Separate Silos: Marginalizing Men in Feminist Theory and Forgetting Females in Masculinities Studies

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In society, the impulse toward sex segregation remains strong. Social separation of the sexes persists, from childhood on. Pink and blue tracking in the nursery gives way to sex segregated public schooling—which is on the rise. In 2006 the Department of Education released new regulations expanding the opportunities for single-sex classes, schools, and extracurricular activities. These regulations fueled an explosive increase in single-sex public schools and classes. In 1995, only three public schools in the country offered a single sex options for students; in 2009, 547 public schools are either entirely single-sex or offer all boys and all girls classes. The popular media endorse separatist themes—from heralding the “boy crisis” in education to proclaiming that single-sex schools are “better for girls.” The separatism continues in labor market. Even though women comprise 47 percent of the labor force, occupational segregation by sex persists, with women accounting for 79 percent of social workers and 89 percent of healthcare support occupations, while 77 percent of protective service

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1 34 C.F.R. § 106.34(b).

2 See Elizabeth S. Kisthardt, Comment, Singling Them Out: The Influence of the “Boy Crisis” on the New Title IX Regulations, 22 WIS. WOMEN’S L.J. 313, 313 (2007). Kisthardt points out that the No Child Left Behind Act provides special funding for “innovative assistance programs, which may include . . . programs to provide same-gender schools and classrooms.” Id. at 313 n.3.


workers and 92 percent of construction managers are men.\textsuperscript{5} In sum, almost 70 percent of all workers are in occupations that are strongly dominated by one sex or the other.\textsuperscript{6}

This segregation in society has its parallels in legal doctrine and legal theory. The central premise of this essay is that masculinities studies and feminist legal theory occupy separate academic silos. The branches of inquiry, although drawing on selected excerpts from each other and with some cross-fertilization in recent years, have remained largely segregated—in their methodologies, scholarship, conferences, and subjects. The first part of the essay traces how those silos were built; the second part addresses whether they should be dismantled and, if so, in what ways.

I. THE SILOS

A. Genesis and Methodology

1. Early feminist methodology

Feminist theory and masculinities studies have developed in separate arenas. On the theoretical level, one of the initial methodologies of feminism was “asking the woman question.” Theorists called attention to the fact that women were left out of social, political and legal issues and discussions proceeded as though women


\textsuperscript{6} Sociologists studying labor markets offer a framework for the consideration of occupations as sex segregated: A male dominated occupation is one that has fewer than 25 percent female workers; a female dominated occupation is one that has more than 55 percent female workers; and integrated occupation has between 25 and 55 percent female workers. Sheila C. Jacobs, Changing Patterns of Sex Segregated Occupations Through the Life Course, 11 EUR. SOC. REV. 157 (Sep. 1995). Applying this framework to current American labor market statistics, among the 321 specific jobs with at least 50,000 employed, 123 are more than 55 percent female dominated, 82 are “integrated” (between 25 and 55 percent female), and 116 are male dominated (less than 25 percent). Department of Labor, Bureau of Labor Statistics, Women in the Labor Force: A Databook (2009), http://www.bls.gov/cps/wlfable11.htm. (There are 321 job titles that have an employment base of at least 50,000 to provide valid statistics. If there are fewer than 50,000 workers in any job, that job category does not show a breakdown by gender.). I am indebted to Lawrence D. MacLachlan for this analysis.
did not exist. Accompanying these efforts to add the situations of women to legal theorizing—jokingly called the “add women and stir” approach\(^7\)—came a method of revealing gender inequities. This second feminist legal method of *unmasking patriarchy* took a number of forms.\(^8\) In part the methodology focused on relative victimization—of women’s exclusion, different legal treatment, perhaps even distinctive pain.\(^9\) Feminists exposed unfairness by showing that seemingly neutral laws disadvantaged women and considered men as the unrevealed reference point.\(^10\) They also showed that gender differences, previously seen as inherent and immutable, were constructed over the course of relationships and in different contexts.\(^11\)

In insisting on contextual reasoning, feminists learned to use these methods for self-critique, acknowledging insensitivity to sexual minorities, to differences among women, and at times the inevitability of pragmatic compromises.\(^12\) Critical race feminists and intersectionality theorists extended this thinking by stressing the intersections of sex, race, and class in varying experiential and political contexts.\(^13\) Cumulatively, feminists of the past three decades exposed hidden biases, challenged governing rules, fought legal battles over myriad issues from workplace rights to family planning services, and introduced the country to a language of equality that cannot be dismissed. These inquiries brought to light the ways in which women have suffered harms in areas such as reproductive rights, wage discrimination and harassment at work, and intimate violence, but have explored the situations of men only in limited ways.\(^14\)

Different strands of feminist legal theory, such as inequality theory or special treatment theory or postmodern feminism, have,

\(^10\) CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 227 (1988) (“Gender neutrality is the male standard. . . . Male physiology defines most sports, their health needs largely define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns . . . their image defines god.”).
\(^14\) See infra text at notes 25-30, 39-43
respectively, treated men as oppressors, or as “other,” or have simply omitted attention to the situations of men. As Nancy Dowd has capsulized, “Feminist theory has examined men, patriarchy, and masculine characteristics predominantly as sources of power, domination, inequality, and subordination . . . In much feminist analysis, men as a group largely have been undifferentiated.”

