

# FIU LAW REVIEW



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## SYMPOSIUM

### *Twelfth Annual LatCrit Conference Critical Localities: Epistemic Communities, Rooted Cosmopolitans, New Hegemonies and Knowledge Processes*

Introduction: Where is There? Locating, Dislocating  
and Relocating Gender, Sexuality in Physical  
and Discursive Space

*Adele M. Morrison*

Gender, Place, Discursive Space:  
Where is Same-Sex Marriage?

*Marc R. Poirier*

Gendering the President Male: Executive Authority  
Beyond Rule-of-Law Constitutionalism in  
the American Context

*Larry Catá Backer*

Abolished by Law—Maintained in Practice: The Trokosi  
as Practiced in Parts of the Republic of Ghana

*Aziza Naa-Kaa Botchway*

Latino Masculinities Under the Microscope:  
Stereotyping and Counterstereotyping on  
Five Seasons of *CSI: Miami*

*Diane J. Klein*

## COMMENTS

Culture Shock: Expanding the Current Federal Law  
Against Female Genital Mutilation

*Vanessa Ortiz*

Reporting Rules for U.S. and International Lawyers  
Under Sarbanes-Oxley: Exporting an  
Unfinished Product?

*Lorella Nerini Dal Pezzo*

The Cuban Adjustment Act of 1966:  
More than Forty Years Later a  
Proposal for the Future

*Javier Arteaga*

# Gendering the President Male: Executive Authority Beyond Rule-of-Law Constitutionalism in the American Context

Larry Catá Backer<sup>1</sup>

**Abstract:** Law, like other methods of disciplining behavior, has a gender dimension. Consciously or not, male elites in the United States, like those in other nations, continue to protect the male gender borderlands of behavior norms in ways that affirm for those behaviors a privileged role of the standard by which male and female conduct is judged. And there is no more powerful set of behavior norms than *law, and especially constitutional law*, in the United States. This essay considers the gender hierarchy and behavior presumptions just under the surface of Harvey Mansfield's recent suggestion that rule of law constitutionalism ought to be limited to the legislative and judicial branches, which are meant to be cooperative and nurturing institutions, but that the President's Constitutional powers extend beyond the mere execution of the laws, and can include extra-legal acts. "Thus it is wrong to accuse President Bush of acting illegally in the surveillance of possible enemies, as if that were a crime and legality is all that matters." After a short introduction, Part II starts with a discussion of the relation between gender hierarchy and law. It sets out the parameters within which gender analysis of institutional action and facially genderless arguments can be understood as embracing gender assumptions of three kinds—first a gender hierarchy in which the male is privileged over the female, second a set of assumptions about those behaviors that are inherently female and those inherently male, and third, a behavior legitimating reflex avoiding the legitimacy of males or male institutions assuming female behavior roles. This analysis provides the context for Part III, which analyses Harvey Mansfield's argument that the assertion of a power in the

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president to act extra-legally is legitimate as a robust application of basic principles of American constitutional law.

## I. INTRODUCTION

Ideologies of gender, understood as a community's articulated forms of social self-consciousness, remain ascendant throughout the world.<sup>2</sup> These ideologies are imprinted in the law of all states—modern and ancient, religious and secular.<sup>3</sup> These ideologies become increasingly less visible as societies substitute the language of corruption, psychosis and ethno-national chauvinism for that of gender.<sup>4</sup> The power of these ideologies to discipline and subordinate women is well understood in the West, even among conservative jurists.<sup>5</sup> Less well-understood is the way in which these ideologies discipline and subordinate women by defining, disciplining, and subordinating the “female” in men.<sup>6</sup> Thus, intra-sex gendering, these male-male behavior-privileging norms, serve as the basis for structuring ideal behavior norms for all members of society—whether sexed male or female, and for the institutions that serve them.<sup>7</sup>

This essay considers the subtleties and dynamics of male on male gendering on the construction of law in general, and on the Constitution of the American government through its constitutional order in particular, in a context in which direct regulation of sexual conduct has lost much of its power, but in which the social power of sexual privileging and order remains vitally strong.<sup>8</sup> For that purpose, the essay will engage in a close reading of a recent work of Harvey Mansfield, a member of the liberal arts faculty at Harvard University. In an article recently published in the Ameri-

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<sup>2</sup> See generally Larry Catá Backer, *Emasculated Men, Effeminate Law in the United States, Zimbabwe and Malaysia*, 17 YALE J.L. & FEMINISM 1 (2005).

<sup>3</sup> See *id.* at 1.

<sup>4</sup> See *id.* at 2.

<sup>5</sup> See *id.* at 2-3.

<sup>6</sup> For recent efforts to interrogate the subject, see generally MICHAEL KIMMEL, *MANHOOD IN AMERICA: A CULTURAL HISTORY* (1996); E. ANTHONY ROTUNDO, *AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA* (1993); MARK E. KANN, *ON THE MAN QUESTION: GENDER AND CIVIC VIRTUE IN AMERICA* (1991).

<sup>7</sup> See Backer, *supra* note 2, at 3. Female space, even within some feminist discourse, is shared space—mother and child. That seems to be the thrust of some of the most compelling feminist scholarship that has sought to overturn the male centered dynamic of social gendering—to posit a standard that is centered on the female. See, e.g., MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH-CENTURY TRAGEDIES* 22-24 (1995) (positing a normative baseline in the mother and child in which the male serves as the catch-all for ‘not-mother,’ and suggesting that a father is a male who can conform his behavior to the ideal of ‘mother’).

<sup>8</sup> See also Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 FLA. L. REV. 755 (1993).

can Standard,<sup>9</sup> Harvey Mansfield seeks to apply a gendered, male oriented, framework of social and political organization that he developed elsewhere,<sup>10</sup> to reorient foundational understandings of constitutional law principles. Professor Mansfield proposes a theory of “lawless” constitutionalism, that is of a constitutionally sanctioned power to act beyond the law, as the basis for defending a substantial extension of Presidential power under the American system of government.<sup>11</sup> The essay will unpack the complex ideological assumptions underlying a seemingly straightforward analysis justifying a non-rule of law simple analysis.

The thesis of this essay is that Mansfield’s project—to convince the reader that traditional rule-of-law constitutionalism emasculates the “true” constitutional framework envisioned by the Founders—is grounded on a series of ideologies of gender, in which rule-of-law governance is painted as female—and appropriate to those branches of government gendered female (the legislative and judicial branches). Such governance norms are inappropriate to that branch of government gendered male—the executive. When rule of law is applied to frame presidential power, however, it re-makes presidential power defectively male. A perversion occurs that can be corrected only when presidential power is understood in its true light—as the embodiment of a state power to act beyond law. The essay starts with a discussion of the relation between gender hierarchy and law. It sets out the parameters within which gender analysis of institutional action and facially genderless arguments can be understood as embracing gender assumptions of three kinds—first a gender hierarchy in which the male is privileged over the female, second a set of assumptions about those behaviors that are inherently female and those inherently male, and third, a behavior legitimating reflex avoiding the legitimacy of males or male institutions assuming female behavior roles. This summary provides the basis for the heart of the essay in Part III, which analyses Harvey Mansfield’s argument that the constitution vests the president with a power act extra-legally, and that the grant of such power is defensible through an application of conventional constitutional principles.

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<sup>9</sup> Harvey C. Mansfield, *The Law and the President: In a National Emergency, Who You Gonna Call?*, THE WEEKLY STANDARD, Vol. 11, issue 17 (Jan. 16, 2006), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/563mevpm.asp?pg=1> (accessed October 23, 2008).

<sup>10</sup> See generally HARVEY C. MANSFIELD, *MANLINESS* (New Haven, CT: Yale University Press, 2006).

<sup>11</sup> See Mansfield, *supra* note 9.

## II. GENDER PRESUMPTIONS IN LAW

Ideologies of gender, understood as a community's articulated forms of social self-consciousness, remain ascendant throughout the world.<sup>12</sup> These ideologies are imprinted in the law of all states—modern and ancient, religious and secular.<sup>13</sup> These ideologies become increasingly less visible as societies substitute the language of corruption, psychosis and ethno-national chauvinism for that of gender.<sup>14</sup> The power of these ideologies to discipline and subordinate women is well understood in the West, even among conservative jurists.<sup>15</sup> Feminists have been at the forefront of thinking through issues of gender in law, a subject that remains largely ignored by others, even within otherwise critical or progressive movements.<sup>16</sup>

Less well-understood is the way in which these ideologies discipline and subordinate women by defining, disciplining, and subordinating the “female” in men.<sup>17</sup> Thus, intra-sex gendering, these male-male behavior-privileging norms, serve as the basis for structuring ideal behavior norms for all members of society—whether sexed male or female, and for the institutions that serve them.<sup>18</sup>

<sup>12</sup> See generally Larry Catá Backer, *Emasculated Men, Effeminate Law in the United States, Zimbabwe and Malaysia*, 17 YALE J.L. & FEMINISM 1 (2005).

<sup>13</sup> See *id.* at 1.

<sup>14</sup> See *id.* at 2.

<sup>15</sup> See *id.* at 2-3.

