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## **Feminist Jurisprudence**

### **Abstract and Keywords**

This chapter explores the contributions of feminist jurisprudence to feminist theory, highlighting several strands of legal analysis that productively challenge feminists more generally to think beyond settled boundaries. The 1980s are remembered as the heyday of feminist jurisprudence in the United States, an impression that rightly acknowledges the vigorous and generative nature of debate in this period but that risks overlooking the significance of more recent developments in feminist legal theory. Focusing on the ideas of intersectionality, gender and sexuality, and masculinities, the chapter demonstrates new directions in feminist legal theory that have emerged in the wake of the sameness/difference debates.

**Keywords:** Law, feminist jurisprudence, feminist theory, gender, sexuality, masculinities, intersectionality

# Introduction

LEGAL scholar Wendy W. Williams opens her canonical law review article “The Equality Crisis: Some Reflections on Culture, Courts, and Feminism” with this rueful observation: “To say that courts are not and never have been the source of radical social change is an understatement” (Williams [1982] 1991, 15). What does Williams’s assessment imply about the radical potential of feminist jurisprudence? Today, it appears that even many feminists dismiss the possibility of a truly transformative feminist jurisprudence. As legal scholar Martha Chamallas observes, feminists appear to “distrust legal reforms because of the tendency of such reforms to tame radical impulses, and they charge that the reforms produce doctrines that reproduce prevailing conservative or neoliberal ideologies, rather than challenge them” (Chamallas 2013, 409). The assumption that the imagination of legal scholars is of necessity constrained by conventional legal reasoning, coupled with the related impression of legal scholarship as being more concerned with practical strategy than theoretical imagination, might explain the notable marginalization of feminist jurisprudence in general surveys of feminist theory (Nicholson 1997; Kemp and Squires 1997; Zerilli 2006; McCann and Kim 2013). To others, the very possibility of a feminist jurisprudence may seem downright oxymoronic, given the highly suspicious regard for state power characteristic of feminist theorists. As political theorist Wendy Brown (1995, 169) pithily remarks, “Whether one is dealing with the state, the Mafia, parents, pimps, police, or husbands, the heavy price of institutionalized protection is always a measure of dependence and agreement to abide by the protector’s rules.” In policy arenas ranging from welfare reform to sexual violence, feminist thinkers have disclosed the many ways that protectionist state interventions can mask and enable the retrenchment of masculine power and male dominance (Ferguson 1984; Brown 1995; Smith 2007; Bumiller 2008). Feminist theorists have been particularly critical of the (p. 248) individualism that structures Anglo-American legal systems, and the attendant limitations of rights-based discourse as a liberatory paradigm (Brown 1995).

The already uneasy relationship between feminist jurisprudence and feminist theory no doubt has been further strained by the fact that prominent feminist legal scholars have emerged as some of feminism’s most progressive—and most searing—critics. Janet Halley’s provocatively subtitled 2006 book, *Split Decisions: How and Why to Take a Break from Feminism*, warns that feminism has been lured into complacency by prioritizing the quest to obtain power over the task of critiquing it. Against the rise of “governance feminism,” Halley encourages critical thinkers not just to turn away from the legal regime as a primary addressee, but to reject as well the unduly cabined vision of social justice produced by what Halley sees as feminism’s defining investment in the idea that the “sexual subordination of women by men” is the primary social injustice (Halley 2006, 125). Legal scholar Martha Fineman also voices skepticism about the current state of feminism, calling for a closer examination of “the ways that a focus on identities can narrow or constrict the critical imagination” (Fineman 2013, 108). To be sure, Fineman offers a very different kind of analysis than the sort proffered by conservative commentators who condemn identity politics as dressed-up navel-gazing. In contrast, Fineman suggests that identity-driven analyses, including feminist approaches, become problematic when they fail to push critique of the status quo far enough, settling for a focus on identity, which

leads, Fineman contends, to partial and dangerously distorted understandings of the scope and effects of injustice. Reflecting on the direction of recent academic feminism, Fineman (2013, 108) wonders, “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?”.