One unintended consequence of this neglect of men and masculinities is that it implicitly presumes that the lives of men are the standard default position. This “inadvertently re-enshrine[s] men as the neutral yardstick by which to measure women’s achievements.”

2. The methodologies of masculinities studies

Masculinities studies grew up in a blue room. Early works in men’s studies owed inspiration to feminist theorizing. When second wave feminism pointed out that the characteristics of men were the unexamined norm, this prompted interest in “men’s and boy’s identities, conduct and problems.” Masculinities studies are expressly about “understanding how male identity is constructed and sustained” and exposing the ways in which “structures and cultures are gendered male.” (Like feminist legal theory, masculinities studies has varying branches. For purposes of this paper, we focus primarily on profeminist masculinities studies, both in law and the social sciences.)

As a fledgling discipline, most of the early literature in men’s studies was preoccupied with upper middle-class, professional men and heterosexual masculinity. Later constructions of masculinities recognized multiple different masculinities, shaped by different political and cultural circumstances, age, race, class and sexuality. In both law and the social sciences, theorists have recognized that gender interacts

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and intersects with other identity characteristics and personal situations.  

Works in masculinities studies have examined the ways laws and institutions marginalize men who are battered, raped or sexually harassed, men who want to be family caregivers, gender nonconforming men, and men of color in realms from the workplace to the criminal justice system. But masculinities studies show little interest in the female subject. While works in masculinities studies give somewhat more attention to feminist theory than to the contemporary situations of women, it is often primarily as an historical progenitor or source of methodology. Among the relatively few areas of intersection between masculinities studies and feminist theory have been issues regarding social constructivism, gender nonconformity, and LGBT rights. Too often, though, what plays out on the level of theory is a battle reminiscent of the headlines—which sex is hurt worse by a law, a policy, an institution.

Of necessity in the early years in each set of disciplines, the subject of inquiry was that particular sex: feminist theorizing asked the woman question; masculinities studies centered on the situations of men. In legal theory, analyses of the gender implications of various laws or legal concepts typically focused on relative victimization—how women or men were harmed more than the other sex by particular laws. Yet even in relatively recent years, with recognition in both disciplines that gender relations are a continually shifting, interactive process, and that gender identity is interactional and dynamic, there is a sharp disinterest of masculinities studies in the female subject and feminist theory in men and masculinities.

3. The rarity of integrated explorations

Only in very recent years have theorists from law and the social sciences worked to integrate understandings from masculinities studies

22 See infra text at notes 45-46.
25 Connell et al., supra note 17, at 7.
and feminist theory. These integrations consist of several different theoretical directions. Some feminists have emphasized the importance of evaluating gendered harms to men. Some masculinities studies theorists look for connections between feminist legal theory, masculinities studies and critical race theory. Others have examined the political interactions of the different movements—engaging, for example, in very thoughtful analysis of whether the fathers’ rights movement represents a backlash against feminism and yet still raises valid concerns about the politics of fatherhood. Theorists working in both feminist studies and masculinities studies have cultivated the concept of intersectionality—which explicitly rejects gender, or any other identity characteristic, as an isolated or discrete category. A very few scholars have used the specific methods of one set of theories to analytically evaluate gender problems for both sexes. Ann McGinley, for example, has applied insights from masculinities theory to employment discrimination to demonstrate the ways Title VII plaintiffs can use workplace patterns of authoritarianism, informalism, careerism, paternalism, and entrepreneurialism to show disparate treatment. Although there are some other exceptional thinkers and promising directions, the overwhelming majority of scholarly projects in

27 See, e.g., Angela Harris, Gender, Violence, Race, and Criminal Justice, 52 Stan. L. Rev. 777 (2000).
31 Ann C. McGinley, Masculinities at Work, 83 Or. L. Rev. 359, 380-84 (2004). See also Ann C. McGinley, Reproducing Gender on Law School Faculties, 2009 B.Y.U. L. Rev. 99 (reversing the typical direction of methodological borrowing and using masculinities studies concepts, such as social role congruity and normative expectations that attach to the different sexes, to evaluate institutional practices that create gendered inequalities on law school faculties).
masculinities studies and feminist theory are occurring in disciplinary bunkers.