<sup>16</sup> Joanne Conaghan's analysis of the work of Duncan Kennedy is illuminating on this score. Some early feminist approaches, drawing on Carol Gilligan's *In a Different Voice*, focused on the extent to which legal reasoning was based on a masculine “ethic of rights” rather than a feminine “ethic of care.” Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) (applying Gilligan's work). Others looked at the allegedly neutral values and assumptions underpinning legal reasoning and exposed their partiality and derivation from male points of view. See, e.g., Regina Graycar, *THE GENDER OF JUDGMENTS: AN INTRODUCTION, IN PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES* 262 (Margaret Thornton ed., 1995). Later, such approaches became tainted with the stain of essentialism, and this may to some extent explain Kennedy's neglect of them. The idea of law as “gendering,” that is, as constitutive of gender categories and roles, is the (post)modern, anti-essentialist version of the argument. Joanne Conaghan, *Wishful Thinking Or Bad Faith: A Feminist Encounter With Duncan Kennedy's Critique Of Adjudication*, 22 CARDOZO L. REV. 721, 742 & n.108 (2001).

<sup>17</sup> For recent efforts to interrogate the subject, see generally MICHAEL KIMMEL, *MANHOOD IN AMERICA: A CULTURAL HISTORY* (1996); E. ANTHONY ROTUNDO, *AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA* (1993); MARK E. KANN, *ON THE MAN QUESTION: GENDER AND CIVIC VIRTUE IN AMERICA* (1991).

<sup>18</sup> See Backer, *supra* note 2, at 3. Female space, even within some feminist discourse, is shared space—mother and child. That seems to be the thrust of some of the most compelling feminist scholarship that has sought to overturn the male centered dynamic of social gendering—to posit a standard that is centered on the female. See, e.g., MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH-CENTURY TRAGEDIES* 22-24 (1995) (positing a normative baseline in the mother and child in which the male serves as the catch-all for ‘not-mother,’ and suggesting that a father is a male who can conform his behavior to the ideal of ‘mother’).

The reinforcement of male hierarchy was traditionally policed through the regulation of sexual activity.<sup>19</sup> Though sodomy laws, or laws like them, have substantially disappeared from the Western world, informal policing remains effective, primarily through the mechanisms of everyday social rules in which gendered conduct ideals are vested with important social and political consequences, sometimes still reinforced with laws of “general” applicability.<sup>20</sup> But, regulatory mechanisms also have a cultural and social dimension.<sup>21</sup> This complex web of regulatory networks, bounded in soft and hard law, suggests the disciplinary techniques of social organization that have been well explored by Michel Foucault.<sup>22</sup> Gendered frameworks on legitimate behavior, focusing on the male female binary, remain strong because they have become submerged in the general discourse of power and universal behavior norms. We discuss what is right, just, appropriate, legitimate, but those discussions are grounded in a host of unspoken assumptions that revolve around a privileging of the male ideal. “Not only because power imposes secrecy on those whom it dominates, but because it is perhaps just as indispensable to the latter: would they accept it if they did not see it as a mere limit placed on their desire, leaving a measure of freedom . . . intact?”<sup>23</sup>

This gendering is also trans-cultural.<sup>24</sup> The foundational nature of intra-male codes of maleness—goodness, right, the privileged social ideal in both public and private sphere—finds expression through mechanisms consonant with the normative structure internalized by the particular communities in which this naturalization occurs.<sup>25</sup> In the United States, those mechanisms are based on principles of Enlightenment rationalism, with an undercurrent of religious foundationalism.<sup>26</sup> American popular understanding of the disordered life as backdrop to the political action of the so-called American Taliban provides a useful referent. In Muslim majority states, it

<sup>19</sup> See generally Larry Catá Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37 (1993).

<sup>20</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 8-15, 85 (1999); CARL F. STYCHIN, *A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS, AND THE DISCOURSE OF RIGHTS* 34-39 (1998); Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 717-18 (2002); Francisco Valdes, *Theorizing 'Outcrit' Theories: Coalitional Method and Comparative Jurisprudential Experience —Racecrits, Queercrits and Latcrits*, 53 U. MIAMI L. REV. 1265, 1296-98 (1999).

<sup>21</sup> See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (Robert Hurley trans., Random House 1978) (1976).

<sup>22</sup> See *id.*

<sup>23</sup> Michel Foucault, *The History of Sexuality: An Introduction* (Vol. I) 89 (Robert Hurley, trans., New York: Vintage Books, 1990).

<sup>24</sup> See Backer, *supra* note 2, at 3-4.

<sup>25</sup> For a discussion of Indian patriarchy along these lines, see generally, RATNA KAPUR, *SUBVERSIVE SIGHTS: FEMINIST ENGAGEMENTS WITH LAW IN INDIA* (1996).

<sup>26</sup> See Backer, *supra* note 2, at 22.

is mediated through the language of religion and purity.<sup>27</sup> This conflation of manliness purity, and religiously based intra-male codes of religious and political behavior, rationalized through law, was nicely exemplified in the sodomy and corruption trials of Anwar Ibrahim in Malaysia in the late 1990s,<sup>28</sup> and in his subsequent rehabilitation.<sup>29</sup> In developing states, gender ideologies are sieved through a discourse of post-colonialism and a reinvention of an idealized past.<sup>30</sup> Others have developed these notions in India, China and Korea with respect to state policy and women's' autonomy.<sup>31</sup>

The reinforcement of male hierarchy was traditionally policed through the regulation of sexual activity.<sup>32</sup> Though sodomy laws, or laws like them, have substantially disappeared from the Western world, informal policing remains effective, primarily through the mechanisms of everyday social rules in which gendered conduct ideals are vested with important social and political consequences.<sup>33</sup> In this guise, critical theory has been instrumental in unmasking the continued power of gender, and especially its intersections with race, ethnicity, and religion in the construction of institutional systems of power.<sup>34</sup>

Intra-male behavior-privileging social ordering and its political effects are also, to some extent, trans-historical. The notion of effeminacy and political behavior, as a dynamic and still living theory of politics, is at least as old as Aristotle.<sup>35</sup> Conflations of physical, moral and political strength are reflected in personal behavior, and give rise to permissions to upset the

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

<sup>28</sup> See *id.*

<sup>29</sup> See Larry Catá Backer, *Of Sodomy and Corruption: Sex, Politics, Religion and Law in Malaysia*, LAW AT THE END OF THE DAY, Aug. 1, 2006, <http://lcbackerblog.blogspot.com/2006/08/of-sodomy-and-corruption-sex-politics.html>.

<sup>30</sup> See Backer, *supra* note 2, at 2.

<sup>31</sup> See Monica das Gupta et al., *State Policies and Women's Agency in China, the Republic of Korea, and India, 1950-2000: Lessons From Contrasting Experiences*, in CULTURE AND PUBLIC ACTION 234-259 (Vijayendra Rao & Michael Walton, eds., Stanford CAS: Stanford University Press, 2004) ("These case studies illustrate the subtle ways in which states influence the manifestation of cultural beliefs and values: most actions and policies are not gender neutral; they either increase or decrease gender equity. They also illustrate the constant tension and negotiation between state ideologies, state interests, and social norms." *Id.*, at 258).

<sup>32</sup> See *id.* at 62; Backer, *supra* note 8, at 756-57.

<sup>33</sup> See Backer, *supra* note 8, at 760-61. "The society that emerged in the 19<sup>th</sup> century. . . did not confront sex with a fundamental refusal of recognition. On the contrary, it put into operation an entire machinery for producing true discourses concerning it. . . . Not however, by reason of some natural property inherent in sex itself, but my virtue of the tactics of power immanent in this discourse." Foucault, *History of Sexuality*, *supra* note 22, at 69-70. And then it moved that discourse underground as a set of bedrock assumptions about the way things are that required no further exploration.

<sup>34</sup> See, e.g., Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 336-39 (2006); see generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997).

<sup>35</sup> See ARISTOTLE, POLITICS: A TREATISE ON GOVERNMENT (William Ellis trans., J.M. Dent & Sons 1912) (350 B.C.).

social order—that is, to act extra-legally.<sup>36</sup> “Thus a general at the head of his army will endeavour to dethrone the monarch, as Cyrus did Astyages, despising both his manner of life and his forces; his forces for want of action, his life for its effeminacy . . . .”<sup>37</sup> The end of tyranny and a certain effeminacy was also conflated:

Contempt also is often the cause of their destruction: for though, for instance, those who raised themselves to the supreme power generally preserved it; but those who received it from them have, to speak truth, almost immediately all of them lost it; for, falling into an effeminate way of life, they soon grew despicable, and generally fell victims to conspiracies.<sup>38</sup>

Effeminacy of mind and body could be ascribed to certain activities, improperly indulged. For example, music:

for it must be admitted that in some cases nothing can prevent music being attended, to a certain degree, with the bad effects which are ascribed to it; it is therefore clear that the learning of it should never prevent the business of riper years, nor render the body effeminate and unfit for the business of war or the State; but it should be practised by the young, judged of by the old.<sup>39</sup>

This is not merely the musings of an ancient citizen of a culture now no longer current. It is reflected in the sexualization of politics. Thus, it has been observed that “Far from being a theoretical abstraction in leftist ideology, the conflation of homosexuality and fascism seems to have marked an opportunistic capitulation of theory in the face of popular sentiment.”<sup>40</sup> The opportunism actually masks a naturalization of behavior norm hierarchies as a basis for political judgment, one that adds potency to judgments about the legitimacy of political actors and the shape and deployment of the state government.<sup>41</sup> “The identification of proletarian revolution with values of virility and sexual potency leads all too easily to an attribution of homosexuality to effeminacy to the enemy: this observation holds for the communists’ homosexualization of the fascist as much as it does for the fascists’ effeminization of the Jew.”<sup>42</sup> In each case, homosexualization acts as an

<sup>36</sup> See *id.*

<sup>37</sup> *Id.* bk. III, ch. X.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* bk. VIII, ch. VI.

