

MASCULINITIES, LAW, AND PERSONAL LIFE: TOWARDS A NEW FRAMEWORK FOR UNDERSTANDING MEN, LAW, AND GENDER

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I. INTRODUCTION

The terms “new sociology” or “critical study” of men and masculinities have been widely used, within a now voluminous body of interdisciplinary theoretical and empirical research, to refer to work concerned, in

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different ways and from a variety of perspectives, with the exploration of the gender of men in an explicitly pro-feminist manner.¹ The scale of the contemporary literature on masculinities is demonstrated by the sheer number of books, articles, and research reports on the topic, as well as the existence of dedicated encyclopedias and extensive bibliographic databases.² As the author of one recent introduction to the subject notes, “[i]ssues surrounding men and masculinities have become ‘hot politics’ in late capitalist societies . . . [T]he new focus on [questions about] men’s identities [and practices] has been a consequence of structural changes . . . interacting with the social and political effects of feminism.”³

Writing in 1995, in the book *Masculinity, Law and the Family*, I observed how, at the time, there had been few texts that took as the specific object of study the relationship between masculinity and law.⁴ This is no longer the case and over the past fifteen years or so, a rich picture has emerged within law and society scholarship of the “man” or, rather, more accurately, the “men” of legal discourse.⁵ This work does, however, remain marginal to much mainstream legal study. At international conferences and symposia concerned with law, gender, and sexuality, it remains rare to find workshops focused on the relationship between law and masculinity.⁶ None-

¹ For a flavor of this work, in addition to material cited below, see R. W. CONNELL, *MASCULINITIES* (2d ed. 2005) [hereinafter CONNELL, *MASCULINITIES*]; R. W. CONNELL, *THE MEN AND THE BOYS* (2000) [hereinafter CONNELL, *THE MEN AND THE BOYS*]; NIGEL EDLEY & MARGARET WETHERELL, *MEN IN PERSPECTIVE: PRACTICE, POWER AND IDENTITY* (1995); JACK S. KAHN, *AN INTRODUCTION TO MASCULINITIES* (2009); MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* (2000); *HANDBOOK OF STUDIES ON MEN & MASCULINITIES* (Michael S. Kimmel, Jeff Hearn & R. W. Connell eds., 2005); MICHAEL S. KIMMEL & MICHAEL A. MESSNER, *MEN’S LIVES* (8th ed. 2010); ANTHONY McMAHON, *TAKING CARE OF MEN: SEXUAL POLITICS IN THE PUBLIC MIND* (1999); BOB PEASE, *RECREATING MEN: POSTMODERN MASCULINITY POLITICS* (2000); ALAN PETERSEN, *UNMASKING THE MASCULINE: “MEN” AND “IDENTITY” IN A SCEPTICAL AGE* (1998); STEPHEN M. WHITEHEAD, *MEN AND MASCULINITIES: KEY THEMES AND NEW DIRECTIONS* (2002); *THE MASCULINITIES READER* (Stephen M. Whitehead & Frank J. Barrett eds., 2001).

² See, e.g., *INTERNATIONAL ENCYCLOPEDIA OF MEN AND MASCULINITIES* (Michael Flood, Judith Kegan Gardiner, Bob Pease & Keith Pringle eds., 2007); *The Men’s Bibliography: A Comprehensive Bibliography of Writing on Men, Masculinities, Gender, and Sexualities* (Michael Flood ed., 19th ed. 2008), <http://mensbiblio.xyonline.net/> (a free for public use database of research citations, containing over seventeen thousand references).

³ FIDELMA ASHE, *THE NEW POLITICS OF MASCULINITY: MEN, POWER AND RESISTANCE I* (2007).

⁴ RICHARD COLLIER, *MASCULINITY, LAW AND THE FAMILY I* (1995).

⁵ Examples of this work are discussed further below. For discussion of the development of this literature on masculinities and law, see generally RICHARD COLLIER, *MEN, LAW AND GENDER: ESSAYS ON THE ‘MAN’ OF LAW* (2010) [hereinafter COLLIER, *MEN, LAW AND GENDER*]; Nancy Elizabeth Dowd, *Masculinities and Feminist Legal Theory: An Anti-essentialist Project in UNIVERSITY OF FLORIDA LEGAL STUDIES RESEARCH PAPER NO. 2008-05* (2008), available at [#%23](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1238070).

⁶ By way of exception, note “Masculinities and the Law” Workshop, held at Emory Law School, September 11–12, 2009. The Emory University School of Law Feminism and Legal Theory Project Archive of Previous Workshops, Conferences and Conversations, <http://www.law.emory.edu/academics/academic-programs/feminism-legal-theory/archives.html> (last visited Feb. 19, 2010).

theless, a substantial body of scholarship has sought to unpack the ways in which ideas about men and gender have been understood, constructed, or otherwise depicted in law.⁷ This work has raised important questions about many aspects of social life, as well as about the variable and contested meanings that attach to gender and the structures of feeling that shape our lives.

Gender struggles involving law have, of course, a long and well-documented history. Yet I argue in this Article that a complex amalgam of social, economic, and cultural change, alongside the embedding of models of formal equality and ideas of gender neutrality in law, have profoundly reshaped a legal-political terrain based on a set of beliefs about men and masculinities. The result is a far-reaching and at times contradictory politicization of masculinity within the legal arena. In relation to law, the “new politics of masculinity” represents an important, yet relatively underexplored, dimension of the “crisis tendencies,” if not the “historical collapse of the legitimacy of patriarchal power,”⁸ that have arisen around gender relations in late modern societies.

The structure of the argument is as follows. After this brief introduction, Section II outlines the social and political contexts that have shaped the “masculinity turn” within legal scholarship, tracing the influences that inform the study of masculinities and law. I consider how an engagement with masculinity developed within feminist legal studies and how the critical study of men and masculinities has conceptualized law, looking at the interactions this work has had with feminist legal theory. Section III turns towards the substance of work on masculinity and law, presenting an overview of arguments, themes, and concerns that recur in this work. Section IV explores the theoretical underpinnings of the literature. I consider the strengths, and limitations, of the two sociological and social-psychological approaches that have shaped how the relationship between law and masculinity has been approached in legal studies. In the first, consisting of an engagement with hegemonic masculinity, law is accorded a particular place in the reproduction of gender relations. The second, in contrast, focuses on the relationship between law, discourse, and the idea of the male (masculine) subject, what has been referred to in some accounts as a psychosocial account of men and masculinities.⁹

⁷ This work is considered in detail below. For a general discussion, see COLLIER, MEN, LAW AND GENDER, *supra* note 5; Dowd, *supra* note 5.

⁸ CONNELL, MASCULINITIES, *supra* note 1, at 85; see also John MacInnes, *The Crisis of Masculinity and the Politics of Identity*, in THE MASCULINITIES READER, *supra* note 1, at 311.

⁹ See John Hood-Williams, *Gender, Masculinities and Crime: From Structures to Psyches*, 5 THEORETICAL CRIMINOLOGY 37 (2001) (discussing the broad transition between these two perspectives); see also WENDY CEALEY HARRISON & JOHN HOOD-WILLIAMS, BEYOND SEX AND GENDER (2002) (presenting a theoretical critique of the sex/gender distinction and a call for it to be transcended).

Section V charts a way through these conversations. I consider how the ideas about men and masculinities that have circulated within debates about law and policy intersect with men's own subjective experiences, or degrees, of power and powerlessness. I argue that developments in relation to third-wave/anti-essentialist feminism, queer theory, and recent sociological and socio-legal work around "personal life," raise important questions not only about the adequacy of the concept of masculinity, but also about the implications of these debates for feminist accounts of law and gender. This Article, in summary, reconsiders the terrain of contemporary scholarship on masculinities in relation to law, as well as the interactions this work has had with feminist theory.

A final point of clarification is required on the terms used. I shall continue to engage with and use the term "masculinities." In questioning gender as contingent, discursive, and of variable significance, it remains possible to locate ideologies and beliefs about men and masculinity that are socially powerful and experientially significant.¹⁰ However, masculinity, as a marker of social identity (connected in some way to feeling oneself to be, or to be seen by others as, "a Man"), has been produced and sustained by discourses of sexuality and gender interwoven and rooted within the dualistic configurations that pervade liberal legal thought. In critically assessing its contemporary deployment within debates about law, gender, and sexuality, I shall argue that the general use of masculinity has rested upon problematic assumptions about the public/private dualism, hetero/homosexuality, sex/gender, and the interconnections of a multiplicity of parallel worlds of the workplace, family, friendships, body regimes, sexual practices, and social relationships. The time is thus propitious to reassess what it means to speak, in the first place, of a relationship between masculinity and law.

II. CONTEXTS: THE MASCULINITY TURN IN LEGAL SCHOLARSHIP

Interrogation of masculinities and law within legal studies has occurred at a nexus of developments that, although interconnected, draw on distinct theoretical and political trajectories. The most significant influence—not only on law, but on the analysis of masculinity throughout the social sciences, arts, and humanities—is that of feminism; or, in relation to legal studies, a body of work sometimes referred to as legal feminism (or, more accurately, legal feminisms).¹¹

¹⁰ That masculinity is both essentially contested and a significant praxis of everyday social relations is a central theme in CONNELL, *THE MEN AND THE BOYS*, *supra* note 1; see also R. W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 *GENDER & SOC'Y*. 829 (2005) (presenting a critical, but broadly supportive, reassessment of hegemonic masculinity in the light of interdisciplinary research undertaken since Connell's original formulation of the concept).

¹¹ See COLLIER, *MEN, LAW AND GENDER*, *supra* note 5 (considering further these feminist engagements with men and masculinities).

A. *Men, Masculinities, and Feminist Legal Studies*

The roots of the engagement with masculinity in social studies can be found in the distinction between sex and gender and, more specifically, in a body of post-war social psychological research concerned with the relationship between sex roles and gender identity.¹² The problem with the broadly functionalist analyses that dominated the study of masculinity during the 1950s and 1960s,¹³ feminist scholars later argued, concerned the way a methodological individualism served to negate any questioning of social structure,¹⁴ the gendered nature of a contingent, socially constituted public/private divide, and the crucial issue of the social *power* of men.¹⁵ In contrast, within the feminist texts that began to impact the social sciences throughout the 1970s and 1980s, an attempt to challenge the structural power of men reframed the understanding of the relationship between masculinity and law.

In the development of a distinctive feminist legal scholarship over the years, masculinity has been deployed in different ways. There are three principal areas, in particular, in which an engagement with masculinity has featured in feminist legal studies.¹⁶ In relation to each, there exist both simi-

¹² For more on this division, see JOHN ARCHER & BARBARA LLOYD, *SEX AND GENDER* (Cambridge University Press 1985) (1982); ROBERT J. STOLLER, *SEX AND GENDER: ON THE DEVELOPMENT OF MASCULINITY AND FEMININITY* (1968). For critical discussion, see CEALEY HARRISON & HOOD-WILLIAMS, *supra* note 9; ANDREW N. SHARPE, *TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF LAW* (2002).

¹³ See Tim Carrigan, Bob Connell & John Lee, *Toward a New Sociology of Masculinity*, 14 *THEORY & SOC'Y* 551, 563 (1985) (discussing the incoherent, "intellectually disorganized . . . [and] erratic" nature of this research); see also R. W. CONNELL, *GENDER AND POWER: SOCIETY, THE PERSON AND SEXUAL POLITICS* (1987) [hereinafter CONNELL, *GENDER AND POWER*] (providing an excellent overview of this early literature).

¹⁴ When masculinity was addressed, it often appeared as something that could be individually possessed or else measured on a scale (as in studies of androgyny). Carrigan, Connell & Lee, *supra* note 13, at 566–68.

¹⁵ See JEAN BETHKE ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* (2d ed. 1993); KATHERINE O'DONOVAN, *SEXUAL DIVISIONS IN LAW* (1985); *CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW, AND PUBLIC POLICY* (Susan B. Boyd ed., 1997); *PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES* (Margaret Thornton ed., 1995).

¹⁶ The project of feminist legal studies has long been—and remains—contentious, not least in terms of an epistemological foundation around the notion of a unified subject "Woman." In the following I will be using, for heuristic purposes, the idea of distinctive "phases" of feminist scholarship. Cf. NGAIRE NAFFINE, *LAW & THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE* 1–19 (1990) [hereinafter NAFFINE, *LAW & THE SEXES*] (explaining the three phases of feminism and their (inter)relation and overlap). I recognize such an argument is problematic in its tendency to categorize together a vast and diverse body of work, and assume that a linear narrative underscores what is, in fact, a far more complex (and contested) history. See also NICOLA LACEY, *UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY* (1998) (discussing the development of feminist critiques of law and the use of law as a means of furthering feminist ethical and political values); CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989) (using a feminist, poststructuralist approach to present a gendered analysis of the power of law); *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* (Martha Fineman ed., forthcoming 2010); Joanne Conaghan, *Reassessing the Feminist*

larities and differences in how masculinity has been conceptualized that reveal significant ambiguities about the meaning of the term as it has been used in relation to the study of law.

Legal Practices and Institutions

First, masculinity has been used extensively within analyses of a wide range of institutions and practices relating to diverse aspects of law and legal regulation. Ideas about masculinity have informed studies of law and gender in relation to the work of solicitors, barristers, and the judiciary;¹⁷ the courts, police, prisons, and the broader criminal justice system;¹⁸ legal education, law school, and the legislature;¹⁹ and the administration of criminal and civil justice generally. The legal profession has seen a heightened focus on issues of diversity and equality,²⁰ raising questions about the consequences of gendered (masculine) cultures of legal practice—the social effects of “what men do” within specific, situated contexts.²¹ Men’s practices, taken together and cumulatively, have been understood to reproduce distinctive cultural forms and belief structures that have deleterious consequences for women (and, depending on the reading, some categories of “subordinated” men).²²

Theoretical Project in Law, 27 J. L. & Soc’y. 351 (2000) (explaining current theoretical debates within feminist legal studies and exploring and critiquing dominant trends in feminist theory); Ngaire Naffine, *In Praise of Legal Feminism*, 22 LEGAL STUD. 71 (2002) [hereinafter Naffine, *Legal Feminism*] (considering the purposes, accomplishments, and difficulties of feminist legal scholarship in broad terms).

¹⁷ See, e.g., JOAN BROCKMAN, GENDER IN THE LEGAL PROFESSION: FITTING OR BREAKING THE MOULD (2001); MARY JANE MOSSMAN, THE FIRST WOMEN LAWYERS: A COMPARATIVE STUDY OF GENDER, LAW AND THE LEGAL PROFESSIONS (2006); HILARY SOMMERLAD & PETER SANDERSON, GENDER CHOICE AND COMMITMENT: WOMEN SOLICITORS IN ENGLAND AND WALES AND THE STRUGGLE FOR EQUAL STATUS (1998).

¹⁸ See *infra* note 87; see also Yvonne Jewkes, *Men Behind Bars: “Doing” Masculinity as an Adaptation to Imprisonment*, 8 MEN & MASCULINITIES 44 (2005) (discussing the use of “manliness” and “hypermasculinity” as a prison coping strategy); PRISON MASCULINITIES (Don Sabo, Terry A. Kupers & Willie London eds., 2001) (focusing on understanding the lives of men in prison through a gendered frame); LOUISE WESTMARLAND, GENDER AND POLICING: SEX, POWER AND POLICE CULTURE (2001) (focusing on the connections between street policing, gender, and occupational cultures).

¹⁹ See, e.g., COLLIER, MEN, LAW AND GENDER, *supra* note 5, at 53–94; Richard Collier, *The Changing University and the (Legal) Academic Career—Rethinking the Relationship between Women, Men and the ‘Private Life’ of the Law School*, 22 LEGAL STUD. 1 (2002); Richard Collier, *Masculinism, Law and Law Teaching*, 19 INT’L. J. SOC. LAW 427 (1991) [hereinafter, Collier, *Masculinism, Law and Teaching*]; Richard Collier, *‘Nutty Professors’, ‘Men in Suits’ and ‘New Entrepreneurs’: Corporeality, Subjectivity and Change in the Law School and Legal Practice*, 7 SOC. & LEGAL STUD. 27 (1998); Margaret Thornton, *Hegemonic Masculinity and the Academy*, 17 INT’L. J. SOC. LAW 115 (1989).

²⁰ See, e.g., THE LAW SOCIETY, THE LAW SOCIETY EQUALITY AND DIVERSITY POLICY AND STRATEGY (2005) (diversity strategy, policy and action plan of the organization that regulates and represents solicitors in England and Wales).

