

# THEORIZING CLASS, GENDER, AND THE LAW: THREE APPROACHES

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## I

### INTRODUCTION

“Class” is a peculiar category in American life and law. Although Americans are no strangers to class struggle, and at various points in our history have participated in lively debates over economic rights and social citizenship (not to mention bloody labor struggles),<sup>1</sup> most people in the United States at present do not understand “class” as a crucial category either for personal identity or for political struggle.

Our legal system, moreover, helps to obscure class relations in the United States. Our eighteenth-century national constitution lacks economic or social rights. Americans perceive, instead, a bright line between the “public” world of rights and the “private” world of market arrangements. In terms of ideology, we have a split-level system of governance: democratic at one level, with state-backed commitments to equality and dignity, and capitalist at the other, with commitments to inequality and submission to the discipline of market forces.<sup>2</sup> Despite the harsh consequences of market rule, so obvious in this time of economic downturn, coercion is conventionally identified with the public sphere, whereas the world of the market—despite its stark inequalities—is understood to be “free.”<sup>3</sup> In the material world, as opposed to ideology,

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1. See generally William E. Forbath, *Caste, Class and Equal Citizenship*, 98 MICH. L. REV. 1 (1999) [hereinafter Forbath, *Caste, Class and Equal Citizenship*] (comparing and contrasting two constitutional traditions: a countermajoritarian tradition aimed at preventing racial subordination, and a majoritarian tradition favoring economic equality); William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697 (2000) (comparing the histories of the civil rights and labor movements in the United States); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001) (describing the New Deal vision of social citizenship).

2. Kermit Gordon, *Foreword* to ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF, at vii (1975).

3. For a Legal Realist critique of this ideology, see for example Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). For a more recent version, see ROBERT B. SEIDMAN, STATE, SOCIETY, AND CORPORATE POWER 17 (Marc R. Tool & Warren J. Samuels eds., 1989). For a historical excavation of this ideology, see Bernard E. Harcourt, *Neoliberal Penalty: The Birth of Natural Order, the Illusion of Free Markets* (John M. Olin Law & Econ. Working

however, governance at all levels in the United States is both state- and market-driven, to varying degrees. As the Legal Realists pointed out long ago, there is no such thing as a “free market” without the backstop of state coercion to enforce private promises.<sup>4</sup> And as contemporary administrative law scholars have noted, in the last few decades enthusiasm for pure “command and control” regulation by the state has declined, and governance of regulated industries has comprised a mixture of market mechanisms and state directives.<sup>5</sup>

The near absence of class as a folk category in the contemporary United States makes analysis tricky. Part of the work of theorizing gender and class is to tease out scholarly from popular uses of these terms. Our split-level governance system also contributes to the trickiness of class analysis: because we tend to speak of the economic and state spheres as distinct and opposed, tracing the intricate interconnections between them is difficult.

A third obstacle to analysis worth mentioning at the outset is that to the extent that class functions at all in popular life, it does so as an identity category as well as a category of structural analysis. The social theorist, then, must take care to distinguish class as it has functioned to give individuals and collectives a sense of identity from class as a structure of power within which people live, whether they recognize it or not.

A fourth tricky thing for the theorist of class is the fact that class, like race and gender, is simultaneously symbolic and material. For example, gender marks material differences between groups of people, as concepts like “the feminization of poverty” indicate. At the same time, gender is a powerful language that we use to represent relations, not only among persons, but also among ideas or practices.<sup>6</sup> In addition, the material and the symbolic uses of gender influence one another. At the symbolic level, for instance, we imagine women to be naturally better at caring for children than men, and this leads to a society where in fact women do the lion’s share of care work (but mostly outside the market, since child care is so “natural” for women).

Similarly, when using class as a tool of institutional analysis (as opposed to an individual or collective identity category), the theorist must be aware that class analysis comes with inherited cultural meanings. Even though class looks more “objective” than, say, race—because economic relations are based in material reality in a way that race relations arguably are not—economic relations, economic institutions, and class relations all come with sometimes-unrecognized symbolic systems, whether Marxist (the source of fantasies about the “proletariat” poised for revolution) or capitalist (the source of fantasies

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4. See Hale, *supra* note 3.

5. See Jody Freeman, *The Private Role in Public Governance* 75 N.Y.U. L. REV. 543, 546–47 (2000).

6. See JOAN WALLACH SCOTT, *GENDER AND THE POLITICS OF HISTORY* ix–xiii (1999).

about captains of industry, unfettered by the state, leading the way to riches for everyone without regard for ecological limits).

The symbolic meanings of these categories are, finally, loaded heavily with politics freight. Categories like male and female, black and white, rich and poor, acquire their meanings in an unequal and exploitative society; indeed, it could be argued that categories like “race” were invented precisely to justify exploitative social relations. Nevertheless, the politically loaded quality of these terms is obscured by a thick layer of justifying ideology. The work of justifying inequality is usually rooted in an underlying dichotomy in western thought: nature versus culture, or, as the anthropologist Levi-Strauss famously put it, between “the raw and the cooked.”<sup>7</sup> Gender and race, in particular, have been imagined to be immutable, natural traits of human beings, allowing us to imagine that the social practices we associate with “masculine” or “feminine,” or “civilized” or “savage,” simply are that way and cannot be changed.<sup>8</sup> An analysis of how gender and class are interrelated, then, must be sensitive to the dynamic production of rhetorical opposites—“binary oppositions,” as the Critical Legal Studies movement named them<sup>9</sup>—that serve to make existing social practices and relations seem natural, normal, and necessary.

With all of these difficulties in mind, I argue in this paper that we may explore the connections between gender and class along at least three distinct analytical paths (and probably more). The most familiar level of analysis is to take gender or class (or both) as identity categories. From a doctrinal perspective, employment discrimination law is one obvious place where issues of gender and class as aspects of personal identity frequently arise, as employees and employers struggle over the extent to which gender performances may be penalized—or demanded—in the workplace.

A second, somewhat less-familiar, analytical approach to the relationship between gender and class is rooted in the tradition of socialist or materialist feminism, and examines gender as a way of structuring and justifying economic practices and institutions. This structural analysis looks at the role of the “sex-gender system” in shaping what kinds of labor people perform, what labor

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7. CLAUDE LEVI-STRAUSS, *THE RAW AND THE COOKED: INTRODUCTION TO A SCIENCE OF MYTHOLOGY* 1 (1966).

