WENDY BROWN AND JANET HALLEY

Introduction

A colleague of ours was giving a paper on the vexed problem of veiling among contemporary Islamic women and Western feminist responses to it.[1] *From the audience, an American woman of South Asian descent challenged our colleague, a feminist Arab secularist, for intervening in a domain properly belonging to* religious *Arab women: "What right have* you *to be saying such things?" "Right?" our colleague responded. "I have no right—I have a critique!"*

This collection emerges from conversations enjoyed and endured by the coeditors as we explored the intersection of certain progressive political projects we care about and certain intellectual undertakings we were pursuing. We were both veterans of various feminist, antiracist, multicultural, sexual liberationist, and antihomophobic efforts. We were both engaged, in different ways, in teaching, thinking, and writing about nationalism. We were both convinced that contemporary traditions of social, political, and literary theory offer rich hypotheses that can be vital ways of testing our own political situations and desires. And we shared an absorption with the many ways that the political projects in which we are involved depicted various elements in the legal system as "the problem" to which they address themselves and framed strategies for social change—indeed, models sometimes of justice itself—that turned in some crucial way on law reform.

Our intellectual and political concerns were thickly intertwined: if we could help identify effective ways to loosen the grip of gender strictures at work, in sex, at home; beat back even by an inch the effects of racism on the educational environments in which we work and social environments in

which we live; slow down even by a moment the ranking and reranking of new immigrant groups in an ever more elaborate racial paradigm; pry apart even by a millimeter sexual shame from sexual desire; revive even slightly a practical critical recognition of the way a capitalist political economy shapes the parameters of freedom and equality in our time—we would think we'd really accomplished something.

But we were increasingly frustrated with ourselves and with the intellectual and political environment we were operating in. It seemed to us less and less an environment in which the question of what the left should be "for" and what kinds of concrete projects could embody and activate those visions was eagerly asked and openly debated. It also seemed to us less and less an environment in which left-allied critical assessments of any putatively progressive political or legal project were welcome. We reviewed, in this regard, all the times that we had let the following sentences—uttered by students, embedded in the work of valued colleagues, lobbed at academic progressives from allies "in the trenches"—slow down our thinking and persuade us to mince words:

- My injury is real; you are just theorizing.
- Why, just now, when women (blacks, Latinos, homosexuals) are finally gaining subjectivity, must we engage in a critique of the subject?
- Writing that's difficult to understand is elitist (and hence bad).
- Writing that's difficult to understand can't be politically effective; anyone who teaches, uses, or produces writing that's difficult to understand must not care about politically inflicted suffering.
- Difficult writing can't be understood by the masses, so it can't possibly be useful to political mobilization.
- Postmodern social and critical theory is an indulgence of "tenured radicals" and has nothing to say about how power really works.
- What can all these abstractions *do* for a woman living in a fifth-floor cold water walkup?
- It's easy to criticize; what do you have to offer that's better?
- 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.
- You couldn't possibly understand, not having had the experience of [fill in here the name of any politically inflicted suffering], and therefore lack authority to speak about how it feels or how to stop it.

– The dignity of my group depends on [fill in the name of any law reform effort undertaken to address group-based stigma]; questioning the premises of that law reform effort reinflicts the stigma.
– The safety and survival of my group depend on [fill in the name of any law reform effort undertaken to protect a subordinated group]; questioning the premises of that law reform effort endorses our subordination.
– Questioning the premises of [fill in the name of any law reform effort currently understood to be "left"] gives aid and comfort to "the right." [Then pick one of the following normative denunciations:]
  The questioner is naïve.
  The questioner is covertly, perhaps subconsciously, on "the right."
  Avoiding co-optation by "the right" is categorically, or perhaps merely *obviously,* more important than reexamining the current commitments or project of "the left."
– Questioning the premises of [fill in the name of any rights-claiming effort currently understood to be "left"] is pointless; after all, we are talking here about human, or civil, or fundamental *rights*. QED.
– Your critique is so far removed from the language of the courtroom or everyday politics that it can't possibly be of practical value.
– Your critique is a luxury we can't afford; what we need right now is solidarity and consensus, not deconstruction.
– I'm offended.
– It's unacceptable.

We were dismayed to find ourselves ceding to these precepts not only because the "common sense" they represented was, upon close examination, almost always intellectually incoherent, but because their invocation in political and intellectual debate bestowed sacred cow status on certain law reform projects whose problematics worried us and which we yearned to understand. Affirmative action, sex harassment, the immersion of the ideal of equality in rights claiming, the displacement of distributive concerns by equality, the central place given to injured subjectivity and ideas of personal dignity in hate speech efforts and sexual liberation projects, the merger of racial justice into the language of essentialized identity and cultural preservation, the deployment of identity-based claims in the form of rights supposedly trumping all competing normative claims: Would these various legal undertakings seem liberatory—would they seem *left*—if the

prohibitive dicta listed above were suspended and the acid of critical theory had a chance to work on them?

And so we set out to write, and to find, work that upended or ignored these precepts and that illuminated what could happen in our understanding of what the left could do with (or without) the law if their prohibitive power were suspended. The essays collected here reflect what we discovered: the state of the art of "left internal critique" focused on law reform. With this volume, we are attempting to reinvigorate and revalue the tradition of critique as vital to what the intellectual left has to offer, and, perhaps, to the very existence and health of the left itself. The book is thus intended as a case for the worth of critique on interconstitutive intellectual, political, and hedonic grounds.

We have gathered essays that examine the tensions between state-centered left legalism, on the one hand, and left theoretical critiques of the state, the law, and identity, on the other. Together, they function as exercises in left critique of certain contemporary left legal and political conventions. They do not advocate a unified political position on the value of left legal reform, nor do they agree about appropriate strategies for such reform. Instead, these essays vary widely—and the differences arise just as much from the specific "real world" problem to which each author is attending as from differences in the kind of justice-seeking project by which each author is guided. Yet, in their different ways, each asks: What are the limits, paradoxes, and perils attending contemporary practices of left legalism? What can we learn from studying these effects? What politics might be refashioned from the critiques?

