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BOOK REVIEW

Thinking with Wolves: Left Legal Theory After the Right's Rise

MARTHA T. MCCLUSKEY†

LEFT LEGALISM/LEFT CRITIQUE. Edited by Wendy Brown[1] & Janet Halley.[2] *Durham: Duke University Press*, 2002. Pp. viii, 447. $22.95 (paper).

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† William J. Magavern Faculty Scholar and Professor, State University of New York at Buffalo. Thanks to Martha A. Fineman and participants at the Feminism and Legal Theory Project 20th Anniversary Workshop for the opportunity to present and discuss an early version of this paper. Thanks also to Carl Nightingale, Laura Kessler, Rebecca French, Jack Schlegel, and other participants in a Buffalo Law School faculty workshop for comments on drafts, and to Dalia Tsuk for helpful conversations on legal theory that sparked my interest in this project.

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INTRODUCTION

In *Left Legalism/Left Critique*, Wendy Brown and Janet Halley gather essays that present "a yearning for justice that exceeds the imagination of liberal legalism, a critical and self-critical intellectual orientation, and a certain courage to open the door of political and legal thought as if the wolves were not there."[3] *Left Legalism/Left Critique* shines new light on the problem of how to invigorate progressive legal theory in the U.S. at the start of 21st century. The book directly confronts what many have noted more casually: left-leaning intellectual analysis has lost ground in politics and law.[4] In the aftermath of the 2004 Presidential election, opponents of right-wing politics continue to lament the lack of visionary *ideas* capable of animating and illuminating centrist, liberal, or left law reform projects.[5]

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3. WENDY BROWN & JANET HALLEY, *Introduction* to LEFT LEGALISM/LEFT CRITIQUE 36 (Wendy Brown & Janet Halley eds., 2002).

4. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 501-02 (1995) (explaining that the problems of the critical legal studies movement raised the question of "whether, in the United States, radical leftist jurisprudential initiatives could ever be genuinely sustained"); William H. Simon, *Fear and Loathing of Politics in the Legal Academy*, 51 J. LEGAL EDUC. 175 (2001) (describing and criticizing the persistent and pervasive recent resistance to left legal theory and politics in legal scholarship).

5. *See, e.g.*, E. J. DIONNE, JR., STAND UP FIGHT BACK: REPUBLICAN TOUGHS, DEMOCRATIC WIMPS, AND THE POLITICS OF REVENGE (2004) (arguing that Democrats have been hurt by their failure to articulate clear progressive ideas); MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2005) (comparing the passionate, compelling

In contrast, since the late 1970s, right-wing politics has been highly successful in rethinking the ideas that grounded the 20th century U.S. regulatory and welfare state.[6] An explosion of visionary legal theory challenging a century of non-conservative law reforms has helped drive the right-wing's political success.[7]

Though the left-leaning critical legal studies ("CLS") movement offered a dramatic challenge to mainstream law in the 1970s and early 1980s, the standard view holds that CLS quickly lost its influence and visibility—which had rarely reached far beyond the margins of a few elite law schools.[8] Later-formed branches of critical legal theory have survived and even thrived by focusing on particular problems of race, gender, and sexual identity.[9] However, it

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conservative vision supporting tax cuts for the very rich with the tepid, unclear defense of the estate tax by liberals); Matt Bai, *The Framing Wars*, N.Y. TIMES, July 17, 2005, (Magazine), at 38 (discussing recent struggles among Democratic political leaders to find academic experts who can help formulate a more successful liberal message).

6. *See* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA (2004) (discussing why American politics veered sharply to the right in the late 20th century).

7. *See infra* Part I.C.; *see also* HERMAN SCHWARTZ, RIGHT WING JUSTICE: THE CONSERVATIVE CAMPAIGN TO TAKE OVER THE COURTS (2004) (showing how conservative activists drew on legal scholars to help fuel a dramatic change in the politics of the judiciary).

8. *See, e.g.*, DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 219 (2004) (discussing the decline of critical legal studies); Richard A. Epstein, *Let "The Fundamental Things Apply": Necessary and Contingent Truths in Legal Scholarship*, 115 HARV. L. REV. 1288, 1294 (2002) (mentioning that Critical Legal Studies achieved prominence in the 1970s and 1980s for its "socialist concern[s]" but that it "has, as best one can tell, withered away in the past decade."); Simon, *supra* note 4, at 178-79 (explaining that the only significant recent left legal theory, critical legal studies, is extinct, had little lasting impact within legal scholarship, and none outside of it).

9. *See, e.g.*, Francisco Valdes et al., *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, *Introduction* to CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 4-5 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002) (discussing the persistent strength of critical race theory despite the challenges from the current time of racial backlash and retrenchment); Edward L. Rubin, *Jews, Truth, and Critical Race Theory*, 93 NW. U. L. REV. 525, 536-37 (1999) (distinguishing critical legal studies' failure from the relative success of critical race theory, feminist

seems that these often fragmented offshoots have not succeeded in building and disseminating a jurisprudence that comprehensively challenges the foundations of centrist or right law and policy.[10]

While many note the fading of left legal theory with resignation, relief, or even relish, *Left Legalism/Left Critique* aims to firmly and passionately revive and promote the project of left legal intellectualism. How should legal activists and scholars whose political commitments remain left of a rightward-moving center resist their slide to the margins? Discussions of that question tend to find four problems with contemporary left legal theory: too much theory, too much politics, too much law, or too much identity (and often all of the above).

This book stands out in its strong argument for *more*, not less, foundation-challenging theory as a key to renewing progressive visions of justice. Reviving and updating the method of critical legal scholarship, the book concentrates on uncovering the contradictions, constraints, and compromises embedded in the liberal ideals of liberty and equality.[11]

But in the context of early 21st century America, criticism of "liberal" ideals has become so loud, pervasive,

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jurisprudence, and gay legal studies by reasoning that race, sex, and gender are more politically salient than class conflict in the contemporary United States).

10. *See* Karen Engle et al., *Roundtable Discussion: Subversive Legal Moments?*, 12 TEX. J. WOMEN & L. 197, 211 (2003) (comments of Nathaniel Berman, explaining that critical theories of feminism, race, sexuality, and other statuses have produced a proliferation of perpetually competing "identity-based interpretive optics" that leave readers of the law "each criticizing the other for the pernicious selectivity of their interpretive optic."); *see also* Athena Mutua, *The Rise, Development, and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. (forthcoming Dec. 2006) (analyzing the development of critical race theory into several branches, but arguing that this diversified focus has the potential to build a stronger left critique). In addition, many versions of feminist jurisprudence and critical race theory, but certainly not all, reject critical theory and even embrace liberalism. *See* DUXBURY, *supra* note 4, at 504-09 (exploring how critical race and feminist theory may not be carrying out CLS, but instead may be resisting and rejecting its challenges to liberal legalism).

11. For an earlier discussion of this critical method in comparison to legal liberalism, see generally MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

and banal that some progressives might wonder why we need the left or intellectuals to add to the din.[12] By joining and sharpening the attacks on liberal legalism by the right-wing "wolves," the book may leave some readers worried (or hopeful) that it ultimately will do more to advance right-wing anti-liberal legalism and less to advance progressive alternatives to liberal law reforms.[13] If so, the book might reinforce the tendency to blame unrestrained theory for the left's failures[14]—the very tendency the book wants to refute.

Instead, this review essay argues that the shortcomings of the book support its main argument. *Left Legalism/Left Critique* risks enhancing the rise of the right not because of too much bold critique, but because of not quite enough.[15] In particular, the book does not have enough bold left theory about what counts as theory versus praxis, law versus policy, and identity politics versus distributional politics. The book tends to undercut the promise of left critique by suggesting that the move toward left theory requires a move away from a focus on politics, law, and identity. By

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12. For an example of scholarship discussing the downfall of "liberal" ideas, see STEVEN F. HAYWARD, THE AGE OF REAGAN: THE FALL OF THE OLD LIBERAL ORDER, 1964-1980 (2001). For an example of popular media discussion of the failures of liberal politics, see JOHN PODHORETZ, BUSH COUNTRY: HOW DUBYA BECAME A GREAT PRESIDENT WHILE DRIVING LIBERALS INSANE (2004).

13. Brown and Halley explain that left critique challenges the liberal political, and legal order without necessarily distinguishing between "liberal[ ]" and "conservative[ ]" branches of that ideology. Brown & Halley, *Introduction*, *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 5. In contemporary politics, in contrast, criticism of "liberal" ideas is generally directed at a particular political position within liberalism. I will follow Brown and Halley's convention of using quotations to refer to this common use of the term "liberal" in opposition to "conservative" politics, distinct from the more general and technical term that refers to the liberal political order. *Id.* Both left and right politics have strands that move outside this "liberal" versus "conservative" polarization within liberalism; my point here is to ask how left efforts to go beyond "liberal" politics *and* the general frame of *liberalism* can avoid contributing to right-wing efforts to also move out of liberalism toward a fascist political order.

14. *See infra* pp. 1203-08 (discussion of view that too much theory caused the demise of left legal scholarship).

15. Peter Goodrich made a similar critique of the earlier CLS movement, arguing that it failed to take seriously either philosophical radicalism or political radicalism. Peter Goodrich, *Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. Rev. 389 (1993).

positioning rigorous, foundation-shaking reason against practical activism, law reform, and identity-based politics, the book uncritically reinforces the liberal conceptual framework that constrains left theory and politics—and that strengthens right-wing power.

The fact that the left generally has been less successful than the right in promulgating politically viable alternatives to "liberal" law in recent years is not primarily a problem of too much or too little impractical left theory. Rather, the left has failed because it has not matched the right in mobilizing politics, law, and identity to change the dominant theoretical framework—a framework that in turn maintains and constrains the mainstream debate about politics, law, and identity so that more progressive possibilities remain unimaginable.

I. MORE (LEFT) THEORY

A. *Theory for Left Politics*

1. *Affirming Theory in Politics.* Brown and Halley's introduction frames the book's driving concern: that "critique" is increasingly viewed as "an unaffordable luxury" for left politics.[16] They describe a climate of left anti-intellectualism that short circuits meaningful debate in favor of incoherent "common sense,"[17] superficial solidarity,[18] and sentimentalized suffering.[19] Advocating theory that is not directly subordinated to politics, they argue "against a construction of the intellectual as a political service worker."[20] They explain that the anthology aims "to reinvigorate and revalue the tradition of critique

16. Brown & Halley, *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 4.

17. *Id.* at 2-3.

18. *Id.* at 3.

19. *Id.* at 33.

20. *Id.*

as vital to what the intellectual left has to offer, and, perhaps to the very existence and health of the left itself."[21]

Brown and Halley begin the book with a list of complaints likely to sound uncomfortably familiar to scholars who hope their work advances progressive politics. For example: "What can all these abstractions *do* for a woman living in a fifth-floor cold water walkup?";[22] "Your critique is so far removed from the language of the courtroom or everyday politics that it can't possibly be of practical value";[23] "You couldn't possibly understand, not being [fill in here the name of any congealed, subordinated identity], and therefore lack authority to speak about the needs of people bearing that identity."[24] Brown and Halley identify these complaints as part of a problem of anti-intellectualism that has had the power to "slow down our thinking and persuade us to mince words."[25] They present this anthology as an effort to correct their own tendency to cede conversation-stopping power to such comments.[26]

To reclaim left intellectual power, Brown and Halley have collected essays critically examining liberal law reform projects that they believe have acquired "sacred cow status."[27] The book especially directs its criticism at legal strategies focusing on antidiscrimination rights grounded in race, gender, sexual orientation, or disability status. Brown and Halley argue that the left may be rewarded not just intellectually but also politically for brazenly opening the door to more criticism of liberal sacred cows—like affirmative action, sexual harassment protections, and gay marriage—despite the loud and abundant attack on such policies from the chorus of "wolves" outside the left.[28]

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21. *Id.* at 4.

22. *Id.* at 2.

23. *Id.* at 3.

24. *Id.* at 2.

25. *Id.*

26. *Id.* at 3.

27. *Id.*

28. *Id.* at 3-4, 35-36.

2. *Affirming Politics in Theory.* In defending an autonomous space for theory against demands for political accountability, the editors nonetheless stand far from the conventional scholarly yearnings for theory anchored in objectivity and impartiality. A postmodern commitment to relentless, rigorous questioning of claims to transcendent truth over contingent power inspires the book's challenge to certainty and authority in both concrete politics and formal principle. The editors explain, "[w]hat critique promises is not objectivity but perspective; indeed critique is part of the arsenal of intellectual movements of the past two centuries that shatters the plausibility of objectivity claims once and for all."[29]

Instead, Brown and Halley astutely stake their claim for theory's power and value—and pleasure—in maintaining a tension between loosening and holding theory's ties to politics. "Not knowing what a critique will yield is not the same as suspending all political values while engaged in critique,"[30] noting, for example, that a passionate vision of equality for sexual minorities can incite and sustain criticism of various approaches to achieving and defining that vision.[31] "[W]e are simultaneously arguing *for* the politically enriching dimensions of critique and *against* the direct subordination of critique to politics."[32] Critique has the potential to bear political fruit, in their analysis, "to the extent that it is unbridled from the terms of the political problem that animate[s] it."[33]

The editors' articulation of the tension between theory and politics has energizing possibilities for both praxis and theory that leans left-of-center. But by partly closing their eyes to the broader political context that threatens both practice and theory on the left—urging the "courage to open

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29. *Id.* at 26.

30. *Id.* at 27.

31. *Id.* at 28.

32. *Id.* at 33.

33. *Id.*

the door . . . as if the wolves were not there"[34]—the editors' vision falls short of the book's ambitious aims.

3. *Affirming Theory for Tough Politics.* In explaining why left politics needs hard-hitting critical theory, Brown and Halley are not naive about the left's beleaguered position in contemporary politics. Instead, they direct their argument for the political usefulness of non-instrumental critique to the particular demands of a politically unfriendly context. The problem that grounds their vision is not that law reform advocates make the "wrong" choice but that politics so often consists of bad choices—double binds—that seem to dig advocates into deeper conflicts with left ideals.[35]

Having lousy options, of course, is what it means to be on the losing end of a power struggle. A retrospective look back to policy choices made in better times shows that even very promising reforms can turn out to be a powerful tool for those who want to undermine the reformers' goals[36]—because what matters is not law on the books but the messy and uncertain world of law in action; action that is always subject to power. Plausible reform strategies can all too often end up reinforcing rather than subverting the problems with the status quo. In the imperfect real world, steps toward justice almost always come at the cost of complicity with other injustices.[37] In this context, left activists who strive for political virtue are likely to end up divided, exhausted, and immobilized.[38]

Critique, the editors explain, allows the left to give up the pressure of pretending impossible purity and authenticity and to instead embrace and up-end the

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34. *Id.* at 36.

35. *Id.* at 29-31.

36. *See generally* Engle, *supra* note 10 (discussing how cases noted as feminist victories may instead be regressive).

37. *See* Brown & Halley *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 10-11 (giving the example of how the "left multiculturalist" goal of promoting francophone sovereignty in Quebec would have created new forms of ethnic oppression, such as renewed colonialism for First Nations people).

38. *Id.* at 28-29.

"torments" of the left's political double binds.[39] The editors note, for example, that while the mainstream debate over gay marriage offers a choice between fueling hostility against non-heterosexual sex on the one hand, and fueling hostility against non-marital sex and intimacy on the other hand, "critique affords us something to do besides voting for 'neither of the above.'"[40]

This emphasis on wrestling with double binds is familiar territory in critical legal scholarship.[41] Much feminist and critical race theory aims to both engage and transcend the problematic choices offered by liberal jurisprudence.[42] This literature has carefully analyzed, for

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39. *Id.* at 30.

40. *Id.* at 29.

41. *See* Michele Goodwin, *Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood*, 9 J. GENDER RACE & JUST. 1, 7-13 (2005) (defining the term and tracing its use from psychology to various branches of critical legal theory); *see also* Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI.-KENT L. REV. 303 (1993) (discussing reproductive surrogacy as an example of the problem that feminist law reforms involve double binds); Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783 (2003) (showing how both liberal and communitarian, neoliberal, and neoconservative branches of mainstream law and policy create a double bind between "efficiency" and "redistribution" grounded in a double standard of race, gender, and class). Critical theorist Gayatri Spivak underscores this lesson of the "perennial critique" with the phrase "*qui gagne perd*," or "who wins (also) loses." Gayatri Chakravorty Spivak, *More on Power/Knowledge*, in THE SPIVAK READER 161 (Donna Landry & Gerald MacLean eds., 1996).

42. *See, e.g*, McCluskey, *supra* note 41, at 817-22 (explaining how analysis of race, gender, and class bias at the heart of ideas about law and economics can help reject mainstream law's double bind that pits economic growth against economic equality); *see also* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY 297 (1997) (challenging the liberal framework of reproductive liberty that excludes reproductive equality by defining liberty "to protect only the interests of the most privileged"); ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING (2000) (exploring how to push beyond the divides of public versus private, victimhood versus agency, reasonable versus irrational); Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13 (1995) (exploring double binds faced by battered women and their advocates); John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1938 (1999) (explaining

example, the costs on both sides of the conventional liberal choice between equal treatment or different treatment, integration or separation, autonomy or dependence, victimhood or agency.[43] To break out of these confounding double binds, much of this literature has worked at "cracking the foundation myths" that undergird such bad choices in hopes of opening up possibilities for different choices more likely to advance progressive values.[44] Critical

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that double binds, featuring few options all of which penalize the chooser, are an "ubiquitous feature of oppression"); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986) (challenging the unstated male norms that ground the losing choice between special treatment and equal treatment for pregnant workers); Martha Minow, *The Supreme Court, 1986 Term: Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 11-15 (1987) (analyzing three "dilemma[s] of difference" that confound much of liberal law and arguing that these dilemmas can be resolved by unearthing and examining the unstated reference point that constructs some particularity as "different"); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989) (explaining how constitutional doctrine gives black women a losing choice between being seen only as women or only as black).

43. *See, e.g.*, Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (discussing feminism's conflict between asserting women's victimization or women's agency); Devon W. Carbado & Mitu Gulati, *What Exactly is Racial Diversity?*, 91 CAL. L. REV. 1149, 1157 (2003) (book review) (discussing how lack of diversity creates a racial double bind where the token blacks are forced to become both more representative of "their race" and more assimilating); Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"? Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1305 (1997) (discussing the "Catch-22" of "passing" as Anglo or claiming Latino identity); Thomas E. Kleven, Brown*'s Lesson: To Integrate or Separate is Not the Question, But How to Achieve a Non-Racist Society*, 5 U. MD. L.J. RACE RELIGION GENDER & CLASS 43 (2005) (challenging the choices offered in race discrimination doctrine); Martha T. McCluskey, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863 (1988) (arguing that equality should require challenging able-bodied norms, not choosing between sameness or special accommodation); Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 567 (1998) (criticizing the equal/different treatment binary in the context of sexual orientation); *see also* Margaret Jane Radin, *The Pragmatist and the Feminist*, S. CALIF. L. REV. 1699, 1700-04 (1990) (discussing double binds as the problem that "nonideal justice" offers bad choices that idealistic approaches aim to dissolve, but that "pragmatic" approaches confront).

44. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 7-54 (2004) (exploring and "cracking the foundational myths" of autonomy and dependency that ground liberalism).

feminist analysis, for example, has attempted to shift the debate over family leave for working women away from a question of the "equal treatment" of the workaholic track and the "special treatment" of the mommy track.[45] In this critical view, a broader reshaping of the legal meaning and structure of work could escape this double bind by giving workers in general better opportunities for combining rewarding work with rewarding personal life.[46]

Brown and Halley's anthology, in part, develops and adds to this critical tradition, though it shortchanges this existing literature in building its case against liberal legalism.[47] Sexuality is not the book's explicit or exclusive focus, but the book particularly advances the critical legal literature by collecting four chapters that struggle to escape liberalism's binds on progressive visions of sexuality.[48] For

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45. *See* Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 870-71 (1997) (explaining how feminist theory challenges the "mommy track[ ]" by advocating not "differen[t]" treatment for women but instead confronting the male privilege and power that structures the workplace and grounds ideas about equality); Finley, *supra* note 42 (arguing that the sameness/difference opposition can be transcended by structuring the workplace on the assumption that it is normal for good workers to get pregnant and to care for children); Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 115, 121-26 (explaining how feminist jurisprudence challenged the "equal treatment/special treatment" problem with regard to workers' family caretaking responsibilities).

46. *See, e.g.*, JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 94-96 (2000) (advocating restructuring work to avoid the problems of the "mommy track"); FINEMAN, *supra* note 44, at 241-62 (advocating changes in the workplace to respond to and facilitate a re-organization of the family); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000) (advocating an extensive improvement of workers' rights as the solution to the problems faced by women workers with caretaking responsibilities); 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 (2001) (challenging the biased liberal binds between choice and constraint that undergird employment discrimination law's failure to promote equality for caregiving women).

47. *See infra* notes 148, 193.

48. *See* Janet Halley, *Sexuality Harassment*, *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 80; Judith Butler, *Is Kinship Always Already Heterosexual?*, *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 229; Michael Warner, *Beyond Gay Marriage*, in LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3,

example, Judith Butler's chapter, *Is Kinship Always Already Heterosexual?*, aims to push left visions of intimacy beyond the fixation on the marital family that frames both sides of the debate over gay marriage.[49]

More generally, Brown and Halley enrich the critical legal tradition by articulating the spiritual and hedonic benefits that can come from intellectual struggles with such double binds—even (or especially) when reframing public policy debate to avoid those double binds seems implausible in the foreseeable political future. Paradoxically, opening the door to more skepticism, pain, and conflict from hard-hitting critique can advance faith, pleasure, and community. "It can interrupt the isolation of those silenced or excluded by the binds of current legal or political strategies; indeed, it can produce conversation in which alternative political formations might be forged."[50] Because critique embodies a desire to "*really* . . . *know* how things work and why, not just what principle we are supposed to uphold, what line we are supposed to toe, what side we are supposed to cheer," it "can free us from our all too frequently cynical or despairing relationships to our most deeply held values and rekindle the animating spirit of those values."[51] The editors stress that this freedom from immobilizing binds, and those new or renewed connections to beliefs and potential allies can be a source of personal pleasure. This pleasure is more likely to mobilize and sustain left activism against steep odds than what the editors see as left politics' fetish for self-effacement and suffering.[52]

B. *Theory for Left Law*

The editors' strikingly extra-intellectual defense of unmitigated intellectual zeal responds powerfully (though

at 259; Katherine M. Franke, *Putting Sex to Work*, in LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 290.

49. Butler, *supra* note 48, at 229.

50. Brown & Halley, *supra* note 3, at 31.

51. *Id.* at 30.

52. *Id.* at 32.

not explicitly) to a crisis in legal theory. Resistance to far-reaching critique is not just a problem of those progressives who reject theory in favor of practical politics, but also of the many contemporary non-conservatives—including some former leading voices of left critical theory—who advocate toning down left intellectual enthusiasm and ambition.

In the conventional wisdom, the critical legal studies (CLS) movement that stirred legal academics from the mid-1970s through the late 1980s is dead,[53] the victim, at least in part, of a self-inflicted overdose of high-flying theory.[54] Mainstream and right-wing critics of CLS have long condemned it (and its offshoots focusing on race and gender) as nihilistic "trashing" of little practical use for the legal profession or for progressive reform movements.[55] Indeed, a number of prominent and prolific scholars associated with critical legal theory have accepted this accusation and now advocate a chastened approach to left legal theory that seeks to be less contentious and ambitious and more content with the constraints of the day.[56]

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53. *See* Simon, *supra* note 4, at 175; DUXBURY, *supra* note 4, at 468 (by the end of the 1980s, "critical legal studies seemed rather moribund").

54. *See* DUXBURY, *supra* note 4, at 476-501 (discussing the movement's fascination and preoccupation with various abstract and utopian theories rather than concrete reform ideas, and suggesting that CLS appeared to fall on its own sword by turning back to liberal legalism when its members faced concrete challenges to their authority).