8. Class, in contrast, would seem to be obviously the product of human making and therefore relatively less important in determining human social relations. Yet the impulse to suture social practices to “just-so” stories about human nature is visible in discussions of economic relations as well. As Chantal Thomas has observed, market forces are conventionally discussed as if they were nonhuman phenomena, like the weather. Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1451, 1479 (2000) (“Accounts of globalization tend to portray it as autonomous—a self-powered juggernaut whose appearance on the horizon has caught governments off-guard.”); see also Martha T. McCluskey, *How Equality Became Elitist: The Cultural Politics of Economics from the Court to the “Nanny Wars,”* 35 SETON HALL L. REV. 1291, 1295 (2005) (“The conventional wisdom assumes that questions of ‘economic efficiency’ (at least in theory) involve objective, scientific, universal principles conducive to national and international harmonization in the interest of all.”).

9. Peter C. Schnack, *Understanding Postmodern Thought and its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2530 (1992).

counts as work, and who does what sort of work. The most familiar path of inquiry along these lines is how the nineteenth-century ideology of family and gender—“domesticity”—continues to influence present-day economic relations.<sup>10</sup> Another avenue for the exploration of gender, class, and social structure is how questions of labor, work, and dependency shape public conceptions of citizenship.<sup>11</sup>

The third and least familiar path into theorizing the relationship between gender and class considers what I will call person-making.<sup>12</sup> Law, allied with what Michel Foucault called “disciplinary power,” not only grants people rights (or not). It also shapes who counts as a person and what kinds of experiences human bodies will have before being recognized as rights-bearing individuals. At the level of person-making, two places where state and market regulation of human bodies converge, marking the interaction of gender and class, are sex work and gender violence. Like racism, which Ruth Gilmore defines as “the state-sanctioned and/or extra-legal production and exploitation of group-differentiated vulnerabilities to premature death,”<sup>13</sup> at the level of person-making, gender and class together subject individuals to group-differentiated vulnerability to violence, injury, and premature death. Gender and class attributions also help determine to what extent humans will be recognized socially and legally as full and legitimate persons before the law.

These three perspectives correspond roughly with three familiar styles of feminist analysis: liberal feminism, socialist feminism, and dominance feminism. Because feminism begins with taking women and gender seriously, it is not surprising that feminism would be a great resource in understanding the relationship between gender and class. A thorough exploration of feminist theory is beyond the scope of this paper, but examining various strands of that theory can illuminate the analysis of gender, class, and law.

## II

### GENDER, CLASS, AND IDENTITY

Perhaps in part because of our constitutional history and the dominance of the Equal Protection Clause in defining and defending individual constitutional rights, United States antidiscrimination law is shaped by the politics of identity. Antidiscrimination law makes it unlawful to treat people differently based on certain ascribed social identities—notably, race and gender identities—without

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10. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 1 (2000); see also CATHERINE ALBISTON, *RIGHTS ON LEAVE: INSTITUTIONAL INEQUALITY, RIGHTS MOBILIZATION, AND THE FAMILY MEDICAL LEAVE ACT* (forthcoming 2010).

11. This is the aspect of citizenship Linda Bosniak associates with “identification and solidarity.” See Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 479 (2000).

12. For those interested in Foucauldian theory, Foucault’s concept of “subjection” corresponds roughly to what I mean by person-making. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 202–03 (Alan Sheridan trans., 1977).

13. Ruth Wilson Gilmore, *Race and Globalization*, in *GEOGRAPHIES OF GLOBAL CHANGE: REMAPPING THE WORLD* 261 (R.J. Johnston, Peter J. Taylor, & Michael J. Watts eds., 2d ed. 2002).

a very good reason. In social life outside the law, however, humans, both individually and collectively, treat identity categories as central to their life experiences and their very personhood.

Gender is perhaps the central identity category in many people's lives. And such is the respect the law has for gender identity that the Supreme Court requires only a medium level of scrutiny for legislative and regulatory actions that treat people differently according to gender. Nevertheless, state action that classifies people by gender must meet the constitutional test of serving an important government interest.<sup>14</sup> Things are quite different with respect to class, however. Neither in law nor in social life today is class considered an important part of American identity. It would be considered unusual to consciously discriminate in employment and education against poor people or rich people, for example. Nevertheless, Americans do recognize class as a social hierarchy.

In the folk language of the contemporary United States, class is a form of status relation,<sup>15</sup> and Americans most commonly use ideas about "taste" to define themselves and one another along class lines. Taste is evident in the things one has, or aspires to have, and having "good" taste or not displays to others where one is (or hopes to be) in the economic hierarchy.<sup>16</sup> Taste, therefore, has a lot to do with consumption. What you buy, or have, says a lot about where you are in the class hierarchy. Taste also has something to do with the way one speaks and acts, quite apart from the things one has. Popular culture, especially advertisements and television programs, is a powerful medium for shaping and transmitting class meanings through developing a national lexicon of "taste."<sup>17</sup> By watching television, we learn what kinds of things and behaviors represent "good" taste and which represent "bad" taste, and taste tracks social class. Everyone "knows" in the United States, for example, that people who live in mobile homes are likely to be loud, uneducated, and tacky. Television show hosts like Jerry Springer and Maury Povich specialize in putting "low class" people on stage, where they both horrify and fascinate people who consider themselves "above" that kind of appearance and behavior. In this way, an employer might indeed attempt to screen out potential employees who appear "low class."

How do gender and class play out as identities in the law? The state's role in regulating gender and class as identities is perhaps most visible in employment

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14. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 722 (1982); see also Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER SOC. POL'Y & L. 229, 241-42 (2009); David Fintz, *The Women's Right to Participate in the Game of Baseball*, 15 CARDOZO J.L. & GENDER 641, 652-53 (2009).

15. Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 800-02 (2003).

16. Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1155-56 (2008).

