Transcending the Boundaries of Law

Generations of feminism and legal theory
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Defending and developing critical feminist theory as law leans rightward

*Martha T. McCluskey*

Feminist legal theory has come of age over the last quarter century; right-wing politics also has grown to cast a long shadow over law and policy, a shadow that threatens to dim feminism’s visions of equality.

*Critical* feminist theory can be useful in countering the ideological and material barriers to equality amassed during the right’s rule. By engaging both foundational theory and substantive context, critical feminism helps to resist the right-wing double binds which make policies promoting equality often appear irrational and impractical. A critical approach to legal feminism emphasizes that ideas about law, gender, and society are always constructed in relationship to a particular context of social and historical power and shaped by particular ideological perspectives, personal interests, and political agendas (Rhode 1990). Feminist critique aims not just to describe law and society or apply particular pre-given principles. It seeks to challenge fundamental assumptions and change distributions of power by understanding that knowledge always helps to create and control as well as to reveal the social world.

**The right’s ideological shadow**

Twenty-five years ago, feminist legal critique gained momentum by challenging the double bind of formal equality (Fineman 1983; MacKinnon 1987). In the standard legal framework, the right to gender equality does not mean the right to particular substantive protections for women. Instead, it simply ensures the distribution of substantive rights in a formally neutral process without regard to gender. Formal equality grants women the right to the same legal privileges as men if women can show they really are the same as legally privileged men. But if gender-based disadvantages are real and relevant to women’s lives, then this right to be treated the same is of little value in alleviating gendered harm (Fineman 1991a; Scales 1986). Alternatively, the formal equality framework allows women to reject equality and instead seek different legal treatment from men based on biological or social differences (recognizing pregnancy, childcare responsibilities, or a history of exclusion from particular opportunities) (Krieger and Cooney 1983). But any protection for unequal gender “difference”
likely reinforces gender-based disadvantages by confirming and rewarding assumptions of gendered incapacity (Williams 1985).

Either way, formal equality gives women a losing choice. Feminist critique explains that this formally neutral framework is not gender neutral. If privileged men are the standard by which women are measured, women will likely seem less deserving and receive subordinate legal status regardless of whether they show they are the same as or different from men (Mackinnon 1987).

This formal idea of equality can give some men a double benefit, effectively allowing them to “have it both ways” by being both equal and different. The law can take into account the particular biological or social needs of privileged men not as special differences or costly privileges but as part of a normal or natural baseline. Many men can enjoy workplace equipment designed to fit an average male body height or work schedules designed to accommodate a stereotypical white middle-class male family role without appearing to receive special or costly accommodations. If women demand changes in workplace structure to adapt to typically female bodies or feminized social responsibilities, these changes are often interpreted as signs of those women’s particular dependency or inferiority (Abrams 1989).

In the 1980s, feminist legal critique reframed this standard approach showing that formal “equal treatment” rests on substantive judgments about whose particular interests and identities to take as the norm (Minow 1990: 21–23). If underlying norms change to include the substantive interests of a broader group of women, then law reforms protecting more women’s substantive interests are consistent with and necessary to legal equality. If pregnant or caretaking women are considered normal citizens and productive workers, then substantive policies, like family leave and government services supporting family responsibilities, are part of the normal vision of equal treatment, not costly accommodations for troublesome “difference” (Finley 1986). But as feminist scholars and activists developed that substantive vision of equality, the right-wing increasingly attacked it with two strands of anti-egalitarian ideology: one centering on supposedly objective economics and the other centering on morality.

In the economic version of this ideological attack, substantive equality is about giving special benefits to a few at the expense of most others; for, this vision of economics defines equality as “redistributing” slices of the economic “pie” in a zero-sum game, versus making the overall “pie” bigger to benefit everyone. This defining assumption decrees that equality fails to benefit society overall and risks hurting the overall good over the long run (McCluskey 2000). Equality means choosing to increase a particular slice of the pie, at the cost of a smaller pie on the whole.

Carried through to its logical conclusion, this view presumes that equality will hurt not just those from whom resources are taken and not just the overall pie, but also those who are the intended beneficiaries. Those with the smallest share of “pie”—those targeted for equal “redistribution”—are by definition those with the least power to compete successfully for a share of overall resources.
As the economic “pie” shrinks, those who are most unequal will lose the most as others with more resources defend their shares of a smaller pie (McCluskey 2003a: 194).

