

# Buffalo Law Review

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Volume 56  
Number 4 *Essay Collection: Classcrits*

Article 3

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12-1-2008

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### Recommended Citation

Laura T. Kessler, *Getting Class*, 56 Buff. L. Rev. 915 (2008).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol56/iss4/3>

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# Getting Class

LAURA T. KESSLER†

Gender-based economic inequality has been a longstanding concern of feminist legal theory, particularly as it affects middle-class women. Yet much legal feminist literature remains uninterested in class analysis. The reasons are rooted in law as much as in feminism: Legal scholars are drawn from a relatively narrow demographic group; reaching beyond our own perspective is often difficult. American constitutionalism addresses economic inequality weakly and indirectly.<sup>1</sup> As scholars and lawyers working in this system, the tools for the job are often unavailable. Neoliberalism and other poststructuralist theories in law often render class analyses passé, perhaps even dangerous in the tenure process. Finally, feminism has its own complicated relationship with structuralism. Most basically, feminism rejects the idea that mainstream economic relations are the root of all social relations.<sup>2</sup> This rejection is especially strong in American legal feminism.<sup>3</sup> How, then, can a focus on class build on and add to feminist legal theory projects? This Essay is intended to initiate a conversation around that question, more than to provide fully formed theories, strategies, or answers.

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1. See CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS 4-5, 105-08 (2004); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. FEMINISM 1, 3-4 (2008).

2. See Iris M. Young, *Socialist Feminism and the Limits of Dual Systems Theory*, SOCIALIST REV., Mar.-June 1980, at 169, 169-88.

3. See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 516 (1982).

I come to the ClassCrits project as someone interested in the devaluation of domestic labor within the law, one of the central means by which gender-based economic inequality is perpetuated. Although a significant body of legal feminist work addresses this problem, certain legal feminist theories and strategies can be fairly critiqued for not taking class differences seriously enough. By placing economically privileged, white, heterosexual women at the center of the analysis, such theories and strategies discount the experiences of many women and men. The first part of this Essay briefly provides some examples of this failing. The second part explores five possible strategies for overcoming insufficient attention to class in legal feminism, taking an intersectional approach. I choose my examples from employment discrimination and family law, but the analysis may well apply to other areas.

#### I. EXAMPLES OF INSUFFICIENT ATTENTION TO CLASS WITHIN LEGAL FEMINIST PROJECTS ON THE WORKPLACE

The workplace has been a major focus of legal feminist advocacy and theorizing since the Second Wave. Broadly, legal feminists have focused their energy on three sources of gender inequality at work: sex stereotyping, the tension between market and family work, and sexualized violence in the workplace. These efforts have resulted in a number of positive legal developments, most significantly the passage of Title VII,<sup>4</sup> the Pregnancy Discrimination Act,<sup>5</sup> and the Family and Medical Leave Act (FMLA),<sup>6</sup> and the judicial recognition of sexual harassment under Title VII.<sup>7</sup>

Yet economically privileged workers have received a disproportionate share of the benefits of legal reform. For

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4. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. § 2000e, 2000e-17 (2000 & Supp. 2005)).

5. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000)) (amending Title VII to include pregnancy-based discrimination as a prohibited form of sex discrimination).

6. Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified at 29 U.S.C. §§ 2601–2654 (2000 & Supp. 2005)).

7. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986).

example, the FMLA covers only employers with fifty or more employees<sup>8</sup> and employees who work, on average, more than twenty-five hours a week in a year.<sup>9</sup> These limitations effectively exclude millions of less economically privileged workers, who are more likely to work in small firms, to work part-time, and to have multiple employers in a given year. Most glaring, the FMLA's provision of unpaid family leave renders its protections out of reach of all but the most privileged workers.<sup>10</sup> Women most likely to take family leave are married, have a graduate school education, earn higher incomes, and are salaried workers.<sup>11</sup> Surely we cannot lay the blame for such partial victories on legal feminism, but overcoming our political and legal system's bias in favor of powerful economic interests may require more serious attention to class than we have been in the habit of giving.

For example, in an effort to address the tension between market and family work, some prominent legal feminist scholarship has pushed for meaningful part-time work and flexible work schedules.<sup>12</sup> This emphasis on less work, rather than, for example, affordable child care, assumes a person of sufficient economic means to live on a part-time salary and/or the presence of a second breadwinner. But marriage rates are significantly lower among the poor than among the middle class,<sup>13</sup> among African-Americans compared with whites,<sup>14</sup> and, of course,

8. Family and Medical Leave Act of 1993, 29 C.F.R. § 825.104(a) (2002).

9. Specifically, an employee is covered only if (s)he works "at least 1,250 hours . . . during the . . . 12-month period" immediately preceding commencement of FMLA leave. 29 U.S.C. § 2611(2)(A)(ii) (2000).

