

**THE WRONGFUL REJECTION OF BIG THEORY
(MARXISM) BY FEMINISM AND QUEER THEORY: A
BRIEF DEBATE**

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INTRODUCTION

A specter is haunting America's Left—which includes feminist and queer theories—the specter of fear: the fear of being perceived as “mediocrely petty-bourgeois and vaguely social-democratic,”¹ the fear of participating in “any enterprise aimed at building[] against all forms of particularism.”² This is the fear of “essentialist” meta-narratives;³ it is a fear of Marxism.

The Left avoided the damaging perception of Marxism by embracing postmodernist thought.⁴ Like any theory born toward the end of a century,

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¹ PIERRE BOURDIEU & LOÏC J.D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY 58 (1992).

² *Id.* Particularism has been viewed as a discourse of the particular subject, while essentialism has been viewed as a discourse of the universal subject. For an interesting critique of the perils of particularism as a “new form of fixity” at a decentered level, see Fred R. Dallmayr, *Hegemony and Democracy: On Laclau and Mouffe*, 1 STRATEGIES: J. THEORY, CULTURE & POL. 29, 29–30 (1988); Carl F. Stychin, *Identities, Sexualities, and the Postmodern Subject: An Analysis of Artistic Funding by the National Endowment for the Arts*, 12 CARDOZO ARTS & ENT. L.J. 79, 107–10 (1994). See generally ERNESTO LACLAU & CHANTAL MOUFFE, HEGEMONY & SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS (1985).

³ Essentialism can be viewed as the “tendency to reduce a complex person to one trait—the trait drawing that person into membership in a particular group—and then to equate that trait with a particular viewpoint and stereotype.” MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 34 (1997).

⁴ See Jane L. Parpart & Marianne H. Marchand, *Exploding the Canon: An Introduction/Conclusion*, in FEMINISM/POSTMODERNISM/DEVELOPMENT 1, 2 (Jane L. Parpart & Marianne H. Marchand eds., 1995); see also Michael C. Dorf, *After Bureaucracy*, 71 U.

postmodernism nurtured a *fin de siècle* atmosphere, based on derision, disillusion, and parody of style.⁵ “Reason” became a metaphor, which ridiculed “the man who wishes to be taken seriously as a philosopher.”⁶ Thus, the Left embraced postmodern and poststructural French thought as its theoretical foundation to explain the “other”⁷ and such universal social problems as those posed by gender and sexual orientation discrimination.

It is common knowledge that, despite their universality, Marx addressed neither gender nor sexual orientation discrimination in his theory of capitalism.⁸ Marx focused on the public sphere where the worker’s alienation and self-alienation took place.⁹ He famously explained how the worker felt at home only in his leisure time, while at work he felt homeless.¹⁰ While Marx’s observations were about workers generally (women, men, and children), he was aware of the inhuman plight that women and children were exposed to at home and in the public sphere.¹¹

Marx described their predicament across Europe from the Danube to the Atlantic Ocean.¹² For example, the Danubian Principalities, which are now Romania, embraced the *corvée* system during the second half of the nineteenth century.¹³ Under this system, entire peasant families—which included of course, women and children—had to work three days a week “gratis for the capitalist”—the owner of the land.¹⁴ Similarly, in England, the “cotton-spinning” industry employed children as young as seven years

CHI. L. REV. 1245, 1246 (2004) (reviewing MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003)).

⁵ Anthony Carty, *Introduction to POST-MODERN LAW: ENLIGHTENMENT, REVOLUTION, AND THE DEATH OF MAN* 1, 3 (Anthony Carty ed., 1990).

⁶ *Id.*

⁷ *See id.* at 6–7. “The ‘Other’ is that upon which the ‘Law’ acts, but which it never completely absorbs, that which remains when the ‘Law’ has spend itself. The ‘other’ may be called ‘Society.’” *Id.* at 7.

⁸ *See* Douglas Kellner, *The End of Orthodox Marxism, in* MARXISM IN THE POST-MODERN AGE: CONFRONTING THE NEW WORLD ORDER 33, 37 (Antonio Callari et al. eds., 1995).

⁹ Karl Marx, *Alienation and Social Classes, in* SOCIAL STRATIFICATION: CLASS, RACE AND GENDER IN SOCIOLOGICAL PERSPECTIVE 87, 87–88 (David B. Grusky ed., 2001).

¹⁰ *Id.* at 88.

¹¹ KARL MARX, *CAPITAL: A CRITICAL ANALYSIS OF CAPITALIST PRODUCTION* 227–28 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Swan Sonnenschein & Co. 1903) (1887).

¹² *Id.* at 219–20, 227–28.

¹³ *Id.* at 219.

¹⁴ *Id.* at 219–20.

old, from six o'clock in the morning to nine o'clock at night, six days a week.¹⁵ Women, presumably, were exposed to similar or worse treatment.

Nevertheless, Marx was not a feminist. While critical of the status quo, he was not concerned with women's subordination.¹⁶ Marx was concerned with commodification,¹⁷ with the never-ending process of the creation of new wants that were, by their nature, impossible for the working class to satisfy, causing alienation that begged for wages and eventually exploitation. Marx was aware of gender discrimination, but he very likely thought of it as a result of capitalist exploitation. Moreover, he perceived the very nuclear family as a means to satisfy the capitalist production by ensuring the transfer of property only to the children the wife bore to her husband.¹⁸ Capitalist exploitation may well be the result of the exercise of power in a patriarchal society, but he ignored such an analysis,¹⁹ and he obviously did not deal with that scenario, because he thought that the most meaningful group identity was economic: neither genetic, age-related, nor cultural.²⁰ Certainly, there is a difference in degree between a child-worker's exploitation and that of his parents, but

¹⁵ *Id.* at 228.

¹⁶ See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* 427, 429 (D. Kelly Weisberg ed., 1993). A feminist, according to Martha Chamallas, is someone who is "critical of the status quo" and the "root of the criticism is the belief that women are currently in a subordinate position in society and that the law often reflects and reinforces this subordination." MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 1 (2d ed. 2003).

¹⁷ MARX, *supra* note 11, at 1–5. "The wealth of those societies in which the capitalist mode of production prevails, presents itself as 'an immense accumulation of commodities,' its unit being a single commodity. Our investigation must therefore begin with the analysis of a commodity." *Id.* at 1 (footnote omitted). However, it is possible to have a commodification debate without referring to Marx, and still understand that it refers to the transfer of goods, whether they are human parts or beings, or just manufactured products. See, e.g., Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 *HARV. L. REV.* 689 (2003).

¹⁸ See KARL MARX & FRIEDRICH ENGELS, *Manifesto of the Communist Party*, in *THE MARX-ENGELS READER* 469, 475–76 (Robert C. Tucker ed., 2d ed. 1978) (1848); FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 75, 95–96 (Ernest Untermann trans., Charles H. Kerr & Co. 1902) (1884).

¹⁹ Diane Polan, *Toward a Theory of Law and Patriarchy*, in *FEMINIST LEGAL THEORY: FOUNDATIONS*, *supra* note 16, at 419, 420.

²⁰ See Karl Marx, *The Communist Manifesto*, in *KARL MARX: SELECTED WRITINGS* 245, 246 (David McLellan ed., 2d ed. 2000) (1848).

Marx let the liberals, often identified as “liberal crétins,”²¹ minimize it. Similarly, Marx was not a queer theorist.²² To my knowledge, he ignored sexual orientation discrimination.

To the extent that there had been a Marxist Left in the United States, gender and sexual orientation discrimination eventually replaced the Marxist “essentialist” discourse.²³ Currently, identity politics²⁴—politics focused on non-economic “identity” features²⁵—is dominating the Left-leaning public discourse.

Despite the opposing stance of Marxism and identity politics, identity politics relies on “essentialist” points of view.²⁶ On one hand, it tends to reduce its members’ identity to some non-economic given trait as determining its individual members’ point of view.²⁷ On the other hand, postmodern thought, despite its aspirations, is strikingly modernist.²⁸ It assumes “a grand narrative to make sense of it all.”²⁹ For example, Catharine MacKinnon—who acknowledged that “[f]eminism has no theory

²¹ MARX, *supra* note 11, at 221.