Tracking this economic logic, employment discrimination laws have been narrowly construed to offer little protection to breastfeeding women (Kessler 2001). If a woman seeks to adjust her work schedule or workspace to accommodate lactation, she risks taking money from employers who must divert resources to this “social” or “personal” need at the expense of “normal” profit-maximizing. Employers who spend money supporting breastfeeding will have less money for the investment and innovation that bring jobs or lower-priced, high-quality goods. In the longer term, the overall economy will shrink. Employers, faced with tighter resources, will be less likely to give their limited jobs to workers who may demand or need costly breastfeeding. Thus, this well-intentioned plan for substantive equality for breastfeeding women seems to end up hurting the breastfeeding women it aims to help, and risks bringing down everyone else to boot.

Note that this logic is a narrative—a rhetorical device—based on definition and metaphor, not empirical fact. This story concludes that equality is a losing policy goal in which helping those at the bottom only reinforces their subordination (McCluskey 2003; 2007a). This story asserts that the best we can do for those who are disadvantaged under existing systems is to reject equality for its proclaimed opposite: an ideal of efficiency (maximizing the pie) that accepts inequality as necessary and natural (if tragic) to promoting the overall good. Meaningful increases in equality must await increased economic growth, with the faith that this growth will somehow trickle down to those deprived of the existing pie.

The second strand of anti-egalitarian theory uses morality to attack substantive equality as a losing proposition. This strand partly accepts feminism’s shift from a formal, supposedly neutral “sameness” approach to equality to the openly moral and political goal of anti-subordination—ending identity-based hierarchies. Although this right-wing moral ideology in some ways recognizes that equality means resisting powerlessness, not just establishing sameness, it puts the moral responsibility for correcting these power hierarchies on subordinated victims. This moral ideology creates a double bind in which victims of inequality are too incapacitated to be trusted with legal authority or not incapacitated enough to deserve legal protection from harm. Either way, legal rights to equality are morally suspect. Libertarian versions of this moral anti-egalitarianism assume that the primary measure of moral responsibility is the ability to defend one’s own substantive interests instead of depending on legal protection from others. Communitarian versions of this moral anti-egalitarianism assume that moral responsibility is demonstrated by supporting oneself and sacrificing for others, not demanding others’ support and sacrifice (McCluskey 2003: 825–29).

If women experience serious substantive harm from divorce, rape, or abortion laws, or from lack of social supports for single parenting, then women do not
need stronger substantive rights or affirmative public support. Instead they need
tighter discipline through self-control or control by others (parents, husbands,
employers, church, or state). The failure to provide legal protection against such
harms does not count as gender subordination but as “tough love” that will
strengthen and teach women to better avoid, change, or accept their substantive
disadvantages. If women seek legal rights to have better choices about sex,
family, work, or morality, using law to make their demands proves they are not
seriously victimized. Those who pursue public legal protection rather than per-
sonal responsibility are seeking special treatment aimed at usurping others’
righthful power. These moral arguments conclude that meaningful substantive
equality must wait until victimized groups are able to accept, grow from, or
mitigate the harm of any perceived or real subordination.

The right’s material shadow

Along with ideological attacks, the right has countered feminism indirectly
through organized efforts to direct material resources toward anti-egalitarian
theory and practice. Over the last 25 years, the right has invested millions in
providing institutional support for anti-egalitarian ideas, changing legal acade-
mia particularly through support for law and economics (McCluskey 2007a).
Direct ideological attacks on feminism’s legitimacy as legal theory are hardly
necessary because conservative institutions dominate much of the field. For most
legal scholars, the easiest and fastest route to career advancement follows the
methods, conversations, topics, networks, and funding opportunities promoted
by conservative organizations.