²¹ See generally SPACES OF MASCULINITIES (Bettina van Hoven & Kathrin Hörschelmann eds., 2005) (on the “spaces” of masculinities and gender constructions).

²² Steve Hall, *Daubing the Drudges of Fury: Men, Violence and the Piety of the ‘Hegemonic Masculinity’ Thesis*, 6 THEORETICAL CRIMINOLOGY 35 (2002) (presenting a

In challenging these gendered cultures, a rich body of theoretical and empirical feminist scholarship has questioned how the masculinity or “masculinism” of law’s institutions and practices has been linked, at different historical moments, to the reproduction of gendered and discriminatory beliefs and practices.²³ Distinctive ideas about masculinity have informed studies of, for example, the marginalizing effects on women of homosocial and homophobic cultures in law,²⁴ and the sexualization of women’s bodies across many legal workplaces, accompanying a denial of women’s corporeality.²⁵ Feminist work has charted the cultural dissociation of women from gendered ideas of authority; for example, from the possession of the “authoritative speaking voice,”²⁶ the voice or gravitas deemed essential to being a “successful” lawyer.²⁷ Women have been associated with normative gendered assumptions about the personal domain, a correlation that has historically privileged a male persona and model of professionalism²⁸ premised on an elaborate silencing of the contingency and structurally grounded nature of men’s (but most certainly not women’s) “private” lives.²⁹ Finally, feminist scholarship has identified the persistent benchmarking of women in law against a normative ideal figure, a “man of law.” This individual is understood simultaneously (and somewhat paradoxically) to be both gendered (as male/masculine: assertive, rational, competent, unemotional, and so on) and equally as gender-neutral, notably in relation to commitments

critique of the class-based assumptions that have shaped much of the discussion of hegemonic masculinity in the context of crime and criminology).

²³ “Masculinism is the ideology that justifies and naturalizes male domination [It] takes it for granted that there is a fundamental difference between men and women, it assumes that heterosexuality is normal, it accepts without question the sexual division of labour, and it sanctions the political and dominant role of men in the public and private spheres.” ARTHUR BRITTAN, *MASCULINITY AND POWER* 4 (1989).

²⁴ See Sharon R. Bird, *Welcome to the Men’s Club: Homosexuality and the Maintenance of Hegemonic Masculinity*, 10 *GENDER & SOC’Y* 120 (1996); Christine M. Bell, *All I Really Need to Know I Learned in Kindergarten (Playing Soccer): A Feminist Parable of Legal Academia*, 7 *YALE J.L. & FEMINISM* 133 (1995); Thornton, *supra* note 19; Collier, *Masculinism, Law and Teaching*, *supra* note 19.

²⁵ See Margaret Thornton, *Authority and Corporeality: The Conundrum for Women in Law*, 6 *FEMINIST LEGAL STUD.* 147 (1998).

²⁶ Judith E. Grbich, *The Body in Legal Theory*, in *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* 61, 75 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

²⁷ See Thornton, *supra* note 25 (discussing gendered conceptions of authority in law and their implications for women).

²⁸ See Stephen Whitehead, *Identifying the Professional “Man”-ager: Masculinity, Professionalism and the Search for Legitimacy*, in *GENDER AND THE PUBLIC SECTOR: PROFESSIONALS AND MANAGERIAL CHANGE* 85 (Jim Barry, Mike Dent & Maggie O’Neill eds., 2003) (discussing the concept of (men’s) professionalism as defined by organizational and identity dimensions).

²⁹ See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) [hereinafter FINEMAN, *THE NEUTERED MOTHER*] (presenting a call for family law to rethink conceptions of intimacy, caregiving, and dependency); see also Stephen M. Whitehead, *Man: The Invisible Gendered Subject?*, in *THE MASCULINITIES READER*, *supra* note 1, at 351 (discussing how gendered dimensions of aspects of men’s lives have been rendered invisible).

associated with caring relationships and practices that fall outside the sphere of paid employment.³⁰

Attempts within the study of men and masculinities to depict, in Raewyn Connell's terms, the "big picture"³¹ of gender hierarchies in the public sphere reveals, like this rich body of feminist scholarship, that men have historically dominated not just the institutions of law but also government, business, and the "world of work" generally.³² This dominance has been described by Stephen Whitehead as part of the "heroic project" of the modern "public man," informing gendered ideas of citizenship and sociality.³³ In relation to law, diverse institutions have been marked by systemic gendered inequalities in ways that connect directly to the masculine nature of law's cultures and practices. As Ann McGinley astutely notes in the context of her analysis of masculinities and workplace norms, masculinities theory can "contradict[] the notion that women 'choose' to work in less equal positions" and "demonstrate that particular practices occur 'because of sex.'"³⁴ Importantly, these practices can be "sufficiently 'severe or pervasive' to create a hostile work environment for women or men who do not conform to gender expectations."³⁵ For some writers, however, it is not so much the gendered character of law's practices and institutions that is at issue as the essentially masculine nature of law itself.

Legal Methods and Reasoning

In questioning how this masculine culture of law connects to the social power of men, feminist work secondly has challenged the gendered nature of law's methods and reasoning. Within earlier liberal-progressive feminist legal scholarship,³⁶ linked to what Sandra Harding has termed "feminist empiricism," the very maleness or masculinity of law appeared as something

³⁰ For an excellent discussion of gender norms in the workplace, see Kathryn Abrams, Book Review, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745 (2000) (reviewing JOAN WILLIAMS, UNDBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000)).

³¹ R. W. Connell, *The Big Picture: Masculinities in Recent World History*, 22 THEORY & SOC'Y. (SPECIAL ISSUE: MASCULINITIES) 597 (1993).

³² See JEFF HEARN, MEN IN THE PUBLIC EYE: THE CONSTRUCTION AND DECONSTRUCTION OF PUBLIC MEN AND PUBLIC PATRIARCHIES (1992); JEFF HEARN, THE GENDER OF OPPRESSION: MEN, MASCULINITY, AND THE CRITIQUE OF MARXISM (1987) (exploring the idea of "public" masculinities).

³³ WHITEHEAD, *supra* note 1, at 117; see also R. W. Connell, *Men, Gender and the State*, in AMONG MEN: MOLDING MASCULINITIES, VOLUME 1, 15 (Soren Ervo & Thomas Johansson eds., 2003) (exploring the relationship between men and the state, focusing on contemporary notions of gender, power and globalization).

³⁴ Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 433 (2004).

³⁵ *Id.*

³⁶ NAFFINE, LAW & THE SEXES, *supra* note 16, at 3-6.

that served to distort the gaze of an otherwise neutral observer.³⁷ The “sexism” and “sexist” bias of law was interlinked to the way law embodied certain “masculine” ideals that resulted from the empirical dominance by men of law’s institutions.³⁸ Underscoring the above model of the (benchmark) “man of law” is a particular *kind* of masculinity, one broadly culturally associated with white, middle and upper-middle class, and able-bodied men. This social group has historically dominated—and continues to dominate—the upper echelons of law, government, and business.³⁹

In contrast to such work, a rather different strand of feminist scholarship has questioned the assumptions about law that underscore this liberal-progressive position.⁴⁰ Here what is at issue is not so much the question of who dominates law’s institutions, but rather the gendered nature of legal method and reasoning. This move involves a subtle shift in how masculinity is seen as connected to law. In 1984 Carol Smart, in her book *The Ties That Bind*, questioned whether the fact particular legal agents may be understood as “subscribing to sexist attitudes to protect their material interests [necessarily] . . . render[ed] the law as a whole sexist.”⁴¹ In contrast, for those writers working within what Ngarie Naffine subsequently termed a second phase feminist tradition, a link was made explicit between law’s status as an andocentric, positivist discipline and the gendered (masculine) nature of law’s governance, institutions, and jurisprudence.⁴²

Law, implicated with other phallogocentric, totalizing, and oppressive knowledge formations, was seen to have historically effaced the specificities of women’s distinctive experiences in its embodiment of a particular masculine worldview. Thus at the very moment classic tenets of liberal legalism, such as individualism, reason, autonomy, and freedom were refigured as somehow quintessentially “masculine” values,⁴³ and a powerful critique of the limits of formal equality and gender neutrality was beginning to inform

³⁷ SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* 24–25 (1986); see NGAIRE NAFFINE, *FEMINISM AND CRIMINOLOGY* 30–37 (1996) (on feminist empiricism, in particular in relation to law and crime).

³⁸ Such an approach informed a number of key and influential texts of the 1970s and 1980s such as SUSAN ATKINS & BRENDA HOGGETT, *WOMEN AND THE LAW* (1984); ALBIE SACHS & JOAN HOFF WILSON, *SEXISM AND THE LAW: A STUDY OF MALE BELIEFS AND LEGAL BIAS IN BRITAIN AND THE UNITED STATES* (1978).

³⁹ See generally NAFFINE, *LAW & THE SEXES*, *supra* note 16.

⁴⁰ See generally Beverley Brown, *Reassessing the Critique of Biologism*, in *FEMINIST PERSPECTIVES IN CRIMINOLOGY* 41 (discussing the mistargeting by feminism of biologism in critiques of criminology); Carol Smart, *Feminist Approaches to Criminology or Postmodern Woman Meets Atavistic Man*, in *FEMINIST PERSPECTIVES IN CRIMINOLOGY* 70, 70–84 (Lorraine Gelsthorpe & Allison Morris eds., 1990) (arguing that the enterprise of criminology for feminism is problematic and perhaps feminist theory need not engage).

⁴¹ CAROL SMART, *THE TIES THAT BIND: LAW, MARRIAGE AND THE REPRODUCTION OF PATRIARCHAL RELATIONS* 17 (1984).

⁴² NAFFINE, *LAW & THE SEXES*, *supra* note 16, at 6–12.

⁴³ See SMART, *supra*, note 16 (presenting, from a feminist poststructuralist perspective, a critique of what the author sees as the essentialism of such approaches).

feminist legal thought,⁴⁴ law was not simply equated with men's power. Law constituted, in some accounts at least, men's power in its purest form. Oft quoted, but summarizing this argument neatly: "the state is male in the feminist sense. The law sees and treats women the way men see and treat women."⁴⁵ Law's purported neutrality is simply a mask for the masculinity of its judgments.⁴⁶

Masculinity and the Social Construction of "Men" in Legal Discourse

Third and finally, in challenging what came to be seen as the essentialism and reductionism of the above approaches, and committed to the rejection of categorical thinking underway within sociological studies of masculinity at the time,⁴⁷ feminist legal scholarship during the late 1980s and early 1990s sought to look at masculinity in a rather different way. In part, this shift reflected the growing impact of postmodernism and post-structuralism across the social sciences, arts, and humanities by the mid 1980s.⁴⁸ Once again, however, a conceptualization of masculinity remained central to how the relationship between law and the power of men was understood.

The "second phase" work on the masculine nature of law was criticized for its tendency to conceive of all men as a homogenous group, and of law itself as somehow akin to an embodiment of the power of all men. The problem, critics suggested, lay in how such an association between law, masculinity, and male power effaced the diversity and complexity of men's lives, and the fact that not all men might be empowered (by law) in the same

⁴⁴ See MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991) (commenting on the unintended consequences of law reform).

⁴⁵ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635, 644 (1983) [hereinafter MacKinnon, *Feminism, Marxism*]; see generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) (exploring the interconnections between traditional liberal legal methods and conceptions of equality, patriarchy, and women's subordination). For critiques of MacKinnon's position, see DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW* 119-64 (1991); Drucilla Cornell, Book Review, *Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's 'Toward a Feminist Theory of the State,'* 100 *YALE L.J.* 2247 (1991).

⁴⁶ "Once masculinity appears as a specific position, not just the way things are, its judgments will be revealed in process and procedure, as well as adjudication and legislation." MacKinnon, *Feminism, Marxism, supra* note 45, at 658. Male dominance "is perhaps the most pervasive and tenacious system of power in history . . . it is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality." *Id.* at 638-39.

⁴⁷ See, e.g., CONNELL, *GENDER AND POWER, supra* note 13.

⁴⁸ See, e.g., SMART, *supra* note 16 (theme evident in her arguments); see also CHRIS WEEDON, *FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY* (1987) (a work of synthesis, providing a useful summary of the debates at this time).

way.⁴⁹ This theme became of heightened significance within the critical study of men and masculinities during the 1980s and early 1990s. Within work on masculinity, notably following the publication of Raewyn Connell's book *Gender and Power* in 1987, a pro-feminist engagement with power and social structure was meshed to an interrogation, not of a singular masculinity, but the plural masculinities.⁵⁰ Similarly in legal studies, drawing on related concerns about anti-essentialism⁵¹ and intersectionality,⁵² feminist work began increasingly to focus on the question of whether, while groups of men might not have equal access to cultural, symbolic, or economic capital, all men, albeit in different ways, might still be seen as the beneficiaries of patriarchal social systems.⁵³

In taking up the question asked by Smart in 1984, therefore, as to whether the fact that legal agents may subscribe to sexist attitudes to protect material interests necessarily rendered law itself "somehow masculine in nature," third-wave feminist legal scholarship by the early 1990s was engaged in a critique of essentialist conceptualizations of masculinity.⁵⁴ Ascribing to the category "Woman" an essential ontological status did more than negate the discursive construction of the (feminist) subject Woman (the "Woman" of law).⁵⁵ What such an approach also achieved was a sidestepping of the

⁴⁹ See, e.g., SMART, *supra* note 16 (presenting a critique of earlier essentialist feminist approaches which, Smart suggests, had failed to consider such diversity).

⁵⁰ See, e.g., MEN, MASCULINITIES & SOCIAL THEORY (Jeff Hearn & David Morgan eds., 1990).

⁵¹ See BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981) [hereinafter HOOKS, *AIN'T I A WOMAN*]; BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984) [hereinafter HOOKS, *FEMINIST THEORY*]; ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); *FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER* (Nancy E. Dowd & Michelle S. Jacobs eds., 2003); see also PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (1990); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

⁵² Work interrogating the intersections of class, race, gender, age, and sexual orientation, for example, has questioned the hierarchies that can exist between women as well as between women and men. See generally INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION (Emily Grabham, Davina Cooper, Jane Krishnadas & Didi Herman eds., 2009); HOOKS, *AIN'T I A WOMAN*, *supra* note 51; HOOKS, *FEMINIST THEORY*, *supra* note 51; Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1990–1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990–1991); Leslie McCall, *The Complexity of Intersectionality*, 30 SIGNS 1771 (2005); see also RACE, CLASS, AND GENDER: AN ANTHOLOGY (Margaret L. Andersen & Patricia Hill Collins eds., 5th ed. 2004).

⁵³ See, e.g., SMART, *supra* note 41 (as an example of feminist work focusing on whether men, despite their differences, are all beneficiaries of patriarchal social systems).

⁵⁴ See generally *FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER*, *supra* note 51 (a collection of essays critical of essentialist approaches to law, and arguing for the need to more fully integrate intersectional analysis into feminist legal scholarship).

⁵⁵ See generally SMART, *supra* note 16 (a study, from a poststructuralist perspective, of the discursive construction of the "Woman" of law).

diverse positionality of—and differences within—men’s lives. Seeing this earlier work ultimately as andocentric as the theories it purported to supersede,⁵⁶ feminist legal study informed by postmodernism and post-structuralism questioned an approach to masculinity which embraced, not least in a depiction of seemingly omnipotent male sexuality and, at times, a disavowal of heterosexuality,⁵⁷ a profound essentialism, “a paradoxical mix of debilitating pessimism and unfathomable optimism.”⁵⁸ Raising broadly similar questions to those being asked in the sociological studies at the time, it was difficult to then see what a progressive *politics* of masculinity might be, and, importantly, what such an approach might mean for the future of feminism itself (and, indeed, for relationships between women and men).⁵⁹

Set against this context, Carol Smart’s influential book *Feminism and the Power of Law*,⁶⁰ published in 1989, exemplifies themes taken up in the study of masculinities and law during the 1990s.⁶¹ In this work, Smart sought to re-address her earlier (1984) questioning of whether there might be a distinction between “legal regulation” and “male control.” Smart drew on the broadly Foucauldian understanding of the relation between law and power that was becoming increasingly resonant across the social sciences at the time, prefiguring, in some respects, later studies concerned with law and governance.⁶² Smart’s analysis began, however, from a belief that although law may be constituted as masculine on both empirical and cultural grounds (that, at the very least, “doing law” and being identified as masculine can be

⁵⁶ *Id.* (arguing this point and critical, in particular, of feminism’s attempts to present a “grand theory” of women’s oppression).