As these debates indicate, feminist jurisprudence is not only a field marked by diversity and internal contestation; it is a location from which scholars have sought to push the boundaries of feminist theory. To be sure, much feminist jurisprudential thought has been and continues to be centrally concerned with addressing specific instances of gender inequality in employment, education, and the social organization of the family, but in so doing, feminist jurisprudence is a place where the very meanings not just of “equality” and “justice,” but of “gender” itself, are vigorously contested. Rather than a watered-down or inherently compromised domain of feminist thought, feminist jurisprudence deserves recognition as a vital site for original and generative feminist theorizing.

To make this case, the chapter offers an overview of the development of feminist jurisprudential thought in the United States. Feminist jurisprudence often is traced to the 1970s, the period when the Supreme Court first declared the Constitution to provide substantial protection against discrimination on the basis of sex. In a series of watershed cases, a feminist jurisprudence centered on equality claims gained official recognition and led to truly historic changes in the law and public policy. On the heels of these momentous changes, the field of feminist legal theory was roiled by the so-called difference debates, as legal scholars reckoned with the limits of asserting “sameness” as the basis for challenging sex-based inequalities. By the end of the 1980s, these debates had (p. 249) reached a stalemate. At first glance, it may seem that the heyday of feminist jurisprudence was over, to be followed by a period of fragmentation, if not outright dissolution. However, I argue that we have witnessed since the 1990s the emergence of a number of significant critical debates that have propelled feminist jurisprudence beyond its focus on the sameness/difference paradigm, while at the same time influencing the course of feminist theorizing outside the legal academy.

# From Women's Rights to Feminist Jurisprudence

For much of US history, law has played a principal role in maintaining relations of gender inequality. Guided by the English common law tradition, the founding legal regime established women's subordination to men. As political scientist Judith Baer (2009) notes, the women's rights activists who signed the Declaration of Sentiments and Resolutions at the historic 1848 conference in Seneca Falls, New York, "identified law as an instrument of male supremacy." The Declaration of Sentiments pointed to numerous instances of "legal sexism," such as restricting voting rights to (some) men, and denying married women the right to make contracts, keep earned wages, and own property by pronouncing wives "civilly dead" (Baer 2009). Denied standing in court, wives were denied legal recourse should they suffer a violation. In the latter part of the nineteenth century, married women finally began to gain legal personhood, though even in granting limited access to citizenship rights, the courts affirmed their enduring belief in women's natural subordination to men. The dominant ideology of "separate spheres" established a firm limit on egalitarian thinking. In 1873, the Supreme Court endorsed the constitutionality of a state law barring married women from entering the legal profession on the grounds that the "paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother" (*Bradwell v. Illinois*, 141).

It would take nearly a century after the *Bradwell* decision for the Court to begin to seriously rethink its approach to Constitutional sex-discrimination cases. In its landmark 1971 decision in *Reed v. Reed*, the Court established that laws treating one sex differently from the other would be subject to a higher than usual standard of review; no longer would mere convenience be considered a sufficient rationale for treating otherwise similarly situated men and women differently. The outcome of the *Reed* case attested not simply to shifting judicial attitudes about the nature of gender differences, but more specifically to the transformative impact of demanding that the courts extend the prevailing logic of race discrimination law into the realm of sex equality jurisprudence. As legal historian Serena Mayeri (2011, 10) explains, "reasoning from race became a centerpiece of feminist legal advocacy." Although it was not as rigorous as the "strict scrutiny" brought to consideration of race-based classifications, by 1976 the Court had made explicit a new standard requiring that any sex-based classification bear a "substantial" relationship (p. 250) to an "important" governmental purpose. Moving forward, equal treatment was to be regarded as the default position, absent a convincing reason for proceeding otherwise.

