

# FEMINISM, MASCULINITIES, AND MULTIPLE IDENTITIES

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## I. INTRODUCTION

It has been suggested that feminist legal theorists might productively use the scholarship on masculinities that has been developed over the past decade. There are several ways in which masculinities scholarship might interact with feminist legal theory. Masculinities scholarship could be seen as distinct from and complementary to feminist theory—an independent and parallel companion theory, developed by men. In this regard, from a feminist’s perspective masculinities scholarship might be thought of as ethnography, helpfully providing insights into the operations and assumptions of a distinct masculine culture. This approach would seem to validate the notion that there are significant differences between men’s and women’s experiences and perspectives, and consideration of both is necessary to form a complete legal theory picture. Feminist legal theory and masculinities theory are thus seen as both contrasting and complementary in nature.

On the other hand, masculinities scholarship can be understood as providing the basis for a critique of feminist legal theory. This approach begins with the allegation that feminist legal theory generally and incorrectly treats men as a monolithic group when there is in fact a multiplicity of male identities. Masculinities scholarship, in this framing, could be categorized as the male-focused companion to critiques that have been made over the past thirty years that feminist legal theory is excluding and essentializing. It is this understanding of the significance of masculinities to feminist legal theory that prompted this Essay.

I begin with summarizing some of the recent work on masculinities and reflect on the relevance of masculinities scholarship to feminist legal theorists. Specifically, I am concerned with the role of identity-based approaches in critical legal theory (feminist or otherwise critical), particularly how they often result in unnecessarily vigorous, overly broad, and ill-conceived accusations about exclusion and silencing that have otherwise similarly oriented individuals at odds with each other. That form of academic criticism may build individual careers, but it also negatively channels energy and resources away from a comprehensive critical legal project in which the demand for social justice is a universal one.

This objective of universality is important. When we deal with the law and the relationship between legal institutions and the structuring of power and authority, as well as their allocation among the individual, the state, and societal institutions, we employ a system dependent on the process of classification,

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generalization, and universal applicability. My reservations about masculinities theories, and other identity-focused approaches to law, reflect my belief that the most important task for those interested in a social justice project at this particular time in legal history in the United States is to construct a legal subject with which to replace the abstract liberal subject with its accompanying and unrealistic constructs of autonomy, self-sufficiency, and independence. This new legal subject must be based on an appreciation of the human condition in order to effectively displace the rhetoric of personal responsibility, small government, and condemnation of state intervention. The liberal subject is a universal construct and, so, must be its alternative. This is not an argument that discrimination on the basis of categories such as race, gender, or sexual orientation is no longer a problem in the United States. Nor do I suggest that stronger remedies for discrimination are needed. My question is, as interesting as the deconstruction of traditional legal categories such as “woman” and “man” might be, how does the fragmented multiplicity of modified legal subjects that remain after such deconstruction aid a legal theorist in constructing an approach within the confines of our imperfect system to address problems, such as poverty and lack of social mobility, that transcend those fragmented identities?

## II. MASCULINITIES CLAIMS

Basically, the argument of identity-focused scholars critical of feminist legal theory has been that the theory reflects a “white women’s heteronormative” perspective that both obscures the complexity and nuances of different experiences and excludes the voices, if not the actual women, who are not white, middle-class, and heterosexual.<sup>1</sup> Such exclusion necessitates the development of a separate feminist (or womanist) legal theory that adopts as a central element the experiences, narratives, and stories of an excluded group.<sup>2</sup> Concepts such as intersectionality allow the inclusion and bundling of identity characteristics, locating the subject of such legal theory at the intersection of a multiplicity of categories.<sup>3</sup> The general category of “women” is, thus, frag-

<sup>1</sup> See, e.g., ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* ix (1988); see also Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 184 (2001); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

<sup>2</sup> The general nature of the charges often extend beyond the totalizing tendency of theory constructed by and for “white middle-class heterosexual women” to offer theoretical remedies for other cultural and social transgressors. See, e.g., I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9, 9–11 (2006) (advocating “reading black” to critically read opinions and narratives attentive to the race); John Tehranian, *Compulsory Whiteness: Towards a Middle-Eastern Legal Scholarship*, 82 IND. L.J. 1, 3 (2007) (contending people of middle-eastern descent need scholarship focused on them because of their unique position—having the same status as white people on paper but without recourse for legal action in the post-9/11 environment); Sunny Woan, *White Sexual Imperialism: A Theory of Asian Feminist Jurisprudence*, 14 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 275, 277 (2008) (arguing that women of Asian descent face “white sexual imperialism,” which has created a hypersexualized stereotype of Asian women).

<sup>3</sup> See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989); Harris, *supra* note 1, at 615; Darren Lenard Hutchinson,

mented by the modification of that general grouping by the inclusion of personal identity characteristics, often in a binary manner.<sup>4</sup> So we now have white women and Black women, heterosexual women and lesbians or, perhaps more complexly, the Black woman who is also a lesbian. The idea that these sorts of differences among women mean that there cannot be a shared core woman's experience is foundational to the critical stance of perspective critiques. So too is the idea that the voices and perspectives of those who are different from some perceived dominant group (white, heterosexual, and middle class women) have been excluded. This different-and-excluded perspective critique has been labeled "outsider" scholarship to reflect both of these premises.<sup>5</sup> It is not always clear whether it is the law or the dominant feminist theorist who is being criticized for such exclusion, but the remedy is seen as the development of a distinct intersectional legal category.

Masculinities theory extends this critique of feminist legal theory's exclusionary bias by fragmenting the category of "men." Masculinities scholarship concedes that there are differences between men and women that might be theoretically relevant, as well as recognizing that men have been present (not been excluded from) feminist legal theory.<sup>6</sup> The exclusion and silencing at issue here is the result of men, rather than women, being essentialized. The allegation is that men in feminist theory have been cast primarily as oppressors or subordinators of women.<sup>7</sup>

In particular, the charge is that feminist legal theorists have not approached men as the objects of gender analysis.<sup>8</sup> It is argued that if we were to do so, we would see significant differences exist among men, just as we do among women.<sup>9</sup> Further, recognizing differences among men would disrupt the narrative of gender subordination or domination, since feminist legal scholars would be compelled to concede that individual women may be in privileged positions compared to marginalized men.<sup>10</sup> One goal in making multiple masculinities visible is that feminist legal theorizing would acknowledge and perhaps even address the barriers men encounter in interactions with each other and with women, as well as the prices men pay for the male or patriarchal privilege, which has so occupied feminist thought.<sup>11</sup>

Some masculinities scholars argue that feminists must now take up the study of masculine identities, incorporating the insights thus revealed in order to correct an exclusionary feminist project as it is going forward.<sup>12</sup> Feminist

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*Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 307–09 (2001).

<sup>4</sup> See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

<sup>5</sup> See Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 685–87 (1992) (outlining outsider scholarship and providing examples).

<sup>6</sup> NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 13 (2010).

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at 23.

<sup>9</sup> See *id.* at 27.

<sup>10</sup> See *id.* at 4–5.

<sup>11</sup> See, e.g., *id.* at 61.