⁵⁷ A flavor of the debates around heterosexuality and feminism at the time can be found in LYNNE SEGAL, *STRAIGHT SEX: RETHINKING THE POLITICS OF PLEASURE* (1994) (describing strategic and moral problems with some feminist engagements with heterosexuality); see also Wendy Hollway, *Recognition and Heterosexual Desire*, in *THEORISING HETEROSEXUALITY: TELLING IT STRAIGHT* 91 (Diane Richardson ed., 1996) (questioning psychological aspects of the taken-for-granted nature of heterosexuality, and exploring how assumptions about heterosexuality have encoded and structured diverse aspects of everyday life); Carol Smart, *Desperately Seeking Post-Heterosexual Woman*, in *SEX, SENSIBILITY AND THE GENDERED BODY* 222 (Jane Holland & Lisa Adkins eds., 1996) (examining the discursive construction of heterosexuality).

⁵⁸ Emily Jackson, *Catharine MacKinnon and Feminist Jurisprudence: A Critical Reappraisal*, 19 J. L. & Soc’y 195, 211 (1992).

⁵⁹ LYNNE SEGAL, *IS THE FUTURE FEMALE? TROUBLED THOUGHTS ON CONTEMPORARY FEMINISM* (1987) (discussing the importance of a socialist feminist analysis and a shift toward an approach that does not polarize differences between women and men, as has often been done). *But see* ROSALIND COWARD, *SACRED COWS: IS FEMINISM RELEVANT TO THE NEW MILLENNIUM?* (1999) (arguing that feminism has often failed to acknowledge its successes and progress in many areas).

⁶⁰ SMART, *supra* note 16.

⁶¹ *E.g.*, COLLIER, *supra* note 4.

⁶² See MICHEL FOUCAULT, *THE FOUCAULT READER* (Paul Rabinow ed., 1984); MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977* (Colin Gordon ed., Colin Gordon, Leo Marshall, John Mepham & Kate Soper trans., 1980). For a general discussion of law and governance, see PAT O’MALLEY, *RISK, UNCERTAINTY AND GOVERNMENT* (2004); NIKOLAS ROSE, *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF* (1990).

congruous), this was not because of any straightforward biological imperative. Rather:

[L]aw is not rational because men are rational . . . law is constituted as rational as are men, *and men as the subjects of a discourse of masculinity* come to experience themselves as rational—hence suited to a career in law. In attempting to transform law, feminists are not simply challenging legal discourse *but also naturalistic assumptions about masculinity*.⁶³

As with the earlier feminist accounts, a challenge to a dominant notion of masculinity and a feminist critique of law were fused. What is significant about the above passage, however, is the notion of men “as the subjects of a discourse of masculinity.”⁶⁴ This draws on both the discourse theory increasingly influential in feminist legal thought at the time and the engagements with rhetoric, interpretation, and hermeneutics informing critical legal scholarship by the late 1980s and early 1990s.⁶⁵ It is an approach, importantly, that opens out to analyze the questions noted above regarding the plurality and contingency of discourses which speak of men and masculinity across diverse institutional and cultural contexts (including, but not confined to, law), the issues eradicated within the second phase feminist work discussed above.

Smart’s argument was built on a growing skepticism about the nature of a “quest for a feminist jurisprudence”⁶⁶ within the context of a debate about the possibilities, and pitfalls, of a postmodern legal feminism.⁶⁷ However, it was also attuned to sociological engagements with masculinity, embracing a recognition that law, far from unproblematically oppressing women, could in certain instances be open-ended and contradictory in how it reproduced (or challenged) patriarchal relations.⁶⁸ Turning attention to the construction of the “Woman” of legal discourse,⁶⁹ in short, inescapably brought into question the nature of the “Man” of legal—and, indeed, of feminist—discourse.⁷⁰ If the fixity of law and feminism’s subject Woman was displaced,

⁶³ SMART, *supra* note 16, at 87 (emphasis added).

⁶⁴ *Id.*

⁶⁵ Of particular influence on debates in the United Kingdom at this time, for example, see generally PETER GOODRICH, *READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHODS AND TECHNIQUES* (1986); PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS* (1987).

⁶⁶ SMART, *supra* note 16, at 66–68.

⁶⁷ See MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* (1992) (discussing generally the relationship between postmodernism and feminism).

⁶⁸ Carol Smart, *Feminism and Law: Some Problems of Analysis and Strategy*, 14 *INT’L. J. SOC. LAW* 109 (1986) (arguing for a theoretical approach in feminist legal scholarship that recognizes the often open-ended and contradictory nature of law reform).

⁶⁹ See generally Carol Smart, *The Woman of Legal Discourse*, 1 *SOC. & LEGAL STUD.* 29 (1992); see also KATHERINE O’DONOVAN, *FAMILY LAW MATTERS* (1993) (discussing the context of the “woman” of family law).

⁷⁰ Compare KATHY E. FERGUSON, *THE MAN QUESTION: VISIONS OF SUBJECTIVITY IN FEMINIST THEORY* (1993) (questioning the division between male and female, man and

revealing (her)self to be a sexed, classed, and raced subject, a question then needed to be asked by legal scholars: what did this mean for feminism's—or law's—"Man?" For all too understandable political reasons, this may not have been a primary concern for legal feminism, but it was, at least, on the agenda in legal scholarship.⁷¹

In the next Section, I consider how law and society scholars took up these questions during the 1990s and to the present day,⁷² seeking to develop an engagement with masculinities and law as well as explore the "man question."⁷³

III. THE CRITICAL STUDY OF MEN, MASCULINITIES, AND LAW

A. *Background: The "Pro-Feminist" Study of Masculinities*

The relationship between men and feminism is, of course, a politically and conceptually problematic issue,⁷⁴ raising questions about how engagement with masculinity connects, at particular moments, to the terrain of so-

woman, and calling for feminism to turn on its head the "woman question" and explore the construction of masculinity as a social problem) with *RETHINKING MASCULINITY: PHILOSOPHICAL EXPLORATIONS IN LIGHT OF FEMINISM* (Larry May, Robert Strikwerda & Patrick Hopkins eds., 2d ed. 1996) (a collection of pro-feminist essays critical of aspects of contemporary masculinity and exploring the diversity of ways of being a male in Western culture).

⁷¹ Writing in 1993, O'Donovan observed, "it is for other men to make us see masculinities, and to bring these into question." O'DONOVAN, *supra* note 69, at 88. For a general discussion of the relation between men and feminism, see, for example, *BETWEEN MEN AND FEMINISM* (David Porter ed., 1992); *MASCULINITY STUDIES AND FEMINIST THEORY: NEW DIRECTIONS* (Judith Kegan Gardiner ed., 2002); *MEN DOING FEMINISM* (Tom Digby ed., 1998); *MEN IN FEMINISM* (Alice Jardine & Paul Smith eds., 1987); Peter Halewood, *White Men Can't Jump: Critical Epistemologies, Embodiment, and the Praxis of Legal Scholarship*, 7 *YALE J. L. & FEMINISM* 1 (1995).

⁷² See COLLIER, *MEN, LAW AND GENDER*, *supra* note 5; Dowd, *supra* note 5.

⁷³ A similar approach has informed interrogations of this "man question," whether in relation to law or feminist thought. See, e.g., FERGUSON, *supra* note 70; ADRIAN HOWE, *SEX, VIOLENCE AND CRIME: FOUCAULT AND THE 'MAN' QUESTION* (2008); NANCY DOWD, *THE MAN QUESTION: MEN, SUBORDINATION AND PRIVILEGE* (forthcoming 2010).

⁷⁴ *MEN DOING FEMINISM*, *supra* note 71 (discussing male responses to feminism as well as feminist responses to pro-feminist men and the study of masculinities, arguing that experiences of feminist men are diverse); *MASCULINITY STUDIES AND FEMINIST THEORY: NEW DIRECTIONS*, *supra* note 71 (examining how feminism's ethical and political agendas have impacted ideas about masculinity and manhood, calling for a new relationship between men, masculinity studies, and feminist theory); Halewood, *supra* note 71 (exploring the relationship between male legal scholars, feminism, and critical race theory, describing some of the possibilities, and dangers, that arise when white male legal scholars seek to write about other social groups); *MEN IN FEMINISM*, *supra* note 71 (an early account of the relationship between feminists and pro-feminist masculinity scholars, considering both the benefits and disadvantages of men's participation in feminism); *BETWEEN MEN AND FEMINISM*, *supra* note 71 (discussing male responses to feminist critiques of masculinity and exploring the relationship between men and feminism in relation to diverse areas of men's social, sexual, and political lives).

cial movements in the field of law.⁷⁵ Nonetheless, much of the work produced in legal studies since the early 1990s can be broadly aligned with the argument set out by Connell in 1987. Connell contends that a politics of masculinity should be the business of those men who have bared the brunt of feminist critiques of masculinity.⁷⁶ The starting point, in contrast to the essentialist presuppositions identified within one strand of feminist thought, is precisely the recognition that “[h]eterosexual men are not excluded from the basic human capacity to share experiences, feelings and hopes.”⁷⁷

What kinds of issues have been addressed in this work? Early pro-feminist studies of men and masculinities, including key texts produced during the 1980s and early 1990s, tended to be informed by concerns about power, social structure, violence, and sexuality that had shaped the politics of the men’s anti-sexist movements of the 1970s.⁷⁸ In marked contrast to these broadly materialist and structurally based accounts, however, research produced during the 1990s was increasingly marked by an engagement with post-structuralism and postmodernism, in much the same way as the developments taking place within feminist legal studies detailed above.⁷⁹ Thus, we find during this period an increasing focus on the “discursive production” of masculinities within specific institutional and cultural contexts, alongside a growing concern with performativity,⁸⁰ cultural representation, and gender(ed) identity.⁸¹ Elsewhere there was a refocusing on the idea of the (gendered) male subject.⁸² In more recent years, a further shift can be

⁷⁵ See also ASHE, *supra* note 3 (on the terrain of contemporary masculinity politics). For a general discussion of the politics of masculinities within social movements, see MICHAEL A. MESSNER, *POLITICS OF MASCULINITIES: MEN IN MOVEMENTS* (1997).

⁷⁶ CONNELL, *GENDER AND POWER* *supra* note 13, at xiii.

⁷⁷ *Id.*; see also Halewood, *supra* note 71 (describing the dangers that arise when white male scholars seek to write about the experiences of other social groups); Nancy Levit, *Feminism for Men: Legal Ideology and Construction of Maleness*, 43 *UCLA L. Rev.* 1037 (1996) (discussing generally the relationship between men and feminism in the context of law).

⁷⁸ For a sense of the discussions of these issues in British legal theory, see ANDREW TOLSON, *THE LIMITS OF MASCULINITY* (1977); *THE ACHILLES HEEL READER: MEN, SEXUAL POLITICS AND SOCIALISM* (Victor J. Seidler ed., 1991); *THE SEXUALITY OF MEN* (Andy Metcalf & Martin Humphries eds., 1985). See also HARRY CHRISTIAN, *THE MAKING OF ANTI-SEXIST MEN* (1994) (presenting stories, life histories, and a general broader understanding of anti-sexist men).

⁷⁹ See, e.g., PEASE, *supra* note 1; PETERSEN, *supra* note 1; David S. Gutterman, *Postmodernism and the Interrogation of Masculinity*, in *THE MASCULINITIES READER*, *supra* note 1, at 56.

⁸⁰ See, e.g., JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”* (1993); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

⁸¹ For a useful discussion of this literature, see ASHE, *supra* note 3, 157–60.

⁸² See, e.g., Margaret Wetherell & Nigel Edley, *Negotiating Hegemonic Masculinity: Imaginary Positions and Psycho-Discursive Practices*, 9 *FEMINISM & PSYCHOL.* 335 (1999).

traced, albeit to a rather limited degree, as insights derived from critical race theory and queer theory have begun to impact the study of masculinities.⁸³

In looking closer at the engagements with masculinity and law that resulted, it is crucial to consider what has been said—and not said—about the “man of law,” the “man question” in this work.

B. On the “Man of Law”: Legal Texts, Practices, Experiences, and Policy

Across diverse areas of law, law and society scholarship has unpacked the way ideas about men and masculinities have been understood, constructed, and depicted in law. Engaging with both practices and institutions of law, the nature of legal reasoning and methods, and the social and legal discursive construction of men and masculinities, such work has addressed the regulation of the intimate, personal and (at least apparently) “private parts” of life: love and personal commitments, sexual desires, and activities.⁸⁴ It has also questioned the world of “public man” as a subject of political and legal theory,⁸⁵ interlinking masculinity with particular ideas about the nation state, sociality, political representation and race, citizenship, and the rule of law.⁸⁶

To give no more than a flavor of the work produced, and in addition to topics already considered in this Article, critics have discussed masculinity in legal and legal-structural engagements in relation to criminal law, criminal justice, and criminology.⁸⁷ Writers have also addressed masculinity in studies of the legal regulation of the gendered workplace,⁸⁸ youth, schooling, and education,⁸⁹ and globalization, international law, and war and peace.⁹⁰

⁸³ See discussion *infra* Part V. Sex/Gender, Personal Life, and the Limits of Masculinity.

⁸⁴ See *infra* notes 97–118.

⁸⁵ See, e.g., Terrell Carver, “Public Man” and the Critique of Masculinities, 24 POL. THEORY 673 (1996).

⁸⁶ See, e.g., Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama’s Feminine Side*, 86 DENV. U. L. REV. (SPECIAL ISSUE) 633 (2009); A. Mark Liddle, *State, Masculinities and Law*, 36 BRIT. J. CRIMINOLOGY (SPECIAL ISSUE) 361 (1996); Kendall Thomas, “Masculinity,” “The Rule of Law,” and Other Legal Fictions, in CONSTRUCTING MASCULINITY 221 (Maurice Berger, Brian Wallis & Simon Watson eds., 1995).

⁸⁷ See, e.g., RICHARD COLLIER, MASCULINITIES, CRIME AND CRIMINOLOGY: MEN, HETEROSEXUALITY AND THE CRIMINAL(ISED) OTHER (1998) [hereinafter COLLIER, MASCULINITIES, CRIME AND CRIMINOLOGY]; JAMES W. MESSERSCHMIDT, MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY (1993); Tony Jefferson, *Masculinities and Crimes*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 535 (Mike Maguire, Rod Morgan & Robert Reiner eds., 2d. ed. 1997).

⁸⁸ See, e.g., McGinley, *supra* note 34.

⁸⁹ See, e.g., MIKE O’DONNELL & SUE SHARPE, UNCERTAIN MASCULINITIES: YOUTH, ETHNICITY AND CLASS IN CONTEMPORARY BRITAIN (2000); Ann Phoenix, *Neoliberalism and Masculinity: Racialization and the Contradictions of Schooling for 11- to 14-Year-Olds*, 36 YOUTH & SOC’Y 227 (2004).

⁹⁰ See, e.g., R. W. CONNELL, *Globalization, Imperialism, and Masculinities*, in HANDBOOK OF STUDIES ON MEN & MASCULINITY, *supra* note 1, at 71.

Research too has explored the (hetero)sexuality of law,⁹¹ the interconnections between gender and law, families, and parenting cultures,⁹² and the relationship between social class, race, ethnicity, and law.⁹³ There has been an explosion of writings on issues around men's bodies, reproduction, and men's health,⁹⁴ raising questions about the content and scope of health care law.⁹⁵ Finally, there exists an extensive literature on how masculinity connects to the seemingly intractable problem of men's violence(s) against women, children, and other men, and how legal systems have, and have not, developed responses to such violence.⁹⁶

It is impossible to summarize all the themes contained within such a rich and varied literature. However, it is necessary, by way of indicating the arguments utilized and theoretical frameworks adopted, to look more closely at how ideas about masculinity have been deployed. Three key themes have been of particular importance in delineating the contours of the engagement

⁹¹ See, e.g., L. J. Moran, *A Study in the History of Male Sexuality in Law: Non-Consummation*, 1 L. & CRITIQUE 155 (1990); Richard Collier, "The Art of Living the Married Life": *Representations of Male Heterosexuality in Law*, 1 SOC. & LEGAL STUD. 543 (1992); O'DONOVAN, *supra* note 69 at 65–75; see also LESLIE J. MORAN, *THE HOMOSEXUAL(ITY) OF LAW* (1996) (exploring the category of "homosexual" within the law, both the specific instances and uses, as well as the significance of the category within the wider legal sphere); Richard Collier, *Straight Families, Queer Lives? Heterosexual(izing) Family Law*, in LAW AND SEXUALITY: THE GLOBAL ARENA 164 (Carl Stychin & Didi Herman eds., University of Minnesota Press 2001) (2000) (on the construction of "heterosexuality as a social practice" within family law and policy debates in Britain); Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J. L. & FEMINISM 257 (2008–2009) (discussing the influences gender has on heterosexist and homophobic stereotypes of gay parents in custody and visitation cases).