As courts brought an increasingly critical eye to sex-based classifications, numerous policies and practices that long had enjoyed the legitimating imprimatur of constitutionality were stricken. As Wendy Williams recounts, throughout the 1970s,

the Supreme Court insisted that women wage earners receive the same benefits for their families under military, social security, welfare, and workers compensation programs as did male wage earners; that men receive the same child care allowance when their spouses died as women did; that the female children of divorce be entitled to support for the same length of time as male children, so that they too could get the education necessary for life in the public world; that the duty of support through alimony not be visited exclusively on husbands; that wives as well as husbands participate in the management of community property; and that wives as well as husbands be eligible to administer their deceased relatives estates.

(W. Williams [1982] 1991, 17)

In the wake of this seismic shift, feminist legal theorists entered a period of intense reflection about the meaning—and limits—of equality as a feminist ideal.

During the 1980s, the so-called sameness-difference debates dominated discussion in the field. Some feminist legal scholars sought to press forward by continuing to demand that women and men be treated as equal in the eyes of the law—a strategy that had proven remarkably successful in the preceding decade. Others, however, were critical of the underlying premise that women must prove they are “just like men” in order to have their rights recognized (Finley 1986; Littleton 1987). The intensity of debates over sameness and difference in this period speaks to the challenge posed by what Martha Minow (1990) aptly calls the “difference dilemma”: how to acknowledge differences between men and women without falling back on an endorsement of stereotypical accounts of gender difference. One possible path around this dilemma was charted by thinkers who shifted feminist inquiry in this period from a focus on how to achieve equality within the current social order to consideration of the relations of power that produce gender as inequality in the first place (MacKinnon 1987). As a result, while feminist jurisprudence may have had its origins in “an essentially liberal attack on the absence of women in the public world,” the field soon became a ground on which feminist legal scholars would propound “a radical vision of the transformation of the world” (Scales 1986, 44–45).

This period of extraordinary feminist intellectual foment in the legal academy is most often remembered as a time of intense debate between two opposing camps: those advocating “equal treatment” and those demanding greater attention to the differently “gendered realities” of men and women (Baer 2009). But this familiar narrative has done a disservice in obscuring the complexity—and radical possibilities—of feminist jurisprudence (Colker 1987; Franklin 2010). At the height of these debates, historian Joan Scott (1988, 48) implored commentators to “stop writing the history of feminisms as a sort of oscillation between demands for equality and affirmations of difference,” (p. 251) for, as she warned, “[t]his approach inadvertently strengthens the hold of the binary construction, establishing it as inevitable by giving it a long history.” As I demonstrate in the remainder of this chapter, in the decades since the 1980s, feminist legal scholars have taken up Scott’s

charge, challenging feminist theory to move beyond its familiar boundaries. In the remainder of this chapter, I focus on three arenas of feminist legal discourse that have been proven particularly generative in this regard: intersectionality, gender and sexuality, and masculinities.

## Intersectionality

Sociologist Leslie McCall (2005,1771) remarks that “feminists are perhaps alone in the academy in the extent to which they have embraced intersectionality.” The term *intersectionality* is used broadly today to describe approaches to social analysis that in some way address “the relationships among multiple dimensions and modalities of social relations and subject formation” (McCall 2005, 1771). But if intersectionality has emerged as a dominant feminist research paradigm, the term also has come to stand for a powerful critique of much of what has counted as feminist theory in the past, particularly during the period associated with the second wave.<sup>1</sup> Intersectionality demands a feminism theorized from a recognition of differences *among* women, rather than an insistence on a shared, essential womanhood—a premise that too often underwrites a false universalism that positions white middle- and upper-class heterosexual women as the exemplary feminist subject.

Intersectionality theory is deeply indebted to the writings of woman of color feminists and critical race theorists (Davis 1983; Moraga 1983; Smith 1983; Spelman 1988; Harris 1990; Collins 1990). Legal scholar Kimberlé Crenshaw commonly is credited with coining the term *intersectionality*. Crenshaw’s two canonical law review articles, “Demarginalizing the Intersection of Sex and Race” (1989) and “Mapping the Margins” (1991), have stimulated scholarly inquiry into the politics of complex identity. In “Demarginalizing,” Crenshaw (1989, 140) sets forth a trenchant critique of the underlying logic of US antidiscrimination law, charging that a legal framework that defines race discrimination and sex discrimination as separate categories “erases Black women in the conceptualization, identification and remediation of race and sex discrimination.” In “Mapping the Margins,” Crenshaw extends her use of intersectional analysis beyond the realm of antidiscrimination law to address the silencing, erasure, and marginalization of “multiply-burdened” subjects in social, cultural, and activist contexts. Reflecting on these articles more recently, Crenshaw explains that her early writings sought to

