ON READING MEN, LAW AND GENDER: LEGAL REGULATION AND THE NEW POLITICS OF MASCULINITY

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Abstract

This essay has two aims. First, drawing on themes in the book Men, Law and Gender: Essays on the ‘Man’ of Law (2010) it explores how an engagement with masculinity has developed in the field of legal studies. The essay argues that particular ideas about men and masculinity have been constituted as distinctive kinds of “social problems” for law at different historical moments, in ways that have served to shape debates about law and gender across a range of areas of social policy in the UK.

Second, building on a recently completed study of fathers’ rights groups and on the book Fragmenting Fatherhood: A Socio-Legal Study (2008), the article explores these issues about law and masculinities in the context of debates about fathers’ rights politics. It argues, via examples, that studies of fathers’ rights and masculinities have much to gain from incorporating a more complex and multi-layered account of the gendered male subject and the interconnected nature of the personal lives of women, children and men.

A rich body of interdisciplinary theoretical and empirical research has explored, from a variety of perspectives, the gender of men in an explicitly pro-feminist manner.¹ The depth of contemporary work on

¹ See, for example, R.W. Connell, *Masculinities*, 2nd edn, Cambridge: Polity, 2005; R.W. Connell, *The Men and the Boys*, Cambridge: Polity, 2000; R.W. Connell, *Gender and Power*, Cambridge: Polity, 1987; *The Handbook of Masculinity Studies*, eds R.W. Connell, Jeff Hearn and Michael Kimmel, London: Sage, 2004; Stephen White-

masculinities is illustrated by the number of books, articles and research reports on the topic as well as by the existence of dedicated encyclopedias and bibliographic databases.² As the author of one recent study has observed, “issues surrounding men and masculinities have become ‘hot politics’ in late capitalist societies”.³ The interaction of structural change and the social and political effects of feminism, in particular, has prompted a new focus on questions about men’s identities and practices in what has been referred to as a “new politics of masculinity”.⁴

How does law relate to this work? In contrast to developments in English literature, history, sociology and social policy, as well as many other disciplines, there is a distinct sense in which law has lagged behind other fields of study. In 1995 writing *Masculinity, Law and the Family*, I noted how, at the time, few texts had sought to explore the relationship between masculinity and law. This is no longer the case, however, and over the past fifteen years or so, a picture has emerged of the “man” or, rather, more accurately, the “men” of law. Certainly, this work remains marginal to much mainstream legal study. At international conferences and symposia in the sub-field of law, gender and sexuality studies, it is rare to find workshops focused on law and masculinity. Nonetheless, a now substantial body of scholarship has sought to address the way in which ideas about men and gender have been understood, constructed or otherwise depicted in law.

This essay explores how a critical study of law can inform understanding of the relationship between men and gender in other disciplines, including English literature.⁵ Work on law and masculinity has

head, *Men and Masculinities: Key Themes and New Directions*, Cambridge: Polity, 2002; *The Masculinities Reader*, eds Stephen Whitehead and Frank Barrett, Cambridge: Polity, 2001; Jack S. Kahn, *An Introduction to Masculinities*, Oxford: Wiley-Blackwell, 2009; Michael Kimmel and Michael Messner, *Men’s Lives*, 8th edn, Boston: Allyn and Bacon, 2010.

² See *The International Encyclopaedia of Men and Masculinities*, eds Michael Flood et al., London: Routledge, 2007, I.

³ Fidelma Ashe, *The New Politics of Masculinity: Men, Power and Resistance*, London: Routledge, 2007, 1.

⁴ See *ibid.*; see also Bob Pease, *Recreating Men: Postmodern Masculinity Politics*, London: Sage, 2000; Alan Petersen, *Unmasking the Masculine: Men and Identity in a Sceptical Age*, London: Sage, 1999.

⁵ This article presents a revised version of material contained in Richard Collier, *Men, Law and Gender: Essays on the ‘Man’ of Law*, London: Routledge, 2010 and selected

raised important questions about the variable and contested meanings that attach to gender and the structures of feeling that shape our lives. Gender struggles involving law have a long and well-documented history. Yet, I shall argue, an amalgam of social, economic and cultural change, alongside the embedding in law, across Western countries, of models of formal equality and ideas of gender neutrality, has reshaped legal-political and cultural terrains based on a particular set of beliefs about men and masculinities. The result is a far-reaching, complex and contradictory politicization of masculinity within and beyond the legal arena, a development that has become a key, if often overlooked, site of conflict around contemporary gender relations.

A brief history: masculinities, law and feminist legal studies

The interrogation of masculinities within legal studies has occurred at a nexus of developments that, although interconnected, draw on distinct theoretical and political trajectories. The most significant influence has been feminism; or, in legal studies, work sometimes referred to as legal feminism (or, more accurately, legal feminisms⁶). The roots of the engagement with masculinity in feminist work in law can be found in the distinction between sex and gender⁷ and, more specifically, post-war social psychological research concerned with sex roles and gender identity. Feminist critiques of the broadly functionalist analyses of masculinity of the 1950s and 1960s revealed an implicit methodological individualism that served to negate any questioning of the social structure, the gendered nature of a contingent, legally constituted public/private divide⁸ and, importantly, the crucial issue of the social power of men. Within feminist texts that began to impact on the discipline of law throughout the 1970s and 1980s, in contrast, a challenge to the structural power of men involved a reframing of how the relationship between masculinity and law was understood.

themes discussed in Richard Collier, "Masculinities, Law and Personal Life: Towards a New Framework for Understanding Men, Law and Gender", *Harvard Journal of Law and Gender*, XXXIII/2 (Summer 2010), 431-75. I am grateful to the publishers for permission to revise and republish this work here. If not further indicated, references to arguments "elsewhere" or "in other works" are to these two texts.

⁶ See *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory*, ed. Martha Fineman, New York: Routledge, 2011.

⁷ See also Wendy Cealey Harrison and John Hood-Williams, *Beyond Sex and Gender*, London: Sage, 2002.

⁸ See Katherine O'Donovan, *Sexual Divisions in Law*, London: Weidenfeld and Nicolson, 1985.