<sup>12</sup> See, e.g., Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431, 431–33

legal scholars are admonished to explore men's experiences with women from the men's perspectives, rather than only considering women's experiences with men from women's perspectives.<sup>13</sup> Additionally, we are told that men's relationships and interactions with other men affect the ways in which they express their masculinity, an interactive process that has significant implications for how they will contemporaneously interact with women.<sup>14</sup>

In a masculinities approach there seem to be two distinct ways in which men are differentiated from each other and then strewn along a hierarchical continuum of masculinities. First, it is asserted that a "hegemonic"<sup>15</sup> masculinity is in operation, constructed in such a way that it is a status that few if any men are actually able to achieve.<sup>16</sup> The idea is that every man is always in struggle to become or attain hegemonic masculinity, but the status is never arrived at in any stable form.<sup>17</sup> Hegemonic masculinity is a state or status that must constantly be defended.<sup>18</sup> Further, since heterosexuality is central in achieving hegemonic masculinity, individual men must be vigilant to act in ways that reinforce the fact that they are neither gay nor a woman (or woman-like).<sup>19</sup> In this rendering, all men are subordinated, although it is to *an ideal*, rather than to some other defined group in society. Subordination in this form would seem to be in constant flux over an individual man's lifetime, as he

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(2010); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1105–06 (1996).

<sup>13</sup> Levit, *supra* note 12, at 1105–06 ("For feminism to succeed in promoting large-scale societal change, not only must it be nonexclusionary, but at least a critical mass of men must become feminists."); see also RICHARD COLLIER, *Men, Masculinities and Law: The "Man Question" in Legal Studies*, in MEN, LAW AND GENDER 7, 9, 19 (2010); R. Lea Brilmayer, *Inclusive Feminism*, 38 N.Y.L. SCH. L. REV. 377, 383, 385–86 (1993).

<sup>14</sup> As part of that inquiry, we are to ask how race and class, in particular, intersect with and complicate the experience of masculinity for individual men. See DOWD, *supra* note 6, at 28.

<sup>15</sup> "[P]reponderant influence or authority over others . . . the social, cultural, ideological, or economic influence exerted by a dominant group." *Hegemony Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/hegemony> (last visited Feb. 24, 2013). This definition implies that hegemonic masculinity is constructed and employed by actual people acting with awareness, intent—that it is a conscious and considered strategy of control that is only available to the most powerful, rather than the product of diffuse and undisciplined cultural and social forces. If it is a status seldom if ever achieved by individual men, however, one wonders just who constitutes the person or group that controls or dominates and just how that domination is accomplished if things are so fluid.

<sup>16</sup> See R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC'Y 829, 846 (2005) (explaining that the hierarchy of masculinities is a fundamental feature of masculinities); see also R.W. Connell, *Psychoanalysis on Masculinity*, in THEORIZING MASCULINITIES 11, 14 (Harry Brod & Michael Kaufman eds., 1994); R.W. Connell, *The History of Masculinity*, in THE MASCULINITY STUDIES READER 245, 252 (Rachel Adams & David Savran eds., 2002).

<sup>17</sup> See SUSAN FALUDI, *STIFFED: THE BETRAYAL OF THE AMERICAN MAN* 29–30 (1999); MICHAEL S. KIMMEL, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY 25, 33 (2005); Frank Rudy Cooper, "Who's the Man?": *Masculinities Studies*, Terry Stops, and Police Training, 18 COLUM. J. GENDER & L. 671, 741 (2009).

<sup>18</sup> DOWD, *supra* note 6, at 28.

<sup>19</sup> *Id.*

could slide up or down the hierarchical scale that measures his masculinity against the hegemonic ideal.<sup>20</sup>

In addition to this generalized subordination, some subsets of men are seen to be in a position of relatively fixed or stable subordination due to the fact that hegemonic masculinity is also raced and classed.<sup>21</sup> The argument in this regard is that when men have characteristics that are deemed inherently incompatible with the hegemonic masculinity, they can be further subordinated because of the way those characteristics intersect with their masculinity.<sup>22</sup> This line of argument, as well as the observations about the centrality of heterosexuality to hegemonic masculinity reflects and parallels some of the criticisms of feminist legal theory. The larger category of “men” is rejected as too essentializing and also as excluding individual characteristics that are as if not more relevant to the subordination analysis.<sup>23</sup> Individual men should not only be seen as men, but also seen as situated along axes of interacting hierarchies of race and class in particular, and perhaps also differences in ability, ethnicity, age, or religion.<sup>24</sup> Therefore, it is as important to distinguish among men and look at the ways in which different men are both differently subordinated and differently privileged within dominant cultural, legal, and socially-imposed understandings of masculinity through those hierarchies.

Recognition that men are different from one another is not seen as suggesting that men as a group are in equivalent positions compared with women as a group in regard to subordination.<sup>25</sup> Most masculinities scholars concede that men as a group remain relatively privileged and that patriarchal privilege continues to matter in social, political, and economic relations.<sup>26</sup> What these scholars seek is that men not be treated as an undifferentiated monolithic group as women make claims about the ways in which gender operates in society in developing feminist legal theory. Since women’s subordination is inevitably intertwined with men’s—one cannot be understood without the other—the result of an excursion into masculinities will be a clarification and reorientation of feminists’ own explorations of inequality.

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<sup>20</sup> The hegemonic ideal could also evolve and change form over time. Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC’Y 201, 209 (2008) (“Seeing masculinity as a social construct rejects, and in fact critiques, the notion of a set or stable sex role that one acquires or masculinity as an inevitable phase of development from child to adult, from boy to man.”).

<sup>21</sup> See KIMMEL, *supra* note 17, at 30–31, 33; see also KIMMEL, *Gendering Desire*, in *THE GENDER OF DESIRE*, *supra* note 17, at 3, 22; KIMMEL, *Pornography and Male Sexuality*, in *THE GENDER OF DESIRE*, *supra* note 17, at 65, 78–79.

<sup>22</sup> See Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 297–98 (2002).

<sup>23</sup> Jeff Hearn, *From Hegemonic Masculinity to the Hegemony of Men*, 5 FEMINIST THEORY 49, 66 (2004). See also John Remy, *Patriarchy and Fratriarchy as Forms of Androcracy*, in *MEN, MASCULINITIES & SOCIAL THEORY* 43, 51–53 (Jeff Hearn & David Morgan eds., 1990).

<sup>24</sup> See Ehrenreich, *supra* note 22, at 275; see also Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 856 n.8 (2006).

<sup>25</sup> See Hearn, *supra* note 23, at 57.

<sup>26</sup> See RAEWYN CONNELL, *GENDER* 142 (2d ed. 2009) (discussing the “patriarchal dividend” as the benefit men derive from their dominance over the other gender).

Some prominent feminist legal scholars have taken up the challenges offered by masculinities critiques. For example, Nancy Dowd uses insights from masculinities theory in examining the situation of boys in the contexts of education and the juvenile justice system and men in regard to fatherhood and sexual abuse.<sup>27</sup> Using this approach Dowd concludes: education is an expressly and formally “gender-neutral” system, but the structure, culture, and norms that are in operation within the system are gendered and often work against the interests of both boys and girls, although differently.<sup>28</sup> The juvenile justice system, by contrast, has been designed with boys in mind—or a version of boyhood that is criminalized—and thus fails to meet the needs of girls who enter the system and, ironically, also fails the boys around whom it was designed. Fatherhood is an inherently male-identified role, but the specifically gendered nature of fatherhood has not been explored.<sup>29</sup> Sexual abuse typically calls to mind a male stranger and a female victim, while the reality is that men are also victims, women are also abusers, and quite often the abuser is a family member or person with a close relationship to the victim.<sup>30</sup>

Dowd argues that a masculinities approach calls attention to, or “exposes” male gendering and challenges us to think of boys and girls/men and women complexly and simultaneously as in relation to each other rather than discreet and independent subjects.<sup>31</sup> Considering masculinities also locates those relationships within specific societal institutions. As she uses masculinities theory, it is not an end in itself but a way to try to understand complex social relationships and structures, such as those found in the family or educational system.<sup>32</sup> Dowd concedes there is some danger women might be excluded or marginalized in an analysis that also encompasses the position of men, who typically have more societal power and privilege than women, but she admonishes us to take not an “either/or” but rather a “both/and” perspective.<sup>33</sup> Her ultimate focus on institutional arrangements and relationships she hopes will lessen the danger of excessively male-focused analyses, particularly when the expressed objective of including men’s experiences is to show the true scope and nature of the harm under patriarchy: harm that is universal, shared by men and women, even if it is also differently experienced. Dowd’s attempt to point out distortions and inadequacies in the functioning of institutions using a multiplicity of identities/complexity of subjects approach is admirable. However, her efforts also point out the limitations of an identity approach.