²² See Jacqueline Stevens, *On the Class Question*, in FEMINIST INTERPRETATIONS OF KARL MARX (Christine di Stefano ed., forthcoming), <http://www.jacquelinestevens.org/OntheClassQuestion.htm>.

²³ See CHAMALLAS, *supra* note 16, at 92.

²⁴ There are many ways in which identity politics can be defined. For example, authors have acknowledged three types of identity politics in relation to law.

The first is resistance to the subordinate traits imposed by the dominant liberal discourses. The second is a politics assumed to flow in a linear fashion from assumptions of weak essentialism about an identity. Third, . . . [are] the possibilities for strategic struggles that recognize that subjectivity is a composite of culturally mapped identities. . . . [I]dentity formation is a complex and ongoing process which takes place within both largely determined dominant discourses and more fluid resistant discourses over which we have some control. Identity formation is therefore always political, and identity and politics are co-constructing and mutually reproductive.

Margaret Davies & Nan Seuffert, *Knowledge, Identity, and the Politics of Law*, 11 HASTINGS WOMEN’S L.J. 259, 275 (2000) (footnote omitted).

²⁵ MINOW, *supra* note 3, at 31–32.

²⁶ *Id.* at 34.

²⁷ *Id.*

²⁸ See Bruce Norton, *Late Capitalism and Postmodernism: Jameson/Mandel*, in MARXISM IN THE POSTMODERN AGE: CONFRONTING THE NEW WORLD ORDER, *supra* note 8, at 59, 59.

²⁹ *Id.* at 60.

of the state³⁰—also recognized that feminist literature relies on either a liberal or a Marxist understanding of society.³¹ Thus, to the extent that identity politics does not use “redemptive human projects,”³² as Fredric Jameson noted in 1984, and does not care about the world around it, it may be perceived as socially reactionary. Identity politics endorses the existing order,³³ which epistemologically relies on essentialist assumptions that Aldous Huxley’s *Brave New World*³⁴ describes so well.³⁵

At first glance, it may seem that identity politics and Marxism have very little in common, but that may not necessarily be true. Of course, “‘if you lick my nipple,’ [as Michael] Warner remark[ed], ‘the world suddenly seems comparatively insignificant,’”³⁶ and with it any macro socio-economic analysis. Identity becomes central and more than a cultural trait; it becomes “the performance of desire.”³⁷ It becomes a place of “ideological and material contestation over need”³⁸ in other words, an ideology that demands legitimacy for its desire. However, Marx too talked about desire, albeit as the result of the never-ending production of commodities.³⁹

Moreover, this Article suggests not only that identity politics and Marxism have similarities, but that they need each other. Feminist and queer symbolism need a grand social theory to attract popular support for their demands and a re-discovery of Marxism may do just that.

Ontologically, Marxism is useful to go beyond the regressive nature of postmodern politics that stresses micro-politics to the detriment of mass

³⁰ MacKinnon, *supra* note 16, at 427.

³¹ *See id.* at 430.

³² Norton, *supra* note 28, at 60.

³³ *Id.*

³⁴ ALDOUS HUXLEY, *BRAVE NEW WORLD & BRAVE NEW WORLD REVISITED* (Harper & Row 1960) (1932).

³⁵ Of course, I am aware of the fact that highly regarded scholars see liberal democracies that thrive on the values of “the free play of ideas and the spirit of enterprise” as the pinnacle of human social development, and thus, for them, endorsing the existing social and political structure is far from being reactionary. JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 97 (rev. ed. 1995). For an interesting view on liberalism and public ethics see *id.* at 81–82.

³⁶ Donald Morton, *Queer Consensus/Socialist Conflict*, in *THE MATERIAL QUEER: A LESBIGAY CULTURAL STUDIES READER* 35, 35 (Donald Morton ed., 1996) (quoting Michael Warner, *Tongues Untied: Memoirs of a Pentecostal Boyhood*, in *THE MATERIAL QUEER: A LESBIGAY CULTURAL STUDIES READER*, *supra*, at 39, 43).

³⁷ *Id.* at 36.

³⁸ *Id.*

³⁹ *See* JON ELSTER, *AN INTRODUCTION TO KARL MARX* 44 (1986).

politics. While “identity politics seems to breed more identity politics,”⁴⁰ Marxism can provide the grounds to unify the disparate political movements. It can “provide values and ideals that might unite specific movements for specific goals.”⁴¹ This would be a bold move for identity politics, which has distanced itself from the masses, seemingly in a desire to be beyond Left and Right.⁴² However, such distancing is hard to achieve, and is often perceived as undemocratic. For example, gay and feminist activism in the former Soviet bloc arrived with “right-wing neo-liberal ideology.”⁴³

Empirically, it might be shown that all major achievements of identity politics took place at a time when the Marxist concepts of “exploitation” and “alienation” were more commonly used than today.⁴⁴ For instance, perhaps it was the Left-leaning public discourse during the mid-1960s and early 1970s that caused the Supreme Court to recognize the existence of certain women’s rights among the other fundamental individual rights.⁴⁵ Moreover, it is well known that “the greatest gains for affirmative action for Blacks and other oppressed people and women were made under Republican Richard Nixon’s presidency in the early 1970s”⁴⁶ as the likely result of public pressure.⁴⁷

⁴⁰ MINOW, *supra* note 3, at 56.

⁴¹ See Kellner, *supra* note 8, at 40.

⁴² BORIS KAGARLITSKY, THE RETURN OF RADICALISM: RESHAPING THE LEFT INSTITUTIONS 49 (Renfrey Clarke trans., 2000).

⁴³ *Id.* at 47–48.

⁴⁴ During the middle of the twentieth century, the academe had not repudiated Marxism and its system of ethical values, and Marxist concepts were explained in schools without teacher disparagement. See *id.* at 41.

⁴⁵ See, e.g., *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (recognizing a woman’s right to terminate a pregnancy within specific guidelines); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that “several fundamental constitutional guarantees” created a “zone of privacy”).

⁴⁶ KAGARLITSKY, *supra* note 42, at 79 (quoting Barry Sheppard, *Letter from the U.S.: Sharp Debate at Left Convention*, GREEN LEFT WEEKLY, July 24, 1996, at 22, available at <http://www.greenleft.org.au/back/1996/239/239p22.htm>).

⁴⁷ President Nixon was criticized for several issues during his presidency, including Watergate and the Vietnam War. See generally Neal Devins, *Bring Back the Draft?*, 19 GA. ST. U. L. REV. 1107, 1120 (2003); Ken Gormley, *Monica Lewinsky, Impeachment, and the Death of the Independent Counsel Law: What Congress Can Salvage from the Wreckage—A Minimalist View*, 60 MD. L. REV. 97, 129 (2001); Kristafer Ailslienger, Comment, *Supreme Court Vetoes the Line Item Veto Act*, 38 WASHBURN L.J. 893, 900 n.52 (1999).

Today, by contrast, when a Marxist-constructivist critique of capitalism is taken derisively by so-called progressive lawyers and politicians, even more modest demands—by Marxist standards—can easily be viewed as extreme by both courts and legislators. Absent the Marxist ethical foundation of social justice, identity theories seem to have lost their social edge as well as their goals of resistance and insurgency. Today, feminism is not about socialism—that is too silly.⁴⁸ Today, feminism seems more focused on lending credibility to “progressive corporate law.”⁴⁹

Current cultural politics discuss two forms of postmodernism: one of “reaction” and one of “resistance.”⁵⁰ The reactionary form “would seem to be [an example] of pure commodification and involves ‘an instrumental pastiche of pop- or pseudo-historical forms.’”⁵¹ Conversely, the resistant form is “concerned with a critical deconstruction of tradition . . . with a critique of origins, not a return to them.”⁵² Feminist and queer theories belong to the latter form of postmodern theories.⁵³ By rejecting the Marxist theoretical framework, however, the theories may end up focusing too much on the individual, thus sharing the conservative’s reactionary social policies that individuals (unlike corporations) do not deserve government subsidies.⁵⁴ Marxism promotes the values of ensuring a decent lifestyle for all, which underlines both its compatibility with the social and economic rights discourse and its potential role in helping feminist and queer theories reconnect with the “others” that are not part of their culturally identified groups. Through the discourse of human rights in its broader usage, which goes beyond our provincial limitation to civil and political rights,⁵⁵ the “others” may be more able to empathize with the

⁴⁸ See KAGARLITSKY, *supra* note 42, at 96.