⁹² See COLLIER, *MEN, LAW AND GENDER*, *supra* note 5, at 175–278 (on the relationship between men and masculinities in the context of family law policy and the contemporary legal profession).

⁹³ See, e.g., Crenshaw, *supra* note 52; Harris, *supra* note 52; RACE, CLASS, AND GENDER: AN ANTHOLOGY, *supra* note 52; see also BLACK MEN ON RACE, GENDER, AND SEXUALITY (Devon W. Carbado ed., 1999) (essays of African American men on gender, sexuality, race, and class); Patricia J. Williams, *Meditations on Masculinity*, in CONSTRUCTING MASCULINITY, *supra* note 86, at 238 (personal reflections and narratives on race and class in daily life).

⁹⁴ See, e.g., BIRD FEATHERSTONE, MARK RIVETT & JONATHAN SCOURFIELD, *WORKING WITH MEN IN HEALTH AND SOCIAL CARE* (2007); STEVE ROBERTSON, *UNDERSTANDING MEN AND HEALTH: MASCULINITIES, IDENTITY AND WELL-BEING* (2007).

⁹⁵ See, e.g., Sally Sheldon, *ReConceiving Masculinity: Imagining Men's Reproductive Bodies in Law*, 26 J. L. & SOC'Y 129 (1999). For a general discussion of the relation between law and the gendering of the male body, see MICHAEL THOMSON, *ENDOWED: REGULATING THE MALE SEXED BODY* (2008).

⁹⁶ See generally SUZANNE E. HATTY, *MASCULINITIES, VIOLENCE, AND CULTURE* (2000) (exploring violence as a gendered (masculine) activity using a postmodern analysis); JEFF HEARN, *THE VIOLENCES OF MEN: HOW MEN TALK ABOUT AND HOW AGENCIES RESPOND TO MEN'S VIOLENCE TO WOMEN* (1998) (discussing different theoretical frameworks used to examine men's violence against women as well as men's own conceptualization of that violence); *MALE VIOLENCE* (John Archer ed., 1994) (collecting essays detailing many aspects of and theories addressing men's violence); *MASCULINITIES AND VIOLENCE* (Lee H. Bowker ed., 1998) (assembling essays that discuss causes, objects, and contexts of male violence).

with the “man of law” in legal study. Each tracks, in different ways, to the questioning of masculinity contained within feminist legal scholarship discussed above. In the remainder of this Section, I will explore these themes in more detail and address how a shifting legal-political context has re-framed, over the past two decades, aspects of feminist and pro-feminist understandings of masculinity and law in a number of significant ways.

C. Law, Autonomy, and the Masculine Subject: The Example of Fatherhood

Within work on gender and law, an individualized notion of autonomy, central to liberal conceptions of the self, has been associated with a set of beliefs about the nature of masculinity.⁹⁷ This association can be seen in feminist legal scholarship and the critical study of masculinities in, for example, the depiction of a model of autonomy based upon a historical separation of men from areas of social life connected to the affective domain, to relations of vulnerability, care, dependency, and personal life.⁹⁸ Martha Fineman has argued in the area of family law that this autonomous subject is marked by gendered ideas of self-sufficiency and moral independence, self governance, and liberty—themes central to Western political culture, embodying culturally encoded (as masculine) ideas about the nature of a self-fashioning individual, a figure in control of his or her life.⁹⁹

Studies of law and masculinities have questioned related ideas about male subjectivity enmeshed with this model of the autonomous subject. In accounts of heterosexuality, parenthood, and family practices, for example, socio-legal scholars have unpacked and challenged the political and practical consequences of assumptions in law and policy about masculinity and men’s physical and emotional distance from children, childcare, and associated ideas of dependency and vulnerability.¹⁰⁰ Ideas about masculinity, it has

⁹⁷ See RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993) (discussing the idea of autonomy in law); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986) (discussing the political theory of liberalism and the nature of freedom, value-neutrality, rights, and equality in law); see also VICTOR J. SEIDLER, *UNREASONABLE MEN: MASCULINITY AND SOCIAL THEORY* (1994) (exploring conceptions of and connections between men, reason, and power throughout various social theories); Victor Jeleniewski Seidler, *Men, Heterosexualities and Emotional Life*, in *MAPPING THE SUBJECT: GEOGRAPHIES OF CULTURAL TRANSFORMATION* 171 (Steve Pile & Nigel Thrift eds., 1995) (on the tendency for men to claim (their) reason as final authority and arbiter of social Truth).

⁹⁸ See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) [hereinafter FINEMAN, *THE AUTONOMY MYTH*]; FINEMAN, *THE NEUTERED MOTHER*, *supra* note 29.

⁹⁹ FINEMAN, *THE AUTONOMY MYTH*, *supra* note 98 (making this argument through analysis of a range of areas of law and a critique of the “foundational myths” of family law).

¹⁰⁰ See, e.g., RICHARD COLLIER & SALLY SHELDON, *FRAGMENTING FATHERHOOD: A SOCIO-LEGAL STUDY* (2008) (discussing the way that fatherhood has been understood, constructed, and regulated within law and sketching the contours of the figure of the

been argued, have informed normative understandings of family law and family life. The “flip side” of an individualized model of autonomy has been an effacing of men’s situated and interconnected lives.¹⁰¹ This is a theme particularly evident within debates around an ethics of care,¹⁰² as well as in work that has sought to question and expose the contingency of the public/private divide.¹⁰³ In so doing, scholarship on law and gender has sought to challenge the political consequences of a historical erasure of men from understandings of the complex dependencies of social life.¹⁰⁴

However, an increasingly pressing issue, one that has resonance across legal and political-legal systems, concerns how this masculine ideal of gendered autonomy increasingly may not fit many aspects of dominant political and cultural ideas about, and the realities of, men’s social practices. This has become a significant issue in policy interventions around men in the areas of paid work, parenting cultures, and childcare, not least with regard to contemporary debates in law around fathers and fatherhood.¹⁰⁵ Sally Sheldon and I argue elsewhere that the emergence in England and Wales of a new normative model of “responsible fatherhood” in law has embodied a particular *kind* of heterosexual masculinity, one markedly different in several respects from the ideas about men and manhood, gender, autonomy, and rationality that informed earlier beliefs about fatherhood in law.¹⁰⁶ Normative ideas of fatherhood have been transformed via a complex refiguring of a nexus of assumptions that historically constituted fathers as a desirable presence within families. More specifically, this has involved a fragmentation of beliefs about the father as *heterosexual* (the sexual father), the father as fam-

father as drawn in law and social policy in England and Wales); Richard Collier, *Male Bodies, Family Practices*, in *BODY LORE AND LAWS* 149 (Andrew Bainham, Shelley Day Sclater & Martin Richards eds., 2002) (examining how ideas about male corporeality and heterosexuality inform ideas about men’s family practices in the area of family law); Richard Collier, *A Hard Time to be a Father?: Reassessing the Relationship Between Law, Policy, and Family (Practices)*, 28 *J. L. & Soc’y* 520 (2001) (discussing and questioning the idea of the “new father” as it has informed aspects of family law policy in England and Wales).

¹⁰¹ *SITUATED FATHERING: A FOCUS ON PHYSICAL AND SOCIAL SPACES* (William Marsiglio, Kevin Roy & Greer Litton Fox eds., 2005) (exploring how the relationship between fatherhood and physical space can inform men’s identities as fathers and their involvement with children).

¹⁰² See e.g., JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993); SELMA SEVENHUIJSEN, *CITIZENSHIP AND THE ETHICS OF CARE: FEMINIST CONSIDERATIONS ABOUT JUSTICE, MORALITY AND POLITICS* (1998).

¹⁰³ See generally *CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW AND PUBLIC POLICY*, *supra* note 15; ELSHTAIN, *supra* note 15; O’DONOVAN, *supra* note 15; *PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES*, *supra* note 15.

¹⁰⁴ For an early and influential example of this approach, see generally FINEMAN, *THE NEUTERED MOTHER*, *supra* note 29. See also FINEMAN, *THE AUTONOMY MYTH*, *supra* note 98 (questioning the ways gendered ideals of autonomy and self-sufficiency have informed legal policy makers’ approaches to families).

¹⁰⁵ See, e.g., COLLIER, *MEN, LAW AND GENDER*, *supra* note 5, at 128–51, 195–241. In the context of the United States, see generally, NANCY E. DOWD, *REDEFINING FATHERHOOD* (2000).

¹⁰⁶ COLLIER & SHELDON, *supra* note 100, at 114–26.

ily *breadwinner* (the worker father), and the father as a figure of masculine *authority* within the household (the father as patriarch, as embodiment of a particular kind of masculinity).

The result, we argue in the book *Fragmenting Fatherhood*,¹⁰⁷ is a contemporary ideal of fatherhood in the law, and a legal policy agenda around “engaging fathers” informed by contrasting, and often contradictory, ideas about men and masculinities, gender, and autonomy.¹⁰⁸ What has reshaped debates about fatherhood in law, interlinked to the increased centrality of formal equality and gender neutrality referred to above, is a significant shift in ideas about men and marriage, about responsibility and intimacy, and about fathers as the embodiment of a particular form of heterosexual masculinity.

D. *Embodiment: The Example of Men’s Bodies*

Interlinked with the above model of the (gendered) autonomous subject, studies in law and society have also sought to explore aspects of the embodied nature of masculinity.¹⁰⁹ This work has tended to draw on sociological studies of the body and, in particular, feminist philosophical engagements with corporeality that emerged in the wake of postmodernism and queer theory.¹¹⁰ In relation to family and criminal law, for example, it has been argued that the penis frequently appears in law as somehow subject to a man’s rational thought and control. By contrast, the vagina has tended to be presented as an always-searchable absence.¹¹¹ Related assumptions have been made around the idea of a natural sexual “fit” between the (sexed) bodies of women and men, and notions of male sexual activity and female passivity informing the determination historically of what does, and does not, constitute a legal marriage.¹¹² In the field of criminal law, the liberal, rational individual has been depicted not simply as a sexed, autonomous, and masculine subject. Rather, this individual is also a peculiarly *disembodied* being: a figure bounded, constituted as male in ways dependent on a separa-

¹⁰⁷ *Id.* at 101–37.

¹⁰⁸ See Jonathan Scourfield & Mark Drakeford, *New Labour and the ‘Problem of Men,’* 22 CRITICAL SOC. POL’Y 619 (2002) (discussing differences in the optimism and pessimism with which the New Labour government has approached men and women in its policies).

¹⁰⁹ See THOMSON, *supra* note 95; see also ALAN HYDE, BODIES OF LAW (1997) (discussing through a critical theory analysis, the multiple ways in which lawyers talk about the body in the United States).

¹¹⁰ See MOIRA GATENS, IMAGINARY BODIES: ETHICS, POWER AND CORPOREALITY (1996); ELIZABETH GROSZ, VOLATILE BODIES: TOWARD A CORPOREAL FEMINISM (1994); SEXY BODIES: THE STRANGE CARNALITIES OF FEMINISM (Elizabeth Grosz & Elspeth Probyn eds., 1995).

¹¹¹ HYDE, *supra* note 109, at 171–72.

¹¹² See, for example, the discussion of laws relating to the formation of marriage in Collier, “*The Art of Living the Married Life*”: *Representations of Male Heterosexuality in Law*, *supra* note 91; MORAN, *supra* note 91; see also O’DONOVAN, *supra* note 69, at 65–73 (in the context of a discussion of gender and family law).

tion from other men and, crucially, on the establishment of (hierarchical) differences from women.¹¹³

It has been a recurring theme in this work that while women's bodies often appear in law as somehow incomprehensible, fluid, unbounded, and defined by "openings and absences," the bodies of men, as Sally Sheldon has suggested, tend to appear rather differently.¹¹⁴ For Sheldon, like Michael Thomson, men's safe, stable, and bounded bodies signify a more tangential and contingent relation to gestation, fertility, and reproduction.¹¹⁵ In criminal law, the bodies of men have been positioned in relation to culturally contingent ideas about masculinity and a condoning of intra-male violence.¹¹⁶ Other work has questioned the encoding of men's bodies as (hetero)sexual within families, exploring the associations these bodies bring with them in terms of normative beliefs about parenting, employment, "family life," and ideas of authority, rationality, emotion, and so forth.¹¹⁷ Importantly however, as a debate about men and masculinity has secured an increasingly high policy profile in places such as the United Kingdom, questions about masculinity and embodiment have moved beyond concerns about statute and case law.¹¹⁸ A rethinking of men's responsibilities within social policy has also reshaped how law is now seen to embody and reproduce normative ideas about masculinities.

E. *Masculinities, Policy, and Practice: The Example of the Legal Profession*

Third and finally, a questioning of masculinity has occurred at the level of social policy and legal practice, as seen in the growing body of work exploring how lawyers and other legal actors "talk about men" across diverse areas of legal regulation.¹¹⁹ To consider the example of the contemporary legal profession, I have argued elsewhere that, be it with regard to cultural representations of young trainee lawyers or contemporary debates

¹¹³ See Ngaire Naffine, *Possession: Erotic Love in the Law of Rape*, 57 MOD. L. REV. 10 (1994) (examining gendered constructions of ideas of sex and sexuality in the criminal law of rape as well as questioning the idea of the male sexual subject therein).

¹¹⁴ See Sheldon, *supra* note 95; see also THOMSON, *supra* note 95; Sally Sheldon, 'Sperm Bandits,' *Birth Control Fraud and the Battle of the Sexes*, 21 LEGAL STUD. 460 (2001); Catherine Waldby, *Destruction: Boundary Erotics and Refigurations of the Heterosexual Male Body*, in SEXY BODIES: THE STRANGE CARNALITIES OF FEMINISM, *supra* note 110, at 266 (providing a general discussion of the heterosexual male body).

¹¹⁵ See also COLLIER & SHELDON, *supra* note 100, at 49–53, 64–67.

¹¹⁶ See Lois Bibbings, *Boys Will be Boys: Masculinity and Offences Against the Person*, in FEMINIST PERSPECTIVES ON CRIMINAL LAW 231 (Donald Nicolson & Lois Bibbings eds., 2000).

¹¹⁷ COLLIER, MEN, LAW AND GENDER, *supra* note 5, at 135–40.

¹¹⁸ See COALITION ON MEN AND BOYS, MAN MADE: MEN, MASCULINITIES AND EQUALITY IN PUBLIC POLICY (2009), available at <http://www.comab.org.uk> [hereinafter, COMAB].

¹¹⁹ See discussion *supra* Part II. A. Legal Practices and Institutions.

about gender and work-life balance in the United Kingdom,¹²⁰ significant political shifts have transformed how gender relates to the benchmarking of the normative (ideal) legal professional as masculine. Far from deploying a monolithic ideal of the masculine culture of legal practice in seeking to understand these changes, however, the position taken is more complex. While “circuits of social embodiment constantly involve the institutions on which . . . privileges rest,”¹²¹ contemporary law firms, for example, may interact with a range of discourses around gender in ways that produce different beliefs about masculinity within specific organizational contexts. In their discussion of globalization, law, and transnational business masculinities, Connell and Wood have observed that there is no *one* mode of participating in transnational (legal) business, just as there is no one model of transnational business masculinity or gender order “imposed” on a large law firm.¹²²

Recognizing that masculinities remain centrally related to power, processes in this context appear far more complex and contested than the deployment of any unitary model of the “man of law” would suggest.¹²³ At the very least, the differential commitments men have to dominant modes of masculinity, mediated by race, ethnicity, age and stage of life, class, sexual orientation, and so forth, suggest it is too simplistic to say that law is in any straightforward way “masculine.” It is too simplistic, at least, without noting how the normative nature of masculinity in this area has changed significantly, a point to which I will return.