<sup>40</sup> Andrew Hewitt, *Political Inversions: Homosexuality, Fascism & the Modernist Imaginary* 9 (Stanford, CA: Stanford University press, 1996).

<sup>41</sup> See Backer, *supra* note 2, at 53-60.

<sup>42</sup> Hewitt, *supra* note 39, at 9-10.



intensifier of illegitimacy, a magnifier of the corruption and error of the action to which the homosexualization—the disorder—is ascribed.

And this sexualization appears to permeate the foundational interpretive documents produced in defense of the adoption of the American Constitution.<sup>43</sup> It is expressed in national political discourse, in the rhetoric of Senator Byrd with allusions to Roman Republican civic virtues.<sup>44</sup> It is central even to the humor of the discourse of state politics as well, with “girlie men” as a well understood compression of meaning—the individual who behaves outside of acceptable (male) gender norms, whose conduct is personally corrupt but also corrupts the actions undertaken in that role.<sup>45</sup>

Gender norm assumptions, gender behavior ordering and privileging, is unconscious, and unconsciously embraced at all levels of society. It is so deeply embedded in cultural understandings that it appears natural. Like anti-Semitism in 19<sup>th</sup> and early 20<sup>th</sup> century Germany, gender role expectations and their naturalization within the legal order are so “fundamental to the dominant world view and operation of a society, [that] they are taken for granted, often not expressed in a manner commensurate with their prominence and significance or, when uttered, seen as worthy by others to be noted and recorded.”<sup>46</sup> As feminists have long argued in the context of marriage as both social relationship and regulatory construct,<sup>47</sup> regulations serve to police identity norms, and patrol the borders of gender expectations.<sup>48</sup> Constitutional law itself is as subject to identity policing as marriage or other legal frameworks that replicate and reinforce social understandings of communal behaviors. It is best understood as “more than the mere articulation of a code of behavior or a preference for a particular group or physical characteristic. Instead, [it refers] to the active attempt on the part of the state to monitor, maintain, and manipulate identity, to patrol its borders in much the same way a police officer might guard a jurisdictional boundary

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<sup>43</sup> See John Kang, Associate Professor of Law, Saint Thomas University School of Law, Presentation at the 12<sup>th</sup> Annual Meeting of LatCrit (Oct. 5, 2007).

<sup>44</sup> See John Tierney, *Byrd, at 85, Fills the Forum With Romans and Wrath*, N.Y. TIMES, Nov. 20, 2002, at A1.

<sup>45</sup> See Associated Press, *California Gov. Not Sorry For 'Girlie Men' Remark: Democrats Blast Schwarzenegger for Mocking Lawmakers*, MSNBC NEWS, July 19, 2004, available at <http://www.msnbc.msn.com/id/5460326/>.

<sup>46</sup> DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 32 (New York: Vintage Books 1996).

<sup>47</sup> See, e.g., Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 Va. L. Rev. 1901 (2000).

<sup>48</sup> “Just as important as this setting of social norms, however, is the extent to which state regulations have also served over time to reproduce and police identity norms in the marriage context.” R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight For Same-Sex Marriage*, 96 CAL. L. REV. 839, 882 (2008).

or keep watch for an intruder.”<sup>49</sup> That is precisely what Mansfield means to do with a focus on presidential power under the constitution. It is to the way in which Mansfield would gender the constitution in the service of legitimating certain Presidential behaviors that the paper turns to next.

### III. A MASCULINE CONSTITUTIONALISM—EXTRA-LEGAL PRESIDENTIAL POWER, RULE-OF-LAW LEGISLATURES, AND COURTS

It comes as no surprise, then, that male elites in the United States, like those in other nations, continue to protect the male gender borderlands of behavior norms. And there is no more powerful set of behavior norms than law, and especially constitutional law, in the United States. Mansfield’s immediate object is to make a specific case for the legitimacy of the Bush Administration’s surveillance activities in the war on terror. In making that case, he also suggests a broadly applicable constitutional jurisprudence,<sup>50</sup> which is increasingly heard in some quarters today. That broad set of constitutional jurisprudence is grounded in the general proposition that the American Constitution does not advance merely a rule-of-law system as the core of American political governance; instead, the federal Constitution represents the whole of sovereign power vested in the federal government. That whole power consists of two parts.<sup>51</sup> The first is the inward-looking, and domesticated system of rule-of-law constitutionalism that characterizes the legislative and judicial powers.<sup>52</sup> The other is outward looking, and mandates the assertion of “extra-legal authority” by the American President under certain circumstances, and against certain contingencies.<sup>53</sup>

Mansfield’s defense of President Bush’s surveillance projects, and of the broader constitutional project, are grounded in a complex system of inversions, growing out of a juxtaposition of related binaries set against, and building on, each other in a series of parallel analogies. These binaries touch on both the peculiarities of the immediate substantive elements (surveillance, criminality, etc.) and on a parallelism of binary aggregations that suggest a fidelity to an ultimate set of *grundnorm* binaries: survival/destruction, strong/weak, good/evil, and male/female.

The initial binary—and binary inversion—presented, is meant to set up the arguments that follow. This initial binary focuses on “law/outlaw.”<sup>54</sup>

<sup>49</sup> *Id.* In this sense, the constitution is very much social design. See GRETCHEN RITTER, *THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER* 66 (Stanford CA: Stanford University Press, 2006).

<sup>50</sup> See Mansfield, *supra* note 9.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* For a discussion of constitutionalism in its rule of law framework, see Larry Catá Backer, *From Constitution to Constitutionalism: A Framework for Analysis of Nationalist and Transnational Constitutionalism*, 113:3 PENN STATE LAW REVIEW (forthcoming 2009).

<sup>53</sup> See Mansfield, *supra* note 9.

<sup>54</sup> See *id.*

Mansfield poses the greater problem from an initially smaller source—criminality.<sup>55</sup> He suggests a foundational distinction in law between criminals and enemies.<sup>56</sup> That distinction is based on the relationship of both criminals, and of enemies, to the political state.<sup>57</sup> According to Mansfield,

Criminals violate the law, and the law can be vindicated with police, prosecutors, juries and judges who stay within the law: at least for the most part the law vindicates itself. Enemies, however, not merely violate but oppose the law. They oppose our law and want to replace it with theirs.<sup>58</sup>

Criminals, the reader is told, operate within the law, and its framework, but enemies fall outside the law and that framework.<sup>59</sup> Enemies are “outlaws”; criminals are merely anti-social people, who must be managed in a bureaucratic state.<sup>60</sup> Because enemies fall outside the territory marked by law, they “need to be faced with extra-legal force.”<sup>61</sup>

Of course, this binary, as proposed, ignores a number of things—two of which are highlighted here. First, Mansfield appears to invert the traditional understanding of outlaw.<sup>62</sup> Second, thus inverted, the binary is at odds with an emerging American understanding of the relationship of law to virtually all human activity.<sup>63</sup>

With respect to the first point, in traditional understanding, to engage in violations of law by, for example, an activity deemed criminal, was to fall outside the law.<sup>64</sup> For example, “Icelandic law understood itself as providing an arena in which a modified form of revenge could take place. . . . [An individual] sued and he enforced the judgment unless he assigned his action, in which case the responsibility devolved upon the assignee. The law did not issue money judgments in disputes involving injuries or killing. The penalty was outlawry, which allowed anyone to kill the outlaw with

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See *id.*

<sup>61</sup> *Id.*

<sup>62</sup> See Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1018-19 (2002) (“At one time serious criminals were deemed outlaws [who were denied the protection of the law] . . .”). Cf. Dorothy Roberts, *Torture and the Biopolitics of Race*, 62 U. MIAMI L. REV. 229, 240 (2008) (“The terrorist is constructed as a stateless outlaw . . .”).

<sup>63</sup> Cf. Daniel F. Piar, *Majority Rights, Minority Freedoms: Protestant Culture, Personal Autonomy, and Civil Liberties in Nineteenth Century America*, 14 WM. & MARY BILL RTS. J. 987, 1006-07 (2006) (discussing the nineteenth century legal system’s treatment of individual rights—as people were considered quite able to control themselves, the law was used sparingly; this was, in part, due to the hold that religion had on society).

<sup>64</sup> See King, *supra* note 62, at 1018-19.

impunity and obliged the judgment holder to do so.”<sup>65</sup> Outlaws could include any individual, from the poor person who stole a loaf of bread to feed a starving family, to a foreign resident the Queen deemed to have engaged in political acts of treason. In contrast, enemies did not fall outside the domestic law, never having been within it, but they fell within the rule systems guiding conduct among combatants, with both hard and soft content.<sup>66</sup> Mansfield would reverse these ancient understandings to suit his very modern purpose.