⁴⁹ Kellye Y. Testy, *Capitalism and Freedom—for Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87, 100 (2004).

⁵⁰ Hal Foster, *Preface* to THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE, at ix, xi–xii (Hal Foster ed., 1983).

⁵¹ Marcia Landy & Lucy Fischer, *Dead Again or A-Live Again: Postmodern or Postmortem?*, 33 CINEMA J. 3, 21 (Summer 1994) (quoting Hal Foster, *Preface* to THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE, *supra* note 50, at xii).

⁵² Foster, *supra* note 50, at xii.

⁵³ See CHAMALLAS, *supra* note 16, at 157, 219.

⁵⁴ See Eric Cohen, *The Politics and Realities of Medicare*, PUB. INT., Summer 2004, at 42–43.

⁵⁵ In *The Dark Sides of Virtue*, David Kennedy observes the classic ill-conceived approaches to human rights by human rights activists, such as the one regarding the “right

specific demands made on behalf of women and those in the queer community.

I. MARXISM AS THE BIG BAD WOLF

Marxism⁵⁶—which I explain in much more depth elsewhere⁵⁷—is usually described as a comprehensive theory that articulates “the principal lines of historical [human] development as a whole.”⁵⁸ Jon Elster refused to define it per se, but asserted that Marxism could be viewed as the theoretical developments of Marx’s writings.⁵⁹ Thus, at a minimum, Marxism is Marx’s writings. Marxism is an essential theoretical foundation for any progressive (mass) movement because it “includes both a specific conception of the good life, and a specific notion of distributive justice.”⁶⁰ Instead of being ignored,⁶¹ Marxism can be used as the theoretical base of any progressive identity theory as well. It usefully highlights socio-economic distinctions among the members of all different minority groups, such as “paupers, vagrants, criminals, prostitutes, [etc.]”⁶² who do not belong to either the “genteel” or “middle-class.”⁶³

Socio-economic identity, as I have also discussed in another piece, has become a subversive concept few scholars want to discuss.⁶⁴ As Frances Raday pointed out, socio-economic identity legitimizes specific state

to development.” DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 9–10 (2004).

⁵⁶ Defining Marxism is not an easy task. Sometimes even so-called Marxist writers refuse to define it. G.A. COHEN, *KARL MARX’S THEORY OF HISTORY: A DEFENCE*, at xvii (expanded ed. 2000).

⁵⁷ Dana Neacșu, *The Political Value of Knowledge and the Elite Schools’ Curricula: To Ignore or Not to Ignore Marxism?*, 82 U. DET. MERCY L. REV. 219 (2005).

⁵⁸ Perry Anderson, *Agendas for Radical History*, 36 RADICAL HIST. REV. 32, 33–34 (Fall 1986).

⁵⁹ ELSTER, *supra* note 39, at 4.

⁶⁰ *Id.*

⁶¹ One main reason for Marxism being ignored may be general academic misunderstanding regarding its merits and not an overweening academic position that theories are dead (supported by luminaries such as Terry Eagleton and Henry Louis Gates, Jr.). See, e.g., Emily Eakin, *The Latest Theory Is that Theory Doesn’t Matter*, N.Y. TIMES, Apr. 19, 2003, at D9; Dinitia Smith, *Cultural Theorists, Start Your Epitaphs*, N.Y. TIMES, Jan. 3, 2004, at B7.

⁶² MARX, *supra* note 11, at 180.

⁶³ *Id.*

⁶⁴ This may be due in part to the fact that it is “more than a cultural ornament,” and certainly more than “an innocuous quaint parallel reality.” Neacșu, *supra* note 57, at 228–29.

intervention in favor of economically disadvantaged groups across racial, gender, or age borders.⁶⁵ It promotes a discourse on “substantive-group status version of human rights [because it] is part and parcel of a socio-economic welfare policy.”⁶⁶ For example, in Canada, state “[i]ntervention in [issues related to] contractual autonomy has . . . been [possible in] situations of systemic imbalance in the socio-economic power of the negotiating parties.”⁶⁷

Marxism justifies socio-economic theoretical constructs and explains how even less controversial concepts, such as “cultural divisions,” as Jon Elster demonstrated, “are never class neutral.”⁶⁸ “Marxism offers an identity to the millions of have-nots,”⁶⁹ across geographical and racial borders because, under Marxism, “classes are distributed non-randomly over cultural groups.”⁷⁰ Furthermore, Marxism is uniquely fit to explain how poverty may become a tool in the hands of politicians interested in connecting poverty to certain minority social groups. Politicians have done this, for example, by ghettoizing those groups and forcing them to live in geographical areas that are underdeveloped and thus have no available jobs.⁷¹ However, by offering “economic ghettos” slightly different to different underprivileged social groups, politicians have successfully segregated the poor by their color, for example, and successfully divided that electorate.⁷² As a result, it has become very difficult for these minority groups to see themselves as belonging to one class—the underprivileged—and speak with one voice, although their demand is one: an employment-filled future.

Of course, there are “more complex” theoretical perspectives than Marxism that explain social phenomena.⁷³ For example, “[c]ritical race feminism . . . goes beyond traditional feminist approaches, which are usually based on the experiences of white middle and upper class

⁶⁵ See Frances Raday, *Privatising Human Rights and the Abuse of Power*, 13 CAN. J.L. & JURISPRUDENCE 103, 134 (2000).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ JON ELSTER, *MAKING SENSE OF MARX* 392 (1985).

⁶⁹ Neacșu, *supra* note 57, at 229.

⁷⁰ ELSTER, *supra* note 68, at 392.

⁷¹ John a. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 758 (1996).

⁷² *See id.*

⁷³ Lewis S. Feuer, *Introduction to KARL MARX & FRIEDRICH ENGELS, BASIC WRITINGS ON POLITICS AND PHILOSOPHY*, at ix, xviii (Lewis S. Feuer ed., 1959).

women.”⁷⁴ These are theories that “focus on the intersection of race and gender,” for example, and they emphasize the anti-essentialist aspect of the group members they represent.⁷⁵ However, it is my belief that, for as long as Marxism has been ignored, a certain poverty of the liberal discourse has flourished.⁷⁶ Marxism remains a valid social theory, if only because its “bold vision does grasp [much] of historical reality.”⁷⁷

Sometimes, “exfoliating social appearances and finding the common denominator among social realities”⁷⁸ may be a necessary theoretical step in understanding options for social reform. Because “Marx[ism] reduce[s] society—the space of human interaction—to its raw essence[,] to an economic and a non-economic component,”⁷⁹ it remains a useful intellectual tool. This dichotomy, often described as simplistic,⁸⁰ in fact helps us focus on important issues—there are basic (economic) issues that relate to housing, education, health care, employment, and a host of other issues that the electorate cares about deeply. However, it is those basic economic issues, as recent events have shown in the U.S., post-Hurricane Katrina, as well as in France and Belgium,⁸¹ that can easily change the electorate into a mob.

⁷⁴ Adrien K. Wing & Christine A. Willis, *From Theory to Praxis: Black Women, Gangs, and Critical Race Feminism*, 11 LA RAZA L.J. 1, 3 (1999).

⁷⁵ *Id.*

⁷⁶ On the poverty of liberal discourse, see Jeffrey Wallen, *The Poverty of Conversation*, 9 YALE J. CRITICISM 405, 412–13, 418 n.14 (1996).

⁷⁷ Feuer, *supra* note 73, at xviii.

⁷⁸ Neacșu, *supra* note 57, at 238.

Such an attitude has also been viewed as its liability. However, Marxism has “had a crucial impact not only on the development of the social and historical sciences since [Marx’s] day, but also on the way in which most people perceive modern society.” It demystifies social realities, and as Jon Elster also noted, at a minimum, its alienation and distributive justice theories remain useful in our postmodern society.