I have conveyed thus far something of the way masculinity has been approached in law, the kinds of areas in which the concept has been employed, and the arguments made. A rich collection of readings, drawing on diverse approaches and methods, have explored the ways in which men—their masculinities, bodies, subjectivities, rights, responsibilities, and duties—have been constructed within legal discourse. The studies of law and masculinities considered in this Section suggest that there are multiple constructions of the gender of men available to legal and other speakers in ways that are neither natural nor limited by biology. There exists a set of conversations about men and masculinity understood as discursive creations, approached within legal studies from an overarching project of denaturalization or deconstruction. Further, the conceptualizations of masculinity that marked earlier feminist and pro-feminist work on law may

¹²⁰ COLLIER, MEN, LAW AND GENDER, *supra* note 5, at 95–128, 152–95.

¹²¹ Connell & Messerschmidt, *supra* note 10, at 852.

¹²² R. W. Connell & Julian Wood, *Globalization and Business Masculinities*, 7 MEN & MASCULINITIES 347, 362 (2005); see also Juanita Elias & Christine Beasley, *Hegemonic Masculinity and Globalization: ‘Transnational Business Masculinities’ and Beyond*, 6 GLOBALIZATIONS 281 (2009) (assessing globalization and masculinity by Connell and others, and offering a “demassification” of the notion of hegemonic masculinity).

¹²³ See also COLLIER, MEN, LAW AND GENDER, *supra* note 5, at 95–128, 152–95 (questioning the idea of a unitary “man of law” via a study of masculinities across diverse areas of legal regulation).

themselves need to be reassessed in light of the ideas about men that now circulate within different areas of contemporary legal policy.¹²⁴ If a particular kind of gendered dualism, for example, has been a key part of the entrenching of sexual divisions in law and of the “sexual contract” historically,¹²⁵ developments around gender neutrality, gender convergence, and equality have played a key role in the creation of a new set of ideas around men and masculinities. These developments have had, I have suggested, significant implications for understanding men’s position in relation to diverse social practices pertaining to law.¹²⁶

An important question remains unanswered. How adequate has the conceptualization of masculinity been in underscoring these studies of law and gender? Each of the readings discussed above can tell us something about how law constructs, sees, or otherwise produces notions of men’s gender. What this work crucially has tended not to do, however, is provide an account of the lived practices and complex everyday experiences of women and men (as well as of children). In addressing this question, it is necessary to look closer at the conceptual underpinnings of this work and in particular, at how it might relate or connect to the “real lives” of individuals. I argue it is here—in relation to the question of what men *do*—that an engagement with masculinities in legal studies has rested upon some questionable assumptions.

IV. LAW, SOCIETY, AND MASCULINITY

Two main sociological or social-psychological perspectives have shaped the engagement with masculinity within Anglophone jurisprudence.¹²⁷ Law has been accorded a particular place in relation first to a structural account of the reproduction of gender relations, and second to the study of discourse and the idea of the male (masculine) subject. What marks out each as different from the functionalist, positivist frameworks that informed earlier sociological accounts is a two-fold rejection of the once influential sex role theory, as well as an attempt to take seriously the insights of feminism and engage with the social power of men. The first perspective, central to both feminist work and the critical study of men and masculinities, has evolved around one key, recurring, and seemingly ubiquitous concept—

¹²⁴ An objective, for example, of the 2009 COMAB Report, *supra* note 118.

¹²⁵ CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1998) (detailing the “sexual contract” and the power that men or patriarchy receive from that contract).

¹²⁶ See also FINEMAN, *THE AUTONOMY MYTH*, *supra* note 98, at 195–202 (discussing policy and arguments regarding fatherhood and father’s rights).

¹²⁷ See Richard Collier, *Reflections on the Relationship Between Law and Masculinities: Rethinking the ‘Man Question’ in Legal Studies*, in 56 *CURRENT LEGAL PROBLEMS* 345 (M. D. A. Freeman ed., 2003) (providing an earlier exploration of these ideas, in particular in relation to law, crime and criminology); see also CEALEY HARRISON & HOOD-WILLIAMS, *supra* note 9.

that of hegemonic masculinity, an idea associated with a structured model of gender power.¹²⁸

A. *Law and Hegemonic Masculinity*

It has become commonplace to trace the origins of hegemonic masculinity back to the publication of the Australian sociologist R. W. Connell's book *Gender and Power*.¹²⁹ Presenting a systematic sociological theory of gender, this work laid the foundations for later engagements of masculinity within the field of law as well as in other disciplines. Connell's thesis has been subject to extensive discussion and critical analysis, prompting something of a sub-field within masculinities scholarship.¹³⁰ Importantly, Connell, writing either alone or with others, has modified her earlier depiction of hegemonic masculinity in a number of ways, responding somewhat to critics while also newly elaborating on the concept in relation to emerging issues, including an engagement with the global politics of masculinities.¹³¹ Notwithstanding subsequent revisions, some continue to see hegemonic masculinity as a deeply problematic concept.¹³² In this Section, I will trace how hegemonic masculinity informed the law and society scholarship discussed above, focusing on the strengths and weaknesses of the concept in relation to analyses of men, law, and gender.

Connell and those who have elaborated on this analysis of gender and power use hegemonic masculinity to address what by 1987 had become a pressing issue, not just within legal studies but also across the social sciences and humanities. That is, how might it be possible to "conceptualise relations

¹²⁸ See WHITEHEAD, *supra* note 1, at 84–99 (discussing structural models and juridico-discursive theories in relation to the concepts of patriarchy, hegemonic masculinity, and the gender order).

¹²⁹ CONNELL, *GENDER AND POWER*, *supra* note 13.

¹³⁰ See, e.g., RICHARD HOWSON, CHALLENGING HEGEMONIC MASCULINITY (2006); Christine Beasley, *Rethinking Hegemonic Masculinity in a Globalizing World*, 11 MEN & MASCULINITIES 86 (2008); Demetrakis Z. Demetriou, *Connell's Concept of Hegemonic Masculinity: A Critique*, 30 THEORY & SOC'Y 337 (2001); Mike Donaldson, *What is Hegemonic Masculinity?*, 22 THEORY & SOC'Y 643 (1993); Tony Jefferson, *Subordinating Hegemonic Masculinity*, 6 THEORETICAL CRIMINOLOGY 63 (2002); Gabriela Spector-Mersel, *Never-aging Stories: Western Hegemonic Masculinity Scripts*, 15 J. GENDER STUD. 67 (2006); Stephen Whitehead, *Hegemonic Masculinity Revisited*, 6 GENDER, WORK, & ORG. 58 (1999).

¹³¹ See Connell & Messerschmidt, *supra* note 10, at 845–54; Connell, *supra* note 90, at 77–85; R. W. Connell, *On Hegemonic Masculinity and Violence: Response to Jefferson and Hall*, 6 THEORETICAL CRIMINOLOGY 89 (2002).

¹³² See Beasley, *supra* note 130, at 88–94; *but see* James W. Messerschmidt, *And Now, the Rest of the Story . . . A Commentary on Christine Beasley's "Rethinking Hegemonic Masculinity in a Globalizing World,"* 11 MEN & MASCULINITIES 104 (2008) (responding to Beasley's critique of the concept of hegemonic masculinity); Richard Howson, *Hegemonic Masculinity in the Theory of Hegemony: A Brief Response to Christine Beasley's "Rethinking Hegemonic Masculinity in a Globalizing World,"* 11 MEN & MASCULINITIES 109 (2008) (responding to Beasley's critique of the concept of hegemonic masculinity).

among men, especially when class and ethnic and generational relations are included?"¹³³ How, in other words, might the diversity of men's lives be addressed while at the same time recognizing the existence of a culturally exalted form of (heterosexual) masculinity? For Connell, the answer lies in hegemonic masculinity, a "configuration of gender practice . . . which guarantees (or is taken to guarantee) the dominant position of men,"¹³⁴ and is "always constructed in relation to various subordinated masculinities as well as in relation to women."¹³⁵ Connell defines masculinities as "configurations of practice structured by gender relations . . . inherently historical . . . [in] their making and remaking . . . a political process affecting the balance of interests in society and the direction of social change."¹³⁶

Central to hegemonic masculinity is the idea that masculinities can be ordered hierarchically and that gender relations are constituted through three interrelated structures, which Connell terms labor, power, and cathexis.¹³⁷ What orderliness exists between them is not that of a fixed system, but a unity of historical composition, and what is produced is a gender order, "a historically constructed pattern of power relations between men and women and definitions of femininity and masculinity."¹³⁸ Thus, the development of a progressive politics of masculinity, Connell suggests, cannot be confined to the level of the personal, be it matters of choice, conditioning, human nature, and so forth. Masculinities are relational, embedded in the gender regime or social structure of societies at particular historical moments, always in a dynamic process of constitution; "[s]tructures identified by analysis . . . exist only in solution, they are not absolutely prior to the subject but themselves always in process of formation. Social and personal life are practices."¹³⁹ Any resulting hegemony, importantly, is always incomplete.¹⁴⁰ The politics of gender (or in this case, of gender and law) arises from the always-contested nature of men's power and the ever-present possibilities of resisting and contesting present gender arrangements. It is a key feature of the thesis, in short, that hegemonic masculinity is never finally closed, fixed, or resolved.

Against this backdrop, it is not difficult to see how law and legal regulation become of central importance in the reproduction of a gender regime or social organization of gender. Challenging patriarchy entails, as a key

¹³³ Tony Jefferson, *Theorising Masculine Subjectivity*, in *JUST BOYS DOING BUSINESS? MEN, MASCULINITIES AND CRIME* 10, 15 (Tim Newburn & Elizabeth A. Stanko eds., 1994) (emphasis omitted).

¹³⁴ CONNELL, *MASCULINITIES*, *supra* note 1, at 77.

¹³⁵ CONNELL, *GENDER AND POWER*, *supra* note 13, at 183.

¹³⁶ CONNELL, *MASCULINITIES*, *supra* note 1, at 44.

¹³⁷ CONNELL, *GENDER AND POWER*, *supra* note 13, at 96–99.

¹³⁸ *Id.* at 98–99.

¹³⁹ PETER MIDDLETON, *THE INWARD GAZE: MASCULINITY AND SUBJECTIVITY IN MODERN CULTURE* 153 (1992).

¹⁴⁰ See CONNELL, *GENDER AND POWER*, *supra* note 13, at 184 (stating that "'hegemony' does not mean total cultural dominance . . . [i]t means ascendancy achieved within a balance of forces . . . a state of play.>").

part of contesting men's social dominance (whether in relation to the state, the family, the professions, the military, men's violence, and so forth) an engagement with law and legal systems.¹⁴¹ Equally, within sociological analyses of the gendered society that sought to engage with ideas about men and masculinities, such as important work by Michael Kimmel, law is explicitly recognized as having a pivotal role in the reproduction of structural, systemic inequalities.¹⁴² Nor is it difficult, bearing in mind feminist legal scholars' increasing concern with the open-ended nature of law by the late 1980s, to see the potential usefulness of hegemonic masculinity for a discipline struggling to make sense of its own internal contestations around gender, sexuality, power, and resistance.¹⁴³ In the analyses of law discussed above, we find numerous references to how law "reproduces," "asserts," or "privileges" a distinctive hegemonic masculine form interlinked, within Connell's schema, with the interests of all men while at the same time embracing a recognition of the diversity and heterogeneity of men's lives.

In one strand of work on law, various associations have been made between aspects of "doing law" and "doing (hegemonic) masculinity."¹⁴⁴ In studies of the legal profession, for example, being or becoming a particular kind of "successful" lawyer has been seen as a project of identity formation involving an engagement with distinctive gendered (masculine) performances and practices.¹⁴⁵ In the field of crime, law, and criminology, meanwhile, the criminologist James Messerschmidt has seen men as "accomplishing" and "doing" masculinity by engaging in crime.¹⁴⁶ Conceptually, each of the ideas of autonomy, rationality, and embodiment considered above, culturally associated with the "man question" in feminist legal scholarship, can be read as further manifestations of a dominant form of hegemonic masculinity in law, particular features of the benchmark "man of law."

It is important, therefore, to recognize the strengths of the concept of hegemonic masculinity in relation to law. The model of structured action from within which the idea of hegemonic masculinity has been commonly articulated has been heralded within criminological debates as an "extremely

¹⁴¹ See e.g., CONNELL, MASCULINITIES *supra* note 1, at 67–86 (discussing the social organization of masculinity and gender as a structure of social practice).

¹⁴² See e.g., KIMMELL, *supra* note 1, at 98, 192–93.

¹⁴³ See generally SMART, *supra* note 16 (discussing debates and dilemmas within feminist legal scholarship at this time, arguing for the need to move beyond essentialist ideas about the power of law and of masculinity).

¹⁴⁴ See *id.* at 86–89 (noting that "both law and masculinity are constituted in discourse and there are significant overlaps in these," such that to change either implicates both).

¹⁴⁵ *Id.*; see also COLLIER, MEN LAW AND GENDER, *supra* note 5, at 95–127, 152–94.

¹⁴⁶ MESSERSCHMIDT, *supra* note 87, at 84–87; see generally COLLIER, MASCULINITIES, CRIME AND CRIMINOLOGY, *supra* note 87 (discussing the shared creation of crime and masculinity through "constructions of modernity"); HOWE, *supra* note 73 (discussing "critical" criminology and postmodernism in relation to men's violence against women).

important” advance in the history of criminology,¹⁴⁷ but also in theorizing masculinity more broadly. In a sense, the concepts of structured action and hegemonic masculinity has been, and remains, at the heart of contemporary masculinity theory more generally.¹⁴⁸ However, if we look more closely, questions remain unanswered that have a direct bearing upon understandings of the relationship between men, law, and gender.

One of the most significant criticisms made of hegemonic masculinity has been that it fails to engage with or theorize the subjectivity of individual men, or explore why some men engage in certain kinds of behavior, or invest in particular (masculine) subject positions, while others do not. A great deal of criminological work, for example, has sought to explore the processes whereby men “accomplish” masculinity in the form of crime. For Messerschmidt, when class and race relations reduce conventional opportunities for the accomplishment of masculinity, crime is a potential solution for men in a struggle to become masculine.¹⁴⁹ It is “now widely recognized most crime is committed by highly specific sub-groups of the category ‘men,’”¹⁵⁰ men who are themselves often the principal victims of crime.¹⁵¹ What tends not to be asked, however, is why a “particular man or men from any given group (usually only a minority)” come to identify with the crime option while others identify with different resources to accomplish masculinity.¹⁵² This raises a broader question: if masculinities are offered up for all men within specific socio-cultural, structural locations, why do men choose one, and not another, masculine identity? To revisit an example I have considered elsewhere, why might one father in the process of a painful separation from his partner come to identify with a particular strand of fathers’ rights activism, and commitment to values associated with hegemonic masculinity, while another man does not?¹⁵³ How adequate is hegemonic masculinity in explaining the emotional and psychological complexity of men’s engagements with law in this, or any other, context?

It can be argued in response that, in the terms of Connell’s thesis, most men, regardless of their socio-economic, racial, or ethnic group, “do” masculinity without resorting to behavior culturally associated with those men who most clearly embody the hegemonic form—they just “do” it in different ways. Equally, it can be argued that all men benefit from the “patriarchal dividend” that results from those who relate to, embody, and reproduce

¹⁴⁷ Hood-Williams, *supra* note 9, at 53.

¹⁴⁸ ASHE, *supra* note 3, at 143–57.

¹⁴⁹ MESSERSCHMIDT, *supra* note 87, at 85.

¹⁵⁰ Hood-Williams, *supra* note 9, at 43 (emphasis omitted).

¹⁵¹ Hall, *supra* note 22, at 42–47; COLLIER, MASCULINITIES, CRIME AND CRIMINOLOGY, *supra* note 87, at 167–70.

¹⁵² Jefferson, *supra* note 87, at 543 (emphasis omitted).

¹⁵³ This question is considered throughout the discussion of law, emotion, and welfare in Richard Collier, *Fathers’ Rights, Gender and Welfare: Some Questions for Family Law*, 31 J. SOC. WELFARE & FAM. L. 357 (2009).

hegemonic masculine values.¹⁵⁴ It is difficult to see within structured action theory, however, an account of why this should be the case,¹⁵⁵ and whether hegemonic masculinity necessarily, as Nancy Dowd has asked, does benefit men.¹⁵⁶ In the reproduction of a normative (hegemonic) masculine ideal there is a certain degree of rigidity in how men are seen to accomplish or aspire to the attributes of this dominant masculinity. Indeed, at times, social structure would seem to constrain practice to such a degree that it is difficult to see where the contestation, resistance, and fluid contingent nature of masculinity, central to Connell's original thesis, fits in.¹⁵⁷

This raises the question of how the (gendered) subject is theorized within this approach. For all the declarations within much socio-legal scholarship on law and gender that law and/or legal discourse are implicated in the way distinctive masculinities are constituted or constructed, it is extremely difficult to grasp the *process* by which this takes place—at least, beyond the making of generalized statements that law “shapes our lives” or is part of a “discursive context” in which a gendered subjectivation occurs. What ultimately tends to be deployed is a model of men as somehow inherently and reflexively rational, self-interested beings; men the social action of whom then relates, in a distinctly deterministic way, to the legal and cultural norms associated with hegemonic masculinity. What remains unclear, however, is precisely what these cultural norms are, the identifications through which they are produced, and how they are understood and given meaning within particular grounded, local contexts.