Between concern with being politically "relevant," usually understood as being "practical," and concern with holding the fort (and hence not criticizing what the fort holds), critique has come to be cast increasingly as an unaffordable luxury, or as simply to one side of the action of political life. We propose instead that theoretical critique is a crucial practice for understanding how legalism can transform and attenuate the values and aims that leftists bring to it. How might left legalism convert into liberal legalism? How or when does legalism sap the political substance from a highly politicized issue or event? How do desires to transform identity unwittingly become projects that instantiate identity? When do strategies of redress become techniques of domination? We do not argue, nor do any of our authors, that legalism or liberalism is irredeemable or that left projects oriented to the state, and more specifically to law, can or should be fore-

sworn. But we do believe that the left's current absorption with legal strategies means that liberal legalism persistently threatens to defang the left we want to inhabit, saturating it with anti-intellectualism, limiting its normative aspirations, turning its attention away from the regulatory norms it ought to be upending, and hammering its swords into boomerangs.

The Left/Liberal Distinction

What is the difference between left legalism and liberal legalism? These, of course, are terms without fixed meaning and, in part, the essays collected here plumb, negotiate, and even aim to invent anew their possible meanings and relations. Indeed, it would be hubristic as well as contrary to our political impulses to offer, for example, a definitive account of what counts as "the left" here. It is not possible to circumscribe that project at this point in history, nor would we want to engage in the kind of gatekeeping and policing that such a definition would entail. However, given our desire to drive a distinction between liberal legalism and left critique, indeed, between liberal and left legalism, neither can we forgo some venture into this terrain. So we offer the following as partial, provisional, and contestable—a conversational gambit rather than a definitive account.

What has conventionally distinguished the left from liberalism is not merely a matter of attitude or precept, but turns on the objects of affirmation and negation that each takes as central to justice. Attempting to map this distinction returns us to the classical meaning of liberalism—not a political position opposite to conservatism but a political order that replaces Tudor monarchy rooted in explicit class privilege with modern democratic constitutionalism rooted in abstract individualism. It is the liberal political order, and not simply an ideological position, that leftists conventionally challenge as inadequate to the production of substantive freedom and equality. Thus leftists often refer to liberalism without making distinctions between "liberals" and "conservatives" or between "liberals" and "communitarians"—all of whom, in a left analysis, inhabit comfortably the liberalism that the analysis seeks to question. However, in what follows, we also try to mark a few of the ideological differences within liberal formulations of justice; to that end, we distinguish between a liberal political order and a "liberal" political position by putting the latter in quotation marks.

Liberalism presumes the legitimacy of a state in which we are guaran-

teed equality before the law and in which individual liberty is paramount. It presumes as well a rough equation of freedom with individual rights. Liberal justice is an order in which this equality and this freedom are maximized to the point where they would begin to cancel one another. Within the liberal order, "free market" and "libertarian" conservatives usually draw the line closer to freedom (as distinct from "moral conservatives," who argue for strong limits on both equality and freedom), and "liberals" usually draw it closer to equality (and thus differ from "civil libertarians," whose primary desideratum is liberty). But these are differences of degree; almost no one in contemporary political life disaffirms one in favor of the other.

Law and the state are ordinarily figured as technically neutral within liberalism, even if "liberals" recognize that these institutions have been historically beholden to socially dominant powers, and even if "conservatives" sometimes regard the state as an inappropriate intruder into the domain of personal and economic freedom. The challenge for "liberal" reformers is to wield the state on behalf of those on the lower end of various social hierarchies or at the losing end of various maldistributions; "conservatives" generally aim to wield it for purposes of consolidating the moral and political order, or to release putatively autonomous individuals or market forces from inappropriate constraints.

Left analysis takes its bearings from what it conceives the liberal formulation of justice to elide, as well as from a different vision of justice itself. Thus, a left political orientation begins with a critique—not necessarily a rejection—of liberalism itself as well as an explicit focus on the *social powers* producing and stratifying subjects that liberalism largely ignores. Of these, capital, male dominance, racial formations, and regimes of sexuality have been of persistent importance, but there are, of course, others. Liberalism's dearest treasure, equality before the law, though preferred to inequality before the law, is regarded by leftists as too abstract to produce substantive egalitarianism without transformation of the social powers that produce inequality. Equal access to rights and opportunities is seen as a false bouquet to those who, consequent to a range of possible constraints issuing from these social powers, cannot make equal use of them. Rights within liberalism are thus conceived as equal only at the formal level, and in concrete terms are seen as differentially deployed by differently situated subjects in a complexly stratified society. To the extent that rights themselves are powers, this differential itself constitutes both an index and a reinforcement of social

inequality. This does not mean that leftists *necessarily* oppose rights, but rather that they are wary of liberalism's generally more sanguine equations between rights and liberty, equal rights and equality.

Leftists conceive of the liberal state as a site and potential instrument of dominance insofar as it masks unequal and unfree conditions with an ideology of freedom and liberty that entrenches or extends the powers of the already advantaged. Traditionally, leftists have focused on the domination and stratification inherent in capitalism and have focused most of their critical and political attention on the effects of the depoliticized status of political economy in liberal orders. More recently, influenced by a range of poststructuralist thinkers, many leftists have added the problem of norms and regulation to their analysis. Here, powers of subordination and inequality are no longer seen as simply achieved through the structure of class society, or through the state-society relationship that secures the interests of capital and class dominance, but as located in norms regulating a great variety of social relations, including but not limited to class, gender, sexuality, and race. From this angle, law and the state are seen neither as neutral nor as merely prohibitive, but as importantly productive of identity and subjectivity. Identity, in turn, is conceived as a crucial site of regulation, and not simply (as it is for many "liberals") a basis of equality or emancipation claims or (as it is for many "conservatives") at best a largely personal or subjective matter irrelevant to justice claims. Whereas liberalism tends to cast identity as arising from a source other than norms, institutions, and social powers, these are the wellsprings and regulatory sites of identity for this strand of left thinking. Whereas "liberals" treat identities as mechanisms for voicing injustice that the state must be made to recognize and repair, from this left perspective, identities are double-edged: they can be crucial sites of cultural belonging and political mobilization, but they can also be important vehicles of domination through regulation. Indeed, to the extent that liberalism bribes the left to frame its justice projects in terms of identity, cultural belonging and political mobilization become problematically regulatory. Grappling with such difficult paradoxes is one goal of this book.

The Left Turn to Legalism

We want to scrutinize projects of the left that invoke the liberal state's promise to make justice happen by means of law. Our concern is with a

strong turn toward law by the left in recent decades, and especially with the implications of this turn both for left political aims and for left internal critique.