Id. at 238 n.135 (quoting Stephen Wilson, Letter to the Editor, *Marxism in Higher Education*, TIMES (London), Nov. 19, 1977, at 15). For a detailed account of postmodernism, see BRENDAN EDGEWORTH, LAW, MODERNITY, POSTMODERNITY: LEGAL CHANGE IN THE CONTRACTING STATE 133–34 (2003).

⁷⁹ Neacșu, *supra* note 57, at 238.

⁸⁰ See Peter C. Schanack, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2578 (1992).

⁸¹ Craig S. Smith, *France Has an Underclass, but Its Roots Are Still Shallow*, N.Y. TIMES, Nov. 6, 2005, § 4, at 3 (comparing the lootings in New Orleans after Hurricane Katrina with the riots in Paris); Craig S. Smith, *Ten Officers Shot as Riots Worsen in*

Moreover, we are all economically identifiable.⁸² Both the poor and the rich are part of the socio-economic class structure.⁸³ “As Raymond Williams observed, [Marxism explains] how the economic component of our lives sets limits and exerts pressures on our daily choices.”⁸⁴ “Extrapolated to law,” it seems as obvious as a truism that “we enjoy only the rights we can afford.”⁸⁵

Critics of Marxism found this “essentialism” to be its major fault.⁸⁶ I disagree. I suggest that “essentialism” may prove necessary to progressive politics today. If indeed we are witnessing a return to mass politics, then even progressive incremental reforms need a larger intellectual goal. Those who are not direct beneficiaries of those reforms need to be able to identify with a larger ideal—human rights, for example—to support them with their vote. Alternatively, the progressive reforms will need to pressure the Supreme Court to refrain from eliminating the meaning of individual rights that have previously been gained.

II. FEMINIST & QUEER THEORIES

As identity theories, feminist and queer theories “problematiz[e] the connection of identity and politics.”⁸⁷ They distance themselves from Marxism in every conceivable way. Methodologically, they focus on

French Cities, N.Y. TIMES, Nov. 7, 2005, at A1 (noting that urban unrest in Paris was caused by unemployment and lack of social services for the poverty-stricken African immigrants).

⁸² Neacșu, *supra* note 57, at 229.

⁸³ See Julia Chaplin, *Biting the Silver Spoon that Feeds Him, on Film*, N.Y. TIMES, Oct. 12, 2003, § 9, at 1.

⁸⁴ Neacșu, *supra* note 57, at 238. Herbert Gans demonstrates

how people’s choices are related, and infers their economic common thread: “[C]hoices are not made randomly. Research into consumer behavior and leisure indicates that choices are related; people who read *Harper’s* or *The New Yorker* are also likely to prefer foreign movies and public television, to listen to classical (but not chamber) music, play tennis, choose contemporary furniture, and eat gourmet foods.”

Id. at 238 n.134 (quoting HERBERT J. GANS, *POPULAR CULTURE AND HIGH CULTURE: AN ANALYSIS AND EVALUATION OF TASTE* 92 (1999)).

⁸⁵ *Id.* at 238.

⁸⁶ See Parpart & Marchand, *supra* note 4, at 12.

⁸⁷ Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, in *THE SECOND WAVE: A READER IN FEMINIST THEORY* 330, 348 (Linda Nicholson ed., 1997).

introducing non-economic “identity as a factor in any political analysis”⁸⁸ rather than identifying a set of objective needs that had been ignored by previous theories and then trying to address them politically. Some feminist theories describe themselves as “middle range [theories]” that “mediate[] between the material circumstances of women’s lives and the grand realizations that law is gendered, that law is a manifestation of power, [and] that law is detrimental to women.”⁸⁹

Undeniably, “our laws are mainly the work of men,” whether they are assembled in legislatures or members of the judiciary.⁹⁰ This fact could pose grave danger for the well-being of women, but it does not necessarily prove a causal relation between the laws that are perceived as nefarious and the composition of the legislative and judiciary bodies.⁹¹ Furthermore, if law is detrimental to women, it does not necessarily mean that it is detrimental to all women.⁹² That being said, law still remains a “manifestation of power,” which is detrimental to all who are economically in a position of subordination.⁹³

Feminist theories represent a first wave of fragmentation of general theories.⁹⁴ Feminist theories follow the “current of left thought that runs away from political economy . . . toward issues of identity.”⁹⁵ Queer theories go a step further beyond identity.⁹⁶ Queer theories tend to avoid any type of characterization, even a cultural one.⁹⁷ If feminist theories famously emphasize that “the personal is political”⁹⁸ and discuss identity politics, queer theories go further to point out that any type of collective

⁸⁸ *Id.*

⁸⁹ Martha Albertson Fineman, *Introduction* to *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY*, at xi, xii (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

⁹⁰ Joel Feinberg & Jules Coleman, *Justice*, in *PHILOSOPHY OF LAW* 258, 264 (Joel Feinberg & Jules Coleman eds., 7th ed. 2004).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Fineman, *supra* note 89, at xii.

⁹⁴ See Peter C. Alexander, *Building “A Doll’s House”: A Feminist Analysis of Marital Debt Dischargeability in Bankruptcy*, 48 *VILL. L. REV.* 381, 421 (2003).

⁹⁵ William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 *U. MIAMI L. REV.* 1099, 1111–12 (1994).

⁹⁶ See CHAMALLAS, *supra* note 16, at 169.

⁹⁷ See *id.*

⁹⁸ See for example Patricia J. Williams’s extensive writings about her family history. Patricia J. Williams, *On Being the Object of Property*, in *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY*, *supra* note 89, at 22–39.

identity needs to be re-examined because “identity can be deployed to harm its own subjects.”⁹⁹

In fact, the signifier “queer” can be viewed as a term that defines a desire to be representative of both “lesbian” and “gay” groups. Additionally, it is a term that can be used to replace identity as a monolithic characteristic with one that is multi-layered, which rests on the ways other types of cultural identity such as race, gender, and ethnicity influenced sexuality.¹⁰⁰ A defiant refusal to use terms of the dominant discourse may also be interpreted as a desire to bring, under one conceptual umbrella, as many fragmented discussions as possible.¹⁰¹ So, more than anti-assimilationist and anti-separatist, queer theory is, perhaps, an acknowledgment that coalitions can be made.¹⁰² Moreover, it may be an opening for recognizing that very little can be achieved within the self-imposed, and maybe even artificial, walls of the category itself.

Feminist legal theory dates from the early 1970s and corresponds to the “second wave” of American feminism, the wave ignited by Betty Friedan’s *The Feminine Mystique*.¹⁰³ The “first wave” of feminism is thought to have started in the mid-nineteenth century with the “fight for the vote” and to have ended in 1920 with the “enfranchisement of women.”¹⁰⁴ The current “third wave” of feminism challenges single-trait analysis in law as unrealistic.¹⁰⁵ If feminism focuses on an “anti-essentialist” critique of society, especially power relations, to reveal that sex influenced both the development of societal structures and thus of legal norms,¹⁰⁶ the third wave of feminism further rejects the “unitary [woman]” category from the legal discourse.¹⁰⁷ The third wave of feminism, having developed contemporaneously with queer theory, has successfully incorporated queer

⁹⁹ Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115, 140 (David Kairys ed., 3d ed. 1998).

¹⁰⁰ Rosemary Hennessy, *Incorporating Queer Theory on the Left*, in *MARXISM IN THE POSTMODERN AGE: CONFRONTING THE NEW WORLD ORDER*, *supra* note 8, at 266, 266.

¹⁰¹ *Id.* at 266–67.

¹⁰² *See id.* at 267.

¹⁰³ D. Kelly Weisberg, *Introduction to FEMINIST LEGAL THEORY: FOUNDATIONS*, *supra* note 19, at xv, xv.

¹⁰⁴ *Id.*

¹⁰⁵ Berta E. Hernández-Truyol, *Querying Lawrence*, 65 OHIO ST. L.J. 1151, 1231–32 (2004).

¹⁰⁶ *See* Weisberg, *supra* note 103, at xvii.