The second point, which suggests that enemies are conceptually incapable of being treated as criminals, rejects what has, since the Nuremberg and Tokyo trials of defeated political enemies, been a fundamentally American project of constructing an international system that does just that.<sup>67</sup> Post-war American efforts (to the political establishment’s current chagrin it seems) have produced an international consensus that tends increasingly to view all anti-social activity as criminal, irrespective of its nature or consequence.<sup>68</sup> The criminalization of political and state activity within an international context has substantially changed the dynamics of the old binary insider/outsider, and internal/external conflict within a new regime of “law-fare”—warfare in the courts.<sup>69</sup>

The regime of international political criminality, subsumed within the regimen of the Rome Statute of the International Criminal Court, thus suggests that there may no longer be much of an area of activity “outside” the law.<sup>70</sup> It is true enough that Americans have resisted the implications of this, as it applies to its international activities.<sup>71</sup> The conceptual framework that gave it life, however, is as much a core set of American jurisprudential values as any recognized within the framework of the federal Constitution.

Yet the “law/outlaw” binary also serves to reinforce the gendered basis of Mansfield’s argument. Law and criminality are tied to the domestic, to the internal matters of state. Criminals are a matter of family. Enemies are

<sup>65</sup> William Ian Miller, *In Defense of Revenge*, in *MEDIEVAL CRIME AND SOCIAL CONTROL* 74 (Barbara A. Hanawalt and David Wallace, eds. Minneapolis: University of Minnesota Press, 1999).

<sup>66</sup> See Jordan J. Paust, *Responding Lawfully to Al Qaeda*, 56 CATH. U. L. REV. 759, 767 (2007) (discussing the legal treatment of the so-called enemy-combatants).

<sup>67</sup> See generally Salvatore Zappala, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS* (2003).

<sup>68</sup> Cf. Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 302 (2004) (“[S]ome Marxist-Leninist regimes have criminalized ‘social dangerousness,’ an apparent catch-all category authorizing prosecutions of supposedly anti-social conduct without reference to specifically defined criminal behavior. . . .”).

<sup>69</sup> For a critical discussion, see W. Chadwick Austin & Antony Barone Kolenc *Who’s Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT’L L. 291 (2006).

<sup>70</sup> See Rome Statute of the International Criminal Court: Overview (1998-99), available at <http://untreaty.un.org/cod/icc/general/overview.htm>.

<sup>71</sup> See Lillian V. Faulhaber, *American Servicemembers’ Protection Act of 2002*, 40 HARV. J. ON LEGIS. 537, 542-543 (2003) (discussing “American opposition to the ICC”).

tied to a public space, to external activities, and to the world of non-domestic work. This gendered distinction, which feminist theory has explored in the construction of national and international legal systems, and in the social spaces produced thereby,<sup>72</sup> becomes the crucial first step in Mansfield's project to articulate an essentially male space "beyond" law.

Having asserted the possibility of a dual space for anti-social activity—within and without the law—Mansfield invokes a complex parallelism of related binaries that will build on each other to produce the necessary support for his thesis: that the American Constitution provides the President with a grant of "extra-legal" power to be used in the President's discretion against enemies of the nation.<sup>73</sup> That grant of extra-legal power is foundational to the nature and character of the executive authority granted to the Chief Executive, created through Article II of the federal Constitution,<sup>74</sup> without which, it would be impossible to understand the office of the Chief Executive as an independent and co-equal branch of the federal government. The federal Constitution, Mansfield tells the reader, created a strong executive.<sup>75</sup> "A strong executive is one that is not confined to executing the laws but has extra-legal powers such as commanding the military, making treaties . . . and pardoning the convicted, not to mention a veto of legislation."<sup>76</sup> This is a thesis far broader than the usual iteration of similar notions in the traditional "unitary executive" theory.<sup>77</sup> Rule-of-law unitary executives remain firmly grounded in the rule-of-law system of the Constitution, and subject to its constraints.<sup>78</sup> Mansfield's executive is not.

To get to this understanding of extra-legal Presidential power, grounded in the law of the Constitution, Mansfield deploys his second great binary—"law/discretion"<sup>79</sup>—and suggests its inversion as well.<sup>80</sup> In fleshing out this binary, a key concept in Mansfield's argument, Mansfield deploys a series of parallel supporting binaries, each to serve as an analogue for, and reflection of the others; all of which are intimately tied to the foun-

<sup>72</sup> See generally Frances Olsen, *International Law: Feminist Critiques of the Public/Private Distinction*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 157 (Dorinda G. Dallmeyer ed., 1993).

<sup>73</sup> See Mansfield, *supra* note 9.

<sup>74</sup> See U.S. CONST. art. II.

<sup>75</sup> See Mansfield, *supra* note 9.

<sup>76</sup> *Id.*

<sup>77</sup> See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1216 (1992).

<sup>78</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>79</sup> The law/discretion binary has a long and contentious history in the United States. For its application in the context of the shaping of immigration law at the end of the 19<sup>th</sup> century, see LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (Chapel Hill, NC: University of North Carolina Press, 1995). In the context of criminal law, see, e.g., Samuel Walker, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990* (New York: Oxford University Press, 1993).

<sup>80</sup> See Mansfield, *supra* note 9.

dational governing binaries of the American state, which lurk in the background until the very end—survival/destruction, strong/weak, male/female.<sup>81</sup> Mansfield seeks to describe a well-ordered governmental house, in which the functional differentiation inherent in separation of powers is both necessary and natural given the characteristics of each of the elements of government—a domestic and rule-bound legislature, and judiciary—in contradistinction to the assertive and unbound protective power of the executive.<sup>82</sup> Constitutionalism merely institutionalizes and assimilates these natural distinctions.<sup>83</sup>

Presidential extra-legal activities, like surveillance, are not illegal merely because they fall outside the law, Mansfield argues.<sup>84</sup> Assertions of extra-legal power are lawful because the American rule-of-law system, founded on the federal Constitution, permits lawless activity under the circumstances therein specified.<sup>85</sup> Thus, according to Mansfield, “it is wrong to accuse President Bush of acting illegally in the surveillance of possible enemies, as if that were a crime and legality is all that matters.”<sup>86</sup> Notice here the conflation of binaries “criminal/enemy” and “law/extra-legal.”<sup>87</sup> The argument points to the need to protect the order of household administration, and the fear that a disordered house, where the rules of functionally differentiated power are not observed, will serve to pull down the house altogether.<sup>88</sup>

It is at this point that Mansfield makes his alternative, and critical, argument. He suggests that constitutional rule-of-law must be understood as constitutionally limited, that is, of occupying only part of the governance space described by the Constitution in the government it creates.<sup>89</sup> This leads to an interrogation—and ultimate limitation—of the scope of a properly understood constitutional rule-of-law system. Mansfield suggests that there is no identity between constitutional rule-of-law and constitutionalism, at least in the American context.<sup>90</sup> “The Constitution took seriously a difficulty in the rule of law that the republican tradition before 1787 had

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> From a different, and outsider perspective, these are the distinctions on which compulsory heterosexuality, grounded in male centered hierarchy, are normalized. See, e.g., Ruthann Robson, *Marriage and Lesbian Liberation*, 75 TEMP. L. REV. 709, 819-820 (2002).

<sup>84</sup> See Mansfield, *supra* note 9.

<sup>85</sup> See *id.*

<sup>86</sup> *Id.*

<sup>87</sup> See *id.*

<sup>88</sup> This notion of domestic and political disorder, founded on the decay of gendered functionally differentiated roles, and the need to protect them, is old in Anglo-American socio-politics. See CYNTHIA B. HERRUP, *A HOUSE OF GROSS DISORDER: SEX, LAW, AND THE 2ND EARL OF CASTLEHAVEN* 37 (1999).

<sup>89</sup> See Mansfield, *supra* note 9.

<sup>90</sup> See *id.*

slighted.”<sup>91</sup> Rule-of-law, understood as a form of “standing rules,” is an appropriate subject for ordinary legislative functioning—power in the hands of many, rule supremacy over discretionary power, etc. It is focused on the domestic sphere. In a domestically focused context, legislative power can be favored over the executive, and law over discretion.