55. *See, e.g.*, Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL. EDUC. 222, 227 (1984) (arguing that CLS proponents should leave legal academics because their nihilistic cynicism is likely to produce "crooks" skilled in "corruption: bribery and intimidation"); Owen M. Fiss, *The Death of the Law*? 72 CORNELL L. REV. 1 (1986) (rejecting Carrington's outright dismissal of CLS while criticizing CLS for its rejection of both law and morality). For a summary and discussion of this strand of criticism of CLS, see DUXBURY, *supra* note 4, at 491-501.

56. *See, e.g.*, John Henry Schlegel, *But Pierre, If We Can't Think Normatively, What Are We to Do?*, 57 U. MIAMI L. REV. 955, 957 (2003) (advocating shifting legal theory from the exercise of reason for normative prescription about the Rule of Law to empirical description about the bureaucratic constraints on the exercise of reason in law); *see also* DUXBURY, *supra* note 4, at 502 (noting that some identified with CLS have joined the trend toward pragmatism).

1. *Disciplining Theory for Non-Conservatives.* According to this chastened strand of CLS, if what passes as principled reason in law is always beholden to partisan power, then rigorous critique is a delusional answer to problems of unjust power. If law's rational principles are indeterminate and incoherent, or if legal principles are as likely to constrain as to liberate, then why bother engaging in more intellectual argument about how law is unprincipled, or based on the wrong principles?[57] Following this reasoning, theorizing about injustice may amount to little more than a way for some people in mostly elite law schools to earn a relatively privileged and pleasurable living within the cogs of an unjust machine of power.[58] Jack Schlegel explains that CLS died to avoid being "marginalized in the act of being included" (like legal realism) as just another "of the possible perspectives . . . in a law professor's kit bag . . . that must be dragged out when it comes time for any topic to be looked at from all sides—in the name of fairness."[59]

Such disillusionment has led some away from critique toward a modest and practical vision of intellectual work as grease in the machine that can sometimes make life a little smoother for at least some of the cogs. Schlegel, for example, advocates that left intellectuals forgo the hubris of prescribing policy and instead emphasize empirical description of the mundane aspects of law and lawyering.[60] In this vision, the political value of intellectual labor comes from teaching lawyers and students "which fork to use" as they enter the legal profession to gain or secure class

57. *See* Schlegel, *supra* note 56, at 956 (observing that as left legal scholars, "[o]ur recurrent tactic is to hold a mirror to [some] legal practice, notice the inequality that undermines the claim of law to be doing justice, shout "Politics!" and follow that shout with a plea to vindicate the ideals of law").

58. *See id.* at 957 (considering that, since normative reasoning is a delusion, one remaining purpose for normative legal scholarship might be to preserve a "mandarin class that likes Thai food, fine wines, and Italian leather sofas").

59. John Henry Schlegel, *Of Duncan, Peter, and Thomas Kuhn*, 22 CARDOZO L. REV. 1061, 1069-70 (2001).

60. *Id.* at 1071-72; Schlegel, *supra* note 56, at 962-69.

privilege.[61] Taking a similarly stinging critique of normative principle in a different direction, Pierre Schlag leads CLS sympathizers down a circular path of ambitious legal reasoning about how ambitious legal reasoning is dead.[62]

Others have taken disaffection with critical legal theory in the direction of pragmatism, which holds on to normative legal reasoning as a humble, contingent approach to policy prescription.[63] In this view, theory is useful for calculating which bad choices in the double binds constraining progressive policy will produce the least costs to progressive norms at a particular moment.[64] This pragmatic turn eschews quixotic challenges to the foundations of law and policy, whether for the sake of principle or pleasure, and instead pins its hopes on small, incremental, admittedly compromised steps within the constraining walls of existing

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61. Bob Gordon, Jack Schlegel, James May & Joan Williams, *Colloquium: Legal Education Then and Now: Changing Patterns in Legal Training and in the Relationship of Law Schools to the World Around Them*, 47 AM. U. L. REV. 747, 771-72 (1998) (comments of Jack Schlegel); *see also* Schlegel, *supra* note 56, at 963-64 (advocating that critical left scholars turn their attention to describing for those "not to the manor born" the fine details of legal practice).

62. *See, e.g.*, PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND (1996); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

63. For a discussion of the difference between Schlag's critique of normativity and pragmatism's small-scale normativity, see Gary Minda, *Jurisprudence at Century's End*, 43 J. LEGAL EDUC. 27, 38-39 (1993). For an argument that CLS "offers little more than a politics of pragmatism," see Goodrich, *supra* note 15, at 391. Richard Rorty, a leading proponent of contemporary non-conservative philosophical pragmatism, argues that critical theory is "a distraction from the history of concrete social engineering." Richard Rorty, *Habermas and Lyotard on Postmodernity*, *in* HABERMAS AND MODERNITY (Richard J. Bernstein ed., 1985). Responding to such challenges, critical theorist Gayatri Spivak notes the "innocent arrogance" of Rorty's pragmatism: "the project of the Enlightenment is considered altogether defensible if only taken not as objectively and universally valid but as the cherished values of a historically definable group, one's own." GAYATRI CHAKRAVORTY SPIVAK, A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT 345 (1999).

64. Radin, *supra* note 43, at 1699-1700 (summarizing pragmatism by saying that "[w]e must look carefully at the nonideal circumstances in each case and decide which horn of the dilemma is better (or less bad), and we must keep re-deciding as time goes on").

political exigencies. Joan Williams, for example, eschews wholesale rethinking of the family and the economy in favor of an approach to feminist reforms aiming to stretch existing narrow liberal ideas of sex equality to protect employees with family caretaking responsibilities.[65]

Others are skeptical about the prospects for safety (much less revolution) in such small steps, but nonetheless join pragmatists in trying to bring abstract, postmodern left critical theory down to earth to focus on practical bargaining with the figurative devil (or with the wolves at the door, as it were[66]). Richard Delgado, for example, urges turning critical race theory away from the etherial realm of discussing discourse about racial justice to a strategic consideration of how to harness and redirect the material interests of those who benefit from white privilege.[67]

2. *Affirming Theory for Left Critics*. In contrast to all of these approaches, however, Brown and Halley—and most of the book's contributors—affirm the power of seemingly impractical reasoning and radical visions even while soundly rejecting faith in the force of normative principle over power. Brown and Halley argue that intellectual workers can wield power, not just service it, because intellectual work does not necessarily depend on principled persuasion for its power.[68] By creating pleasure, community, and renewed commitment, transgressive thinking can take on material force, even if the impact of that force is not easily predictable. Unlike the left theorists

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65. Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279, 293 (1998) (differentiating her short term strategic focus from what she sees as the more "utopian" approach to caretaking policy advocated by Martha Fineman).

66. *See* text accompanying note 3.

67. Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121 (2003) (book review); *see also* Derrick A. Bell, *Unintended Lessons in* Brown v. Board of Education, 49 N.Y.L. SCH. L. REV. 1053 (2005) (arguing that racial justice depends not on empirical proof of harm or on persuasive theoretical articulations of moral principles, but on the convergence of white self-interested power and the interests of racialized minorities).

68. *See* Brown & Halley *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 33.

who preach (if not practice) intellectual chastity in the face of indeterminacy and inconsistency, Brown and Halley promote an intellectual passion that aspires not just to enlighten or bribe opponents (or to secure a comfortable academic salary[69]) but to arouse and re-orient dormant, nascent, or conflicted political interests and allegiances among potential allies.

The value of the book's varied policy prescriptions does not depend on the unlikely possibility that a host of eager lawmakers, lawyers, and activists stand ready to be enlightened by the contributors' reasoning, however rigorous.[70] In his essay for the book, Duncan Kennedy takes us off Schlag's treadmill by explaining that passion for theory can persist or even grow from a lack of faith in principled reason as the key to truth and justice.[71] He explains that even though good reasoning won't necessarily convince others (or even ourselves) of the correctness or causal impact of our policy positions, it can still enhance the variety of resources (intellectual, social, emotional, and ethical) from which we can "leap into commitment or action" and presumably influence others to do so as well.[72] "Losing faith in theory doesn't mean giving up doing theory—it just means giving up the expectation of rightness in the doing."[73] Kennedy describes an approach that moves between skepticism and faith toward both left politics and critique, blurring the division between principle and strategy.[74]

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69. *See* Schlegel, *supra* note 56, at 967.

70. In affirming Pierre Schlag's withering critique of normative legal reasoning, Jack Schlegel notes that "[e]ven the modest amount of evidence that legal scholars have been heard suffers from the fact that it is easily capable of being interpreted as an example of busy bureaucrats adding decorations to an already over-trimmed Christmas tree . . . . [O]ne sees little evidence that the arguments of legal academics are successful in persuading a decision maker whose politics are not already sympathetic." Schlegel, *supra* note 56, at 960.

71. Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 178, 220-23.

72. *Id.* at 222.

73. *Id.* at 221.

74. *Id.* at 220-24.

Another contribution to the book offers a more concrete example of how irreverent, non-instrumental theory can foster politically beneficial pleasure, community, and commitment. David Kennedy tells the story of his effort to organize and sustain an academic group focusing on questioning the intellectual foundations of international law.[75] He concludes that the power of his effort came not from producing any clear or coherent body of ideas or policies but from more of a "spirit of new thinking [that] lived for awhile for some people."[76] Kennedy compares the value of this critical theory project to that of a good dance performance: it was a shared experience that affirmed "that dramatic things are possible . . . that projects can find their way to expression, that quotidian practices don't exhaust the possible."[77] Kennedy observes that

> "[y]ou can sometimes ignite someone's creative impulse by providing a terrain that is not quite fully assimilated to the establishment or the mainstream, that provides a safe hint of ongoing opposition and possibility. Something terrific can happen when people who share this sense find ways of telling one another, of touching, itching, expressing the animus within."[78]

By rooting theory's political power in a tension between political commitment and skepticism, *Left Legalism* adds to a larger body of work exploring the complex interconnections between knowledge and action, ideas and interests, or reason and emotion. The success of critical race and gender theory in building an enthusiastic and productive (if marginalized) intellectual movement through the 1990s may in part be due to the success of these branches of left critique in explicitly wrestling with the interrelationship between theory and practice.[79] Reflecting

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75. David Kennedy, *When Renewal Repeats: Thinking against the Box, in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 373-419.

76. *Id.* at 417.

77. *Id.*

78. *Id.*

79. *See, e.g.*, Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997) (developing a theory of "critical race praxis" that would better bring

on the history and future of critical race theory, for example, insiders often discuss the political value of their project in terms of building community or fostering joy.[80]

Connecting the early work of critical legal studies movement to these later movements, Robert Gordon explains that critical legal theory has persisting value as a remedy for political passivity. Although abstract discussion of ideas will not in itself alter the material power arrangements that may matter most, the process of reimagination "is a necessary first step" for mobilizing the kind of political action that brings meaningful material change.[81] "People don't revolt because their situation is bad; they can suffer in silence for centuries. They revolt when their situation comes to seem unjust and alterable."[82] Discussing literary theory, Eve Kosofsky Sedgwick similarly analyzes critique's affective qualities and points to

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together lawyers, activists, and critical race theorists); Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Response to Catharine MacKinnon*, 5 YALE J.L. FEMINISM 217, 247-49 (1993) (exploring how the problematic dichotomy between feminist theory and practice works to obscure white racial privilege); Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749 (1992) (analyzing the interworkings of theory and practice using the example of racial profiling); Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249 (1998) (analyzing how theory can only be understood through political practice, and practice through theory). Gayatri Spivak has extensively theorized the problematic divide between theory and practice in the context of feminist and postcolonial studies. *See, e.g.*, SPIVAK, *supra* note 63, at 1-34 (critiquing the Kantian construction of the rational "man" in opposition to the "raw" and primitive native, identified in terms of race, geography, economics, and gender).

80. Charles R. Lawrence III, *Who Are We? And Why Are We Here? Doing Critical Race Theory in Hard Times, Foreword* to CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, *supra* note 9, at xix (concluding that "we struggle because that is what gives life meaning, that is what gives us joy" and that we are together because "collectively we are a nuclear explosion of beauty"); Francisco Valdes, *Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits, and LatCrits, Afterword* to 53 U. MIAMI L. REV. 1265 (1999) (analyzing the relationship between theory and community-building among "outsider" scholars).

81. Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 657 (David Kairys ed., 1998).

82. *Id.*

its possibilities for producing and proliferating hope from a position that foregrounds uncertainty and contingency.[83] Critical theory can create "room to realize that the future may be different from the present" and to "entertain such profoundly painful, profoundly relieving, ethically crucial possibilities as that the past, in turn, could have happened differently from the way it did."[84]

C. *Theory for Right-Wing Politics*

The Right's success over the last several decades in both politics and jurisprudence supports *Left Legalism*'s claim for the political power of iconoclastic theory. However, the Right's success offers a warning against *Left Legalism*'s tendency to analyze theory primarily as a matter of individual moral and intellectual fiber rather than as a matter of institutionalized political economy.

1. *Affirming Theory in Right Politics.* The Right's rise in power may strengthen the book's case for theory as an elementary need, not an "unaffordable luxury," for the left at the start of the 21st century.[85] While many non-conservative legal scholars and activists have been bemoaning the limited value of theory,[86] their right-wing counterparts have been bidding up its price by investing staggering amounts of money in theoretical scholarship, and particularly in legal theory.[87] Moreover, to a large

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83. EVE KOSOFSKY SEDGWICK, TOUCHING FEELING: AFFECT, PEDAGOGY, PERFORMATIVITY 13-21 (2003).

84. *Id.* at 146.

85. Brown & Halley *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 4 (stating the book's purpose as challenging the increasing characterization of critique as an unaffordable luxury for left politics).

86. *See supra* part I.B.

87. *See* DAVID CALLAHAN, NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY [hereinafter "NCRP"], $1 BILLION FOR IDEAS: CONSERVATIVE THINK TANKS IN THE 1990S (1999) (describing how right-wing funders have spent almost $1 billion over that decade to make right-wing theory the prevailing source of public policy ideas); JEFF KREHELY ET AL., NCRP, AXIS OF IDEOLOGY: CONSERVATIVE FOUNDATIONS AND PUBLIC POLICY 10, 26 (2004) (estimating total conservative grantmaking by 2001 at $1.8 billion and finding over $20 million given to universities for specifically conservative research during the 2000-2003

extent right-wing politics has embraced precisely the tension between committed politics and unconfined theory that Halley and Brown urge on the left.

In the 1970s, a number of wealthy right-wing activists organized to make theory a basic part of their political strategy.[88] One leader of this political campaign, former Republican Treasury Secretary William E. Simon, wrote two best-selling books outlining a strategy which he then implemented as a longtime president of the John M. Olin Foundation.[89] Simon argued that "[t]he alliance between the theorists and men of action in the capitalist world is long overdue in America. It must become a veritable crusade if we are to survive in freedom."[90] Simon further

period alone); *see also* Lewis H. Lapham, *Tentacles of Rage: The Republican Propaganda Mill, A Brief History*, HARPER'S MAGAZINE, Sept. 2004, at 31, 32 (reporting that former Democratic political strategist Rob Stein estimated the funding for conservative ideas at roughly $3 billion over 30 years); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 272-76 (2003) (discussing the importance of conservative funding in the production and shaping of recent legal theory); MICHAEL PATRICK ALLEN, THE FOUNDING FORTUNES: A NEW ANATOMY OF THE SUPER-RICH FAMILIES IN AMERICA (1987) (finding $88 million in funding for development of politically conservative ideas from 1977-1986).

88. James Piereson, Opinion, *You Get What You Pay For*, WALL ST. J., July 21, 2004 at A10 (describing, from viewpoint of executive director of the Olin Foundation, how the conservative foundation movement "took shape . . . in the mid-1970s when Irving Kristol penned a series of articles in the Wall Street Journal challenging businessmen to use their charitable funds to strengthen the system of private enterprise and limited government" and when William E. Simon made a similar plea in a best-selling book); *see also*, Lapham, *supra* note 87, at 32 (describing and criticizing "the nature and extent of the re-education program undertaken in the early 1970s by a cadre of ultraconservative and self-mythologizing millionaires bent on rescuing the country from the hideous grasp of Satanic liberalism"). Michael Joyce, President of the conservative Lynde and Harry Bradley Foundation, directed millions toward funding intellectual work in mostly elite universities because he "believes that investment in academia is vital to the long-term success of the conservative movement." PEOPLE FOR THE AMERICAN WAY FOUNDATION, BUYING A MOVEMENT: RIGHT-WING FOUNDATIONS AND AMERICAN POLITICS 16 (1996) [hereinafter "PFAW"].

89. *See* WILLIAM E. SIMON, A TIME FOR ACTION (1980) [hereinafter SIMON, ACTION]; WILLIAM E. SIMON, A TIME FOR TRUTH (1978) [hereinafter SIMON, TRUTH]; *see also* Hanson & Yosifon, *supra* note 87, at 275-77 (discussing Simon's leadership of the Olin Foundation).

90. SIMON, TRUTH, *supra* note 89, at 233.

argued that corporate profits needed to "rush by [the] multimillions"[91] to provide "intellectual refuges for the non-egalitarian scholars and writers . . . [who] must be given grants, grants and more grants in exchange for books, books and more books."[92] Simon explained that the goal must not just be to take sides in existing controversies, but to open up the "basic premises of these controversies" for debate and to produce a new "counterintelligentsia" capable of setting the terms of the debate.[93] Simon argued that the goal of this "mobilization" of intellectuals must be "to raise the unnamed issues, to ask the unasked questions, to present the missing contexts, and to place a set of very different values and goals on the public agenda."[94] Simon's work built on a similar well-publicized call for right-wing theory by Lewis Powell in 1971, shortly before his appointment to the Supreme Court.[95] Working with the Chamber of Commerce, Powell advocated an organized system of financial support for conservative scholars, media, educational textbooks, and public speakers who could promote American free-enterprise and develop an attack on political "liberals."[96]

At a 2002 meeting of a group of conservative foundations that had spent the prior two decades implementing this blueprint, one speaker reflected that the right's decision to turn from the conventional "bricks-and-mortar" donations to an approach designed to "leverage" ideas has paid off handsomely.[97] For a mere $70 million a

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91. *Id.* at 230.

92. *Id.* at 231. Also discussed in Hanson & Yosifon, *supra* note 87, at 276.

93. SIMON, TRUTH, *supra* note 89, at 233-34.

94. *Id.*

95. KREHELY, *supra* note 87, at 9.

96. Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr. (Aug. 23, 1971) (on file with the Buffalo Law Review).

97. Robert Kuttner, *Philanthropy and Movements*, AMERICAN PROSPECT, July 15, 2002, at 2 (discussing a presentation by wealthy funder and activist Roger Hertog).

year, the speaker gloated, these groups have changed the course of American politics.[98]

Legal theory was at the center of this radical vision to mobilize intellectuals for the right. By the end of the twentieth century, the Olin Foundation, under William E. Simon's leadership, had made an "investment" of around $50 million in "law-and-economics" scholarship.[99] Looking back at that foundation's history, the succeeding executive director James Piereson attributed its success in maximizing political "dividends" to its strategic "investment in ideas."[100] According to Piereson, the Olin Foundation was designed to heed a "call to arms" in "defense of capitalism."[101] Right-wing leaders realized that this defense of "commercial civilization" required a "full-blown engagement with the world of ideas" that would discuss not just business but "deeper cultural assumptions" about the "rule of law, religion, the family and the evolution of our political institutions."[102]

2. *Affirming Radical Politics in Right Theory.* This political strategy for mobilizing aggressively ideological theoretical work differs sharply from the approach to scholarship that has predominated outside right-wing circles. Although a number of non-conservative foundations funding intellectual work are wealthier,[103] "most . . . are centrist, and their philanthropy is cautious and apolitical"[104] and certainly very few if any major foundations have ever come close to overtly advancing a

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98. *Id.* (noting that Herzog, who is a wealthy owner of significant interest in *The New Republic*, is known as a relatively moderate "velvet" conservative but who at this meeting extolled a radical conservative politics).

99. WILLIAM E. SIMON, A TIME FOR REFLECTION: AN AUTOBIOGRAPHY 272 (2004).

100. Piereson, *supra* note 88.

101. *Id.*

102. *Id.*

103. *See* Shawn Zeller, *Conservative Crusaders*, 35 NAT'L J. 1286-87, 1290 (2003).

104. MARK DOWIE, AMERICAN FOUNDATIONS: AN INVESTIGATIVE HISTORY 218 (2001).

strong *left* (rather than *"liberal"*) politics.[105] Some substantial supporters of U.S. scholarship on public policy have roots in progressive era law reform movements—for example the Russell Sage Foundation, the Twentieth Century Fund (now renamed The Century Foundation), and the Brookings Institution.[106] Consistent with their roots, however, such organizations have tended to support a vision of scholarship as technical expertise that draws on neutral social science methods to develop pragmatic solutions to policy problems.[107] In general, non-right-wing foundations envision the mission of intellectual work as minimizing, softening, or resolving breaches in a presumed moral and political consensus about the foundational principles of society.[108] The Henry J. Kaiser Family Foundation, for example, devotes substantial resources to health policy reform but describes itself not as an "advocacy group" but as a "purveyor of credible and objective research . . . from all sides of the ideological spectrum."[109] Similarly, although the Pew Charitable Trust pours substantial resources to support scholarly involvement in issue advocacy, it aims to "fund thinkers on all sides of the debate" trusting that the best idea will then win.[110]

In contrast, William E. Simon's plan for building a late-twentieth century conservative counterintelligentsia set as the basic principle that "philanthropy must not capitulate to soft-minded pleas for the support of 'dissent'" and that capitalists must not let their foundations finance "the

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105. Indeed, some research suggests that major foundation support for left-leaning sociolegal reform movements in the 1960s and 1970s served to move these groups toward the political center and away from grassroots activism. *See id.* at 208-13 (giving example of funding of voting rights and women's rights movements); *see also id.* at 201-02 (discussing the small number of less wealthy foundations focused on more radical left political activism).

106. CALLAHAN, *supra* note 87, at 9.

107. *Id.*

108. *Id.*; *see also* Kuttner, *supra* note 97, at 3.

109. Zeller, *supra* note 103, at 1290 (quoting Henry J. Kaiser Family Foundation President Drew Attman).

110. *Id.*

intellectual opposition" in the interests of "fairness."[111] Given this difference in approach to funding theory, it is not surprising that, as Stanford Law Professor William H. Simon[112] finds, "[t]here is nothing in centrist or left-of-center legal scholarship with a level of coherence, mutual engagement, and ideological commitment comparable to those of legal conservatism."[113]

Following their view of theory as part of foundation-shaking, consciously revolutionary political mission,[114] the right-wing foundations have enhanced the institutional connections between scholarship and practical politics through two methods that differ from their "more genteel" centrist and "liberal" counterparts.[115] First, the new conservative foundations solidified and sustained a strong ideological direction in the scholarship they funded by rejecting the governance structure common among long-established centrist groups like the Ford Foundation, which tended to disperse control among a large and diverse group of board members and staff with a broader range of viewpoints and backgrounds than their founders.[116] Instead, wealthy conservative activists structured their foundations to centralize control among a small, interlocking group of business executives sharing a sharply focused political vision.[117] According to a scholar of contemporary U.S. philanthropy:

> [t]he fact is that mainline foundations are not in the philanthropy game to win hearts and minds or to create new orthodoxies—both

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111. SIMON, TRUTH, *supra* note 89, at 230.

112. Not to be confused with former Treasury Secretary and Olin Foundation Director William E. Simon.

113. Simon, *supra* note 4, at 175.

114. For discussions of the unapologetically radical political focus of this conservative funding movement, see DOWIE, *supra* note 104, at 216-17; SIMON, TRUTH, *supra* note 89; Kuttner, *supra* note 97.

115. CALLAHAN, *supra* note 87, at 9.

116. DOWIE, *supra* note 104, at 217; Piereson, *supra* note 88.

117. James Piereson, *The Insider's Guide to Spend Down: Switching Off the Lights at the Olin Foundation*, PHILANTHROPY ROUNDTABLE, March/April 2002 at 23-24; CALLAHAN, *supra* note 87; KREHELY, *supra* note 87, at 54-55 (noting the small size and interactive approach of conservative foundation boards).