Broader political and economic changes have produced new pressures in the
legal profession and academy with new costs for feminist theory and practice.
Substantial opportunities for feminism now exist in legal education and legal
scholarship, thanks to 25 years of extensive feminist networking and mentoring,
exemplified by Martha Fineman’s Feminism and Legal Theory Project. But at
the same time, both higher education and the legal profession have moved away
from democratic ideals of public service and intellectual independence to
embrace a business-like pursuit of private profit (Angel 2005). Institutional
changes like the increased importance of law school rankings, declining public
funding for higher education, and rising student debt levels have increased
competition among law schools for high-scoring students, high-paying employ-
ers, prominently publishing faculty, recognition by powerful mainstream judges
and lawyers, and the favor of wealthy donors. This market context risks raising
the costs to students, faculty, and institutions of pursuing feminist scholarship,
and activism, particularly if that feminism embraces far-reaching
critique of sociolegal power.

Despite significant increases in feminist faculty at law schools and universities,
these institutions have not necessarily addressed systemic problems of gender
discrimination that continue to impede feminist scholarship and action.
Women faculty often shoulder disproportionate administrative duties in the interest of gender “balance.” Feminists particularly are tempted by the opportunities to change institutional structures to better support women and others traditionally disadvantaged in the profession—serving on hiring and tenure committees, designing anti-discrimination policies, or organizing publications and events to highlight marginalized work. Furthermore, the mounting institutional “domestic” labor involved in the increasing market demands for improved rankings may be distributed unequally to women, based on real or perceived gender bias shaping ideas about who is willing or able to work well with others for the good of the institution at their own expense. Feminist faculty who devote more time to teaching and institutional service may be penalized for real or perceived sacrifices in scholarship, resulting in less support for their scholarship and more pressure to serve as institutional “housekeepers” and student service providers. Feminist law faculty may find their work hindered by retaliation and harassment if their feminist involvement in institutional governance threatens those with power.

These ideological and material obstacles make critical feminist legal theory seem like an unaffordable luxury. Many legal scholars have turned away from cutting-edge critique to a more chastened approach that emphasizes pragmatism over theory, platitudes over political confrontation, raw power or pseudo-scientific positivism over law’s moral subjectivity, and economic interests over gender identity (McCluskey 2007a). But the right’s example provides evidence that ambitious critical theory can sometimes be most practical and even necessary in a context of powerful opposition. Critical feminist theory is particularly powerful in this context because it rejects the divides that have been central to the right’s power: the division between ambitious theory and practical change, between rigorous reason and political passion, between public law and private market or family, between gender identity and material interests.

Resisting the right’s shadow

Engaging law’s foundational theory

One practical lawyering lesson is that persuasive power often depends as much on framing the questions as on providing good answers. By shifting attention from the choice between competing arguments to the underlying questions and founding assumptions, critical feminist theory challenges the right-wing ideology that makes substantive equality seem unjust. Ironically, idealistic change may be most pragmatic when the prevailing system provides bad choices.

Many scholars and policymakers respond to the prevailing economic arguments against egalitarian policies by defending limited “redistribution” as part of a policy “balance” to be weighed against economic growth (McCluskey 2007b). It may be more pragmatic and powerful to redefine what counts as the economic “pie.” Economic “growth” need not be measured by dollars accumulated in
a given quarter by a few rich people; it could be defined as the long-term health and education of non-wealthy women and children. For example, in the 2008 presidential campaign, John McCain challenged Obama’s economic policies by suggesting Obama would be the “Redistributor in Chief.” Obama responded by explaining that his policies would “grow the economy not from the top down but from the bottom up” (Bender 2008). Feminist policies such as paid family leave, public childcare, and government health insurance are no more “redistributive” than conservative-backed policies of economic development subsidies, trade regulation, or intellectual property rights. In fact feminist policies are arguably more growth-oriented than other policies (depending on what counts as growth). By rejecting a simple opposition between growing the economic pie and dividing the economic pie, feminists can refute the claims that substantive economic support for women will necessarily shrink the economic “pie” and the long-term shares available to the most disadvantaged.