To argue that the left has lately become more heavily implicated in liberal legalism is not to suggest that there was a past in which the left did not engage with the law or the liberal state. In pursuit of racial justice by means of civil rights, the American left entered into a deep collaboration with a liberal legalistic project. The Montgomery bus boycott (seeking to establish blacks' right to use public accommodations on an equal basis with whites); Freedom Summer (seeking to establish blacks' equal voting rights); the 1964 March on Washington (seeking to pressure President Johnson and Congress to pass federal civil rights legislation) — these are classics in American legalism: they pointedly and directly tie broad-based, locally and culturally rich "movement" politics to demands for state-enforced rights. People whose political posture was decidedly left engaged in all these efforts, thus infusing their leftism with legalism and producing something that could be called left legalism. This was never an unproblematic undertaking for them. Liberal goals such as race universalism and national integrationism contended with left goals such as radical transformation of the racial economy. And legalistic engagements were challenged by participants acting under left motives. Moreover, the civil rights movement was persistently both roiled and energized by nonlegalistic initiatives and constituencies; recall the agonized struggle within the Student Nonviolent Coordinating Committee (SNCC) over the decision to sacrifice lives for ("mere"?) voting rights, black nationalists' efforts in the direction of community self-help, and Martin Luther King's turn in the last years of his life from race to poverty, from rights to redistribution.

Many of these tensions have subsided and must be actively recalled to memory. As a language and strategy for seeking justice for the historically subordinated, the civil rights discourse coined for racial justice has become almost hegemonic. More recent emancipatory and egalitarian efforts model themselves explicitly and seemingly inevitably on the black civil rights movement remembered only in its liberal and legalistic modalities: the women's movement, the disabled movement, even transsexual and transgendered activists have turned to the vocabulary of civil rights as to an ineluctable fund of justice claims. The classic status of the black civil rights effort has made it seem natural, inevitable to think that rights are central,

exemplary, paradigmatic in any understanding of the justice-seeking legal resources of the liberal state.

But rights are not the only form in which the left has sought to mobilize the implicit promise of the liberal state that it will attempt to make justice happen by means of law. In the early part of the twentieth century what put the left on the political map in the United States was, surely, pursuit of collective bargaining. As Duncan Kennedy reminds us in his contribution to this volume, this effort involved an *attack* on rights in the form of freedom of contract and strong property entitlements; when the core left project was collective bargaining, employers' monopoly over rights — and thus rights — were viewed as *the problem*. Moreover, those involved in the project sought face-to-face relations between employee and employer under conditions of equalized bargaining power and in pursuit of improved wages and working conditions; neither the procedure nor the remedy was centrally legalistic or liberal. Eventually, more legalistic rights to unionize, to strike, and to fair representation took shape as the National Labor Relations Act and within various related legal regimes. But certain characteristic themes of liberalism — proceduralism, or justice as rights, etc. — however crucial they may be at any particular juncture, are typically *instrumental* to players working the labor side of that piece of governance.

Clearly, "the left" has no "natural" relationship to the legalism of rights. One reason for this is that rights cannot be fully saturated with the aims that animate their deployment. For all the content they may be given by their location in liberal orders, they retain a certain formality and emptiness which allow them to be deployed and redeployed by different political contestants. A right to be free from state-sponsored race discrimination can be asserted not only by black schoolchildren assigned to racially segregated schools, but also by Alan Bakke in his 1975 challenge to affirmative action and by Ward Connerly in his more far-reaching 1998 Civil Rights Initiative. And the Janus-faced character of rights can precipitate realignments of the left aims to which they might, until that moment, seem fixedly attached. For instance, the legal realist critique of rights corresponded well with a left attack on constitutional protection of freedom of contract but had to be backgrounded in the course of civil rights activism. And thus one reason for the complex and contingent relationship between "the left" and legalism is that "the left" situates itself as such in part by engaging and disengaging various legalisms. Within left labor politics, for example, the legal effort to

secure the power to bargain collectively gives way at another moment to intra-union legal and political struggles to democratize the structure of unions or to force gender equity issues onto union agendas; as economic, political, and institutional conditions change, and left aims contest with one another, the value of and engagement with various legalisms will vary as well.

Civil rights, however dominant as a form of contemporary left legalism, does not exhaust the ways the left engages legalism. Consider those justice projects in which the left attempts to capture or at least influence some fragment of the state's administrative apparatus. For our purposes, such projects could be arrayed under the rubric *governance legalism*. We do not mean to imply a relationship of mutual exclusivity between rights legalism and governance legalism; certainly there are overlaps. But when antipornography activists turned to zoning restrictions, attempting to map pornography out; when left multiculturalists weighed in with francophone nationalists and sought to justify the secession of Quebec from Canada, attempting to map minority culture in; when ACT-UP staged its rage on the steps of the Food and Drug Administration's Washington, D.C. headquarters, attempting to secure a place at the bureaucratic table where the speed of drug approval would be decided—when the left has engaged in these projects, it has engaged with elements of the state that have little or nothing to do with rights, that are sometimes even illiberal, but are perhaps even more legalistic than a rights project. This kind of left legalism seeks to involve the left directly in governance: once you win, you *are* the state.

The mutability we have detected in rights legalism can emerge in governance legalism as well. Consider the aim of left multiculturalists in Quebec: to achieve francophone sovereignty by the secession of Quebec from Canada and its establishment as a new nation-state. Left multiculturalists sought to tie themselves to the state in this way because of their concern for a minority population, in this case, the French-speaking Québecois. But if they had attained their goal, their governance project would have been running an ethnic state in which French-speaking Québecois enjoyed dominant status with respect to a new set of subordinates. As francophone Québecois had been to Quebec before secession, anglophone Quebecers would have been to Quebec after it (although each is positioned differently vis-à-vis Canada as a whole and in the political economic order). In addition, a new chapter in the history of colonialization for First Nations peoples would have been inaugurated; the hard-won deal they had cemented

with Canada would have been reopened under a new sovereign. However distinct the locations of First Nations and anglophone Quebecers (they would have been indexed differently to dispositions of power outside Quebec), the problem of ethnically and linguistically ordered dominance and subordination inside Quebec would not have been solved, but merely rearranged. And in the course of that rearrangement, a left preoccupation with francophone cultural survival would have been supplanted by new minoritizing projects ready to disavow the initial left impulse to run a state.

The Regulatory Capacities of Legalism

We have suggested thus far that left projects in liberal democratic orders can rarely avoid rights and governance legalism; nor can they avoid the problematics of these modes of legalism. We want to go further now, to suggest that legalism has regulatory capacities which have been particularly dangerous for left projects because they remain so unstudied, so unavowed.