> central objectives of the consistently ideological foundations of the Right whose trustees and staffs are of one mind and pretty much of one class. Politically balanced boards of trustees create politically neutral foundations.[118]

In a second tactic for bridging the gap between scholarship and politics, the new right-wing funding for intellectuals has included substantial resources devoted to *marketing* theoretical work to popular media, lobbyists, grassroots activists, lawyers, politicians, and judges.[119] Scholarship, in this view, is not a collegial quest for truth or pleasure (and not simply a way to provide a nice middle-class income and lifestyle for academics[120]). Instead, leading contemporary right-wing activists have viewed intellectual work as part of a strategic business plan that can produce large returns for their donors in a tough competition for power and profit.[121] For example, individual donors to the right-wing Hudson Institute are designated "investors" on the think tank's web site, where they can click on an "investment impact button" that lists the policy areas in which donors are promised a "real world impact."[122]

As a particularly important part of their plan for ensuring theory's impact, conservative "venture capital[ists]" developed a large network of interconnected think tanks.[123] In the 1990s, these right-wing think tanks spent over one billion dollars, and had become "the key generator and purveyor of *public* ideas," according to a study by liberal philanthropists.[124] One of these, the

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118. DOWIE, *supra* note 104, at 218.

119. Kuttner, *supra* note 97 (reporting that Edwin Feulner of the Heritage Foundation emphasized support for marketing as one of four keys to successful conservative funding); CALLAHAN, *supra* note 86; PFAW, *supra* note 87.

120. *See* Schlegel, *supra* note 56, at 956.

121. *See* Kuttner, *supra* note 97 (describing boasting from conservative funders about using philanthropy as a strategic investment with high leverage).

122. Hudson Institute Investment Impact, *available at* http://www.hudson.org/invest/ index.cfm?fuseaction=investment_impact (last visited Oct. 1, 2006).

123. Zeller, *supra* note 103, at 1290.

124. CALLAHAN, *supra* note 87.

Heritage Foundation, explains its power by noting that "'traditional' think tanks cling to the notion that their work will leave its imprint on Washington through a process of osmosis. Heritage efforts are deliberate and straightforward."[125] Twenty percent of the Heritage Foundation's 2002 spending, for example, went to media and government relations and another twenty-one percent went to educational programs.[126] Similarly, the conservative John M. Olin Foundation funds not only the production of ideas in think tanks, law schools, law professors, law students, and Law and Economics theory workshops, but also spends lavishly to disseminate and implement these ideas through conservative publications, public interest law firms, judicial training, and, through their board members and senior staff, Republican political candidates.[127]

In contrast, a spokesman for the centrist Bill and Melinda Gates Foundation explained that it steered clear of political activism and instead aimed to "provide information to government agencies . . . when they request it."[128] Centrist or liberal foundations "promote policies piecemeal," but "[y]ou would never hear senior officers of big mainstream foundations talking about building a [political] movement" with the scholarship they fund.[129]

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125. *Id.* (quoting Heritage Foundation Annual Report). A vice president of the conservative Heritage Foundation reported that his group differs from traditional think tanks like the Brookings Institute, by adopting "the intense marketing and issue management capabilities of an activist organization." DOWIE, *supra* note 104, at 216 (quoting Stuart Butler).

126. KREHELY, *supra* note 87, at 19.

127. *See* PFAW, *supra* note 88, at 18-20; JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 49-79 (1996) (detailing, for example, how conservative foundations, including the Olin Foundation, helped turn political opinion against racial affirmative action by linking conservative scholarship to funding for the Washington Legal Foundation, the Center for Individual Rights, the Heritage Foundation, the Manhattan Institute, the Center for Equal Opportunity, the American Enterprise Institute, the Hoover Institution, the Cato Institute (for a time), the Hudson Institute, the Heartland Institute, and the Institute for Justice).

128. Zeller, *supra* note 103, at 1287-88.

129. Kuttner, *supra* note 97, at 3.

3. *Affirming Right-Wing Theory for Tough Politics.* Along with a strategy that institutionalizes the integration of theory and politics, the Right has simultaneously pursued a strategy of *separating* theory from politics, successfully embracing the tension that Brown and Halley hope to capture. The right-wing funders often have taken a long-term, hands-off, and high-risk approach to their investment in theory, thereby encouraging internal debate and a diversity of policy strategies.[130]

Non-right-wing foundations and donors tend to require extensive monitoring, evaluation, and documentation of the policy impact of their grants.[131] In contrast, the more conservative foundations tend to eschew quantitative measures and strict accountability in favor of "a blank check" approach that tells grantees to "follow your heart."[132] By nurturing institutions and individuals rather than focusing on discrete projects, right-wing funders have combined direct, centralized governance of the general ideological direction of their spending[133]—with substantial freedom and flexibility for the scholars who benefit from their funds. By providing general operational support over several decades, conservative funders have encouraged intellectuals and institutions to be entrepreneurs and incubators, not political servants or technicians.[134]

For example, beginning in the mid 1980s, right-wing foundations gave generously to build the Federalist Society[135] into a group able to spend around $5 million a

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130. *See* KREHELY, *supra* note 87, at 11.

131. *See* Zeller, *supra* note at 103, at 1291; *see also* KREHELY, *supra* note 87, at 42.

132. Zeller, *supra* note 103, at 1291; *see* KREHELY, *supra* note 87, at 54.

133. *See supra* note 116.

134. *See* CALLAHAN, *supra* note 87; *see also* PFAW, *supra* note 88; KREHELY, *supra* note 87, at 16; DOWIE, *supra* note 104, at 217 (noting that conservative foundations use separate think tanks to offer scholars "the very intellectual freedom they so vigorously sought to deny American universities.")

135. *See* PFAW, THE FEDERALIST SOCIETY: FROM OBSCURITY TO POWER 6-8 (2001) (discussing "millions" of dollars in contributions from the John M. Olin Foundation, the Lynde and Harry Bradley Foundation, the Sarah Scaife Foundation and the Charles G. Koch Foundations); KREHELY, *supra* note 87, at 11 (noting the Olin Foundation's long-term strategic support of the Federalist

year[136] on intellectual networking aimed at "reforming the legal order."[137] The group's donation web page touts the political and market value of a theoretical focus removed from practical demands, stressing the group's success in "shift[ing] the very terms of the debate."[138] "While candidates, political races, and the issues of the day emerge and exhaust themselves fairly quickly, the effort to renew our intellectual and philosophical tradition is constant and ongoing."[139] As that group's web site tells prospective donors, an "investment in the Federalist Society will have a sustained impact for years to come."[140]

Similarly, the Olin Foundation has made the development of the Law and Economics branch of legal theory a long-term priority over the last twenty years.[141] A founding organizer of this right-wing legal theory reflected that the field might have fizzled out in the late 1970s or early 1980s if John M. Olin had not decided to use his gun and chemical company wealth to fund academic fellows who could promote a conservative economic vision.[142] After Olin's death, the John M. Olin Foundation continued and expanded its "enormous" financial support for Law and

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Society, beginning with a small group of law students, and amounting to about $2 million dollars over 20 years); Michael Fletcher, *What the Federalist Society Stands For*, WASH. POST, July 29, 2005, at A21 (reporting support for the group from leading conservative foundations as well as from major corporations such as Verizon, Microsoft, and DaimlerChrysler).

136. Fletcher, *supra* note 135, at A21; *see also* INST. FOR DEMOCRACY STUDIES, THE FEDERALIST SOCIETY AND THE CHALLENGE TO A DEMOCRATIC JURISPRUDENCE 2 (2001) (reporting, based on earlier data, a $3 million annual budget).

137. The Federalist Society: Background, http://www.fed-soc.org/our background.htm (last visited Oct. 1, 2006).

138. Eugene B. Meyer, President, The Federalist Society: Why Give, http://www.fed-soc.org/whytogive.htm (last visited Oct. 1, 2006).

139. *Id.*

140. *Id.*

141. *See* John M. Olin Foundation, Inc., Grant Programs, http://www.jmof.org/grant_programs.html (last visited Oct. 1, 2006).

142. *See* Henry G. Manne, *How Law and Economics Was Marketed in a Hostile World: A Very Personal History*, *in* THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS 309, 322-23 (Francesco Parisi & Charles K. Roley eds., 2005) (noting how "very expensive" this fellowship program was).

Economics scholarship with the effect of producing "an organized program in every major law school in the country (and several in Canada)" by 1986, along with numerous journals, textbooks, and conferences.[143] By the 1990s, this support had continued to develop into a prominent professional society and a specialized law school (George Mason), with the result that "[n]o other intellectual paradigm in legal education could begin to match the power of law and economics."[144]

In another example of long-term investments in intellectual production, right-wing activists have also heavily funded conservative Christian legal scholarship, which is now claiming a place as a significant branch of contemporary jurisprudence.[145] Although religious institutions have long played an important role in legal academics, these new investments in Christian law take a distinctly comprehensive, ideological, and fundamentalist approach. In contrast to past religious commentary on specific legal issues like abortion or poverty, this new Christian theory aims to rethink the foundations of American law. In 1978, Pat Robertson founded Regents University Law School (using profits from his Christian Broadcasting Network)[146] to "integrate biblical principles" into the teaching and practice of law.[147] In 2000, anti-abortion activist Tom Monaghan used his Dominos Pizza wealth to open the Ave Maria School of Law, which promotes natural law jurisprudence based on what its leaders view as the traditional Roman Catholic moral

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143. *Id.* at 322, 323.

144. *Id.* at 326; *see also* Hanson & Yosifon, *supra* note 87, at 273-76 (arguing that the dramatic success of the Law and Economics scholarship was pivotally influenced by the Olin Foundation's long-term strategic investment designed to produce a rightward shift in the politics of legal theory).

145. *See, e.g.*, CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al. eds., 2001); *see also* William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707 (2003).

146. Harvey Cox, *The Warring Visions of the Religious Right*, ATLANTIC MONTHLY, Nov. 1995, at 59.

147. Jeffrey A. Brauch, *It Sounded Great in the Glossy Brochure . . . So Where Is It? Carrying Out the Mission at a Mission Driven Law School*, 33 U. TOL. L. REV. 1, 2 (2001).

order.[148] In 2004, the first class of students entered Liberty University School of Law, which Jerry Falwell established to train what he hoped would be Christian "conservative warriors" mobilized against groups like the ACLU.[149] In 2000, the Olin Foundation joined with other conservative funders to start the James Madison Program in American Ideals and Institutions under the leadership of jurisprudence scholar and political activist Robert George.[150] This center operates as a semi-independent conservative think tank within Princeton University and has helped to promote George's conservative Christian natural law theories as well as right-wing policies on topics like sexuality and immigration.[151]

Another aspect of right-wing legal activism that is consistent with Brown and Halley's vision of theory is the emphasis on fostering decidedly impractical scholarship. Right-wing activists have directed their investment in theory particularly toward promoting ideas that (at the outset) are likely to seem unorthodox, utopian, and immodest in mainstream policy and theory—privatizing social security and public education, or even rolling back the whole New Deal administrative and welfare state.[152] In

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148. *See* M.L. Elrick, *Higher Law*, NAT'L LAW J., May 14, 2001, at A18; *see also* Jim Suhr, *Pizza Magnate Puts His Fortune Where his Faith Is*, CHI. TRIB., Nov. 10, 2001, §2, at 8; *see also* CALLAHAN, *supra* note 88, at 25 (discussing Monaghan's funding to promote both scholarship and political activism, including the radical anti-abortion group Operation Rescue).

149. *See* David A. Bernstein, *The Christian Right: Jerry Falwell's War on the ACLU*, BOSTON PHOENIX, Aug. 27-Sept. 2, 2004.

150. *See* Max Blumenthal, *Princeton Tilts Right*, THE NATION, Mar. 13, 2006, at 11, 16 (reporting that Olin contributed $525,000 in startup funds, and that other major donors since then have included the Bradley Foundation, the family of Republican presidential candidate Steve Forbes, and several conservative Catholic activist groups).

151. *See id.* at 18-19 (noting that because the Program does not depend on University funding, the director and funders—represented on the Program's advisory council—have unusual power to ensure fellowships and events are determined by political rather than academic criteria).

152. *See* Zeller, *supra* note 103, at 1286; *see also* Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAGAZINE Apr. 17, 2005, at 42 (discussing how conservative activists have used think tanks in an effort to transform the

a comment that could be mistaken for postmodern thinking, former Regent University Law School Dean Herb Titus defended his use of far-fetched legal arguments supporting judicial display of the Ten Commandments by explaining that "[p]ragmatists are the most impractical persons I know because they base their decisions on what they think the future will be, and no one knows what the future will be."[153] An Olin Foundation program officer explains that they are "wary of supporting endeavors that preach to the choir."[154] Instead, right-of-center foundations are "looking for people who are making new arguments and are 'getting noticed, shaping the agenda, and moving the ball down the field.'"[155] Furthermore, conservative funders often emphasize the emotional, aesthetic, and spiritual aspects of their investment in theory. For example, conservative leaders promote scholarship not just to rationally persuade liberal or centrist policymakers to adopt particular policies, but to cultivate the social support and recognition useful in building and sustaining organized political commitments.[156]

In addition to long-term financial and social support for ambitious theory, the right-wing's strategy has emphasized collaboration across scholarly and political divisions. Right-wing activist William E. Simon argued that wealthy conservatives must ensure that tight philosophical restrictions on academic grantees nonetheless recognize and support the "enormous diversity of viewpoints within

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fundamental assumptions about law established in the New Deal era of the 20th Century).

153. Eddie Curran, *Moore's Audacious Attorney [or, Losing Your Case on Purpose]*, FREE REPUBLIC, Aug. 31, 2003, http://www.freerepublic.com/focus/news/973677/psts?page=1.

154. Zeller, *supra* note 103, at 1287.

155. *Id.*

156. *See, e.g.*, Meyer, *supra* note 138 (describing how the group aims to correct the problem that many conservative law students often felt alone or confronted with hostility and indifference). Regent University's law courses and lectures cultivate their students not just with biblical passages but with religious music. *See* Cox, *supra* note 146, at 61 (noting he could not imagine the gospel singing that accompanied his lecture at Regent taking place at a Harvard lecture); *see also*, *Regent University Law School's Mission is to Integrate the Will of God and the Nation's Law*, NPR radio broadcast (May 6, 2005) (discussing a constitutional law class that opens with a hymn).

the center-to-right intellectual world which endorses capitalism."[157] Working together through an interlocking network of funding, board members, and staff, libertarian and conservative groups smoothly meld arguments about free-market liberty and authoritarian morality to rationalize reforms in areas like social security, education, welfare, and tort law.[158] For example, although the neoliberal Cato Institute takes opposing positions from the neoconservative Heritage Foundation on a few issues like gay rights,[159] it has drawn substantial support from several of the leading funders of groups (like Heritage) at the fore of the campaign for "conservative morals" (the Sarah Scaife Foundation, the Lynne and Harry Bradley Foundation, and the Castle Rock Foundation).[160] In turn, the Charles A. Lambe foundation, a leading funder of Cato's libertarianism, is also a major supporter of the Heritage Foundation's moralistic conservatism.[161]

Besides fostering and bridging internal diversity, right-wing academic and research institutions have avoided ideological purity or authenticity by supporting and reaching out to centrists, liberals, and new scholars likely to

157. SIMON, TRUTH, *supra* note 89, at 231.

158. *See generally* McCluskey, *supra* note 41 (showing the connections between economic (neoliberal) and social (communitarian) conservative politics directed at undermining the welfare and regulatory state in the late 20th century); STEFANCIC & DELGADO, *supra* note 127 (discussing the centrality of pro-business conservative economic politics to changing "America's social agenda" on issues such as affirmative action, welfare, "English only," and eugenics).

159. *See* Brief of the Cato Institute as Amicus Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152342 (arguing that criminalization of same-sex sodomy violates constitutional privacy protections); *see also* Robert P. George, *Judicial Usurpation and the Constitution*, *in* HERITAGE LECTURES (Lecture #871, Feb. 17, 2005) (comparing the Supreme Court's rulings extending the right to privacy to include abortion and same-sex sodomy to the infamous decisions of *Plessy* and *Dred Scott*).

160. *See* Media Transparency Project, Recipient Grants: Cato Institute, http://www.mediatransparency.org/recipientgrants.php?recipientID=51 (last visited Oct. 1, 2006). The Scaife foundation restricts its Cato grants to certain issues. *See* STEFANCIC & DELGADO, *supra* note 127, at 69.

161. *See* Media Transparency Project, Claude R. Lambe Charitable Foundation Grant Recipients, http://www.mediatransparency.org/recipientsofunder.php?funderID=8 (last visited Oct. 1, 2006).

be receptive to some of their positions or at least to some of their largesse.[162] For example, institutions like the Federalist Society and Regent University's law school build a reputation for intellectual legitimacy and openness by inviting liberal and centrist scholars to share their views.[163] By supporting the occasional pro-welfare, pro-regulatory, or pro-equality liberal—while clearly keeping left economics out of the debate—Olin money in law schools can appear to be driven by neutral pursuit of knowledge rather than by a political movement.[164]

D. *Critique of Theory's Politics*

Even if ambitious, iconoclastic, and committed theory has nourished the growing muscle of the right-wing "wolves" who attack progressive policies, does that mean a similar dose of more irreverent theory would ease the problems confronting a left-wing vision of justice? In its vision of how the left might burst the binds of liberal legalism, *Left Legalism's* call for more theory takes an oddly uncritical approach to the politics of theory.

The book stands for the hope that by modeling the diverse possibilities for theorizing beyond liberal law, they will encourage more of such theory.[165] But, as their opening

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162. *See* Kuttner, *supra* note 97 (explaining why the right-wing network of foundations and think tanks "makes great efforts to co-opt New Democrats.").

163. *See* Cox, *supra* note 146, at 60-61 (describing his warm reception from Regents Law School even though he is a liberal theologist); *see also* INSTITUTE FOR DEMOCRACY STUDIES, *supra* note 136; Federalist Society, What People are Saying, http://www.fed-soc.org/whatpeoplearesaying.htm (last visited Oct. 1, 2006) (Federalist Society web page featuring praise for its openness by leading centrist or liberal legal scholars such as Cass Sunstein, Sanford Levinson, and Nadine Strossen).

164. *See, e.g.*, Brian Leiter, Right-Wing Olin Foundation, Major Benefactor of Law and Economics, is Closing Up Shop, Leiter Reports: A Group Blog, (May 30, 2005) http://leiterreports.typepad.com/blog/2005/05/index.html (last visited October 1, 2006) ("The only redeeming aspect of the Olin Foundation's history is that, at least with law schools, they gave the money and stayed away. That meant that liberals like Ian Ayres (Yale) and Gillian Hadfield (USC) could feed at the trough, even if the conservatives outnumbered them.")

165. *See* Brown & Halley, *supra* note 3, at 36.

list of left activists' challenges to critical theory suggests,[166] the problem may not be a lack of recognizable models of left intellectual challenges to liberalism but the fact that existing prominent left theories have often inspired antipathy or apathy among those on the left they hope to court.

1. *Castigating Left Character.* Considering why critique gets such poor reception among progressive activists, Brown and Halley portray left activists and scholars as beset by emotional, moral, and intellectual weakness. They castigate "suffer-mongerers"[167] for an "unstinting, self-effacing devotion to a cause of misery" that regards with suspicion "any pleasure taken in intellectual or political work."[168] They challenge the simplistic reasoning of those who treat liberal law as just a "tool" for implementing left goals without recognizing how liberalism is itself a politics that redirects and constrains those goals.[169] They complain of the "orthodox[y] often locked into left thinking."[170] They demand more "courage" in the face of the "wolves" at the door.[171]

Compare Brown and Halley's analysis of the left's problem with a similar call to intellectual arms against liberal legalism on the right. Like Brown and Halley, in the late 1970s, William E. Simon and other conservative activists directly challenged the then-dominant liberal legal framework and particularly urged theoretical work aimed at rejecting the ascendancy in the 1960s of ideas of justice centered on the civil rights and the regulatory state models.[172] But ironically, this right-wing attack on liberal legalism analyzed insufficient right theory not as a problem of conservatives' weak character, bad humor, or shaky intellect, but as a problem of the systemic political economy

166. *See id.* at 2-3.

167. *Id.* at 33.

168. *Id.* at 32.

169. *Id.* at 23-24.

170. *Id.* at 35.

171. *Id.* at 36.

172. *See* SIMON, TRUTH, *supra* note 89, and accompanying text.

of ideas. Though Simon bemoaned the weakness of right-wing intellectuals, he explained this weakness as a problem of being an "impoverished underground" in an academic world dominated by the left.[173] As a solution, Simon urged fellow conservatives not to scold or persuade too-cautious intellectuals, but to *pay* them to take more risks against the liberal establishment. "I know of nothing more crucial than to come to the aid of the intellectuals and writers who are fighting on my side," Simon said,[174] by giving them money to ensure their ability to better compete in the marketplace of ideas.[175]

If, as Brown and Halley argue, progressive intellectuals should not be "political service worker[s],"[176] then a strong left analysis would question not so much the nature or skills of those who accept such a position, but instead would challenge the academic and professional labor markets that produce so much service work and so few ownership or management opportunities for progressive thinkers seeking to take the political and intellectual lead. From this perspective, left activists' complaints that theory is an unaffordable luxury[177] could count as an intellectual challenge, not anti-intellectualism, as evidence of a political double bind, not individual irrationality.

2. *Avoiding Theory's Political Economy*. Why does foundation-shaking left critical theory cost so much both to do and to do without—and how can critics change that double bind? The price of most academic or advocacy jobs might be accepting liberal legalism (or challenging it only from the right or from racialized, gendered, or impoverished margins). If left anti-intellectualism comes in part from a sense that left critique is perceived as a vocation for an academic aristocracy, then the book's model might not be persuasive: the six chapters by legal academics, for example, are all contributed by tenured professors at a few of the most elite, wealthy, and some would say conservative

173. *See id.* at 231.

174. *Id.* at 233.

175. *See id.* at 231.

176. Brown & Halley, *supra* note 3, at 33.

177. *See id.* at 3.

law schools (Harvard, Stanford, and Columbia—with a co-author at UCLA).[178] All of the contributors are scholars with senior positions at leading U.S. research universities.[179]

Though the book should not necessarily be faulted for concentrating on non-material barriers to critical theory on the left, its general elision of the perhaps crasser questions of the role of money and prestige is worrisome because it reinforces a liberal convention of awkward silence about the political economy of legal theory. Except for right-wing funders and activists, many prominent analyses of the direction of recent U.S. legal theory have steered away from examining in any depth the impact of changes in funding sources.

For example, in a piece considering, "[w]hy did critical legal studies disappear? Will it reappear? Why does the Federalist Society prosper?," legal scholar Cass Sunstein steps gingerly outside the bounds of the conventional liberal presumption that competing legal theories rise or fall based on their purely rational merits.[180] Although he maintains that most legal academics generally are drawn to good ideas and committed to truth, he argues that the neutral market for good legal theory has slight imperfections. Governing intellectual paradigms can become distorted through "cascade effects"—unintentional naturalized forces such as habit, information costs, and mass psychology—that lead scholars to credit some theoretical views without fully examining their merits.[181] Sunstein notes, for example, that both CLS and the Federalist Society gained strength in the early 1980s not just through rational persuasion but also through the emotional power of the organized academic communities each built.[182] But in considering why many early followers and leaders of CLS showed "little continuing

178. *See id.* at 435-36.

179. *See id.*

180. Cass R. Sunstein, *Foreword: On Academic Fads and Fashions*, 99 MICH. L. REV. 1251, 1251 (2001).

181. *Id.* at 1251-52.