Using identities inevitably brings the inquiry back to a search for specific targeted discrimination based on those identities. Those so identified are splintered off from the universal legal subject (the liberal legal subject) and, as a now differentiated part of the whole, measured against the universal ideal to see

<sup>27</sup> Dowd, *supra* note 6, at 73–125.

<sup>28</sup> *Id.* at 84; see also Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455, 486 (2005).

<sup>29</sup> See Dowd, *supra* note 6, at 105; but see NANCY E. DOWD, REDEFINING FATHERHOOD 2–3 (2000) (discussing data known about fathers and fatherhood); ANDREA DOUCET, DO MEN MOTHER? FATHERING, CARE, AND DOMESTIC RESPONSIBILITY 21 (2006).

<sup>30</sup> See Dowd, *supra* note 6, at 125.

<sup>31</sup> See *id.* at 65–66.

<sup>32</sup> *Id.* at 26–27.

<sup>33</sup> *Id.* at 67.

if differences in treatment, status, or position are impermissible. This comparative process is inevitable in a discrimination analysis, but if we want the inquiry to go to institutional and structural inequalities that are not (or are no longer) based on intentional impermissible discrimination, making multiple identities central to the analysis will be difficult to do in practice and may actually further obscure problems not captured by or transcending those identities. Dowd concedes that it is difficult to both hold multiplicities in mind (and not privilege one over others) and make the analysis relevant to the objective of suggesting institutional transformation through law. Interesting from my perspective is the fact that her book contains few concrete suggestions for engagement with law and law reform. This is not a criticism of the book, which does offer, even if in abstract terms, suggestions and admonitions directed to feminist legal scholars: “Adding men should not mean displacing women, and it requires a willingness to consider the position of the dominant gender group while demanding that the dominant group acknowledge and commit to the achievement of liberation and justice for women while raising men’s and boys’ issues.”<sup>34</sup>

And in regard to sexual abuse:

[T]he focus on child sexual abuse has unintentionally meant that other forms of abuse have been given less attention. The negative consequences of that focus are disproportionate for boys. In addition, this focus has avoided the reality that women constitute the majority of offenders. The dynamic of that pattern of maltreatment and abuse is a critical part of understanding motherhood that must be addressed.<sup>35</sup>

My concern with such insights is not that either is inappropriate, but that they seem more directed at giving guidance for the reform of feminist legal scholarship than focused on how legal institutions and practice might be approached and reformed.

I am also concerned with the ways that a focus on identities can narrow or constrict the critical imagination. In focusing on the gendered categories of “mother” and “father,” for example, we may fail to see and critically explore the institution of the family and its role in the larger society. Looking at the examples Dowd uses, I would ask different questions. For example, why isn’t the fact that we routinely incarcerate children, regardless of their gender, the issue, and not the fact that incarcerated boys and girls are differently disadvantaged in a system that treats everyone inhumanly?<sup>36</sup> Isn’t the more pressing question in regard to education the lack of resources for public schools, the overcrowding, and other problems that have resulted from significant ideological shifts in the United States around privatization? The whole idea of public education is under attack, not because it is failing boys and girls differently, but

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<sup>34</sup> *Id.* at 85.

<sup>35</sup> *Id.* at 138.

<sup>36</sup> See Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress’s One-Way Criminal Law Ratchet?*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 494 (2011) (“The politics of criminal law [in the United States] have generally resulted in a one-way ratchet toward harsher policies and punishments . . .”). But see Gerard de Jonge, *Youth, Crime and Juvenile Justice in the Netherlands*, 4 J. INST. JUST. & INT’L STUD. 25, 28–29 (2004) (explaining some of the measures taken towards a more humane juvenile detention system in the Netherlands).

because, increasingly, politicians and powerful interests assert that the government should not be in the business of providing it.<sup>37</sup>

In regard to parenting, isn't the dilemma not that fatherhood has been differently gendered, but that both genders have been shaped by the fact that dependency is politically perceived as primarily the responsibility of the private family, and this necessitates some role division as between wage earner and caretaker?<sup>38</sup> Historically this role division was gendered, but the social disadvantages are attached to the role or status of the caretaker, not the sex of the person performing the care. What is needed is not more gender equality in law, but a more responsive state and accommodating workplace policies.<sup>39</sup> Similarly, understanding the extent and nature of child abuse in all its forms would not only look at and compare abusive fathers' with abusive mothers' behavior, but also critique the condoning effects of religious and cultural premises that parents "own" their children and have not only a right but a duty to discipline them.<sup>40</sup> The legal manifestation of this state abandonment of its responsibility to children is found in the extensive parental rights doctrines that shape policy in regard to education as well.

If the use of even the broad categories of male and female and the critical tool of gender construction can obscure structural issues, it seems wrong to suggest that further deconstruction of those categories will help in the reformation of complex social relations and structures. Critical legal scholarship should be generative of solutions as well as critical?<sup>41</sup>

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<sup>37</sup> See, e.g., Julianne Hing, *Bobby Jindal, Using ALEC Playbook, Radically Reshapes Public Education*, COLORLINES (Apr. 23, 2012, 8:44 AM), [http://colorlines.com/archives/2012/04/bobby\\_jindal\\_using\\_alec\\_playbook\\_signs\\_education\\_reform\\_overhaul.html](http://colorlines.com/archives/2012/04/bobby_jindal_using_alec_playbook_signs_education_reform_overhaul.html); see also Salvatore Colleluori & Brian Powell, *How ALEC Is Quietly Influencing Education Reform in Georgia*, MEDIAMATTERS FOR AM. (May 9, 2012, 10:41 AM), <http://mediamatters.org/research/2012/05/09/how-alec-is-quietly-influencing-education-refor/184156>.

<sup>38</sup> See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* 59, 67 (2004) [hereinafter FINEMAN, *THE AUTONOMY MYTH*].

<sup>39</sup> See Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 14, 25–26 (2000).

<sup>40</sup> See Barbara Bennett Woodhouse, *Individualism and Early Childhood in the U.S.: How Culture and Tradition Have Impeded Evidence-Based Reform*, 8 J. KOREAN L. 135, 138 (2008) (explaining how notions of "parental authority" have worked as an impediment to fostering the rights of children in the United States). United States law gives parents a great amount of deference in upbringing their children in United States law because of the presumption that they act in the child's best interests. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 400, 402–03 (1923) (holding that parents have a right to direct the upbringing of their children, including control over the child's education); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (reiterating that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . ."); *Stanley v. Illinois*, 405 U.S. 645, 657–58 (1972) (recognizing the privacy right of parents to make decisions concerning the care, custody, and control of their children).