In the development of feminist legal scholarship, masculinity has been deployed in different ways in seeking to account for the relationship between women, men and the power of law. There are, I have argued elsewhere, three principal areas in which an engagement with masculinity has featured in feminist legal studies. In relation to each, there exist similarities and differences in how masculinity has been conceptualized, revealing ambiguities about the meaning of the term as it has been used more generally in the study of law and gender.

First, masculinity has been deployed extensively within analyses of institutions and practices relating to diverse aspects of law and legal regulation. Ideas about masculinity have informed, for example, studies of the work of solicitors, barristers and the judiciary.⁹ There exists a rich literature on gender and the courts, police, prisons and criminal justice systems (see below), legal education, the law school and the legislature¹⁰ as well as the administration of criminal and civil justice. In some accounts of these institutions of law, men's practices, taken together and cumulatively, have been understood to reproduce distinctive cultural forms and belief structures, an ideology of "masculinism"¹¹ that has deleterious consequences for women and, depending on the reading, some categories of "subordinated" men.¹²

In challenging the gendered cultures of law, feminist scholarship questioned how the masculinity of law's institutions and practices has been linked to the reproduction of discriminatory beliefs and practices. Feminist work has unpacked, for example, the homosocial and homophobic aspects of legal cultures and the gendered perceptions of authority at play within the legal field.¹³ Of particular significance for the argument to follow, feminist work in law has challenged an elaborate silencing of the contingency and structurally grounded nature of men's private lives, not least in relation to social practices of care and

⁹ See Hilary Sommerlad and Peter Sanderson, *Gender Choice and Commitment: Women Solicitors in England and Wales and the Struggle for Equal Status*, Aldershot: Ashgate, 1998.

¹⁰ See Margaret Thornton, "Hegemonic Masculinity and the Academy", *International Journal of the Sociology of Law*, XVII (1989), 115-30; Richard Collier, "'Nuttty Professors', 'Men in Suits' and 'New Entrepreneurs': Corporeality, Subjectivity and Change in the Law School and Legal Practice", *Social and Legal Studies*, VII/1 (March 1998), 27-53; Richard Collier, "Masculinism, Law and Law Teaching", *International Journal of the Sociology of Law*, XIX (1991), 427-51.

¹¹ Arthur Brittan, *Masculinity and Power*, Oxford: Basil Blackwell, 1989, 4.

¹² Connell, *Masculinities*; Connell, *Gender and Power*.

¹³ See Thornton, "Hegemonic Masculinity and the Academy".

relations of dependency within families.¹⁴ Feminist scholarship has further identified the persistent benchmarking of women in law against a normative ideal figure, a “man of law”. This is an individual seen as both gendered (as male/masculine: assertive, rational, competent, unemotional and so on) and, equally, gender-neutral, notably in relation to commitments associated with caring relationships and practices that fall out with the field of paid employment.¹⁵

Second, feminist work has explored the connections between masculinity and legal methods and reasoning – the very ways of studying and doing law as a discipline. Questioning the conceptual and political limitations of liberal-progressive feminist legal scholarship, a different strand of feminist work has sought to interpret the relationship between law and masculinity in a rather different way. Far from seeing otherwise gender-neutral legal systems somehow skewed by gendered (that is, masculine) assumptions that resulted from the empirical dominance by men of law’s institutions, at issue was precisely the inherent masculinity or maleness of law and global patriarchal legal systems. Within this work, a link was made explicit between law’s status as an androcentric, positivist discipline and the masculine nature of law’s governance, institutions and jurisprudence. Concepts central to liberal legal thought, such as individualism, reason, autonomy, justice, freedom, were themselves refigured as somehow quintessentially masculine values.¹⁶

Third, and finally, challenging the essentialism and reductionism of each of the above two approaches, later engagements with masculinity in feminist legal studies were, by the late 1980s and early 1990s, increasingly shaped by the impact of postmodernism and post-structuralism.¹⁷ This development was taking place across the social sciences, arts and humanities. In the context of law, however, and aligned to the rejection of categorical thinking underway within socio-

¹⁴ See Martha Fineman, *Autonomy Myth*, New York: New Press, 2004; Martha Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*, New York: Routledge, 1995.

¹⁵ See Kathryn Abrams, “Cross Dressing in the Master’s Clothes”, *The Yale Law Journal*, CIX/4 (January 2000), 745–82.

¹⁶ See Robin West, “Jurisprudence and Gender”, *University of Chicago Law Review*, LV/1 (Winter 1988), 1–72; Catherine A. Mackinnon, *Feminism Unmodified: Discourses on Life and Law*, Cambridge, MA: Harvard University Press, 1987.

¹⁷ Note, for example, Carol Smart, *Feminism and the Power of Law*, London: Routledge, 1989; Drucilla Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law*, New York: Routledge, 1991.

logical studies of masculinity,¹⁸ it served to refigure how law was seen to link to masculinity and the power of men.

Drawing on concerns about anti-essentialism¹⁹ and intersectionality,²⁰ feminist work in law increasingly began to focus on the question of whether, given that men might not have equal access to cultural, symbolic or economic capital, all men might still be seen as the beneficiaries of patriarchal legal systems. In this third-wave feminist legal scholarship, a key concern related to whether earlier feminist work had ascribed to the category “Woman” an essential, ontological status, negating the discursive construction of the feminist subject Woman (the “Woman of law”).²¹ In so doing, however, such work had also sidestepped the diverse positionality of, and differences within, men’s lives.

Feminist legal scholars thus began to question an approach to masculinity that had, at times, embraced a depiction of a seemingly omnipotent male sexuality and which had failed to engage with questions of heterosexuality.²² Raising broadly similar questions to those being asked in the sociological studies of masculinity at the time, what became of issue were the “significant overlaps” or “mutual resonances” between how “both law and masculinity are constituted in discourse”. How, that is, “challenging legal discourse” also entailed unpacking the “naturalistic assumptions about masculinity” to be found in law.²³ Linking to engagements with rhetoric, interpretation and hermeneutics informing critical legal scholarship by the late 1980s and early 1990s,²⁴ this approach opened up to analysis the plurality and contingency of those discourses which speak of men and masculinity across diverse institutional and cultural contexts. Turning attention to the construction of the “Woman” of legal discourse,²⁵ in short, brought

¹⁸ See Connell, *Gender and Power*.