182. *See id.* at 1259-60.

interest" once they became established academics,[183] while the Federalist Society developed into a major producer of laws, law professors and judges,[184] Sunstein concludes only that the CLS premise that "law is 'political'" was intellectually insufficient to sustain much "illuminating further work."[185]

This conclusion is puzzling, given the parallel success of Law and Economics and of the Federalist Society in criticizing and capitalizing on reducing liberal law's principles to narrow political interests. Sunstein makes no mention whatever of the fact that the prosperity of these conservative schools of thought have coincided with enormous and unprecedented direct strategic investment by wealthy conservative activist organizations intending to change the foundations of American jurisprudence.[186] Indeed, Sunstein happily assures us that "no one pays directly for what academics produce" and that "little money is usually involved" in the market for legal theory.[187]

But Sunstein (and any scholar active in U.S. legal academia) undoubtedly is at least generally aware of the vast amount of money going to produce and shape legal scholarship. The Olin Foundation's web site shows the following grants authorized in 2003 to law schools to promote Law and Economics: $10 million to Harvard (the

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183. *Id.* at 1255.

184. *See* Amy Bach, *Movin' On Up with the Federalist Society: How the Right Rears its Young Lawyers*, THE NATION, Oct. 1, 2001, at 11.

185. Sunstein, *supra* note 180, at 1263.

186. *See, e.g.*, STEFANCIC & DELGADO, *supra* note 127 (analyzing the influence of conservative think tanks on the law); *see also* Eric M. Fink, *Post-Realism, or the Jurisprudential Logic of Late Capitalism: A Socio-Legal Analysis of the Rise and Diffusion of Law and Economics*, 55 HASTINGS L.J. 931, 948-51 (2004) (discussing how self-interested financial contributions helped make Law and Economics a dominant legal theory); Hanson & Yosifon, *supra* note 87 (attributing the success of Law and Economics to Olin Foundation money); Richard Lippett, Note, *Intellectual Honesty, Industry, and Interest Sponsored Professorial Works, and Full Disclosure: Is the Viewpoint Earning the Money, or is the Money Earning the Viewpoint?*, 47 WAYNE L. REV. 1045 (2001) (analyzing the problem of extensive conservative and corporate funding of legal scholarship).

187. Sunstein, *supra* note 180, at 1253-54.

largest foundation grant in that law school's history); $5.3 million to Yale; $1.2 million to the University of Virginia; $1 million to Stanford; $663,000 to the University of Chicago; $600,000 to Columbia; $405,000 to George Mason; $404,500 to Cornell; $316,000 to the University of California at Berkeley; $234,000 to the University of Southern California; $233,000 to Georgetown University; and $114,000 to Northwestern University.[188] Also in 2003, Olin listed current grants of $617,000 to the Federalist Society, along with many other generous grants for Law and Economics scholarship in other academic departments and about half a million dollars for "public" interest law firms using litigation to put Law and Economics precepts into action.[189] Similarly, it is no secret that the Federalist Society has enjoyed millions of dollars of contributions from leading right-wing activist organizations, including the Olin, Bradley, Sarah Scaife, and Charles G. Koch foundations.[190]

Although I have not found any detailed comparison, it seems fair to assume that CLS or other institutions or groups promoting specifically left-leaning critical jurisprudence have rarely received any grants remotely approaching even the smaller of these.[191] I am not aware of a single comparably funded research institute or center devoted to left or progressive legal critique. Russell Sage funding from the mid-1960s to the mid-1970s helped produce the liberal-leaning Law and Society Association,

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188. John M. Olin Foundation, Inc., Schedule of Grants, http://www.jmof.org/grants1996.html (last visited Oct. 1, 2006).

189. *Id.*

190. *See* PFAW, *supra* note 135, at 6-8.

191. The organizers of the CLS conference in its height in the early 1980s kept the group's funds in a shoebox. Interview with Elizabeth Mensch, Professor, State University of New York at Buffalo School of Law, in Amherst, New York (Nov. 18, 2005). One notable exception to the meager or nonexistent funding targeted at critical left theory was Martha A. Fineman's appointment as the first Dorothea S. Clarke professor of Feminist Jurisprudence at Cornell Law School in 1999, the only endowed law school faculty position focusing on feminist theory. However, Fineman accepted a position at Emory Law School in 2004, and official Cornell faculty listings in early 2006 gave no indication that the position still exists. *See* Cornell Law School Faculty Profiles, http://www.lawschool.cornell.edu/faculty/index.cfm (last visited Dec. 15, 2006).

along with a scholarly journal and several university centers for law and society research.[192] But compared to the recent funding for conservative legal theory movements, that period of law and society funding was far more limited in dollars, time, and geography, and was less directly and explicitly tied to a movement for radical political and ideological change.[193] And after the Law and Society movement broadened to include more non-positivist, and more explicitly political analysis (in response to internal criticism in the mid-1970s), it has mostly operated without substantial external funding and without extensive institutional connections to judges, think tanks, litigation groups, political activists, or mass media.[194] Today, the Russell Sage Foundation states that its funding is project-specific and that tax law prohibits it from giving general support to institutions.[195] While several law schools maintain reputations for fostering progressive law and politics, none have been backed by multi-million dollar funding explicitly tied to increased production of wide-ranging left jurisprudence comparable to the law schools designed to produce conservative Christian and Law and Economics jurisprudence.

By sharing Sunstein's striking silence about the political economy of theory, *Left Legalism/Left Critique* reinforces the conventional wisdom presenting increased

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192. *See* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 248-51 (1995); *see also* Christopher Tomlins, *Framing the Field of Law's Disciplinary Encounters: A Historical Narrative*, 34 LAW & SOC'Y REV. 911, 953-55 (2000).

193. *See* Tomlins, *supra* note 192, at 958-61 (noting that the Law and Society movement was challenged by critical legal studies scholars for failing to address the role of political ideology); *see also* SCHLEGEL, *supra* note 192, at 251 (noting that Russell Sage's strategy was about "fostering growth in an academic area and then moving on" and concluding that this funding overall did not cause significant change in legal academia).

194. *See* Tomlins, *supra* note 192, at 958-61 (discussing development of the Law and Society movement).

195. *See* Russell Sage Foundation, What We Do Not Fund, http://www.russell sage.org/about/dontfund/ (last visited Oct. 1, 2006); *see also* KREHELY, *supra* note 87, at 43 (noting that conservative foundations are much more likely than others to "use the tax system to its full advantage" with the goal of evading restrictions on funding political activity).

right-wing funding as largely coincidental to any corresponding rise of right-wing theory and policy or decline of left theory. Judge Richard Posner, for example, dismisses the charge that Law and Economics succeeds through foundation money rather than intellectual merit alone, explaining that outside funding is not necessary for salaried academics to produce legal theory.[196] Left theory production might, however, be affected by cost-benefit decisions about allocating scarce time among the extensive teaching, professional, administrative, and community duties at the core of most non-elite law school jobs—duties that can be relieved by employment in conservative think tanks or by outside research grants. One would not have to adopt either a Posnerian or Marxist faith in the overarching power of material incentives to give some credit to the claims of the Olin Foundation and other "investors" that they are receiving handsome substantive policy returns on their enormous outlay of money to support conservative legal theory.[197]

By focusing on the demise of left theory as a problem divorced from a material, historical context, *Left Legalism* tends to perpetuate a construction of theory as separate from politics, history, and material support. As a result, Brown and Halley's argument for theory is in many ways liberal and uncritical, and even anti-left. They argue for understanding left law reform choices as posing double binds that require not just taking sides but questioning the framework of analysis.[198] But they do not sufficiently understand left scholarly choices as governed by double binds that could similarly benefit from being subjected to critique. It is not enough to simply theorize as if the wolves are not at the door. Instead, left critique should envision, and strategize about, how to strengthen and open the doors

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196. *See, e.g.*, Richard A. Posner, *Comment on Lempert on Posner*, 87 VA. L. REV. 1713, 1714-15 (2001) (criticizing as "extreme" and absurd the suggestion by Richard Lempert that conservative funding had anything to do with the success of Law and Economics, on the ground that outside funding is "not vital to research conducted in law schools" because of its theoretical, non-empirical nature).

197. *See supra* notes 99, 188-90, and accompanying text.

198. *See supra* notes 34-40, and accompanying text.

that would make it possible and pleasurable for more progressive and left scholars to think beyond the wolves that they aim to resist.

II. LESS (LEFT) POLITICS

Left Legalism/Left Critique argues that the left needs not just more theory, but also less instrumental politics. By criticizing the left's *practical* politics, and overlooking the right's *intellectual* politics, the book tends to reinforce the (uncritical) mainstream tradition of defining good theory in opposition to politics, particularly left politics. Most of the chapters in *Left Legalism* do engage concretely, creatively, and cogently with controversial contemporary policy issues: gay marriage,[199] employment discrimination law,[200] reproductive rights,[201] and international human rights law.[202] As a result, *Left Legalism* helps refute the conventional criticism that critical legal theory is too nihilistic and abstract to be politically relevant.

Nonetheless, much of *Left Legalism* tends to avoid some of the hardest political and intellectual questions by treating the left's dilemmas primarily as conflicts between smart theory and simplistic politics rather than as conflicts between competing theories or between competing political interests (or both). Adopting *Left Legalism*'s mischievously skeptical spirit, how do we know that the book's asserted eagerness to "open the door to the wolves" represents left intellectual "courage" (as the editors hope[203]) rather than uncritical or cowardly capitulation to prevailing right-wing politics and theory?

Brown and Halley's introduction wisely warns against immunizing left identity-based movements from intellectual

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199. Butler, *supra* note 48, at 229-58; Warner, *supra* note 48, at 259-89.

200. Richard T. Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics*, *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 38-79; Halley, *supra* note 48, at 80-104.

201. Drucilla Cornell, *Dismembered Selves and Wandering Wombs*, *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 37-372.

202. *See* Franke, *supra* note 48, at 290-337.

203. *See* Brown & Halley, *supra* note 3, at 36.

challenge simply because these movements purport to represent the correct (left) politics—the alleged interests of subordinated groups—in the face of right-wing attacks.[204] But that should be coupled with a countervailing warning that spurning conventional left or liberal politics (or flirting with right-wing arguments) is not sufficient proof of politically irreverent and intellectually superior theory—especially in a context where contempt for liberal ideas is a quite orthodox part of politics and jurisprudence. The challenge for left theory is how to critically engage left politics without reinforcing the convention that privileges distance from such politics as distinctively a-political—and without disparaging attachment to left politics as distinctively anti-intellectual.

A. *Theory Versus Left Politic*

In calling for more left thinking "as if the wolves were not there,"[205] *Left Legalism* oddly echoes the conventional centrist jurisprudence that has so strongly opposed critical legal theory. That conventional view, repeated in Sunstein's commentary, faults left-leaning critical legal theory for stripping reason down to power.[206] In response, legal scholar William H. Simon argues that a disturbing "fear and loathing" of politics drives "[c]ompulsive crit-baiting" among non-conservative legal scholars.[207] He argues that among non-conservative legal academics, intellectual excellence often has come to be measured in terms of distance from political commitment and controversy.[208] As a result, scholarly integrity often means setting up polarized positions and then advocating a midpoint (or affirming each side a little) to avoid complex and careful evaluation of the

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204. *See id.* at 1-3 (opening the book with examples of political claims allegedly bestowed with "sacred cows status" among left activists).

205. *See id.* at 36.

206. *See id.*; *see also* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 263-64 (1993); Sunstein, *supra* note 180, at 1263.

207. Simon, *supra* note 4, at 175.

208. *Id.* at 177-78.

best position.[209] Ironically, this emphasis on moderating, balancing, or alternating conflicting political positions means non-conservative legal academics often value incoherence, vagueness, and irrelevance more than consistent, clear and well-elaborated arguments about contemporary policy.[210]

While many non-conservatives have focused on defending principle from politics (however incoherently), conservatives have mobilized this slippery opposition in favor of right-wing politics. The right's success has been built in part on reconstructing the opposition between politics and principle as an opposition between left and right political visions. Thanks to widely disseminated conservative ideas, both popular wisdom and sophisticated scholarship now readily reduce liberal principles of fairness, democracy and equality to elitist "special interest" politics. In this now-conventional critique, for instance, plaintiffs' tort protections are about enriching greedy trial lawyers; support for public education is about enriching incompetent and overpaid unionized teachers; and fair and transparent trade regulation is about coddling xenophobic, selfish, and anachronistic blue collar American workers.

In contrast, non-conservative scholars and politicians tend to uncritically take right-wing arguments about "global competitiveness," "consumer choice," or "market incentives" as legitimate (though contestable) public norms rather than as cynical protection for laziness, greed, or prejudice on the part of those who stand to personally gain from right-wing reforms.[211] The "special interests"—and vast investment—driving conservative policies are hardly a secret. Nonetheless, critique that translates favorite conservative principles like "efficiency" or "personal

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209. *See id.*; *see also* Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785, 795-97 (describing and criticizing the judicial strategies of appearing independent of ideology by "difference splitting" or becoming "bipolar"—shifting between ideological poles).

210. *See* Simon, *supra* note 4, at 178, 181.

211. *See* McCluskey, *supra* note 41, at 869 (criticizing Michael Graetz and Jerry Mashaw for analyzing the political barriers to broader social insurance programs as a matter of disinterested commitment to principles of "economic productivity" and "individual responsibility").

responsibility" into private protectionism (for instance, of insurance company profits, white racial privilege, or legal scholars seeking Olin money for personal advancement) is more likely to get construed as crudely reductionistic and deterministic, if not uncollegial or un-American.

A left critical analysis of the tensions between legal theory and legal practice should be wary of, and interested in, the political ends and effects of any theory/praxis divide. Critical theorist Gayatri Spivak admonishes that every theory is a strategy—implying the converse, that every strategy is a theory.[212] What is at stake, and for whom, in constructing conflicting positions on policy questions like affirmative action and sexual harassment as conflicts between brave, sophisticated theory and naive, sentimental "political correctness"?[213] Liberalism (including both its "liberal" and "conservative" political branches) has been built on a long and sorry history of using the oppositions of theory versus praxis, reason versus sentiment, and principle versus power to represent and reinforce hierarchies of race, gender, class, sexuality, disability, religion, and nationality.[214] Many of the chapters in *Left Legalism* continue this uncritical tradition by singling out feminist, anti-racist, gay identity, and disability law reform movements for blame as insufficiently theorized political orthodoxy and irrational sentiment.

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212. Personal notes from International Feminist Theory course taught by Gayatri Chakravorty Spivak, Columbia University (1993) (on file with the Buffalo Law Review).

213. *See* Brown & Halley, *supra* note 3, at 3-5 (suggesting that positions favoring rights to protection from sex harassment or to race-based affirmative action rest on "common sense" politics while the book's challenges to such positions represent stringent critical theory).

214. *See, e.g.*, LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY 100-25 (1995) (discussing how intelligence and its absence has been complexly identified with the bodily status of blindness and deafness in theory and literature); *see also* STEVEN JAY GOULD, THE MISMEASURE OF MAN (1996) (analyzing how the most prestigious institutions and scholars of mainstream biological and social science have continued through the 20th century to construct, promote, and "prove" their white supremacist theories identifying capacity for reason with white male and often upper class status); SPIVAK, *supra* note 63, at 13 (analyzing the Kantian idea of "rational man" as grounded in an opposition to a primitive or savage status identified in terms of race, gender, family status, and geography).

B. *Theory Versus Egalitarian Politics*

A number of *Left Legalism's* contributors hope to put strong progressive theory back in the drivers' seat by especially pointing out the limitations of achieving equality through the legal protection of "multiculturalism" or "difference."[215] At the same time, many of the chapters too often uncritically treat non-left politics and theory—especially opposition to identity-based egalitarian law reforms—as generally reflecting an impartial, transcendent quest for truth, reason, and the public good.

If current barriers on the road to left justice are produced not so much by anti-intellectualism as by anti-egalitarianism, then the book's critique of liberal equality ideals might strengthen rather than loosen the constraints on left theory and politics. Rather than concentrating on the moralistic project of dividing "bad" left politics from "good" theory, left critique might do better to focus more on confronting and negotiating the *politics* of theory. Once again, paying attention to the "wolves at the door," the right's success especially suggests the political value of questioning and recasting the fundamentally political divisions between theory and politics.

1. *Theory Versus Racial Justice Politics.* In a chapter entitled *Beyond "Difference": A Reluctant Critique of Legal Identity Politics*,[216] Richard T. Ford criticizes liberals for switching their vision of racial justice from racial assimilation and integration to an "obsession" with protecting "racial difference."[217] Ford argues, for example,

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215. *See* Ford, *supra* note 200, at 38 (focusing on racial "difference"); Halley, *supra* note 48, at 87-89 (criticizing "cultural feminism" for holding that women form a distinct and morally superior culture or consciousness); Mark Kelman & Gillian Lester, *Ideology and Entitlement*, *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 158 (criticizing "left multiculturalism"); Kennedy, *supra* note 71, at 206-07 (blaming the disintegration of left rights rhetoric on the proliferation of identity-based law reforms that undermined the idea of rights as universal); Wendy Brown, *Suffering the Paradoxes of Rights*, *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 422-26 (explaining that gender-specific rights entrench gender regulation).

216. Ford, *supra* note 200.

217. *Id.* at 41-42.

that the "diversity rationale" for race-conscious affirmative action reinforces the anti-egalitarian idea that racialized differences stem from an inevitable, natural culture rather than from historically contingent racism.[218] Liberal attempts to secure legal recognition of cultural difference risk reproducing the constraints of racial stereotypes.[219] With difference-based affirmative action, Ford explains, "*only* by highlighting their own distinctiveness could minority students justify their presence in the universities that admitted them."[220]

Consistent with the book's theme of theory over practice, Ford blames the "analytically deficient and normatively impoverished" ideal of multiculturalism[221] on liberals' "misguided tactical pragmatism that has become confused with ultimate ends."[222] Multiculturalism represents the hope that a "difference-based" approach will provide a route toward substantive equality that can partly offset the empty formalism of the dominant colorblind "equal treatment" ideal.[223] The ideal of protecting cultural "diversity" has attracted some support from a conservative judiciary, for example as a rationale for affirmative action in *Bakke*,[224] and now *Grutter*,[225] Ford insightfully questions these strategic advantages by showing how an emphasis on racial "difference" perpetuates racism in specific examples

218. *Id.* at 46.

219. *Id.* at 49-51.

220. *Id.* at 46.

221. *Id.* at 44.

222. *Id.* at 45.

223. *See id.* at 42-43 (discussing the emergence of a liberal "politics of difference").

224. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (striking down a race-conscious admissions program designed to increase "disadvantaged minority" students in medical school but stating that racial diversity can be one among many admissions factors); *see also* Ford, *supra* note 200, at 45-49 (discussing the case).

225. Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding race-conscious law school admissions policy because it furthered a compelling state interest in diversity).

ranging from racial buddy films to employment discrimination cases.[226]

But politically sympathetic skeptics might well respond that Ford's strategic calculation about the merits of assimilation over diversity[227] lacks both theoretical and political sophistication. Ford asks why multiculturalism is so popular, and why left alternative conceptions of racial justice are almost nonexistent.[228] However, his chapter ignores the extensive left scholarship and activism that has amply detailed and debated such alternatives. Many critical race scholars, for example, have tried to reframe the problem of racial justice from a question of racial ontology (essential sameness versus difference) to a question of racial politics (historically contingent subordination).[229] This critical literature criticizes the dominant view of racial inequality on the ground that it imagines racial inequality primarily as a problem of improper moral reasoning or irrational culture, thereby obscuring the conflicts over

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226. Ford, *supra* note 200, at 38-40 (discussing a claim that an employer's policy banning all-braided hairstyles count as illegal employment discrimination based on race); *id.* at 49-52 (discussing popular culture).

227. *See id.* at 74-75.

228. *See id.* at 44.

229. *See, e.g.*, Derrick A. Bell, Jr., *Racial Realism*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, 302-09 (Kimberle Crenshaw et al. eds., 1995) (criticizing the liberal formalism of antidiscrimination law and advocating instead a "realist" approach focused on detailed examination of the context of political and legal power); *see also* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra*, at 103, 114-19 (discussing the persistence of white supremacist norms under regimes of formal equality and analyzing critical theories of race); Gary Peller, *Race-Consciousness*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra*, at 127 (critiquing the debate about integration versus segregation and arguing that a black nationalist perspective would have better promoted racial justice); Valdes, Culp & Harris, *supra* note 9, at 2-3 (discussing critical race theory's focus on antiessentialism); Robert Wesley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998) (arguing for shifting the debate from affirmative action to financial reparations for African Americans as compensation for white supremacy).

power and resources that undergird U.S. racialization.[230] Ford joins this dominant flight from a political analysis of race by refusing to name an obvious, longstanding left alternative to the depoliticized idea of "multiculturalism": ending white supremacy.[231] Ford's erasure of this left antiracist theory—and its political focus—helps him present the problem of difference-based reforms as the left's intellectual or moral lack, not the right's political strength.

In a contrasting example of race critique, Jean Stefancic and Richard Delgado confront the *politics* of the sameness versus difference debate by examining the substantial flow of right-wing resources toward reframing ideas about racial justice.[232] In the 1980s and early 1990s, right-wing activists and foundations subsidized and marketed scholarship promoting the sometimes contradictory (yet politically complementary) theories of biological racial difference, multicultural "diversity" and government "colorblindness."[233] During the same period, right-wing funders poured substantial resources into a campaign to misrepresent and demonize legal scholars who rejected both colorblind and difference-based approaches in

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230. *See* Kendall Thomas, *Racial Justice: Moral or Political?*, *in* LOOKING BACK AT LAW'S CENTURY, 78-105; *see also* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 229, at 29-31 (arguing that prevailing liberal law constructs race discrimination from a "perpetrator's perspective" that looks at the moral guilt or innocence of individual discriminators rather than at evidence of harmful subordination).

231. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (striking down a state law criminalizing interracial marriage not on the ground of diversity but on the ground of white supremacy).

232. *See* STEFANCIC & DELGADO, *supra* note 127, at 33-81 (discussing conservative political campaigns focused on promoting eugenic views of intelligence and opposition to affirmative action).

233. *See, e.g.*, *id.* at 34-81 (discussing American Enterprise Institute (AEI) fellow Charles Murray's work attributing racial inequality to genetic intelligence differences and AEI's campaign against affirmative action, supported by the Olin Foundation); *see also id.* 73-75 (discussing the Olin funding for the Hudson Institute's campaign to promote corporate "diversity" instead of "affirmative action").

favor of a more complex theoretical and political analysis of racialized subordination.[234]

A right-wing media campaign, for example, transformed Lani Guinier into a difference-enforcing "quota queen," derailing her appointment as head of the Justice Department's Civil Rights Division, even though her vision of voting rights presents a sophisticated alternative to both colorblindness and essentialized racial difference.[235] Right-wing think tanks and centrist scholars have similarly attacked Patricia Williams as a leading proponent of racial essentialism and separatism[236] even though her work emphasizes a postmodern vision of race that challenges assumptions of fixed, coherent identity and difference[237] and even though she explores the limits, fluidity, and inconsistencies of rhetoric about both multiculturalism and integration.[238]

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234. *See* Crenshaw, *supra* note 229, at 22-25 (discussing the race-baiting of critical race theorists in legal academia and in popular media); *see also* Valdes, Culp, & Harris, *supra* note 9, at 3-4 (discussing how racial backlash politics targets critical race theory).

235. *See* Laurel Leff, *The Making of a "Quota Queen," in* FEMINISM, MEDIA & THE LAW 27 (Martha A. Fineman & Martha T. McCluskey eds., 1997); *see also* PATRICIA J. WILLIAMS, THE ROOSTER'S EGG 138-49 (1995).

236. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 13, 20 (1997); *see also* Heather MacDonald, *Law School Humbug*, CITY J., Autumn 1995, at 46-59 (giving Williams as an example of someone who thinks black women share a single, unquestionable, and distinct voice); Neil A. Lewis, *For Black Scholars Wedded to the Prism of Race*, N.Y. TIMES, May 5, 1997, at B9 (reporting criticism of Patricia Williams' argument that the false basis for a young black woman's charge of rape did not mean there was no crime or racial stereotyping involved); Charles R. Lawrence III, *Foreword: Who Are We? And Why Are We Here? Doing Critical Race Theory in Hard Times, in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, *supra* note 9, at xvi (discussing scholarly and media criticism of Patricia Williams as an example of personal attacks directed at critical race scholars).

237. *See* Laura Kalman, *Race Matters*, N.Y. TIMES, May 10, 1998, § 7, at 31 (reviewing PATRICIA WILLIAMS, SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE (1997)).