<sup>41</sup> I am not referring to the generation of yet more law review articles here, but to the creation of progressive social legal policy that can actually make a difference in the ways in which the system operates.

## III. LEGAL THEORY AND SOCIETAL TRANSFORMATION

The masculinities critique, as well as other critiques of feminist legal theory raises a question with which I have grappled my entire academic career: Should feminist legal theorists give up on the possibility that law can be used to advance a positive social justice and equality project because the legal categories we are compelled to use are inevitably imperfect? This question suggests an even broader issue as to how the law in general and critical legal theory in particular should respond to socially produced economic, political, and structural differences among and between individuals and groups in society. The problems inherent in using the general categories of women and men to explore one aspect of difference—that of gender—and its implications for institutional relationships are multiplied in the contexts of intersectional or multidimensional identities. Perhaps the feminist legal theorists should confine themselves to criticism as outsiders—to the deconstruction of legal categories and the ferreting out of situations not addressed or interests seemingly ignored—and abandon the idea of constructive legal reform.

Of course, a great deal would have been lost if feminist legal theorists had abandoned reform aspirations in the past. Feminist legal theory brought into existence innovations in legal thought and generated substantive changes in the way gender is addressed in law. Using the now vilified category of “women,” feminists in law used gender equality as the concept with which to suggest reforms of significant sites of inequality, such as the workplace, family, and public sphere. Reforms in those areas benefited many women across their differences (and some men in spite of their gender difference).<sup>42</sup>

In fact, when legal feminists entered the field, the categories of women and men were defined as different and contrasted with one another in laws that structured many of society’s institutions. One could even say that historically the law actually recognized two distinct legal subjects: one male and one female. The object of legal feminism was to challenge those different institutional and identity constructions, which tended to disadvantage and justify exclusion of women as a legally defined group.<sup>43</sup> Feminist legal theorists imagined utopian gender-neutral and egalitarian visions for society (some might label them dystopian) and brought concepts reflecting gendered institutional arrangements such as “care-work” (which was to be valued equally with paid work) and “marital property” (which recognized different, but equally important, forms of contribution to the accumulation of wealth and property) into mainstream legal and political discourse and made them the basis for

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<sup>42</sup> See, e.g., Katharine T. Bartlett, Comment, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1540–41 (1974); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1118–20 (1986); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1, 1–2 (1985); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 196–200 (1982).

<sup>43</sup> See Martha Albertson Fineman, *Feminist Legal Theory*, 13 AM. U. J. GENDER SOC. POL’Y & L. 13, 14–16 (2005).

reform.<sup>44</sup> They also created legal harms from what had been invisible gendered experiences for many women, “discovering” things like domestic violence and marital rape, and toppled the common law concept of husbands as disciplinarian heads of households.<sup>45</sup> The idea of using law to get at such inequalities is hard to abandon, at least for feminist scholars of that generation.

There should be significant questions about how far fragmenting the legal subject along multiple axes of identity characteristics can get us in using law to develop a reconstructive social justice project.<sup>46</sup> In fact, it could be argued that the turn to multiplicities of identities has actually worked to derail a social justice project that began in the 1960s using broad categories of race and gender, in that fragmenting identities may have contributed to shattering old alliances and impeded the formation of broad and effective new coalitions. Differences can be used to divide groups who might otherwise come together in the interest of working toward greater social justice.

Equally harmful to a broadly conceived and inclusive social justice project is the way in which identity categories have become proxies through which we articulate and understand social inequalities such as poverty and other forms of social disadvantages.<sup>47</sup> Attribution of socially produced disadvantage to the mistreatment of only some groups detracts from the development of a systemic analysis of the political and economic organization of the United States at the beginning of the twenty-first century and the ways in which subordination and inequalities are generated and shared across identities.<sup>48</sup> Equally problematic for the likely success of the approach is the way in which identities-focused analysis tends to concentrate attention on identifying “victims” and also, generally, is premised on the assumption that there are, or have been in the recent past, individual or institutional villains.<sup>49</sup> This assumption is often difficult to prove and many people, including judges and jurors, go to great lengths to find reasons other than discrimination for behavior by focusing on plaintiffs’ conduct or attitude rather than defendants’.<sup>50</sup>

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<sup>44</sup> See, e.g., CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 95 (1989) (suggesting that a woman’s problems are not just hers alone but of women as a whole, and we must address the problems as a whole, through political solutions).

<sup>45</sup> See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 170 (1987).

<sup>46</sup> The approaches to the legal subject by categorizations of feminism might not be particularly useful. See MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 15–22 (2d ed. 2003) (discussing the three stages of feminist legal theory: the equality stage, the difference stage, and the diversity stage.)

<sup>47</sup> See Jessica Knouse, *From Identity Politics to Ideology Politics*, 2009 UTAH L. REV. 749, 765 (2009) (discussing how awareness of inequalities arise once an awareness of difference is established).

<sup>48</sup> CHAMALLAS, *supra* note 46, at 22.

<sup>49</sup> See Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1297 (2012).

<sup>50</sup> See *id.* at 1296–1302 (summarizing psychological literature on the fundamental background belief of meritocracy that makes a charge of discrimination extremely difficult for Americans to believe, even when the evidence is very strong and not contested).

## IV. LAW AS DISCIPLINE

Like feminist theory generally, masculinities theory was not initially developed by legal theorists but evolved first in other disciplines, particularly those of sociology and psychology.<sup>51</sup> The initial disciplinary origins of masculinities theory are important because there are significant differences between a legal approach and that of psychology or sociology. The subject and object of analysis are different as are the focus and methodology, which leads the disciplines to ask different questions and be concerned with different norms and goals. Certainly the construction of a cultural, social, or social-science subject involves different disciplinary considerations. The categories can be, and often are, mandated to be more nuanced, focused on distinguishing characteristics and used to create descriptive and explanatory categories than those in legal scholarship and theory. This does not mean that those disciplines are irrelevant to law or that theorists from other areas cannot use law within their disciplines. Rather, it is merely a reminder that the legal subject is an artifact that is constructed by and through law in part to hide the various and varying realities of persons of flesh and blood and confine them within the roles that they are assigned in and through law.<sup>52</sup> The actual legal subject at issue need not even be a real person; it can be a corporation or association.<sup>53</sup>

Also significant is the fact that the relationship between social science disciplines and institutions of state power are different than that of law. Of course, theorists from those areas can play a role in court proceedings as expert witnesses and their scholarship is used by legal theorists and in legal contexts. But, legal scholarship directly and differently engages with state institutions that can and do exercise considerable power and influence over people's lives. Lawyers as judges, legislators, or even professors generate, explicate, manipulate, and critique norms, rules, and systems that punish and reward certain behaviors. The disciplining nature and force of law on an individual or institution is different—more immediate, focused, and more likely to have a direct impact on structuring people's lives than sociological or historical research. The legal subject formed by law has concrete and coercive implications for real persons and institutions.<sup>54</sup> Further, there are unique characteristics associated with law and its uses that affect the legal system's ability to incorporate generalized insights about differences, be they sex or race-based or found in hierarchies of masculinities.