uncover the paradoxical dimension of the sameness/difference rationales that undergirded antidiscrimination law more broadly. By these logics, Black females are both too similar to Black men and white women to represent themselves and too different to represent either Blacks or women as a whole. Although Black male and white female narratives of discrimination were understood to be fully inclusive and (p. 252) universal, Black female narratives were rendered partial, unrecognizable, something apart from standard claims of race discrimination.

(Cho, Crenshaw, and McCall 2013, 790–791)

Although Crenshaw's articulation of intersectionality arose in the context of a critique of antidiscrimination law, she emphasizes that she never intended intersectional analysis to be "limited to securing legal reforms that would grant greater inclusion to differently defined subjects" (Cho, Crenshaw, and McCall 2013, 791). Nonetheless, some recent commentators suggest that the origins of Crenshaw's formulations in the context of contestation of antidiscrimination doctrine, particularly as it affects black women, may impose certain limits on the concept's serviceability as a central feminist analytic (Nash 2008; Puar 2011; Wiegman 2012, 247-250). American Studies scholar Jennifer Nash warns that intersectionality scholarship "must begin to broaden its reach to theorize an array of subject experience(s)" if it wishes to transcend parochialism and provide a more "nuanced" "conceptualization of identity that captures the ways in which race, gender, sexuality, and class, among other categories, are produced through each other, securing both privilege and oppression simultaneously" (Nash 2008, 10). However, the richness of the research literature inspired by Crenshaw's discussion can leave little doubt of intersectionality's capacity to continue to propel feminist theory in new and important directions, for example, by drawing attention to the implication of masculinity, whiteness, and sexual orientation in the production of "racialized modes of gender normativity" in the law (Carbado 2013, 8).



## Gender and Sexuality

Since the 1980s, feminist legal scholarship has explored the complex and intertwined relationship between gender and sexuality. Since the 1970s, the scope of sex discrimination law has broadened significantly, now reaching such previously unregulated offenses as sexual harassment (Mackinnon 1979; Schultz 1998). Nonetheless, courts have insistently distinguished sex discrimination from sexual orientation discrimination—a distinction that has left many victims of sexualized harassment without remedy. In asserting a categorical distinction between sexual harassment and sexual-orientation harassment, courts have been compelled to delicately parse treatment that arises from an individual's perceived gender nonconformity and treatment that emanates from perceived sexual nonconformity. In cases presented by effeminate men identified as gay, this type of analysis has appeared particularly strained.

In emphasizing the interrelationship between gender and sexuality, feminist legal theorists pose a challenge not just to a particular approach to sex discrimination adjudication, but also to a broader habit, now widely institutionalized in the US academy, of demarcating a boundary between the field of gender and the field of sexuality. This boundary authorizes the institutional separation of programs dedicated to women's, gender, or feminist studies, on the one hand, and those committed to the study of (p. 253) sexuality, LGBT studies, and queer studies, on the other. (Even the increasingly common use of the "gender and sexuality" rubric reinforces the irreducible exclusivity of these two domains by acknowledging intellectual proximity while simultaneously refusing the possibility of transcendence). The widely accepted imperative to mark the distinction between gender and sexuality studies was perhaps most famously articulated by anthropologist Gayle Rubin in her canonical 1984 article, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." In "Thinking Sex," Rubin charges feminists with failing to reckon with sexuality in the campaign to address sexism and gender inequality. Citing legal scholar Catharine Mackinnon's characteristically uncompromising proclamation that "sexuality is the linchpin of gender inequality," Rubin offers a compelling counterpoint, contending that "[t]he cultural fusion of gender with sexuality has given rise to the idea that a theory of sexuality may be derived directly out of a theory of gender" (MacKinnon 1982, 533; Rubin 1984, 169). In Rubin's view, too many feminists have been conscripted into policing sexuality to protect women from the threat of sexual subordination, effectively displacing sexual liberation as a fundamental feminist goal. Rubin (1984, 170) proclaims it nothing less than "essential to separate gender and sexuality analytically to reflect more accurately their separate social existence" and issues an urgent call for "an autonomous theory and politics specific to sexuality."