10. See David Cantor et al., *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys*, § 2.1.3, at 2-9 (2000) (Westat report funded by the Dep't of Labor) (on file with author).

11. *Id.*

12. See, e.g., JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 112, 237, 291 n.23 (2000); Joan Williams & Cynthia Thomas Calvert, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms: The Project for Attorney Retention*, 8 WM. & MARY J. WOMEN & L. 357 *passim* (2002).

13. See Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, *FUTURE CHILD.*, Fall 2005, at 37-38.

14. *Id.* at 38-39.

among same-sex couples. When we consider these demographic data, a major area of feminist theorizing about women's economic inequality appears to miss the mark.<sup>15</sup>

More generally, the emphasis on wage work as the most promising path to women's liberation<sup>16</sup> (rather than on a more robust welfare state, for example) also potentially underacknowledges the problem that safe, well-paid, fulfilling work may not be available for many women. Looking to wage work as a promising source of equality and freedom is a project worthy of feminist support. But emphasizing wage work to the exclusion of other strategies for addressing gender-based economic inequality underappreciates the oppressive nature of wage work for many workers.

Work has meant equal citizenship primarily for white, economically privileged people; it has been a significant source of exploitation for women and men of color and lower-class whites, who have historically occupied the lower rungs of our wage economy. Moreover, the new economy and technological innovation, in which some labor and employment law scholars see liberatory potential,<sup>17</sup> are often deployed in ways that reinforce status-based hierarchies. They have given professional workers relatively more autonomy than less privileged workers, as well as a higher stake in the work enterprise, while delivering to the rest of the workforce mechanized, outsourced, and contingent work characterized by increased monitoring and control.<sup>18</sup> These oppressive effects of

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15. This critique is gaining some momentum. See, e.g., Lucy Williams, *Poor Women's Work Experiences: Gaps in the 'Work/Family' Discussion*, in LABOUR LAW, WORK, AND FAMILY: CRITICAL AND COMPARATIVE PERSPECTIVES 195 (Joanne Conaghan & Kerry Rittich eds., 2005); Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. CIN. L. REV. 433, 447-49 (2004); Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL'Y 7 *passim* (2006).

16. See, e.g., Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886-92 (2000); Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHI.-KENT L. REV. 1557, 1558 (2001).

17. See, e.g., KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE *passim* (2004).

18. See RICHARD SENNETT, THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM 57-59 (1998).

modern work arrangements have been underexplored in some feminist legal theorizing on the workplace.<sup>19</sup>

Emphasizing wage work as the most promising path to economic equality also implicitly suggests that childrearing, domestic labor, and the home and family are primarily sources of oppression. Again, this places the experience of white, economically privileged, heterosexual women at the center of the analysis. Although family caregiving may simply seem to support patriarchy, a closer examination reveals that it can also be a deeply and complexly subversive practice. For example, caregiving work within African-American families and communities is imbued with significant positive political meaning that derives from blacks' historical experience of discrimination with regard to family life and reproduction, including the sexual economy of slavery, the eugenics movement, and contemporary welfare policies aimed at influencing poor black women's reproductive decisions.<sup>20</sup> Along the same lines, gay men and lesbians have long suffered state-sponsored discrimination with regard to their reproduction, sexuality, and family life, as demonstrated by laws denying them sexual privacy, marriage, adoption, and custody rights.<sup>21</sup> When considered in the context of these histories, family care work within a range of minority communities can be understood, at least in part, as an act of resistance to oppression. This vision contrasts with the "cult of true womanhood"<sup>22</sup> rejected by many white feminists, in which family care work is defined as being primarily at odds with liberation.

The recent focus on sexual pleasure within certain cutting-edge strands of legal feminism is another area that may benefit from more attention to class. This scholarship

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19. In contrast, legal feminists have spent a great deal of energy debating whether it is wise to value unpaid family labor through welfare, employment, divorce, and other laws, given the risk that such strategies will reinforce traditional gender roles. See Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U.L. REV. 1, 49-70 (2005). My point is that legal feminism may benefit from subjecting paid labor to this type of critical analysis too.

20. See *id.* at 12-27.

21. See *id.* at 27-44.

22. See Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151 (1966).

suggests that legal feminism has unduly focused on dependency and reproduction to the exclusion of sexuality.<sup>23</sup> Similarly, it is argued that legal feminist scholarship on sexual violence is inattentive to the pleasure producing aspects of sexuality. A major target of this sex-positive critique is sexual harassment law.