The tools available to legal scholars are limited in some important ways by the nature of legal institutions, the nature of law itself, and the constraining norms and values of legal scholarship. For one thing, law relies on broad categories that are rather entrenched within the law as it has developed over centuries as a coercive tool of the state. Law making relies on classification—the

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<sup>51</sup> See Dowd, *supra* note 6, at 28–29, 35 (outlining major sociological and psychological scholars in masculinities).

<sup>52</sup> See FINEMAN, *THE AUTONOMY MYTH*, *supra* note 38, at 17–20.

<sup>53</sup> See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010) (suggesting that corporations are legal subjects: “the Government may not suppress political speech on the basis of the speaker’s corporate identity”).

<sup>54</sup> See FINEMAN, *THE AUTONOMY MYTH*, *supra* note 38, at 17–20.

generation of broad generalizations about individuals, groups, or classes of things and people. This classification process occurs initially at the legislative level, which generates systems of rules and norms that are intended to have universal application within categories. Generalizations and aggregation are inevitable in this process.<sup>55</sup> Once the categories are drawn, the foundational principle of equality before the law demands the same treatment be applied to those who fit within the same classification. In other words, the legal or political subject is a universal subject. Individuals may be sexed, raced, and classed; but the whole point of equal protection of the law is to erase difference in treatment.

On the other hand, adjudication is the means whereby individual circumstances are fitted into existing classification, the process whereby individual and specific facts are assigned legal meaning or consequences on a case-by-case basis.<sup>56</sup> Adjudication is not an ad hoc process and the same mandate of equal treatment applies.<sup>57</sup> Courts make decisions using analogies and distinctions within the context of rules such as those governing “precedent” and “stare decisis,” ideally tying like things together in a web of consistent, coherent, and predictable doctrine using classifications.<sup>58</sup>

Legal classifications are of necessity broad and take legal subjects outside of personal history, universalizing that which might appear as inherently different to scholars in some other disciplines. In order to “speak” to law, legal theory, even of the feminist variety, must to some extent assimilate concrete and material differences into the dominant meta-narratives of law and, as a result, will have only a limited ability to theorize around particulars. Law is too gen-

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<sup>55</sup> Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1, 6 (1992).

<sup>56</sup> Classification and principles governing the organization of objects into groups according to their similarities and differences or their relation to a set of criteria is evident in every body of knowledge.

According to strict logic, organizing a domain of objects into classes must leave no two classes with any object in common; also, all of the classes together must contain all of the objects of the domain. This theory, however, disregards the frequency in practice of borderline cases—i.e., objects that can with equal correctness be accepted or rejected as members of two otherwise exclusive classes [intersection]. This is often seen in biology, where the theory of evolution implies that some animal populations will have characteristics of two distinct species.

In practice, the principles used to classify a domain of objects depend upon the nature of the objects themselves.

*Classification Theory*, BRITANNICA ONLINE ENCYCLOPEDIA, <http://britannica.com/EBchecked/topic/120378/classification-theory> (last visited Feb. 25, 2013). In law, the articulation of perceived similarities and differences is particularly important because of the antidiscrimination mandate in equal protection jurisprudence. The classification of process in this situation requires a standard object against which all others are compared, the male norm identified in feminist legal theory.

<sup>57</sup> See J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 386 (1974) (noting that the ad hoc procedural approach taken in administrative rulemaking is different from the procedures required in the formal adjudication process).

<sup>58</sup> See *Stare Decisis Definition*, LEGAL INFO. INST., [http://www.law.cornell.edu/wex/stare\\_decisis](http://www.law.cornell.edu/wex/stare_decisis) (last visited Feb. 25, 2013) (“Courts cite to *stare decisis* when an issue has been previously brought to the court and a ruling already issued. Generally, courts will adhere to the previous ruling, though this is not universally true.”).

eral and reflective of the status quo, too rule and precedent bound to easily and quickly absorb and reflect nonconforming experiences. Rather, operating in society as a dominant structural paradigm and discourse, law both co-opts the experiences of diverse groups, while also homogenizing and standardizing those experiences as they are specifically subjected to law. Co-optation is achieved through classification and tinkering reforms, while standardization operates upon those individuals caught in legal constructs, such as the adversarial process, rules of evidence, and the structured elements of causes of action and claims for relief, which make it impossible to tell stories outside of legal narratives.

Many years ago, in thinking about the imperfections of existing gendered classifications in law, I referred to motherhood as a “colonized category”—a category occupied exclusively by women, but given legal meaning and content in institutions that were predominantly populated by men.<sup>59</sup> I now realize that most, perhaps all, legal categories are colonized to some extent. This is as true with “men” (or the masculine) as it is with “women.” Colonization is inherent in the classification process and classification is essential to the operation of the legal system. The fact that broad, over- and under-inclusive classifications are inevitable does not mean that the resulting categories, imperfect as they are,<sup>60</sup> cannot be employed to effect positive change. Nor does it mean that the interpretation and content of legal categories are not worth fighting over.

Certainly, one way out from under the criticism and accusation of essentialism coming from masculinities scholars in regard to the category of men, and from others in regard to the understanding of “women,” is for feminist legal theorists to give up on the possibility of positive uses of law, perhaps pursue cultural and political engagement outside of formal institutions, even outside of academic disciplines altogether. This is the direction some feminists are taking. Janet Halley in particular has argued that feminists should turn away not only from law but also from feminism.<sup>61</sup> Borrowing from Foucault’s model of diffuse power, she asserts that any attempt to productively engage law will simply extend the reach of regulation, administration, and discipline.<sup>62</sup> In this analysis the law cannot be redeemed, and trying to transform or reform law poses risks of co-option and marginalization. Provocatively, she couples this move away from law with a call to “take a break from feminism.” This is justified because of the way that legal feminism has produced a legal subjectivity for women associated with experiences of oppression and/or victimization, which are assumed to hold true for all those falling within the legal category of women.<sup>63</sup>

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<sup>59</sup> MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 51 (1995).

<sup>60</sup> MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 36–52 (1991) [hereinafter FINEMAN, *THE ILLUSION OF EQUALITY*].

<sup>61</sup> See generally JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 304–47 (2006).

<sup>62</sup> *Id.* at 124–31. See also Michel Foucault, *The Subject and Power*, 8 *CRITICAL INQUIRY* 777, 781–82 (1982) (describing “subjectivation”).

<sup>63</sup> See HALLEY, *supra* note 61, at 346.

Halley's concerns are related to points also made by masculinities theorists. She is right to insist that issues about the construction of victimhood and conferral or denial of agency, as well as the problems associated with governance feminism's tendency to regulate sexuality, should be explored. The law can and does generate norms, rules, and rationalizations outside of and above lived daily experience as a result of the co-opting/standardizing nature of legal institutions. But there is a paradox for the critical legal theorist, or at least those who are adherents to a law and society tradition when encountering the call to turn away from law: *law is everywhere*.

Law is not only found in statutes, cases, courts and legislatures but spills over into and permeates the daily life of individuals, entities, institutions, and relationships. In other words, critical legal scholarship must reconcile a paradox: inevitably legal classifications homogenize distinct individual experiences into some overarching whole, but law in society, and through the institutions it creates, profoundly shapes both individual and institutional experiences. We cannot stand outside of law any more than we can stand outside of culture. This realization for a feminist legal scholar means that we must engage with law, although it does not tell us what form that engagement should take.