¹⁰⁷ Rosemary C. Salomone, *Feminist Voices in the Debate over Single-Sex Schooling: Finding Common Ground*, 11 MICH. J. GENDER & L. 63, 85 (2004).

theory ideals, which defy, for example, the “traditional dyad of spouse and child as the primary, if not exclusive, objects of women’s hedonic lives,” into its literature.¹⁰⁸

Despite the differences among feminist legal theories,¹⁰⁹ it can also be said that the theories are unified by their multiple perspective approach and their lack of ideological unity. If the ambition of any social theoretical construct is to have some practical impact, which can mean changing the general view about the social phenomenon or nurturing some form of social action, then this ambition can be described as unifying feminist theories as well.

Social change is obtained through social action. Arguably, the most advanced form of social action is collective political action. It will require, at a minimum, however, “a sense of shared identity and purpose.”¹¹⁰ Marxism could offer that sense of shared purpose.

Nevertheless, both feminist and queer theories have been successful on some levels. These theories brought social change, both when it required popular legislative support and today, when the Supreme Court’s changes require only elite support.

There are statutes and court decisions that recognize the social issues underlined in those theories. Either by name or through their proposed theoretical strategies, some of the most significant theorists have also been publicly acknowledged. For example, in the unanimous opinion of the first Supreme Court decision to favorably decide a claim of sexual harassment, *Meritor Savings Bank v. Vinson*,¹¹¹ the archconservative Justice Rehnquist incorporated the radical views of Professor Catharine MacKinnon on sexual policing.¹¹²

¹⁰⁸ Katherine M. Franke, *Women Imagining Justice*, 14 YALE J.L. & FEMINISM 307, 311–12 (2002); accord CHAMALLAS, *supra* note 16, at 85, 92.

¹⁰⁹ CHAMALLAS, *supra* note 16, at 3.

¹¹⁰ Simon, *supra* note 95, at 1110.

¹¹¹ 477 U.S. 57 (1986).

¹¹² Compare *id.* at 73 (“[A] claim of ‘hostile environment’ sex discrimination is actionable under Title VII.”), with Catharine A. MacKinnon, *Sexual Harassment: Its First Decade in Court (1986)*, in 3 GENDER AND AMERICAN LAW: THE IMPACT OF THE LAW ON THE LIVES OF WOMEN 53 (Karen J. Maschke ed., 1997) (observing that sexual harassment is sex discrimination because sexual harassment is based upon a woman’s sex). Additional cases that recognize the influence of feminists include: *O’Sullivan v. Boerckel*, 526 U.S. 838, 861 (1999) (citing Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 894 (1984)); *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 569 (7th Cir. 1997) (citing CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979)). For a more detailed analysis of the tangled relationship between radicalism and conservatism in American

Queer theories have had success, too. In *Lawrence v. Texas*,¹¹³ Justice Kennedy focused on “the liberty of all” rather than curtailing it under the Court’s “own moral code,”¹¹⁴ as the Court did two decades earlier in *Bowers v. Hardwick*,¹¹⁵ when it denied constitutional protection to adult same-sex partners engaged in consensual sexual acts.¹¹⁶ Unfortunately, *Lawrence* may not be quite what it seems because what it exalts may be viewed as nothing more than the equivalent of marital sex.¹¹⁷ However, the nature of identity politics’ success is incremental,¹¹⁸ so more sexual freedom is tomorrow’s fight. That said, what can be achieved tomorrow depends on the political climate of that day, and on what is then considered reasonable.

III. IDENTITY POLITICS V. MARXISM

The problems raised by feminist and queer theories vis-à-vis Marxism could be described using Janet Halley’s paradigm of minoritizing and universalizing understandings.¹¹⁹ Minoritizing understandings are about politics-of-recognition, while universalizing understandings are about social constructivist models.¹²⁰ Pierre Bourdieu remarked, “I know too

jurisprudence in the context of sexuality, see Dana Neacșu, *Tempest in a Teacup or the Mystique of Sexual Legal Discourse*, 38 GONZ. L. REV. 601, 601–04 (2002/03).

¹¹³ 539 U.S. 558 (2003).

¹¹⁴ *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

¹¹⁵ 478 U.S. 186 (1986).

¹¹⁶ For a more detailed analysis, see Neacșu, *supra* note 112, at 625–27.

¹¹⁷ Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1408 (2004).

In two paragraphs, Justice Kennedy does a thorough job of domesticating John Lawrence and Tyron Garner—Lawrence an older white man, Garner a younger black man, who for all we know from the opinion, might have just been tricking with each other. Did they even know each other’s name at the point police entered Lawrence’s apartment? Did they plan on seeing each other again? None of these facts is in the record, none of the briefing in the case indicated that they were in a relationship. Nevertheless, the Court took it as given that Lawrence and Garner were in a relationship, and the fact of that relationship does important normative work in the opinion.

Id.

¹¹⁸ Neacșu, *supra* note 112, at 653.

¹¹⁹ Halley, *supra* note 99, at 137.

¹²⁰ *Id.*

well that . . . it is all too easy to deride the mediocresly petty-bourgeois and vaguely social-democratic inspiration of any enterprise aimed at building[] against all forms of particularism”¹²¹ Of course, Marxism has been derided for many reasons, and postmodernism was an answer that grew out of those laughs.¹²² However, the time has come to admit that the decades of postmodern thought have brought us to the brink of a crisis of imagination of liberal effort—world-wide. With few exceptions—which include Western Europe, Cuba, Syria, and Iran—unrestrained capitalism is reigning.¹²³ The battle is about finding universalizing understandings that could explain a choice for our liberal democracy, for example.

Marxism belongs to that universalist school of thought. It assumes a general consensus of ethical values despite the gender, age, or sexual orientation of the members of any society. However, such an aspiration seems to be the very reason for the derision current politics shows it to be.

The derision is deplorable. It cannot be but a doctrinal façade: achieving a decent lifestyle for all must be a value respected by all progressive movements and their members, unless they can afford not to care about Hiroshima, metaphorically speaking, because they are too absorbed with the “night thoughts of a tired surgeon.”¹²⁴

From a feminist point of view, the main deficiency of Marxism is its focus on the economy.¹²⁵ Marx has been viewed as eliminating “those [activities] identified by feminists as ‘reproductive’ (childcare, nursing)” as well as those concerned with kinship regulation.¹²⁶ Marx is accused of using a narrow meaning of “production,” and not including in his meaning of “mode of production of material life,” all social interaction “conducive to the creation and re-creation of a society’s physical existence.”¹²⁷

¹²¹ BOURDIEU & WACQUANT, *supra* note 1, at 58.

¹²² Jason E. Whitehead, *From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies Through Reexamination of Frankfurt School Critical Theory*, 26 FLA. ST. L. REV. 701, 716 (1999).

¹²³ See LEONARD SILK & MARK SILK, MAKING CAPITALISM WORK 5 (1996) (Syria and Iran); *id.* at 119–28 (Western Europe); Jesus (Jay) Sanchelima, *Selected Aspects of Cuba’s Intellectual Property Laws*, 15 FLA. J. INT’L L. 377, 378 (2003) (Cuba).

¹²⁴ The latter was Sylvia Plath’s choice, who is an icon for some in the feminist movement. See Deborah Solomon, *Pretty in Paint*, N.Y. TIMES, Feb. 27, 2005, § 6 (Magazine), at 25.

¹²⁵ See Linda Nicholson, *Feminism and Marx: Integrating Kinship with the Economic*, in THE SECOND WAVE: A READER IN FEMINIST THEORY, *supra* note 87, at 131, 132.

¹²⁶ *Id.* at 133.