To be sure, Rubin rightly identifies not just the analytic conflation produced when sexuality is regarded as merely derivative of gender, but also the problematic political effects of this subordinating assumption. But what about the potential harms produced by an equally categorical insistence on the analytic separation of gender and sexuality? Twenty-five years after Rubin's provocative call to liberate sexuality studies from the tyranny of feminist judgment, sociologists Kristin Schilt and Laurel Westbrook (2009, 441) observe that "the relationship between heterosexuality and gender oppression remains undertheorized in social science research." This critical neglect suggests that the salutary

effort to “think sex” apart from gender can all too easily ossify into a counterproductive imperative if it discourages efforts to interrogate the mutually constitutive operation of gender and sexuality in social life.

These costs have been forcefully addressed by feminist legal theorists, who have made a compelling case for the theoretical and practical value of thinking gender and sexuality dialogically (Hunter 1991; Case 1995; Valdes 1995; Franke 1997; Koppelman 2001; Abrams 2010). Pushing back against judicial decisions that treat gender discrimination and sexuality discrimination as autonomous phenomena, legal scholar Mary Ann Case highlights the hidden gender stereotyping that operates under cover of actions seemingly directed at matters of sexuality. For example, she describes a case in which an “effeminate” man who was perceived to be gay was fired from his job as pre-school teacher for wearing an earring. The plaintiff’s claim of sex discrimination was denied in court on the grounds that he was fired because of his sexuality, not his gender. Case demonstrates how, in this instance, the courts’ conflation of gender and sexual orientation led to the denial of relief. Thus, Case argues for “disaggregating” sex, gender, and sexuality as analytic categories, not by way of asserting an inherent distinction among these identity markers, but, rather, to draw attention to the overlaps that are masked when analysis of (p. 254) gender or sexuality is undertaken in isolation.<sup>2</sup> In this context, to insist on the analytic distinction between gender and sexuality serves not to reinforce their independence, but rather to disclose their simultaneity. Taking this logic one step further, legal scholar Katherine Franke suggests that the wrong of sexual harassment resides not merely in the fact that a behavior is sexual but that it is also sexist. From Franke’s perspective, “sexual harassment is a technology of sexism. It is a disciplinary practice that inscribes, enforces, and polices the identities of both harasser and victim according to a system of gender norms that envisions women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects” (1997, 693). Using the term “hetero-patriarchy” to characterize the cooperation of heteronormativity and male privilege, Franke emphasizes the mutually reinforcing nature of homophobia and gender norms (Franke 1997, 739).<sup>3</sup>

In the wake of sustained feminist critique, sexual-orientation discrimination increasingly is being understood by courts to involve gender stereotyping, and hence to constitute a prohibited form of sex discrimination in violation of Title VII (Chamallas 2013, 246). Feminist legal theorists’ insistence on acknowledging the interconnection between gender and sexuality has been extended to analysis of other issues as well, such as same-sex marriage. Case (2010, 1233), for example, suggests that opposition to marriage equality emanates not just from homophobia but also from a desire to preserve and protect traditional gender roles: “The fact that recognition of same-sex marriage and elimination of enforced sex roles are as inextricably intertwined as the duck is with the rabbit has long been clear to opponents of both, from David Blankenhorn to the pope.” More generally, legal scholar Kathryn Abrams (2010, 1135) contends that, in the present moment, “analysis of and organizing around gender and sexuality may be suffering not from too much convergence but from too little”—a point Abrams makes in response to Halley’s suggestion, discussed earlier, that we take a break from feminism to make room in which the interests of others, including queer-identified people, can be heard and addressed.