238. *See, e.g.*, WILLIAMS, *supra* note 235, at 27-28 (describing the practice of "verbal blockbusting" where both integration and multiculturalism can be taken over by anti-egalitarian politics).

Ford follows the right-wing bandwagon by reading the critical race literature to magnify its racial essentialism,[239] though his somber view of the politics of assimilation and the prevalence of racial injustice maintain a clear distance from the dominant center/right discourse. At times, he steps toward embracing anti-subordination in place of either assimilation or multiculturalism, for instance by reconstructing affirmative action as a correction to inequality rather than as a promotion of "diversity."[240] Ford astutely observes that racism is "Janus-faced . . . it articulates difference with one mouth and condemns it with another,"[241] and that this double bind means that racism "cannot be effectively resisted by an approach that grabs only one side of the pincers."[242]

But Ford ultimately rejects the critical race project of theorizing solutions to this racist double bind, instead limiting the chapter's analysis to what he admits is the politically ineffective project of favoring the sameness "pincer."[243] Ford's intellectual caution here seems tied to his political caution; he repeatedly backs off from analyzing racial inequality as a problem of antagonistic interests and ideology. Contradicting his later analysis of a "racist discourse" producing a "double bind,"[244] the chapter begins by assuming that the competing ideals of multiculturalism and assimilation represent an "honest disagreement about

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239. *See* Ford, *supra* note 200, at 57-59 (reading Regina Austin's analysis of a race discrimination case in a way that emphasizes its cultural essentialism rather than its critique of cultural stereotypes).

240.*vSee id.* at 47-48.

241. *Id.* at 75. The more the idea of government colorblindness stands for racial justice, the more the law is free to produce and punish racialized "difference" (naturalizing that difference as a problem of genetics, culture, or economics rather than as discrimination susceptible to state redress). *See id.* at 51. On the other hand, the more law reforms aim to mitigate this punishment of racialized difference (with affirmative action or "cultural" rights, for example), the more it constructs the production and punishment of racialized difference as neutral or natural and the advancement of racial assimilation as suspect, unequal legal intervention or social engineering.

242. *Id.* at 75.

243. *Id.* at 52, 75.

244. *Id.* at 75.

what racial justice entails" among those unequivocally committed to racial justice or "a partial victory of one wing of the racial justice left."[245]

Similarly, Ford's argument in favor of race-neutral civil rights strategies depends on a simplistic assumption that the right's interest in "colorblindness" reflects a coherent and principled preference for increased racial integration and race-neutrality. Instead, political interest in colorblindness may reflect and reinforce a self-serving or unreflective white supremacist "common sense" that is fully compatible with increased racial separation and hierarchy. For example, the popularity of "colorblindness" may be a product of an unexamined and convenient premise that racial justice has been largely achieved regardless of actual racial segregation; or that whites are now the subordinated caste; or that racial hierarchy is an inevitable and fair reflection of "market forces" or "cultural difference." Or, some of the support for "colorblindness" may represent a cynical and strategic belief that taboos on overt discussion of race will paradoxically reinforce a race consciousness that will preserve or excuse white privilege. From this more complex perspective, colorblindness is likely to work as a one-way ratchet to constrain, but not expand, racial equality[246]—making the choice between race-neutrality and race-consciousness a double bind, as Ford sometimes recognizes.

At the end of the chapter, Ford hints at his reasons for refusing to "negotiate the tightrope" of the double bind that makes all legal strategies for racial justice risky.[247] Dimming the chapter's initial hope for resolving "an honest disagreement"[248] about moral principles or strategic calculations, he confesses that racism is inherent and

245. *Id.* at 43.

246. *See, e.g.*, KENNETH J. NEUBECK & NOEL A. CAZENAVE, WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR 122 (2001) (discussing how colorblind antipoverty programs in the 1960s War on Poverty nonetheless sparked white supremacist backlash and a racialized politics of welfare).

247. *See* Ford, *supra* note 200, at 75.

248. *Id.* at 43.

endemic in American society.[249] But, unlike critical race scholars who share that view,[250] Ford removes that pervasive racism from intellectual analysis, political challenge, or legal reform by assuming that it is a cryptic, universal force of "culture" seemingly beyond human knowledge, agency, and interest.[251] As a result, Ford's chapter ends up seeming to embrace the cultural essentialism it claims to critique.

Perhaps, in keeping with the general postmodern bent of the book, Ford sees racial justice as a *cultural* or *moral* rather than as a *political* problem because he resists viewing racial domination and subordination as a systemic pattern. But, like much of the book as a whole, the resistance to an overdetermined structuralist vision of political power tends to take shape as a deterministic conservative vision that locates most inequality outside of politics. Ford's chapter ultimately acquiesces in a common sense that makes racial injustice not primarily a problem of rationally exercised power, but instead a matter of irrationally determined essential, ahistorical, pre-political structural force variously called culture, nature, market, or individual preference.

2. *Reason Versus Disability Rights Politics.* In another chapter criticizing liberal legal protection of "difference," Mark Kelman and Gillian Lester challenge rights to special education for children with learning disabilities ("LDs").[252] The authors present special education rights as an example of how "left-wing multiculturalism"[253] uses antidiscrimination arguments to avoid rational debate about the overall costs and benefits—and the morality—of procuring educational resources for particular students at

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249. *Id.* at 75.

250. *See* Adrien Katherine Wing, *Introduction* to CRITICAL RACE FEMINISM 5 (Adrien Wing ed., 2d ed. 1997) (listing the idea that "racism is an ordinary and fundamental part of American society, not an aberration that can be readily remedied by law" as an organizing principle of critical race theory).

251. *See* Ford, *supra* note 200, at 75.

252. *See* Kelman & Lester, *supra* note 215, at 134-77.

253. *Id.* at 136.

the expense of others.[254] Again demonstrating the book's theory-over-politics theme, they blame left-wing intellectual deficiency, not right-wing political power, for the shortcomings of special education as a strategy for educational equity.

But the chapter's supposed left theory is difficult to distinguish from uncritical right-wing politics. The authors' analysis consists mainly of applying a simple and familiar Law and Economics formula for constructing right-wing policy as good reason and left-wing policy as bad politics. Step one: construct progressive policies as problems of "redistribution" or "equity" that pit one disadvantaged group's interests or needs against another's.[255] Step two: invoke neutral reason or impassioned morality to justify hard-hearted scrutiny of these interests to determine the group's deserved rank in a long "queue" for meager resources.[256] Step three: let anti-progressive policies stand unquestioned outside of that competitive queue by constructing conservatives' underlying interests as matters of essential and universal truth, not contingent and partial

254. *See id.* at 164.

255. *See id.* at 160-64 (critiquing the "liberal" or centrist distinction between "discrimination" and "redistribution," but failing to critique the conservative distinction between state-based "redistributive" gains and market-based "productivity" gains); *see also* MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 71 (2003) (showing that Richard Epstein's Law and Economics characterization of disability rights as "charity" relies on the unsupported speculation that disability discrimination laws impose more costs than benefits on society); Martha T. McCluskey, *The Politics of Economics in Welfare Reform*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW & SOCIETY 198-99 (Martha Albertson Fineman & Terence Dougherty eds., 2005) [hereinafter McCluskey, *Welfare Reform*] (explaining how identity politics helps construct what protections count as "redistribution" rather than efficiency-promoting). For a discussion of the inevitably political basis of distinctions between "redistribution" and "efficiency," see McCluskey, *supra* note 41, at 786-89; *see also* Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657, 716-63 (1998) [hereinafter McCluskey, *Illusion*].

256. *See* Kelman & Lester, *supra* note 215, at 161-64; *see also* MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES (1997) (expanding this argument and using empirical evidence to question the merit of claims for accommodating learning disabilities).

politics. Voila: the right's policies conveniently come to the front of the line as normal and natural distribution, while the left's policies go to the rear as special and political "re"distribution that usually must await better days, better politics, or better proof that the recipients are truly deserving.[257]

For Kelman and Lester, educational accommodations for students with LDs should be analyzed as "special" intervention at the expense of the many other potentially deserving children patiently waiting for help in an inevitable educational queue.[258] Progressives should keep children with LDs in their place in the distributive line, resisting temptation to help them "jump the queue" with misleading claims to disability rights.[259] Implicitly, however, the children favored by educational methods that harm students with LDs can claim their place in line not as an undeserved "jump" or contingent, coercive political intervention but as a natural, and naturally deserved, advantage.

The authors reject as disingenuous and unprincipled the conventional liberal arguments that educational accommodations for students with LDs will benefit society overall through, for example, increased productivity, improved educational effectiveness, more rational educational standards, or reduced animus.[260] The authors fault such arguments because, in theory, a different progressive strategy—such as reforms directed at the harms of economic class, not disability—might better

257. *See* McCluskey, *Illusion*, *supra* note 255, at 715-22, 914-20 (showing how the opposition between "redistribution" and "normal" distribution rests on arbitrary but political distinctions between essential and contingent costs and rights).

258. *See, e.g.*, Kelman & Lester, *supra* note 3, at 163 (distinguishing between accommodations for LD students and policies based on what they imply as a pre-political, non-redistributive idea of "pedagogic policy"); *see also id.* at 151 (characterizing antidiscrimination policies as "interventions" compared to some implicitly naturalized market distribution).

259. *Id.* at 164.

260. *See id.* at 152-61.

address all these supposed goals.[261] Because advocates cannot prove disability rights are the best means to these supposed (and supposedly nondistributive) ends, Kelman and Lester conclude that disability rights must be understood as a strategy for securing advantages (or charity) for a narrow interest group.[262]

Opposition to disability rights from the right or center, in contrast, needs no such empirical proof or careful logic. The authors catalog the demands by opponents of disability rights not as artificial or irrational "entitlements" but as authentic, consistent, and widely shared values. They accept at face value opponents' arguments that educational accommodations threaten, for example, productivity, educational effectiveness, states' rights, rational educational standards—or even freedom and capitalism itself.[263] Might there be more important barriers to American educational equity or excellence—or to the future of American productivity—than accommodations for children with LDs?

If so, then opposition to disability rights logically involves not just principled concern for the general welfare but also strategic advancement of particular political interests that might impose less-than-perfectly-reasonable costs on others. For instance, criticism of LD accommodations might plausibly serve some upper class interests, like encouraging disadvantaged groups to fight over their place in line for educational crumbs rather than

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261. Here, the authors ignore the substantial left disability scholarship and activism that justifies disability rights by complicating, rather than invoking, liberal principles of "productivity," "educational excellence," or lack of animus. *See, e.g.*, LENNARD J. DAVIS, BENDING OVER BACKWARDS: DISABILITY, DISMODERNISM, AND OTHER DIFFICULT POSITIONS 30-31 (2002) (explaining that productivity or functionality is a product of the political and social context, so that providing a wheelchair for the "disabled" person is little different than providing computers for the "normal" person); *see also* Martha T. McCluskey, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863 (1988) (examining how what is discounted as "animus" or counted as a "cost" or "benefit" is itself a product of the problematic political and social assumptions that presume the subordinate status of persons with disabilities).

262. *See* Kelman & Lester, *supra* note 215, at 163-64.

263. *See id.* at 148-53.

uniting to demand more overall educational resources and less queuing.[264] Or, plausibly, criticism of LD programs might help to animate and legitimate broader opposition to public education;[265] it might help to construct flexible, individualized learning as a privilege restricted to those who can afford elite private schooling; or, it might help foster a climate of animus and disdain toward those unable to succeed in the current political economy so that its ample injustices are blamed on its victims' natural inferiority—and on their unnatural "entitlements"[266]—rather than on right-wing public policies and the elites they enrich.[267]

Like much of *Left Legalism*, this chapter risks being not just irreverent but irrelevant to left politics because it avoids careful, critical analysis of these questions of political context. Kelman and Lester assert that left advocacy of disability rights is a politically expedient compromise with the right that diverts attention from the "real battles against social caste"[268] to a group (the disabled) many conservatives already privilege as particularly deserving.[269] The enactment of the Americans with Disabilities Act proves that "[i]t is surely the case that conservative support for programs that benefit the disabled,

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264. *See* Kirk A. Johnson & Krista Kafer, *Why More Money Will Not Solve America's Education Crisis*, 1448 HERITAGE FOUNDATION BACKGROUNDER, June 11, 2001, http://www.heritage.org. Right-wing support for special education seems to focus on making funding for children with disabilities contingent on funding cuts for educational services targeted to gender equity, racial minorities, or lower-income populations. *See* Krista Kafer, *Making Good on Promises to Increase Funding for Special Education*, 1585 HERITAGE FOUNDATION BACKGROUNDER, Sept. 10, 2002, http://www.heritage.org.

265. *See* Marie Gryphon & David Salisbury, *Escaping IDEA: Freeing Parents, Teachers and Students Through School Choice*, *in* POLICY ANALYSIS 2002 (Cato Institute, No. 444, 2002).

266. Kelman & Lester, *supra* note 215, at 156.

267. *See* JOHNSON, *supra* note 255, at 68-75 (explaining the right-wing strategy and interest in undermining antidiscrimination laws by naturalizing the subordination of people with disabilities).

268. Kelman & Lester, *supra* note 215, at 164.

269. *See id.* at 135.

rather than other needy constituencies, has been high over the past two decades."[270]

Kelman and Lester do not acknowledge or respond to a contrary, and more complex, analysis common among left-leaning disability advocates: that conservative ideology treats people with disabilities as particularly deserving of segregation, private (especially religious) charity and medical intervention, but particularly *undeserving* of assimilation, government economic support, or substantive legal rights. Journalist and activist Mary Johnson explains, for example, that virtually no conservative, centrist or even liberal funding goes to support activism for disability rights, despite substantial funding for "curing" disability, consistent with conservative views of disability as a personal, medical issue.[271] On the other hand, right-wing foundations, think tanks, and wealthy business leaders have put substantial resources into a campaign to turn public, judicial, and scholarly opinion against disability rights[272] and against government disability benefits.[273] As one prominent part of this strategy, wealthy individual and corporate donors have directed funding to legal scholars who deploy Law and Economics arguments against disability rights and benefits.[274]

A critique that understands theory as a product of political economy might footnote the fact that Kelman and Lester received Olin Foundation money for empirical research that contributed to their work criticizing disability

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270. *Id.* at 136.

271. JOHNSON, *supra* note 255, at 129-30.

272. *See id.* at 68-75.

273. *See* McCluskey, *supra* note 41, at 847-71 (showing how both economic and moral conservatives have promoted the restrictions on benefits for disabled workers by constructing them as undeserving); *see also* MARTA RUSSELL, BEYOND RAMPS: DISABILITY AT THE END OF THE SOCIAL CONTRACT 144-69 (1998) (explaining the conservative political campaign to reduce disability benefits); James M. Taylor, *Facilitating Fraud: How SSDI Gives Benefits to the Able-Bodied, in* POLICY ANALYSIS 2000 (Cato Institute, No. 377, 2000) (advocating restrictions in social security benefits for persons with disabilities).

274. *See* JOHNSON, *supra* note 255, at 68-70.

rights.[275] More clearly relevant is the fact that the right-wing Cato Institute has used their work to support its arguments for replacing (or weakening) public education with "private choice."[276] Kelman and Lester may well intend their work to inspire radical reform of the vast class disparities in America's educational resources, and Brown and Halley wisely argue that critical thinking should not be held to a strict cost/benefit test of its political impact.[277] But Kelman and Lester's analysis might be more useful to left rather than to right-wing theory and politics if it had considered whether educational reform requires something more than perfecting our rational (or moral) rankings of who deserves most in a pluralist queue for increasingly meager public resources.[278] Instead, a critical analysis of educational equity should examine how to increase resistance to a political double bind in which the line ahead of the plausibly most deserving only gets longer when we send others to the rear.

3. *Theory versus Feminist Anti-Harassment Politics.* Janet Halley contributes a chapter faulting sexual harassment doctrine for its ties to a "cultural feminism" that is "easily offended . . . schoolmarmish, judgmental, [and] self-righteous."[279] She worries that increased legal protection for sexual harassment plaintiffs (especially in same-sex harassment cases) will lead to *sexuality*

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275. *See* KELMAN & LESTER, *supra* note 256, at x. This is not to say that receiving right-wing funding essentially determines the political identity of the work, but only that the political economy of a specific theory is one part of what critical scholars might usefully look at in analyzing the complex question of what political and economic work a particular theory actually does.

276. *See* Gryphon & Salisbury, *supra* note 265, at 12, 23 n.99; David F. Salisbury, *Lessons from Florida: School Choice Gives Increased Opportunities to Children with Special Needs*, *in* BRIEFING PAPERS 2003, at 13 n.42 (Cato Institute, No. 81, 2003).

277. *See* Brown & Halley, *supra* note 3, at 27.

278. *See* Kelman & Lester, *supra* note 215, at 157 (asserting that the real task of the disability advocate is to rationally persuade others of the place of disabled children in a moral ranking of those deserving increased educational assistance).

279. Halley, *supra* note 48, at 89.

harassment.[280] If workers have more legal power to challenge the sexual conditions of work, in theory they will have more power to increase the costs of others' enjoyment of sexualized workplace interactions, especially interactions that eroticize workplace subordination and coercion.

In part, Halley's critique exemplifies how irreverent left theory can valuably sharpen analysis of the politics of seemingly progressive law reforms. What counts as sexual behavior and what counts as unwanted or coerced sex will in practice be interpreted not by neutral principles or objective facts but in reference to problematic heterosexual, gender, and racial norms.[281] As a result, laws against sexual harassment are likely to disproportionately penalize gay men, lesbians, and other subordinated persons whose sexual and economic autonomy has been subject to suspicion.[282]

On the other hand, subordinated groups also may have the most to gain from legal protection against workplace sexual harassment. Gay men, lesbians, and others have used sexual harassment law to challenge disparate treatment on the job due to their gender non-conformity.[283] Compared to their numbers in the workplace, women of color are overrepresented as plaintiffs in sexual harassment lawsuits.[284] In her analysis of this empirical evidence,

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280. *See id.* at 99.

281. *See* Franke, *supra* note 48, at 292-93 (summarizing chapter's argument that by reading certain assaults as sexual violations we can elide the race, gender, or other injuries involved).

282. *See* Halley, *supra* note 48, at 98-99.

283. For example, a gay postal worker used the sexual harassment doctrine to make a sex discrimination claim that he was disciplined unequally and ultimately fired for failing to conform to prevailing masculine stereotypes, Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002), and a restaurant worker used the sexual harassment doctrine to seek redress for frequent anti-gay insults directed at his supposed femininity, Nichols v. Azteca Rest. Enter., 256 F.3d 864, 875 (9th Cir. 2001). For a theory of how sexual harassment doctrine can protect lesbians, gay men, and others who are penalized for gender nonconformity, see generally Katherine M. Franke, *What's Wrong with Sexual Harassment?*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 169 (2004).

284. *See* Tanya Katherine Hernandez, *The Next Challenge in Sexual Harassment Reform: Racial Disparity*, 23 WOMEN'S RTS. L. REP. 227, 227 (2002) (noting that women of color made up 16% of the female work force but filed 33%

critical race feminist Tanya Hernandez explains that some studies suggest that women of color are particularly disadvantaged by workplace sexual harassment due to their vulnerability in the labor market.[285] Hernandez found that women of color were more likely than white women to rely on litigation rather than on informal, internal complaints, because of concerns about receiving fair treatment from employers.[286] Another leading critical race and feminist scholar, Adrienne Davis, analyzes slavery as a system of institutionalized sexual harassment and notes that, despite serious limits in sexual harassment doctrine, black women have also had some success in developing the doctrine to remedy their particular problems of workplace subordination.[287]

The problem is that both *with* and *without* sexual harassment protection, gay men and lesbians—like others with subordinated status—are at heightened risk of losing access to work on account of their (real or perceived) sex and gender transgressions.[288] But Halley evades grappling with the double bind she initially poses as the central political and intellectual challenge for sexual harassment doctrine.[289] Instead, she risks tightening the bind by disparaging sexual harassment protections as sentimental moralism,[290] and by implicitly contrasting her preferred protections against *sexuality* harassment as tough-minded individualism.

In part, Halley astutely refuses to appeal to some imagined moral consensus or transcendent principle to resolve the dilemmas of sexual harassment policy, and

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of all women's sexual harassment claims under Title VII during the 1992-1999 period).

285. Tanya Katherine Hernandez, *A Critical Race Feminism Empirical Project: Sexual Harassment and the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1244-45 (2006).

286. *Id.* at 1255-60.

287. Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment Law*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 283, at 457, 462-64, 470-71.

288. Halley, *supra* note 48, at 81.

289. *Id.* at 81.

290. *See id.*

instead confronts the problem as an inevitably *political* conflict between queer and feminist interests.[291] On the one hand, some feminists (along with some anti-feminist defenders of conventional femininity) prefer to enlist legal authority on the side of reducing the costs of challenging a workplace culture that enforces engagement with conventionally masculinized sexuality as a condition of the job.[292] On the other hand, some queer activists (along with some anti-feminist defenders of conventional hetero-masculine privilege) prefer to err on the side of reducing the costs of fostering and playing with such a sexualized workplace culture.[293]

Halley retreats from astute political analysis, however, when she uncritically presents the feminist cultural preference as uniquely moralistic and essentializing ("trend[ing] toward totalitarian")[294] while contrasting the queer cultural preference as uniquely liberatory. This characterization—despite its expressed disdain for "moralism"—shifts the discussion from a complex, uncertain, and contestable question of *politics* into a superficially clearcut and impartial *moral* project of ranking good versus bad *theory*.

Adopting Halley's critical stand, why isn't any alleged anxiety about harm from sexual harassment lawsuits a problem of oversensitive, self-righteous potential defendants?[295] Maybe those at increased risk under a pro-plaintiff legal regime really desire—or really *should* desire—not more legal protection, but more opportunity to prove themselves tough enough or honest enough to sit back and enjoy the excitement of facing heightened danger, complexity, and vulnerability in their workplace sexual

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291. *Id.* at 102.

292. *See id.* at 93, 98.

293. *See id.* at 98.

294. *Id.* at 89.

295. *See* Martha T. McCluskey, *Fear of Feminism: Media Stories of Feminist Victims and Victims of Feminism on College Campuses*, *in* FEMINISM, MEDIA & THE LAW, *supra* note 235, at 61-69 (showing how gendered and racialized ideas of "real" injury privilege the victim narratives of those claiming harm from feminist sexual harassment policies).

interactions.[296] How does Halley *know*? It seems fair to ask, since Halley uses a similar irreverent moral and epistemological skepticism to deprecate as bad theory feminist claims to *know* that the risks of sexual harassment are more likely to be a source of pain than pleasure for potential plaintiffs.[297]

By insisting on and even reveling in (albeit inconsistently) the impossibility of knowing and proving who really is hurt, what really constitutes harm, and who really has the power to inflict it,[298] Halley's chapter cuts to the heart of a major tension between left politics and some strands of postmodern critical theory. Starting with a premise that all claims of harmful power are suspect, and that indeed all power is fluid, complex, and enmeshed with powerlessness, it can then seem smarter, more fun, and even more *moral* to abstain from complaining about injustice or from advocating any clear and concrete social change.

Left activists who are bored—or outraged—by such celebrations of postmodern "unknowability" should not be dismissed as unsophisticated thinkers with a fetish for "suffer-monger[ing]."[299] Those who take delight in turning claims of "real injustice" into hypothetical justice, as Halley's chapter so provocatively does with the *Oncale*[300] same-sex harassment case, may be using uncertainty as a sentimental excuse for denying and evading their own power. Any argument involves *actual* (if not perfectly knowable) political and moral choices, explicitly or implicitly. By pretending uncommitted distance from the

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296. Here I am adopting (but reversing) the argument Halley makes when she argues that a feminist position might assume it is insulting to think women too "milquetoast" to concoct powerful fantasies of subjection. Halley, *supra* note 48, at 101.

297. *See id.* at 85, 89, 97.

298. *See id.* at 96.

299. *See* Brown & Halley, *supra* note 3, at 33 (criticizing in general left justice projects focused on protecting injured victims).