¹²⁷ *Id.*

Catharine MacKinnon disliked Marx's writings for ignoring women.¹²⁸ The best articulated criticism of Marxism is that its construction of "class" is essentialist and "ignore[s] the oppression of social groups not constituted economically."¹²⁹ It is well known that together with postmodernism, poststructuralist feminism "engendered" the orthodox interpretation of "reproduction of class relations."¹³⁰ If issues such as reproductive rights and unpaid household labor were marginal to Marxist discourse, to its credit, feminism brought them to center stage.¹³¹

However, Marxism remains relevant today. In addition to what has already been mentioned, Marxism can also help explain how the oppression of gays and lesbians¹³² is expressed economically "through denial of employment, housing, and health care."¹³³ Any comprehensive demand for human rights, which would include social and economic rights in addition to civil and political ones, would have such discrimination addressed. Marxism can help feminists focus on issues "that are meaningful to those who do not enjoy [what Gayatri C. Spivak defined as] 'the institutional privileges of power.'"¹³⁴

Marxism is able to unite feminists from different parts of the world whose interests otherwise may not intersect.¹³⁵ For example, Marxism offers the tools to criticize the scourge of globalization¹³⁶ and the end of garment trade quotas, which cause women in many global regions to face the bleak choice of either earning 30 cents an hour to work in a "real

¹²⁸ See MacKinnon, *supra* note 16, at 429.

¹²⁹ Carol A. Stabile, *Feminism Without Guarantees: The Misalliances and Missed Alliances of Postmodernist Social Theory*, in *MARXISM IN THE POSTMODERNIST AGE: CONFRONTING THE NEW WORLD ORDER*, *supra* note 8, at 283, 284.

¹³⁰ Antonio Callari et al., *Introduction to MARXISM IN THE POSTMODERN AGE: CONFRONTING THE NEW WORLD ORDER*, *supra* note 8, at 1, 6.

¹³¹ *Id.* at 7.

¹³² For a discussion of the problems raised by trying to define "gays" and "lesbians," see MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 186–90 (1999).

¹³³ Stabile, *supra* note 129, at 284.

¹³⁴ *Id.* at 289 (quoting Gayatri C. Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271, 280 (Cary Nelson & Lawrence Grossberg eds., 1988)).

¹³⁵ See Callari et al., *supra* note 130, at 7.

¹³⁶ For a more in-depth discussion on the nefarious effects of globalization, see Michael H. Davis & Dana Neacșu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 *UMKC L. REV.* 733 (2001).

sweatshop” or becoming a prostitute.¹³⁷ Recently, this choice was faced by Chinese women who had been employed by American garment companies with factories in Saipan, Northern Mariana Islands, an area sometimes referred to as a “quiet little American territory.”¹³⁸

Marxism can provide insight into a world divided into classes whose members form further alliances according to a wide set of interests and identities, including gender and sexuality.¹³⁹ With its focus on class struggle, Marxism can provide theoretical guidance to those who want to organize social movements along other lines of social interest.¹⁴⁰ For example,

Marxists have contributed to struggles over reproductive rights by showing the links between feminist concerns about gender subordination and the rights of women and class issues about who does the work of child care and under what conditions, or about who has access to reproductive technology and medical services and for what reasons.¹⁴¹

Marxism can also help explain the spread of HIV in economically deprived areas of the globe and in those with high rates of prostitution.¹⁴² It can help because a Marxist explanation would connect the spread to both the poverty of resources to stop the virus and to the poverty of knowledge, which is often caused by a lack of adequate resources to support adequate public awareness.¹⁴³

However, as queer theorists have noted, there are “privileged forms of sexuality—such as heterosexuality, marriage, and procreation—that are protected and awarded by the state and subsidized through social and economic incentives.”¹⁴⁴ These forms need to be addressed separately if we want to understand their specificity, and Marx did in fact ignore such

¹³⁷ James Brooke, *Made Elsewhere: An Island's Quandary*, N.Y. TIMES, Apr. 9, 2005, at C1.

¹³⁸ *Id.*

¹³⁹ See Callari et al., *supra* note 130, at 7.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Rosalyn Baxandall, *Marxism and Sexuality: The Body as Battleground*, in MARXISM IN THE POSTMODERN AGE: CONFRONTING THE NEW WORLD ORDER, *supra* note 8, at 235, 241–42.

issues.¹⁴⁵ Nevertheless, if making distinctions is intellectually necessary, it is also necessary to recognize commonality among the differences. If mass politics are involved, a singular focus on sexuality and gender may be particularly ill-advised.

For the last few decades, the Left and the Right have played good cop/bad cop when it comes to sexuality: they are both interested in regulating it.¹⁴⁶ Both have successfully addressed it as a “site of critique.”¹⁴⁷ For example, sexuality has been a “field of power, [and] a category of identity” for the Left.¹⁴⁸ Moreover, queer theory has been “a critique of heterosexuality” as a regulatory social practice.¹⁴⁹ And for the Right, sexuality is a place to criticize liberals, and the Left fears that what was gained yesterday may be lost tomorrow.¹⁵⁰

Marxism, whose materialism remains useful for both feminist and queer theories,¹⁵¹ is an answer to those uncertainties. A “materialist queer critique,” for example, explains how “human capacities for reproduction and pleasure are always historicized or organized under certain specific conditions across a complex ensemble of social relations—economic, political, [or] ideological.”¹⁵² Furthermore, it explains how sexuality “mediate[s] and traverse[s] other facets of social reproduction.”¹⁵³ More interestingly, a materialist queer theory can provoke the Left to develop “a radical oppositional politics” that speaks to lesbians and gays and queers whether they are urban middle-class members or marginalized in prisons and shelters.¹⁵⁴

¹⁴⁵ Nicholson, *supra* note 125, at 133.

¹⁴⁶ See Baxandall, *supra* note 144, at 241.

¹⁴⁷ *Id.*

¹⁴⁸ See Hennessy, *supra* note 100, at 266.

¹⁴⁹ *Id.*

¹⁵⁰ See Baxandall, *supra* note 144, at 242.

¹⁵¹ See Hennessy, *supra* note 100, at 273–74.

¹⁵² *Id.* at 273.

¹⁵³ *Id.*

¹⁵⁴ Understanding sexuality from a systemic social perspective has several implications First of all, while it acknowledges that sexuality is always discursively constructed, it simultaneously insists that the materiality of sexuality is not *just* discursive. This perspective shift encourages us to address how the normative discursive construction of sexuality as heterosexuality has been imbricated in divisions of wealth and has helped organize state relations and formations of citizenship. But such a systemic materialist analysis also exerts critical pressure on lesbian, gay, and queer politics as well, raising questions about the relationship between the view of social life

Additionally, if the radical discourse today is about more detailed issues—such as the eradication of HIV, the expansion of reproductive rights, and the elimination of child abuse and the battering of women—it will not negate the value of Marxism. In fact, the more the radical discourse proliferates, the more the academe, as its creator, needs to be wary of it.

For instance, Boris Kagarlitsky called such discourse explosion “a projection onto social and political life of the market situation of redundant diversity.”¹⁵⁵ “Redundant diversity is . . . a characteristic feature of the capitalist market,” which adds “a choice between advertising symbols” to the choice of goods.¹⁵⁶ It changes the discourse from one of competent choice to one manipulated by advertisers; in politics, something similar has also happened.¹⁵⁷ Kagarlitsky explained the process as the result of the “commercial propaganda,” which demands that new goods constantly appear on the market.¹⁵⁸ This process has not avoided the field of women’s studies. There are even “rumours of the decline of women’s studies in the academy, replaced by a more contemporary consideration of sexuality,” called “contemporary sexual politics”¹⁵⁹

The simple old formulae of “class struggle,” “social transformation,” “solidarity” and “popular power” are becoming “old fashioned” not because they are remote from the needs of present-day humanity, but because they are forced onto a subordinate level by new ideas formulated so as to accord exactly with the principles of modern advertising.¹⁶⁰

in most queer theory as so thoroughly and exclusively stylized, textual, and performative, and the increasing commodification of homosexuality as a new market niche, (life)style, or fashion statement. It questions as well the loosening of heterosexual gender codes among the professional/consumer class in “postindustrial” economies and the invisible laborers elsewhere on which they depend.

Id. at 273–74.

¹⁵⁵ KAGARLITSKY, *supra* note 42, at 42.

¹⁵⁶ *Id.* at 40.

¹⁵⁷ *Id.* at 40–41.

¹⁵⁸ *Id.* at 41.

¹⁵⁹ Mandy Merck et al., *Introduction* to *COMING OUT OF FEMINISM?* 1, 3 (Mandy Merck et al. eds., 1998).