Similarly, feminist critique aimed at upending the framework of moral conservatism can help strengthen standard arguments for increased substantive equality. A critical approach to feminism can unpack the double standards of “personal responsibility” and “independence” that ground the right’s moral argument in which substantive equality rights seem incompatible with good citizenship or individual freedom. Conventional liberal defenses of the morality of social welfare programs tend to argue either that welfare has little effect on women’s choices because welfare recipients are too disadvantaged to exercise personal responsibility, or that welfare “dependency” can be mitigated with policies designed to control recipients’ irresponsibility. Critical theory pushes further into the underlying assumptions, turning the tables to consider welfare recipients as exercising responsible choices to support and sacrifice for others (McCluskey 2003). For example, Fineman (2004) argues that caretaking for dependent children is a public responsibility for which society as a whole is indebted. She explains how a myth of autonomy and self-sufficiency covers up the extent to which businesses and others depend on extensive government support and unjustly stigmatizes single mothers for seeking assistance for valuable caretaking work.

Although legal arguments often seem more threatening and less credible to the extent they resist dominant frameworks, boundary-breaking ideas may have long-term practical benefits. The right would not have spent so much money on the organized production and distribution of ideas about fundamental legal change over the last quarter century if it believed its own rhetoric that real-world power is determined not by contesting and changing ideas but by acquiescing to the limits set by fixed natural laws, interests, values, and resources. Ambitious right-wing investment in utopian theory has put previously absurd or radical policies like privatized social security, deregulated financial markets, and unchecked executive power on the table (McCluskey 2007a).

Similarly impractical and risky legal visions from a different political perspective are vital to fostering comparable energy and interest in feminism. Such visionary thinking also helps resist a rightward tilt that turns the tiniest, most
incremental, or compromised steps toward equality into radical socialism. Consider John McCain’s attack on raising the top marginal income tax rate from 35 to 39.6 percent. McCain portrayed this slight adjustment as “socialist,” even though that change would restore the rate in place under the Clinton administration and would be far less than the top tax rate of 91 percent in 1964 (Goodman 2008).

Ideas matter—particularly ideas that reach beyond immediate practical constraint—but, they do not matter more than political or practical concerns. By understanding reason as inevitably grounded in, developed from, and accountable to particular human perspectives and material interests, critical feminism aims to ensure that theory is not exempt from the power of fundamental questioning that it wields.

A critical feminist perspective should engage and explore the questions of whose voices and experiences count as disinterested theory, as well as the questions of whose interests and values really are served by any particular theoretical inquiry. While feminist critique values intellectual inquiry that is not primarily directed at producing immediate policy results—rethinking the basic idea of the family, for instance—it should also engage questions about the practical and political value of any given line of intellectual argument. Questions like “what can all these abstractions do for a woman living in a fifth-floor cold water walk-up,” are not anti-intellectual conversation stoppers as Wendy Brown and Janet Halley (2002: 2) argue in their articulation of critical theory. Such questions should be taken as important and sophisticated reminders that all theories are also practical strategies, shaped and harnessed by political and personal agendas that can and should be subject to continual scrutiny and enrichment (Mccluskey 2007a).

A critical perspective that rejects the theory–practice divide can also help in challenging the silence that keeps the political economy of legal theory off limits in polite academic company. That silence helps legitimate and naturalize the dominance of right-wing ideology as powerful principle rather than patronage politics. Right-wing arguments against equality have gained substantial power not just because of ambitious questioning of foundational assumptions, but because of ambitious funding by so-called “investors” who stand to gain from decreased social spending and regulatory protection for the non-elite. From the late 1970s through the early twenty-first century, the Olin Foundation spent more than $50 million in US law schools to promote what its director termed “anti-egalitarian” theory (Simon 2004: 272). Right-wing ideas have also been successful because of right-wing material support for organizations, like the Federalist Society, that provide an intellectual and social community as well as career advancement linked to opposition to substantive equality (Mccluskey 2007a).

By rethinking theory to include its material ground, especially its “housekeeping” and “mothering” needs, feminist critique can help emphasize the value of the non-intellectual work necessary to cultivate powerful theory.
Though we cannot match the right’s funding, Martha Fineman’s work in the Feminism and Legal Theory Project is a model of how powerful feminist theory and social change comes from smart individuals with good ideas, as well as organizing those individuals into networks and institutions that can provide mentoring, marketing, and community support—including fun and friendship.