Because we appreciate the co-opting potential and exclusionary tendencies of law, we might not want to undertake test case litigation or draft ordinances or lobby for specific reforms. But I do think that critical legal scholars must use their unique understanding of law and legal institutions to bring forward a sophisticated critique of the role of law in the construction and organization of society and its institutions, particularly when those institutions perpetuate inequality. Further, we have a responsibility to suggest concrete reforms or changes when we can be reasonably confident that they will improve conditions for some, even if not for everyone, and this is particularly true when some in society are disadvantaged or harmed by or through law.

Feminist legal scholars recognize that legal categories or classifications have real world consequences in people's lives, which is why there are political struggles over their meanings and applications. The struggles over meaning reflect both a legal and a political process—one that takes place within a pragmatic system that recognizes lines must be drawn and decisions made regardless of the incomplete or emerging nature of the underlying facts and theories. And, of course, those in power craft the categories and definitions and in ways that benefit themselves and their interests. Power permeates law and legal institutions. The limitations of the process can and does create problems, lead to distortions, injustices, subordination, and discrimination.

## V. LAW AND SOCIETY

My model for productive engagement with law is the Law and Society movement.<sup>64</sup> Long before there was an anti-essentialist critique of feminist theory—long before there was anything labeled “feminist legal theory,” in fact,

<sup>64</sup> The movement grew out of the legal realist tradition. See Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 *LAW & SOC'Y REV.* 409, 417–19 (1998) (outlining the history of the movement); see also Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain't*

scholars, such as Karl Llewellyn,<sup>65</sup> Willard Hurst,<sup>66</sup> and Stewart Macaulay,<sup>67</sup> recognized that classification, while inevitably part of the legal process, was nonetheless susceptible to both over- and under-inclusiveness. They identified additional problems with the implementation of law, and the “gap” between law on the books and law in action that has been explored in countless articles and books.<sup>68</sup> They and other law and society scholars exposed the ways “unintended consequences,” which were often also unforeseen, were all too frequently the lasting product of well-intentioned law reform efforts.<sup>69</sup>

The work of legal feminists following this tradition in the 1970s and 1980s was very attentive to the position of non-middle-class and non-white women. Their work documented the negative repercussions that feminist-inspired law reforms, asserted to benefit women generally, actually had on the subset of poor women’s lives.<sup>70</sup> I, myself, did this type of analysis in regard to gender-neutral family law reforms and welfare reform proposals addressing the “dilemma” of single motherhood using empirical data.<sup>71</sup> My work urged would-be reformers to try to lessen the possibility of unintended consequences by self-consciously grounding analyses of existing and proposed laws in women’s experiences broadly.<sup>72</sup> I adopted an approach developing “middle-range theory,” as advocated by Robert K. Merton.<sup>73</sup> Middle range feminist

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*What They Used to Be*,” 2005 Wis. L. Rev. 365, 391–96 (2005) (discussing the legal realist roots and influence on the Law and Society Movement).

<sup>65</sup> See Karl N. Llewellyn, *Group Prejudice and Social Education*, in CIVILIZATION AND GROUP RELATIONSHIPS 11, 11–13 (R. M. MacIver ed., Kennikat Press 1969) (1945); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 431–32 (1930).

<sup>66</sup> See JAMES WILLARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 47 (1977); JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 184 (1950).

<sup>67</sup> See LAWRENCE M. FRIEDMAN & STEWART MACAULAY, LAW AND THE BEHAVIORAL SCIENCES 1028–29 (2d ed. 1977); Macaulay, *supra* note 64, at 390–91.

<sup>68</sup> See, e.g., Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (originating the distinction between law in books and law in action); see also EUGEN EHR- LICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 253, 293 (Walter L. Moll, trans., Transaction Publishers 2002) (1936); Mark Kessler, *Lawyers and Social Change in the Postmodern World*, 29 LAW & SOC’Y REV. 769, 771 (1995); David Nelken, *Law in Action or Living Law? Back to the Beginning in Sociology of Law*, 4 LEGAL STUD. 157, 157–59 (1984); William Herbert Page, *Professor Ehrlich’s Czernowitz Seminar of Living Law*, 4 N. KY. L. REV. 37, 59 (1977).

<sup>69</sup> Austin Sarat et al., *The Concept of Boundaries in the Practices and Products of Sociolegal Scholarship: An Introduction*, in CROSSING BOUNDARIES: TRADITIONS AND TRANS-FORMATIONS IN LAW AND SOCIETY RESEARCH 1, 4 (Austin Sarat et al. eds., 1998).

<sup>70</sup> See, e.g., Linda Gordon, *The New Feminist Scholarship on the Welfare State*, in WOMEN, THE STATE, AND WELFARE 9, 9–13 (Linda Gordon ed., 1990); see also SPELMAN, *supra* note 1, at 72–74; Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 247 (1987); Maria O’Brien Hylton, “Parental” Leaves and Poor Women: Paying the Price for Time Off, 52 U. PITT. L. REV. 475, 484–86 (1991) (assessing the effects of parental leave on wages and job availability).

<sup>71</sup> FINEMAN, THE ILLUSION OF EQUALITY, *supra* note 60, at 36–38.

<sup>72</sup> *Id.* at 36–39.

<sup>73</sup> *Id.* at 7–8. The middle-range approach was developed by sociologist Robert K. Merton. It sought to integrate theory with empirical research. Middle-range theory begins with an empirical observation of a group or institution, such as the family (as opposed to a broad abstract speculation about something like the social system). The theory is abstracted from the concrete observations to create general statements that can be verified by subsequent

legal theory can be distinguished from the approach of feminist legal theorists like Catherine MacKinnon, who is more inclined to engage in the construction of grand theoretical overarching concepts and claims about the category of “women.”<sup>74</sup> MacKinnon’s work has been criticized as “totalizing” insofar as it transforms “experience into objective truth,” and middle range theory sought to escape that sort of condemnation.<sup>75</sup>

In fact, MacKinnon has become the target of choice for those who want to employ the essentialist critique in regard to feminist legal theory.<sup>76</sup> Law and society feminist scholars’ work is typically not under discussion, perhaps because with its focus on poverty, imbalance of power, and so on, it would disrupt the mantra of “white middle-class heterosexual feminism” that is the entry point for so much of the perspectival or identity-based scholarship. Middle range theorists try to understand and engage with the complexity of lives on the ground and ground their theoretical insights in those lives. Feminist legal theorists have done this without giving up on the category of woman itself.<sup>77</sup> The recent reinvigoration of a law and society approach apparent in the “New Legal Realism” movement provides examples of such work.<sup>78</sup> But even using middle-range theory, if you resort to law, you must eventually draw lines and make generalizations that may gloss over differences. So I am left with my dilemma—how to productively use law to accomplish progressive reforms—and also with a nagging concern.

Using law and legal institutions (including legal theory) can be risky, may produce unforeseen and unintended consequences, and may overlook some differences among people in the interests of furthering reforms to benefit the larger group. But the tendency of some schools of critical legal theory over the past decade or so to primarily focus on identities also may have had unintended and unwanted consequences. In particular, identity-based analyses can obscure the ways in which subordination is shared across identities.<sup>79</sup> Masculinities

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data. Merton’s approach was offered as an alternative to “grand” theorizing, such as with functionalism, in sociology. See ROBERT K. MERTON, *On Sociological Theories of the Middle Range*, in *SOCIAL THEORY AND SOCIAL STRUCTURE* 39, 39–72 (1968).

<sup>74</sup> See MACKINNON, *supra* note 45, at 2. This is a different class of distinction than the superficial, forced and often misleading division of feminist legal theory into “liberal,” “difference,” “dominance,” and “post-modern” cubbyholes.

