy is attributable to the actions of certain bad apples. The focus on domination on a micro level renders the views of particular individuals the source of explanations.[365] The problem with this is that "[experience] operates within an ideological construction that not only makes individuals the starting point of knowledge, but that also naturalizes categories such as man, woman, Black, white, heterosexual, or homosexual by treating them as given characteristics of individuals."[366] This tendency brushes aside issues of language, discourse, structure, and history, and instead focuses on how particular subjects experience the world. Rather than focusing on how particular subjectivities are constructed and how discourse precedes subjecthood, masculinity studies works generally from a more humanistic perspectives that sees individuals who have experiences.

There appears to be a tension between the need for a local, contextualized approach to problems of gender oppression (which avoid buying into essentialist accounts of gender) and not overly relying on the evidence of experience; anti-essentialism suggests going more micro while critiques of experience seem to suggest a more macro approach. What has occurred is that the trend in masculinity studies has been to turn inward, to move from macro to micro, to be practical and focus on the actual behavior of men, rather than on big boring questions about discourse, theory, and language. But something gets lost in making this decision. There need not be any grand theory that suddenly makes masculinity comprehensible. In fact, focusing on individual experiences is partly done because of a desire for tangible solutions, to reduce harm and eliminate suffering, to make the world a tangibly more just place. The implication is not to

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[365] *See* Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARVARD WOMEN'S LAW JOURNAL 89, 114 (1996) (identifying the problem with founding arguments on individuals' stories: "The notion that women may be oppressed in part through the internalization of cultural norms calls into question the reliance on individual accounts of oppression.").

[366] Scott, *supra* note 187, at 782.

throw out experience, as we are cautioned by Scott "[e]xperience is not a word we can do without, although, given its usage to essentialize identity and reify the subject, it is tempting to abandon it altogether,"[367] but simply not to rely on it as something apolitical and devoid of interpretation.

In the context of *Ricci*, we see how the experiences of the firefighters are constructed as the foundation of the truth. The categories with which the firefighters built their reality—*e.g.*, white, Black, male, female—are made to appear ahistorical, and thus devoid of interpretation. The subjects, though, have been conceived within patriarchal and white supremacist social relations; the visions of the firefighters are structured through particular discourses and histories and the experiences are not pre-discursive, but rather formed in discourse. The question, in this case, is not one of choosing between two alternative perspectives (white vs. Black; man vs. woman), but rather about questioning the structures that formed the subjects.

One of the insights from the expert witness in *Ricci* Janet Helms was that subjects are formed within existing social (*e.g.*, racist and patriarchal) relations. It is not only that there are two contrasting perspectives that are equally true. That paradigm is palatable to the law, it adheres to the conventional narrative of history that new evidence is discovered that changes existing interpretations; the constant being that the experiences themselves are occurring to subjects and not the subject constituted by the experience. The insight of Helms is not palatable to the law, and, thus, her testimony was considered beyond the scope of the case and not taken seriously by either the majority opinion or the dissent. But the insight is an important one because it reorients the focus from the question of choosing between two contrasting experiences to that of the naturalness of the categories that structure the experiences themselves.

[367] *Id.* at 797.

When experience is viewed as the foundation of truth, then we risk missing the fact that experience is both always already an interpretation and something that needs interpreting. The subject is constituted through the experience, as opposed to subjects simply *having* experiences. In practice, however, the law does determine which experiences to privilege and which perspective to adopt. In doing so, the fact that subjects are formed within patriarchal relations continues to play a role. In the example of Justice Kavanaugh's confirmation hearing, patriarchy rendered Dr. Ford's experience *an* interpretation while Justice Kavanaugh's was something *to be* interpreted.

Experience should not serve as a stand-in for an analysis of the production of knowledge. Thinking within the terms dictated by experience simply reproduces the categories of analysis without any critical turn, which, in the context of masculinity studies, is vital considering the validity, usefulness, and effect of the category, is what is being interrogated. Thinking about structural problems, the discursive construction of subjects, and of the need to think beyond and in different terms than sexual differences allow, is a daunting task without tangible near-term goals. Indeed, making the decisions to not pursue these questions, or rather to emphasize the others, is making a political decision; a decision that claims, rightly or wrongly, that the overarching political structure within which we live is capable of accommodating the changes that are sought.

CONCLUSION

In 1987, Alan Bloom published *The Closing of the American Mind*. Thirty years later, Mark Lilla published *The Once and Future Liberal*. Bloom a republican, Lilla a democrat, both feel a little repugnance toward diversity and see the students of their day as too narcissistic. Bloom sees openness and acceptance as signifiers of relativism.[368] Bloom's book was called a "raging assault on liberal tolerance,"[369] while Lilla rants against "identity" activists, urging them to shut up, stop marching, and "get real."[370] Both Lilla and Bloom complain about the lack of some larger moral vision. To Lilla, we have been subjected to liberal identity politics that have come to control our university campuses, while to Bloom, we had all become soft relativists, quasi-narcissists, too self-involved to be concerned with transcendent truths. Bloom wants us to reprioritize the great books on which Western civilization was founded, and Lilla wants us to teach our students the great forces that have shaped our history (as opposed to emphasizing things like the relatively trite women's movement). We live in a time of individual self-fulfillment, where there is truth to experience and being true to oneself is paramount—"speak your truth." Lilla has famously called for a post-identity liberalism and described contemporary American liberalism as having "slipped into a kind of moral panic about racial, gender, and sexual identity that has distorted liberalism's message and prevented it from becoming a unifying

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[368] Butler, *supra* note 140, at 25 ("They are unified only in their relativism and in their allegiance to equality. And the two are related in a moral intention. The relativity of truth is not a theoretical insight but a moral postulate, the condition of a free society, or so they see it.").