For example, certain prominent scholarship suggests that sexual harassment law may constitute a form of sexuality regulation.<sup>24</sup> According to this critique, sexual harassment lawsuits represent a potential vehicle for homophobia, what Janet Halley has termed "sexuality harassment."<sup>25</sup> More broadly, the objection to sexual harassment law is that it enforces a prudish, heteronormative view of sexual desire.<sup>26</sup> Other feminist scholarship critiques sexual harassment law from a liberal perspective.<sup>27</sup> For example, Vicki Schultz argues that the law's focus on individual wrongdoers and overtly sexual behavior hides more serious problems of structural gender inequality in the workplace.<sup>28</sup> Yet Schultz too worries about sexual harassment law's dampening effects on sexual pleasure.<sup>29</sup> For example, she suggests that sexual harassment law may go too far in limiting potential sexual liaisons among employees in workplaces demonstrating a high degree of gender integration and equality.<sup>30</sup> Exploring whether employers

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23. See, e.g., JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 22-23 (2006); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 187, 199, 202, 208 (2001); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

24. See Janet Halley, *Sexuality Harassment*, in *LEFT LEGALISM/LEFT CRITIQUE* 80 (Wendy Brown & Janet Halley eds., 2002).

25. *Id.* at 80, 98-103.

26. *Id.* at 88-89; see also Franke, *supra* note 23, at 206.

27. See Schultz, *supra* note 23, *passim*.

28. *Id.* at 2132.

29. *Id.* at 2166-67 ("[W]e may have to allow people to engage in sexual liaisons at work in order to find potential mates . . . . Yet the problem isn't simply that rules against sexual conduct might pose a barrier to people forming traditional sexual relationships that would extend *outside* the workplace. The bigger problem is that such rules may pose barriers to people forming erotic and other close connections that would occur primarily *inside* the workplace.").

30. *Id.* at 2174.

should be subject to a lower risk of liability for sexual harassment is part of the larger sex-positive project.

To be sure, these critiques are driven by legitimate concerns about certain potentially problematic and unintended effects of sexual harassment law. Moreover, the legal feminists who have explored these questions are hardly disciples of the Law and Economics movement. Indeed, Schultz's scholarship on the workplace is singular in its attention to the concerns of working class women and men. Yet there are similarities between their thought on these issues and neoliberal attacks on discrimination law. Like neoliberalism, this strand of legal feminism holds an optimistic view of workers' power, freedom, and autonomy. It is also more or less committed to a restrained state.

These visions of work, and the appropriate role of the state in protecting workers, are hard to square with the experience of poor workers such as domestic servants, low-paid service workers, and factory workers. Take, for example, the following description by a labor organizer of the work conditions at AgriProcessors, an Iowa slaughterhouse and meat packing plant:

[J]uana . . . came to this rural corner of Iowa a year ago from Guatemala. Since then, she has worked 10-to-12-hour night shifts, six nights a week. Her cutting hand is swollen and deformed, but she has no health insurance to have it checked. She works for wages, starting at \$6.25 an hour and stopping at \$7 . . . . Juana and other employees at AgriProcessors—they total about 800— . . . receive virtually no safety training. This is an anomaly in an industry in which the tools are designed to cut and grind through flesh and bones. In just one month last summer, two young men required amputations; workers say there have been others since. The chickens and cattle fly by at a steady clip on metal hooks, and employees said they are berated for not working fast enough. In addition, employees told of being asked to bribe supervisors for better shifts and of being shortchanged on paychecks regularly.<sup>31</sup>

Certainly not all Juanas of the world are interchangeable, and some otherwise incredibly marginalized workers may very well see the workplace as a site of potential romantic fulfillment, but my guess is that finding dates is not on the top of Juana's list of priorities at work. Add to Juana's story Supreme Court decisions tying employer liability for sexual

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31. See Nathaniel Popper, *In Iowa Meat Plant, Kosher 'Jungle' Breeds Fear, Injury, Short Pay*, FORWARD, May 26, 2006, at 1-2.



harassment to a plaintiff's required use of any internal complaint procedures,<sup>32</sup> research showing that women of color are less likely than white women to report sexual harassment,<sup>33</sup> and the low success rate of employment discrimination plaintiffs in federal court,<sup>34</sup> and the sex-positive angle on women's liberation seems out of touch with the plight of many workers.<sup>35</sup> And do sex panics motivate a sufficient number of sexual harassment claims to roll back sexual harassment law, especially when more straightforward, less costly avenues for eradicating sexuality discrimination could be developed?<sup>36</sup> The expansive, queer vision of desire suggested by this area of feminist theorizing is important for all of the reasons that paradigm-shifting work is so valuable.

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32. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

33. See Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1255-57 (2006).

34. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Cases in Federal Court: From Bad to Worse?*, 3 HARV. L. POL'Y REV. 3, 3 (2009); Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 555 (2001).