B. Scholarship

Scholarly projects in a wide range of disciplines focus on separate harms and often omit or minimally address harm to the other sex. The separate spheres phenomenon is pronounced at seminars and symposia. Feminist theory conferences and masculinities conferences speak to separate audiences and predominantly address gender-distinct topics. There also seems to be a disinclination for women to try to research the lives of men or men to explore the experiences of women. Douglas Falen, for example, makes the point that anthropological fieldwork about the experiences of women is almost always conducted by women.

1. In law

One example of the segregative thinking—thinking about legal problems as affecting a single sex and requiring a sex-specific remedy—has occurred in the realm of education. Two decades ago when evidence showed that girls were being shortchanged in the classroom, legal commentators touted single sex schools as a remedy. In the past several years parallel arguments have emerged that a relatively recent

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“boy crisis” in education justifies single sex education. Interestingly, both waves promoting single sex education were prompted by concerns about a single sex. Proponents selectively culled favorable studies and overlooked the wealth of data that showed—once conflating variables were controlled—no academic advantages of single sex over mixed sex education. (Is it any wonder that when researchers begin with the assumption of gender differences and look for them and find some that the end recommendation is a sex segregative remedy?)

Omitted by the promoters of single sex schools and classes was consideration of the interrelated effects on the other sex from the creation of all boys’ or all girls’ preserves. Research showed, for example, that creating all girls’ classes had deleterious effects on the boys left behind. Also neglected was the larger social picture: the protectionist model of the single sex remedy does not teach toward improved coeducation. Furthermore, sex exclusivity often leads to regressive forms of gender-differentiated treatment:

The concern that segregation based on sex can reinforce gender stereotypes is supported by a study of the experimental California academies. In 1997, as a pilot project, California provided five million dollars to institute ten public single-sex academies, equal down to the number of pencils. A study conducted by researchers from the University of Toronto and the University of California at San Diego, and sponsored by both the Ford and Spencer Foundations, evaluated the academies between 1998 and 2000, interviewing over 300 students, parents, teachers, and administrators, and observing classes. An important finding was that although the California


36 See Nancy Levit, Separating Equals: Educational Research and the Long Term Consequences of Sex Segregation, 67 GEO. WASH. U. L. REV. 451, 500 (1999) (“Earlier studies, those conducted in the 1970s and 1980s, are more likely to find correlations between a single sex environment for girls and positive achievement results. Later studies, from the mid 1980s to the present, and those with more sophisticated methodology (controlling for conflating variables), are more likely to find the effects of institutional gender type are insignificant and to show that other variables, such as prior individual student factors or institutional selectivity factors, matter much more to student satisfaction and performance. These later studies demonstrate effects that favor mixed sex over single sex education.”). See also David S. Cohen, No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity, 84 IND. L.J. 135 (2009).

37 Levit, Separating Equals, supra note 36, at 499-500.
administrators insisted on equal resources, assumptions about the different educational needs of boys and girls caused the educators to explicitly reinforce traditional gender stereotypes. As one example, during a unit on frontier exploration, the boys’ schools learned survival skills, and the girls’ schools learned how to quilt and sew.38

Finally, state sponsorship of sex segregation stigmatizes—“it explicitly states and physically embodies, that the problem is the presence of the opposite sex.”39 In short, gender equality in schools was treated as a “zero sum game.”40

At times, theoretical works depict women or men only as a “victim subject,”41 which promotes an essentialist view of a single sex and undercuts emancipatory politics. Gender inquiries often focus on relative victimization—the ways in which women are harmed worse than men or vice versa in a particular area. Parental alienation syndrome, for instance, has surfaced as a concept that seems to be used as a gendered weapon in custody battles.42 Some are simply factual statements—such as, for example, that women are more often the victims than the perpetrators of domestic violence.43 This is empirically

39 Levit, Separating Equals, supra note 36, at 517.
40 Dowd, supra note 15, at 247.
41 See, e.g., Ratna Kapur, The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics, 15 HARV. HUM. RTS. J. 1, 2 (2002) (arguing that “the focus on the victim subject in the [violence against women] campaign reinforces gender and cultural essentialism in the women’s human rights arena”).
42 See, e.g., Michele A. Adams, Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Father’s Rights, 40 FAM. L.Q. 315, 323-24 (2006) (“Promotion of parental alienation syndrome represents another related, success story of the fathers’ rights movement. Deployment of this “syndrome,” although technically developed outside the context of the mens’ movement, encapsulates the ability of fathers’ rights campaigners to co-opt and adapt feminist rhetoric of equality, victimization, and freedom of choice, and combine it with taken-for-granted stereotypes of women to turn the successes of the women’s movement into defeat for mothers.”).
true. But the idea of an essentialized male perpetrator may have discouraged research into female perpetrators of intimate abuse.\footnote{44}