17. See generally JULIET B. SCHOR & DOUGLAS HOLT, *THE CONSUMER SOCIETY READER* (2000); see also JULIET B. SCHOR, *THE OVERSPENT AMERICAN: WHY WE WANT WHAT WE DON'T NEED* 3-24 (1998).

law. In the 1970s, gender began to be a protected category in antidiscrimination law, and employment practices have been greatly affected by this shift. Under Title VII of the Civil Rights Act of 1964,<sup>18</sup> for example, employers may no longer bar workers from certain jobs or condone their harassment by other employees simply because of their gender; to do so is “sex discrimination.”<sup>19</sup> Under the equal protection clause, government classifications based on gender are subject to being struck down as invalid unless the government can show that they serve an important state interest and do not simply reflect and reinforce popular stereotypes about men and women.<sup>20</sup>

“Class,” as we have rendered it here, has no such similar protection under American law. Employers are free to impose standards of appearance and conduct that are associated with middle-class rather than lower-class taste. In most situations, this would not even be considered “discrimination.” Everyone is expected to aspire to leave the lower and working classes and join the middle class in one’s possessions, appearance, and behavior. However, there are situations we can recognize where the concept of “class discrimination” does make sense—because class intertwines with region and race.

Class prejudice in the United States is entwined with race. The pejorative term “trailer trash,” or even more pointedly, “white trash,” is used to express contempt for lower-class white people, and is especially applied to poor white people from the South.<sup>21</sup> Anti-black prejudice overlaps substantially with class prejudice; when middle-class black people are praised by whites for being “articulate,” it reflects the prejudice that most black people are not capable of speaking in Standard English, and more broadly, are ignorant and uneducated, as poor people are presumed to be. In workplace relations, unspoken class prejudices may inform employer-imposed grooming standards, although these prejudices are not actionable unless they are played out in race or gender terms, or both.

Consider, for example, the case of *Hollins v. Atlantic Company, Inc.*<sup>22</sup> Hollins sued her employer under Title VII, alleging disparate treatment on the basis of race in applying the company’s personal grooming standards to Hollins’ hairstyle. Hollins wore “finger waves” to work, which she alleged were neat and well-groomed, but her employer said the style was too “eye-catching” and therefore inappropriate.<sup>23</sup> Hollins was told to seek approval of her hairstyles in advance by presenting her supervisor with pictures of the styles she wanted to

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18. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e-e-4 (2006)).

19. 42 U.S.C. at § e-2.

20. See *United States v. Virginia*, 518 U.S. 515, 532–33 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Orr v. Orr*, 440 U.S. 268, 278–79 (1979).

21. See MATT WRAY, *NOT QUITE WHITE: WHITE TRASH AND THE BOUNDARIES OF WHITENESS* 1 (2006).

22. *Hollins v. Atlantic Co.*, 188 F.3d 652 (6th Cir. 1999). I thank LaToya Franklyn for bringing this case to my attention.

23. *Id.* at 655.

try. Hollins continued to adopt new hairstyles that her employer deemed inappropriate, including a ponytail and braids. Hollins eventually filed a complaint with the Equal Employment Opportunity Commission and then filed suit in federal court. At the trial level, she lost on a motion for summary judgment, but on appeal before the Sixth Circuit, the court determined that a jury could reasonably infer that Atlantic's grooming policy was applied in a manner that was racially discriminatory.<sup>24</sup>

*Hollins* is visibly about race because Hollins was African American and the hairstyles she sought to adopt are associated with African Americans. But class also may have played a role in the conflict between Hollins and her employer. Finger waves, for example, are associated with a self-presentation that is derisively called by some in popular culture "ghetto fabulous;" like gold "grills" that cover one's teeth and extremely long and elaborately decorated fingernails, certain styles of braids and ponytails are associated with working-class or underclass black people. Employment discrimination in this context may in fact be "compound discrimination," simultaneously involving gender, race, and class. The class component, however, is submerged in the gender and race components, both in law and perhaps in popular understanding.

Gender and class, interacting with race, have shaped not only the fortunes of individual employees but the culture of entire workplaces. The history of sexual harassment of women attempting to integrate job categories such as firefighter, police officer, and construction worker can be read not just as a story of antipathy to women, but also as a story about the collective efforts of groups of men to protect a certain kind of class-driven masculine identity. Sociologists of gender identify two broad, masculine gender-classes: professional, upper-middle to upper-class men, who aspire to "manliness"—an identity based on raw intelligence and the triumph of reason over emotion (think the high-tech industry)—and working-class, non-professional men, who aspire to a conception of "masculinity," an identity based on superior bodily strength and a rude, crude, but down-to-earth, non-effete personality (think "Joe Six-Pack").<sup>25</sup> Both white-collar and blue-collar workplace cultures may be perceived by women as "boys' clubs," permeated with gendered behaviors. The presence of women in a workplace or job category that is socially understood to require masculinity or manliness threatens to disrupt the "homosocial" bonding that often stabilizes these boys' clubs, and may even threaten the gender identities of the male workers.

Antidiscrimination law has also recognized this kind of gender-class subordination, although once again the class component is submerged. The law

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24. *Id.*

25. Historically, "manliness" was associated with whiteness, and "masculinity" with blackness. For an examination of how "masculinity" emerged as a new form of manhood in the late nineteenth century, through discourses of race, class, and "civilization, see generally GAIL BEDERMAN, *MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880–1917* (1995).

of “hostile environment” sexual harassment protects women who are personally attacked and belittled in boys’ club working environments, when these attacks take the form of disparaging comments or unwanted sexual attention.<sup>26</sup>

Legal intervention from the perspective of gender as identity comprises the long-standing liberal feminist agenda: better, possibly state-subsidized, child care; tough enforcement of sex-discrimination laws; better workplace policies to support work–life balance, and a restructuring of social welfare policy to avoid the invidious distinctions between the “deserving” and the “undeserving” in favor of policies that support women and men at all class levels participating fully in both meaningful work and meaningful personal life.<sup>27</sup> This agenda might be of particular interest to working-class women needing jobs that pay a living wage and access to good-quality child care. But it is difficult to imagine an agenda for legal change based on a desire to protect lower-class culture or identity as such, because most Americans born in humble circumstances, though they may be proud of their original identity as “Jenny from the block,” are meanwhile also striving to collect the income, and the status markers of luxury and privilege, that spell wealth.<sup>28</sup> If we approach gender and class from an identity perspective, then, class is and perhaps ought to be subsumed within more legally and socially salient forms of discrimination.

### III

#### GENDER AND CLASS: A STRUCTURAL PERSPECTIVE

Socialist feminists have long argued that, quite apart from personal identity, the gender divide is central to economic relations of production, consumption, and exchange as we know them.<sup>29</sup> From this perspective, class is best analyzed not as “taste,” or a form of social status, but rather in Marxian terms as a system of exploitation.<sup>30</sup> Under traditional Marxian analysis, capitalism produces two

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26. Critics have charged, however, that the jurisprudence of Title VII focuses too much on workplace sexuality as the problem, rather than the exclusion of women. *See, e.g.*, L. Camille Hébert, *Sexual Harassment is Gender Harassment*, 43 U. KAN. L. REV. 565, 567 (1995); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1689 (1998).