35. To be fair, Schultz proposes that workplaces demonstrating persistent structural gender discrimination, such as a segregated workforce, would be exempt from her proposal to reign-in sexual harassment law. Indeed, under her proposal, such employers would be subject to an even higher risk of liability for sexual harassment than current law provides. See Schultz, *supra* note 23, at 2174-75. Although this workplace-specific test would go a long way toward limiting the potentially harmful effects of this critique of sexual harassment law, certain challenges remain. First, gender discrimination manifests in complex and subtle ways even in apparently equal and integrated workplaces. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 *passim* (2001). Second, the common intersectional experience of sexual harassment by women of color is not explicitly accounted for in the proposal. For example, if Juana works side by side with Latino immigrant workers under the supervision of another Latino—perhaps someone the white factory owners rewarded and promoted for furthering their interests—and one of these men sexually harasses her, it is not clear whether AgriProcessors would be subject to a higher or lower standard of liability under Schultz's proposal. Schultz's forward-thinking proposal represents a powerful challenge to the bifurcation within employment discrimination law of sexual harassment and systemic, structural gender discrimination. A deeper intersectional analysis could enrich the strategy she articulates.

36. See, e.g., Employment Nondiscrimination Act, H.R. 2015, 110th Cong. (April 24, 2007).

Still, I worry that the workplace, which remains a site of dependency and inequality for many people, is not the place for the law to facilitate an exploration of the sexiness of subordination, at least just yet.<sup>37</sup>

## II. EXAMPLES OF INSUFFICIENT ATTENTION TO CLASS WITHIN LEGAL FEMINIST PROJECTS ON THE FAMILY

In the 1980s, legal feminists developed a major critique of the growing dominance of a formal equality framework in divorce law. In particular, they questioned rules that allocate marital property equally in most instances and provide little or no ongoing spousal support on the theory that independent, faultless parties should have a clean break. Legal feminists, most prominently Martha Fineman, articulated how the no-fault system unjustly disregards the economic dependencies that develop as a result of women's disproportionate role in childbearing and childrearing, as well as the effects of wage discrimination in the labor market.<sup>38</sup> Fineman's analysis included both a focus on family law and a structural critique of our country's insufficiently robust welfare state.

Yet many critiques of divorce reform were more narrowly focused on the problem of disappearing alimony awards and other aspects of the no-fault system.<sup>39</sup> The escape of the primary breadwinner's future earning capacity under the no-fault regime surely hurts women economically. Income is a major asset of most marriages. However, this problem is less relevant to women of limited economic means and women of color, who are less likely to ever be married and who, if married, are unlikely to be married to a man with the kind of job that would make a generous alimony

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37. More generally, as legal feminism embarks on these promising new lines of inquiry provoked by the success of queer legal theory in law, it may be worth carefully considering which sites, institutions, and practices are best subject to the sex-positive critique, and how queer theory might be integrated with the insights of feminism, race theory, and materialism. This is a "convergentist feminist" project. See HALLEY, *supra* note 23, at 26. No apologies.

38. See MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 39-51 (1991).

39. See, e.g., LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 163-83 (1985).

award a promising path to economic independence.<sup>40</sup> Along the same lines, reviving the remedy of support in the divorce context offers essentially nothing to same-sex couples denied the right of marriage or civil unions.<sup>41</sup>

To provide a second family law example, many states have expanded the definition of parent to include persons to whom a child has bonded in a parental relationship but with whom the child does not necessarily have a biological, adoptive, or legal relationship.<sup>42</sup> Despite this progressive trend toward recognizing a broader range of familial relationships, courts and family law scholars across the political spectrum seem to accept the prevailing legal rule that a child shall not concurrently have more than two legal parents. Yet children in lower income families, families of color, and families with one or more gay or lesbian parent are significantly more likely to have economic and emotional ties to multiple caregiving adults—what I call “community parenting.”<sup>43</sup>

For example, the practice of “othermothering” is common in many African-American communities.<sup>44</sup> Othermothers are women who assist biological parents by sharing parenting responsibilities. They can be but are not confined to such blood relatives as grandmothers, sisters, aunts, cousins, or

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40. For a fuller articulation of this critique, see Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2493, 2497-99 (1994).

41. Same-sex couples have post-dissolution support rights through marriage, civil unions, or domestic partnerships in just eight states. See *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 481-82 (Conn. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003); CAL. FAM CODE § 297.5 (West 2007); D.C. CODE ANN. § 32-702 (LexisNexis 2007); N.H. REV. STAT. ANN. § 457-A:6 (LexisNexis Supp. 2007); N.J. STAT. ANN. § 37:1-31 (West Supp. 2008); Oregon Family Fairness Act, ch. 99, 2007 Or. Laws, reprinted in OR. REV. STAT. tit. 11, ch. 106 notes at § 9(1) (2007); VT. STAT. ANN. tit. 15 § 1204 (West Supp. 2007).