These points have particular bearing when we consider the plurality of the models of masculinity that circulate within the legal arena. Recent studies of men, legal policy, and parenting cultures suggest, for example, that diverse and frequently contradictory ideas about masculinity inform legal policy debates in different areas of law.¹⁵⁸ At the same time, it cannot be assumed that there exists a coherent form of masculinity that is “inherited” by individual men within particular contexts. The processes involved with “being masculine” in advanced capitalist societies are profoundly contingent and problematic, defined, at least within major urban populations, by consumer practices and identifications, created within a social context marked by a multiplicity and diversity of choice.¹⁵⁹ An allegiance to specific

¹⁵⁴ CONNELL, MASCULINITIES, *supra* note 1, at 79.

¹⁵⁵ See JEFFERSON, *supra* note 87 (discussing the development of the study of masculinities in the discipline of criminology and arguing for a psycho-social approach rather than one based on an engagement with hegemonic masculinity).

¹⁵⁶ Dowd, *supra* note 5.

¹⁵⁷ CONNELL, MASCULINITIES, *supra* note 1, at 77.

¹⁵⁸ See, e.g., COLLIER, MEN, LAW AND GENDER, *supra* note 5, at 128–52 (exploring how the rise of the “fatherhood” problem has been influenced by the changed relationship between law and gender, specifically a reconceptualization of men, masculinity, and fathers).

¹⁵⁹ ANTHONY GIDDENS, MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE 80 (1991) (wherein modernity allows that “a fundamental component of day-to-day activity is simply that of *choice*.”).

gender(ed) cultural norms may be experienced by some individuals within some social contexts as shaping choice to the degree that it could be seen as no choice at all. Yet it does not follow that the values associated with hegemonic masculinity are then experienced in any uniform way, whether as oppressive or as unambiguously positive attributes for men, values that, for a host of (unexplored) psychological imperatives, men are assumed to desire, achieve, or accomplish.¹⁶⁰

For critics, therefore, this structured model of gendered power holds in place a normative masculine gender (hegemonic masculinity, to which is then assigned a range of usually undesirable/negative characteristics) while, at the same time, imposing “an a priori theoretical/conceptual frame on the psychological complexity of men’s behaviour.”¹⁶¹ What is evaded in such an account are “the ways in which each act of aggression or kindness, sensitivity or independence, self-sacrifice or selfishness is encoded at particular moments and locations as a [variously culturally] ‘masculine’ or ‘feminine’ attribute.”¹⁶² It is curious that masculinity has often appeared in studies of law and gender to be both a primary and underlying cause of a social effect (whereby masculinity causes men *to* act in a certain way) and simultaneously, something which results from certain social actions (masculinity is produced *by* men acting in a certain way). This is, as has been observed in the context of debates about gender and crime, something of a tautological proposition. For what, ultimately, is it in hegemonic masculinity that “causes” this behavior?

Connell, writing with Messerschmidt, has “flatly” rejected¹⁶³ the charge that hegemonic masculinity entails a kind of structural determinism.¹⁶⁴ Nonetheless, writing in 2005, these authors recognized that “*the internal complexity* of masculinities has only gradually come into focus as a research issue,”¹⁶⁵ and that “[w]ithout treating privileged men as objects of pity, we should recognize that hegemonic masculinity does not necessarily translate into a satisfying experience of life.”¹⁶⁶ A cursory look at autobiographical, empirical, and theoretical work on men and gender in the fields of sociology, psychology, history, and literature, alongside recent studies of emotion and

¹⁶⁰ See, e.g., Jane Garde, *Masculinity and Madness*, 3 COUNSELLING AND PSYCHOTHERAPY RES. 6 (2003) (examining the links between masculinity and contemporary ideas of madness in the context of men’s relationship to counseling and therapy).

¹⁶¹ COLLIER, MASCULINITIES, CRIME AND CRIMINOLOGY, *supra* note 87, at 22.

¹⁶² *Id.*

¹⁶³ Connell & Messerschmidt, *supra* note 10, at 843.

¹⁶⁴ See WHITEHEAD, *supra* note 1, at 91–94.

¹⁶⁵ Connell & Messerschmidt, *supra* note 10, at 852 (emphasis added).

¹⁶⁶ *Id.*

affect,¹⁶⁷ would suggest that the relationships individuals have to gendered categories are indeed far more complex.¹⁶⁸

Where does this leave us? The situated investments individuals can have in gender categories within particular social and legal contexts, as well as their emotions, experiences, and subjectivities, can be seen as effects of power while, at the same time, having the potential to produce oppositional practices and resistances.¹⁶⁹ This points to an approach in which men's lives and motivations may be marked by gendered investments and commitments that can be experienced as fluid and contradictory within particular contexts. It is in an attempt to address the above problems that alternative perspectives on theorizing masculinity and law have emerged in recent years focusing on the complexity and multi-layered nature of the "masculine" social subject.

B. *Law, Discourse, and the (Masculine) Psychosocial Subject*

Particularly within the discipline of criminology over the past decade, a growing body of work has sought to explore the social and psychological processes that inform men's experience of masculinity.¹⁷⁰ This approach, building on the critique of the structured action model outlined above, has involved an attempt to take the psychic dimensions of (masculine) subjectivity seriously. It is a perspective that has a number of implications for law. In this Section, I outline the implications of this work for developing an understanding of how masculinity has been approached within legal studies, and consider questions arising therein about the relationship between law, men, and gender.

¹⁶⁷ See, e.g., THE AFFECTIVE TURN: THEORIZING THE SOCIAL (Patricia Ticineto Clough with Jean Halley eds., 2007); EVE KOSOFSKY SEDGWICK, TOUCHING FEELING: AFFECT, PEDAGOGY, PERFORMATIVITY (2003); see also Kathryn Abrams, *Legal Feminism and the Emotions: Three Moments in an Evolving Relationship*, 28 HARV. J. L. & GENDER 325 (2005) (discussing three specific conceptions of the relationship between legal feminism and emotion); Clare Huntington, *Embracing the Affective Family*, 33 HARV. J. L. & GENDER 321 (2010) (discussing the relationship between law, emotion, and the idea of the affective family); Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J. L. & GENDER 447 (2005) (using rape and domestic violence law to explore criminal law's simplistic approach to emotion, to the detriment of women); MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004) (exploring the roles shame and disgust have in the law).

¹⁶⁸ Wetherell & Edley, *supra* note 82, at 351–52; see also DAVID JACKSON, UNMASKING MASCULINITY: A CRITICAL AUTOBIOGRAPHY (1990) (critical autobiography detailing his life as a gendered person, questioning dominant ideologies).

¹⁶⁹ ASHE, *supra* note 3, at 158.

¹⁷⁰ See, e.g., DAVID GADD & TONY JEFFERSON, PSYCHOSOCIAL CRIMINOLOGY (2007); O'DONNELL & SHARPE, *supra* note 89; David Gadd, *Masculinities, Violence and Defended Psychosocial Subjects*, 4 THEORETICAL CRIMINOLOGY 429 (2000); Tony Jefferson, *The Tyson Rape Trial: The Law, Feminism and Emotional 'Truth'*, 6 SOC. & LEGAL STUD. 281 (1997); Phoenix, *supra* note 89; see also KAHN, *supra* note 1, at 209–30 (explicating the psychosocial perspective of the masculinity crisis); Wetherell & Edley, *supra* note 82 (on the "psycho-discursive" practices used by men in constructing masculinity). *But see* HOWE, *supra* note 73, at 138–42 (critiquing particularly Jefferson's psychosocial approach).

A distinctive strand of work on masculinities and law has drawn, we have seen above, on the concept of discourse rather than that of social structure,¹⁷¹ placing center stage an engagement with the presentational forms of various masculine performances, identities, and corporeal enactments.¹⁷² This work has rejected, in suitably postmodern fashion, the existence of a unitary rational male subject.¹⁷³ The stated aim of an explicitly psychosocial approach to masculinity has been to develop a *social* understanding of the masculine *psyche*; one that might then shed light on men's behavior across diverse contexts, including law and legal practice.

For advocates of this position there are clear advantages over structured action theory. This approach allows for the possibility of understanding the contradictions and difficulties that men may experience in the process of "becoming masculine." Integrating questions of individual backgrounds and histories in a way that addresses conflicted dimensions of an individual's experiences within particular social settings facilitates an engagement with the question of why some men do or do not invest or engage in certain kinds of behavior or subject positions.¹⁷⁴ Importantly, questions of power remain. The focus of analysis shifts, however, to how an (non-unitary) inherently contradictory subject comes (himself) to invest, whether consciously or unconsciously, in what are seen at particular historical moments and contexts as socially empowering discourses around masculinity.¹⁷⁵

In contrast to feminist and pro-feminist approaches that posit a seemingly omnipotent sense of the power of men, correlating with a dominant form of (hegemonic) masculinity—a masculinity that ironically, "no man may ever actually embody"—this perspective appears different.¹⁷⁶ What is sought is a more complex recognition of "the *reality*, and not simply the theoretical *rhetoric*, of relative power and powerlessness experienced by different men throughout their lives."¹⁷⁷ An overarching social structure or gender norm is no longer seen as accounting for what men do. It is, rather,

¹⁷¹ See, e.g., Gutterman, *supra* note 79, at 56–71; PEASE, *supra* note 1, at 33–36.

¹⁷² See generally David Bell & Gill Valentine, *The Sexed Self: Strategies of Performance, Sites of Resistance*, in MAPPING THE SUBJECT: GEOGRAPHIES OF CULTURAL TRANSFORMATION, *supra* note 97, at 143 (presenting an overview of performativity of the sexed subject).

¹⁷³ See generally WEEDON, *supra* note 48 (discussing generally the lack of a unitary rational male subject in feminist poststructural thought).

¹⁷⁴ WHITEHEAD, *supra* note 1, at 205–22.

¹⁷⁵ For a general introduction and overview of this approach, see generally WENDY HOLLWAY, SUBJECTIVITY AND METHOD IN PSYCHOLOGY: GENDER, MEANING AND SCIENCE (1989). But see HOWE, *supra* note 73, at 138–42 (criticizing Tony Jefferson's writings on engaging with masculinity, which largely draw on Holloway's work on this issue).

¹⁷⁶ Wetherell & Edley, *supra* note 82, at 337 ("No living man is ever man enough by this reckoning and this transcendent and unattainable quality gives hegemonic masculinity regulatory force.").

¹⁷⁷ Jo Goodey, *Biographical Lessons for Criminology*, 4 THEORETICAL CRIMINOLOGY 473, 489 (2000) (second emphasis added).

in the interaction between this social realm and the individual psyche that the disposition or motivation towards particular action is located.¹⁷⁸

The charge that this approach sits uneasily with the sociological moorings of traditional law and society scholarship is one that can be easily dismissed. The very point is that much work on masculinity and law has, like sociological accounts, failed to engage with “real lives” of individuals, the lived reality and inner life of the complex subject, in any meaningful way.¹⁷⁹ The well-established broader critique of psychoanalysis remains pertinent in this context however, and the relation that some of these readings have to other psychoanalytic traditions, non-psychoanalytic psychology, or the idea that there might be multiple psychological mechanisms of subjective positioning is, at best, uncertain. We may choose to leave aside here the question of whether the more explicitly psychoanalytically informed strand of work on masculinity, such as that developed by some writers within criminology, has itself been informed by an unduly mechanistic model of personality formation.

Although this approach offers a rich story for describing the effects of discourses of masculinity, these remain, at the end of the day, just that: stories. It is difficult to see how the kinds of accounts produced about the taking up of masculine subjectivity can ever be tested or proven in any meaningful way.¹⁸⁰ Are we effectively reduced to an all-discourse position which, disavowing any outer reality, embraces a wholly semiotic account of the subject? One in which, as Connell has put it, “with so much emphasis on the signifier, the signified tends to vanish”?¹⁸¹ What is lost is precisely the focus of Connell’s attempt to engage with the concrete, material, grounded institutional spaces of masculinities, the social sites in which ideas take on meaning (such as specific locations around law). John Hood-Williams has noted a further tension here.¹⁸² On the one hand, it has been claimed that there are many discourses of subjectivation whereby masculine identities become attached to individuals. On the other, however, it is

¹⁷⁸ See Valerie Walkerdine, *Subject to Change Without Notice: Psychology, Postmodernity and the Popular*, in MAPPING THE SUBJECT: GEOGRAPHIES OF CULTURAL TRANSFORMATION, *supra* note 97, at 309, 324–29 (depicting social action as the product of biographically contingent anxieties and desires); see generally CHALLENGING SUBJECTS: CRITICAL PSYCHOLOGY FOR A NEW MILLENNIUM (Valerie Walkerdine ed., 2002) (exploring academic and critical psychology and how subjectivity is implicated).

¹⁷⁹ See CAROL SMART, PERSONAL LIFE: NEW DIRECTIONS IN SOCIOLOGICAL THINKING (2007) (offering a new conceptual approach for understanding “personal life,” emphasizing the use of a multi-dimensional approach based in empirical research and lived experiences).

¹⁸⁰ STEPHEN FROSH, SEXUAL DIFFERENCE: MASCULINITY AND PSYCHOANALYSIS 91–94 (1994) (describing how psychoanalysis has been a system and approach imbued with gendered assumptions, and how ideas about masculinity have themselves informed psychoanalytic theory and practice). Contrast, again, the explicitly feminist critique of Howe, *supra* note 73.

¹⁸¹ CONNELL, MASCULINITIES, *supra* note 1, at 50; see also Ian Craib, *Masculinity and Male Dominance*, 35 SOC. REV. 721, 733–41 (1987) (considering similar issues).

¹⁸² Hood-Williams, *supra* note 9, at 37–40.

maintained that the claims this approach is making are ultimately grounded in real, historically specific, and irreducible psychological processes.¹⁸³

The implications in terms of politics, policy, and practice in relation to law are similarly uncertain. It is unclear how theorizing subjectivity at the level of the individual can ever be an effective strategy in facilitating social change in a broader sense. Unpacking the heterogeneity of gendered identifications within and between categories of men has no clear relationship to developing concrete strategies of change that might engage with contemporary gender politics in terms of the “social, economic, legal and political inequities . . . [that exist] between pluralist communities of men and women.”¹⁸⁴ As Connell has argued, reducing an analysis of masculine identities to psychological processes tends to lead to individualistic therapeutic approaches that afford little grasp on these broader gender inequalities.¹⁸⁵

In a recent feminist socio-legal study of a strand of this work on masculinity as it has developed in the area of crime and criminology, Adrian Howe takes this critique further. Howe argues powerfully that the psychosocial approach does more than simply misread feminism and the nature of feminist work informed by postmodernism, including work on law and crime.¹⁸⁶ She identifies a troubling, profoundly regressive development here, one that is as politically problematic as it is methodologically suspect.¹⁸⁷ Noting the “irony” of how, after decades of feminist work, it has been left to men to make us see “men *as men*,”¹⁸⁸ Howe argues that the psychosocial approach, within criminology at least, has been informed by “[a]n extraordinary anti-feminist *animus*.”¹⁸⁹ This has resulted in the silencing of the violence(s) of men, the harms that men do, and the materiality of men’s practices. In contrast to an engagement in which questions of social structure and, importantly, power have been central to the analysis of masculinities,¹⁹⁰ Howe identifies in much of this psychosocial work something more akin to a profound lack of empathy with women and instead, an individualistic focus of attention on the “insecure, vulnerable and anxious” man.¹⁹¹

¹⁸³ *Id.*; see also HOWE, *supra* note 73, at 141 (criticizing Tony Jefferson’s “virulently anti-feminist” work for developing an uncritical and sympathetic account of how the lives of violent men are grounded in particular historical situations).

¹⁸⁴ ASHE, *supra* note 3, at 159.

¹⁸⁵ See CONNELL, MASCULINITIES, *supra* note 1, at 206–11.