27. *See, e.g.*, Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers’ Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029 (2004).

28. Feminist legal theorist Ruthann Robson quotes cultural critic John Guillory on this point. “For while it is easy enough to conceive of a self-affirmative racial or sexual identity, it makes very little sense to posit an affirmative lower-class identity, as such an identity would have to be grounded in the experience of deprivation per se. Acknowledging the existence of admirable and even heroic elements of working-class culture, the affirmation of lower-class identity is hardly compatible with a program for the abolition of want.” JOHN GUILLORY, *CULTURAL CAPITAL: THE PROBLEM OF LITERARY CANON FORMATION* 13 (1993), quoted in Ruthann Robson, *To Market, To Market; Considering Class in the Context of Lesbian Legal Theories and Reforms*, 5 S. CAL. REV. L. & WOMEN’S STUD. 173, 176 (1995). Robson, nevertheless, supports legal protection based solely on class identity.

29. Adrienne D. Davis, *Foreword: Straightening It Out: Joan Williams on Unbending Gender*, 49 AM. U.L. REV. 823, 849 (2000).

30. For a primer on the many different uses of the term “class,” including its functions within Marxist theory, see Erik Olin Wright, *Class*, *ENCYCLOPEDIA OF SOCIAL THEORY* (George Ritzer ed., 2004).

broad classes related by exploitation: those who own the means of economic production and thus are able to profit from the labor of workers (capitalists), and workers, who own only their own labor power and must sell it to capitalists in order to survive. A Marxist feminist might add that both capitalists and workers reap the benefits of the unpaid labor of women within the household. Capitalists benefit indirectly through access to a pool of “ideal workers” available full-time for their entire careers, undistracted by the demands of family life; workers benefit directly from their ability to outsource care work to women. In this way, “productive” labor is supported by “reproductive” labor—the labor involved in keeping workers fed, clothed, and otherwise cared-for; the labor of socializing and caring for children who are too young to work; and the labor of caring for the elderly who are too old to work.

For theorists who analyze gender and class from a structural perspective, then, the market cannot be understood apart from the family, and the family and the market together constitute a single economic system. In modern times, this economic system is justified and perpetuated by reference to a powerful story about gender. Under the ideology of “domesticity,” which was elaborately articulated in the United States in the late nineteenth century, men and women were to occupy different spheres of social life: men were to participate in the market as wage laborers, and women to be leaders in family relations, performing unpaid work both to reproduce the next generation and to care for the declining older generation.<sup>31</sup> This ideology, in turn, drew on gendered conceptions of national citizenship, under which civic obligations for men included the obligation to serve in the military and to pay taxes, and civic obligations for women were owed not to the state at all but to the head of the household.<sup>32</sup> The ideology of domesticity was a response to the changing nature of work in nineteenth-century America, as production moved into factories and away from individual households, white working men struggled to distinguish “wage slavery” from actual slavery, seeking a sense of pride and dignity in wage work.<sup>33</sup>

Economic activity, to make a long story short, is gendered, and it has fallen to feminist scholars and activists not only to seek to change the gender meanings of wage work but also to expand the definition of “work” itself to include unpaid work in the home.<sup>34</sup> This struggle is far from over. For example,

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31. Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI-KENT L. REV. 1441, 1457 (2001).

32. Linda K. Kerber, “A Constitutional Right to be Treated Like . . . Ladies”: Women, Civic Obligation, and Military Service, 1993 U. CHI. L. SCH. ROUNDTABLE 95, 96, 105 (1993).

33. See DAVID ROEDIGER, *THE WAGES OF WHITENESS* 66 (3d ed. 2007).

34. See generally MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Kathryn Abrams, *The Second Coming of Care*, 76 CHI.-KENT L. REV. 1605 (2001); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998); Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403 (2001); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005); Gillian Lester, *A Defense of*

contemporary welfare regulations continue to express popular understandings of fitness for full citizenship. When the federal programs we call “welfare” were instituted, payments were granted so that mothers without husbands could stay at home and care for their children. Today, mothers receiving TANF (Temporary Assistance for Needy Families) are expected to engage in wage work in order to be considered deserving of state economic support.<sup>35</sup> Wage work is the opposite of dependency in contemporary life, and to be considered dependent (as are children and people whose disabilities prevent full participation in the workforce) is to be unfit for full citizenship.<sup>36</sup>

Another result of the gendering of wage work is the male-derived norm of the “ideal worker.” As Joan Williams argues, most of the “good jobs” in the United States, whether they are white-collar or blue-collar, require forty hours or more of labor per week, regular face time in the workplace, and a career trajectory unbroken by time off to care for family.<sup>37</sup> As Noah Zatz puts it,

[T]he welfare state purports to follow a neutral principle of supporting productive workers and disclaims the notion that full citizenship is reserved for men and those who follow conventionally masculine life courses; it just so happens that those identified as workers are disproportionately men, thereby systematically leaving women marginalized and insecure.<sup>38</sup>

The result is that workers made vulnerable by gender expectations, such as mothers of small children, are under enormous pressure: they must both participate in full-time wage work and perform to the gender standard that women should be the primary caretakers of children and the elderly within the family.<sup>39</sup> Income and wealth, however, influence how individual mothers perceive and are able to respond to these pressures. Mothers closer to the top of the income and wealth pyramid have the choice to cease wage work and devote

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*Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005); Gillian Lester, *Unemployment Insurance and Wealth Distribution*, 49 UCLA L. REV. 335 (2001); Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 60–61; Dorothy E. Roberts, *The Value of Black Mothers’ Work*, 26 CONN. L. REV. 871 (1994); Schultz, *supra* note 27; Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880*, 103 YALE L.J. 1073 (1994); Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996); Williams, *supra* note 31; Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994); Noah D. Zatz, *What Welfare Requires From Work*, 54 UCLA L. REV. 373 (2006).

35. See Catherine J. Ross & Naomi R. Cahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 8 AM. U.J. GENDER SOC. POL’Y & L. 55, 65–66 (2000); see also Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673, 1674–75 (2001) (discussing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996).

36. See Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 309 (1994).

37. See WILLIAMS, *supra* note 10, at 1.

38. Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 957 (2008).