Rule-of-law constitutionalism is female space. For Mansfield, this space can only partially describe the extent of actual governmental (or state) power that could be lawfully asserted under our constitutional grant of sovereign power to the institutions of the federal government. He tells the reader: “[y]et the rule of law is not enough to run a government,” and it was government that the Constitution created.<sup>92</sup> Rule-of-law, and even constitutional rule-of-law constitutionalism, must then itself be limited within an overall theory of governance. Mansfield appears to suggest that implicit in the Constitution is the idea that an appropriately constituted government needs “both the rule of law and the power to escape it—and that twofold need is just what the Constitution provides for.”<sup>93</sup> The Constitution thus provides a framework in which two conceptions of legitimate state authority co-exist. The first is the ordinary rule-of-law governance, understood as a state constituted from democratic principles and grounded in legislative superiority.<sup>94</sup> But while this is a necessary framework for establishing a legitimate state, it is also an insufficient basis for constituting a state that lasts, because of the “inflexibility of the rule of law.”<sup>95</sup> Fidelity to the constitution requires its interpretation as a system that is both efficient in general and which does not hobble the state in its operation, if in so hobbling, the Republic is rendered inoperable.<sup>96</sup>

As such, the constitution must include provision for the assertion of all authority necessary to ensure its preservation, and that authority out to be consonant with the nature of the power given to each branch of government. Rule of law is appropriate to collegial bodies where power is by definition diffused among many co-equal individuals. That is the essence of the legislature and judicial power. Yet, state authority is incomplete without a way around rule of law to be asserted by the executive as necessary to save the state from internal and external threats against which rule of law governance provides no defense. This principle of extra-legal constitutionally legitimate authority, of course, has its own limitations and risks. And Mansfield does not avoid naming them. That danger is the well

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

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

<sup>93</sup> *Id.*

<sup>94</sup> See Larry Catá Backer, From Constitution to Constitutionalism: A Framework for Analysis of Nationalist and Transnational Constitutionalism, 113:3 PENN STATE LAW REVIEW (forthcoming 2009).

<sup>95</sup> See Mansfield, *supra* note 9.

<sup>96</sup> *Cf. McCulloch v. Maryland*, 17 U.S. 316 (1819).

documented (even in a strongly Republican system) the risk of Caesarism in our executive.<sup>97</sup> The echoes of Aristotle's "family/state" political theory are strong.<sup>98</sup> Rule-of-law corresponds to law and criminality; discretion corresponds to extra-legal power and enemies of the state. Ironically, of course, that risk is probably greater when the executive is a likeable chap (perhaps a future president) than, in the case of the second President Bush (for whose immediate benefit Mansfield articulated his interpretive theory), whose popularity among the masses, media and elites is quite low.

How does the Constitution provide space for both a limited rule-of-law system and democratic Caesarism? Mansfield suggests that the doctrines of separation of powers, and checks and balances, starkly highlight this constitutional binary between (rule of) law and discretion.<sup>99</sup> Law is built into the legislative and judicial branches—but not into the core of the executive function.<sup>100</sup> The legislature and the judiciary are bound by rule-of-law constitutionalism; law is the thing they produce and manage and to which they are subject.<sup>101</sup> This, Mansfield describes as the choice aspects of constitutionalism.<sup>102</sup> But the higher law of the Constitution constitutes the lawful power of the President differently.<sup>103</sup> The "executive power represents necessity in the form of responses to emergencies."<sup>104</sup> He elaborates:

The Constitution mixes choice and necessity, reflecting our desire for self-government (which takes effect in our legislature) and our recognition of the limitations of human foresight and the imperfection of human laws. These are opposite principles made into opposing elements of our government.<sup>105</sup>

Together, they form the entirety of the constitution of lawful power that may be asserted by the State. Thus, Mansfield uses a traditional separation of powers analysis as the basis for the support of a non-rule-of-law legal system. Separation of powers serves as a proxy for the split between the rule-of-law governance (by legislation and the judiciary) and extra-legal executive power. In this, it serves as an idealized and institutional version of the separation of functions in a marriage. And with this separation is understood to come a necessary hierarchy, reflecting the division of author-

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<sup>97</sup> Mansfield, *supra* note 9.

<sup>98</sup> See ARISTOTLE, *supra* note 24, bk. I, ch. V. Modern variants, as I have suggested, in this conflation, are also trans-cultural and historical. See generally MATTHEW H. SOMMER, *SEX, LAW AND SOCIETY IN LATE IMPERIAL CHINA* (2000).

<sup>99</sup> See Mansfield, *supra* note 9.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> *Id.*

<sup>103</sup> See *id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*



ity between a man and his wife.<sup>106</sup> The West has understood these gendered divisions of institutional functions for a long time before the founding of the Republic. These functional differentiations, and the hierarchies they give rise to, as well as the fundamentally gendered nature of the division, has long served as, for example, a foundation of the organization of power within the Catholic Church, and the Church's relationship to the Trinity.<sup>107</sup>

But they are also complementary principles. By fiercely asserting the bases of each of their powers, the three branches serve to check the others, producing a democratic whole.<sup>108</sup> "The Constitution maintains both opposite principles by arranging for an interested party or parties to support [its organizing principle] in exercising its power."<sup>109</sup> Checks and balances thus serve as a proxy for the only constitutionally permitted basis for controlling the ascendancy of either a hidebound rule-of-law state on the one hand, or Caesarism on the other.<sup>110</sup> Consequently, the structural or principled limitations of rule of law governance as a structural basis for limiting the assertions of power by any branch of government must give way to political exigency—and thus subject only to the power of the other branches to resist by resort to those mechanisms constitutionally granted them, or to that of the electorate. Thus, according to Mansfield, "there will be conflict between discretion and the rule-of-law, each party aware of the other principle but more convinced by its own."<sup>111</sup>

And thus, the Constitutional framework is reduced to a great binary in motion: the American government is thus a combustion engine that operates as the force of a constant series of explosions among the branches, moving the pistons of state from monarchism to republicanism, while avoiding the extremes of tyranny and demagogic democracy.<sup>112</sup> Still, this argument would have to confront over a century of jurisprudence suggesting significant limits on Presidential "extra-legal" power,<sup>113</sup> as well as modern rule-of-

<sup>106</sup> See generally GEORGE GILDER, *MEN AND MARRIAGE* (1992).

<sup>107</sup> See, e.g., Angela L. Padilla & Jennifer J. Winrich, *Christianity, Feminism, and the Law*, 1 COLUM. J. GENDER & L. 67, 75-87 (1991) (discussing the "traditional Christian worldview [which] ascribes to men and women separate, specific, and immutable social roles"). Thus, for example, the Church (in its institutional guise) has long been associated with Mary—female, mother of Jesus, nurturer, domestic, etc.—in contradistinction to the Trinity—a transcendent power to be sure, but invariably depicted in its male form within Christianity (other than, perhaps, in its incarnation as Holy Spirit: ethereal, in between, and transformative). See, e.g., *id.*; Cheryl B. Preston, *Feminism and Faith: Reflections on the Mormon Heavenly Mother*, 2 TEX. J. WOMEN & L. 337, 357 (1993) (discussing the "traditional trinity of Catholicism," and whether it is "entirely male"). The relationship between the Church and the Divine is the foundational organizational model that then serves to organize the family and the state.

<sup>108</sup> See Mansfield, *supra* note 9.

<sup>109</sup> *Id.*

<sup>110</sup> See *id.*

<sup>111</sup> *Id.*

<sup>112</sup> See *id.*

<sup>113</sup> See, e.g., *Fleming v. Page*, 50 U.S. 603 (1850).

law based arguments for curtailing (or taming) the extra-legal power of the President.<sup>114</sup> Though he devotes no time to it, it might be reasonable to assume that Mansfield would dismiss over a century of rule-of-law jurisprudence that clearly views the President in a far less extra-legal power capacity as partisan—that is, as efforts by one branch to control another—and on that basis to constitute a less authoritative interpretive source.

The law/discretion binary thus serves as a cover for a number of parallel binaries—active/passive, individual/group, monarchy/republic, separation of powers/checks and balances. But Mansfield is not done with separation of powers. He elaborates by drawing support from the Federalist Papers, which he refers to as “the most authoritative source for understanding the thinking of the Framers.”<sup>115</sup> He also seems to draw on his interpretation of the *cultural* context of gender-social assumptions that were current at the time of the Founding as the basis for reading those authoritative works as *political* documents.<sup>116</sup> Mansfield reads the Federalist Papers to strengthen the idea that the Framers had meant to constitute a republican monarchy.<sup>117</sup> Responsibility is vested in the executive.<sup>118</sup> “To be sure of responsibility you must fix it on one person; true responsibility is *sole* responsibility. That is why, under our republican Constitution, the people, when they want to hold the whole government responsible, end up holding the president responsible.”<sup>119</sup> The logic of this progression is not beyond dispute, and indeed its simplicity and naiveté seem to serve as the greatest arguments against it. Whatever the value of Mansfield’s insight, he uses it to buttress the law/discretion binary, and its formal incorporation into the American constitutional order.<sup>120</sup>

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<sup>114</sup> For a taste of the current version of these arguments, from a national and transnational perspective, and well cited to earlier work, see generally Ingrid Brunk Wurth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61 (2007); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007).

<sup>115</sup> Mansfield, *supra* note 9.

<sup>116</sup> C.f. ROTUNDO, *supra* note 6. There is irony here, for Mansfield is engaging in that most post-modern of tasks, the interrogation of text within the social, cultural, political, religious, and ethnic context in which it was framed. Progressive post-modern and critical theory engages in this task to expose and eliminate the subordinating and hierarchical elements in the work (or to reject the theories as beyond “salvation”), an exercise which, arguably, is necessarily contingent and incomplete. See Larry Catá Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law*, in LEGAL QUEERIES: LESBIAN, GAY AND TRANSGENDER LEGAL STUDIES 185-203 (Leslie J. Moran, et al. eds., 1998). Mansfield and traditionalists use similar techniques to convince the reader that one must accept (and live) the social, cultural, ethnic, religious, and political context from which these works arose. Thus, the techniques of progressive critical theory can be as useful to the traditionalist as they are to the progressive—with both techniques successfully using interrogation and analysis.