¹⁹ *Feminist Legal Theory: An Anti-Essentialist Reader*, eds Nancy Dowd and Michelle S. Jacobs, New York: New York University Press, 2003.

²⁰ *Intersectionality and Beyond: Law, Power and the Politics of Location*, eds Emily Grabham *et al.*, Abingdon: Routledge-Cavendish, 2009.

²¹ See further on this idea Carol Smart, “The Woman of Legal Discourse”, *Social and Legal Studies*, 1/1 (March 1992), 29–44.

²² See Lynn Segal, *Is the Future Female? Troubled Thoughts on Contemporary Feminism*, London: Virago, 1994; Lynn Segal, *Straight Sex: The Politics of Pleasure*, London: Virago, 1994.

²³ Smart, *Feminism and the Power of Law*, 86–87.

²⁴ See Peter Goodrich, *Legal Discourse*, Oxford: Blackwell, 1987.

²⁵ Smart, “The Woman of Legal Discourse”.

into question, inescapably, the nature of the “Man” of legal – and, indeed, of feminist – discourse.

Exploring the “man” of law

It is impossible to summarize all the themes contained within the rich and varied literature on law that has engaged with the analysis of masculinities in legal cases, statutes, utterances and representations in relation to such areas as family, criminal, health care law, jurisprudence, crime and criminology.²⁶ I have sought to chart these principal areas of study and key arguments contained in this scholarship in more detail elsewhere. For the purposes of this essay, concerned with reading the masculinities of law, three themes emerge as of particular importance in delineating the contours of the “man of law” in legal study.

First, work on gender and law has explored how an individualized notion of autonomy, central to liberal conceptions of the self,²⁷ has been associated with a particular set of beliefs about masculinity.²⁸ Work in family law, for example, has questioned a model of autonomy based upon a historical separation of men from areas of social life connected to the affective domain, to relations of care and caring.²⁹ In accounts of heterosexuality, parenthood and family practices, socio-legal scholars have challenged the political, practical consequences of assumptions in law and policy about men’s physical and emotional distance from children, childcare and associated ideas of dependency and vulnerability. An increasingly pressing issue, with resonance across political-legal systems and evident in contemporary cultural debates in both the United Kingdom and Germany, concerns how this masculine ideal of gendered autonomy may itself, in important respects, increasingly ill-fit many aspects of dominant political and cul-

²⁶ See further, for examples of recent work, Nancy Dowd, *The Man Question: Male Subordination and Privilege*, New York: New York University Press, 2010; *Masculinities and the Law: A Multidimensional Approach*, eds Frank Rudy Cooper and Ann C. McGinley, New York: New York University Press, 2012; *Exploring Masculinities: Feminist Legal Theory Reflections*, eds Martha Albertson Fineman and Michael Thomson, Farnham: Ashgate, 2013.

²⁷ See further on this idea Joseph Raz, *The Morality of Freedom*, Oxford: Oxford University Press, 1986; Ronald Dworkin, *Life’s Dominion: An Argument about Abortion and Euthanasia*, London: Harper Collins, 1993.

²⁸ See further Stephen Whitehead, *Men and Masculinities: Key Themes and New Directions*, Cambridge: Polity, 2002.

²⁹ See Fineman, *Autonomy Myth*.

tural assumptions about masculinity and men's social practices. I have argued elsewhere, with Sally Sheldon, that the emergence in England and Wales of a new normative model of responsible fatherhood in law has embodied a particular kind of heterosexual masculinity markedly different from the ideas about men, gender and autonomy that informed earlier beliefs about fatherhood.³⁰

Second, interlinked to this model of the gendered autonomous subject, studies in law and society have explored aspects of the embodied nature of masculinity.³¹ Work has drawn on sociological studies of the body and feminist philosophical engagements with corporeality that emerged in the wake of postmodernism and queer theory.³² In studies of family and criminal law, for example, the liberal rational individual has been seen not simply as a sexed, autonomous, masculine subject, as above, but also as a peculiarly disembodied being. This is a figure bounded, constituted as male in ways dependant on a separation from other men and, crucially, on the establishment of hierarchical differences from women.³³ Women's bodies in law have frequently appeared as incomprehensible, fluid, unbounded. The bodies of men, in contrast, Sheldon has suggested, more often appear marked by ideas of bodily absence and physical disengagement than any sense of corporeal presence.³⁴ In particular, an association has been made between ideas of men's bodies as safe, stable and bounded, and a culturally, and legally, tangential and contingent relation to gestation, fertility and reproduction.³⁵

Third, and finally, alongside engagements with the gendered nature of autonomy and embodiment, a questioning of masculinity has also occurred at the interface of social policy and legal practice, with a growing body of work exploring how lawyers and other legal actors

³⁰ Richard Collier and Sally Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study*, Oxford: Hart, 2008.

³¹ See Michael Thomson, *Endowed: Regulating the Sexed Male Body*, London: Routledge, 2007; Collier, "'Nutty Professors', 'Men in Suits' and 'New Entrepreneurs'".

³² See Elizabeth Grosz, *Volatile Bodies: Towards a Corporeal Feminism*, St Leonards, NSW: Allen and Unwin, 1994; Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporeality*, London: Routledge, 1996.

³³ See Ngaire Naffine, "Possession: Erotic Love in the Law of Rape", *Modern Law Review*, LVII/1 (January 1994), 10-37.

³⁴ See Sally Sheldon, "Reconceiving Masculinity: Imagining Men's Reproductive Bodies in Law", *Journal of Law and Society*, XXVI/2 (June 1999), 129-49.

³⁵ See further Collier and Sheldon, *Fragmenting Fatherhood*, Chapter 3.

“talk about men” across areas of legal regulation. In the case of the legal profession, for example, I have argued elsewhere that, with regard to cultural representations of young trainee lawyers and policy debates about gender and work-life balance, significant political shifts have transformed how gender relates to the benchmarking of the normative ideal legal professional as masculine.³⁶ Far from deploying a monolithic ideal of the masculine culture of legal practice, the position is much more complex. Thus, whilst “circles of social embodiment constantly involve the institutions on which ... privileges rest”,³⁷ the differential commitments individual men have to dominant modes of masculinity, mediated by race, ethnicity, class, sexual orientation and so forth (see below), suggest it is too simplistic to say that law is in any straightforward way masculine without at least noting how the normative nature of masculinity has changed significantly.