300. *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) (deciding that Title VII's ban on sex discrimination reaches same-sex workplace harassment).

political and moral fray, the postmodern skeptic and cynic risks joining the politically phobic centrist in a "will to ignorance" that evades critical examination of the normative commitments and knowledge on which they inevitably depend.[301] Indeed, in the current political context, intellectuals who spurn empirical knowledge as too uncertain and too partial may be more likely to reinforce right-wing fundamentalism than left-wing critique.[302]

Critical race and feminist analysis has shown that intellectuals' (and lawmakers') professed desire to know often is no match for the seductiveness of *not* knowing—especially when knowing might be politically threatening to the privileges or political investments of the knowers. A decision to analyze any given inequality or injustice as a hypothetical rather than as a *real* problem demanding investigation and evaluation of empirical context (however contested and imperfectly knowable), is itself a political decision as well as an intellectual strategy.

How should we decide whether workplace sexual harassment or workplace "sexuality harassment" is the greater harm? Are the costs to plaintiffs of bringing a sexual harassment case likely to outweigh the benefits of suing to assuage morning-after "panic" about enjoyment of transgressive workplace sex? Could sexual harassment doctrine be reframed to better protect those most vulnerable to coercive power, both in the workplace and in the courts? Halley refers such questions to *politics*, dependent on contested judgments about uncertain consequences.[303]

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301. *See* Simon, *supra* note 4, at 77 (explaining that fear of politics among non-conservative legal scholars leads centrist scholars to seek safety by taking positions in opposition to their declared politics, with the effect that intellectual merit becomes measured by political incoherence).

302. *See, e.g.*, Ron Suskind, *Without a Doubt*, N.Y. TIMES MAGAZINE, Oct. 17, 2004, at 44 (explaining how right-wing religious fundamentalism creates a culture and logic in which President Bush gains moral and political standing by demonstrating he can dispense with "inconvenient facts"). Suskind describes how a senior aide to President Bush explained, "[w]e're an empire now, and when we act, we create our own reality." *Id.* at 51.

303. Halley, *supra* note 48, at 102-03.

But a critical analysis should be careful not to imagine political debate in simple opposition to empirical or moral truth, even if it recognizes that power always informs and infuses all judgments of fact and value. Critically engaging *political* questions about who really is hurt and who really benefits requires moving theory from hypothetical to imperfect empirical evidence, or more precisely, digging into the details of the historical, legal, social, and economic context.[304] The hard *political* labor of that digging, questioning, and deciding need not be any less—and indeed could be much more—intellectual, pleasurable, or critical than the playfully disingenuous passivity of disavowing such *knowing* and *deciding*.

4. *Theory Engaging the Politics of Marriage Equality.* Michael Warner's chapter, *Beyond Gay Marriage*, joins the chapters by Halley, Ford, and Kelman and Lester in analyzing the high, often hidden, costs of prominent pro-equality law reforms.[305] Warner challenges liberal arguments that same-sex marriage reforms would simply involve an impartial deference to individual preferences, fundamental rights,[306] or transcendent sentiment.[307] Instead, he emphasizes that gay marriage has broad social consequences,[308] and that these consequences include reinforcing or expanding the degree to which marriage is a status that confers power and privilege on some at the expense of others.[309] In particular, Warner argues that same-sex marriage will penalize many unmarried persons, a result that is likely to undermine more radical visions of sexual and economic justice.[310]

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304. Gayatri Chakravorty Spivak explains that the point of critical theory is not to reject truth or ignore history but to examine the production of ideas about truth. *See* THE SPIVAK READER, *supra* note 41, at 9 (reporting an interview with Spivak).

305. Warner, *supra* note 48, at 259-89.

306. *Id.* at 266.

307. *Id.* at 269.

308. *See id.* at 268-69.

309. *See id.* at 260.

310. *Id.* at 263-66.

In contrast to other chapters in *Left Legalism*, however, Warner's critique more consistently engages the issue as a *political* conflict that requires negotiating and evaluating antagonistic interests in a particular historical context. Unlike Kelman and Lester's chapter on educational equity, Warner recognizes that the political impact of gay marriage on any set of interests will be far too complex, dynamic, and dependent on unknowable future events to be neatly resolved by perfecting activists' rational cost/benefit calculations or empirical data.[311] In contrast to Ford's chapter on racial equality, Warner evaluates the merits of an assimilationist view of equality not mainly as a general logical or moral principle, but rather as a political strategy that will play out in practice differently and more difficultly than its advocates intend—particularly in the prevailing anti-egalitarian, anti-gay political context. For instance, Warner argues that a focus on gay marriage will not be a step toward more radical reforms because that focus is more likely to result in limiting the internal politics of the activist movement itself than in integrating same-sex couples into marriage law.[312]

Unlike the chapters by Halley and Ford (and the politically phobic centrists), Warner's chapter takes the uncertainty, intractability, and antagonism of politics more as the beginning than the end of rational analysis. Instead of avoiding or disdaining moral and factual judgments about the distribution of power and subordination, Warner takes positions and defends them with argument and some evidence. Warner values a "queer ethos" favoring a sexual culture not tied to marriage, the couple form, or love.[313] He risks *knowing*—instead of merely hypothesizing—that dominant law and ideology (and gay marriage reforms) are harmful to his preferred sexual culture.[314] He asserts this cultural value not as a neutral, apolitical reflection (or perfection) of individual free choice or determinate differences, but as an unabashedly political struggle for

311. *Id.* at 286.

312. *Id.* at 286-87.

313. *Id.* at 288.

314. *See id.* at 287.

public power to foster queer normative ideals.[315] Rather than naturalizing, romanticizing, or accommodating the high costs of existing progressive reforms, Warner imagines possible strategies for reframing the debate to better alleviate such costly divisions within the pro-gay left. He suggests, for example, that gay marriage campaigns could do more to link marriage equality to the goal of ensuring more equal access outside of marriage to entitlements like health care.[316]

Like many other contributions to *Left Legalism* (along with non-left scholarship), however, Warner's analysis tends to focus on resisting the political power of liberal reformers more than on resisting their right-wing opponents. A skeptic should wonder why so much queer intellectual energy is concentrated on criticizing gay marriage advocates rather than on theorizing how a queer vision of justice could better play in Peoria or in Kansas,[317] or to other constituencies around the world who might gain from resisting right-wing ideology and policy. Both liberal gay marriage advocates and their more radical queer critics are likely to remain largely politically irrelevant—or worse, politically useful scapegoats for the right—unless they are able to counter the right's power to portray both camps as economic, racial, and cultural elites who are to blame for most Americans' increasing insecurity.[318] In contrast, focusing on the right's power to use marriage politics to promote inequalities that go beyond sexuality, Lisa Duggan and Richard Kim argue for expanding gay marriage advocacy into a left vision of household security that could

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315. *See id.* at 277-78.

316. *See id.* at 278.

317. *See* THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA (2004) (arguing that many American voters have moved away from progressive economic policies that would benefit them because of the right's successful, if illusory, appeals to moral conservatism).

318. *See* Martha T. McCluskey, *How Equality Became Elitist: The Cultural Politics of Economics from the Court to the "Nanny Wars,"* 35 SETON HALL L. REV. 1291, 1291-93 (2005) (discussing how the "cultural wars" debate mixes and mistakes cultural and economic politics to make progressive policies seem elitist).

better capture shared interests among working class, heterosexual, and queer constituencies.[319]

III. LESS (LEFT) LAW

In the book's introduction, editors Brown and Halley proclaim their desire "to scrutinize projects of the left that invoke the liberal state's promise to make justice happen by means of law."[320] Like the book's call for *theory* over *politics*, the book's call for *politics* over *law* echoes and reinforces prevailing themes in rightward-leaning theory and politics. To support its argument against *legalism* in left practical politics, the book should go further to theorize the practical politics of criticizing legal protection for subordinated groups.

In the context of early 21st century United States, where the right has so successfully undermined progressive politics by mobilizing opposition to "big government" and to liberal rights, the book's anti-statism raises two questions. First, what makes a critique of egalitarian rights and regulation distinctly *left* (rather than right-wing)? Second, what makes arguments against *liberal legalism* distinctly *critical* (rather than fundamentalist or narrowly instrumentalist)? Challenging the problems of liberal law reform (without reinforcing conservative law reform) requires examining and resisting liberalism's very *division* between law and politics, as a substantial body of critical legal analysis has suggested.[321] The book too often takes the critical claim of law-as-politics in the direction of *rejecting* law in politics rather than in the bolder and more critical left direction of reconstructing and redirecting the politics of dividing law from politics.

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319. *See* Lisa Duggan & Richard Kim, *Beyond Gay Marriage*, THE NATION, July 18/25, 2005, at 24.

320. Brown & Halley, *supra* note 3, at 7.

321. *See* Simon, *supra* note 4, at 175-77 (discussing criticism of the critical legal studies premise that law is politics). For a classic anthology of the critical challenge to liberalism's law and politics distinction, see THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998).

The book's challenge to left legalism can be roughly captured as two arguments: first, that law is not powerful enough; and second, that law is too powerful. Both ideas are necessary, but not sufficient, for robust left politics and left critique. Both arguments, after all, are central to right-wing politics and theory.

A. *Left Critique of Law's Weakness*

The book's complaint about the law's lack of power continues familiar legal realist criticisms of legal formalism and CLS claims of law's indeterminacy. According to this critique, law is not and cannot be independent from politics. Law is always a product of particular, interested, contingent power, and as such cannot achieve or even usefully approximate the liberal ideal of a universal, autonomous, principled, or stable constraint on power.

Law's weakness in the face of power means that progressives cannot rely on law to shift power to subordinated groups. The "master's tools" are unlikely to "dismantle the [m]aster's house," says an adage commonly invoked by critical race and feminist jurisprudence.[322] In the book's concluding chapter examining the paradox of rights for feminism, Wendy Brown extends a similar warning: "[a]lthough rights may attenuate the subordination and violation to which women are vulnerable in a masculinist social, political, and economic regime, they vanquish neither the regime nor its mechanisms of reproduction."[323]

In their introduction to the book, Brown and Halley complain that the left has been seduced by a hegemonic civil rights discourse coined for (but contested within) the mid-twentieth-century struggle for racial justice.[324] Rights,

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322. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER 110 (1984) (coining the phrase); *see also* Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113 (2005).

323. Brown, *supra* note 215, at 422.

324. *See id.* at 8.

they explain, "cannot be fully saturated with the aims that animate their deployment."[325] If a legal right is sufficiently abstract to allow it to transcend particular power relations as a formal, universal principle, then that right's generalized, open, and indeterminate form will invite those with the most power to manipulate that right in their interest, filling it with concrete substance likely to defeat progressive goals.[326] For example, the civil right to racial equality has been successfully captured by those defending purported white victims of progressive racial justice projects, such as affirmative action.[327] "[T]he more social resources and the less social vulnerability one brings to the exercise of a right, the more power that exercise will reap, whether the right at issue is sexual freedom, private property, speech, or abortion."[328]

Furthermore, these problems with liberal law cannot be readily or reliably solved by taking a more contextual, substantive, or particularized approach to legal reforms. Brown cites the history of feminist law reforms as evidence of the double bind presented by law's weakness: "the more highly specified rights are as rights for women [for example], the more likely they are to . . . encode a definition of women premised on our subordination" or at least premised on empowering only the more privileged and powerful women.[329] Liberal law frames rights as either "universal"—thereby ignoring specific inequalities of power—or as "special"—thereby rendering those specific inequalities normal and their remediation suspect.[330] Echoing much critical race and feminist scholarship, Brown and Halley note that liberalism's rights framework offers "a particularized focus on the distinctive injury suffered by a racially subordinated group only by conceding that it is

325. *Id.* at 9.

326. *See id.*

327. *See id.*

328. *Id.* at 423.

329. *Id.* at 422-23.

330. *See id.* at 16.

special (not universal) and needs protection (not equality)."[331]

Rights are not only likely to fall short of their theoretical promise to stand outside of politics, but also cannot dependably advance left goals *within* politics. In a chapter developing his longstanding critique reducing "rights" to "interests," Duncan Kennedy spells out the false hope that liberal rights claims can represent and mobilize universalist reason against partisan interest or moral preference.[332] "[R]ights argument [is] indistinguishable from the open-ended policy discourse it was supposed to let us avoid."[333] If the left cannot win an interest battle in policy discourse, then why should it expect to win the same battle when translated as rights discourse? After all, the right has proven quite capable of using liberal rights rhetoric, such as "reverse discrimination" claims, to inscribe conservative interests as universal neutral principles insulated from open interested-balancing.[334]

B. *Left Critique of Law's Power*

Left Legalism builds on these older challenges to law's power by freshly and forcefully articulating the Foucauldian-inspired position that law's *powerlessness* is also an illusion of liberalism. Liberal legalism presents procedural and rights-based law reforms as a means of *representing* and *protecting* pre-existing individual political subjects and political interests. But many of the contributors to *Left Legalism* analyze how law is not simply a servant doing the bidding of the political actors who use it. Instead, law always creates and constrains the subjects whose sovereignty and autonomy it paradoxically affirms. Ford explains that "[l]egal entitlements in general and especially rights do not simply protect people from outside interference; they also channel energies and shape

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331. *Id.*

332. *See* Kennedy, *supra* note 71, at 188-89.

333. *Id.* at 197.

334. *See id.* at 189.

perceptions about what is important, necessary, and good in life."[335]

In short, to claim new individual rights against the state is to submit to new regulation by the state.[336] Brown explains, for example, that "[t]o have a right *as* a woman is not to be free from being designated and subordinated by gender. Rather . . . it reinscribes the designation as it protects us, and thus enables our further regulation through that designation."[337] Protecting women's reproductive freedom through a right to abortion "tend[s] to reinscribe heterosexuality as defining both what women are and what constitutes women's vulnerability and violability."[338] Similarly, advocacy for gay and lesbian rights in childbearing and adoption law "only reaffirms the extent to which these issues, defined as gay and lesbian issues, are understood as separate from the project of securing *women's* rights."[339]

Brown rejects critical race and feminist scholars' hopes that such constraints can be upended through an "intersectional" approach that would understand and protect individual rights-bearers in more complex and specific terms (prohibiting discrimination against black lesbian women, not just "women," for instance).[340] "[T]o treat these various modalities of subject formation as simply additive or even intersectional is to elide the way subjects are brought into being through subjectifying discourses, the way that we are not simply oppressed but produced through these discourses . . . ."[341] Considering racial justice activism, Richard T. Ford explains that legal rights to cultural difference risk becoming "a significant new source of governmental regulation over the lives of

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335. Ford, *supra* note 200, at 62.

336. *See id.* at 61, 63.

337. Brown, *supra* note 215, at 422.

338. *Id.* at 425.

339. *Id.*

340. *See id.* at 426-27.

341. *Id.* at 427.

people of color."[342] "The individual who wishes to escape the suffocating conformity and oppressive social norms of the family and ethnic community will be blessed by the intermeddling state with a 'right' to retain them forever."[343]

Law enlists the state in enhancing danger not only to intended beneficiaries of legal protections, but also to others vulnerable to state oppression. Brown and Halley challenge the silencing power not just of civil rights strategies, but also of progressive procedural, institutional, or administrative justice projects that they call "*governance legalism*."[344] For instance, they argue that when "left multiculturalists" supported the movement for Quebec separatism, these egalitarian activists were supporting what would have been a newly powerful subordination of ethnic minorities (like First Nations peoples) by the state.[345]

C. *Right-Wing Critique of Law's Power and Powerlessness*

Left Legalism invokes this anti-statism in hopes of *advancing* left power independent of law at a time when the right has successfully mobilized anti-statism to *disable* progressive power in government. Right-wing activists and intellectuals have eagerly repositioned progressive ideas and interests well outside legitimate law and government, while simultaneously embracing and advancing CLS-like arguments that meaningful and legitimate power lies beyond the state. The right-wing story, however, places this *truly* legitimate non-state power in the very institutions it describes as threatened by progressive law reforms—the market, the family, the local community, or the church.

By reifying and romanticizing certain sociolegal institutions as the law's *outside*, the right paradoxically can justify both its powerful opposition to the liberal or left "redistributive" and liberating state—and also its powerful affirmation of an inegalitarian and authoritarian state. If

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342. Ford, *supra* note 200, at 61.

343. *Id.* at 68.

344. *See* Brown & Halley, *supra* note 3, at 10.

345. *See id.* at 10-11.

the supposedly democratic and egalitarian state generally boils down to ineffective or oppressive special interests, then the least oppressive, most public-interested state and law must be that which cedes authority to supposedly transcendent natural or supernatural forces insulated from democratic and egalitarian control.

1. *Neoliberal anti-statism.* According to the libertarian branch of right-wing politics, this transcendent force is the free market. Neoliberalism imagines the market as a space outside of both law and politics governed by the natural and inevitably powerful laws of economics.[346] Set against this imagined market, the state is both *too powerless* and *too powerful*—especially when the state attempts to promote progressive egalitarian goals.

Law and Economics scholars have exhaustively played out the neoliberal theme that law reforms designed to promote equality through rights or regulation will fall victim to countervailing market pressures.[347] Just like CLS lefties, the Law and Economics righties and centrists explain that human law is too weak to constrain the forces of supply and demand that drive the invisible, impersonal hand of the market. In the classic example, if law promotes equal access to housing through rent controls, then "the market" will reflect landlords' demand for profits by reducing the supply of well-maintained rental units.[348] Legal rights—whether to housing, to racial equality, to environmental protection, or to income support—always boil down to political and economic interests subject to the power of competing political and economic interests. As a result, these "rights," even if enforced, will produce

346. *See* McCluskey, *supra* note 41, at 784-85 (summarizing neoliberalism, or "free market" economic ideology).

347. *See, e.g.*, RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? (1997) (using neoliberal Law and Economics arguments to explain why rights to equality in health care will fail in their goals).

348. *See* Neil Duxbury, *Law Markets, and Valuation*, 61 BROOK. L. REV. 657, 657-58 (1995); *Panel Discussion: Redistribution and Regulation of Housing*, 32 EMORY L.J. 767, 793-97 (1983) (remarks by Richard Muth, Chair of the Department of Economics, Emory University).

"unintended consequences."[349] When liberal or progressive law reforms confer new rights as protection for the weak against countervailing powerful interests (of landlords, employers, polluters, and so on), then those new rights will simply create new "market" incentives for those with countervailing interests to extract resources from the weak in new ways. Similarly, new regulatory reforms designed to protect groups like consumers, patients, or workers from exploitation will simply produce incentives for their exploiters to find new ways of evading or capturing state control at the expense of the exploited.

Those without power, in other words, must always "buy" their protection by making a countervailing sacrifice. Following this reasoning, rights will inevitably translate rather than transform existing power relationships. Neoliberal creed proclaims that in law, as it is in the market, the power and glory lies in some pre-determined, transcendent "market" distribution, forever and ever, and the best thing for the powerless to say is "amen."

Nonetheless, neoliberalism's "free market" faith reveals law as *excessively* as well as *insufficiently* powerful. Law and Economics scholarship is full of stories about how liberal rights and regulation designed to advance equality victimize the all-powerful market, undermining its promised rewards. The conventional neoliberal dogma (like much of the unconventional left critique) presents the state's power as uniquely coercive, parochial, and incompetent. Government "redistributive" action is by neoliberal definition a deviation from a market comprised of inherently free individual exchanges that necessarily maximize overall societal well-being to produce the best of all possible worlds. In this tautological logic, any state "intervention" that upsets that free market "distribution" will not only fail to protect the oppressed, but in fact will

349. Cass Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994) (applying the standard Law and Economics critique of "unintended consequences" to regulation of campaign finance as a means to improve political equality).

risk making that oppression worse.[350] Generous welfare benefits for the poor, for example, will hurt the poor the worst.[351] By diverting resources from efficiency-maximizing taxpayers and employers—and by feeding new special interests and transaction costs produced by an expanded bureaucracy—such social programs will shrink the overall economic pie.[352] Those with the least market power will be the first to suffer when there is less to go around. While government "redistribution" sounds tempting to those who complain of the market's harsh demands, it is always by definition more elitist, dangerous, and anti-social than market distribution (according to neoliberalism's tautological reasoning).[353]

2. *Neoconservative anti-statism*. The social conservative branch of right-wing politics identifies the force that transcends law as an inegalitarian moral order rather than in an economic order.[354] That moral order is variously located in nature, divinity, or social and cultural tradition. Compared to this asserted extra-legal moral authority, government attempts to promote morality through egalitarian or liberatory law reforms will be, at the same time, too powerless and too powerful.

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350. *See* McCluskey, *Illusion*, *supra* note 255, at 716-17, 717 nn.243-44 (summarizing arguments and examples, but criticizing this reasoning as circular).

351. *See* McCluskey, *supra* note 41, at 805-06 (analyzing this argument as the neoliberal double bind, produced by a tautological definition of economic growth which makes "redistribution" necessary but impossible for those disadvantaged in a presumed market).

352. *See, e.g.*, Gordon Tullock, *The Reality of Redistribution*, *in* POVERTY AND INEQUALITY: THE POLITICAL ECONOMY OF REDISTRIBUTION 127, 127-31 (Jon Neill ed., 1997).

353. *See* Martha T. McCluskey, *Deconstructing the State-Market Divide: The Rhetoric of Regulation from Workers' Compensation to the World Trade Organization*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS, *supra* note 255, at 147, 170 (explaining why feminist or progressive arguments for "redistribution" will fail without challenging the division between state and market); *see also* McCluskey, *supra* note 41, at 808-22 (critiquing that argument as resting on a double standard).

354. *See* PETER STEINFELS, THE NEOCONSERVATIVES: THE MEN WHO ARE CHANGING AMERICA'S POLITICS 53-63 (1979) (listing and explaining the key beliefs of neoconservatism).

Because moral conservatives tend to be eager to use state authority to enforce this moral order, they may appear to stand far from the Crits and Free Marketeers who emphasize law's powerlessness to achieve the good society. On closer examination, however, the theme of (human) law's weakness against immoral power is central to the ideology of the moralistic right. Conservatism has frequently argued that the problem with social liberalism is its naive hope that government can make people good and human power benign. Social conservatives have tended to assume most human beings are inherently weak and imperfect and to portray the masses as fundamentally irrational, sinful, selfish, violent or unequal (or all of the above). This assumption drives the frequent conservative arguments about the failures of "social engineering" by bleeding-heart liberals who deny or ignore these harsh facts.

Social conservative positions often present law's powerlessness with the same anti-statist cynicism as economic libertarians and as left or postmodern Crits. Consider some familiar conservative arguments: welfare rights failed to cure poverty because poor single mothers (and their children) needed not legal power, but moral discipline;[355] school desegregation failed to promote racial integration because disadvantaged minorities needed cultural change not laws mandating racial balance;[356] sex discrimination law failed to advance women's interests because women wanted spiritual fulfillment or familial protection, not worldly equality.[357]

For social conservatives, however, fundamental faith in an inegalitarian extra-legal moral order reveals the law as not only impotent to re-order society but also as a source of dangerous power to foster social *dis*order. Like left Crits and market libertarians, social conservatives challenge the

355. *See* McCluskey, *supra* note 41, at 825-32 (explaining and critiquing social conservative arguments for welfare reform).

356. *See, e.g.*, THOMAS SOWELL, RACE AND CULTURE: A WORLD VIEW (1994); SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1991).

357. *See, e.g.*, Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAGAZINE, Oct. 26, 2003, at 42.

liberal presumption that rights-based or regulatory reforms can be fashioned neutrally to facilitate individual moral choices without disturbing the social order that shapes those choices. The social conservative opposition to same-sex marriage, for example, emphasizes that gay and lesbian marriage rights threaten profound disruption of heterosexual families. These conservatives fear (and radicals hope) that marriage equality could be a grand "social experiment" capable of disrupting gender and sexual conventions fundamental to the existing family and civilization. Fears (or hopes) of widespread shifts in behavior and culture due to marriage rights (or due to welfare rights, or tort rights, or in previous generations, racial desegregation) often draw on liberalism's naive faith that isolated law reforms can readily vanquish countervailing social pressures.