39. Men as well are placed under pressure to perform as “ideal workers,” and risk loss of masculine status as well as financial security if they take advantage of family leave. See generally ALBISTON, *supra* note 10.

themselves exclusively to family work, or to outsource the menial aspects of their care work to lower-class, especially immigrant, women.<sup>40</sup> Toward the bottom of the income and wealth pyramid, mothers have far fewer good choices, and may find themselves compromising both their family and their wage work responsibilities in an effort to do it all.<sup>41</sup>

Domesticity lingers as a cultural ideal: submission to economic discipline at work plus “family values” at home equals full social citizenship. From this perspective, what Libby Adler identifies as “the gay agenda”—the drive for same-sex marriage that has dominated gay–lesbian organizing in the past decade<sup>42</sup>—can be seen as a bid by queer people for social citizenship. Adler and others argue that the campaign for same-sex marriage has been waged in deeply assimilationist ways, assimilationist not only in the “normalization” of what it means to be queer (those not in line for marriage licenses are currently marginalized) but in its acceptance of the ideology of social citizenship under domesticity: full-time wage work in the public sphere, marriage and family in the private.<sup>43</sup>

Despite the continuing cultural appeal of the family-market, public-private split, however, domesticity no longer accurately describes the American work force. Increasing economic pressures on American households, including stagnant or falling real wages and rising health care costs, and the effects of the feminist movement for gender equality in law, policy, and society have made it untenable and, for many, undesirable for most households to compose themselves of one male, full-time wage worker plus one female, full-time homemaker, accompanied by their child dependents. It is women, however, who have borne the brunt of the move away from domesticity. The shortfalls in care of children and the elderly that are the result of women moving into the work force are popularly understood as the fault of women collectively, and the responsibility of individual women. Facing the contemporary gender expectation that women should “have it all”—that they should perform flawlessly as ideal workers in the workplace while simultaneously devoting themselves selflessly to motherhood—women, especially mothers, find themselves judging one another’s choices. Commentators, meanwhile, blame feminism for the ever-constricting vise in which the neoliberal state is squeezing

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40. Glenda Labadie-Jackson, *Reflections on Domestic Work and the Feminization of Migration*, 31 CAMPBELL L. REV. 67, 70 (2008); Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 55–56 (1997); see also Mary Romero, *Nanny Diaries and Other Stories: Imagining Immigrant Women’s Labor in the Social Reproduction of American Families*, 52 DEPAUL L. REV. 809 (2003); Donna E. Young, *Working Across Borders: Global Restructuring and Women’s Work*, 2001 UTAH L. REV. 1 (2001).

41. See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1649–50 (2005).

42. See generally Libby Adler, *The Gay Agenda* (Northeastern Pub. Law and Theory Faculty Working Papers Series No. 25-2008), available at <http://ssrn.com/abstract=1268303>.

43. For a similar argument, see Rosemary Hennessy, *Queer Theory, Left Politics*, in MARXISM BEYOND MARXISM 214 (Saree Makdisi, Cesare Casarino, & Rebecca E. Karl eds., 1996).

the family sector.<sup>44</sup> The virtue of seeing gender as an integral part of political economy is the recognition that this is not a problem that either individuals or reformist social policy can solve.

What would legal and political reform look like in a structural analysis of gender and class? To begin with, socialist feminists have long criticized the public–private dichotomy in law and society, which is frequently used to stabilize the opposition of market and family and the opposition of both to the state. In her foundational article, *The Family and the Market*, Frances Olsen examined the intricate interlocking rhetorical structures by which “the market,” “the family,” and “the state” are figured as public or as private: the family is consistently considered private, the state, public, but the market can be portrayed as either depending on which other sphere it is being opposed to.<sup>45</sup> The falsity in this rhetorical structure, as has been pointed out by critical legal scholars since the Legal Realism movement of the 1920s, is that no dichotomy between public and private exists: the state, the market, and the family are each a complex network of institutions and practices governed by both state and nonstate forms of power.

The “private” family, for instance is shaped by mandates that emanate from the state as well as from our culture. Marjorie Shultz observes,

Although paeans to the family have typically emphasized its sanctity and “privacy,” much of legal tradition and commentary has assumed that the family should be publicly regulated. Conventional morality espoused unequivocal “right” answers regarding family matters, and the law encoded them as status relations. For most of America’s legal history, family law has imposed those status prescriptions on individuals’ intimate lives (e.g., gendered sex roles in marriage, criteria and consequences of illegitimacy of children). The post-sixties decades brought a loosening of family law’s traditional directives, but a resurgent demand for legal enforcement of “family values” has recently emerged. Evidently, many citizens still prefer a mandatory and normative family policy.<sup>46</sup>

Legal theorists have performed similar deconstructions on the private market: market relations are always laced through with state regulation, direct and indirect.<sup>47</sup> Even the public state relies as much on private social norms and agreements as on the threat of organized force.<sup>48</sup>

44. See generally JACOB HACKER, *THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM* (2008); ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP* (2003); WILLIAMS, *supra* note 10; Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89 (1998) (discussing the challenges confronting women attempting to work full-time).

45. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501 (1983).

46. Marjorie Maguire Shultz, *Legislative Regulation of Surrogacy and Reproductive Technology*, 28 U.S.F. L. REV. 613, 615–16 (1994).

47. See, e.g., Hale, *supra* note 3, at 471–75.

48. The regime of “American apartheid,” for instance, both under de jure and de facto segregation involved private threats of violence as well as state exclusions and punishments in order to secure racial hierarchy; the same is true of the status regime of coverture. Even contemporary public functions are, particularly in the present era of neoliberalism, often contracted to private organizations and institutions. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000)

At the symbolic level, as critical scholars have noticed, the public–private split, entangled as it is with the gender-making domesticity system that has marked out family, work, and market as separate spheres, has infused spheres of legal analysis and regimes of governance themselves with gendered meanings, creating hierarchies of value. Shultz, for example, notes that the laws and forms of governance associated with commercial law are treated, even within legal scholarship, teaching, and analysis, as more important than those associated with family law.<sup>49</sup> Judith Resnik contends that “[i]n the subject areas of procedure and federal courts, if one wants to say that something is unimportant, a stock phrase (if one chooses to use it) is available—that something is just ‘a housekeeping rule.’”<sup>50</sup> Catharine MacKinnon observes a similar hierarchy between public and private realms in the Supreme Court’s decision that the civil-rights provisions of the Violence Against Women Act went beyond the power of Congress to enforce,<sup>51</sup> crossing the boundary between “gender relations” and “commerce.”<sup>52</sup> As several other scholars have noted, female legal scholars are still being advised to stay away from “women’s issues,” as those are considered trivial compared with the rigorous and demanding study of, for example, corporate law.<sup>53</sup>

If we are to employ a structural analysis of gender and class, therefore, the first step is to drop the misleading designations of public and private, and examine how all spheres—family, market, and state—must be reconstructed in order to permit a better balance between individual autonomy and collective interdependence. Joan Williams’ “reconstructive feminism” proposes to do this by eliminating the “ideal worker” norm in both the workplace and in family

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(discussing the problems of delegating administrative functions to private organizations); Ian Ayres & Frederick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577 (1998) (describing the interconnection between government and market).