I have conveyed thus far something of the way masculinity has been approached in the discipline of law. An important question remains unanswered, however, one that I address in the remainder of this article. How adequate has the conceptualization of masculinity been underscoring studies of law and gender?

(Re)conceptualizing masculinity: lessons from law

In other works, I have traced in depth the strengths, and weaknesses, of the principal sociological and social-psychological perspectives that have shaped the study of masculinity within Anglophone jurisprudence. What marks these engagements out as different from the functionalist, positivist approaches that informed the earlier sociological accounts discussed earlier is a two-fold rejection of the once influential sex role theory and an attempt to take seriously the insights of feminism and engage with the social power of men. The first perspective, central to feminist work and the critical study of men and masculinities, evolved around hegemonic masculinity, a recurring, and seemingly ubiquitous concept associated with a structured model of

³⁶ See Collier, *Men, Law and Gender*, Chapters 4 and 6; on transnational business masculinities in law, see also Richard Collier, “Rethinking Men and Masculinities in the Contemporary Legal Profession: The Example of Fatherhood, Transnational Business Masculinities and Work-Life Balance in Large Law Firms”, *Nevada Law Journal*, XIII/2 (Winter 2013), 410-37.

³⁷ R.W. Connell and James W. Messerschmidt, “Hegemonic Masculinity: Rethinking the Concept”, *Gender and Society*, XIX/6 (December 2005), 852.

gender power.³⁸ The second concerns the interconnections between the discursive production of masculinity and the contingency of the male subject, what has been termed, in some accounts, a psychosocial approach to masculinities.

The concept of hegemonic masculinity, developed notably in R.W. Connell's book *Gender and Power* (1987) and elaborated on in later work, presents a systematic sociological theory of gender.³⁹ Masculinities are defined by Connell as configurations of practice structured by gender relations, inherently historical in their making and remaking, enmeshed with questions about the balance of interests in society and the direction of social change.⁴⁰ Hegemonic masculinity has prompted a sub-field of study within the masculinities scholarship⁴¹ and has been seen by some critics as a problematic concept.⁴²

In the analyses in legal studies discussed earlier we find numerous references to how law "reproduces", "asserts" or "privileges" a distinctive hegemonic masculine form interlinked, within Connell's schema, with the interests of all men whilst at the same time embracing recognition of the diversity and heterogeneity of men's lives. Various associations have been made between "doing law" and "doing (hegemonic) masculinity".⁴³ In the field of crime, law and criminology, for example, men have been seen as "accomplishing" masculinity

³⁸ See Whitehead, *Men and Masculinities*, 84-99.

³⁹ See Connell, *Gender and Power*; Connell, *The Men and the Boys*; Connell and Messerschmidt, "Hegemonic Masculinity"; R.W. Connell, *Masculinities*, 1st edn, Cambridge: Polity, 1995. See further Richard Howson, *Challenging Hegemonic Masculinity*, London: Routledge, 2005; Christine Beasley, "Rethinking Hegemonic Masculinity in a Globalizing World", *Men and Masculinities*, XI/1 (October 2008), 86-103.

⁴⁰ See Connell, *Gender and Power*; and *Masculinities*, 2nd edn. See further Peter Middleton, *The Inward Gaze: Masculinity and Subjectivity in Modern Culture*, London: Routledge, 1992, 153; Segal, *Is the Future Female?*, 288.

⁴¹ See Mike Donaldson, "What is Hegemonic Masculinity?", *Theory and Society*, XXII/5 (October 1993), 643-57; Tony Jefferson, "Subordinating Hegemonic Masculinity", *Theoretical Criminology*, VI/1 (February 2002), 63-88.

⁴² See, for example, Beasley, "Rethinking Hegemonic Masculinity in a Globalizing World"; Stephen Whitehead, "Hegemonic Masculinity Revisited", *Gender, Work and Organization*, VI/1 (January 1999), 58-62; Demetrakis Z. Demetrious, "Connell's Concept of Hegemonic Masculinity: A Critique", *Theory and Society*, XXX/3 (June 2001), 337-61; Richard Collier, *Masculinities, Crime and Criminology*, London: Sage, 1998.

⁴³ See Smart, *Feminism and the Power of Law*, 18.

by engaging in crime.⁴⁴ Yet, some critics suggest, there has been a failure here to engage with and theorize the subjectivity of individual men and explore why some men engage in certain kinds of behavior, or invest in particular masculine subject positions, whilst others do not.

Thus, if masculinities are offered up for all men within specific socio-cultural, structural locations, for example, why do men choose one, and not another, masculine identity?⁴⁵ Why, say, might one father in the process of a painful separation from his partner come to identify with a strand of fathers' rights activism and commitment to values associated with hegemonic masculinity, whilst another man does not?⁴⁶ How adequate is hegemonic masculinity in explaining the emotional, psychological complexity of men's engagements with law in this context?

It can be argued in response that all men benefit from the "patriarchal dividend" resulting from those who relate to, embody and reproduce hegemonic masculine values.⁴⁷ However, it has been argued that it is difficult to see within structured action theory an account of why this should be the case, and whether hegemonic masculinity necessarily, as Dowd has asked in the context of law, benefits men.⁴⁸ What tends to be deployed, rather, is a model of men as inherently reflexively rational, self-interested beings; men whose social action relates, in a distinctly deterministic way, to the legal and cultural norms associated with hegemonic masculinity. Connell and Messerschmidt, writing in 2005, have recently noted how "the internal complexities of masculin-

⁴⁴ See James W. Messerschmidt, *Masculinities and Crime: Critique and Reconceptualization of Theory*, Lanham, MD: Rowman and Littlefield, 1993. For further discussion, see Collier, *Masculinities, Crime and Criminology*; Adrian Howe, *Sex, Violence and Crime: Foucault and the 'Man' Question*, Abingdon: Routledge-Cavendish, 2009.