Perhaps the practice of forgetting the regulatory capacities of legalism is animated by an idea that the production of regulated subjects and disciplined populations belongs to "culture" or "society" rather than "the state." Although this is not the argument of Michel Foucault, it seems he is sometimes read this way. His genealogy of the rise of biopower in modernity—of power in its microphysical, disciplinary, and regulatory form—combined with his insistence that we must "cut off the king's head in political theory" (i.e., redirect our attention from the state and law to culture and society as the domain of power in society) are taken together to imply that law has been historically superseded by nonlegal forms of power. But this is a poor reading of a thinker who, if anything, has taught us to be alert to the imbrication of juridical and disciplinary discourses, an imbrication that can range from the overt to the very subtle. Indeed, law has a penchant for hiding itself in background rules so minute that they facilitate or activate regulatory regimes that seem immune from legalistic effects.

This appearance can be quite convincing. Take the invention of standardized clothing sizes and the diffusion of the practice of sized clothing throughout the apparel market. Standardized clothing sizes standardize the bodies that wear clothes: they make possible an imagined community of "size 10s," rendering it both a form of consumer rhetoric and a form of subjectivity. "What size *are you*?" we ask, acknowledging that this marketing device constitutes us with precision and intimacy. Indeed, if it doesn't

constitute us, consequences emerge in the kind of selfhood we experience and present. If the slippage takes a dysphoric form, we become nonstandard, deviant, possessed of a wrong body that could not have been imagined as wrong in quite this way before sized clothing became the market standard. If the slippage takes a more euphoric form—as it does, for instance, when young black and Latino men wear clothes carefully selected to be "too large" or when women seeking to produce one kind of sexy effect wear clothes carefully selected to be "too small"—we achieve a kind of ironic play on the idea of standardization. However it plays out, sized clothing regulates diet, exercise, healthiness, posture; it interpellates us into gender, sex, and class; it normalizes along all these dimensions and more without once touching on the implicit promise of the liberal state: that it will attempt to make justice happen by means of law.

We are not claiming that a "free market in sized clothing" could exist without all the requisite state apparatuses—contract enforcement, capital accumulation in the corporate form, tax-subsidized interstate commerce—that make mass markets possible. The so-called free market is surely subtended by the state in myriad ways. But the particular thing that happened in the marketing of clothing—the standardizing of size—seems to be perfectly intelligible without reference to those legal supports, and certainly without reference to the idea that legal technologies are distinctively associated with our yearning for justice. And so legalism as we are framing it for this book appears to have a jurisdictional edge: it can have little or no bearing upon some modes of regulation that are nonetheless quite potent in producing and organizing subjects.

But recall now our caution that legalism has ways of hiding its presence, of providing background rules so backgrounded that we can forget they are there. Perhaps we have committed this very error in our sized clothing example. Consider that there is no legally enforceable warranty that a pair of size 10 jeans will actually have dimensions similar to any other pair of size 10 jeans sold by another manufacturer, or indeed the same one, last year or yesterday. The regime of sized clothing includes, then, an implicit "right" of manufacturers to change the parameters of clothing sizes. They can exercise this "right" unilaterally, without affording consumers notice and an opportunity to be heard on the matter, without even letting consumers know what they're doing. Perhaps this "right" contributes to the strange mixture of anxiety and excitement, dread and relief, with which we greet sized clothing; clothing sizes are always midpoint in a narrative of our

embodiment, one that mysteriously alters the meaning of any answer to the question "What size *are you*?" and thus one that can intimately *re*shape the kind of selfhood we experience and present. The legal rule that clothing sizes are not subject to an implied warranty of rigid standardization may have an important role in what at first appears to be a "purely" cultural form of regulation.

Because law can take the shape of permissions rather than prohibitions, it can invisibly capacitate social and cultural actors to do particular kinds of social and cultural work. Suddenly seeing legalism operating as the background rules of culture, whence it is supposed to be absent, should defeat, at least for the case at hand, the presumption that culture is profoundly distinct from law. And once we have a firm grip on this hypothesis (of course, it is merely that; in any particular situation the point may be utterly unimportant) we can assign a number of possible conceptual consequences to it. First, the left yearning (like the right one) to live "outside of law" may be unattainable; we may think we've gotten free of law only to realize that it creates the conditions for who we are or what we do, and that realization can profoundly alter our normative assessment of our situation. And second, the effects of law can be complex, multiple, and contingent in the same way that cultural powers like sized clothing are complex, multiple, and contingent. Left legalism will imagine its own effects much more adequately if it is ready to see them not as monolithic installations of "justice" but as mutable, contestable entries into complex discursive and distributive systems.

Although Foucault helpfully drew our attention to ways that powers of regulation operate and regulate in extralegal or legal domains, he may have underestimated the degree to which the modern liberal state itself can operate *as* micropower. It seems clear to us that "the law" exceeds the figure, supposed by Foucault to define it, of the prohibiting, death-wielding sovereign, and has *incorporated* the managerial, normativizing, regularizing, biopoweristic forms that he proposed were distinguishable from the juridical form, even if historically entwined with it. "The law" in our world takes not only the form of the sovereign who kills in the name of the rule "Thou shalt not kill," but also the form of the Department of Youth Services worker who inspects your personal life in minute detail to decide whether you are a fit person to adopt your lover's child. This underpaid and overworked functionary, laden with forms that standardize good parenting, has his or her effects on you and on parenting more broadly not through rules

about it but through mobile, shifting, highly momentary assessments—discretionary *standards* that are nevertheless intrinsic to the design of adoption *law*.

To be sure, state-sponsored regulation of good parenting can operate in culture much as temple-, synagogue-, and church-sponsored normalization of good parenting does. Indeed, there may ultimately be no interesting difference between the cultural effectivities generated when the state, on one hand, and *Rugrats,* on the other, regulate good parenting. That may suggest that the state is not more culturally powerful than other cultural players, but it also suggests that law is capable of intensely intimate effects.

Left legalism has been repeatedly willing to seek these effects. Every time the left seeks to achieve its aims by increasing state "services," every time it seeks to enlist the state in endorsing the personhoods and the values that it thinks deserve recognition and respect, every time it calls upon judges or legislatures to substitute rigid legal rules with flexible discretionary standards it commits itself to normativizing deployments of state power of this kind. To take but one example: the feminist critique of legal rules as insufficiently attentive to circumstance and perspective has led feminists to advocate a shift to standards such as "the reasonable person" or indeed "the reasonable woman." The introduction of these standards should, we think, be seen as a normatively saturated and deeply interpellating legalistic gesture.