¹⁶⁰ KAGARLITSKY, *supra* note 42, at 41.

IV. IS THIS THE END/MY FRIEND?¹⁶¹

Where are we in terms of progressive legal theory and social movements? Clearly, we are not near a theory that relies on any deep social consensus or on any strategy of change “commanded from the centers of power.”¹⁶²

Our society continues to further “splinter” every day into finer divisions, and those divisions are translated into legal theories that do not dare to speak for the many.¹⁶³ As Robert W. Gordon noted almost a decade ago, America had known a large array of progressive legal theories supporting similarly progressive social movements: “civil rights, women’s rights, welfare rights, children’s rights, gay and lesbian rights, international human rights, immigrants’ and farm workers’ rights, environmentalism and community development.”¹⁶⁴ Correspondingly, by some standards, America has experienced extraordinary changes in “racial relations and perceptions, in the roles and relations of men and women, and in beliefs about the appropriate relation of humans to their natural environment.”¹⁶⁵

Identity politics seems to be running away from the basic institutions of civil democracy, such as civic equality,¹⁶⁶ “toward medieval concepts of specific rights, liberties and privileges possessed by each particular social group.”¹⁶⁷ “[I]dentity politics has given rise to its own political practice, whose main achievement has been affirmative action”¹⁶⁸

Affirmative action “aim[s] at improving the career prospects of members of oppressed groups within [the] society.”¹⁶⁹ But what if such affirmative action plans are not related to general movements to create jobs and democratize society¹⁷⁰—for example, by improving the national education system, including the inner city schools, and by fighting for job

¹⁶¹ THE DOORS, THE END (Elektra 1990) (1967).

¹⁶² Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 99, at 641, 643.

¹⁶³ *See id.*

¹⁶⁴ *Id.* at 641.

¹⁶⁵ *Id.* at 643.

¹⁶⁶ KAGARLITSKY, *supra* note 42, at 83. Of course, I am aware that equality is often regarded as a “formal and empty” political slogan. *See, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM 217 (1986).

¹⁶⁷ KAGARLITSKY, *supra* note 42, at 83.

¹⁶⁸ *Id.* at 78–79.

¹⁶⁹ *Id.* at 79.

¹⁷⁰ *Id.*

creation for all¹⁷¹—and instead are just a ploy to “strengthen[] the elite”?¹⁷² Interestingly, the position of women and the lives of the poor improved in the countries where a strong labor movement exists.¹⁷³ To the extent that data show that in the United States, affirmative action benefited middle- and upper-class white women the most,¹⁷⁴ it only seems logical to assume that identity politics does not seem to find fault with participating in the reproduction of injustices and imbalances.¹⁷⁵ Instead, it seems to be happy to participate in infusing “new blood” in the elite itself.¹⁷⁶

So where are we now, both theoretically and practically in terms of progressive and transformative politics? In 1998, in the middle of a Democratic administration, it became apparent that

[e]ven the smallest victories of the reformers mobilized ferocious right-wing movements determined to roll them back. Conservatives have managed to replace liberal state and federal judges with conservatives; to defund and cripple legal services; to invalidate employment and education policies aimed at overcoming structural barriers to racial equality; to demolish welfare entitlements without putting in their place realistic means of caring for children and getting work at a living wage; to defeat [what was presented as] universal access to medical care; and to weaken enforcement of the labor laws against employers who illegally fire union organizers. . . . [T]hrough crusades

¹⁷¹ William Julius Wilson, *Jobless Poverty: A New Form of Social Dislocation in the Inner-City Ghetto*, in SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE, *supra* note 9, at 651, 653.

The jobless poverty of today stands in sharp contrast to previous periods. In 1950, a substantial portion of the urban black population was poor but they were working. Urban poverty was quite extensive but people held jobs. However, as we entered the 1990s most adults in many inner-city ghetto neighborhoods were not working [T]he absence of regular employment . . . [brings a lack of] regular income but also [a lack of] a coherent organization of the present—that is, a system of concrete expectations and goals.

Id.

¹⁷² KAGARLITSKY, *supra* note 42, at 79.

¹⁷³ *See id.* at 79–80.

¹⁷⁴ *Id.* at 79.

¹⁷⁵ *See id.* at 85.

¹⁷⁶ *Id.*

for “family values[.]” [conservatives have tried] to limit the growing power of women to control the terms on which they will bear children and remain in marriages and to reverse the increasing recognition of the legitimacy of gays and lesbians.¹⁷⁷

The same is true today. We are further witnessing a “conservative restoration”¹⁷⁸ when few acknowledge the specific class interests on which their political discourse is structured.¹⁷⁹ Feminist and queer theories, for the most part, ignore the context of multi-national capitalism—how capitalism affects the lives of billions of women, children, and those in queer communities from less-developed countries.¹⁸⁰ In fact, since the collapse of the USSR, the free market has been credited with “economic prosperity and human freedom.”¹⁸¹ Do we want to let free market ideologies define our ideal of human freedom?

Marxism offers the tools to understand the limits of such freedom because Marxism analyzes capitalist exploitation in all unrestrained forms, and as such it emphasizes the incredible suffering such capitalism has produced all over the world. Globalized capitalism indeed freed small elite—which includes members of the gender and sexual minorities—and brought human freedom to very few individuals.¹⁸² Furthermore, as mentioned above, the need for regulations that both feminist and queer theorists demand on the domestic front are easier to obtain within a Marxist frame.¹⁸³

So where are we today? The only change between then and now is that both liberal and conservative politics use anti-establishment symbols. The liberals promote the “hawkish” Hillary Clinton, who voted to

¹⁷⁷ Gordon, *supra* note 162, at 644. Additionally, Kagarlitsky notes, “The problem . . . is that struggling for redistribution within the bounds of the system is itself a dead-end. . . . Identity politics and affirmative action fail precisely because the logic of social relationships cannot be annulled through liberal resolutions. Injustices and imbalances are reproduced again and again.” KAGARLITSKY, *supra* note 42, at 85.

¹⁷⁸ Stabile, *supra* note 129, at 283.

¹⁷⁹ See Parpart & Marchand, *supra* note 4, at 10. For a more detailed discussion on materialist feminism, see Hennessy, *supra* note 100, at 273–74.

¹⁸⁰ See Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations*, 52 EMORY L.J. 71, 79 n.30 (2003).

¹⁸¹ Kellner, *supra* note 8, at 38.

¹⁸² ELSTER, *supra* note 39, at 146–47.

¹⁸³ Kellner, *supra* note 8, at 38.

authorize the war in Iraq¹⁸⁴ and has “warm words to opponents of legalized abortion,” giving religion praise in her message that champions “teenage celibacy.”¹⁸⁵ The conservatives promote the “dominatrix” Condoleeza Rice, who demonstrated female power by reviewing our troops while stylishly dressed in stiletto boots.¹⁸⁶ Both the liberals and the conservatives use Mary Cheney, whom the Right puts “[s]ometimes onstage, sometimes not, depending on the stage and the target audience.”¹⁸⁷

So what is the state of progressive politics for both feminist and queer theorists in 2005? Presently, it seems that the only thing that matters is advancing one’s individual agendas of “power and career, [which] completely takes over anything else.”¹⁸⁸ So identity theories may support individual achievement, with little benefit for the masses. Is that good? Is that bad? Is there anything else possible?

V. SUGGESTION: DIVERSIFY THE DISCOURSE AND INTRODUCE MARXIST VALUES

Perhaps progressive politicians, based on non-economic identity issues, which, by definition, have a minimalist approach to social change, lost something when they distanced themselves from Marxism, whose focus is on essential economical features and the exploitation of others—the impoverished masses.¹⁸⁹ The gap between the rich and the poor is deepening each day.¹⁹⁰ There are more people who become poor than rich

¹⁸⁴ Meet the Press Transcript for Feb. 27 (Feb. 27, 2005), <http://www.msnbc.msn.com/id/70414261/> (comment made by William Safire) [hereinafter Meet the Press].

¹⁸⁵ Patrick D. Healy, *Clinton Seeking Shared Ground over Abortions*, N.Y. TIMES, January 25, 2005, at A1.