These are not badly intentioned projects of scholarship. They typically try to isolate gender-based harms for the purpose of inquiry. Some of this is understandable. On the doctrinal level, illustrating relative disadvantage is a method of proving unequal treatment under the law. In constitutional or employment discrimination cases, for example, plaintiffs often demonstrate discrimination by proving that a government entity or an employer treated a comparator more favorably.\footnote{45} Yet relative victimization is a limited method of inquiry and, as this essay develops later in Part II, it is not a method that comports with contemporary scientific and social scientific theorizing.\footnote{46}

2. In other disciplines

This singular focus on one sex at a time is not unique to law, but is emblematic of other disciplines as well. A review of the past five years of issues of Psychology of Men & Masculinity, for example, shows articles on, among other topics, male body image, the drive for masculinity, male gender role conflict, masculine norms inventories, predictors of sexual harassment proclivities, stay-at-home fathers, risky sex practices, the masculine depression scale, masculinity ideology and college choices, men’s fear of rape, posttraumatic stress among men who endure partner violence, and masculine gender role stress among male veterans. The articles devote only scant attention to intersections between feminist theory and masculinities studies or even topics applicable to both sexes.\footnote{47} Recent topics covered in the Journal of Men’s Studies include: male sex workers, men’s friendships.\footnote{48} Issues of

\footnote{46} See infra discussion of complexity theory in text at notes 69-91.
\footnote{48} http://www.mensstudies.com/content/u34518j60120/?p=43e8c1c7ff324a5caf1a dd16c31099de&pi=0
Men and Masculinities are somewhat more ecumenical. Although the journal has featured articles on male promiscuity, masculinity and vulnerability, prostate cancer, sports culture, caring fathers, emotional intimacy among HIV positive men, patterns of masculinity in various educational settings, rural masculinity, and hegemonic masculinity in a global world, it also has a special symposium issue on men engaged in anthropological research on women.

Perusal of some of the predominant feminist theory publications reveals a similar singular focus. Recent issues of Signs: Journal of Women and Culture in Society, for instance, contain symposia on feminist zines, assisted reproductive and genetic technologies, the situations of indigenous women, comparative perspectives in feminist philosophy, challenges to women’s leadership, women’s labor activism, and feminist art and social change. A promising symposium title was Gendered Migrations, but other than articles on autism and freedom of religion, the content centered on migrant women. Other prominent journals of feminist theory, such as Feminist Theory and Women’s Studies, exhibit similar disinterest in the male subject. Articles in Hypatia and Gender & Society offer somewhat more balanced and integrated explorations.

What this single sex focus has led to in other disciplines is pockets of ignorance about the “other” sex. Consider several brief examples: The fastest growing segment of prison populations is women.

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Female inmates have extremely rates of mental illness, but the same mental illness may have different presentations in women and result in different diagnoses. Yet in research at the intersection of penology and psychology, women are not studied, and the different presentations of mental illness in this sub-population may be misdiagnosed. Similarly, the prevalence and symptoms of ADHD in girls remains largely unexplored. Regarding men, the medical community has only recently addressed the phenomenon of “male menopause.” Preliminary research indicates that andropause (a decrease in testosterone related to aging) is a common, but rarely treated, medical condition, and one that is woefully underexplored.

In international relations, until just the past decade, men were missing from discussions of gender and development policy. Perhaps understandably, the thought was that men in developing countries possessed the power and the wealth and that a focus on promoting gender equality necessitated attention primarily to the situations of women in poverty. Only in that recent time frame was there a change in terminology from “Women in Development (WID) to Gender and Development (GAD).” This change in terminology and underlying philosophy has prompted an expansion of focus and inquiries. Formerly the development literature had concentrated on men’s experiences in industrialized nations. The studies of men in southern countries had predominantly been “exotically ethnographic or historical accounts.” New research has moved from simple evaluations of ways men could change to give up power to women to broader theorizing of the ways socio-political obligations trap men, how violence affects developing masculinities, encouraging male involvement in development policies, and ways of incorporating men in development practices to ensure more sustained gender equality over time.

56 Frances Cleaver, Men and Masculinities: New Directions in Gender and Development, in MASCULINITIES MATTER: MEN, GENDER AND DEVELOPMENT 1, 1 (Frances Cleaver ed. 2002).
57 Id.
II. INTEGRATION NOW, INTEGRATION FOREVER

Popular culture may be one of the most insidious influences in emphasizing segregated understandings of the sexes. The constellation of ideas—that boys and girls are different, that men and women are different, that the sexes have continually competing interests—and constant media bombardment of gendered images may make it difficult to think of gender disparities as anything other than relative victimization.\(^{59}\) Hopefully, theory can move beyond popular understandings. This section urges theorists to dismantle the silos of academic inquiry and to move toward ways of analyzing gender that are more exploratory and collaborative and better empirically grounded than sex segregative thinking.