Abrams offers several examples of missed opportunities for coalition among feminist, gay and lesbian, and queer activists who presumably share an interest in “resisting state-supported efforts at gender normalization” (Abrams 2010, 1137). On the one hand, Abrams notes the failure to engage feminist critiques of marriage in the debate spurred by the passage in California of Proposition 8 banning same-sex unions. At the same time, she considers how the campaign to “clean up” Times Square in New York mobilized the image of “vulnerable women in need of protection” as a strategy to shut down the “queer sexual cultures” occupying prime urban real estate, a strategy that failed to elicit significant opposition from women’s advocates. These examples suggest a need to move beyond a reactive defense of the autonomy of gender and sexuality, and to appreciate the critical possibilities afforded not only by thinking gender and sexuality apart, but also together.

## **Masculinities**

In recent decades, masculinities studies has risen in prominence within the academy (Carrigan et. al. 1985; Connell 1995; Kimmel 1996; Messner 2002; Gardiner 2002; (p. 255) Wiegman 2002a; Wiegman 2002b; Pascoe 2007). This development has evoked apprehension in some quarters. Some have warned that the rise of masculinities studies threatens to displace women as the central subjects of feminist analysis while reinforcing the authority of men in the field of gender scholarship (Modleski 1991). Others, including some feminist legal scholars, are especially wary of giving men prominence in the campaign for gender equality, pointing, as a cautionary tale, to former civil rights lawyer Ruth Bader Ginsburg’s strategy of pursuing claims on behalf of male plaintiffs to challenge the constitutionality of sex-based classifications in the law, an approach some believe enabled the Court to adopt an unduly narrow, formalistic vision of equality.<sup>4</sup>

These warnings, occasioned by the formalization of masculinities studies as an academic field, obscure the fact that there is nothing particularly new about addressing men and masculinity in feminist studies; indeed, explorations of male dominance lies at the very heart of feminism (Levit 1996, 1038). More to the point, as sociologist Michael Kimmel rightly observes, feminists’ resistance to engaging men’s lives and experiences ultimately may do more to sustain than to subvert masculinized power. Reflecting on a historical tendency to marginalize men in feminist studies, Kimmel concludes, “The failure to include men-as-gendered in our work meant that men remained the unexamined center, the invisible pole around which gender dynamics revolved. Not ‘naming’ men and masculinity reinscribed their dominance” (2010, xiv). As Kimmel’s work powerfully demonstrates, masculinities studies scholarship can make a valuable contribution to feminist research in illuminating the complex and ambivalent ways men get conscripted into the project of patriarchy. It is important to note as well, however, that an account of contemporary masculinities must include, but certainly cannot be limited to consideration of male bodies (Halberstam 1998).

In recent years, a growing number of feminist legal scholars have turned their attention to masculinities (Levit 1998; Dowd 2010; Cooper and McGinley 2012; Fineman and Thomson 2013). Moving beyond the sameness/difference debates, these scholars have shifted attention from “the notion of women being measured by male standards (and thus put in the strange position of having to assert that they were just as good at masculinity as men were), to decentering masculinity as the norm against which all behaviors were to be measured, and thus to deconstructing masculinities” (Kimmel 2010, xv). Imploring feminists “to ask the man question,” legal scholar Nancy Dowd riffs on Simone de Beauvoir’s famous formulation with a call to rethink the very practice of feminist jurisprudence (2010). In her well-known 1990 treatise on feminist legal methods, legal scholar Kathleen Bartlett explains:

In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be nonneutral in a general sense, but also “male” in a specific sense. The purpose of the woman (p. 256) question is to expose those features and how they operate, and to suggest how they might be corrected.”