Moreover, while left legalism has often been willing to produce normalizations, it has less often been willing to subject them to close scrutiny. It presumes, for example, that cultural preservation for racial minorities merely liberates racially marked subjects to express their racial selves, without exploring how cultural preservation will *produce* racial selves. It presumes that changing the Department of Youth Services' standards of good parenting to include rather than exclude the goodness of same-sex couples as parents will liberate same-sex couples to become parents, setting to one side the question of how it may *induce* them to imagine themselves as couples of a very particular sort and as parents within very particularized parameters of parenthood.

The problem here is not just one of unintended regulatory effects. There is also the problem of intended but unavowed ones. We take an example from our own engagement with a project in which both of us are invested and each of us understands to be deeply connected to her left aspirations:

fostering intimate attachments between adults and between adults and children that can't be found on the nuclear family menu. As part of this project, we have endorsed lesbian and gay male coparent adoption because it would secure the relationships between nonbiological parents and the children in whose conception, gestation, birth, and/or upbringing they have participated. Nor are we alone: the feminist and queer left loves these liberal family law projects because they signify the possibility of a more open texture of kinship, beyond the specific families they are consecrating and in the hope of disabling a certain privilege that otherwise devolves on biological and/or heterosocial parentage.

So left, feminist, queer, and liberal constituencies together have celebrated these reforms as a way for the law to recognize brave, exploratory "families we choose" as they evolve into ever new forms of intimate attachment. But our loose, fluid normativity stiffens when, in the aftermath of a breakup between lesbian coparents who had not secured a second-parent adoption, the biological mother asserts a unique status as parent to deny her legally unprotected lover access to the(ir) child. Let us confess it now: we furiously want those women to be married, or to be tied to one another by a coparent adoption decree, so that they enter the custody struggle as formal equals. Now we are willing to deploy "best interests of the child" rhetoric even though our political rage attaches not to the child's welfare but to the way the biological mother has turned the state against a lesbian for *being* a lesbian, and tightened the epistemological and social grip of an official representation—posited by our feminism to be subordinating—of maternity as biological rather than social. It would seem that we want to interpellate lesbians through new family law structures so that it *doesn't even occur to them* to deny their former partner full parental status.

Acknowledging the rawness and fury of this will to power, and the contradiction between it and our sunny confidence that intimate attachments should evolve under conditions of the maximum deregulation, pries us loose from both. We are startled: suddenly we can ask whether mobility or stability, invention or fixity, liberation or regulation is what we want in our discourses and practices of intimacy. This moment of disorientation can happen—we offer this book as an affirmation that it *should* happen—within a variety of left legalistic projects. Consider what it would do in the context of cultural preservation projects. The aim of these projects seems to be unequivocally desirable when we imagine them as a counter to cultural

extinction or erasure. But once we note the will to power involved in a left project of keeping certain cultures alive, we can also suddenly see them as problematically related to our left commitments to cultural transformability, cosmopolitanism, ethnic hybridity, feminism, anti-racism, and the liberation of children from the exclusive dominion of their families. And suddenly, again, we are disoriented, and again we can seize the moment for a reexamination of our political desires and commitments. Forming a new sense of purposive aims won't be easy; surely the production of racial subjects may be good, bad, or indifferent depending on the normativities and distributive circuits that those subjects will inhabit. Deciding these matters is delicate work, provisional work almost always. But it cannot even be undertaken unless we acknowledge the deep cultural productivity of left legalism.

Left Legalism in a Liberal Political Order

As we've indicated, the range of yearnings and objections that we're designating "left" is relatively, sometimes acutely, inconsistent with that of liberalism. And yet legalism in the United States is largely *liberal* legalism.

Submitting left projects to the terms of liberal legalism translates the former into the terms of the latter, a translation which will necessarily introduce tensions with, and sometimes outright cancellations of, the originating aims that animate left legalism in the first place. When liberal legalism frames the problem of racial stratification as a problem in the register of "rights," for instance, and then frames rights as either "special" (and thus normatively suspect) or "universal" (and thus oblivious to racial particularities), anyone making a race-based justice claim can reap the benefits of universalism only at the cost of paving the way for judicial protection of white people, and can reap the benefits of a particularized focus on the distinctive injury suffered by a racially subordinated group only by conceding that it is special (not universal) and needs protection (not equality).[2]

Or consider affirmative action, a project to which the left has become adamantly committed the more it has been attacked by the right. Surely affirmative action has accumulated effects that are precisely what the left could not have intended when it joined liberals on this path to racial justice. It could not have intended that a mere remedy would take the place, conceptually and politically, of antidiscrimination tout court, nor could it have

intended that all race-based equality jurisprudence would be the target of the same backlash ostensibly aimed only at affirmative action. It could not have intended the startling effect, subjected to critique in these pages by Richard T. Ford, that, once legitimated by the Supreme Court only to the extent that it promoted "diversity," affirmative action as practiced in educational institutions would effectively *require* its beneficiaries to affirm rather than disaffirm, to consolidate rather than mobilize identities produced by racially organized power.

Indeed, the entanglements of left legalism with the liberalism scribed into so many dimensions of legalism can be deeply normalizing. Here we propose that legalism often deploys liberalism as a normativizing, regulatory form of power: when liberalism posits that we are individuals primordially, that human selfhood is given, not constituted, that choosing is the preeminent human deed, it bids to constitute us as individuals and choosers. To the extent that this set of liberal entailments interpellates us in this way, liberalism has its subjections. And to the extent that left legalism engages liberalism, it can be directly responsible for these regulatory effects.

One way of exploring the dangers here is to ask how the act of making justice claims in the language of liberal legalism shapes us as justice-worthy subjects. How, for example, did we become people for whom domestic, economically interdependent, long-term, coupled and monogamous intimacy is *the* paradigm of adult intimacy itself, if not, at least in part, through the centrality guaranteed for marriage by the unique and preeminent place it enjoys in the law governing personal relationships? Given that, what are the interpellations risked by the gay-centrist project of gaining legal recognition for same-sex marriage? Though this effort purports to reflect a natural desire for the institution of marriage, it actually draws upon and endorses the state's deep involvement in shaping our ideas of human intimacy and connection, in guiding our desires, and in persuading us to assume status-like relations with respect to one another.[3] Yet the same-sex marriage project glides along, obdurately oblivious of the productive, regulatory forces that course through state-sanctioned marriage; if it succeeds, the reach of the state into certain intimacies can only deepen and the normative ordering of sexual objects according to their willingness to be so regulated can only intensify. Thus Michael Warner worries that gay marriage achieved in the name of equality will actually regulate sexuality and order

sexual subjects in ways that will dramatically reshape queer political and social life; he predicts that many who have been gathered under that sign will be repatriated to its edges by this move.