<sup>75</sup> CAROL SMART, *FEMINISM AND THE POWER OF LAW* 70–71, 163 (1989).

<sup>76</sup> See DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW* 130–34 (1999); DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 82–83 (1989); see also Katherine M. Franke, *Theorizing Yes: Can an Essay on Feminism, Law, and Desire*, in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 29, 38 (Martha Albertson Fineman et al. eds., 2009); see also Katharine T. Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829, 873–77 (1990); Harris, *supra* note 1, at 585.

<sup>77</sup> See FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 60, at 7–8.

<sup>78</sup> See Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 *U. CHI. L. REV.* 831, 831 (2008); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 *CORNELL L. REV.* 61, 63–71 (2009); Gregory Scott Parks, Note, *Toward a Critical Race Realism*, 17 *CORNELL J.L. & PUB. POL’Y* 683, 708–12 (2008).

<sup>79</sup> Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 *B.U. L. REV.* 1713, 1750 (2012) [hereinafter Fineman, *Beyond Identities*].

scholarship makes this point explicit when considering different groups of men, but it does so by differentiating men into more- or less-privileged cohorts and distinguishing all of them from women. The continued focus on identities risks distorting and limiting analyses and reform proposals. The most salient danger is that continuing to primarily think about inequalities within an identities context risks leaving unexamined and unchallenged wider structural disadvantages that would not be considered discrimination under our equal-protection jurisprudence. One can begin with identities and build outward to institutional structures. But, all too often, analysis that begins with identities also ends up there. Even approaches focused on intersectionality (or multidimensionality) will tend to direct critical attention to discrimination by and against individuals or, at best, individual institutions, and not to the failure, distortions, or corruption of societal structures more systemically.

Identity-focused critiques, because they ultimately rely on identity as the basis for the disadvantaged (or advantaged) status or treatment, are anchored in antidiscrimination logic and individualized assessments of behavior. Recent theories of unconscious or implicit bias,<sup>80</sup> while more institutionally focused, nonetheless are tied to identities and histories of intentional discrimination based on certain identity categories. While discrimination, intentional or unconscious, remains a problem, and certainly should be addressed in law, discrimination does not capture the universe of legal inequalities.

Looking at American society, we see a growing list of material and social inequalities. We are not guaranteed basic social goods like housing, food, and health care. The dominant economic and political systems not only tolerate, but also justify grossly unequal distributions of power, wealth, and opportunity.<sup>81</sup> Nevertheless, in the United States, antidiscrimination, the sameness-of-treatment version of equality, has remained resilient in the face of arguments for a concept of equality, which is result-oriented and takes into consideration past circumstances and future obligations, considering needs and disadvantages. Moreover, sameness-of-treatment has been used to effectively argue against measures like affirmative action, which might generate remedies for past inequities.<sup>82</sup>

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<sup>80</sup> See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490 (2005); Gregory Scott Parks & Jeffrey J. Rachlinski, Abstract, *A Better Metric: The Role of Unconscious Race and Gender Bias in the 2008 Presidential Race* (Cornell Legal Studies Research Paper No. 08-007, 2008), available at <http://ssrn.com/abstract=1102704> (“Recent research from social psychologists indicates that unconscious race and gender biases are widespread and influence judgment. Because existing anti-discrimination law is designed to combat overt, or explicit, biases, it does not address unconscious biases well.”).

<sup>81</sup> See, e.g., John W. Lee, III, *Class Warfare 1988–2005 Over Top Individual Income Tax Rates: Teeter-Totter from Soak-the-Rich to Robin-Hood-in-Reverse*, 2 HASTINGS BUS. L.J. 47, 147–49 (2006) (analyzing 2005 Census data documenting the growing rich/poor gap in American society).

<sup>82</sup> I acknowledge that discrimination does exist, and I do recognize that these personal characteristics might work to complicate the experience of vulnerability for any individual. My claim is merely that discrimination models based on identity characteristics will not produce circumstances of greater equality and may, in fact, lead to less in many circumstances. For an example of this argument in the context of family law reform, see FINEMAN, *THE ILLUSION OF EQUALITY*, *supra* note 60, at 36 (describing how sameness of treatment has failed to provide equality for women in the context of divorce).

The general tendency under a sameness-of-treatment framework is to focus on individuals and their actions. The task is to identify the perpetrators and the victims of discrimination, and to define what the prohibited activities were, the individual injury, and the specific intent that was involved in each occurrence.<sup>83</sup> Left out of the picture are systemic aspects of existing societal arrangement, unless they can be tied to individuals and discrimination either in the present or not too distant past. It is as if existing material, cultural, and societal imbalance are products of natural forces which are unable to be rectified by law. While it may not be able to be altered by law, such inequalities are certainly not natural. They are produced and reproduced by society and institutions. Since neither inequalities nor the systems that produce them are inevitable, they too can be objects of reform.<sup>84</sup>

## VI. DEFINING THE UNIVERSAL LEGAL SUBJECT

If the legal subject must be abstract, based on general principles or theories rather than on specific instances, as I have argued it has been historically, then it seems to me that the task for a critical legal scholar is to argue for a conception of the legal subject that is flexible, powerful, and able to incorporate a panoply of circumstances and positions. This is an argument that we must move beyond the impoverished legal subject of Locke and liberal thought, with its characteristics of autonomy and independence. Perspective scholars try to do this through intersectionality and multiplicities of identities, but I suggest we move in exactly the opposite direction: away from the fragmentation of the legal subject to the creation of a vigorous universal conception that will bring under consideration not the differences among individuals, but the relationship and complementary shared responsibilities of the individual, the state, and societal institutions in regard to responding to the realities of the human condition.

### A. *The Vulnerable Subject*

In my recent work, I have used the idea of a universal “vulnerable subject” to replace the one-dimensionally deformed liberal subject that is used to render natural and inevitable relationships of dependency, need, and vulnerability pathological and deviant.<sup>85</sup> The concept arose from asking two fundamental questions: (1) What should be the political and legal implications of the fact that we are embodied beings—which means “we are born, live, and die within a fragile materiality that renders all of us constantly susceptible to destructive external forces and internal disintegration?” (2) If “bodily needs and the messy dependency they carry cannot be ignored in life,” how can they “be absent in our theories about society, economics, politics, and law”? Unlike the liberal legal subject, the vulnerable legal subject is built around the idea of “life-

<sup>83</sup> Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1, 4 (2008) [hereinafter Fineman, *The Vulnerable Subject*].

<sup>84</sup> *See id.* at 4–5.