⁴⁵ See Tony Jefferson, "Masculinities and Crimes", in *The Oxford Handbook of Criminology*, eds Mike Maguire, Rod Morgan and Robert Reiner, 2nd edn, Oxford: Clarendon Press, 1997, 341.

⁴⁶ See Richard Collier, "Fathers' Rights, Gender and Welfare: Some Questions for Family Law", *Journal of Social Welfare and Family Law*, XXXI/4 (December 2009), 357-71.

⁴⁷ See Connell, *Gender and Power*; Connell and Messerschmidt, "Hegemonic Masculinity".

⁴⁸ Nancy Dowd, "Masculinities and Feminist Legal Theory: An Antiessentialist Project", *SSRN.com*, Social Sciences Research Network, *University of Florida Legal Studies Research Paper*, 19 August 2008: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1238070.

ities have only gradually come into focus as a research issue". Further, that "without treating men as objects of pity, we should recognize that hegemonic masculinity does not necessarily translate into a satisfying experience of life".⁴⁹ If we look to accounts of masculinity in autobiographical, empirical and theoretical work in the fields of sociology, psychology, history and literature, it is precisely this emotional complexity of the relationships that individuals have to gendered categories which comes to the fore. It is often difficult to see this complexity in accounts of masculinities and law.

In a way that connects to developments at the interface of feminist philosophical work and queer theory⁵⁰ and a heightened engagement across disciplines with emotion and affect,⁵¹ there has emerged a move to explore the relationship between the social and psychological processes that inform men's experience of masculinity.⁵² This work has rejected, in suitably postmodern fashion, the idea of a unitary rational male subject. The stated aim of what has been termed, in the context of criminology, a psychosocial approach to masculinity, rather, has been to develop a social understanding of the masculine psyche: one that might shed light on men's behavior across diverse contexts, including in relation to law and legal practice.

For advocates of this position, integrating questions of individual biography and life history, and addressing the contingency and conflicted dimensions of lived experience, gives a handle on the question, noted earlier, of why some men do, and others do not, invest or engage in certain kinds of behavior or subject positions. The focus of analysis shifts, however, away from social structure to how a non-unitary inherently contradictory subject comes to invest, whether consciously or unconsciously, in socially empowering discourses around masculinity. An overarching masculine gender norm, embodied in or reproduced through law, is not seen as accounting for what men do. It is in the interaction between the social realm and the individual psyche, rather, that the disposition or motivation towards particular action

⁴⁹ Connell and Messerschmidt, "Hegemonic Masculinity", 851-52.

⁵⁰ See *Intersections between Feminism and Queer Theory*, eds Diane Richardson, Janice McLaughlin and Mark Casey, London: Palgrave Macmillan, 2006.

⁵¹ See, for example, Kathryn Abrams, "Legal Feminism and the Emotions: Three Moments in an Evolving Relationship", *Harvard Journal of Law and Gender*, XXVIII/2 (Summer 2005), 325-45; Martha Nussbaum, *Hiding From Humanity: Disgust, Shame and the Law*, Princeton, NJ: Princeton University Press, 2004.

⁵² Kahn, *An Introduction to Masculinities*, Chapter 10.

is located. Social action is depicted, in one strand of writing, as the product of biographically contingent anxieties and desires.⁵³

In turning towards the implications of this work for law and legal regulation, however, it remains unclear how accounts of the taking up of masculine subjectivity can ever be tested or proven in any meaningful way.⁵⁴ Indeed, within some accounts we would seem to be reduced to a wholly semiotic understanding of the subject whereby, as Connell has put it, “with so much emphasis on the signifier ... the signified tends to vanish”.⁵⁵ What is lost in these discursive readings of masculine subjectivity is precisely the original focus of Connell’s attempt to engage with the concrete, material, grounded institutional spaces of masculinities, the social sites in which ideas about gender take on meaning (such as specific locations around law).

The implications in terms of politics, policy and practice in relation to law are similarly uncertain. It is unclear how theorizing subjectivity at the level of the individual can ever be an effective strategy in facilitating social change in a broader sense.⁵⁶ In one recent feminist socio-legal study of this strand of work on masculinity, focused on how it has developed in the area of crime and criminology, Howe has argued that the psychosocial approach does more than simply misread feminism and feminist work informed by postmodernism. She identifies a troubling, profoundly regressive development here.⁵⁷ Howe argues that the psychosocial approach, within criminology at least, has been informed by “an extraordinary anti-feminist animus”.⁵⁸ This has resulted in the silencing of the violence(s) of men and the harms that men do. Howe identifies in much of this psychosocial work something more akin to an individualistic focus on the “insecure, vulnerable, anxious” man.⁵⁹ How, therefore, might it be possible to move this debate forward?

⁵³ See Jefferson, “Masculinities and Crimes”; *Challenging Subjects: Critical Psychology for a New Millennium*, ed. Valerie Walkerdine, London: Palgrave Macmillan, 2002.

⁵⁴ See Collier, *Men Law and Gender*.

⁵⁵ Connell, *Masculinities*, 1st edn, 50-51.

⁵⁶ See Connell, *Masculinities*, 1st edn; Connell, *The Men and the Boys*.

⁵⁷ Howe, *Sex, Violence and Crime*, 136-42.

⁵⁸ *Ibid.*, 139.

⁵⁹ *Ibid.*, 140.

Sex, gender and the “masculinity” of law

The critique of masculinity that has developed across disciplines in recent years has been based, in part, on questioning the analytic utility and coherence of concepts premised on the epistemic frame of sex/gender, outlined earlier in this chapter. This work has raised a number of theoretical and political questions particularly relevant to legal studies that can be grouped around two key themes. First, an engagement with the gendered binary divisions that have shaped legal regulation; and, second, a rethinking of what it means to speak of gender, law and “personal life”. I will address each of these issues in turn.