A. Combat Antinomal Thinking—Look for Shared Vulnerabilities

In both social and legal theorizing, gender is often constructed into dichotomous and opposing categories. *Men Are From Mars* and *Women Are From Venus* is interesting. It offers much more pizzazz than a book entitled *Men and Women Are From Earth*. Gender discourse typically develops harms to men and harms to women as pairs of warring opposites. This way of thinking becomes a pattern. Claude Lévi-Strauss, the French anthropologist and post-structuralist philosopher who died last year at age 100, wrote a brilliant book entitled *The Raw and the Cooked*.\(^{60}\) Lévi-Strauss said that we envision the world as a series of antinomals—matched pairs of opposite—such as hot and cold, wet and dry . . . raw and cooked. When the matched pairs don’t present themselves, we have become so accustomed to antinomal thinking that tend to create the pairs of opposites—to envision the world as stark opposites. We don’t see the gray and we don’t even look for the continuum.

This infects legal doctrine and theorizing as well. Consider an example from the Supreme Court. In *International Union, UAW v. Johnson Controls*, a battery manufacturer excluded fertile women, but not fertile men, from manufacturing jobs that exposed them to lead. The Supreme Court framed the issue solely as matter of women’s reproductive and employment rights. The Court’s initial framing of the


case viewed the matter solely as a woman’s issue: “May an employer exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might conceive?”

Completely omitted from the Supreme Court’s opinion was the reproductive rights claim of Donald Penney, one of the initial plaintiffs. Donald was a married male who had wanted to transfer out of the lead exposure areas to reduce his blood lead levels so that he and his wife could conceive. He offered extensive evidence that lead exposure impairs male fertility. The company denied his leave of absence. In its ruling that the company’s fetal protection policy amounted to sex discrimination, the majority held: “Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job.” That was factually incorrect. The fetal protection policy was sex-specific in not one but two directions, and men were not given the option to avoid confronting workplace lead exposure that might risk their fertility. Donald Penney was not afforded any such choice.

The Court was looking for differences in treatment, not shared vulnerabiliies of men and women regarding workplace impediments to family formation. Perhaps almost twenty years ago the Court could not “conceive” of fertility discrimination with both male and female plaintiffs.

Gender differences often obscure commonalities. Both women and men can be and often are disadvantaged by economic and social institutions. What is often overlooked, though, is that most gender-based classifications are “a double-edged sword. Many such statutes tangibly disadvantaged males, not females, though they intangibly harmed women by perpetuating stereotypes of female dependency, passivity, and lack of business acumen.”

B. Alter the Lens

Looking through the lenses of other identity categories or social practices can depolarize gender discourse. One way of changing polarized thinking about gender is to examine a shared identity category

62 Id. at 211.
or status that transcends gender. Judith Kegan Gardiner examines age.

ADD AN EXPLANATION OF HER EXAMPLE

Let’s look at parenthood. Professors Kenneth Dau-Schmidt, Marc Galanter, Kaushik Mukhopadhyaya, and Kathleen Hull evaluated twenty-five years’ worth of surveys from more than ten thousand University of Michigan Law School alumni. They were searching for the impact of gender on legal careers; what they found instead was that taking time away from law practice to care for children, more than gender, altered lawyers’ career paths and affected their satisfaction. The commonality they found was that attorneys who take time off from paid work for childcare, whether those lawyers were male or female, will experience reduced earnings and a reduce chance of partnership later in their careers, and—as some of you who are parents will appreciate—greater life satisfaction among the parents: “Both the men and women who take time away from paid work to do childcare, and who work fewer hours, are significantly happier with the balance of work and family in their lives as compared with any of the other groups.”

This dovetails with findings in masculinities studies, sociology, demography, and family relations that document convergences in familial roles and ever-greater decision-making equality (particularly among certain classes) between men and women within marriage. Increasing rates of employment among women will school age children have coupled with, in each generation, fathers participating to a much greater extent in primary childcare. To the extent that couples are sharing childcare more, they are sharing the social problem of balancing work and family responsibilities. One of the fastest growing employment discrimination theories is that of family responsibilities

67 Dau-Schmidt et al., *supra* note 66, at 72. They did find though that, “the big dividing line in terms of the experience attorneys have in private practice is not between men and women . . . It is between women with children and everybody else.” *Gender or Childcare? Study Sheds Light on Career Roadblocks*, Indiana L., Fall 2009, at 3. (quoting Ken Dau-Schmidt). They also found that fathers who assume primary caretaking roles (a smaller group) suffer greater career setbacks than mothers: “male attorneys who perform childcare fare even worse than female attorneys who do the same.” *Id.*
discrimination. In May of 2007, the EEOC released a guidance about discrimination against workers who are caregivers.\textsuperscript{70}

If the lens is altered—and theorists begin to examine gender inequalities through the perspective of a different category than embraces both sexes, such as parenthood or familial caregiver—this may create a more robust theory of family responsibilities discrimination. It may also solidify greater political and social support for an activity, familial caregiving, that has been dramatically gendered throughout history.