<sup>85</sup> *See, e.g.*, Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251, 265–66 (2010).

course,” reflecting the range of developmental and social stages through which individuals are likely to pass in the course of a normal life span.<sup>86</sup>

The liberal legal subject at best captures only one stage—the likely least vulnerable of the human condition.<sup>87</sup> By contrast, the vulnerable legal subject recognizes that, during their lives, individuals will encounter a myriad of possible opportunities, frustrations, challenges, and experiences necessitating a wide range of differing and interacting abilities.<sup>88</sup> We will be dependent, weak, in need, as well as empowered and strong at different developmental stages in our lives.<sup>89</sup> Throughout our lives we may be subject to external and internal negative, potentially devastating, events over which we have little control—disease, pandemics, environmental and climate deterioration, terrorism and crime, crumbling infrastructure, failing institutions, recession, corruption, decay, and decline. We are situated beings who live with the ever-present possibility of changing needs and circumstances in our individual and collective lives. We are also accumulative beings and have different qualities and quantities of resources with which to meet these needs of circumstances, both over the course of our lifetime and as measured at the time of crisis or opportunity.<sup>90</sup>

#### *B. Vulnerability and Difference*

One issue for a perspective- or identity-focused scholar at this point might be the question of just where and how individual identity categories fit into a vulnerability analysis. The theory argues, paradoxically, that while human vulnerability is conceived as universal and constant on an abstract theoretical level that a construction of the legal and political subject requires, on the individual or experiential level it is realized in particular, varied, and unique ways. This approach allows us to see two different roles for law and policy in regard to human vulnerability.<sup>91</sup>

Two forms of individual difference are relevant: the first form is the physical/mental/intellectual and other variations are differences in human embodiment. These differences are not socially neutral, and historical reaction to some human variations, particularly race and gender, has led to the creation of hierarchies, discrimination, and even violence.<sup>92</sup> Individuals who have certain characteristics have been subordinated and excluded from the benefits of society, often because their differences are thought to indicate they are dangerous, or interpreted as inadequacy, inferiority, or weakness.<sup>93</sup> These differences are often the basis for segregation of individuals into a “vulnerable population” category, which both obscures the reality of universal vulnerability and stigmatizes the designated population.<sup>94</sup> The appropriate legal response to such instances is an improved and strengthened antidiscrimination system, perhaps

<sup>86</sup> See Fineman, *The Vulnerable Subject*, *supra* note 83, at 11–12.

<sup>87</sup> Fineman, *Beyond Identities*, *supra* note 79, at 1753.

<sup>88</sup> See Fineman, *The Vulnerable Subject*, *supra* note 83, at 10–12.

<sup>89</sup> See *id.* at 9–12.

<sup>90</sup> Fineman, *Beyond Identities*, *supra* note 79, at 1753–54.

<sup>91</sup> *Id.* at 1754.

<sup>92</sup> *Id.*

<sup>93</sup> See Fineman, *The Vulnerable Subject*, *supra* note 83, at 4.

<sup>94</sup> *Id.* at 8–10.

complemented by affirmative action and social welfare processes to make up for past discrimination and reduce the probabilities that discrimination will reoccur in the future.

The second forms of relevant difference are the differences in social location that are produced as the result of institutional practices and operations.<sup>95</sup> While it is the case that such differences are manifested on the individual level, attention to the functioning of institutions is the specific focus in this part of the analysis. We are all differently situated within webs of economic and institutional relationships that structure our options and create opportunities. All individuals are dependent on institutions, be it the family or market and state institutions, because institutions provide the primary access and pathways to gain the resources necessary to address our vulnerability.<sup>96</sup> Interestingly, this institutional and structural approach also allows for much more recognition of individual differences than does an identity-based analysis, which groups individuals according to their characteristics even if nuanced and multiplied. But, the focus is not on those distinguishing characteristics but on the institutions which produce them.

This focus on institutions is to my mind one of the most significant aspects of the vulnerability analysis. Societal institutions are theorized as having grown up around vulnerability.<sup>97</sup> They are seen as interlocking and overlapping, creating layered possibilities of opportunities and support but also containing gaps and potential pitfalls.<sup>98</sup> These institutions collectively form systems that play an important role in lessening, ameliorating, and compensating for vulnerability.<sup>99</sup> Together and independently they provide us with resources in the form of advantages or coping mechanisms that cushion us when we are facing misfortune, disaster, and violence. Cumulatively, these assets provide individuals with resilience in the face of our shared vulnerability.<sup>100</sup> There are at least five different types of resources or assets that societal organizations and institutions can provide: physical, human, social, ecological or environmental, and existential.<sup>101</sup>

There is a link between these various types of resources and state responsibility. Many of the institutions providing resources that give us resilience can only be brought into legal existence through state mechanisms.<sup>102</sup> Entities such

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<sup>95</sup> See *id.* at 5, 18.

<sup>96</sup> *Id.* at 11.

<sup>97</sup> *Id.* at 12–13.

<sup>98</sup> *Id.* at 13.

<sup>99</sup> See BRYAN S. TURNER, *VULNERABILITY AND HUMAN RIGHTS* 25–28 (2006).

<sup>100</sup> Urie Bronfenbrenner's ecological child development model, for example, examines systems and assets that influence the child. See Barbara Bennett Woodhouse, *A World Fit for Children is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 *HOUS. L. REV.* 817, 822 & n.18 (2009) (citing URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT* 6–7 (1979)).

<sup>101</sup> Among the social resources are group affiliation and identification based on the first form of embodied differences or distinctions. See Fineman, *Beyond Identities*, *supra* note 79, at 1756 n.206.

<sup>102</sup> See, e.g., 26 U.S.C. § 501(c)(3) (2012) (granting churches and other religious organizations tax exempt status). Robert Dahl, Yale professor, observed that “without the protection of a dense network of laws enforced by public governments, the largest American corporation could not exist for a day.” GAR ALPEROVITZ & LEW DALY, *UNJUST DESERTS* 138 (2008)

as corporations, schools, workplaces, families, or churches are legitimated and given a status that confers on them benefits and protections by law.<sup>103</sup> Their very content and meaning is defined through state processes. The dissolution of many of these entities is also accomplished only through state processes. To the extent that these legally-constituted institutions distribute significant social goods, they should be monitored by the state. State involvement in the creation and maintenance of these institutions requires that the state be vigilant in ensuring that the distribution of such assets is accomplished with attention to public values, including equality or justice, or objectives beyond private or profit motivation. Instead, what we find in the United States is that, within these various asset-conferring systems, individuals are often positioned differently from one another. Specifically, some are privileged by the structure and operation of these institutions, while others are relatively disadvantaged and left to cope with their shared vulnerability on an individual level. The responsibility to overcome existing systemic inequalities is an individual, not a state, responsibility.

## VII. CONCLUSION—A BEYOND-IDENTITIES VISION

Legal reforms are by definition institutionally focused and the trick is how to effect a turn away, not from law, but from identities to institutional structures. When the urge for change begins with identities, all too often that is where the energy for reform ends up being absorbed. Even an approach focused on intersectionality (or multidimensionality) will tend to direct critical attention to discrimination by and against individuals, not to the real or potential failures, distortion, or corruption of societal structures that affect everyone in society. If we focus on institutions, the significant intersections might very well be those we see when systems, such as the educational, financial, political, familial, and employment systems, work in unison to produce privilege and structure disadvantage.

Gender and/or race have been the entries into progressives thinking more complexly about equality for many decades, but the “best” contemporary feminist legal theory (in my opinion) has moved beyond gender and other identity markers and engages with institutional and structural relationships (including ideological structures). An antidiscrimination model will not help us understand the institutional mechanisms through which economic resources are generated and distributed, as well as the allocation of power within society. Critical theory must engage with theories of regulation and institutionalization and define how we can access the multiplicity of power relationships we call “the state.” We should be rethinking contract, corporation, family, and education law—not from the perspective of identities, but from the perspective of privilege and disadvantage and with a firm grounding in a theory of state responsibility for the vulnerable legal subjects who actually populate society.

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(quoting ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* 184 (1982)). Dahl also noted that the view of economic institutions as private is an “ill fit” for their “social and public” nature. *Id.* at 139.

<sup>103</sup> Legal documents such as charters, documents of incorporation, licenses, or permits come to mind.