(Bartlett 1990, 837)

Importantly, Dowd’s investment in asking the man question arises not from an interest in parity for its own sake, rather from a commitment to unpacking the workings of male privilege. Dowd’s useful “distillation” of the primary theoretical insights of masculinities scholarship underlines several significant points of overlap with leading feminist approaches to gender. Perhaps most importantly, Dowd emphasizes that masculinities scholars regard masculinity “as a social construction, not a biological given,” echoing the strong anti-essentialist tendency in feminist theory. At the same time, however, Dowd calls on feminist scholars to move beyond reductive and essentializing conceptions of male privilege. As an alternative, she demonstrates the critical purchase of a “multiple masculinities” perspective that recognizes the significant differences among men (2010, 57–58, 60). As Dowd explains, it is possible to at once acknowledge that all men enjoy a “patriarchal dividend” emanating from “the dominance of men in the overall gender order,” while also accounting for the high price men pay for this privilege in areas ranging from mental and physical well-being to vulnerability to extreme forms of violence. Indeed, this recognition is critical both to understand the resilience of male privilege, and to encourage challenges to it.

Legal scholar Nancy Levit similarly gestures at the productive possibilities of greater interchange between feminist legal theorists and masculinities scholars. Diagnosing feminism as having “stalled” at the point of serious critical engagement with men and masculinities, Levit (1996, 1040) demands greater attention to the operation of male privilege in the present. She explains, “The focus of feminist scholarship has been almost exclusively on the ways in which men subjugate women, rather than on exploring the complex system of structures and beliefs that impel the perpetual dominance of men. To the extent that men unthinkingly accept the dominant ideology, transformation is only

possible through an understanding of the methods of cultural transmission and replication” (1085). To this end, Levit proposes that we take a closer look at the ways in which law constructs masculinity. In so doing, she aims “to make visible how the treatment of men by various legal doctrines reinforces stereotypic notions of maleness” (1054). Levit provides numerous vivid examples, including rape law’s normalization of male sexual aggression by treating the absence of strenuous physical resistance as a sign of consent, and the way the courts’ refusal to recognize sexual-orientation discrimination as a form of sex discrimination renders invisible the harms men suffer as victims of male-on-male sexual harassment (1056, 1072). In these ways, Levit contends, the legal regime “reinforces social stereotypes of men as tough, sexually aggressive, and impervious to pain,” while helping to maintain “a cultural climate in which men cannot express their humiliation, their sense of invasion, or their emotional suffering” (1072).

The preceding suggests that the turn to “deconstructing masculinities” can be undertaken not by way of superseding feminist analysis but, rather, to address some of feminism’s unfinished business. The same surely can be said of the other strands of feminist legal analysis considered here as well. In each of these areas, it should be clear that feminist jurisprudence is neither intellectually derivative nor limited to the realm of applied thinking; rather, it is an engine of original thought and a source of the continued vitality of feminist theory more broadly. (p. 257)

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## Notes:

(1.) For an important challenge to common narratives of the second wave, see Thompson (2002).

(2.) Confusingly, in an article published in the same year, Katherine Franke declares "the disaggregation of sex from gender" to be "the central mistake of sex discrimination law." Here, Franke is referring to the tendency of sex discrimination law to regard "sex as a product of nature, while gender is understood as a function of culture" (2). This distinction problematically reifies the truth of sexual difference by naturalizing gender, "[S]ex equality jurisprudence has uncritically accepted the validity of biological sexual differences. By accepting these biological differences, equality jurisprudence reifies as foundational *fact* that which is really an *effect* of normative gender ideology" (2). Franke's ultimate point is that sex discrimination protection is unduly cabined by assumptions about "real" sex differences; in other words, the supposed fact of a real sex difference becomes a justification for differential treatment (12). Franke calls this view "sexual realism." In this case, the "disaggregation" Franke refers to is not the positing of a conceptual distinction between sex and gender, which Franke herself relies on (in the same way Case does)—but rather, the way the distinction is drawn, i.e. positing sex as natural and gender as socially constructed, thereby denying the ways in which the sexed body, too, is a social construction.

(3.) Franke attributes the term "hetero-patriarchy" to Francisco Valdes (1995).

(4.) But see Franklin (2010), who makes the compelling case that litigator Ginsburg's "decision to press the claims of male plaintiffs was grounded not in a commitment to eradicating sex classifications from the law, but in a far richer theory of equal protection involving constitutional limitations on the state's power to enforce sex-role stereotypes" (216).

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