First, within work variously termed a “new corporeal” or “sexed bodies” approach to law and gender, there has been a forceful critique of the dualism between sex and gender.⁶⁰ Within this approach the idea of the “sexed body” is seen to be neither inherently masculine – active, rational, reasonable, bounded, non-permeable and so forth – nor feminine – as passive/vulnerable, irrational, unreasonable. It is, rather, positioned as an object interwoven with and constitutive of a heterogeneity of systems of meaning, signification and representation that vary across social contexts, including, in this case, different areas of law and legal regulation. Far from presuming a body as the passive recipient of gender roles or messages (for example, the messages conveyed by the law, media or peer groups), this perspective integrates an appreciation of the sexed specificity of the bodies of women and men in determining consciousness. Rather than seeing the body as a tabula rasa upon which social lessons are inscribed by law/society, what becomes an issue is the materiality of gender in/of bodies, the significance of embodiment and, importantly, the contingent, always socially grounded nature of these processes in relation, for example, to race, ethnicity, class.

This approach stands in marked contrast to the broadly constructionist perspectives that have underscored so much gender and law scholarship to date, where the object has been to unpack or reveal the meanings of masculinity that circulate within law. Far from negating the complexity of men’s subjectivity, a theme central to the psychoso-

⁶⁰ See Gatens, *Imaginary Bodies*; and Moira Gatens, “A Critique of the Sex/Gender Distinction”, in *Beyond Marxism? Interventions after Marx*, eds Judith Allen and Paul Patton, Sydney: Intervention Publications, 1983, 143-60. See also Cealey Harrison and Hood-Williams, *Beyond Sex and Gender*; Kathleen Daly, “Different Ways of Conceptualising Sex/Gender in Feminist Theory and their Implications for Criminology”, *Theoretical Criminology*, 1/1 (February 1997), 25-51.

cial critique of hegemonic masculinity considered earlier, an attempt is made here to see sex (difference), like gender, as something itself constituted in discourse. This does not occur, however, by means of any essentialist fixing of meaning about what constitutes a male/female, masculine/feminine body, experience, identity, culture and so forth. It is, rather, through reference to cultural and historically specific discourses and practices that women and men come to have differential relationships to reproduction and gestation, parenting and employment, caring, crime and so forth.

This critique can be located within the context of broader attempts in legal studies to transcend binary oppositions that have informed understandings of gender. Other dualisms singled out for attention include nature/nurture, the public/private and, within a body of queer legal theoretical work, the binary between hetero- and homosexuality. An interrogation of the latter, I've already intimated, is of particular potential significance to discussions of masculinities and law, raising questions about how assumptions about heterosexuality encode and structure many aspects of everyday life, whether in relation to law's regulation of the family, the workplace, health care and so on. In exploring the active processes involved in becoming a gendered subject, and recognizing how the body can, and does, intervene to confirm or to deny social significances, this literature also connects to recent sociological attempts to address the realities of gendered experiences.

Second, these debates about masculinity and law connect to and, I have argued elsewhere, have much to gain from developments taking place at the interface of sociological work on gender and what Carol Smart has termed in her book of the same name "Personal Life".⁶¹ In the words of a call for papers for a conference held in September 2009 in the UK, *Turning Personal: An Interdisciplinary Conference* (16-17 September 2009, University of Manchester), this personal turn in sociology constitutes an attempt to explore how social research can incorporate more complex and multi-layered accounts of personal lives into academic writings and analyses. It constitutes, in part, an attempt to bring to sociology an appreciation of the complexity, texture, richness and contradictory nature of social relations. These are issues, in a sense, central to studies of masculinities and English literature. Importantly for law however, highlighting the deficiencies of grand theories of sociology, this work involves reappraising the place of affect

⁶¹ Carol Smart, *Personal Life*, Cambridge: Polity, 2007.

and emotion, memory, love and commitment in understandings of gender and law. What is called for is a renewed engagement with the significance of social class, race, ethnicity, intimacy, relationality and kinship. In so doing, questioning the long-standing neglect of feelings within the social sciences, and gendered conceptions of human nature and divisions of labor in which this perspective has its roots, such developments bear upon the relationship between law and masculinities in a number of intriguing ways.

Approaching the gendered dimensions of social experience in such a way as not to lose track of the issues of power raised by feminism entails integrating an appreciation, at both a theoretical and political level, of the complexity and often contradictory nature of “personal life”. Such an engagement interlinks to the accounts of the social and psychological processes informing men’s experiences of masculinity discussed earlier in this chapter. It differs, however, in not losing sight of the sociological grounding of these processes. It also leads to some intriguing questions about how previous social constructionist accounts of masculinity have interpreted legal policy agendas pitched at changing masculinity. One result of focusing policy on masculinity as a social problem was to divert attention from individual men’s actions so that the responsibility for particular actions shifts from individual men to society and gender relations. This can lead to an evacuation of questions about responsibility and agency.⁶² The experience of the individual, Whitehead has suggested, can be lost when what is privileged is an “ideological apparatus” of masculinity, a reification of a gender category that results, paradoxically, in an erasure of men’s practices.⁶³ Put simply, if masculinity – existing prior to its production through social agency⁶⁴ – appears as the problem, then the embodied and inter-subjective dimensions of gender experience are effaced.

In a similar manner, Jeff Hearn has argued that what is required is a move away from these debates about masculinities and back to men in an attempt to distinguish between hegemonic masculinity from

⁶² See also Howe, *Sex, Violence and Crime*; Anthony McMahon, *Taking Care of Men: Sexual Politics in the Public Mind*, Cambridge: Cambridge University Press, 1999; Wendy Hollway, *The Capacity to Care: Gender and Ethical Subjectivity*, London: Routledge, 2006.

⁶³ Whitehead, *Men and Masculinities*, 94.

⁶⁴ See Ashe, *The New Politics of Masculinity*, 155.

what he terms the hegemony of men.⁶⁵ This is a subtle but important difference in rethinking the place of power in analyses of masculinities and law, although to what extent it avoids the essentialism of earlier accounts is open to question.⁶⁶ For Hearn, at issue is how “men are both a social category formed by the gender system and dominant collective and individual agents of social practices”.⁶⁷ Such concerns connect to how the psychodynamic dimensions of social experience as a man may be marked, as we have already seen, by emotional ambivalence and contradiction as much as any notion of straightforward hegemonic masculine identification. Emotions and experiences, moreover, can themselves be seen as effects of power that have the potential not just to reinforce dominant masculinities but also, importantly (and possibly at the same time) generate oppositional practices and resistances. This can be seen in the field of fathers’ rights politics for example where, I have argued elsewhere, cultural, social and economic transformations around equality and gender neutrality have altered men’s expectations of law and practices in the legal field.⁶⁸ Particular discursive positioning and gender categories can thus be understood as products of a matrix of social and legal relations shaped by historically specific ideas about power and subjectivities not necessarily held out or available to all individuals in the same way. With this point in mind, moving towards conclusions, it is necessary to look closer at what in law the term “masculinity” has been seen to involve.