42. Compare William C. Duncan, “Don’t Ever Take a Fence Down”: The “Functional” Definition of Family—Displacing Marriage in Family Law, 3 J.L. & FAM. STUD. 57, 77 (2001), with Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 360-62 (1996).

43. Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL’Y 47, 47, 53-59 (2007).

44. See Patricia Hill Collins, *The Meaning of Motherhood in Black Culture and Black Mother/Daughter Relationships*, SAGE, Fall 1987, at 3, 4-5 (1987).

supportive fictive kin. Along the same lines, although many low-income men do not provide formal child support payments, they often contribute to the support of their children by spending time with them and by providing them with gifts and necessities.<sup>45</sup> Conceptions of fatherhood that focus primarily on a man's ability to financially support his family in the form of earned wages obscure the extent to which nonresidential fathers remain in children's lives in minority and low income communities, along with other biological and fictive kin.

Community parenting occurs in other contexts as well. For example, more Americans than ever have grandparents who are alive,<sup>46</sup> and there is evidence that ties between grandparents and grandchildren have become stronger over the past half century.<sup>47</sup> Moreover, research shows that grandparents are more involved with their grandchildren when parents are divorced, especially maternal grandparents, given the norm of maternal custody. As two leading sociologists of the family note, "intergenerational ties are often latent in the kinship system" until a crisis occurs.<sup>48</sup> Thus, "far from uniformly destroying the bonds of kinship, divorce appears to strengthen intergenerational ties along the maternal line. As a result, children of divorced parents may have stronger ties to some of their grandparents than children from non-disrupted marriages have to any of their grandparents."<sup>49</sup> The remarriage of a parent does not appear to affect this increased contact between grandchildren and their maternal grandparents

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45. See KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 164-65 (1997); Jennifer F. Hamer, *The Fathers of "Fatherless" Black Children*, 78 FAMS. SOC'Y 564, 569-70 (1997).

46. See Merrill Silverstein & Jeffrey D. Long, *Trajectories of Grandparents' Perceived Solidarity with Adult Grandchildren: A Growth Curve Analysis over 23 Years*, 60 J. MARRIAGE & FAM. 912, 912 (1998).

47. See Chrystal C. Ramirez Barranti, *The Grandparent/Grandchild Relationship: Family Resource in an Era of Voluntary Bonds*, 34 FAM. REL. 343, 343-44, 346-48 (1985).

48. ANDREW J. CHERLIN & FRANK F. FURSTENBERG, JR., *THE NEW AMERICAN GRANDPARENT* 163-64 (1986).

49. *Id.* at 164.

after divorce. The potential result is three or more adults across households and generations who are substantially involved in a child's life.

Similarly, lesbians and gay men often engage in care practices involving social kin.<sup>50</sup> For example, a gay family of choice may include lovers, ex-lovers, friends, co-parents, gamete-donors, and children brought into the family through adoption, foster care, prior heterosexual relationships, and alternative reproduction. Like the tradition of othermothering within the black community, gay families of choice are made up of fluid networks that have different purposes—including emotional support, economic cooperation, socialization, reproduction, consumption, and sexuality—which overlap but are not coterminous. And like the community parenting practices in communities of color, biological fathers are increasingly playing an active role in the parenting of children of lesbian mothers, becoming a “junior partner in the parenting team.”<sup>51</sup>

These community parenting practices are obscured by political and legal discourses surrounding divorce, cohabitation, single-parenthood, and gay family rights that conceive contemporary families only in relation to an idealized, two-parent norm. In these discourses, modern families are described as “broken” and “divorced.”<sup>52</sup> Unmarried parents are referred to as “single.” Even when “blended,” contemporary families are typically conceived of as nuclear, two-parent families different only in their presence of non-biologically-related family members. These understandings ignore the unique ways in which class, race, and other aspects of identity combine to produce fundamentally different family structures and caregiving practices among a substantial portion of the population. Even seemingly progressive family law reforms such as the trend toward recognizing psychological parents, if limited to those situations where the end result will be only two legal

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50. See KATH WESTON, *FAMILIES WE CHOOSE* 2-3 (1991).

51. Gillian A. Dunne, *Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship*, 14 *GENDER & SOC'Y* 11, 25 (2000).

52. See, e.g., INST. FOR AM. VALUES, *MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES* 21 (2006).

parents, are likely to come up short of their justice related goals without more attention to these diverse cultural and economic practices.

### III. PROPOSALS

What insights do these examples suggest about how legal feminists can better incorporate class into their projects, taking an intersectional approach? This section provides some preliminary thoughts, or rather, five possible strategies.