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The treatment of families as “special” establishes an intimate terrain that is “lawless” in the sense that ordinary rules of law do not apply. At the same time, that intimate terrain—described as uniquely private—is suffused with public moral judgment conveyed through the mechanisms of the law. The curricular pattern reinforces gendered spheres of influence in which family is less important, legally speaking, than commerce. By separating family issues from doctrinal areas like contracts, this pattern also obscures prevailing but problematic legal judgments about matters such as whether promise-based expectations are important in intimate relations, or what constitutes an appropriate balance of public and private norm-setting in each of these domains.

Marjorie Maguire Shultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55, 60–61 (1991).

50. Judith Resnik, *Visible on “Women’s Issues,”* 77 IOWA L. REV. 41, 50 (1992) [*hereinafter* Resnik, *Visible*]; Judith Resnik, *Housekeeping: The Nature and Allocation of Work in the Federal Trial Courts*, 24 GA. L. REV. 909, 914 (1990).

51. *United States v. Morrison*, 529 U.S. 598 (2000).

52. See Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 146–52 (2001); see also Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 654–55 (2002) (criticizing the Court’s assumption that family law is not a national or international matter).

53. Resnik, *Visible on “Women’s Issues,”* *supra* note 50, at 41–42.

law, and reconstructing market work so that persons of all genders and family structures will be able to better balance workplace and family.<sup>54</sup> Linda McClain, working from another direction, seeks to bring state governance further into family relations by explicitly recognizing the civic functions of parenthood.<sup>55</sup> Barbara Woodhouse, from still another direction, identifies the toxic social environment that contemporary capitalism generates as one of the greatest harms to children and child-rearing and, following the model of environmentalism, wishes to tame the market in order to free the family.<sup>56</sup> Martha Fineman seeks to inject state policy with an awareness of human vulnerability.<sup>57</sup> And a collaboration of lesbian, gay, bisexual, and transgender (LGBT) activists and allies, in a document called “Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships,” proposes that state economic support for family relations should no longer be channeled through marriage, but that the state should recognize the variety of different structures of intimate life being generated in civil society.<sup>58</sup>

Another entry point for structural critique of gender and class for legal theorists is international and comparative work that pushes for the United States to recognize social and economic rights recognized elsewhere in the world. Feminist activists and policymakers have long pointed to work and family policies of other countries in order to motivate change in the United States.<sup>59</sup> Some activists advocate using international human rights law, or the example of nations that recognize social and economic rights as fundamental, to foment a social movement in the United States to reconstruct regimes of governance in order to disrupt the class exploitation of workers in the gendered spheres of both market and family.<sup>60</sup>

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54. See generally WILLIAMS, *supra* note 10.

55. LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 85–114 (2006).

56. See Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL’Y & L. 409 (2005).

57. See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2009).

58. KATHERINE ACEY ET AL., *BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES & RELATIONSHIPS* (July 26, 2006), [www.beyondmarriage.org/BeyondMarriage.pdf](http://www.beyondmarriage.org/BeyondMarriage.pdf); see also NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008) (arguing that state-granted legal and financial benefits should be extended to nontraditional families and not contingent on legal marriage). This work draws on Martha Albertson Fineman’s earlier work. See *supra* note 57.

59. See, e.g., Jennifer Seidman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211, 237 (2004); see also generally *FOSTERING KINSHIP: AN INTERNATIONAL PERSPECTIVE ON KINSHIP FOSTER CARE* (Roger Greeff ed., 1999).

60. See, e.g., Dina Bogecho, *Putting It to Good Use: The International Covenant on Civil and Political Rights and Women’s Right to Reproductive Health*, 13 S. CAL. REV. L. & WOMEN’S STUD. 229 (2004) (discussing the link between human-rights efforts and improvements in women’s reproductive health); Bernardine Dohrn, *“I’ll Try Anything Once”: Using the Conceptual Framework of Children’s Human Rights Norms in the United States*, 41 U. MICH. J.L. REFORM 29 (2007) (advocating the adoption of a human-rights-based approach to “court-involved” children); Yakaré-Oulé Jansen, *The Right to Freely Have Sex?: Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40

One of the principal obstacles to movement in this direction has been the political impossibility of challenging capitalism, as we know it, in the wake of the Cold War. As global environmental concerns become increasingly urgent, however, radically reshaping relations of production, consumption, and exchange may suddenly be possible.<sup>61</sup> If this becomes the case, gender analyses of economic relations are essential to making changes that will be just.

From the perspective of structural analysis, then, family and market relations rather than “gender” or “class” per se are the targets of reform.

#### IV

#### CLASS, GENDER, AND PERSONHOOD

Probably the least familiar aspect of the relationship between gender and class (to legal scholars) is how economic practices and institutions converge with the gender system to diminish the personhood of certain individuals and groups and leave them vulnerable to what Iris Marion Young calls the “five faces of oppression”: economic exploitation, marginalization, powerlessness, cultural imperialism, and violence.<sup>62</sup> In this analysis we return to individuals and groups rather than social structures and practices, but rather than being concerned with discrimination—treating some groups differently than other groups—we are concerned with how the gender system and economic system together stigmatize some people as deserving of less respect than others, on the symbolic level, and make them vulnerable to physical and mental abuse, at the material level.