¹⁸⁶ See HOWE, *supra* note 73, at 138–42.

¹⁸⁷ See *id.*

¹⁸⁸ *Id.* at 142 (quoting Richard Collier, *After Dunbane: Crime, Corporality and the (Herero)sexing of the Bodies of Men*, 24 J. L. & Soc’y 177, 193 (1997)).

¹⁸⁹ *Id.* at 142; see also Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHL-KENT L. REV. 687, 693 (1999–2000) (criticizing “postmodernism” for “der-ealiz[ing] social reality by ignoring it, by refusing to be accountable to it, and, in a somewhat new move, by openly repudiating any connection with an ‘it’ by claiming ‘it’ is not there.”).

¹⁹⁰ See, e.g., Jeff Hearn, *From Hegemonic Masculinity to the Hegemony of Men*, 5 FEMINIST THEORY 49, 50 (2004) (developing a framework to understand masculinity “in which the centrality of power issues is recognized.”).

¹⁹¹ HOWE, *supra* note 73, at 140.

How might it be possible to move this debate forward? Both the structural model of gender power and the psychosocial approaches discussed above can be seen to engage, in different ways, with questions about how ideas of masculinity become problematized at particular historical moments and contexts. Each, I have argued, has strengths. Yet each stands in an uneasy relation to essentialist conceptualizations of and presuppositions about masculinity. The problem may lie, as I argue below, within the concept of masculinity itself.

V. SEX/GENDER, PERSONAL LIFE, AND THE LIMITS OF MASCULINITY

Central to the questioning of the concept of masculinity in recent years has been an engagement with the analytic utility and coherence of concepts premised on the epistemic frame of sex/gender, as outlined earlier in this paper. This work has raised a number of theoretical and political questions relevant to law and masculinities.

A. *Gender, Embodiment, and the “Sexual Divisions” of Law*

Within work variously termed a “new corporeal” or “sexed bodies” approach to gender, a forceful critique of the core dualism between sex and gender has emerged.¹⁹² Within this approach, the “sexed body” is seen to be neither inherently masculine—active, rational, reasonable, bounded, non-permeable—nor inherently feminine—passive, vulnerable, irrational, unreasonable. Rather it is positioned as an object interwoven with, and constitutive of, a heterogeneity of systems of meaning, signification, and representation that vary across social contexts.¹⁹³ It rejects the idea of a natural pre-social body, a body that exists before discourse. Far from presuming a body as the passive recipient of gender roles or messages (for example, the messages conveyed by the media, peer groups, or legal discourse), this perspective seeks to integrate an appreciation of the (sexed) specificity of the

¹⁹² See generally HARRISON & HOOD-WILLIAMS, *supra* note 9 (presenting a critique of the sex/gender division and calling for a new way to understand the idea of the sexed body); GATENS, *supra* note 110 (an early and influential critique of the sex/gender distinction that prefigured the discussion that was to follow within feminist philosophical work in this area); GROSZ, *supra* note 110; Moira Gatens, *A Critique of the Sex/Gender Distinction, in BEYOND MARXISM? INTERVENTIONS AFTER MARX* 143 (Judith Allen & Paul Patton eds., 1983) (critiquing the increased use of sex/gender distinction and proponents of neutrality of the body and mind); Kathleen Daly, *Different Ways of Conceptualizing Sex/Gender in Feminist Theory and Their Implications for Criminology*, 1 *THEORETICAL CRIMINOLOGY* 25 (1997) (discussing challenges in the 1980s to dominant forms of feminism and feminist responses to such challenges, including the reconceptualization of sex/gender as “class-race-gender” and “doing gender.”).

¹⁹³ See HARRISON & HOOD-WILLIAMS, *supra* note 9, at 135–36 (on the need to move beyond the “natural body”); see also GROSZ, *supra* note 110, at 187–210 (generally on the idea of “sexed bodies”).

bodies of women and men in determining consciousness.¹⁹⁴ Rather than see the body as a *tabula rasa* upon which social lessons are inscribed, what becomes at issue is the materiality of gender in/of bodies, the significance of embodiment, and importantly, the contingent, always *socially grounded* nature of these processes in relation, for example, to race, ethnicity, and class.¹⁹⁵

This stands in marked contrast to the approach that has underscored much gender and law scholarship concerned with the “social construction” of masculinity in law, where the object has been to unpack or reveal the meanings of masculinity that circulate within law. Moreover, far from negating the complexity of men’s subjectivity, a theme central to the psychosocial critique of hegemonic masculinity considered above, an attempt is made here to “see sex” (difference), like gender, as something constituted in discourse.¹⁹⁶ This does not occur, however, via any essentialist fixing of meaning about what constitutes a male/female, masculine/feminine body, experience, identity, culture, and so forth.¹⁹⁷ The argument is not that “biology is destiny.” The argument rather is that it is via reference to culturally and historically specific discourses and practices that women and men come to have differential relationships to, for instance, reproduction and gestation, parenting and employment, caring, crime, and so forth.¹⁹⁸ This approach questions the view that bodies can be understood as simply and inescapably categorized into two mutually exclusive groups, male and female, at once biologically fixed and separate from the cultural contexts in which they exist; contexts often importantly marked by heterosexist, hierarchical gendered frameworks of sexual difference.¹⁹⁹ At the same time, ideas about what constitutes, within any specific social and cultural context, a quintessential “masculine” quality or characteristic are contingent—enmeshed with how individuals become situated or embodied within particular locations in ways mediated by race, ethnicity, class, sexuality, and so on.

A charge that can be leveled against such an approach is that it is as essentialist in the way gender difference is conceptualized as the perspectives outlined earlier in this Article. To accept that active processes are involved in becoming a particular (gendered) subject, however, does involve a recognition that there may be some bodily experiences and life events (for

¹⁹⁴ See Daly, *supra* note 192, at 37–41 (on the relationship between sexed bodies, sex/gender, and corporeality); see also HARRISON & HOOD-WILLIAMS, *supra* note 9, at 104–06 (discussing the idea of the body as a *tabula rasa* and sex/gender as social construction).

¹⁹⁵ See Daly, *supra* note 192, at 33–37, 37–41 (on the idea of the development of the idea of sexed bodies in feminist work).

¹⁹⁶ For an example of these arguments in the context of debates about gender, crime, and criminology, see generally Daly, *supra* note 192.

¹⁹⁷ Gatens, *supra* note 192, at 152–53.

¹⁹⁸ See *id.* at 152.

¹⁹⁹ See also CEALEY HARRISON & HOOD-WILLIAMS, *supra* note 9 (making this argument in the context of a broader critique of sex/gender); SHARPE, *supra* note 12 (discussing how these issues relate to a “transgender jurisprudence”).

example, childbirth) which, though lacking any fixed significance within a particular cultural context, are nonetheless likely to be seen as privileged sites of social significance. Anthropological and historical evidence has been used to show that the body can, and does, intervene to confirm or to deny such social significances, albeit technological developments (for example around assisted reproduction and gender realignment) have transformed, and are transforming, the contours of “what is possible” in this regard.²⁰⁰ The problem with the sex/gender dualism, however, is that it polarizes accounts in such a way that the human subject becomes characterized as being either predominantly or wholly determined by the influence of, on the one hand, social relations (be they environment, society, gender, law); or, on the other, biological forces (be it heredity, the body, sex).

This critique of the division between (biological) sex and (socially constructed) gender, present within, if still marginal to, much contemporary work on masculinities, can be located within the context of broader attempts within feminist sociological theory and socio-legal work to transcend binary oppositions that have informed understandings of gender and law. Other significant dualisms singled out for attention have been the public/private divide²⁰¹ and, in particular within a body of queer legal theoretical work, the binary between heterosexuality and homosexuality.²⁰² An interrogation of the latter, I intimated above, is of particular significance to discussions of masculinities and law, raising important questions about how assumptions about the normative nature of heterosexuality have encoded and structured many aspects of everyday life and ideas about masculinity—whether in relation to the family, the workplace, health care, and so on. Some critical and socio-legal scholars, drawing on feminist philosophical explorations, understand the gendered subject itself in terms of a fluid, performative practice, such that being masculine is just one manifestation of a gendered self, con-

²⁰⁰ See SHARPE, *supra* note 12 (providing a general discussion of the jurisprudential implications of this development). Note also in this context, the insights of anthropological work. See DAVID D. GILMORE, *MANHOOD IN THE MAKING: CULTURAL CONCEPTS OF MASCULINITY* (1990); *DISLOCATING MASCULINITY: COMPARATIVE ETHNOGRAPHERS* (Andrea Cornwall & Nancy Lindisfarne eds., 1994).

²⁰¹ See, e.g., ELSHTAIN, *supra* note 15; *PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES*, *supra* note 15; *CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW, AND PUBLIC POLICY*, *supra* note 15.

²⁰² See generally Kim Brooks & Debra Parkes, *Queering Legal Education: A Project of Theoretical Discovery*, 27 HARV. WOMEN'S L.J. 89 (2004); *LEGAL INVERSIONS: LESBIANS, GAY MEN, AND THE POLITICS OF LAW* (Didi Herman & Carl Stychin eds., 1995); CARL F. STYCHIN, *LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE* (1995); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999); RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY* (1998); see also *INTERSECTIONS BETWEEN FEMINIST AND QUEER THEORY* (Diane Richardson, Janice McLaughlin & Mark E. Casey eds., 2006) (discussing the links between feminist and queer theory).

ceptualized in terms of a series of constantly shifting practices and techniques.²⁰³

Far from taking for granted what is meant by masculinity, therefore, the having, obtaining, or taking up of masculine identity here becomes “a public process of power relations in which everyday interactions [are seen to] take place between actors with sexual identities in sexualised locations.”²⁰⁴ In terms of law, these locations potentially encompass numerous and diverse arenas and areas of practice. Thus exploring and challenging masculinity, be it in relation to family law courts, lawyer’s offices, university law schools, prisons, the workplace, schools, or the military, becomes a project intimately related to broader attempts to question binary divisions that have constrained analyses of men, law, and gender. I argue in the following Section that this approach also connects to recent attempts within sociology to “turn personal” in engaging with law and social life in ways that question the possibilities, and limits, of legal policies aimed at “changing” masculinity based on problematic assumptions about gender neutrality and gender convergence.²⁰⁵

B. *Turning Personal*:²⁰⁶ Policy, Law, and Gender Neutrality

In her 2007 book *Personal Life*, Smart questions a number of influential ideas about the interrelationship between gender, families, and social change.²⁰⁷ She highlights the deficiencies of approaches, such as individualization theory, in understanding the “everyday” complexity of family practices.²⁰⁸ Seeking to move beyond conceptual frameworks that have hitherto limited sociological understanding, *Personal Life* represents an important attempt to reappraise affect and emotion, memory, love, and commitment, as well as promote a renewed engagement with the significance of social class,

²⁰³ The idea of gender performance has been a particular theme within a body of queer legal theoretical work. See Brooks & Parkes, *supra* note 202; LEGAL INVERSIONS, *supra* note 202; STYCHIN, *supra* note 202; ESKRIDGE, *supra* note 202; ROBSON, *supra* note 202; see also Bell & Valentine, *supra* note 172.

²⁰⁴ Bell & Valentine, *supra* note 172, at 146.

²⁰⁵ See also WENDY HOLLWAY, THE CAPACITY TO CARE: GENDER AND ETHICAL SUBJECTIVITY (2006) (suggesting that some problematic assumptions about gender neutrality have informed understandings of men and women as gendered subjects in the field of social policy).

²⁰⁶ Morgan Centre for the Study of Relationships and Personal Life, Turning Personal: An Interdisciplinary Conference, <http://www.socialsciences.manchester.ac.uk/morgancentre/events/2009/turning-personal> (last visited Feb. 20, 2010) (describing a conference held at the University of Manchester on Sept. 16–17, 2009 seeking to explore “how social research can incorporate more complex and multi-layered accounts of personal lives into academic writings and analyses”).

²⁰⁷ See SMART, *supra* note 179.

²⁰⁸ See *id.* at 17–26; see also ULRICH BECK & ELIZABETH BECK-GERNISHEIM, INDIVIDUALIZATION: INSTITUTIONALIZED INDIVIDUALISM AND ITS SOCIAL AND POLITICAL CONSEQUENCES (2002) (explicating and exploring the importance of (sociological/institutionalized) individualism).

race, ethnicity, intimacy, and ideas about relationality and kinship.²⁰⁹ In so doing, Smart draws on a body of work that questions the long-standing neglect of feelings within the social sciences, as well as gendered conceptions of human nature and intellectual divisions of labor in which this approach has its roots.²¹⁰

These concerns bear upon the relationship between law and masculinities in a number of intriguing ways. Approaching the gendered dimensions of social experience so as not to lose track of the issues of power raised by feminism entails, in a sense, integrating appreciation at both a theoretical and political level of the complex, and often contradictory, nature of “personal life” and, at the risk of simplifying, what individuals “do” and “feel.” Such an engagement can be seen as interlinked to accounts of the social and psychological processes informing men’s experiences of masculinity discussed above. It differs, however, in not losing sight of the sociological grounding of these processes and with it, the questions about law and power raised by earlier feminist work on masculinities and law. This approach is concerned with the reality, and not simply the rhetoric, of women, men, and children’s experiences of both power and powerlessness. It also leads us to some important questions about political and policy agendas pitched at “changing” masculinity as an abstract gender category, rather than engaging with the complex and contradictory nature of these social practices in the first place. This point requires clarification as it relates directly to the limits of social constructionist accounts of masculinity and law discussed above.

One result of focusing at a policy level on a “social problem” of men and masculinity is that attention becomes easily diverted from the content and consequences of men’s actions. To follow Howe’s argument, this can involve an evacuation of questions about responsibility and agency.²¹¹ The experience of the individual, Stephen Whitehead has suggested, easily becomes lost when what is privileged is an “ideological apparatus” of masculinity, a reification of a gender category that results in an erasure of men’s practices and of the very questions about social power raised by feminism.²¹² Put simply, if it is masculinity, existing prior to its production through social agency, that appears to be “the problem,” the question of how gendered

²⁰⁹ See SMART, *supra* note 179. Smart’s discussion on class and emotion draws on work such as ANDREW SAYER, *THE MORAL SIGNIFICANCE OF CLASS* (2005) and *EMOTIONS AND SOCIOLOGY* (Jack Barbalet ed., 2002).

²¹⁰ See also ABRAMS, *supra* note 167 (discussing the relationship between feminism and emotion and the importance for feminism of engaging more fully with questions of emotion).

²¹¹ HOWE, *supra* note 73, at 127–29, 138–42; see also McMAHON, *supra* note 1 (making a similar argument in the context of his account of social policies that seek to “take care of men”); Jeff Hearn, *Is Masculinity Dead? A Critique of the Concept of Masculinity/Masculinities*, in *UNDERSTANDING MASCULINITIES* 202 (Máirtín Mac and Ghail ed., 1996) [hereinafter Hearn, *Is Masculinity Dead?*] (also critiquing the masculinity concept as potentially and destructively averting focus away from women and gendered power relations).

²¹² WHITEHEAD, *supra* note 1, at 93–94.

norms, identities, and so forth are structurally reproduced through particular social practices easily fades from view.²¹³ Importantly, the psychodynamic dimensions of social experience “as a man” can themselves be marked, we have seen above, as much by emotional ambivalence and contradiction as any notion of straightforward hegemonic masculine identification. The complexities and nuances of emotion, intimacy, the effects of individual and collective memory, and their interplay with behavior, aspirations, and motivations are not necessarily exercised or experienced rationally or logically. This does not mean that questions of power and social structure fade from view. Rather emotions and experiences can themselves be seen as effects of power that may have the potential not just to reinforce dominant masculinities but also to generate oppositional practices and resistances.²¹⁴ This can be seen, for example, in the field of fathers’ rights politics,²¹⁵ where cultural, social, and economic transformations have altered men’s expectations and practices for themselves and others in complex ways.²¹⁶

Distinctive gender categories can be understood, therefore, as products of a matrix of social and legal relations shaped by historically specific ideas about power, entitlement, and subjectivities—subjectivities that are not necessarily held out or available to all individuals in the same way. With this point in mind, it is necessary to consider the question of just who this debate about the concept of masculinity has addressed. Just *whose* masculinity it is that is “in crisis” or “needs exploring”? Who is included, and excluded, in these debates about masculinity? This entails interrogating more closely the possibilities, and limitations, of masculinity itself.