<sup>117</sup> See Mansfield, *supra* note 9.

<sup>118</sup> See *id.*

<sup>119</sup> *Id.*

<sup>120</sup> See *id.*

Yet he also uses selective references to the Federalist Papers for another purpose: to privilege the constitutional principle of efficient government (corresponding to European constitutional notions of *effet utile*)<sup>121</sup> over the anti-tyranny principle built into rule-of-law governance.<sup>122</sup> Mansfield conflates the idea that the Framers sought to make a strong executive “in order to have both power and security,”<sup>123</sup> with a fundamental reconsideration of the meaning of separation of powers. That reconsideration leads to a reconstitution of the unitary part of the unitary executive. Separation of powers is characterized as a 17<sup>th</sup> century invention improved by the Framers.<sup>124</sup> That improvement consisted of a strengthening of the executive.<sup>125</sup> “They enabled the executive to act independently of the legislature [something Mansfield now suggests would be impossible in a monopolistic rule-of-law constitutional order] and not merely to serve as its agent in executing the laws.”<sup>126</sup>

What does Mansfield mean? Perhaps he is suggesting that the executive, in order to be denominated as such, must exist not merely as a servant of the legislature and the courts, but must be able to assert power in his own right. But the only sort of power that the executive may assert in his own right must be extra-legal—that is extra-legislative—power. Otherwise, he remains merely the subordinate and minister of the legislature and the courts. If the Constitution means what it says—and it says that it created three co-equal branches of government that together constitute the state<sup>127</sup>—then the executive must be able to assert an authority equal to, and independent of, that of the other branches. Mansfield seems to suggest that this extra-legal power may only be asserted in emergencies,<sup>128</sup> but asserted it must if the executive is to be co-equal. Thus, separation of powers suggests that to assert lawful power, the President must be able (in an emergency) to disregard the law. His actions may be illegal (that is, contrary to the power of Congress to legislate and the courts to hear cases), but not unconstitu-

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<sup>121</sup> See, e.g., Kristien Vanvoorden, *Cases and Comments: Case C-200/02, Zhu and Chen v. Secretary of State for the Home Department*, 12 COLUM. J. EUR. L. 305, 317-18 (2005). *Effet utile*, as a constitutional proposition, permits a certain flexibility in rule-of-law order for the effectuation of foundational obligations. See Ian S. Forrester, *The Judicial Function in European Law and Pleading in European Law*, 81 TUL. L. REV. 647, 673 (2007). In the context of the work of the European Court of Justice (ECJ), the point has been stressed that “[t]he ECJ has been willing to look sympathetically at claims which have the effect of making Community law more efficient and remedies more effective – *effet utile* [sic] is an untranslatable phrase connoting teleological efficacy.” *Id.* This, of course, is Mansfield’s point, though from a different and more disordered perspective.

<sup>122</sup> See Mansfield, *supra* note 9.

<sup>123</sup> *Id.*

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> *Id.*

<sup>127</sup> See U.S. CONST. art. I- art. III.

<sup>128</sup> See Mansfield, *supra* note 9.

tional (that is, exceeding the lawful powers of his office as set forth in the Constitution itself). "Emergency action of this kind may be illegal but not unconstitutional; or since the Constitution is a law, it is not illegal under the Constitution."<sup>129</sup>

The law/discretion binary is thus critical to the development of Mansfield's constitutional theory of a constitutionalism in which rule-of-law aspects of the Constitution are separable from a legal power to avoid law. But, the law/discretion binary subsumes a number of other binaries running in parallel. And it is those supporting binaries, to binaries that seem drawn from "natural,"<sup>130</sup> that Mansfield invokes. And it is in this effort that Mansfield's reliance on strict gendering, and the conflation of power, law, and social organization in gendered terms is most easily visible. Mansfield speaks of the binary law/discretion in terms of responsibility versus irresponsibility, of efficiency of individual action versus inefficiency of consensus or institutional action, of the rule-of-law versus necessity *in extremis*.<sup>131</sup> But, again grounding analysis on his extractions from the Federalist Papers, he focuses on another set of binaries that he suggests run in parallel, or serve to illustrate the law/discretion binary: energy versus stability, "terms taken from physics to designate discretion and law. Energy has its place in the executive, and the foremost guarantee of energy is unity . . . . Unity facilitates 'decision, activity, secrecy, and dispatch.'"<sup>132</sup> The President must be understood as a constitutionally mandatory nexus-point for energy, discretion, unity, singularity and responsibility.<sup>133</sup>

Thus, the president appears as the embodiment of the male principle.<sup>134</sup> The legislature and judiciary are not. These institutions represent the female principle.<sup>135</sup> Stability, nurture, standing rules, consensus and limitation of power serve as the constitutionally mandatory expression of the construction of an institutional and limited assertion of its form and content. Mansfield thus constructs a constitutional theory based on those binaries at the heart of gendered social ordering. Male/female, strong/weak, public/private, these are the parallels used to justify a division in which men dominate the state and women are relegated to civil society.<sup>136</sup>

<sup>129</sup> *Id.*

<sup>130</sup> See MANSFIELD, *supra* note 32, at 196-98.

<sup>131</sup> See Mansfield, *supra* note 9.

<sup>132</sup> *Id.* (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

<sup>133</sup> See *id.*

<sup>134</sup> See MANSFIELD, *supra* note 32, at 23-49 (exploring the notion of "manliness" in the context of gender-based stereotypes).

<sup>135</sup> See *id.*

<sup>136</sup> See Frances Olsen, *International Law: Feminist Critiques of the Public/Private Distinction*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 157, 164 (Dorinda G. Dallmeyer ed., 1993).

And here, Mansfield is able to begin to bring the analysis around to its conclusion—that secrecy is the sort of action that is most consonant with energy, and the responsibility, properly understood, of the executive.<sup>137</sup> Thus, Mansfield argues, “secrecy is compatible with responsibility because, when one person is responsible, it does not matter how he arrives at his decision.”<sup>138</sup> By implication, secrecy might be incompatible with law (and the rule-of-law)—with stability—a telling point—but not for Mansfield. Instead, that parallelism suggests the need for lawlessness in the executive rather than an absence of secrecy within government, considered as a whole.<sup>139</sup> Secrecy is incompatible with law, but perfectly compatible with responsibility bound up in the body of a single executive.<sup>140</sup> This practice, Mansfield suggests, is truer to American cultural practice than a more collegial and institutionalized decision-making process subsumed under the legislation rule-of-law model.<sup>141</sup> Thus, the attempt to bring secrecy under the law is the same, for Mansfield, as bringing the President under Congress and the Courts as a mere minister of enforcement of law. It is in this context that Mansfield would prefer surveillance and torture to be understood in the American constitutional context: the *rule-of-law* cannot apply when law does not apply—in those emergencies in which a President must assert a lawless, masculine, virile, protective, singular power.<sup>142</sup> “You have to do what you have to do” reminds Mansfield, quoting John McCain, on the issue of torture.<sup>143</sup> Surveillance reasserts a private/public distinction at the heart of gendered ordering of law and politics.<sup>144</sup>

There is thus a space within American constitutionalism, Mansfield argues, “when liberties are dangerous and law does not apply.”<sup>145</sup> Lawless-

<sup>137</sup> See Mansfield, *supra* note 9.

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

<sup>139</sup> For a discussion of the difficulties of surveillance in law, and the rise of lawmaking through surveillance, see Larry Catá Backer, *Global Panopticism: <States, Corporations, and the Governance Effects of Monitoring Regimes*, 15(1) *IND. J. GLOBAL LEGAL STUD.* 101 (2008).

<sup>140</sup> See Mansfield, *supra* note 9 (stating that “secrecy is necessary to government yet almost incompatible with the rule of law... [y]et secrecy is compatible with responsibility because, when one person is responsible, it does not matter how he arrives at his decision”).

<sup>141</sup> See *id.* (arguing that the Framers intended this “unity in one person” because it facilitates “decision, activity, secrecy, and dispatch”). For another reading of this gendering and the “civic virtues,” see generally MARK E. KANN, *ON THE MAN QUESTION: GENDER AND CIVIC VIRTUE IN AMERICA* (1991).

<sup>142</sup> See Mansfield, *supra* note 9 (arguing that “[O]ur Constitution, properly understood, shows that” there is a way to deal with necessity—not under the rule-of-law, but side-by-side with the rule-of-law); see also MANSFIELD, *supra* note 32, at 56 (“[M]anliness appears first not as a claim of authority but as the assertion of virtue against authority, an assertion always required because authority is always in the way of virtue. . .”).

<sup>143</sup> Mansfield, *supra* note 9.

<sup>144</sup> See MANSFIELD, *supra* note 23, at 61 (arguing that it takes a quality of manliness to cross the public/private lines that are drawn in our society); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *STAN. L. REV.* 1, 3-4 (1992).