[369] Benjamin R. Barber, *The philosopher despot: Allan Bloom's elitist agenda*, HARPER'S MAGAZINE, 61 (January 1988), https://harpers.org/archive/1988/01/the-philosopher-despot/.

[370] Beverly Gage, *An Intellectual Historian Argues His Case Against Identity Politics*, N.Y. TIMES, Aug. 15, 2017, https://www.nytimes.com/2017/08/15/books/review/mark-lilla-the-once-and-future-liberal.html.

force capable of governing."[371] Lilla's call for a renewed liberalism and the castigation of America's universities and colleges for a disproportionate focus on diversity issues[372] at the expense of what teachers *ought* to be teaching their students—an awareness of their system of government and the major forces and events in our history—sounds remarkably similar to Bloom's complaints about the lack of interest in transcendent issues in the youth of his day. A similar sense of self-fulfillment is palpable among both generations. Both Bloom and Lilla, from different angles, have articulated concerns that liberalism has somehow been disfigured. To both thinkers, "truth" has lost prominence in our society—warped by identity politics to Lilla and relativism to Bloom. Today, the youth are dogmatic about their progressiveness, and the authenticity of their experience. And there is a sense of a larger moral vision, one in which those who are read as intolerant or not progressive enough are deemed harmful. Importantly, though, there is also a deep extant sense of alienation from these voices. And the group feeling most alienated? Men.

The political nature of the emancipatory project at the heart of masculinity studies is manifest when one looks at how subjectivity is viewed. The existence of a pre-existing subject is tied to the humanist conception of each individual containing some sort of essence, and thus, potentially, being worthy of certain rights. Masculinity studies, therefore, by foregrounding a pre-discursive subject and describing its project as emancipatory, is implicitly buying into the politics of liberal humanism. It becomes difficult to suggest a radical politics or agenda within a

[371] Mark Lilla, *The End of Identity Liberalism*, N.Y. TIMES, SR1, Nov. 18, 2016, https://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html.

[372] "But the fixation on diversity in our schools and in the press has produced a generation of liberals and progressives narcissistically unaware of conditions outside their self-defined groups, and indifferent to the task of reaching out to Americans in every walk of life." *Id.*

discipline defined by those parameters. Masculinity studies, thus, is essentially a humanist project, striving for freedom and equality through rights and law, but it needn't be. The focus can turn back to the political implications of thinking about sexual difference as naturalistic and inevitable, it can focus on the implications of thinking about masculinity studies as an emancipatory project focused on retrieving a pre-patriarchal space, it can stop exclusively focusing on the actions of individual men and recognize how experience is not the sole key to knowledge.

While it is generally accepted that masculinity plays a role in informing what the law is, the more counterintuitive proposition—that the law plays a non-negligible role in creating the parameters of masculinity today—is equally problematic. I have suggested that the law creates the parameters of masculinity not only via an explicit exercise of juridical power—*i.e.*, through rulings that specifically address questions regarding masculinity, or, more specifically, rulings which determine who gets to be a man. I am suggesting that the relationship between the law and masculinity is most effectively revealed when the power of the law is thought about as productive, as a creator of claims of truth. In a modern, liberal society, force is more robustly and insidiously deployed, not in the juridical nature of the law, in physical or economic might, but in claims of truth.

When thinking about and studying masculinity there is a fear that, as a culture, we will fall into silly stereotypes about masculinity; that we will accept "frat boy" behavior out of young men; that we will propagate outdated ideas about what it means to be a man and about the rituals that make boys men; that we will contribute to the seemingly endless perpetuation of patriarchy. But this should not be the only concern. There are equally important questions about masculinity

regarding more than just falling into stereotypical and essentialized ideas about masculinity. No longer does the major challenge—although it remains part of the challenge—only entail suggesting that masculinity comes in different shapes and sizes and that there is more than one way to be a man. It is no longer enough for critiques of masculinity to problematize sex roles and power imbalances, to highlight experiences of injustice, and to offer easy solutions that provide superficial critiques of patriarchy that resort back to an imaginary origin where equality was ubiquitous. Masculinity studies is in danger of turning clinical to avoid the uncertainty and agnosticism pivotal to an honest study of masculinity. Masculinity and the law remain pieces in a neoliberal puzzle that not only continues to re-articulate patriarchal relations in ever new ways, but falsely promises an illusory cohesiveness and an emancipation that is both inapt and misdirected.