**Engaging the politics of law**

A critical approach can also help resist the rightward-leaning intellectual climate that constructs support for substantive equality as unsophisticated thinking. Responding to attacks by the right, non-conservative legal scholars often adopt what William H. Simon describes as a “fear and loathing” of politics, using distance from political commitment and controversy to establish intellectual credibility (Simon 2001). Scholarship can appear most careful and constructive when it stakes out polarized abstract positions and then advocates a seemingly balanced but vague or contradictory midpoint that avoids a detailed evaluation of the competing ideas and interests supporting each side (or possible alternatives outside that polarized scheme). Alternatively, this culture often rewards scholars for presuming a world devoid of serious power contests, where justice involves rather technical problems of discovering, implementing, and articulating abstract moral principles that are mostly a matter of broad and disinterested consensus.

Feminist theory is at a disadvantage in an intellectual culture that presumes a largely conflict-free context of gender neutrality. Even cautious and “balanced” analysis of the gendered meaning and impact of particular policies can seem irresponsible or unproductive by violating this implicit taboo. Scholarship can appear reasonable and persuasive if it analyzes income tax provisions favoring breadwinner–homemaker marriage as an accidental consequence of widely accepted principles of federalism or as the natural result of institutional rigidity in the face of changing demographics. Scholarship that links such policies to congressional gender or race bias or to the gender, race, and economic privilege of influential interest groups is likely subject to particular scrutiny or marginalization (McCaffery 1997). Of course, the failure to analyze seriously such policies as a product of contested gender and racial ideologies is unlikely to be raised as a sign of intellectual bias, insignificance, or sloppiness.

If feminist theory avoids political conflict by invoking broadly accepted and seemingly gender-neutral principles in support of law reforms, then these arguments may appear credible and persuasive yet largely irrelevant. For example, scholarship defending expanded government health insurance for children on the ground that it fosters some abstract normative goal like human capacity or economic efficiency may receive little opposition from relatively conservative scholars. However, without further analysis of the political and economic interests aligned against such seemingly rational policies, and how those opposing interests might be overcome, such purely normative scholarship can seem
impractical and simplistic in contrast to scholarship advancing right-wing policy goals.

The right has mobilized against substantive equality by combining arguments about disinterested principle with hard-hitting attacks on conflicting political interests. The right routinely attacks policies aimed at protecting vulnerable persons on the ground that these well-meaning policies advance elite special interests. Tort protection for “non-economic” harm (like women’s reproductive injuries) is often reduced to trial lawyers’ greed; support for public services like day care is criticized for enriching overpaid and incompetent unions; and environmental regulation is reduced to elite pastoralism or property value protection at the expense of working-class jobs or consumption. Such arguments reducing principled policy to partisan politics and personal gain may be contested by non-conservatives but are rarely dismissed as uncollegial or anti-intellectual. Yet, when conservatives invoke principles like “efficiency” or “market freedom” to oppose substantive feminist reforms, non-conservatives typically debate these principles at face value as coherent visions of the public interest divorced from personal or political gain (McCluskey 2003: 869–70).

Critical feminism recognizes that policy questions always involve taking sides in conflicts of partisan power and personal gain. Critical theory can show how an approach to law that openly engages this context of competing interests, identities, and ideologies is more intellectually rigorous than one that assumes politics away. If partisan power and personal gain blocks law reforms such as universal health care, then feminist analysis that combines moral and technical arguments with political strategy will be most practical.

Nevertheless, feminist theory resists the cynical disengagement and passivity of some critical perspectives that tend to reduce law entirely to narrow-minded political and economic interests. Feminist scholarship refuses a naturalized view that makes power, interest, and identity seem beyond the reach of rational analysis and moral argument. For example, Fineman (2004) analyzes the gendered vulnerability of family caretakers—like single mothers—not as an inevitable product of female weakness or maternal emotions, nor as the inevitable result of male selfishness, physical difference, or political advantage, but instead as the product of a sociolegal structure that we can imagine changing for the better.

**Engaging law’s societal power**

Critical feminist theory is also useful in countering the right’s rise by defending law as a tool for feminist politics. While feminist critique understands that substantive power shapes law, it also maintains a sharp focus on law’s potential to shift power in society. Critical feminist theory can advance hope for substantive justice that rests neither on a strained liberal faith in formal, neutral process nor on new fundamentalisms that shift that faith from law to imagined realms of naturalized and idealized authority outside of law, such as the market, family,
or divine order. Feminist critique challenges the division between public and private spheres, analyzing how law’s implication in social, economic and political practices and institutions appears as natural or the product of individual choice (Olsen 1983). By changing the background rules governing the family, state, or market, new opportunities may arise to change the gendered power relationships that can impede feminist law reforms.