¹⁸⁶ Meet the Press, *supra* note 184 (remarks made by Maureen Dowd).

Tim, I know you’re salivating for a Hillary-Condi 2008 race, and it’s interesting, because Hillary’s nickname is “The Warrior” with her staff. And Condi obviously is the warrior, as she showed when she reviewed the troops in Wiesbaden this week in a “Matrix” dominatrix outfit that is going to put the Oscar women to shame in the high black stiletto boots.

¹⁸⁷ Hank Stuever, *What Everybody Doesn’t Know About Mary Cheney*, WASH. POST, Oct. 19, 2004, at C1.

¹⁸⁸ *Id.* (quoting Chastity Bono).

¹⁸⁹ See ELSTER, *supra* note 39, at 79.

¹⁹⁰ See Sam Roberts, *In Manhattan, Poor Make Two Cents for Each Dollar to the Rich*, N.Y. TIMES, Sept. 4, 2005, at 16.

today, and the gap is greater than it was a decade ago.¹⁹¹ So even if there are more women in the work force and in places of social importance today than a few decades ago, is that only a shift in the composition of the privileged or is that a sign that the society as a whole is better off today?

Clearly there are limits in the positions that those who are now part of the elite can take. Clearly, many whites seem uncomfortable taking up minority issues.¹⁹² It is worth noting that being white, male, and middle-class had been viewed as an impediment in accurately representing the position of those who identified themselves as being female, as belonging to a racial minority group, or some other similarly subordinate group.¹⁹³ However, two things can be said about that. First those women who reach the levels of power previously held by white middle-class males ought to lose their representative legitimacy as well, for reasons of theoretical coherence;¹⁹⁴ they may not be white or males, but becoming middle-class or even upper-middle-class must inflict upon them the same loss of legitimacy. Second, from a Marxist point of view, such distinctions are irrelevant. A Marxist, unfortunately, does not speak on behalf of minorities. The vast majority of the world population is the quiet “other” in the Marxist discourse. Thus, maybe we should forget about such identity-legitimizing issues, because, as Kim Lane Scheppelle has stated, “[I]t is simply not true that people can’t understand those whose experiences and values are very different from their own.”¹⁹⁵ Similarly, people can adequately represent and be represented by others with whom they may not share the same skin color, gender, or sexual orientation, as long as they share the same political goals.¹⁹⁶

Perhaps the problems rest with the current Left symbolism—a non-socio-economic one—which has been so easily cannibalized by the Right. Maybe we should try to find ways to make it impossible for the Right to do

¹⁹¹ See Joseph Kahn, *Globalization: Unspeakable, Yes, but Is It Really Evil?*, N.Y. TIMES, May 7, 2000, at 4.

¹⁹² See, e.g., Portia Y.T. Hamlar, *Minority Tokenism in American Law Schools*, 26 HOW. L.J. 443, 570–71 (1983) (noting that a white law school professor was “obviously uncomfortable [teaching] the subject matter” of *Brown v. Board of Education*).

¹⁹³ Duncan Kennedy, *Political Power and Cultural Subordination: A Case for Affirmative Action in Legal Academia*, in AFTER IDENTITY: A READER IN LAW AND CULTURE 83, 92 (Dan Danielsen & Karen Engle eds., 1995).

¹⁹⁴ See Craig Owens, *The Discourse of Others: Feminists and Postmodernism*, in THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE, *supra* note 50, at 57, 59.

¹⁹⁵ Kim Lane Scheppelle, *The Reasonable Woman*, in PHILOSOPHY OF LAW, *supra* note 90, at 456.

¹⁹⁶ See *id.*

it.¹⁹⁷ Perhaps gender and sexual orientation discourse are just too slippery, in the way it is constructed today, to be the sole representative of progressive politics.¹⁹⁸

Perhaps, as other commentators have recognized, it is time to return to a discourse based on political economy.¹⁹⁹ Thus, we could analyze the pervasive role of power and oppression, especially if presented from the more conventional leftist position, which sees them from the perspective of the larger structure of political economy.²⁰⁰ We could reassess the tactics employed by progressive politics and see the limits of what can be and has been achieved using the existing methods that focus solely on the micro-structure, or what is known as superstructure in the Marxist literature.²⁰¹ One major way to change tactics is through education.²⁰² Through education we can conserve or attempt to change the “culture inherited from the past.”²⁰³ What are the legal theories offered to students today? Have the students’ legal imaginations been shuttered by the theories they have been exposed to recently? Are they able to imagine alternative distributive justice systems?

“[D]espite attacks from the Right,” from “conservative and free-market ideologies,” and from the postmodern Left theories, such as feminism and queer theories, “Marxism retains formidable critical powers” that “derive[] from its profound allegiance to struggles for social justice.”²⁰⁴ To the extent that feminism and queer theories are struggles for social justice, then the Marxist symbolism cannot but help, especially because continuing to rely on the epistemological stances of postmodernist “relativity,” which ignores social justice for all, threatens to be perceived as reactionary.

¹⁹⁷ Moreover, the fact that queer symbolism can become part of cultural mainstream but Marxist symbolisms do not also tells us something about each movement’s insurgent qualities and about their aspirations and demands. It tells us that the social imagination is able to accept only “minority deviations.” See Hennessy, *supra* note 100, at 268.

¹⁹⁸ See Neacșu, *supra* note 112, at 652.

¹⁹⁹ See, e.g., Simon, *supra* note 95, at 1101.

²⁰⁰ *Id.* However, it should be noted that the author, Simon, does not indorse this particular approach.

²⁰¹ For a discussion of superstructure see for example, Neacșu, *supra* note 57, at 236–47.

²⁰² For a discussion on the role of education to enlarge our legal imagination, see *id.*

²⁰³ Pierre Bourdieu, *Cultural Reproduction and Social Reproduction*, in KNOWLEDGE, EDUCATION, AND CULTURAL CHANGE: PAPERS IN THE SOCIOLOGY OF EDUCATION 71, 72 (Richard Brown ed., 1973).

²⁰⁴ Callari et al., *supra* note 130, at 3.

CONCLUSION

Mass organizations have been replaced by non-government organizations (NGOs).²⁰⁵ NGOs have enticed radical activists that are “tired of poverty and self-sacrifice.”²⁰⁶ Despite this bourgeois radicalism, there are signs that mass politics have come back.²⁰⁷ If true, then progressive theories need the foundational knowledge to deal with mass politics. Marxism offers it. Unfortunately, religion offers it, too.

The successes of the Reagan conservatism and, now, the Bush right-wing policies, rest, to a large degree, on their “ability to provide society with a unifying mythology, capable of mobilizing a massive social base of conservatives.”²⁰⁸ They resuscitated God.

In contrast, Democrats, then and now, “were unable to put forward anything that might have unified their heterogeneous social base.”²⁰⁹ They “lacked a vocabulary for the common good.”²¹⁰ Todd Gitlin and the others who decried the Left’s rejection of a universalist approach were then criticized as being “angry white men.”²¹¹ During the most recent presidential elections, and since then, the Left seems more inclined to invoke religious morals rather than a secular morality of social justice. The Left has replaced anger with piousness in public discourse only to achieve failure.

However, if the Left concentrates on human rights, and also includes in that discourse economic social rights, in addition to political rights, and tells the masses that it understands their alienation, their fears, their anxieties regarding lack of jobs, lack of proper education, and lack of health care, maybe progressive politics can be resuscitated too.

Voting alone does not establish a democracy. However, through the vote, people may come together and small revolutions may occur. The twenty-first century may not necessarily become the new obscurantist Middle Ages, but it clearly defines itself as a century that rests on meta-narratives that are meant to compensate for a life increasingly dissatisfied in a global-capitalist society that creates wants that can never be mass satisfied.

²⁰⁵ KAGARLITSKY, *supra* note 42, at 89.

²⁰⁶ *Id.*

²⁰⁷ *See id.*

²⁰⁸ *Id.* at 93.

²⁰⁹ *Id.*

²¹⁰ TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS* 82 (1995).

²¹¹ Jesse Lemisch, *Angry White Men on the Left*, 6 *NEW POLITICS* 97, 98 (Winter 1997).