<sup>145</sup> Mansfield, *supra* note 9.

ness of this sort is both moral and lawful, precisely because it rejects the weakness and stability of rule-of-law constitutionalism.<sup>146</sup> The higher law of the Constitution is said to solve this problem by making lawless actions lawful.<sup>147</sup> The male principle is thus embedded in the uniqueness of the Presidential office. And, in this way, Mansfield would undo two hundred years of American jurisprudence built in the blood of the colonists' English forbearers, who took down a Stuart king of England and Scotland to defend the primacy of law—organic, extra governmental—and binding on a monarch who would also assert the virile power of lawless activity.<sup>148</sup> This binding power once severed the neck of a King to the power of law.<sup>149</sup> Mansfield forgets that the American republic was built on that scaffold.

For Mansfield, then, a federal Constitution that is bound solely by rule-of-law constitutionalism, a constitution in which legislative and interpretive power appear to set the boundaries of executive action, is a constitution that is defective, and defectively male.<sup>150</sup> Rule-of-law constitutionalism is essentially defectively *male*, effeminate, and thus female.<sup>151</sup> This is to be despised, as Mary Anne Case reminds us, for two reasons: "The man who exhibits feminine qualities is doubly despised, for manifesting the disfavored qualities and for descending from his masculine gender privilege to do so."<sup>152</sup> The male principle<sup>153</sup>—energy, discretion, responsibility, singularity, and unity<sup>154</sup>—must serve to provide a space in which lawlessness is lawful. Mansfield thus builds on binaries, with significant gendered tones, to present a picture of an appropriately manly construction of the constitution. Still, consider the consequence for such a construction of American law: rule-of-law constitutionalism is female, and incomplete, without the

<sup>146</sup> See, e.g., MANSFIELD, *supra* note 32, at 61-62 (arguing that while "we don't want people to . . . cross [the] line . . . on subjects for which we have an established law . . ." manliness, through its assertiveness and reasoning, *can* effectively cross that line).

<sup>147</sup> See Mansfield, *supra* note 9 ("[W]e need both the rule of law and the power to escape it—and that twofold need is just what the Constitution provides for.").

<sup>148</sup> See generally KEVIN PHILLIPS, *THE COUSINS' WARS: RELIGION, POLITICS, AND THE TRIUMPH OF ANGLO-AMERICA* (2006) (discussing the issues, causes, and justifications behind the war, which involved issues of class, religion, and a drive for control of an unbounded power between Parliament and Crown).

<sup>149</sup> See *id.*

<sup>150</sup> See Mansfield, *supra* note 9 ("There will be conflict between discretion and the rule of law, each party aware of the other principle but more convinced by its own . . . [i]n combining law and discretion, the Framers of the Constitution made a deliberate departure from the sorry history of previous republics . . .").

<sup>151</sup> See MANSFIELD, *supra* note 32, at 64 (arguing that manliness is distinguished from feminine by its assertiveness and willingness to exercise reasoned power, outside the rule-of-law—"lacking as women are, comparatively, in aggression and assertiveness, it is no surprise that men have ruled over all societies at almost all times").

<sup>152</sup> Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 3 (1995).

<sup>153</sup> See generally MANSFIELD, *supra* note 32.

<sup>154</sup> See generally Mansfield, *supra* note 9.

male principle of governance—a certain lawlessness in the executive. That lawlessness is to be used against the enemies of the state, against which rule-of-law limitations do not apply.<sup>155</sup> In this constitutional order—surveillance, torture, military tribunals, military action without Congressional approval—all would follow the power of the President as Commander in Chief.<sup>156</sup> Extension of the rule-of-law to the executive reduces the President to something less than complete—in gendered terms, a defective male—and that would produce a parallel defect in the American constitutional legal order.<sup>157</sup> Because the Founders could not have intended the creation of an effeminate legal order, the President must be accorded extra-legal constitutional power.<sup>158</sup> Mansfield would label this “monarchical republicanism.”<sup>159</sup>

For all of that, Mansfield has not created a constitutional theory out of whole cloth. Instead, whether he knows it or not, he has drawn on a rich source of ancient constitutional theory that long predates the founding of the Republic. This constitutional theory, going back to Bracton in England, suggests a division between the lawmaking and executive function—that is, between *gubernaculum* and *jurisdictio*.<sup>160</sup>

Within the sphere of *gubernaculum*, the power of those who hold authority to act is absolute. That power could be expressed by action—the enforcement action of the state—and also by enactment of law, narrowly conceived. The narrowness of the conception is grounded in the fundamental distinction between enactments of an administrative character, and the power to define a legal right.<sup>161</sup>

The lawmaking function is essentially organic, customary, conservative, and communal, and not lightly disturbed. “I think it extremely dangerous to make any change in the law touching the constitution. . . . But to touch

<sup>155</sup> See *id.* (“[E]nemies, being extra-legal, need to be faced with extra-legal force.”).

<sup>156</sup> See John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1200-01 (2004) (arguing that there are multiple Constitutional bases for extra-legal presidential power: “[e]ven if the Constitution’s entrustment of the Commander in Chief power to the President did not bestow upon him the authority to make unilateral determinations regarding the disposition of captured enemies, the President would nevertheless enjoy such a power by virtue of the broad sweep of the Vesting Clause.”); see also Mansfield, *supra* note 9 (“[T]hus it is wrong to accuse President Bush of acting illegally in the surveillance of possible enemies, as if that were a crime and legality is all that matters”).

<sup>157</sup> Mansfield, *supra* note 9 (“[T]he rule of law is not enough to run a government . . . [i]n Machiavelli’s terms, ordinary power needs to be supplemented or corrected by the extraordinary power of a prince . . .”).

<sup>158</sup> See *id.* (“The Framers improved [the Constitution] when they strengthened the executive. They enabled the executive to act independently . . .”).

<sup>159</sup> See *id.* (comparing Presidents’ exercise of executive powers to that of a prince).

<sup>160</sup> See generally EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (Cornell Univ. Press, 1971) (1955).

<sup>161</sup> See Larry Catá Backer, *Reifying Law: Government, Law and the Rule of Law in Governance Systems*, 26 PENN ST. INT’L L. REV. 521, 527 (2008).

the laws of the constitution is as dangerous as to undermine the foundations, or remove the cornerstone on which the whole weight of the building rests."<sup>162</sup> Lawmaking is thus to be distinguished from the executive function of the executive—traditionally the monarch—whose principal obligation was to maintain the integrity of the state.<sup>163</sup> This division was the basis of Stuart absolutism<sup>164</sup>—an absolutism that appears to have survived the beheading of Charles I in 1649 and now reappears in its more pristine traditional form, in the guise of Mansfield's muscular, extra-legal, power-wielding executive.<sup>165</sup> This is not merely traditionalism, or even original understanding; this might well be a reactionary stance, even by the standards of the Founding generation.<sup>166</sup>

Yet, Mansfield's underlying gendered analysis causes an inversion of original doctrine and a perversion of traditional male ordering. Still, the ordering survives his analysis. That is because gendered action is still at the core of the value system at the foundation of the Republic.<sup>167</sup> Mansfield's essay<sup>168</sup> suggested the ironies inherent in his articulation of manliness,<sup>169</sup> through Presidential extra-legal muscularity. A great irony centers on Hamilton's poorly remembered justification for union as a means to protect rights and the rule-of-law, set out in Federalist No. 8.<sup>170</sup> Hamilton suggested that the United States, like Great Britain, can profit from union, because of its geographic position as a state insulated from constant warfare and the need to defend its territory.<sup>171</sup> In such a context, the rights of the people (and their resolve to protect these rights) would be strengthened, and their otherwise justifiable fear of a military state would be diminished.<sup>172</sup>

There is a wide difference, also, between military establishments in a country seldom exposed by its situation to internal invasions, and in one which is often subject to them and always apprehensive of them . .

<sup>162</sup> JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH*, 125 (M. J. Tooley trans., Basil Blackwell Oxford 1955) (1576).

<sup>163</sup> See CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 86 (rev. ed. 1947).

<sup>164</sup> See *id.*

<sup>165</sup> See Mansfield, *supra* note 9.

<sup>166</sup> See generally THE FEDERALIST NO. 70 (Alexander Hamilton) ("Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive and a numerous legislature. They have with great propriety, considered energy . . . as most applicable to power in a single hand, while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.").

<sup>167</sup> See MANSFIELD, *supra* note 32, at 58 ("Our democracy up to now, *has* been some kind of patriarchy, permeated by stubborn, self-insistent manliness.") (italics in original).

<sup>168</sup> See Mansfield, *supra* note 9.

<sup>169</sup> See generally MANSFIELD, *supra* note 32.

<sup>170</sup> See THE FEDERALIST NO. 8 (Alexander Hamilton).