C. Get Empirical—Embrace Complexity

One other way of dismantling intellectual silos—or at least seeing connections, overlaps and exchanges between them—is to tap empirical understandings of the ways gender is constructed. Going back to first principles and early feminist methodology, “asking the woman question” was in no small part an empirical assessment—using data to reveal how seemingly neutral laws contain a gender bias.\textsuperscript{71} A more contemporary search for the explanatory mechanisms of prejudice should use methods developed in other disciplines.

One of those methods from the sciences is complexity theory. The science of complexity looks at the various relations among parts of systems and evaluates the collective behaviors of that system. Applied to the social sciences, complexity theory looks at complex dynamics of relationships and their interactions with institutions. Multiple strands of social inequality occur simultaneously and have to do with systems and institutions beyond facets of identity—with religion, nations, and economic and political systems. Identity categories are not static, but interact with all of these systems.\textsuperscript{72} The science of complexity tries to move away from incomplete or fractional perspectives and fixed understandings. As Cass Sunstein says, what tends to “emerge from


\textsuperscript{71} NANCY LEVIT \& ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER 46 (2006).

close attention to mere pieces of complex problems” are, quite simply, only “partial perspectives.”  

In the late 1980s critical theorists pushed identity theories such as feminism toward anti-essentialist understandings by pointing out that discrimination occurred at the intersection of identity categories. “A black woman, for instance, experiences not just racism and sexism, but the greater-than-double burden of intertwined racism and sexism, which is its own unique (and perhaps particularly virulent) form of discrimination.” Since then feminists and critical race theorists have built on intersectionality ideas that discrimination based on a single identity characteristic can be compounded by discrimination based on other facets of identity. They are adding to ideas of intersectionality (as discrimination based on intersecting aspects of identity) by using concepts from complexity theory. Intersectionality examines the interrelations of various facets of identity, such as gender, race, ethnicity and class; complexity moves to a more four-dimensional model that considers individuals and their identity characteristics, their environments, and normative practices and institutions, across time and cultures.

Darren Lenard Hutchinson, for example, calls these new understandings “multidimensionality” and suggests going beyond intersectionality by understanding invisible privileges, such as whiteness and the benefits of class standing. He urges an understanding of how privileges operate in tandem with staid institutions, governmental policies and public discourse to shape legal doctrines. Nancy Ehrenreich’s “symbiotic” approach is another example of the use of complexity theory in legal analysis. She urges evaluations of doctrines and discourse “by focusing attention on the multiplicity of oppressions and the complex mechanisms by which subordinated statuses interact.”

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75 Levit, Theorizing Connections, supra note 21, at 228.
Complexity theory says humans are complex organisms, adapting to life around them, but not in a linear way. Similarly, law is an adaptive institution—evolving and becoming more organized. Applying these understandings to gender theory, complexity theory would recognize that the gendered subject is complex: family circumstances, sexuality, race, class, age and other characteristics matter to everyday interactions. Gender relations occur in various different networks and gender is constructed in multiple dynamic processes. This is in part what Raewyn Connell suggests when she urges consideration of multiple masculinities, encompassing varying presentations of masculinity even for a single individual in different circumstances such as at home, at the office, or in sports. What all of this implies is that understandings of gender solely through feminist theory or masculinities studies are relatively unidimensional, while gendering is a multidimensional, dynamic and relational process.

Consider two concrete examples of the ways in which complexity theory might change thinking about gender studies. The first example has to do with identifying discrimination in the employment arena.

Social organization theorists have demonstrated that various types of gender bias affect promotion of leaders in an organization. This phenomenon is known colloquially as “the glass ceiling.” Mary Hogue and Robert G. Lord have applied complexity theory to this idea. They argue that gender bias in organizations functions as a complex system of behaviors at various organizational levels with numerous different units, occupations and processes. They maintain that an understanding of how gender bias occurs at various levels and in different relationships

requires more than simple unidimensional explanations. It is a conceptual error to generalize that prejudice at one level—which may result, for instance, from a female leader displaying characteristics that are not typical either for her gender or for the typical occupant of the role—works the same as prejudice at other levels. Many different types of prejudice (such as lower evaluations of competence of women than men in leadership roles or reluctance among women in mixed sex groups to seek leadership positions) can work cumulatively to make identification of the sources of prejudice difficult. 84

The science of complexity, which understands organizations such as places of employment as complex systems, would suggest looking for interconnections among different types of prejudice and aggregation of multiple types of bias occurring in different ways at various different levels. A more sophisticated understanding of the different currents of prejudice, stereotyping, and relational disadvantage poses a challenge for current antidiscrimination law, which often impels an unrealistic search for unicausal channels of discrimination. 85 A complex understanding of the relational nature of the ways leaders emerge might nudge theories of employment discrimination away from simple causal explanations.