On masculinities and legal study

Masculinity remains a primary reference point within studies of law and gender as well as a key concept within contemporary cultural conversations about gender and social change more generally. The concept cannot be wished away. It has cultural resonance and meaning(s) and a resonance across diverse legal and policy debates. Yet, whether understood as embedded within and reproduced through the interaction of social structure and individual/collective practice, or

⁶⁵ Jeff Hearn, “From Hegemonic Masculinity to the Hegemony of Men”, *Feminist Theory*, V/1 (April 2004), 49-72.

⁶⁶ See Beasley, “Rethinking Hegemonic Masculinity in a Globalizing World”.

⁶⁷ Hearn, “From Hegemonic Masculinity to the Hegemony of Men”, 59.

⁶⁸ See Collier, “Fathers’ Rights, Gender and Welfare”. See also Collier and Sheldon, *Fragmenting Fatherhood*; Sandy Ruxton and Helen Baker, “Father’s Rights, Fatherhood and Masculinity/ies”, *Journal of Social Welfare and Family Law*, XXXI/4 (December 2009), 351-55.

else discursively constituted by the contingencies of psyche and society, I have suggested that masculinity has been used within legal scholarship in some very different ways involving diverse attributes and ideas.

Masculinity has been deployed in work on law and gender, we have seen, to describe the psychological characteristics of men and particular aspects of men's gendered experiences and identities. It has also been used to describe an array of gendered cultural practices, rationalities and ways of thinking about law, legal norms and legal values. It has been pivotal to psychoanalytic, psychological and power-based readings of men and gender, as well as to analyses of men's gendered behavior within specific institutional settings relating to law. Masculinity has appeared as both the cause and, curiously, the consequence of hierarchical, oppressive gender relations, structurally embedded in societies, interconnected, in often ill-defined ways, to the sexed bodies of men.

For others, masculinity is no more, or less, than a fluid performative practice, the having, obtaining, taking up of masculine identity "a public process of power relations in which everyday interactions [are seen to] take place between actors with sexual identities in sexualized locations".⁶⁹ In the case of law these locations potentially encompass numerous and diverse areas, although, curiously, it would also appear there is no one model of "masculinity" at play in the legal arena.⁷⁰ Bodies, cultures, discourses, practices, emotions, modes of thought, sexual practices, discrete areas of law and even political views, therefore, each have been described, in different contexts, as "masculine". At times, masculinity has been conceptualized in different ways, drawing on different theoretical traditions, even within the same piece of writing or research project. In the light of such diversity, however, it is profoundly unclear just what masculinity entails.

As Peter Middleton has asked, what is masculinity? "Is it a discourse, a power structure, a psychic economy, a history, an ideology, an identity, a behavior, a value system, an aesthetic even?" Or is it "all these and also their mutual separation, the magnetic force of repulsion

⁶⁹ David Bell and Gill Valentine, "The Sexed Self: Strategies of Performance, Sites of Resistance", in *Mapping the Subject: Geographies of Cultural Transformation*, eds Stephen Pile and Nigel Thrift, London: Routledge, 1995, 146.

⁷⁰ See Jonathan Scourfield and Mark Drakeford, "New Labour and the 'Problem of Men'", *Critical Social Policy*, XXII/4 (November 2002), 619-40; Collier, *Men, Law and Gender*.

which keeps them apart ... a centrifugal dispersal of what are maintained as discrete fields of psychic and social structure?"⁷¹ To speak legitimately within a diverse body of work on law and gender of a coherent "discourse of masculinity" it would be necessary to show that these usages of the term were located structurally within "a clearly defined institution with its own methods, objects and practices".⁷² It is possible one could argue this in relation to law, although the heterogeneity of the legal contexts discussed in this essay suggests otherwise. In which case, accounts seeking to reveal a discourse of, say, "hegemonic masculinity in law" are really simply referring to repeated patterns of linguistic usage within the parameters of a legal field that is itself contested. It is far from clear, in short, that, in talking about masculinity, legal scholars have been talking about the same thing. In relation to work on masculinities and law emerging from North America and Europe, for example, contrasting welfare regimes and distinctive legal-political systems shape these engagements with masculinity in a number of ways. Different social, economic and policy contexts inform the way studies of masculinities and law integrate discussion of issues such as class, race and ethnicity.

For some, it is the concept of masculinity itself that is problematic. Hearn, writing in 1996, charged masculinity with being more than just analytically imprecise: "it is as if [it] ... exemplifies [a] field of concern and even, possibly, distils the aggregation of activity of men in the social world into one neat word."⁷³ The general use of the term across disciplines, he suggests, has all too often been premised on heterosexist, ethnocentric assumptions mediated by ideas about class and disadvantage (see below); he finds it to be the product of a particular historical moment that is, in some cultural contexts at least, at best "irrelevant or misleading".⁷⁴ These points have significance for law as masculinity has been viewed as potentially yielding high explanatory returns for critical studies of law and gender.⁷⁵ However, I shall suggest, by way of concluding remarks, these engagements with law may themselves have been bound up with a form of thinking about men and masculinity for which the time has now passed.

⁷¹ Middleton, *The Inward Gaze*, 152; see also Pease, *Recreating Men*.

⁷² Middleton, *The Inward Gaze*, 142.

⁷³ Jeff Hearn, "Is Masculinity Dead?", 202.

⁷⁴ *Ibid.*, 209. Contrast Connell, *Masculinities*, 1st edn, 30-34.

⁷⁵ See further, Gatens, *Imaginary Bodies*.

Concluding remarks

In this article, I have traced diverse political, intellectual and institutional influences that have shaped the study of masculinities and law. These developments constitute part of what has been, within legal studies, a broader “discursive attempt ... to stop the depiction of women as ‘the problem’”.