Nonetheless, social conservatives—like postmodern critics and libertarian economists—recognize and reject liberalism's naive faith that the consequences of isolated law reforms are limited to their intended and immediate goals.[358] These diverse perspectives, for example, are skeptical of the liberal argument that those opposed to gay marriage can rest assured they need not have one. The persisting uneasiness that fuels the movement against gay marriage probably reflects not just heterosexual supremacists' will to overpower those with different morality, but also a widespread fear that legal neutrality will instead overpower a moral virtue dependent on authoritarian and inegalitarian control of individual desire.

D. *Left Critique of Law's Outside*

In contrast to the left, however, the right's ideological anti-statism appears to have led to scholarly, political, and financial *enthusiasm* for achieving these goals through legalistic reforms and state power. Though *Left Legalism* complains that law's ties to liberalism risk diverting left

358. *See* Brown & Halley, *supra* note 3, at 23 (criticizing the liberal rationale that "procuring a right to marriage" will have "no effect on those who do not wish to marry.").

politics toward more centrist liberal reforms,[359] the right seems to be successfully mobilizing law to *undermine* those centrist liberal policies. Indeed, the right's successful law reform campaign seems not only to further marginalize left-of-center politics but also to threaten replacing legal liberalism with legal authoritarianism to some extent.

The right can both use and undermine legal liberalism so effectively because liberalism rests on not just a fundamental faith in *law*, but on a fundamental faith in some transcendent, pre-political space *outside* law (variously represented, for example, as the family, the market, nature, or the individual autonomous subject).[360] The problem with legal liberalism, then, is not just that liberal law falsely privileges some state support for partisan interests by masking that support as public law that transcends private power. Instead, the problem with legal liberalism, from a critical perspective, is that liberal law also falsely privileges some partisan interests by masking these as private power that transcends public law. Feminist critical theory in particular has analyzed how the liberal ideology of "privacy" has served to strengthen public legal protection of gender status—for example, by masking systemic state protection of male family violence or male family economic control as legal "non-intervention."[361]

By presenting its inegalitarian, anti-democratic legal vision as an essentialized economic or moral order *outside* the law, the right has effectively rejected liberal law and captured it as well. Neoliberalism justifies new rights and regulations favoring elites as a move away from "liberal" government toward superior market mechanisms;[362]

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359. *See* Brown & Halley, *supra* note 3, at 24.

360. For an example of feminist theory explaining this point, see generally ZILLAH R. EISENSTEIN, THE RADICAL FUTURE OF LIBERAL FEMINISM 3 (1981) (explaining the problems of liberalism for feminism, since that liberalism has positioned women outside the liberal subject); *see also* FINEMAN, *supra* note 44 (critiquing liberalism's fundamental separation of state, market, and family).

361. *See, e.g.*, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (critiquing the idea of state "intervention" in the family).

362. *See* Martha McCluskey, *Rhetoric of Risk and the Redistribution of Social Insurance*, *in* EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE

neoconservatism justifies new rights and regulations favoring elites as a move away from liberal government toward superior morality grounded in community, nature, or divinity.[363] Despite their challenges to liberal faith in law, many of *Left Legalism's* essays tend to retain a liberal (and even illiberal) faith in some space free from law that promises (first) the strength of a more authentic power and (second) the innocence of a more authentic powerlessness.

1. *Adding a Left Critique of Extra-legal Power.* First, *Left Legalism* needs to go further to strip law's *outside* of its guise of essentialized power. Although political power cannot be neatly contained by formal rules of law, that political power is also constituted, maintained, and changed by formal rules of law. That means that eschewing legalism is as illusory a route to power as embracing legalism.

Take, for example, Brown and Halley's assertion that anti-pornography activism involving picketing and debating have been more complex, democratic, liberating, and transgressive than activism advocating new tort rights or zoning regulations. But if picketing and debating had superior strategic power for feminism in a particular historical context, why do Brown and Halley conclude that this power stems from politics more than from law? They describe feminist power as "raw,"[364] "rich,"[365] and "fertile"[366] when exercised outside law, but conclude that this power became artificially "narrow[ ]," "flat," and "impoverished"[367] when it took a "legalistic turn."[368] They explain that the tort and zoning strategies "dessicated" the feminist anti-

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AND RESPONSIBILITY 146 (Tom Baker and Jonathan Simon eds., 2002) (arguing that the late 20th century brought not a decline of social insurance, but a shift in government security toward the most wealthy).

363. *See* McCluskey, *supra* note 41, at 825-32, 858-63 (criticizing communitarian moral conservatism for advocating *different* morality, based on renewed race, gender, and class hierarchy, not for replacing liberal neutrality with moral authority).

364. Brown & Halley, *supra* note 3, at 22.

365. *Id.* at 23.

366. *Id.* at 21.

367. *Id.* at 22.

368. *Id.* at 21.

pornography movement because this "legalistic moment"[369] confined feminist explorations of gender and sexuality within the established liberal framework of "free speech, censorship, and privacy rights."[370]

They do not, however, consider that the alleged superior freedom, diversity, and vitality of the feminist debating and picketing strategies might have resulted as much from the imperfect liberal rights and regulation they criticize as from the gutsy anti-legalism they imagine. After all, the streets, schools, and media in which the purported "porn wars" took place were hardly virgin territories unengaged with law, despite neoliberal or neoconservative pretensions to the purity of the market or civil society. The same first amendment framework that constrained the debate over anti-pornography ordinances might well have helped produce and enrich the academic conferences, publications, and protests that Brown and Halley celebrate. When Brown and Halley portray feminist advocates of anti-pornography ordinances as "the legalists" who "brought into play local governments and judges as authoritative decision makers,"[371] they erase the comprehensive legal authority exercised by judges, university administrators, and federal regulators, among others, which likely undergirded and nourished the "raw" exchanges of feminist power and ideas possible in the 1980s.

Indeed, the apparent power of left "politics" over rights and regulation often fades as rights and regulations change—especially, in recent history, as right-wing legalism changes the background (and foreground) rights and regulation of the supposedly extra-legal market and civil society. For example, the earlier era of raucous feminist pornography debates that Brown and Halley recall may have been flattened not so much by the relatively marginal anti-pornography ordinances but by successful right-wing efforts to capture regulatory control of educational and media institutions. Lisa Duggan relates the story of a 1997 conference on sexuality, which included

369. *Id.* at 22.

370. *Id.*

371. *Id.*

workshops on safe lesbian sadomasochist sex, sex toys for women, and queer sexuality, sponsored by the women's studies department of the State University of New York (SUNY) at New Paltz.[372] In contrast to similar events in universities in the 1980s, this conference appeared to do less to enrich queer and feminist sexual politics and more to fuel a broad right-wing law-reform movement.[373] Conservative government officials publicized selective details of the conference to conservative commentators in national media, and also attempted to fire the university president and to harass women's studies and performing arts faculty—using freedom of information requests, for instance, to scrutinize and publicize their teaching materials.[374] Duggan explains how right-wing government officials and business leaders encouraged this "sex panic" as part of a broad strategy—both political and legalistic—to dampen left and feminist debate by centralizing and strengthening state and corporate control over public universities.[375]

More generally, *Left Legalism's* examples of the failures of liberal law reforms may be evidence of the weakness of left *politics* as much as the weakness of left *legalism*. The equal treatment/special treatment dilemma that confronts feminist and anti-racist law reforms, for example, is not a natural (or supernatural) feature of equality law but instead is the product of a particular political strategy addressing inequality as a problem of individual irrational prejudice against "difference" rather than a problem of systemic subordination that produces, institutionalizes, and rationalizes certain "differences" as really and reasonably inferior.[376] Outside the United States, in some countries where equality movements—and legal scholars—have more widely adopted a left-leaning analysis of structural subordination, equality law has gone further to incorporate

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372. *See* LISA DUGGAN, TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS AND THE ATTACK ON DEMOCRACY 23-24 (2003).

373. *See id.* at 22-35.

374. *See id.* at 24-29.

375. *Id.* at 31-42.

376. *See supra* notes 44-47 and accompanying text.

a disparate impact standard that can require the government to question and change this production and rationalization of difference.[377] An impact-based equality rule can require the government to respond to "differences" of race, gender, and disability (for instance) not as "special" needs of a particular identity group but as normal and equal public benefits.[378]

Indeed, anti-legalism among non-conservative legal scholars may reflect and reinforce not gutsy left politics but left political cowardice (or capitulation to right politics) given a political context in which *advocating* left law is less likely to be rewarded than *challenging* left law.[379] It seems likely that non-conservative scholars will do more to advance *right* rather than *left* politics if, for example, they attribute liberal law's inadequacies in promoting racial justice to legalism in general rather than to particular legal rules (and particular political movements) that presume and protect white privilege.[380]

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377. *See, e.g.*, Joseph M. Pellicciotti, *The Constitutional Guarantee of Equal Protection in Canada and the United States: A Comparative Analysis of the Standards for Determining the Validity of Government Action*, 5 TULSA J. COMP. & INT'L L. 1 (1998) (advocating that the United States adopt an approach closer to Canada's equality doctrine).

378. *See, e.g.*, McCluskey, *supra* note 43, at 878-80 (explaining the advantages of a disparate impact model in the context of disability discrimination).

379. *See supra* notes 99, 127, 141-43, 150, 188-89, 197, 266-67, 275 and accompanying text (discussing Olin funding of law schools).

380. For examples of critical scholarship that rejects liberal legalism not as a problem of "law" in itself, but as a problem of the politics of law, which specifically wrestles with how doctrine could be made more progressive, see Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Policies*, 23 LAW & INEQ. 1 (2005) [hereinafter Hutchinson, *Majoritarian*] (offering a "sober" reading of recent "liberal" constitutional rulings on sodomy and affirmative action as determined by centrist and conservative politics but exploring the strategic use of law for more progressive ends); Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615 [hereinafter Hutchinson, *Unexplainable*] (analyzing how equality doctrine has developed to give special judicial protection to historically privileged groups and suggesting how this could be changed into an anti-subordination vision of equality).

Finally, in amplifying the longstanding CLS (and neoliberal) argument that legal rights do not trump political interests, *Left Legalism* risks naturalizing political interests as somehow more independent, authentic, and determinate than legal rights. A critical left analysis should understand that those interests are not fixed, but are dynamically shaped by a variety of social and political factors including the law. From a critical perspective, judging the social and political impact of those interests is every bit as convoluted, unpredictable, and ideological as judging the impact of legal rights.

Kelman and Lester, for example, mythologize—and depoliticize—the process of formulating and contesting political interests when they complain that "left multiculturalist[s]" threaten irrational and chaotic distributive politics by replacing careful measurement and balancing of "genuine" costs and benefits with ideological claims to "rights" based on disablity status.[381] A Foucauldian insight that rights produce as well as reflect—or mask—interests and identities challenges not just the natural superiority and authenticity of legalistic rights but also the natural superiority and authenticity of political interests. In contrast to Kelman and Lester's analysis, for instance, sociolegal scholars David Engel and Frank Munger show the rich interdependence of legal rights, personal identity, and political interests in their study of persons negotiating identities as learning disabled.[382] Engel and Munger conclude that even when formal rights-based claims are rarely invoked or weakly enforced, a liberal civil rights framework can serve to dramatically and meaningfully reconstruct ideas about individual capabilities and interests.[383]

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381. Kelman & Lester, *supra* note 215, at 163.

382. DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003) (studying the impact of the Americans with Disabilities Act on individuals with disabilities based on interviews eliciting life story narratives).

383. *Id.* at 177-204 (discussing the differing and changing effects of legal rights on different individuals' sense of their interests and identities over time in response to changing social circumstances).

Left law reform advocates, like those on the right, have often effectively used rights-based advocacy to change political interests and identification in circumstances where their political strength is insufficient to meaningfully secure or enforce those legal rights. For example, Martha Davis describes how welfare rights advocates have used international human rights claims to inspire, inform, and mobilize new political activism and coalitions even while recognizing that international law will have little or no binding impact on U.S. welfare policy in the near future.[384] Similarly, right-wing campaigns against abortion, welfare, affirmative action, or gay rights, for example, may often be directed less at changing specific laws on these "cultural" issues and more at reshaping politics so that many working and middle class Americans sacrifice their economic interests (whether willingly or unwittingly) out of hopes or fears that more symbolic forms of status will offer better security.[385]

2. *Adding a Left Critique of Extra-Legal Innocence.* Second, *Left Legalism* needs to go further to strip law's *outside* of its guise of essentialized innocence. Both left and right critics are right that law's power cannot be neatly contained by formal rules of law (liberal law reforms have unintended consequences that may be harmful and illiberal). But the same is true of any supposedly non-legal exercise of power, regardless of any assumed connection to market, divinity, social tradition, or radical transgression of any of the foregoing. That means that *eschewing* legalism is as illusory a route to moral (or anti-moralist) purity as *embracing* legalism.

Left Legalism tends to drift from its critical recognition that all law involves potentially dangerous power toward a wistful desire for liberalism's neutrality. The contributors

384. Martha F. Davis, *International Human Rights from the Ground Up: The Potential for Subnational, Human Rights-Based Reproductive Health Advocacy in the United States, in* WHERE HUMAN RIGHTS BEGIN: HEALTH, SEXUALITY, AND WOMEN IN THE NEW MILLENNIUM 235 (Wendy Chavkin & Ellen Chester eds., 2005).

385. *See* FRANK, *supra* note 317 (arguing how right-wing political strategies offer the illusion of moral conservativism to persuade non-wealthy voters to support economic policies that enrich the wealthy at their expense).

often seem seduced by the neoliberal fantasy that an unregulated space of free, independent, and authentic individual subjectivity awaits those who reject liberal rights.[386] When Halley criticizes feminist law reforms for engaging in moral regulation, she admits that this complaint "makes one sound like a libertarian."[387]

Similarly, when Ford criticizes left and liberal "cultural rights" for exercising moral and political power, he tends to avoid the harder questions of *which* moral and political power is most justified. For example, he rejects a construction of racial equality that would include a right of workers to wear braided hair out of fear that such a right would constrain individuals' ability to define their own cultural identity.[388] "Private institutions, in marked contrast to the state, with a very few exceptions, do not even attempt to provide such authoritative censorship and approval. When and if they do, they usually are met with equally legitimate competitors who censor and approve of different things."[389]

From a critical perspective, state power and legal rights pervade these supposedly "private" institutions. And from a left perspective, the supposedly "private" spheres of workplace, church, family, plantation, housing market, health care system, and mass media—for just a few examples—historically have been deeply enmeshed in, constrained by, and productive of the same historical inequalities and coercive powers that pervade the state. If courts deny cultural rights to black workers who choose to wear cornrows, to consider Ford's example, they will likely recognize and enforce not individual freedom to define identity, but *employers'* rights, for example, to fire a white woman whose make-up is deemed insufficiently "feminine," or to fire a black woman whose un-straightened hair is deemed insufficiently "professional." And without unblinking faith in a fundamentally fair market, it seems

386. *See* McCluskey, *supra* note 41, at 794-95 n.45 (comparing and criticizing both neoliberal and postmodern criticisms of rights).

387. Halley, *supra* note 48, at 89.

388. *See* Ford, *supra* note 200, at 38-40.

389. *Id.* at 64.

unlikely that those "unfeminine" and "unprofessional" women will readily find an equal number of similarly rewarding jobs where employers are equally eager to reward their particular gender and race expressions and to penalize others for instance, white men without make-up or white men who don't alter their naturally straight, balding, or graying hair.

Taking seriously the capacity of legal rights to *produce* as well as to *protect* individuals and their interests, left activism and intellectualism should have all the more reason to engage, rather than cede, rights-based law reform. Wendy Brown's chapter on rights affirms the paradoxical necessity and danger of feminist rights, but then tends to imagine that the productive capacity of rights will necessarily threaten left ideals.[390] Why does Brown see a problem, rather than a possibility, when she observes that left visions of rights based on intersecting identities will bring into being new political subjects?[391] When welfare mothers, for instance, seize on human rights discourse to build legitimacy as political actors participating in a global quest for political, racial, gender, and economic justice, their new identity—however risky and regulatory—might still well be a welcome change from the regulatory impact of an anti-rights identity as needy or greedy societal dependents, sexual deviants, or market failures.

Finally, when Brown and Halley criticize "governance legalism" for implicating left politics in potentially coercive power, they seem to refuse left *power* as much as left *statism*. Commenting on the example of AIDS activists who sought participation in Food and Drug Administration procedures, they argue that, "[t]his kind of left legalism seeks to involve the left directly in governance: once you win, you *are* the state."[392] They are right to warn that any particular left regulatory effort should be scrutinized for anti-left impact, and that in a society of systematic

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390. *See* Brown & Halley, *supra* note 3, at 7 (acknowledging that "identities are double-edged" and can be "crucial sites of cultural belonging and political mobilization").

391. *See* Brown, *supra* note 48, at 426-27.

392. Brown & Halley, *supra* note 3, at 10.

subordination, few regulatory reforms will be free of political constraints that make liberation for some contingent on oppression of other subordinated groups. Yet they ignore that the same problematic effects equally challenge any left *abstention* from (or resistance to) state governance, unless we fall back on fundamentalist faith in an autonomous private sphere inherently and naturally safe from oppressive power (as do right-wing market or moral fundamentalists).

From a critical perspective that refuses such fundamentalism, the hard and urgent question is not whether or not to *be* "the state," but *which* state structures, governed in *whose* interests, we (and others) will have the risk and responsibility of *being* part of and *being* subjected to. Guerrilla theater by Act-Up activists may *feel* more liberating, transgressive, and comfortable to some U.S. activists and scholars than tedious, marginalized, and morally messy involvement in federal bureaucracy. But those feelings provide no guarantee of left moral superiority or political effectiveness in a time when pharmaceutical companies and right-wing Christians are happy to seize state authority to advance their interests at the expense of millions of lives.[393] As the "stupidest housemaid" concludes in Paul Butler's rewriting of the classic jurisprudential story of the Spelunkian Explorer, *surrendering* the power to invoke the rule of law is even stupider and more pitiful than *believing* in the rule of law.[394]

IV. LESS (LEFT) IDENTITY

Much of *Left Legalism* finds left identity politics particularly guilty of its charges of too little theory, too much practical politics, and too much legalism. Anti-subordination movements focusing on race, gender, disability, and sexuality tend to be emotional and dogmatic, expedient and naive, controlling and ineffective, and just

393. *See* Lauren Berlant, *The Subject of True Feeling: Pain, Privacy, and Politics*, *in* LEFT LEGALISM/LEFT CRITIQUE, *supra* note 3, at 105, 105-33 (arguing that a critical approach to law and politics must reject sentimentalism).

394. *See* Paul Butler, *The Case of the Spelunkian Explorers: Revisited*, 112 HARV. L. REV. 1876, 1917, 1923 (1999).

plain no fun, a number of the contributors suggest. To escape the left's binds, *Left Legalism* often seems to demand not just more left theory and less liberal law but a *different* left politics: one that eschews faith in shared culture, sentiment, morality, or suffering, and instead strips left demands down to raw assertions of power, economic interests, and pleasure.[395]

But once again, how do we know that the book's complaints about identity politics are smart attacks on "sacred cow[s]"[396] rather than politically expedient beatings of dead horses? The right has feasted on identity politics, fueling its growing muscle through highly publicized attacks on the moral or cultural assumptions driving school integration, affirmative action, gay marriage, abortion, gender equality, and sexual harassment protection. Once again, *Left Legalism* leaves unexamined the question this political context raises: what might make a challenge to left or liberal identity politics distinctly *critical* and distinctly *left*, when right-wing fundamentalists (both market and moral) have staked out this territory so well?

Identity (based on statuses of gender, sex, race, nation, religion, and class) has traditionally defined what counts as the legitimate, rational exercise of power over others. Athenian self-government, part of the foundation of Western political theory, was defined through dominion by the propertied male head of household over others (children, wife, slaves, non-human property) who had no political rights.[397] This ancient linkage between the power to rule rationally and status in a gendered, racialized, sexualized, propertied hierarchical order has continued to shape modern and perhaps even postmodern ideas about the proper scope of political liberty and governmental

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395. *See* Berlant, *supra* note 393, at 126-28 (arguing that left visions of justice should not be grounded in the reparation of pain); Brown & Halley, *supra* note 3, at 32-33 (advocating pleasure rather than suffering as the focus of left theory); Kennedy, *supra* note 71, at 181 (criticizing the left's turn from economic politics to "identity" and rights).

396. *See* Brown & Halley, *supra* note 3, at 3.

397. *See* MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 5-6 (2005).

authority.[398] Within such a framework, the left will not escape the charges (from right or left) of illegitimate and irrational political power by doing *less* identity politics, but only by undoing liberalism's "common sense" presumptions making *identity* the (often incoherent and conflicting) measure of legitimate political power.

A. *The Identity Politics of Critical Theory*

In an opening salvo challenging "silenc[ing]"[399] by left activists, the editors position *Left Legalism* as an effort to seize power from left identity politics in particular.[400] Their examples of left "censorship" include activists' arguments that the particular law reform being critiqued is necessary for the dignity, safety, or survival of a particular subordinated group; or that critical theory is the elitist indulgence of tenured "radicals" without authority to speak for a particular subordinated identity group; or that certain identity-based strategies of the anti-subordination movement cannot be questioned without giving "aid and comfort to 'the right.'"[401] By dismissing these identity-based concerns as annoying attempts to "slow down our thinking,"[402] the editors claim to re-establish authority for left politics in independent and critical (though politically committed) rationality rather than in simplistic presumptions of identity, culture, or injury.

1. *Whose Power Counts as Rational?* But what power, premises, and prejudices animate the book's refusal to take their critics' arguments from identity seriously—and delightfully—as fresh intellectual challenges capable of moving left politics forward? Why disdain these identity-based arguments as insubordinate irrationality rather than credit and engage them with rigorous investigation? The arguments the editors reject boil down to two central

398. *See id.* at 44 (discussing the persistence of this view as the "police power" in modern Anglo-American jurisprudence).

399. *See* Brown & Halley, *supra* note 3, at 29.

400. *See id.* at 2-3 (describing examples).

401. *Id.*

402. *Id.* at 2.

questions: "What right do you have to speak for us?" and "what political power do you advance when you speak against us?" Interpreted generously, both of these questions have potential to boldly expand the scope of critical theory by piercing the traditional veil that dresses up good theory as pure reason holding power in chaste abeyance.

The editors instead offer a smug answer to these questions: we have no right and no inviolable political agenda—we have a critique![403] This response asserts an authority to speak that depends not on coercive human law, popular political dictates, or essentialized identity or culture, but on cool, clever detachment from the political positions that commonly seduce the left. "We have . . . no set of included and excluded objects, no party line about the right level of risk to be run with legalism, no correct or valorized audience."[404] The editors defend their refusal to give in to conventional and unexamined commitments as a stand that is not just negative, but pleasurable and constructive.[405]

But the temptations of irrational power (like sex) may thrive on professions of abstinence, and on slippery definitions of what counts as the impure act one is abstaining from—and on slippery reasoning about who counts as presumptively impure. As feminist and postcolonial critical scholarship has analyzed, the tradition of European critique that *Left Legalism* celebrates[406] itself has at its core an act of inevitably extra-rational identification that categorizes some as the subjects of reasoning and some as the objects.[407] Brown and Halley endorse Heidegger's formulation of critique as "a separation and lifting out of the special, the uncommon, and . . . a

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403. *Id.* at 1 (relating how a colleague dismissed an identity-based challenge to her right to speak about Islamic woman by saying "I have no right—I have a critique!").

404. *Id.* at 35-36.

405. *See id.* at 25-33.

406. *Id.* at 25-26.

407. *See* SPIVAK, *supra* note 63, at 1-31 (discussing the identity of reason in Kant).

rejection of the commonplace and unsuitable."[408] As Heidegger's pro-Nazi politics suggests, such understandings of critique's mission fit especially well with uncritical right-wing stories about identities of race, gender, geography, nation, disability, and sexuality.[409] Heidegger's project of elevating pure reason over a fearsome, contaminating, and irrationally powerful "Other" resembles and revives not just the rationalism of ancient Athenian jurisprudence, as Brown and Halley identify it.[410] Instead, as Maria Grahn-Farley explains, Heidegger's project resembles the pre-modern rural Germanic folk tales featuring the struggles of pure young men to stand firm against the irrational seductions of semi-human essences which would tempt those men to forsake their superior humanity.[411] Such traditional superstitions would appear to be the opposite of Brown and Halley's model of critical theory.