The right’s economic and moral arguments against equality rest on the presumption that law is both too weak and too strong to protect people who lose out under the status quo (Mccluskey 2007a). Thus, legal protections that try to change the presumptively natural distribution of power will inevitably fail to overcome that naturally superior authority, giving only false hope, and more dependency, for the subordinated. Workplace regulations mandating paid family or medical leave may do little to protect workers who fear employers will deny promotions or other job benefits to those who assert their rights.

Yet, this line of argument simultaneously warns that egalitarian legal protections have vast power to destroy the naturally protective authority of market or morality that supposedly offers the best hope for the powerless. Anti-statist rhetoric from both right and left often warns that even minor and well-intentioned law reforms can have complex, far-reaching, and unpredictable harmful effects on society and those they claim to help (Mccluskey 2009). The hierarchical market and moral order appear too fragile to withstand even marginal adjustments designed to make current institutions a bit more responsive to the needs of those outside the elite. For example, criticisms of paid family medical leave often construe this policy as government “interference” that threatens to disrupt the market economy as a whole.

In response, some advocates of equality have adopted a minimalist approach to law, aiming to scale down legal rights and regulation to accommodate or appease the imagined authority and frailty of market, culture, family, biology, or other seemingly extra-legal spheres. For example, federal welfare reform received strong support across the political spectrum on the theory that impoverished single mothers would benefit more from the market and “traditional” morality than from legal rights to economic protection (Mccluskey 2003). That new law structured punishments and benefits to induce single mothers into substituting low-wage work and marriage for government income. However, this seeming substitution of private market for public law cannot offer much power in market or family to those who lack it. The tighter the penalties on mothers who avoid formal work or marriage, the more recipients are likely to lose out on opportunities for secure and beneficial work and family. Restrictions on welfare may pressure women to engage in illegal work leading to incarceration and further economic devastation, or to rely on intimate relationships that are abusive or financially harmful in the long run, or to subject their children to inadequate care. To the extent welfare reform policies shift substantive support toward work and marriage, the more those policies will risk being challenged for disrupting prevailing market and family power. For example, meaningful public day care
funding that would better support single mothers as market workers has been stymied by concerns that such funding will undermine the market through increased taxes or government debt, or that good public day care will undermine the family by discouraging parental care in two-parent families.

Feminist critique aims to debunk the imagined power of the law's outside by rejecting both market and moral fundamentalism, viewing economic and moral orders as contingent constructions of politics and law. From a critical perspective, welfare reform that replaces government benefits with work is not a shift in anti-poverty policy from government to market and family. Instead, it may be a policy mobilizing government control to regulate the labor market for business interests by increasing cheap and vulnerable labor (McCluskey 2003), to increase racial divisions (Neubeck and Cazenave 2001), and to restrict access to family privacy and intimacy (Solinger 2001).

Critical analysis digs beneath the right's anti-statist rhetoric to recognize its aggressive and successful practice of harnessing big government and systemic law reform to upend egalitarian policies. Over the last 25 years, the political and economic power of the wealthiest capital owners and businesses has expanded through regulatory institutions like the International Monetary Fund and the World Trade Organization; through increased statutory protections of laws governing welfare and technical subjects like bankruptcy; to newly expanded, non-text-based constitutional rights like corporate protection from punitive damages and restrictions on civil rights; or from centralization of government power through expansive federal preemption. Resistance to the right and rebuilding from its destructive effects requires not just reviving private political and economic power but reclaiming state power through law. It requires analyzing and engaging the interconnections between law and politics. Legal rights and institutions can protect or impede political movements and shape the available political and economic choices, their costs and benefits. For example, better legal protection of voting rights facilitated the Democratic Party's electoral victory in 2008; a restructured international currency regulation or corporate governance system could open up new options for economic change.