1. *Focus on theories and strategies that de-link the delivery of economic benefits from historically status-laden institutions.* The examples provided in Parts I and II represent logical strategies to allow previously excluded individuals to enjoy the full economic benefits of the workplace and the family, two major institutions in American society that provide for economic dependency. For example, looking to wage work as a promising route to women's liberation (and all of the corresponding projects that would enable that strategy) makes significant sense in light of the fact that paid employment is a preferred source of economic support in American society. Along the same lines, legal feminist theories and strategies that seek to preserve adequate alimony awards for women ensure that women are able to benefit from the support function of the family even after a formal marriage dissolves, just as child support payments ensure the support function of the family for children. And giving non-biological gay parents, stepparents, and grandparents the formal legal status of parent often provides children in "nontraditional" families the economic benefit of two legal parents, even if recognizing three or more adults as parents would better reflect the social and economic relationships of many families. Finally, the federal Employment Non-Discrimination Act (ENDA)<sup>53</sup> and same-sex marriage would go a long way toward addressing sexuality and gender-based economic injustice, given that the workplace and the family are the two core institutions for delivering economic

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53. See, e.g., H.R. 2015, 110th Cong. (2007). ENDA provides employment protections similar to those of Title VII, but specifically directed to gay, lesbian, bisexual, and under some versions, transgender employees.

benefits in our society. However, as essentially assimilatory projects, these strategies fail to disrupt the designation of the workplace and family as the institutions primarily responsible for economic dependency in the first place.<sup>54</sup>

Therefore, a legal feminist approach to economic inequality, in addition to seeking a more fair distribution of resources within the workplace and family, must also attack the fundamental structure of the system itself. There is no simple formula for doing this, except to say that any theory or proposal should be evaluated on this basis. Some examples that come closer on this measure than the strategies discussed in Parts I and II include beefing up the social welfare state along European lines, which would broadly include the middle class in addition to the poor, thereby giving everyone a stake in the system; universal health insurance, which provides minimum health benefits to all Americans regardless of their employment or marital status; and civil union benefits for all individuals in committed, economically interdependent relationships, regardless of the sex of the parties, the number of individuals, or the sexual nature of the relationship.<sup>55</sup>

2. *Integrate the perspectives of other liberatory social movements more deeply and thus make effective alliances.* This may seem too obvious to state, given that it is a core methodological approach of feminism. However, for some of the reasons stated in the introduction, there is a tendency within legal feminism in particular not to take antiessentialism seriously enough.<sup>56</sup> Where can we learn to think more fully from the positions of others,<sup>57</sup> admittedly a

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54. Although these four examples all fall into the category of equality-based strategies, freedom-based strategies can have the same reinforcing effects. For example, recognizing contracts for support and property between unmarried cohabitants, as the California Supreme Court did in *Marvin v. Marvin*, 557 P.2d 106, 116, 122 (Cal. 1976), also implicitly constructs intimate sexual relationships as the preferred site of economic dependency.

55. For a thorough and clearly articulated account of this vision, perhaps absent my expansive view on lifting numerosity limitations, see NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* ch. 8 (2008).

56. See HALLEY, *supra* note 23, at 58-60.

57. See SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE?: THINKING FROM WOMEN'S LIVES* 269-70 (1991); María Lugones, *Playfulness, "World"-Traveling, and Loving Perception*, *HYPATIA*, Summer 1987, at 3.

difficult skill? In my opinion, critical race feminists and critical race scholars more generally have gotten it right; in particular, they know how to seriously incorporate race, class, *and* gender into their analyses.<sup>58</sup> If legal feminists, or left legal scholars more generally, want to learn how to incorporate class into their work, they should read race theory.

3. *Do not concede the state as a significant potential source of freedom and equality.* Power today is largely privatized within corporations, nongovernmental organizations, and markets more generally. Thus it seems odd to argue, as we seem to hear everywhere (including from many legal feminists, self-identified left legal theorists, and in virtually every job talk I heard in 2007), that markets are preferable to governments in distributing resources, protecting rights, facilitating freedom, or creating happiness. Concentrated power, wherever and however it exists, is a problem. Certainly, we need to develop context-specific strategies to deal with that. Sometimes markets will be helpful and sometimes governments will be; there are advantages and disadvantages of each. But to define the state primarily as the problem and markets primarily as the solution seems not only naive, but downright dangerous in light of recent neoliberal and fundamentalist religious attacks on government. Legal feminists who argue that private markets or private ordering are the best tools to break down gender and sexuality-based hierarchies might benefit from this insight.