This volume features other examples of left-endorsed liberal legalist projects that generate troubling social subjects and subjectivities. Mark Kelman and Gillian Lester argue that the very articulation of the identity "learning disabled" probably owes its genesis to a liberal legalist idea affirmed by the left: the decision to provide education in a particular way to particular people not on the basis of some model of distributive justice, but on a civil rights model. Kelman and Lester ask: Can we imagine a distribution of educational benefits better than the resulting one, in which those with learning disabilities "jump the queue" filled with garden-variety slow learners? And we would add: How deep does the sense of "being learning disabled" run for those bearing this new identity? How liberatory *is* this new personhood? Lauren Berlant asks whether the persistent left aspiration to ensure remedies for injured feelings might not also interpellate us into a sentimental affectivity that is fundamentally reactionary. And Richard Ford warns that rights to cultural preservation may end up strengthening the hand of the most conservative and constraining elements in the cultural life of subordinated groups. If cultural preservation projects have this tendency (a tendency that would seem to reside in the very grammar of "preservation"), should the left antiracist enterprise embrace them uncritically?

Each of these examples tracks effects of legalism that, though imbricated in liberalism and mediated by the liberal state, cannot be captured by liberal categories or an orthodox left analytics of power. And this is no mere disability: liberalism in particular is frequently then heard to announce the nonexistence of what it cannot see. Recall that liberalism credits itself with crisp institutional limits and formal aridity, while leaking into social and cultural life at every orifice. When liberal legalism frames rights as empty, formal, procedurally rather than substantively bestowed and bestowing—when it insists that rights merely protect the potential choices of the autonomous selves we are and always have been—it nevertheless produces and orders subjectivities while according these grave rearrangements of social life the importance, on a scale of one to ten, of approximately zero.

Left legalistic projects, entwined as they are with the regulatory tugs of liberalism and legalism, are going to produce unintended consequences. We want a critical theoretical engagement with left legalism in part because we want to apprehend these side effects. To see and to evaluate them, we need

to step back from our legalism, to open up the space for *politics* that can put legalism under a viewfinder, and to examine both politics and legalism with the attitude of *critique*.

Legalism's Political Outside

Is there such a thing as nonlegalistic political practice, a politics even a few degrees outside legalism, especially if legalism is not defined simply in reference to the state and law, but to less institutionally codified practices and effects? So saturated by legalism is contemporary political life that it is often difficult to imagine alternative ways of deliberating about and pursuing justice. Yet the legal realist point that law is politics by other means should not commit us to its converse: that all endeavors to shape and order collective life are legalistic.

Legalism not only carries a politics (and liberal legalism carries a very specific politics) but also incessantly translates wide-ranging political questions into more narrowly framed legal questions. Thus politics conceived and practiced legalistically bears a certain hostility to discursively open-ended, multigenre, and polyvocal political conversations about how we should live, what we should value and what we should prohibit, and what is possible in collective life. The preemptive conversion of political questions into legal questions can displace open-ended discursive contestation: adversarial and yes/no structures can quash exploration; expert and specialized languages can preclude democratic participation; a pretense that deontological grounds can and must always be found masks the historical embeddedness of many political questions; the covertness of norms and political power within legal spaces repeatedly divests political questions of their most crucial concerns. When the available range of legal remedies preempts exploration of the deep constitutive causes of an injury (think hate speech and the racial order that makes it sting), when the question of which rights pertain overrides attention to what occasions the urgently felt need for the right (think abortion and the way reproductive work is organized, valued and [un]remunerated in male-dominant orders), we sacrifice our chance to be deliberative, inventive political beings who create our collective life form. Legalism that draws its parameters of justice from liberalism imposes its own standards of fairness when we might need a public argument about what constitutes fairness; its formulas for equality when we may need to reconsider all the powers that must be negotiated in

the making of an egalitarian order; its definitions of liberty at the price of an exploratory argument about the constituent elements of freedom.

As we incessantly refer our political life to the law, we not only sacrifice opportunities to take our inherited political condition into our own hands, we sacrifice as well the chance to address at a more fundamental or at least far-reaching level various troubling conditions which appear to require redress. Consider: What if some of the disturbing aspects of contemporary sex harassment doctrine, in which redress of gender subordination has been increasingly usurped by greater sexual regulation, can be traced to a certain failure on the part of second-wave feminism actually to effect a significant transformation in the social construction of women and men, a project that was once deeply constitutive of that political and cultural enterprise? And what if the tendency toward ever more intensive legal regulation of gender and sexuality is a compensatory response to that failure, a response that effectively gives up on the project of transforming gender in favor of protecting a historically subordinated group from some of the most severe effects of that subordination, even as it tacitly defines women through those effects? If feminism once aimed to make women the sexual equals of men, this aim entails the complex social, psychological, and political project of making gender differently, and not simply the legal one of protecting (historically and culturally produced) vulnerable women from (historically and culturally produced) rapacious men. Indeed, the legal project, in its instantiation of sexuality as subordinating, especially of women, may be substantially at odds with the political project of fashioning women as men's substantive equals, that is, as people who cannot be "reduced to their gender" through an unwanted sexualizing gesture or word.

This is not to argue that there is some pure left political space independent of legalism, nor that left political projects implicated in legalism inevitably sacrifice their aims and values. Rather, it is to assert the possibility of political life and political projects not fully saturated by legalistic constraints and aims. It is to recover radically democratic political aims from legalism's grip in order to cultivate collective political and cultural deliberation about governing values and practices.

We remember a mode of activism among antipornography feminists that was more political than legalistic. Women walked into porn shops and trashed the pornography, shamed the customers, and mock-shamed themselves. They also led tours through the porn districts, offering feminist interpretations of pornographic representations and marketing of women,

interpretations which others could and sometimes did argue with. The antiporn activists worked in the name of feminism, and though all feminists did not condone the stance toward porn and the depiction of women that this activism represented, our dissension itself was not monolithic or fully codified. This mode of antiporn activism thus provoked argument and reflection among and across feminists and nonfeminists alike.