By rejecting an essentialized division between law and society, feminist critique helps to debunk claims that law's unintended effects are too powerful and unknowable to harness for substantive social change. Feminist critique analyzes law as always inextricably intertwined with its substantive social context. Feminist scholarship and advocacy engages legal issues as empirical problems requiring close attention to practice and interpretation on the ground. It strives to question, craft, and revise law reforms with attention to both impact and purpose. For example, feminist work on domestic violence used close connections with activists and empirical evidence to explore a variety of alternatives for using law to leverage social change, such as international human rights claims or litigation against police departments (Marcus 1994; Schneider 1994). Because knowledge of the substantive effects of law reforms can never be perfect and always risks perpetuating elitist biases, feminist critique emphasizes the need for
a democratic and diverse approach to empirical analysis, subjecting claims of technical expertise and objectivity to special scrutiny.

Feminist critique rejects an anti-empirical vision that suggests law’s effects are too subjective, too powerful, and too complex to be susceptible to rational design. Some postmodern or libertarian strands of the political left and right romanticize a posture of passive, detached abdication from concern with substantive justice. Feminism’s commitment to gender justice seems sentimental and naïve, if not disingenuous and dangerous (Halley 2002). But critical feminism rejects the fantasy that we stand outside of law’s power in some neutral space free from imperfect empirical assumptions and imperfect political and social commitments. We always live embedded in law, privileged or penalized by legal institutions; all our actions or inactions work to reinforce or change a legal regime and the assumptions about the empirical world that legal regime helps shape. Refusing to know about, care about, or respond to the injustices that pervade our daily lives is itself an action with potentially far-reaching and complex effects on others. Critical feminism can debunk such detachment from substantive justice as a political strategy likely to serve the political and economic interests of those who stand to gain from denying and acquiescing in current systems of injustice (McCluskey 2007a).

**Engaging identity’s complexity**

Finally, a critical feminist approach can resist the right’s rise by advancing ideas of substantive equality that engage and complicate current identity politics. Feminist public policy sometimes is framed as an expression of personal identity rather than as a moral and political vision. This framework echoes the double binds defining substantive equality as “special treatment,” “redistribution,” or dependency. If feminism is defined as protection for female identity, then it is about promoting special interests for an essentialized group in a divisive, zero-sum gain that ignores individual differences within the group identified as “female” as well as competing interests outside that group. Furthermore, if feminism is about identity rather than equality, it seems to be private and trivial, or even a lifestyle choice, rather than a rational and important public concern. For example, in the 2008 presidential Democratic primary campaign, the media often assumed that women who supported Barack Obama over Hillary Clinton did so to express their individual race or class identity, rather than to push for substantive change in public policy out of concern for the overall good. In the 1991 debate over the nomination of Supreme Court Justice Clarence Thomas, prominent commentary portrayed feminist concern about allegations of workplace sexual harassment as an expression of white professional class identity, marginal to meaningful gender justice or to Thomas’s views of law (Patterson 1991).

Feminism’s push for substantive equality has also been challenged by the argument that substantive protection confines women into a victim identity
marked by weakness and dependency on government (Brown 1995; McElroy 1991). Despite fueling criticisms of feminist victimhood, the right has constructed and mobilized prominent victimized identities in opposition to feminist reforms. The right often portrays men, conservative Christians, homemaking mothers, or childless women as subject to oppressive feminist control (McCluskey 1997). This contest of victimized identity can make feminism seem outdated or even bullying.

To avoid such divisive and slippery identity politics, some argue for an egalitarian strategy that rejects the discursive realm of identity for greater attention to redistribution of material resources. By replacing gender with economic class, it might appear possible to mobilize a broader coalition in favor of progressive policies capable of benefiting most women and men. Policies catering to seemingly measurable individual economic gain rather than contestable identities may seem less susceptible to manipulation or elitist bias.

Yet feminist critique can help bridge the simplistic separation between cultural identity and economic “redistribution” by analyzing economic interests as socially constructed in relation to group identities (Duggan 2003). Our material interests will seem different depending on whether we see ourselves primarily as “taxpayers” who might pay for increased social services, as members of a self-sufficient and successful “middle class,” as “investors” or potential lottery winners, as parents and grandparents concerned about future generations, as potentially divorced homemakers, as consumers, as workers, as community members, as global citizens, or as embodied humans vulnerable to illness and disability.