4. *Incorporate sociology within left legal theory and legal reform projects, including legal feminism.* Why sociology? If we are to make any headway in addressing class-based and other inequalities, we need more structuralism, not less. Sociology provides an opportunity to do that by combating the poststructuralist assumptions and methodologies that have been imported into law through

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58. See, e.g., Angela P. Harris, *Equality Trouble: Sameness and Differences in Twentieth Century Race Law*, 88 CAL. L. REV. 1923, 1927-28, 1998-2002 (2000); Berta Hernandez-Truyol, Angela Harris & Francisco Valdés, *Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis*, 17 LA RAZA L.J. 169, 192 (2006); Reginald C. Oh, *Mapping a Materialist LatCrit Discourse on Racism*, 52 CLEV. ST. L. REV. 243, 250-52 (2005).



economics and literary theory. Sociology is helpful because it reveals the ways that human behavior is influenced by various structures. Sociology focuses on institutions and society more generally, rather than on the atomized individual or the nonhuman symbols with which postmodern theory is largely concerned.<sup>59</sup> Sociology has a long tradition of attention to social class, not as an afterthought but as a main concern. Finally, sociologists employ quantitative and qualitative methods that are highly effective at revealing subtle but significant differences *within* groups. These differences are potential pay dirt for left legal theory of all kinds, including legal feminism. On this last point, I will provide three examples.

a) Discourses within family law and legal feminism often assume a monolithic experience of marriage and divorce. However, research shows, for example, that marriage rates are much lower and divorce rates are much higher among low-income individuals and people of color. This information, if taken to heart, should result in a significant re-orientation away from marriage-based solutions to gender- and race-based economic inequality—for example, a more robust social welfare state rather than divorce reform.

b) The idea that Americans face increasingly long work hours is widely accepted in political discourse and legal scholarship. Both legal feminists and employment law scholars have devoted much attention to solving this alleged problem. However, this is only true in the most general sense. Although research shows that work hours are increasing on average, this is occurring primarily because individuals in certain sectors of the workforce are working substantially more hours per week than thirty years ago.<sup>60</sup> Longer workweeks are most common among professionals and managers, married couples, and white men. But less educated workers, nonprofessional workers, and African-American men are working fewer hours per week than in the past. The result has been a bifurcation of

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59. See Martha Nussbaum, *The Professor of Parody*, NEW REPUBLIC, Feb. 22, 1999, at 37-45.

60. This part is drawn largely from a discussion in Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 413 n.234 (2001).

the workforce between overworked, full-time, salaried employees and underemployed, part-time employees without benefits. If legal scholars paid attention to these differences among workers, a set of alternative agendas might emerge—for example, job creation and on-site childcare for employees with family responsibilities, rather than part-time work.

c) Although the prevailing stereotype of the same-sex couple is the well-off “DINC” (“dual income no children”), social science research and demographic data show that: (1) gay men who work full-time earn as much as twenty-seven percent less than heterosexual men; (2) the rate of home ownership is lower for partnered gay and lesbian households than for married heterosexual couples; (3) lesbians earn about the same as straight women, but they experience the same persistent wage discrimination as straight women; (4) same-sex couples in the U.S. raising children have lower median incomes than opposite sex couples raising children; and (5) there exists widespread employment discrimination against gay, lesbian, bisexual, and transgendered people.<sup>61</sup>

Despite these economic challenges, much queer theory in law seems to embrace private, market-based solutions to the status-based inequality of gay and lesbian people. For example, scholars working in the area of sexuality and the law have argued that a private market for gametes is preferable to state regulation of alternative reproduction, given the history of state-sponsored discrimination against gay and lesbian families.<sup>62</sup> This is a valid point, but perhaps the analysis might change somewhat if we incorporated the social science data on class and sexual orientation. The available routes to genetic parenthood are prohibitively expensive for most gay men<sup>63</sup> and many

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61. See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 125-32, 231-34 (1999); R. BRADLEY SEARS ET AL., *THE WILLIAMS PROJECT ON SEXUAL ORIENTATION LAW AND POLICY, UCLA SCHOOL OF LAW, SAME-SEX COUPLES AND SAME-SEX COUPLES RAISING CHILDREN IN THE UNITED STATES* 10-16 (2005); Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 *DEMOGRAPHY* 139, 140-41 (2000).

62. See Martha M. Ertman, *What's Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 *N.C. L. REV.* 1, 21-26 (2003).

63. See Judith Stacey, *Gay Parenthood and the Decline of Paternity as We Knew It*, 9 *SEXUALITIES* 27, 30 (2006).

lesbians,<sup>64</sup> and there is significant discrimination in the private market for gametes in any case for all gays and lesbians.<sup>65</sup> From this perspective, ending discrimination with regard to alternative reproduction, adoption, and foster care—whether state or private—may be more pressing than ensuring the continued operation of private gamete markets.

One has to read a lot of sociological studies to identify major debates such as these. However, the payoff for legal feminism and for left legal scholarship is potentially great. Legal scholars concerned about class and structural discrimination of all kinds should study sociology. And they should mentor and recruit scholars trained in sociology, rather than giving them up to the Law and Society programs.