This political mode presupposed an interlocutory relationship between those who valued pornography and those who condemned it, indeed between porn and its consumers or audiences. In that interlocutory relationship, many women encountered and studied pornography for the first time. As this occurred, women found themselves having all kinds of responses to porn that could not simply be classified as for or against: some were distressed by it but grasped their distress as an index of the sexual shame their gender construction entailed; others were drawn to it and flatly delighted to be let into a sexual order previously designated for men; others were more ambivalent, liking the idea of porn or liking bits of it but troubled or turned off by the misogynistic (or racist or colonial) strains in it (some were confusingly turned on by these very same strains); still others were inspired to try to make good porn for women. What was the political cache of this rich array of responses? It produced a wave of new feminist work on sexuality: new questions, new theories, new domains of research, new practices, new arguments, new positions in every sense of the word. Hence followed as well new possibilities of alliances with gay men as well as new forms of alliance across a presumed heterosexual-homosexual divide, the possibility of queer thought, and the invention of new sexual subjectivities and identities through a proliferation of cultural discourses of and cultural struggles over sexuality. "Feminism" so constituted was a field of widely divergent values, beliefs, and practices, all of which had to contest with one another over the question of "the good" for women.

Compare this marvelously fertile political contestation and intellectual exploration with the social and ideological concomitants of antipornography activists' turn to the state. Antipornography activism took a legalistic turn with the invention of a tort claim for damages arising from the injury to women's sexual status supposedly inflicted by pornography (rights legalism) and the deployment of zoning ordinances to shut down the public space devoted to sex commerce (governance legalism). Wherever feminists took this turn, the politics of sexuality in feminism and feminist communities, and the form of feminist internal critique, changed dramatically.

Defining porn narrowly (and badly) as "the graphic sexual subordination of women," the legalists promulgated local ordinances establishing porn as a violation of women's civil rights. This move brought into play local governments and judges as authoritative decision makers. And the arguments that could then be addressed to those decision makers were as flat and impoverished as the arguments characteristic of the political struggle were multidimensional and rich: to participate in the legalistic moment, feminists had to declare themselves for or against porn, and even for or against sex, as they took a position on the ordinances.[4] The debate about porn became framed by the terms of free speech, censorship, and privacy rights. In short, it became consolidated by a narrow rights framework: Should your right not to be violated/offended trump my right to consume what I want? Does Larry Flynt's free speech silence Catharine MacKinnon's? In this consolidation, all the complexities of sexual representation, of the imbrication of sexuality and gender, of the relation of fantasy to reality, and above all, of the extraordinary and detailed range in the sexual construction and desires of women and men were eclipsed. The adversarial structure of rights legalism as deployed by all the parties meant that the stakes were now "winner takes all." In that context neither side could risk nuance, internal dissension, or differentiation of positions along a continuum. Hence the debates produced a new form of internal silencing of each side's constituents; solidarity and a united front became mandatory. Above all, neither side could afford to break with liberalism (a notoriously impoverished discourse on the subject of sexuality) in its arguments: the terms of the new debate were set not only by established definitions of equality, civil rights, and free speech, but by flat and monolithic conceptions of gender, women, sexuality, and representation. And this debate, dessicated because it adopted rather than contested the terms of liberal legalism, was the form in which the feminist question about pornography hit the mainstream.

To be sure, the porn wars in their political mode had their brutal and punitive dimensions; open-ended political contestation in unbounded spaces and unregulated by settled rules of engagement can be an arena for raw aggressions and un-self-knowing posturing of the most grandiose sort. Thus, in the political struggle, women accused each other of false consciousness, mocked each other's sexual desires, set themselves up as sexually righteous, and denounced each other viciously for their positions in

these battles. But the political mode had several virtues that the legalistic mode distinctively lacked: it was open-ended in the questioning and conversations it incited; it was accessible to a wide variety of participants (and was probably the most interracial, cross-class, and intersexual political moment second-wave feminism had); and it occurred in a range of different idioms, from analytic position papers to poetry to biography. Perhaps most important, because the arguments were about sex, gender, and representation rather than free speech, censorship, and civil rights, the political mode incited a substantial body of rich new political, cultural, and psychological inquiry and political understandings that were both valuable in themselves and gave new life to the social movements that bred them.

If we are right about the legalistic usurpation of many left political projects, then what we are calling left legalism has sometimes turned left projects against themselves. Yet left legalistic discourse has at least three arguments that admit that legalism may be eccentric to left aims but that deny its capacity to translate and usurp them. We hear, first, that the rights sought in left legalistic projects are mere legal placeholders that will be occupied, if at all, only by people who want to occupy them; thus, the argument concludes, no broadly sweeping rearrangement of the social field or of movement aims is intended or risked. This is the gravamen of MacKinnon's claim that her private right of action against pornography will merely vindicate those women who are actually injured by pornography; it is the rationale for making hate speech a "mere" tort or a "mere" basis for sentence enhancement rather than a crime; it is the rationale for procuring a right to marriage that is presumed to have no effect on those who do not wish to marry. But a private right of action against pornography would deter its production and distribution; a tort claim for hate speech would radically alter the utterability of some parts of the racial vocabulary; and an extension of marriage rights to new couple forms would reconfigure, perhaps strengthen, the normalizing power of marriage.

Second, we hear that left legalistic moves are merely incremental, that they merely seek to take down the beasts of sexism and racism with BBs because more effective weaponry is currently inaccessible. For example, sexual harassment is portrayed by some feminists as a small fragment of a seamless wrong, "women's sexual subordination," so that making it actionable addresses a paradigmatic piece of the totality of women's subordination, a classic incrementalizing move. But such a formulation of the

feminist endorsement of sex harassment regulation ignores a profound disgreement among feminists about what subordinates women and about whether protecting women from sex protects them from harm or inflicts it. Here and, we think, elsewhere, a left legalistic project has not deferred or incrementalized the left's engagement with racism, sexism, and heterosexism: but has transformed it into something else, infused left politics with its own discursive forms, and substituted left with legalistic debate.