A second example of the way understandings from complexity theory might help dismantle silos of thinking about gender has to do with the institutional practice of family leave. A specific instance of this near to lawyers’ hearts is flexible work hours in law firms. Lawyers want more work-life balance than they have now. (The buzzword is rampant; it’s just that nobody seems to have much of the real thing.) “Nearly two-thirds of all lawyers report difficulty managing the demands of work and personal/family life.” 86 The single most influential factor prompting attorneys to change jobs was to obtain a “reduction of work hours.” 87 In response to an ABA survey, 84 percent of lawyers said they would be willing to receive less income in exchange for a lower billable hours requirement. 88 Although 98 percent of large

84 Id. at 371.
87 SUSAN SAAB FORTNEY, IN PURSUIT OF ATTORNEY WORK-LIFE BALANCE: BEST PRACTICES IN MANAGEMENT 95-96 (Paula Patton ed. 2005).
88 Stephanie Ward, The Ultimate Time-Money Trade-Off, ABA J., Feb. 2, 2007, at 2. These numbers reflect the situations of both associates and partners. Almost half of attorneys in managing positions would give up some portion of
law offices responding to a NALP survey in 2008 said that they permit part-time work schedules, fewer than 6 percent of all lawyers work part-time. Most of them are women.

An understanding of work-life balance or family friendly policies informed by complexity theory would examine not just the existence of policies, but the environment in which those policies exist. A hallmark of complex systems is “path-dependence”—“the path direction of a complex system is extremely sensitive to the environmental conditions in which the system exists.” Although firms say that flex time or family friendly policies are available, one study showed that only about 60 percent of associates knew about the flex time alternative or thought that it was a realistic option. Interestingly, gender stereotypes operating in both directions make women and men hesitant to pursue family leave and work-life balance policies. Single, anecdotal reports of the treatment of men or women who seek family leave can dramatically affect whether others view it as a realistic option.

One critique of the idea of using complexity theory is that when it insists on multiple, incommensurable factors and the adaptive properties of complex systems, complexity sounds like classic relativism—it is hard to say anything certain about much of anything, but we know it’s complicated. This poses difficulties in the practical

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90 Id.
91 J.B. Ruhl & James Salzman, Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State, 91 GEO. L.J. 757, 818 (2003) (“This property, known as sensitivity, means that two similar systems may be found at one time to be located at very close decision nodes, where the choice as to where to go next must be made, but can later be found to have diverged wildly from each other based on seemingly minor differences in the decisions.”).
93 See Joan Williams, Our Economy of Mothers and Others: Women and Economics Revisited, 5 J. GENDER RACE & JUST. 411, 426 (2002).
application of the theory as a matter of methodology. Gender theory can certainly tap the understandings of the science of complexity, while using models developed in other disciplines. For instance, disciplines like neoclassical economics try to introduce certainty—often simplifying to the point of triviality or bias.\textsuperscript{95} There are middle methodological grounds. One is evolutionary economics. It asks the question how a change in one variable likely to transform (as opposed to alter at the margins) a set of transactions or institutions.\textsuperscript{96} For example, same sex education tries to solve one problem (such as girls’ math anxiety), but then introduces a series of other effects (such as the hypermasculine ethos of the boys’ left behind or less engaged teachers because the more innovative teachers want to be part of the new experiment). Evolutionary economics tries to capture dynamic effects by modeling the cascade of consequences that follow from individual changes in dynamic (“evolutionary”) systems.\textsuperscript{97} It asks how a change affects the composition of the players, institutional objectives, the nature of the transactions, the allocation of resources, and so on.

Query whether an evolutionary approach (the term has long been associated with sociobiological ideas and conservative policies of the political right, but it need not be\textsuperscript{98}) can be applied to devise litigation or other legal strategies. If the problem with the glass ceiling is child care responsibilities, what is the best way to address these issues for men and women? Joan Williams’ work is a very good example of self-conscious consideration of when it makes sense to emphasize sex discrimination as opposed to parental responsibility discrimination or gendered understandings of the latter (the maternal wall) as opposed to strategies designed to prompt greater male assumption of family responsibilities.\textsuperscript{99} The evolutionary economics methodology of trying to hold single

\textsuperscript{95}See, e.g., ROBERT L. HAYMAN, NANCY LEVIT & RICHARD DELGADO, JURISPRUDENCE—CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM 300-01, 308 (2d ed. 2002)
\textsuperscript{96}François Moreau, The Role of the State in Evolutionary Economics, 28 CAMBRIDGE J. ECON. 847 (2004). It is a theory that considers markets as complex, adaptive systems. See June Carbone, Who Decides What Number of Children Is “Right”??, 104 NW. U. L. REV. COLLOQUY 109 (Sep. 6, 2009).
\textsuperscript{98}The word “transformative” describes much of this approach when it comes from the left; “evolutionary” mechanisms tends to be the vocabulary of the right.
variables constant and considering the consequences—if, say, companies adopt and broadcast their parenting leave policies, will both men and women take the family time?—could be useful in gender studies.