Dominance feminism recognized long ago that under our contemporary gender system, women are not treated as full persons; men are the measure of the human, and women are treated as less than men along all axes deemed important.<sup>63</sup> The dominance feminists argued that liberal reforms to get women equal treatment with men miss the point: if maleness is built on the denigration of the female, feminists should not try to be equal to men, but rather should tear down the very edifice of gender, which rests on a foundation of woman-hating. Postmodern feminists, inspired by the work of Michel Foucault,

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AKRON L. REV. 311 (2007) (examining the nexus between human rights and sexual and reproductive rights, particularly as concerns women); Catharine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and “Personal Laws,”* 4 INT’L J. CONST. L. 181 (2006) (discussing the Indian approach to resolving problems of women’s rights); Oliver Phillips, *A Brief Introduction to the Relationship Between Sexuality and Rights*, 33 GA. J. INT’L & COMP. L. 451, 464 (2005) (discussing resistance to the expansion of sexual rights to lesbians); Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*, 39 VAND. J. TRANSNAT’L L. 1551 (2006) (discussing the interaction among international family law, globalization, and human rights).

61. Some examples are the conferences and gatherings in the United States and elsewhere to discuss what a “solidarity economy” might look like. See generally <http://www.solidarityeconomy.net/> (compiling articles discussing and calling for social change).

62. Iris Marion Young, *Five Faces of Oppression*, in READINGS FOR DIVERSITY AND SOCIAL JUSTICE 35 (Maurianne Adams, ed., 2000).

63. CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 36 (1987).

developed a more general theory of “subjection,” arguing that even before we reach the question of whether this group or that should be given “equal” rights, we have to look at the networks of power in which selves—or “subjects”—are recognized in the first place.<sup>64</sup> Systems of subordination, in producing collective identities like “male,” “black,” or “handicapped,” produce some identities that are considered deserving of less respect than others. As in MacKinnon’s work, the argument is that we should look at the process by which this happens rather than only criticize the result.

The understanding of “class” that is most helpful from this perspective is neither identitarian nor Marxist. Rather, it is useful to begin with capitalism’s great power, which from a moral standpoint is also its fatal flaw: its ability to turn all entities, including human beings, into objects—commodities—for others’ profit. The Atlantic slavery trade is the most obvious example of what this perspective on human relations can produce. Though state regulation during slavery in the United States never ceded complete power over slaves to the market, the treatment of humans as chattels made possible new levels of economic profit and wealth creation, as well as new sorts of human cruelty and misery.<sup>65</sup> Capitalism’s ability to turn all entities, living or not, into commodities is conventionally checked by state power, which through law draws a line between “the state” and “the market” and endows humans with inviolable rights.<sup>66</sup> Yet the interaction of capitalism with systems of social subordination like gender and race means that groups not accorded full personhood are particularly vulnerable to exploitation, marginalization, powerlessness, and violence in both state and non-state arenas.

The overlapping issues of human trafficking, modern-day slavery, and the sex industry provide an example. Although human slavery is no longer facilitated by American law—indeed, slavery is now constitutionally prohibited—economic incentives ensure that extreme forms of exploitation continue to flourish, in the United States and elsewhere.<sup>67</sup> When slavery interacts with gender domination, the result is that slave labor, like labor in the formal market, becomes gendered: women and children, lacking relative power under the gender system, are most likely to be the commodities trafficked, and men most likely to be the consumers. The convergence of capitalism and the gender system produces the contemporary sex industry, in which human interactions customarily left to the “private,” family sphere occur in the market sphere. There is a raging debate among feminists about whether sex work is inherently unjust and degrading to women and children, or whether there are

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64. See MICHEL FOUCAULT, *THE SUBJECT AND POWER*, 8 *CRITICAL INQUIRY* 777 (1982) (describing “subjectivation”).

65. See KEVIN BALES, *NEW SLAVERY* 8–9 (2004) (distinguishing between customary forms of slavery in which the slaveholders are given certain kinds of obligations to their slaves, and more modern forms of contract-based slavery, in which there is no regard for the humanity of the slave at all).

66. See EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE* 73 (2005).

67. See generally BALES, *supra* note 64.

some forms of sex work which are no different from any other kind of labor under capitalism.<sup>68</sup> We need not take sides in this argument, however, to recognize that at least in some niches of the sex industry, human rights go so unrecognized, or are so little enforced, that the exploited parties are left vulnerable to the complete dehumanization of which capitalism is capable.<sup>69</sup>

Another example of how capitalism and gender converge in ways that produce injustice at the level of subjection has to do with economic marginalization and the social powerlessness it produces. As Dean Spade observes,

Trans people are disproportionately poor because of employment discrimination, family rejection, [and] troubles accessing school, medical care, and social services. These factors increase our rates of participation in criminalized work to survive, and that, combined with the profiling engaged in by police, produces high levels of criminalization. Once imprisoned, trans people face high levels of harassment and violence in both men's and women's facilities. Violence against trans women in men's prisons is consistently reported by prisoners themselves as well as researchers.<sup>70</sup>

Trans people do not only have limited access to employment because of employment discrimination; they also, because of the lack of recognized social and economic rights in the United States, cannot get access to the medical care that allows them to live safe and dignified lives without a certain income level. With respect to the state, trans people are frequently not treated as legitimate legal persons to begin with. Identity documentation, crucial to the receipt of human services and state benefits, as well as employment, commonly requires an official gender designation. Trans people, whose gender identities vary from the gender identity imposed on them at birth, find themselves subject to hundreds of informal and formal policies at the federal, state, and local levels concerning gender reclassification.<sup>71</sup> As Spade points out, these policies are often unclear and often conflicting, adding to the economic marginalization of trans people. As Spade further observes, one end point for economically marginalized people is the criminal justice system, the final repository of the powerless. A prison record, of course, makes subsequent employment vastly less likely, ensuring a life on the economic margins. And prison itself is

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68. See Berta E. Hernández-Truyol & Jane E. Larson, *Sexual Labor and Human Rights*, 37 COLUM. HUM. RTS. L. REV. 391 (2006) (arguing that sex work is similar to other labor).

69. Thus, for example, the widespread refusal of the state to recognize and regulate prostitution in the United States leaves the most impoverished sex workers vulnerable not only to labor exploitation but extreme physical and emotional abuse. *Id.* at 395. Margaret Baldwin argues that prostitutes suffer not only from degrading and dangerous work conditions, but that they are dehumanized: to be a prostitute is not to be recognized as worthy of the respect due other human beings. See Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 81 (1992) (“[L]egal regulation of sexual violence and sex discrimination at bottom always functions as some form of judicial review of a man's conclusion that a complaining woman was, in fact, a whore, and therefore a permissible target of misogynist rage, contempt, and sexual use.”).