5. *Begin an explicit conversation about the role of law schools and legal education in devaluing class analysis in legal feminism and other left legal projects.* Here, I offer several ideas for potential future exploration: (1) The new focus on empirical scholarship within the legal academy will privilege economic analysis absent a concerted effort to incorporate a range of empirical methodologies; (2) The continued segregation and devaluation of clinical legal education, which historically has focused in large part on poverty law, contributes to the devaluation of class analysis within law; (3) The *U.S. News* ranking system, which favors the admission of more economically privileged, white students into law schools (and the undue reliance on the LSAT more generally), are likely to have long-term negative effects on justice-based movements and left legal theory; (4) Left legal scholars doing some of the most powerful work challenging the neoliberal juggernaut have not made their way on to the faculties of the nation's most elite law schools in significant numbers. Particularly since the late 1990s, feminism in the most prestigious law schools has tended to be shaped as cultural legal studies, a descendant of critical legal studies that may be less threatening to the neoliberal/patriarchal/white power center than many strands of feminism, because it focuses less on material harm and inequality, structures, institutions, and even

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64. See Kessler, *supra* note 19, at 43 n.228.

65. *Id.* at 42 n.227.

law.<sup>66</sup> More generally, job candidates who are doing economic analyses of law and/or who tout market-based solutions to various legal problems seem to dominate the entry-level market for law school teaching jobs; (5) Finally, massive resources are being directed toward legal scholarship that is consistent with the neoliberal and neoconservative agendas.<sup>67</sup> Unmasking and attacking these systemic aspects of law schools and legal education that disfavor robust class-based critique should be part of a feminist agenda that takes class seriously.

### CONCLUSION

In an effort to continue and build on the important and exciting work of the ClassCrits project, in 2008 I co-organized a program for the Association of American Law Schools' Section on Women in Legal Education titled "Gender & Class: Voices from the Collective."<sup>68</sup> When we sent the call for papers, there was a deluge of responses on the section listserv, and it quickly became apparent that the topic merited a full-day extended program. Ultimately, the program featured an opening and closing plenary and eight topical sessions: Children, Work, Care, Criminalization, the State, National Security, Globalization, and the Family. There were nearly fifty speakers. Our questions were: (1) How can class be more fully incorporated into mainstream legal analysis and political discourse on gender-based inequality?; (2) How do economic class and economic structures intersect with other forms of subordination, such as race, gender, sexual orientation, disability? How do they diverge?; (3) What are the challenges and complications involved in bringing class analysis together with analyses of

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66. On the commonalities between Law and Economics and Critical Legal Studies, see Stanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1224-25, 1248-52 (1991) (book review). On the commonalities between male supremacy and queer theory, see Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1, 4-10 (2004).

67. See Martha T. McCluskey, *Thinking with Wolves: Left Legal Theory After the Right's Rise*, 54 BUFF. L. REV. 1191, 1212-15 (2007) (book review).

68. The full committee was: Terri Beiner (University of Arkansas, Little Rock), Laura Kessler (University of Utah), Ann McGinley (University of Nevada, Las Vegas), Lisa Pruitt (University of California, Davis), Joan Vogel (University of Vermont), and Rebecca Zietlow (University of Toledo).

gender and other forms of subordination?; (4) Is class the right concept for theorizing economic equality?<sup>69</sup> Productive discourse on these larger questions and particular papers characterized the day. Yet there was a significant sense that we had only begun to scratch the surface. Among other challenges, we lacked a shared vocabulary and definition of class, and the emphases of the presenters on different aspects of identity rendered the fragility of the whole affair palpable.

This Essay similarly only begins to scratch the surface. I have not defined class, interchangeably using class, inequality, and poverty. Nor have I interrogated class as a useful lens of analysis. For example, simply considering class along with race, gender, and other axes of identity may not go far enough to address the serious limitations of traditional formal equality analysis.<sup>70</sup> I also have not touched on the complications and tradeoffs involved in bringing class analysis to the various feminist projects identified. Finally, in highlighting what I believe are some blind spots within legal feminism to class and economic inequality, I have likely under-credited legal feminist scholarship that is giving these areas critical attention. Perhaps I have also under-credited the potentially class-positive implications even of the works I discuss. As an initial exploration intended to initiate an admittedly uncomfortable conversation about how a focus on class can build on and add to feminist legal theory projects, I only hope that these very tentative thoughts will bear fruit for this exciting and ambitious project.

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69. These questions largely tracked those of the ClassCrits project. They also built on a conversation begun in May 2007 at Martha Fineman's Feminism and Legal Theory Project workshop on Caste and Class at Emory Law School.

70. See Fineman, *supra* note 1, *passim*.