In short, the use in both masculinities studies and feminist theorizing of some of the lessons of complexity theory or the methods of evolutionary economics would break down disciplinary walls and encourage recognition that gender inequalities are interrelated, path-dependent, and constructed in multiple dynamic processes.

III. CONCLUSION

TO BE COMPLETED AFTER THE CONVERSATIONS AT THE CONFERENCE.

A. Gender Litigation Versus Legislation

This essay has suggested looking at parallel and intersection gender issues to discover things about gender that might not surface from separate examinations: (e.g., to explore whether methodologies developed in one theoretical area can apply to the other, whether integrated explorations are possible—to examine how institutions and cultural norms create gendered expectations for both men and women, and whether examining categories other than gender can provide a different lens that will illuminate gendering in different ways). Difficulties surface in efforts to examine parallel male and female socio-legal issues. Existing law reinforces the silos because more forms of analysis are designed to isolate issues.

First, law typically acts on gender issues through the vehicle of litigation: court cases, defined by individual plaintiffs, in particular causes of actions against defendants, under specific facts. In Johnson Controls, for example, the cause of action is sex discrimination or nothing. If the company penalizes or endangers all employees, there is no gender-based cause of action. While it is relatively easy to design parallel sex discrimination suits for men, it is harder to get courts to recognize the discrimination at times,100 harder still to address workforce policies in general. With regulatory approaches, such as the Occupational Safety and Health Act, an agency can use more holistic approaches. One problem here is that the exposure of employees to radiation has a disproportionate risk for those of reproductive age, and the balance between employee advancement qua employees versus reproductive safety might be different for men and women, but an issue for both.

100 See supra discussion in text at notes ___.

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Regulatory approaches to address inequalities relating to sex and gender, however, face turbulent political battles on the national level and often succumb to red state-blue state politics on the state level.\textsuperscript{101} Compare, for instance, the legislative process surrounding the proposed Employment Non Discrimination Act and the dozen states that have extended anti-discrimination protection to cover sexual orientation.\textsuperscript{102}

**B. The Difficulties of Integrated Scholarship**

Numerous areas of research might benefit from research that searches for commonalities. Autism research, for instance, might progress dramatically by comparing boys and girls and looking for commonalities and differences; so too could research on gender and classroom educational arrangements. That research might then develop into transformative strategies that, like regulation, see the totality.

The problems with scholarship are both empirical and political. On the empirical side, analysis is easiest that isolates variables. Econometric, statistical and regression analyses try to isolate a single factor and examine it.\textsuperscript{103} It is much harder to say anything “rigorous” about events with multiple factors.\textsuperscript{104}

The political problems encompass an intertwined set of difficulties. First, it may hard to cultivate interest in seeing beyond the concerns of an identity group. Intersectionality studies aside, identity politics focuses on a group as special and cultivates support for that group. Works that champion the idea that males and females are both disadvantaged by gender threatens the pretense that either is special. Second, scholarship is easier if the scholar has a “privileged” omniscient perspective. This leads to perceived experiential impediments to men doing research about women and women doing research about men.\textsuperscript{105}

\begin{footnotes}
\textsuperscript{101} Naomi Cahn & June Carbone, Red Families v. Blue Families: Legal Polarization and the Creation of Culture (2010).
\textsuperscript{103} James E. Wren & Timothy C. Williams, Selling Blue Elephants to the Jury: Potential Application of Rule Developing Experimentation in Litigation, 61 Baylor L. Rev. 1, 16 n.85 (2009)(“Regression analysis is a technique for the analysis of numerical data consisting of values of a dependent variable and one or more independent variables in order to isolate the effect of the independent variables.”).
\textsuperscript{105} See Berliner & Falen, supra note 49.
\end{footnotes}
Third, there is a problem of individual interests becoming lost in the process of coalition-building. Richard Delgado warns against disempowered groups building strategic alliances:

Gains are ephemeral if one wins them by forming coalitions with individuals who really do not have your interest at heart. It’s not just that the larger, more diverse group will forget you and your special needs. It’s worse than that. You'll forget who you are. And if you don't, you may still end up demonized, blamed for sabotaging the revolution when it inevitably and ineluctably fails.106

So if gender is a construct, the question is not whether men and women are the same—sometimes we are, sometimes we’re not. The more central posing of the question is one Martha Minow framed so long ago: what difference does it make and how does the world change when we look for similarities, comparisons, or differences?107

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107 Martha Minow, Making All the Difference: Inclusion, Exclusion and American Law (1990). In Johnson Controls, the answer is that the company could expose men to hazards without compensation and this is clearly sex discrimination. With same sex education, it’s a way of allocating resources: particular types of teachers, funds for experimental projects, and it’s a way of avoiding hard questions about either the conduct of the ordinary math class or about power relations between the sexes. So how does seeing male and female together generate a different solution?