C. *The Problem of Masculinity*

Masculinity, we have seen in this Article, remains a primary reference point within the study of law and gender, a symbolic icon within contemporary cultural conversations about gender and social change. The concept cannot be “wished away.” It has cultural resonance and meaning(s), and certainly in countries such as the United Kingdom and the United States, a considerable political purchase across diverse legal and policy debates. What remains unclear, however, is what it is actually being used to denote. For what, ultimately, *is* masculinity?

Whether understood as embedded within and reproduced through the interaction of social structure and individual/collective practice, or else dis-

²¹³ ASHE, *supra* note 3, at 155.

²¹⁴ *See id.* at 154–60.

²¹⁵ *See* COLLIER, MEN, LAW AND GENDER, *supra* note 5, at 195–241 (discussing how ideas about masculinities have informed the terrain of contemporary fathers’ rights politics); *see also* FATHERS’ RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE (Richard Collier & Sally Sheldon eds., 2006) (considering the broader international politics of fathers’ rights within the legal arena).

²¹⁶ Collier, *supra* note 153, at 235–41.

cursively constituted via the contingencies of psyche and society, masculinity has been used within legal studies in some very different ways, involving diverse attributes and ideas. It has been deployed to describe the psychological characteristics of men and men's gendered experiences and identities, as well as an array of cultural practices, values, and rationalities. It has been pivotal to psychoanalytic, psychological, and power-based readings, as well as analyses of men's gendered behavior within specific institutional settings. Masculinity has appeared as both a cause and a consequence of hierarchical, oppressive gender relations, structurally embedded in societies, interconnected, albeit in ill-defined ways, to the bodies of men. It is for some, no more, or less, than a fluid, performative practice. Bodies, cultures, discourses, practices, emotions, modes of thought, sexual practices, discrete areas of law, and even political views have been described, in different contexts, as "masculine." Masculinity has been conceptualized in different ways, drawing on different theoretical traditions, even at times within the same piece of writing or research.

In the light of such diversity, however, it is unclear just what masculinity entails:

[i]s it a discourse, a power structure, a psychic economy, a history, an ideology, an identity, a behaviour, a value system, an aesthetic even? Or is it all these and also their mutual separation, the magnetic force of repulsion which keeps them apart . . . a centrifugal dispersal of what are maintained as discrete fields of psychic and social structure[?]²¹⁷

To speak legitimately within a diverse body of work on law and gender of a coherent "discourse of masculinity it would be necessary to show that a particular set of usages was located structurally within a clearly defined institution with its own methods, objects and practices."²¹⁸ It is possible one could argue this in relation to law, although the heterogeneity of the legal contexts discussed in this Article strongly suggests otherwise. In which case, any account seeking to reveal a discourse of, say, "hegemonic masculinity in law" is really simply a reference to "repeated patterns of linguistic usage" within a particular discursive field.²¹⁹ In short, it is far from clear that in talking about masculinity, legal scholars have been talking about the same thing.

For a growing number of writers reflecting on these issues, it is the concept of masculinity itself that has become increasingly problematic. Masculinity has been charged with being more than just analytically imprecise. In Jeff Hearn's words, writing in 1996, "it is as if [it] exemplifies [a]

²¹⁷ MIDDLETON, *supra* note 139, at 152. See generally PEASE, *supra* note 1 (for a general discussion of conceptual problems in defining masculinity).

²¹⁸ MIDDLETON, *supra* note 139, at 142.

²¹⁹ *Id.*

field of concern and even, possibly, distills the aggregation of activity of men in the social world into one neat word.”²²⁰ More recently, Hearn has sought to move away from masculinities and “back to men,” in an attempt to distinguish between hegemonic masculinity and what he terms “the hegemony of men,” a subtle but potentially important difference in rethinking the place of power in analyses of law and gender.²²¹ For Hearn, at issue is not so much questions about masculinity but about *men*, calling for an interrogation of how “men are both a *social category formed by the gender system* and *dominant collective and individual agents of social practices*.”²²² The way the term masculinity has been used across disciplines, he suggests, has all too often been premised on “heterosexist assumptions” and a failure to interrogate how dominant ideas about masculinity have been enmeshed with assumptions about the normative nature of heterosexuality. Moreover, he argues, masculinity may itself be “an ethnocentric or even a Eurocentric notion,” a product of a particular historical moment and mode of thought that is, in some cultural contexts at least, at best “irrelevant or misleading.”²²³

In law, as in other disciplines, masculinity continues to be viewed as potentially yielding high explanatory returns for critical study.²²⁴ Yet I wish to suggest, by way of concluding remarks, that this engagement with law and gender has itself been bound up with a particular *form of thinking* about masculinity that may itself be increasingly obsolete within late modern political, economic, and cultural contexts.

VI. CONCLUDING REMARKS

Diverse political, intellectual, and institutional influences have shaped the study of masculinities and law to date. These developments constitute part of what Margaret Thornton has referred to as a discursive attempt in law to deflect the objectifying gaze away from women.²²⁵ An aim has been to explore the complexity and contingency of benchmark masculinity as part of a project aimed at disrupting “the conventional orderings of modernity within legal texts.”²²⁶ Yet I have suggested that masculinity is not a fixed,

²²⁰ Hearn, *Is Masculinity Dead?*, *supra* note 211, at 202; *see also* Jeff Hearn, *The Implications of Critical Studies on Men*, 5 *NORA* 48 (1997) (discussing consequences of the “taking for granted” of the category “men”).

²²¹ *See* Hearn, *From Hegemonic Masculinity to the Hegemony of Men*, *supra* note 190; Jeff Hearn, *Theorizing Men and Men’s Theorizing: Varieties of Discursive Practices in Men’s Theorizing of Men*, 27 *THEORY & SOC’Y* 781 (1998).

²²² Hearn, *From Hegemonic Masculinity to the Hegemony of Men*, *supra* note 190, at 59.

²²³ Hearn, *Is Masculinity Dead?*, *supra* note 211, at 209.

²²⁴ GATENS, *supra* note 110, at 3.

²²⁵ Margaret Thornton, *Neoliberal Melancholia: The Case of Feminist Legal Scholarship*, 20 *AUSTL. FEMINIST L.J. (SPECIAL ISSUE)* 7, 15 (2004).

²²⁶ *Id.*

homogenous, or unchanging concept. Far from taking for granted what is meant by the term, locating its meaning within a grand political narrative or “big debate” in sociology (or, indeed, of any other discipline), it is more helpful to look at how it has been deployed in different contexts and at different moments, as a particular kind of (inter)discursive construction.²²⁷ Masculinity, male subjectivity—what it means, for example, to be a “man” within specific, grounded contexts—can be seen as culturally constituted categories, neither wholly dependent on nor set apart from biology. There is, we have seen, no such thing as an essential or intrinsic “male” or “masculine” identity. Men’s identities, rather, are constituted through diverse and socially contingent practices that, within certain contexts, may be experienced in different ways.

Studies of law and gender, and of feminist legal scholarship, have much to gain from incorporating a more complex account of the gendered male subject and, with it, an appreciation of the interconnected, interrelated, and interdependent nature of the lives of women, children, and men.²²⁸ Work on masculinity emerging at the interface of the cultural turn in sociology, sociological studies of personal life, and anti-essentialist and materialist feminist scholarship, for example, has been marked by a reappraisal of precisely what it means to speak of, perform, or “do” a masculine gender.²²⁹ In some respects, this development can be located as part of a wider shift within the social sciences to develop a self-reflective science of the subject, focusing on how some social experiences, but not others, are constructed as social problems in ways then seen as requiring attention involving the use of law.²³⁰ Such work raises, in turn, questions about the shifting role of legal mechanisms, legal arenas, functionaries, and forms of reasoning in late modern forms of governance.²³¹ However at the same time, I have argued, it is important not to lose sight of the political and policy dimensions and consequences of these contemporary debates about masculinity and law.

²²⁷ See SMART, *supra* note 179 (as a central theme, critiquing the tendency of sociology generally to seek to explain complex social relations within families in terms of “grand theories”).

²²⁸ See, e.g., SMART, *supra* note 179.

²²⁹ See generally MATERIALIST FEMINISM: A READER IN CLASS, DIFFERENCE, AND WOMEN’S LIVES (Rosemary Hennessy & Chrys Ingraham eds., 1997) (arguing against what is seen as a retreat to identity politics and for the integration in feminist work of materialist perspectives on women’s lives); ROSEMARY HENNESSY, MATERIALIST FEMINISM AND THE POLITICS OF DISCOURSE (1993) (exploring how feminism has understood materiality and arguing for a materialist feminist re-articulation of discourse as ideology).

²³⁰ See Nikolas Rose & Mariana Valverde, *Governed by Law?*, 7 SOC. & LEGAL STUD. 541 (1998).

²³¹ On the governmentality approach with which this argument is aligned, see generally MARIANA VALVERDE, LAW’S DREAM OF A COMMON KNOWLEDGE (2003) (exploring the relationship between law, legal research, and knowledge production, and seeing different types of knowledge and forms of power as circulating in legal arenas); O’MALLEY, *supra* note 62 (examining the relationship between law, governance, risk, and crime); ROSE, *supra* note 62 (exploring, from a “governmentality” perspective, how different forms of regulation shape the governance of subjectivity).

It is ironic in this regard how one effect of focusing a legal policy debate on the “social problem of men and masculinities” has been, as evident in much recent debate about fathers and fatherhood in the United Kingdom, an effacing of the agency of women and of women’s own views and experiences.²³² Equally, public policies based on outmoded stereotypes of both sexes will remain unlikely to address the very real problems that both women and men can face in relation to particular areas of law.²³³ What is required, I have argued, is a re-theorizing of men’s identities by looking critically at, and beyond, the term “masculinities” in ways that might produce a richer, more nuanced conceptual framework in which both men’s, and women’s, practices, subjectivities, and bodies can be approached. Locating questions about men’s agency within networks of power entails, following Ashe’s reading, challenging both simplistic “male positive” and “anti-male” standpoints alike, recognizing the politically open-ended nature of “practices that people socially categorised as men reproduce through their agency within contexts of power.”²³⁴

The debates and issues about masculinity discussed in this Article illustrate, in different ways, how conversations about masculinity have become emblematic of wider concerns and anxieties about the meaning of social, economic, cultural, and technological change.²³⁵ These contestations around the relationship between men, law, and gender have a powerful symbolic significance within diverse debates about law reform, serving as a cipher for social tensions about shifting relations between men and women (as well as children). The result is a cultural and political questioning of masculinity that, in terms of legal policy debates, would appear to have left no aspect of social life unaffected.

These debates also have significant implications for feminism, pro-feminist praxis on the part of men, and understandings of the “man” of feminist legal discourse. They reveal the uncertain and contradictory effects of social change, how the questions being raised about law within studies of masculinities cut across categories of men, women, and children, and involve the mobilization of contrasting interests and loyalties. In the areas of fathers’ rights politics, for example, different concepts of fatherhood, men, and intimacy circulate, involving diverse ideas about how men and women relate to care and caring, legal rights and responsibilities, and gendered understand-

²³² See BIRD FEATHERSTONE, *CONTEMPORARY FATHERING: THEORY, POLICY AND PRACTICE* 119–25 (2009) (describing feminist concerns about activist fathers).

²³³ Collier, *supra* note 153, at 148–51, 237–39.

²³⁴ ASHE, *supra* note 3, at 159.

²³⁵ ANTHONY CLARE, *ON MEN: MASCULINITY IN CRISIS* (2000) (exploring the terrain of a “crisis” of masculinity from a broadly psychological perspective); cf. SUSAN FALUDI, *STIFFED: THE BETRAYAL OF THE MODERN MAN* (1999) (examining the idea of a betrayal of working men in the United States and questioning the idea of a crisis of masculinity).

ings of autonomy.²³⁶ The concept of hegemonic masculinity, I have argued, is not sufficiently textured to account for the complexity of these developments in law or the politically open-ended nature of the debates about law that have resulted.

Raising such questions is not to efface issues of power, but to recognize how these debates about masculinity have occurred in the slipstream of the embedding in law of ideals of egalitarianism and gender neutrality—a process that has transformed normative understandings of many aspects of masculinity and of men’s lives.²³⁷ Set against this backdrop, this Article has sought to challenge outmoded ways of thinking about men and gender, and calls for an approach that transcends the framework of “celebration or refusal” of masculinity. In rejecting the idea that there exist essential male identities among those people who are identified, within particular societies, as “men,”²³⁸ developments at the interface of feminist theory, third-wave/anti-essentialist feminism, and queer theory have questioned both pro-feminist masculinities scholarship and some traditional feminist accounts of masculinity. At the same time, sociological work is raising new questions about how emotion, intimacy, memory, love, and commitment can interrelate with ideas of social class, race, ethnicity, relationality, and kinship.²³⁹ The result is a redrawing of the terrain around masculinities, a development that opens up new possibilities for a more nuanced and multi-layered engagement with the gendered subject.

At both national and cross-national levels, a critical engagement with masculinity should not be seen as marginal to debates about law.²⁴⁰ Rather it has become a significant, if often implicit, feature of research agendas, policy engagements, and political contestations across a wide range of topics.²⁴¹ Writing in 2004, Margaret Thornton spoke of her wish to begin “a conversation in which I hope others will join so that we might discursively constitute

²³⁶ See COLLIER, MEN, LAW AND GENDER, *supra* note 5, at 195–241; Sandy Ruxton & Helen Baker, *Father’s Rights, Fatherhood and Masculinity/ies*, 31 J. SOC. WELFARE & FAM. L. 351, 351–52 (2009).

²³⁷ See FINEMAN, THE AUTONOMY MYTH, *supra* note 98, at 195 (discussing in relation to policy concerning fathers and fatherhood).

²³⁸ See ASHE, *supra* note 3, at 159.

²³⁹ See, e.g., SMART, *supra* note 179.

²⁴⁰ In the case of the United Kingdom it is important to note the influence of European Union agendas around diversity and the mainstreaming of gender equality. See VERENA SCHMIDT, GENDER MAINSTREAMING—AN INNOVATION IN EUROPE? THE INSTITUTIONALISATION OF GENDER MAINSTREAMING IN THE EUROPEAN COMMISSION (2005).

²⁴¹ See, e.g., COMAB, *supra* note 118; McGinley, *supra* note 34 (on the use of masculinities research and theory to inform the law of sex stereotyping, specifically to conceptualize it as sex discrimination under Title VII); see also JEFF HEARN & KEITH PRINGLE, EUROPEAN PERSPECTIVES ON MEN AND MASCULINITIES (2006) (compiling information and research through a collaborative effort on the contemporary state of men, masculinities and gender relations in Europe); Critical Research on Men in Europe (“CROME”) Network, <http://www.cromenet.org> (last visited February 20, 2010) (an umbrella research network bringing together researchers from European countries and established with funding from the EU Framework 5 project, “The Social Problem of Men”).

a new episteme of feminist legal theory that is linked to the political.”²⁴² Asking whether “the conjunction of postmodernism and neo-liberalism” might add up “to post-feminism,” Thornton expressed concern about whether the institutional base of feminist legal scholarship may be “disappearing beneath our feet” at a time of seeming neo-liberal hegemony.²⁴³ Yet “clinging to the universals of the past,” she concluded, cannot “save legal academic feminism.”²⁴⁴ Rather, it is important to locate developments in feminist legal studies in the context of “a particular politico-historical moment.”²⁴⁵

The approaches to masculinity discussed in this Article can be seen as products of just such a “particular politico-historical moment.”²⁴⁶ There has been a tendency in law, as in sociological accounts of masculinity, to categorize a vast range of men’s activities by “treat[ing] them as if they were all subject to the same laws.”²⁴⁷ An essentialist form of thinking about law and masculinity can itself be seen as part of a particular “episteme” of legal theory, the time for which, following Thornton, may well have now passed.²⁴⁸ What is required is a re-theorizing “of men’s identities beyond the term ‘masculinities’” in such a way as “to produce a more multi-conceptual framework for examining men’s subjectivities, bodies and practices.”²⁴⁹ Social, legal, cultural, and technological developments have reshaped the political terrain around law and masculinity. Along with this reshaping, new ideas about how law, men, and gender relate to one another have emerged, challenging the nature of masculine identity and the power of law.

²⁴² Thornton, *supra* note 225, at 22 (emphasis omitted).

²⁴³ *Id.*

²⁴⁴ *Id.* at 9.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Smart, *supra* note 40, at 77.

²⁴⁸ See Thornton, *supra* note 225, at 22.

²⁴⁹ ASHE, *supra* note 3, at 158.