70. Dean Spade, *Keynote Address: Trans Law and Politics on a Neoliberal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 353, 358 (2009).

71. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 733–34 (2008).

characterized by high levels of violence, including sexual violence.<sup>72</sup> Thus poverty, crime, and criminal justice feed on one another to place trans people at society's margins. And like prostitutes, trans people are vulnerable to "private" violence based on the public perception that they are not entitled to the same human dignity and respect as others.

A theoretical perspective that examines the convergence of gender and class with respect to person-making points to the potential for importation into social and psychic relations of capitalist dehumanization, the "thingification" of one's self or aspects of one's self—such as one's sexuality—that are taken to be central to human dignity.<sup>73</sup> The interaction of gender hierarchy and capitalist relations makes it possible for people to view themselves and one another as commodities, objects, with value conferred by the marketplace, rather than subjects of desire.<sup>74</sup> Indeed, perhaps both the gender system we have and capitalism demand dehumanization. Margaret Baldwin argues that the process of subjection as a female subject demands the abjection of the prostitute,<sup>75</sup> and it might also be argued that the process of subjection as an economic citizen demands the abjection of the homeless. Social abjection combined with capitalist commodification makes the violation of the Kantian ethic,<sup>76</sup> and violence against human bodies and spirits, eminently possible.

What kinds of legal reforms make sense from this perspective? Strengthening the "human rights" of those most vulnerable to economic exploitation—for example, more effective enforcement of anti-trafficking laws and more humane regulation of prostitution constitute possible areas of public reform.<sup>77</sup> The implementation of currently nonexistent economic and social rights would lessen the vulnerability of humans to the abuses of commodification. Finally, some theorists have attempted to locate concern for human dignity within the "private" law of contract itself.<sup>78</sup> This project could do for U.S. law what the South African constitution does for South African law: make equality rights "horizontal" rights that pervade the private as well as the public sphere.<sup>79</sup> From a personhood perspective, then, law's task is to thwart the

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72. Spade, *supra* note 70, at 358.

73. See generally MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

74. *Id.* at 2.

75. See generally Baldwin, *supra* note 69.

76. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1898 (1987).

77. See, e.g., Margaret A. Baldwin, "A Million Dollars and an Apology": *Prostitution and Public Benefits Claims*, 10 HASTINGS WOMEN'S L.J. 189, 223–24 (1999) (calling for coverage of prostituted women under state benefits programs); see also generally Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking*, 29 HARV. J.L. & GENDER 335 (2006) (discussing legal approaches to exploitation of women in various countries).

78. See, e.g., Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1026 (2003) ("The use of racial prejudice in the contracting process should provide a good faith cause of action for at-will employees.").

79. T. W. Bennett, *Re-introducing African Customary Law to the South African Legal System*, 57 AM. J. COMP. L. 1, 17 (2009).

social, political and economic dynamics by which some humans become nonpersons.

## V

### CONCLUSION

Writing this paper has felt strangely “old-school.” Perhaps that is appropriate. Now that nostalgia for the 1980s is in full bloom, why not don my leg warmers, put Boy George on the record player,<sup>80</sup> and ponder grand theories of gender and class? Perhaps, however, it is also appropriate in these final paragraphs to consider why and how the activity of abstractly theorizing the relationship of gender and class feels so old-school in the first decade of the twenty-first century.

It surely is not that theory, gender, or class has disappeared. Contrary to the deepest hopes of generations of revolutionaries, neither gender nor class has withered away; and contrary to the wishes of countless generations of anti-intellectuals, theorizing is not going anywhere either. But post-modernity has caught up with us, intellectually and socially. We need not Google “Third World Feminism” or “Jacques Derrida” to recognize that gender is like Orion or the Big Dipper: real yet at the same time a pattern wholly dependent on one’s standpoint. It is a constellation that can never be fully disentangled from race, class, nation, disability, sexuality, or myriad other factors. And as the beginning of this paper suggests, class as a concept has been in this sort of crisis for even longer than gender, which held together for a shining moment in the late 1970s and early 1980s as the cultural superstructure of “sex.” (And then “sex,” supposedly biological and hence “natural,” unitary, and immutable, began to crumble, and the queers broke away from feminism to make their own thing, which oscillates uneasily between assimilationism and nearly pure anti-essentialism.)<sup>81</sup> The recognition that a Theory of Everything, a thread that when pulled would unravel the entire tapestry of subordination, was not forthcoming also seeped into political activism. There are no all-encompassing grassroots social movements now comparable to the heydays of the International Workers of the World or Women’s Liberation.

There are, instead, both in theorizing and in practice (hopefully we have kept from the 1980s the recognition that the two are never separate), the

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80. I was recently roundly mocked by my ten-year-old daughter for referring to a collection of songs released at the same time by an artist as a “record.” (She inquired whether back in the 80s after listening to our “records” my friends and I then would get in our cars and foot-pedal them away, as in *The Flintstones*.)

81. For a history of the uses of “gender” in feminist theorizing, see Joan Wallach Scott, *Gender As a Useful Category of Historical Analysis*, in *CULTURE, SOCIETY, AND SEXUALITY: A READER* 57 (Richard Parker & Peter Aggleton eds. 1999); see also Donna Haraway, “Gender” for a Marxist Dictionary: *The Sexual Politics of a Word*, in *CULTURE, SOCIETY, AND SEXUALITY: A READER* 76 (Richard Parker & Peter Aggleton eds. 1999). For a thoughtful analysis of the uneasy relationship between feminist and queer theories, see generally Judith Butler, *Against Proper Objects*, in *FEMINISM MEETS QUEER THEORY 1* (Elizabeth Weed & Naomi Schor eds., 1997).

ambition to keep our categories provisional and our alliances always open to change. If gender, class, and the rest are interconnected (not interchangeable), theorizing these concepts is a pragmatic enterprise—directed not toward discovering a fixed truth but finding a useful tool in the present moment. For that reason, my old-school exercise immediately became a garden of forking paths: an exercise in identifying possible maps, scaled for different uses. Identity-based, structural, dominance analyses of gender and class—all provisional and dispensable, none the key to anything else, but all paths that may facilitate theorizing in the present moment. Identifying and distinguishing the paths has been my purpose, and perhaps this modest and pragmatic aim perfectly suits the present day.