<sup>171</sup> See *id.*

<sup>172</sup> See *id.*



. the perpetual menacings of danger oblige the government to be always prepared to repel it, her armies must be numerous enough for instant defence. The continual necessity for his services enhances the importance of the soldier, and proportionably degrades the condition of the citizen. The military state becomes elevated above the civil. The inhabitants of territories often the theatre of war, are unavoidably subjected to frequent infringements on their rights, which serve to weaken their sense of those rights; and by degrees, the people are brought to consider the soldiery not only as their protectors, but as their superiors. The transition from this disposition to that of considering them as masters, is neither remote nor difficult: but it is very difficult to prevail upon a people under such impressions, to make a bold or effectual resistance, to usurpations supported by the military power.<sup>173</sup>

Mansfield will take this insight and turn it on its head, suggesting a notion of rule-of-law as both effeminate and passive that was once, more appropriately, the province of more totalitarian ideologies.<sup>174</sup> But, even the focus on surveillance suggests inversion: the object of strong executive extra-legal power is surveillance in the protection of the state.<sup>175</sup> But surveillance itself was traditionally gendered female—the sort of thing gentlemen will not do.<sup>176</sup> But, surveillance appears to become male in the face of a greater failure of maleness—the resort to terror in lieu of traditional acts of war between equals. Terror is depicted as cowardly, sneaky, conspiratorial, dishonorable, uncontrolled and reactive—all of the attributes of the traditionally depicted defective male.<sup>177</sup> It follows that terror would itself likely be gendered female, causing a “cure” or at least a rehabilitation of surveillance.

Mansfield thus suggests that as the Presidential Power is gendered male, the President’s Constitutional powers extend beyond the mere execu-

<sup>173</sup> *Id.*

<sup>174</sup> See, e.g., MANSFIELD, *supra* note 32, at 18 (“[I]n our century . . . we have seen the epitome of manliness in fascism.”); See generally BENITO MUSSOLINI, *FUNDAMENTAL IDEAS* (Ion Munro trans., 1933) (1932), reprinted in *READINGS ON FASCISM AND NATIONAL SOCIALISM* (Alan Swallow ed., 2004), available at <http://www.gutenberg.org/files/14058/14058.txt>.

<sup>175</sup> See Mansfield, *supra* note 9.

<sup>176</sup> See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (suggesting that the invasion of privacy by the yellow press was ungentlemanly); see also MANSFIELD, *supra* note 32, at 49 (suggesting that, according to Kipling and Darwinians, females have a disregard for abstract justice in the form of dire necessity and ferocity).

<sup>177</sup> See generally Larry Catá Backer, *Constructing a ‘Homosexual’ for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996); see also MANSFIELD, *supra* note 32, at 49 (“[D]espite the deadliness of females and cowardice of men, for Kipling women can not win and the sex roles remain.”).

tion of the laws.<sup>178</sup> "Thus it is wrong to accuse President Bush of acting illegally in the surveillance of possible enemies, as if that were a crime and legality is all that matters."<sup>179</sup> If law is male, Mansfield suggests, then rule-of-law is defectively male (and thus subordinate as female)—passive, docile and risk averse.<sup>180</sup> He effectively suggests an Aristotelian political effeminacy<sup>181</sup>—and not as a source of strength. And by imposing and enforcing these differences, differences based on a need to distinguish male from female behavior—to distinguish more from less valued behavior—Mansfield's exercise in "manliness" is symptomatic of the more subtle, and corroding, subversive nature of the hierarchy of male gendering. Intra-sexual gender role hierarchies, based on a normative model of male role supremacy, continue to marginalize the normatively female, both within each sex and between the sexes. When this marginalization becomes the stuff of constitutional analysis, *caudillismo* cannot be too far behind.

#### IV. THERE IS NO LOSING FOR WINNING

This essay has suggested the ways in which Mansfield's efforts to reproduce an originalist and gendered constitutionalism produce, instead, an aggregation of inversions. These inversions draw on a number of original sources of American constitutionalism, but more importantly, on the gendered hierarchy of values and its expression as political doctrine. This essay engaged these efforts through a close reading of Mansfield's development of a constitutionally sanctioned proposal of a President with legitimate extra-legal authority. It suggested that Mansfield's reading of law and presidential power is couched not only in gendered terms but in irony as well—the disciplining of manliness through inversion is an odd thing indeed. There is both audacity and inversion in the understanding of the American Constitutional system Mansfield proposes. His reading is more consonant with Francis Bacon's understanding of Stewart absolutism within a customary law society,<sup>182</sup> than it is with popular constitutional understanding in the United States in the 21<sup>st</sup> century. On the other hand, to the extent that it does reflect an underlying valid, though currently unpopular, reading of the possibilities of American constitutionalism—if it is instead an early assertion of a coming reality—then it suggests a move to a conception of constitutional governance largely abandoned here for a long time. Perhaps

<sup>178</sup> See Mansfield, *supra* note 9 ("[Y]et the rule of law is not enough to run a government . . . In the Constitution executive power represents necessity . . . it anticipates what we cannot anticipate.").

<sup>179</sup> *Id.*

<sup>180</sup> See generally MANSFIELD, *supra* note 32 (suggesting that female is generally nonaggressive, docile, and risk averse).

<sup>181</sup> See generally ARISTOTLE, *supra* note 24 (asserting that the male, by nature, is to rule the female).

<sup>182</sup> See FRANCIS BACON, *Essay No. 56*, in *ESSAYS AND NEW ATLANTIS* 221 (1942) (1612).

Mansfield is right, the United States is moving towards a neo-medievalism in its political organization—which, it had been thought, the Founding generation sought to avoid.<sup>183</sup> A gendered analysis of this framework analysis helps expose both its character and consequences.

And yet, even if Mansfield's extra-legal constitutionalism is misplaced in historical context—and two hundred years of male dominated American jurisprudence suggests that it is<sup>184</sup>—the gendered legal order still survives intact. Theory merely reverts to the traditional binary which genders rule-of-law as male, and the domestic portion of the private sphere female, and thus extra-legal. Law is supposed to be rational, objective, abstract, and principled, like men; it is not supposed to be irrational, subjective or personalized, like women.<sup>185</sup> And, thus, is exposed the ultimate inversion of Mansfield's formulation of extra-legal constitutionalism—the idea of unregulated space; extra-legal space is traditionally gendered male, when in fact it forms, as feminist theory has long understood, the core of “unregulated space” gendered female (and *consciously* unregulated because it does not merit the attention of positivist state theory<sup>186</sup> or post-Dicey constitutionalist theory).<sup>187</sup>

Either way, the unitary executive theory, now in its current form almost a century old,<sup>188</sup> has assumed a more medieval caste in the hands of Harvey Mansfield. I have suggested that, like Francis Bacon before him, extolling the extra constitutional power of the Stuart Monarchs,<sup>189</sup> Harvey Mansfield serves well an executive seeking to distinguish the executive office, in form and in kind, from the more consensus based, domestic and inward looking branches of government. The implications, from the perspective of hierarchy and subordination, extend well beyond institutional theory.<sup>190</sup> Mansfield represents an urge to neo-medievalism that is becom-

<sup>183</sup> See generally Larry Catá Backer, *Reifying Law: Government, Law and the Rule of Law in Governance Systems*, 26 PENN ST. INT'L L. REV. 521 (2008).

<sup>184</sup> See Backer, *supra* note 2.

<sup>185</sup> See, e.g., Frances E. Olsen, *Feminism and Critical Legal Theory: An American Perspective*, 18 INT'L J. SOC'Y L. 199, 201 (1990).

<sup>186</sup> See generally JOHN AUSTIN, LECTURES ON JURISPRUDENCE: OR THE PHILOSOPHY OF POSITIVE LAW (Robert Campbell ed., Gaunt 1998) (1879).

<sup>187</sup> See generally A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (Liberty Classics 1982) (1915).

<sup>188</sup> See Calabresi & Rhodes, *supra* note 61.

<sup>189</sup> See BACON, *supra* note 34, at 221.

<sup>190</sup> See Jennifer C. Nash, *Bearing Witness To Ghosts: Notes On Theorizing Pornography, Race, And Law*, 21 WIS. WOMEN'S L.J. 47, 48 (2006) (“In the service of exposing the continued ‘seething presence’ of white dominance on the workings of feminist legal theory, it is critical to cast sustained theoretical attention to sites that feminists have analyzed as solely gendered.”). Jennifer Nash's insight, focusing on the intersections of gender and race, has an application in the construction of the apparatus of state, and theories of its legitimacy. I note, though, that the focus on whiteness in the context of state building is over-narrow. As I have sought to demonstrate, race may determine the form of patriarchal subordination, but does not suggest an absence of subordination. See generally Larry Catá Backer,

ing increasingly fashionable among those elements of the American elite who are no longer happy with the dominant Enlightenment foundationalism of the Republic.

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*Emasculated Men, Effeminate Law in the United States, Zimbabwe and Malaysia*, 17 YALE J.L. & FEMINISM 1 (2005). A richer analysis would focus on the ways in which race and gender conflate in different expressions of hierarchies, as one moves from the "germinal" context—white male dominated states, to those in which non-white, non-Christian, male elites have been constituted. Neither the urge to subordination, patriarchy, or gender hierarchies is a unique feature of whiteness, nor of the West; all are intertwined with the West in shifting and peculiar ways. See generally Maxine Baca Zinn & Bonnie Thornton Dill, *Theorizing Difference from Multiracial Feminism*, in FEMINIST THEORY READER: LOCAL AND GLOBAL PERSPECTIVES 353-59 (Carole R. McCann & Seung-Kyung Kim eds., 2003).