The paradox of critique is that its missionary project of replacing "common sense" with reason inevitably must build reason through common sense. The heart of the problem is that any critique must distinguish which arguments, which speakers, and which factual narratives merit attention and authority as relevant and rational—and which arguments, speakers, and stories get ignored, dismissed, or constrained as irrational power, irrelevant indulgence, or primitive sentiment. Due to inevitable limits on time, space, and information, those distinctions fall back on common sense, habit, and institutional custom—much of which (like the Germanic folk tales echoed in Heidegger) has been saturated with essentialist ideas and practices of race, gender, and sexual (and other) subordination.

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408. Brown & Halley, *supra* note 3, at 25.

409. *See* Maria Grahn-Farley, *The Ideology of Genus & the Ghost of Heidegger*, BROOK. J. INT'L L. 1, 3 n.2 (2004).

410. *See id.* at 25 (tracing critique's origins).

411. *See id.* at 4-5. Maria Grahn-Farley explains that Heidegger's contrast between Wesen and Dasein—spiritual "essences" and the "human"—tracks common folk tales about corrupting "Wesen," like leprechauns, elves, trolls and other spirits. Grahn-Farley notes that the folktales typically portray the humans corrupted by these non-human essences as young heterosexual males, and the dangerous essences appearing as females. *See id.* at 4-5 n.5.

A more carefully theorized response to the complaints from left activists would acknowledge that *Left Legalism*, like any practice of theorizing, does *not* only have a critique, it also has rights and other forms of power. Any critical theory inevitably must be supported by a ground of coercion and convention typically protected from rigorous rational scrutiny. Very concretely, the editors and contributors of *Left Legalism* have the legal right and the socioeconomic power to be published and to publish, to speak and to selectively listen, read, and cite—and to be selected for listening, reading, and citation by audiences privileged with legal and socioeconomical power to shape law, scholarship, and policy. The speakers in *Left Legalism* have substantial power, for instance, as editors and authors, teachers, tenured professors, conference organizers, and as owners and consumers of substantial financial, property, and social resources, to exclude or include many persons and ideas from participation in theoretical debates.

Some who walk into, for instance, a Harvard Law School classroom or conference room hoping to make bold arguments challenging the premises of U.S. law can expect to be arrested, not critiqued (thanks to property rights, backed by state violence, taking priority over free speech rights). Some will be free to enter and listen, but will not be invited to speak, and some who speak will not receive much attention or engagement. Many others will not get in or even near the doors of the powerful institutions that open ideas to substantial circulation and discussion. Access to those doors, and power to command an audience within them, depends in part on access to particular attributes of citizenship, money, language, politics, culture, and on status in the U.S. academic or professional hierarchy. It is neither irrational nor trivial to seek to question how the distribution of socioeconomic power and legal rights to theoretical exchange might reflect and advance the problematic status hierarchies of right-wing identity politics as much as the pure pursuit of critical reason.

This problem does not mean that critical theory is essentially non-left, non-rational, or immoral, but only that a critical project of bold rationality should strive to subject its inevitable ground of power and common sense to continual critical scrutiny. Turning such scrutiny on *Left*

Legalism, this volume often excludes without explanation much of the large body of left critique that places the politics of race, gender, empire, geography, and disability (among other status categories) at the center of rigorous, anti-foundationalist theorizing.

For example, the editors' introduction situates critique in the European scholarly tradition of Kant, Hegel, Marx, Heidegger, Foucault, and Derrida,[412] without mentioning (favorably or not) other enormously influential non-European-identified framers of left critical theory like Gayatri Chakravorty Spivak or Edward Said (both of whom center questions of race, nation, and geography in their critiques). *Left Legalism*'s editors depict left law and scholarship as uncritically subservient to liberal law reforms, like equality in family law, race-based affirmative action, or sexual harassment doctrine, omitting without explanation a rich body of contemporary critical race and feminist scholarship criticizing these law reforms and their liberal theoretical ground.[413] Subsequent chapters continue this pattern of placing feminism and critical race theory primarily on the side of liberalism, leaving out the extensive and influential challenges to faith in liberal rights from the feminist and critical race scholarship of, for example, Martha Fineman, Derrick Bell, and Richard Delgado, as well as critical progressive scholarship on human rights.[414] It is these undefended exclusions, not just rigorous reasoning, that helps position the book as an example of bold intellectual leadership that deserves to take the reigns of left politics away from anti-subordination movements.

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412. *See* Brown & Halley, *supra* note 3, at 25-26.

413. *Id.* at 13-17, 29.

414. For examples of this omitted but influential critical race and feminist scholarship challenging "liberal" law reforms, see Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 355 (Richard Delgado ed., 1995); MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991); Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Toward (An)other Vision*, *in* CRITICAL RACE FEMINISM, *supra* note 250, at 372; MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002).

The book does contain exceptions to this overall pattern of uncritically measuring good theory in significant part as distance from feminism, anti-racism, and other identity-based movements. Janet Halley's chapter on sexual harassment recognizes and affirms Catharine MacKinnon's early work as a radical critique of gender and sex as the products of power.[415] Drucilla Cornell turns to feminist activism in India as a source of theoretical leadership on questions of reproductive rights, discussing Nivedita Menon's analysis of abortion of female fetuses as an important contribution.[416] Wendy Brown's concluding chapter recognizes Gayatri Spivak's critical analysis of the paradox of liberal rights for feminism and for anti-subordination movements.[417]

2. *Which Identity Theories Count as Successful Politics?*

This sort of scrutiny of what and who gets engaged as theory may seem like petty bean-counting. Yet the seemingly superficial politics of intellectual including and excluding goes to the heart of the book's substantive reasoning. If indeed left identity politics in general, and critical race and feminist jurisprudence in particular, have already produced abundant anti-essentialist critiques of liberal legalism, then *Left Legalism*'s hope to recover left power with more bold theory and less identity politics seems politically and intellectually naive. If the book had more fully recognized that critical literature, it might have pushed its analysis further to ask *not* why so much of the left excludes powerful theoretical critique, but why so much of the left's bold theoretical critiques—particularly those developing anti-subordination jurisprudence—remain excluded from power?

That reframed question not only points more critical attention to the institutional and economic barriers to left scholarship, as discussed earlier in this article, but also presents a more complex view of the intellectual and

415. Halley, *supra* note 48, at 83.

416. Cornell, *supra* note 201, at 364-68.

417. Brown, *supra* note 215, at 420 (quoting Spivak and discussing her analysis of liberalism).

political challenge facing left anti-subordination movements. By shifting the vantage point to the politics of theory, we can examine left politics as caught within a double bind of identity. Within a mainstream theoretical framework that (consciously or not) entwines rationality and legitimate, effective authority with traditional markers of race, gender, and class, opposition to identity-based subordination will tend to appear powerful and relevant to the extent it is constructed as irrational or untheoretical—an expression of crude instrumental identity politics. Conversely, left anti-subordination analysis will often appear theoretical or rational to the extent it is constructed as lacking in political force or relevancy—an exotic indulgence or utopian idealism.

For example, centrist scholars have often challenged critical race theory on the ground that it is both too *anti-intellectual* and too *intellectual* to command serious authority among mainstream legal scholars or policy makers. Critics portray the scholarship of Patricia Williams, for example, as anti-intellectual on the ground that it subverts liberalism's faith in abstract, impartial principle free from racial substance.[418] But the same critics have blamed Williams and other critical race scholars for writing that is inaccessible and impractical because it fails to connect "with the experiences of white and male readers" or to offer clear policy prescriptions.[419]

If Brown and Halley are correct that hard-hitting left critique has become a silenced victim of powerful "censorship" by a simplistic multicultural politics focused on happily accommodating and celebrating identity-based "difference," then this might reflect the power of right-wing, not left-leaning, identity politics. Right-wing politics has been happy to turn law reformers and scholars from

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418. For the classic example, see FARBER & SHERRY, *supra* note 236; Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 849 (1993) (arguing that the storytelling of critical race scholars like Patricia Williams, Richard Delgado, and Derrick Bell rejects reasoned analysis in favor of politics). On the other hand, Duncan Kennedy characterizes Williams as an example of critical race theory's excessive *liberalism*. *See also* Kennedy, *supra* note 71, at 180.

419. Farber & Sherry, *supra* note 418, at 827.

challenging white supremacy to celebrating (and criticizing) multicultural diversity.[420] By narrowing anti-subordination politics to "identity," some of *Left Legalism's* contributors join the political right in constructing the debate over race, gender, and other status hierarchies as contests of culture, rather than contests of power.[421] That refusal is consistent with many of the contributors' postmodern skepticism of a structural vision that identifies clear lines of domination and subordination.

But perhaps the book's tendency to avoid exploring and challenging systemic subordination is not simply a product of bold theory. Instead, perhaps *Left Legalism* (despite its contrary intentions) ends up being a more humble acknowledgement of the realities of politically expedient compromise—an accommodation, after all, to the wolves at our door. *Left Legalism*'s effort to shift left politics away from identity could be most persuasive, from a critical perspective, as a strategic judgment that opposition to identity-based subordination makes for unsuccessful politics, regardless of its theoretical merits. In this view, the real problem is that the left will not achieve political success in mobilizing progressive economic interests until it pays the price of acquiescing in right-wing identity politics because the working class majority is culturally conservative.[422]

B. *The Identity Politics of Economic Class*

Such arguments which lead back to the debate between class and culture have long divided left politics and theory.[423] Some contributions to *Left Legalism* inscribe this divide deeper, suggesting that left critique requires focusing

420. *See supra* note 233 and accompanying text.

421. *See, e.g., supra* text accompanying notes 216-78 (discussing Ford, Kelman and Lester); Kennedy, *supra* note 71, at 179-82.

422. Thanks to Jack Schlegel for comments along this line.

423. *See* DUGGAN, *supra* note 372, at xv-xix, 6-7 (criticizing this divide).

on economic "redistribution"[424] instead of on legal regulation of race, sex, gender, and disability.[425] Contributors suggest, for instance, that the left should turn away from pursuing rights to gay marriage toward promoting better access to health insurance regardless of family status;[426] from pursuing rights to educational equity for persons with disabilities to securing better funding for public education;[427] from promoting sexual harassment regulations to building stronger labor organizations.[428]

Once again, from a more sharply critical perspective, this choice between economic politics and cultural politics may be more a right-wing Catch-22 than a route toward left-wing strength in theory or politics.[429] The more progressive politics eschews identity politics in favor of economic issues (like international finance, tax, health insurance, collective bargaining rules, utility regulation, campaign finance, or corporate governance), the more it appears materialistic, technocratic, outdated, weak, uninspiring, obscure, impractical, inaccessible, bureaucratic, controlling, immoral, and dangerous compared to the right. But the more progressive politics engages identity politics at the expense of economic politics (defending racial affirmative action, abortion rights, gay and lesbian rights, protecting against sexual harassment, racial profiling, or disability discrimination), the more it appears elitist, frivolous, obscure, outdated, controlling, immoral, irrelevant, or dangerous compared to the right.

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424. For a critique of the idea of "redistribution" (as opposed to some normalized and naturalized distribution), see McCluskey, *supra* note 318, at 1307-08.

425. *See* Brown & Halley, *supra* note 3, at 3 (questioning "the displacement of distributive concerns by equality"); Kelman & Lester, *supra* note 215, at 160-64; Kennedy, *supra* note 71, at 181. For a critique of the opposition between questions of economic distribution and questions of race and gender equality, see McCluskey, *supra* note 41.

426. *See* Butler, *supra* note 48, at 236.

427. *See* Kelman & Lester, *supra* note 215, at 152-64.

428. *See* Halley, *supra* note 48, at 81 (advocating a return to "socialist feminism" in place of "cultural feminism").

429. *See* McCluskey, *supra* note 318 (arguing that the opposition between cultural issues and economic issues serves to undermine progressive politics).

Why do not more indebted, overworked, Americans struggling to pay for acceptable housing, education, and health care show more political interest in economic policies that would seem to better support their material needs? Why do some Americans seem willing to sacrifice access to health insurance or retirement security they would use and enjoy for a ban on the gay marriage they were not planning to have? That puzzle can be better answered by examining how right-wing political movements have helped create a culture identifying egalitarian economic policies with femininity, childishness, sexual deviance, foreignness, physical weakness, racial inferiority, and with secularism.

The problem, as Lisa Duggan argues in her call for deeper left critiques of neoliberalism,[430] is that the right's theory and politics of economic *in*equality is a *cultural* and *moral* politics, despite its technocratic and libertarian veneer.[431] "Neoliberalism was constructed in and through cultural and identity politics and cannot be undone . . . without constituencies and analyses that respond directly to that fact."[432] Neoliberalism—or free-market economic ideology—"organizes material and political life *in terms of* race, gender, and sexuality as well as economic class and nationality, or ethnicity and religion."[433]

The upwardly redistributive policies characteristic of recent U.S.-led global economic policy are the products of a well-funded, well-organized (though often conflicted and not fully conscious) *cultural* and *political* movement to build support for elite business and financial interests.[434] From presidential candidate Barry Goldwater to Presidents Nixon, Reagan, and Bush (elder and younger), right-wing strategists have worked hard to direct many Americans' increased economic and cultural anxiety away from the enormous gains being reaped by the wealthiest corporate managers and owners—and away from the racial and other forms of identity-based oppression that often fueled those

430. DUGGAN, *supra* note 372, at 71.

431. *See id.* at 3.

432. *Id.*

433. *Id.*

434. *See id.* at xvii, 12; *see also* text accompanying *supra* note 102.

gains—toward the more modest egalitarian gains achieved by women, nonwhites, and others identified in "cultural" terms.[435] In the last quarter of the twentieth century, conservative leaders from libertarian and authoritarian camps have together (though not always in concert) built winning political coalitions by convincing enough white male voters (and their dependents) that they should be more afraid of the potential power of black or brown or yellow people (or of feminists or gay rights advocates or non-Christians) than of the legal, economic, and (indirect) military power of their bosses and bankers.[436] It is this strategy of linking economic inequality to many Americans' perceptions of cultural security that helps explain why, during this era, enough non-wealthy white American voters lend support to political agenda that advocates spending more money incarcerating people of color than securing most Americans' access to high-quality public education; more money supporting foreign militarism than protecting most Americans from the risk of losing their health insurance, child care, jobs, or retirement income; and more energy opposing race-based affirmative action, gay marriage, or immigration than challenging the

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435. *See, e.g.*, DAN T. CARTER, FROM GEORGE WALLACE TO NEWT GINGRICH: RACE IN THE CONSERVATIVE COUNTERREVOLUTION 1963-1994, xiv (1996) (concluding that "even though the streams of racial and economic conservatism have sometimes flowed in separate channels, they ultimately joined in the political coalition that reshaped American politics from the 1970s through the mid-1990s"); THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1992) (explaining the decline of the Democratic party to the Republican party's success in mobilizing white racial anxiety against liberal or progressive tax policies); GODFREY HODGSON, MORE EQUAL THAN OTHERS: AMERICA FROM NIXON TO THE NEW CENTURY (2004) (linking the rise of right-wing economic policies and class inequality in part to racial politics); LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT (2001) (studying the rise of social conservatism in 1960s Orange County, California).

436. *See* KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM (2005) (tracing the rise of suburban-based right-wing economic politics in Atlanta to the withdrawal of middle class whites from support for racial equality); Carl H. Nightingale, "Recognize It Without Appearing To": Defending a World of White Privilege (unpublished manuscript, on file with the Buffalo Law Review) (tracing the rise of neoliberalism in the U.S. and globally to political movements covertly and overtly defending white privilege).

International Monetary Fund, corporate welfare and fraud, or tax cuts for the rich.

Right-wing activists and intellectuals have constructed American class politics as identity politics. In U.S. politics, the term "nanny state" codes progressive economics as an affront to a moral order dependent on upper-class (probably white) male authority over women, children, and servants (especially servants of color).[437] Similarly, the "girly-man" slur (popularized in the 2004 Presidential campaign) has become a shorthand argument defending inegalitarian economic policies.[438] Such terms convey the message that defending the privileged status of white Christian masculinity, American nationalism, and the heterosexual, patriarchal family requires not only attacking, for instance, racial affirmative action, abortion, or gay marriage—but also requires promoting tax cuts for the very wealthiest, cutting welfare benefits for the very poorest, reducing plaintiffs' tort rights, privatizing public services, and deregulating business.[439]

Furthermore, right-wing cultural and political movements often attempt to essentialize this racialization, nationalization, masculinization, (hetero)sexualization, and Christianization of neoliberal right-wing economics as a mysterious or inevitable part of working-class American human nature. Justice Scalia, for example, couches his decisions opposing gay rights or abortion as deference to a non-elite culture who hold their anti-feminist or anti-gay moral views normally, naturally, and trans-historically free

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437. *See, e.g.*, SIMON, ACTION, *supra* note 89, at 22 (Olin Foundation leader outlining his political and philanthropic project of challenging "'big mother' down in Washington" who treats Americans like "self-indulgent infants who need a federal nanny to look after us at every waking moment"); McCluskey, *supra* note 45, at 150 (citing and criticizing use of the "nanny state" slur); Myriam Marquez, Editorial, *Florida Democrats Stuck with Kerry*, ORLANDO SENTINEL, Mar. 4, 2004 at A21 (criticizing Presidential candidate John Kerry for advancing "nanny state" policies).

438. *See, e.g.*, Andrea Peyser, *This Party's Dem and Dumber*, N.Y. POST, Apr. 20, 2005, at 10 (using this slur to condemn a Democratic politician's opposition to increased tax cuts for the wealthy).

439. *See* McCluskey, *supra* note 41, at 808-22, 828-32 (identifying connections between right-wing identity politics and right-wing libertarian economics in welfare and workers compensation reform).

from indoctrination by well-funded or self-interested professionals.[440] In contrast, Scalia constructs contrary pro-gay or pro-choice moral views as distinctly *cultivated* and *cultured*—the product of the socialization into upper class institutions like law schools and country clubs.[441] By constructing right-wing morality as the true marker of non-wealthy economic status, advocates of right-wing economics can deny and excuse their own dependence on and promotion of race, gender, sexual (and other) status-based subordination. In fact, empirical studies of voting patterns refute simple assumptions that working class white Americans have been a major source of moral conservatives' increased political power.[442] By stereotyping and essentializing the working class as the source of conservative cultural politics, the right, rather than the left, can appear to be the true defender of working class interests.

Neoliberal "free market" ideology—like liberalism more generally—gains political and theoretical power among centrist and liberal elites by obscuring the connections between economic politics and identity politics. If policies promoting free trade, deregulation, privatized public schools, or tort reform can be portrayed as above and beyond the cultural fray, grounded in neutral economics, then the harmful disparate impact of these policies along

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440. *See* Lawrence v. Texas, 539 U.S. 558, 601-05 (2003) (Scalia, J., dissenting) (arguing that the Court's decision to strike down a Texas sodomy law represented a departure from the Court's obligation to defer to tradition and respect for the democratic process); Romer v. Evans, 517 U.S. 620, 652-53 (1996) (Scalia, J., dissenting) (arguing for deference to democratic traditional mores); *see also* McCluskey, *supra* note 318, at 1292 (discussing the class politics in this reasoning).

441. *See Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting) (discussing how the "law-profession culture" has indoctrinated courts with a "homosexual agenda"); *Romer*, 517 U.S. at 652-53 (Scalia, J., dissenting) (criticizing the "lawyer class" for protecting its right to hand out jobs on the basis of country club membership without allowing others to protect their heterosexual privileges); *see also* McCluskey, *supra* note 318, at 1292 (discussing this reasoning).

442. Larry M. Bartels, *What's the Matter with* What's the Matter with Kansas?, 2006 Q. J. OF POL. SCI. 201-26 (using empirical data to challenge Thomas Frank's thesis that cultural issues have moved the working class to vote their values rather than their economic interests).

identity-based lines can be dismissed as tragic, but necessary side effects or essentialized as indications of separate cultural factors that further reinforce the superiority of those who prioritize economic principle over identity politics.

Throughout history, many left critics and activists have recognized and built coalitions against the problem that the right often works to divide and conquer economic resistance by constructing and fueling "cultural" divisions among the working class (and vice versa).[443] More recently, some of what are arguably the most successful examples of left political muscle have come from those who have integrated identity politics and class politics. Some strands of the anti-corporate globalization movement work to reconstruct widespread economic security as a political contingency that may be changed by organizing across boundaries of race, class, gender, religion, sexuality, and nationality.[444] Similarly, beleaguered labor activists in the United States arguably have been most successful when they have linked class politics to identity politics.[445]

What can left critique contribute to the spirit and strategy of both left and right efforts to use identity politics to bridge rather than divide competing interests? Anti-identitarian theory and politics can help resist the neoliberal view (sometimes promoted by left activists) that conflicts among cultures and interests are essential, fixed, non-contradictory, and pre-political. Yet an identity politics

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443. For a classic history of left resistance to right-wing efforts to divide and conquer subordinated classes in the United States, see HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492 TO THE PRESENT (2005); *see also* DUGGAN, *supra* note 372, at 87-88 (discussing, for example, the New York City-based Audre Lorde project, which organizes "queers of color" to address economic and health policy).

444. The World Social Forum, for example, organizes opposition to economic neoliberalism specifically by promoting social equality, "cultural" diversity, and opposing multiple grounds of subordination, and by linking people across boundaries of race, ethnicity, nationality, geography, and gender. *See* WORLD SOCIAL FORUM, WORLD SOCIAL FORUM CHARTER OF PRINCIPLES (Aug. 8, 2002), http://www.forumsocialmundial.or.br.

445. *See, e.g.*, William P. Jones, *Working-Class Hero*, THE NATION, Jan. 11, 2006, at 23 (discussing New York City transit workers' strike as an example of the power of activism linking racial justice and economic rights).

directed at political economy can also help challenge the right-wing neoliberal rhetoric (sometimes promoted by left theory) that engaging in left cultural politics means capitulating to irrational, illegitimate, unsophisticated, or uniquely coercive power.

CONCLUSION

This article argues that the theory and politics of *Left Legalism* deepens rather than deconstructs liberalism's divides between theory and politics, between law and politics, and between left cultural politics and legitimate politics. These conceptual oppositions are not just theoretical puzzles, but also help support the material barriers that make strong left theory and politics an anomaly or even an impossibility in most of contemporary U.S. law. The book's effort to re-think left legalism "as if the wolves were not there" fails left theory and politics by accepting as natural, normal, and neutral some of the walls the "wolves" have built to keep good legal theory separate from strong left politics.

But we should measure *Left Legalism*—and left critique of law in general—not simply by asking whether it has impeccable theoretical or strategic logic. Instead, following the lead of the book's editors[446] as well as the words of critical legal historian Robert Gordon, we should conclude by asking whether "it help[s] give us reason for hope and a motive for action [in place of] paralysis and despair."[447] *Left Legalism* is a powerful step toward upsetting the right-wing resurgence in law in part because of its declaration of passion and commitment toward left theory.

Even though imperfectly realized, this passion and commitment reminds us that U.S. law can set its sights beyond the limited options, tough choices, and low expectations offered by liberal legalism—and by the right-wing economic and moral authoritarianism that would

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446. *See* Brown & Halley, *supra* note 3, at 32-33 (arguing for the hedonic value of left theory).

447. Gordon, *supra* note 81, at 658 (discussing the contributions of critical legal theories).

replace liberalism as the answer to a world of increasing danger, scarcity, and conflict for most people. *Left Legalism*'s aspiration to bold theory can help remind us that those "wolves" at the door, however powerful, feed on ideas, and on the willingness of legal scholars and activists to accept and promote the ideas that insist that inevitable barriers preclude a better world. By calling on activists and scholars concerned about a rightward-leaning world to imagine the possibility and power of desiring *more and better*, *Left Legalism* breathes much-needed fresh air into the shuttered halls of legal theory.