Critical feminism has rejected fixed, abstract ideas about “women,” but gender as a factor in analyzing law and politics remains important. By challenging and engaging with the complicated social process of constructing identities and interests in relation to a substantive social and historical context, critical feminists have tried to open up new opportunities for political and economic coalitions capable of supporting reform. Martha Fineman’s (2008) vision of substantive equality focuses on a vulnerability that is often gendered; women disproportionately assume caretaking responsibilities. Yet, this idea of vulnerability reaches beyond gender to encompass a variety of potentially fluid and intersecting interests, identities, and issues—from environmental devastation to middle-class economic insecurity. It may be an idea that can mobilize broader political and legal support for egalitarian policy in the current social context.

By viewing identity as complex and intersectional and economics as political, critical feminism understands that economic interests are steeped in identity politics. In the US, economic equality has long been feminized and racialized. For example, political commentators and policy analysts use the term “nanny state” to code progressive economics as an affront to a moral order dependent on upper-class, white male authority over women, children, and servants—especially female servants of color (McCluskey 2005b). At the 2004 Republican National Convention, California Governor Arnold Schwarzenegger used the slur
“economic girlie men” against legislators supporting unions and trial lawyers in a state budget debate to suggest such positions were weak and silly (Grossman and McClain 2004). In the 2008 presidential campaign, Schwarzenegger similarly mocked Democratic candidate Obama for his “skinny legs” and “spread-the-wealth” ideas lacking “meat” in contrast to “action hero” McCain and his “pumped up” supporters, suggesting Obama was too feminine and too socialist to lead the nation (Campanile 2008). Critical feminist scholarship focuses on the continuing importance of identity politics in impeding economic equality and resists the tendency to essentialize the divide between economic class and cultural politics dealing with sex, gender, and race (McCluskey 2005). Justice Scalia, for example, defends his opposition to gay rights and abortion rights as deference to working-class culture under threat from professional elites (McCluskey 2007a: 1294 note 440). A critical approach questions whose interests are served by portraying gender inequality as a cultural attribute inherent to the working class, rather than as the product of policies shaped in part by elite interests. Critical analysis of the underlying policies and institutional structures that support current identity-based divisions can suggest ways of crafting policies to build new coalitions. For example, policies increasing economic support and security for diverse families might help overcome some of the “moral panic” currently directed at gay marriage (Duggan and Kim 2005).

**Aftermath of the right’s rule?**

The formerly triumphant “free market” economy is in crisis, and newly-elected President Obama enjoys popular support for his call for major policy change. The right-wing shadow may be receding to reveal new opportunities for advancing substantive equality. Critical feminism can be useful in helping to rebuild political movements for positive change. By ambitiously questioning assumptions and thinking beyond existing boundaries, a critical approach opens us to open our imagination to the possibilities for a different, better world (Gordon 1998). Such imagination must counter the legacy of lowered expectations and complacency in the face of enormous inequalities which prevailing theories have rationalized as the inevitable or tragic consequences of maintaining economic and social order.

A critical legal approach rejects the assumption that simply redistributing money or changing political parties and individual leaders will suffice to promote major change. Critical analysis understands the current political, economic, and social institutions as legal structures designed to advance and entrench substantive power inequalities in the guise of neutral systems (McCluskey 2006). For that reason, feminist critique digs into the technical and empirical details of legal rules and political context to find the barriers to meaningful change.

Finally, feminist critique remains urgently important even with increased general support for policies promoting substantive equality. It is not just economic inequality that is tied to masculinist identity politics. Policies promoting
economic equality are likely infused with gendered ideas and practices that reinforce and increase vulnerability and unequal burdens for many women and men. Feminist economist Randy Alhelda (2006), for example, challenges a “macho” economic stimulus program that emphasizes physical infrastructure and “green jobs” focused on stereotypically male-identified construction and technology work. She argues for a “pink jobs” initiative aimed at improving the social caretaking infrastructure just as important to the nation’s well-being as building roads or energy conservation. This proposal for a social caretaking stimulus program would include substantial government investment in education, health, and social services; it might expand jobs and raise salaries in areas like nursing and childcare disproportionately done by low-income women. But before such a vision of feminist reform can become reality, much feminist work reaching beyond the boundaries of existing law, politics, gender identity, and foundational theory remains to be done.