The aim has rather been to deflect “the objectifying gaze” to “benchmark masculinity and heterosexuality ... [and] to disrupt the conventional orderings of modernity within legal texts”.⁷⁶ Yet masculinity is not, I have suggested, a fixed, homogenous or unchanging concept.⁷⁷ Far from taking for granted what is meant by the term, locating its meaning within any grand political narrative or big debate within law, sociology or any other discipline, it is more helpful to look at how it has been deployed in different contexts, in different ways, and at different moments, as a particular kind of (inter)discursive construction.

Both studies of law and gender and feminist legal scholarship have much to gain from incorporating a more complex account of the gendered male subject and, with it, an appreciation of the interconnected, interrelated and interdependent nature of the lives of women, children and men. Work emerging at the interface of sociological studies of personal life⁷⁸ and anti-essentialist and materialist feminist scholarship,⁷⁹ for example, is leading to a reappraisal of precisely what it means to speak of, perform or do a masculine gender. In some respects this can be located as part of a wider shift within the social sciences to develop a self-reflective “science of the subject”, focusing on how social experiences and gender categories are “offered to thought” as social problems requiring attention.⁸⁰ Importantly, this raises questions about the role of legal mechanisms, legal arenas, functionaries and forms of reasoning within late modern forms of governance. It is also important not to lose sight of the political and

⁷⁶ Margaret Thornton, “Neoliberal Melancholia: The Case of Feminist Legal Scholarship”, *Australian Feminist Law Journal*, XX (June 2004), 12.

⁷⁷ See Collier, *Men, Law and Gender*.

⁷⁸ See Smart, *Personal Life*.

⁷⁹ See *Materialist Feminism: A Reader in Class, Difference and Women's Lives*, eds Rosemary Hennessy and Chrys Ingraham, London: Routledge, 1997; Rosemary Hennessy, *Materialist Feminism and the Politics of Discourse*, London: Routledge, 1993.

⁸⁰ Nikolas Rose and Mariana Valverde, “Governed by Law?”, *Social and Legal Studies*, VII/4 (December 1998), 541-51.

policy dimensions of debates about law and social order that have tended to be pitched at certain categories of men and not others in ways mediated by assumptions about class, race and ethnicity.

What is required, I have argued in more detail elsewhere, is a re-theorizing of men's identities by looking critically at, and beyond, the term "masculinities" in ways that might produce a richer, more nuanced conceptual framework in which both men's, and women's, practices, subjectivities and bodies can be approached.⁸¹ Locating questions about men's agency within networks of power entails, following Ashe, challenging simplistic male positive and anti-male standpoints alike, and recognizing the politically open-ended nature of practices that people socially categorized as men reproduce through their agency within contexts of power. Reducing developments in an area such as fathers' rights activism around law, for example,⁸² to no more than an anti-feminist animus on the part of men offers little "in terms of conceptual clarity or theoretical usefulness".⁸³ Importantly, the concept of hegemonic masculinity is itself insufficient to account for the complexity of these developments in law and the politically open-ended nature of the debates that have resulted.

Where does this leave us? At national and cross-national levels, a critical engagement with masculinity should no longer be seen as marginal to debates about law. In the UK, as in Germany, it is important to note the influence of European Union agendas around diversity and the mainstreaming of gender equality. In the UK, certainly, this issue of men and masculinities has itself become an explicit, rather than implicit, feature of high profile policy debates, research agendas and political contestations across a wide range of topics.⁸⁴ These debates about masculinities are occurring in the slipstream of the embedding in law of ideals of egalitarianism and gender neutrality, part of a broader social process transforming normative understandings of many aspects of men's and women's lives.⁸⁵

⁸¹ See Collier, *Men, Law and Gender*.

⁸² See Collier and Sheldon, *Fragmenting Fatherhood*.

⁸³ Ashe, *The New Politics of Masculinity*, 159.

⁸⁴ Note, for example, Coalition on Men and Boys (COMAB), *Man Made: Men, Masculinities and Equality in Public Policy*, London: COMAB, 2009; also "Critical Research on Men in Europe" Network (CROME). See Jeff Hearn and Keith Pringle, *European Perspectives on Men and Masculinities*, Basingstoke: Palgrave Macmillan, 2006.

⁸⁵ See Fineman, *Autonomy Myth*, 195.

In rejecting the idea that there exist essential male identities amongst those people identified, within particular societies, as “men”,⁸⁶ developments at the interface of feminist theory, third-wave/anti-essentialist feminism and queer theory question aspects of both pro-feminist studies of masculinities and feminist accounts of law, men and gender. At the same time, contemporary sociological work is raising important questions about how emotion and affect, intimacy and memory, love and commitment interrelate with ideas of social class, race, ethnicity, relationality and kinship. The result is a redrawing of the theoretical terrain around masculinities and law, a development that opens up new possibilities for a more nuanced and multi-layered engagement with the gendered subject. In following Thornton’s call for a refocusing on “political engagement, rather than introspection”, this rethinking of masculinities can be seen as part of the constitution of “a new episteme of feminist legal theory that is linked to the political”.⁸⁷

There has been a tendency in legal studies, as in sociological accounts of masculinity, to categorize a vast range of men’s activities by “treat[ing] ... them as if they were all subject to the same laws”.⁸⁸ What may be more productive, however, I have argued, is an attempt to re-theorize men’s identities beyond the term masculinities in such a way as to produce “a more multi-conceptual framework for examining men’s subjectivities, bodies and practices”.⁸⁹ In reconsidering how a political terrain around law and masculinity has itself been reshaped by a complex amalgam of social, legal, cultural and technological developments, it is necessary to recognize the emergence of a new constellation of ideas about the relationship between law, men and gender. It is necessary to challenge, with it, what it means to speak of masculinity and law.

⁸⁶ See Ashe, *The New Politics of Masculinity*.

⁸⁷ Thornton, “Neoliberal Melancholia”, 22.

⁸⁸ Carol Smart, “Feminist Approaches to Criminology or Postmodern Woman meets Atavistic Man”, in *Feminist Perspectives in Criminology*, eds Lorraine Gelsthorpe and Anne Morris, Buckingham: Open University Press, 1990, 77.

⁸⁹ Ashe, *The New Politics of Masculinity*, 158.