Third, left legalism often borrows from liberalism certain representations of law that purport to empty it of substantive elements that impede left aims. In these representations, law is depicted as a mere instrument rather than a politics, as a tool deployed for goals external to it. We are thus asked to understand law to have no content of its own and also to be independent of the extralegal discourses that endlessly supply and supplement its content. To review but one recent example: For a time, pro-gay litigators argued that homosexuality was an "immutable characteristic" and thus more deserving of judicial solicitude than, say, age; they even put "gay gene" geneticists on the stand to prove their point. Challenged by bisexual, gender-transitive, and queer constituencies to account for this intervention in a hotly contested politics of knowledge about sexuality, they invariably replied that the immutability argument would have effects only on the judges to whom it was pitched, not elsewhere, and that if it helped a gay plaintiff win a favorable ruling it could then fade without a trace from the culture it had made more egalitarian. But the argument from immutability, particularly in its "gay gene" form, was far from empty in this way; instead, it helped to produce the very science on which it then relied—a dynamic that made it richly productive and substantive. This episode counsels that both rights and governance legalism should be hypothesized as rife with normative categories, indeed as powerfully productive discourses that draw their normativity from widely dispersed sites in the culture, economy, and polity. We should not be surprised, then, by the phenomenon in which you go to the state with your sexual injury and come out as a Woman, or in which you go to the state for legitimation of your gay relationship and come out as an embodiment of the idea that sexuality is subject to a stable set of regulatory norms, or in which you go to the state with your fury about a racial epithet and come out as a member of a permanently hateable racial minority. Once again, this apology for left legalism fails to account for the *capture* and transformation of its political

aims. It is this capture and transformation of a left critical project engaged with legalism that calls for the scrutinizing practice called critique.

Critique

The most common complaint from liberal and left activists about left critique is that it is a "negative" practice that fails to offer clear avenues for progressive change. This complaint comes with diverse accent marks. Critique is variously charged with being academic, impractical, merely critical, unattuned to the political exigencies at hand, intellectually indulgent, easier than fixing things or saying what is to be done—in short, either ultraleftist or ultratheoretical but in either case without purchase on or in something called the Real World. Critique is thus characterized as an abandonment of politics, insofar as it is an abandonment of the terms and constraints of real political life, a flight to an elsewhere, politically and theoretically.

The fact that the nineteenth-century tradition of critique is beset by such an impoverished understanding and has fallen into such disrepute signifies more than can be said here about the condition of contemporary intellectual life, political life, and their relation. Critique, as it emerges in the German philosophical tradition starting with Kant and continuing through Hegel, Marx, and the Frankfurt School, represents a genre of theoretical work that neither presumes a specific political outcome nor forsakes the political world for the purely intellectual one. Critique derives from the ancient Greek *crisis,* a term that connotes "the art and tools of making distinctions, deciding, and judging."[5] Interestingly for the purposes of this book, for the ancient Athenians, *crisis* was a jurisprudential term and was especially important in expressing the function of the Athenian court in judging: "separating, distinguishing, discerning, and so with deciding what (or who) properly fell under the categories articulated by the indictment. . . . It therefore had little if anything to do with criticism in the general sense of fault-finding and censure."[6] Heidegger maintains proximity to the Greek meaning in his own formulation of critique: "Because critique is a separation and lifting out of the special, the uncommon, and at the same time, decisive, therefore, and only as a consequence, it is also a rejection of the commonplace and unsuitable."[7]

Critique in Enlightenment hands is inflected with the conviction that only that which can withstand the press of reason deserves intellectual or

political fealty. Thus, for Kant and his successors, critique expressed the recognition that no formulation—political or intellectual, empirical or theoretical, institutional or philosophical—is unpremised, and that only a critical reckoning with premises will yield an understanding of the terms by which we live. There are, of course, many varieties of critique that emerge in the eighteenth and nineteenth centuries—for example, those that call themselves immanent and presume only to be working the elements of a particular formulation against itself (the tradition of Hegelian-Marxist critique from which both early Frankfurt School theory and Derridean deconstruction are derived) and those that work more expressly against the grain of a text in order to bring forth the unspoken or suppressed constituents of its existence. Foucault is a contemporary heir of this latter strain of the tradition of critique, a strain that might be seen as drawing more from Nietzsche's formulation of genealogy than from the philosophic exercises of German idealism. There are also a variety of objects of critique; in addition to the philosophical critique that inaugurates the modern tradition, there is ideology critique, culture critique, critique of political economy, and more.

Although critique has at times presumed that a truth could be arrived at with regard to the constitutive nature and meaning of the premises of a given work or doctrine, it does not inevitably entail this particular Enlightenment conceit. Critique is not weakened by admitting its investments—consider Kant in *The Critique of Pure Reason,* or Marx in his *Critique of Hegel's Philosophy of Right* or "On the Jewish Question"—because the aim of critique is to reveal subterranean structures or aspects of a particular discourse, not necessarily to reveal the truth of or about that discourse. What 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. In the insistence on the availability of all human productions to critique, that is, to the possibility of being rethought through an examination of constitutive premises, the work of critique is potentially without boundary or end.

So what is the value of critique, and why should the left in particular cherish it both intellectually and politically? Critique offers possibilities of analyzing existing discourses of power to understand how subjects are fabricated or positioned by them, what powers they secure (and disguise or veil), what assumptions they naturalize, what privileges they fix, what norms they mobilize, and what or whom these norms exclude. Critique is

thus a practice that allows us to scrutinize the form, content, and possible reworking of our apparent political choices; we no longer have to take them as givens. Critique focuses on the workings of ideology and power in the production of existing political and legal possibilities. It facilitates discernment of how the very problem we want to solve is itself produced, and thus may help us avoid entrenching or reproducing the problem in our solutions. It aims to distinguish between symptoms and sources, as well as between effects of power and origins of power. It invites us to analyze our most amorphous and inchoate discontents and worries, indeed to let these discontents and worries themselves spirit the critique. And it invites us to dissect our most established maxims and shibboleths, not only for scholastic purposes, but also for the deeply political ones of renewing perspective and opening new possibility.

Let us admit forthrightly, however, that critique does not guarantee political outcomes, let alone political resolutions. Yet, rather than apologize for this aspect of critique, why not affirm it? For part of what it means to dissect the discursive practices that organize our lives is to embark on an inquiry whose outcome is unknown, and the process of which will be radically disorienting at times. To probe for its constituent elements discontent about a particular political aim or strategy is not to know immediately what might reform or replace that aim. Indeed, one of our worries about legalism pertains to its impulse to call the question too peremptorily. Marx's early critiques of left Hegelianism worked closely with the texts and political formulations that he found dissatisfying, but they were not expressly organized by a clear alternative. It was *through* the process of subjecting political and philosophical idealism to critique that Marx found his way to dialectical materialism and political economy, but a careful reading of this early work makes clear that Marx did not know *in advance* where his critiques would take him, and that premature closure on the question would have stymied both the critique and the productive disorientation it achieved for him about left Hegelianism. Surely we should not disavow a left critique of the tensions and contradictions in affirmative action simply because that critique does not deliver in advance a blueprint or set of strategies for achieving racial, gender, or class justice in America.

Not knowing what a critique will yield is not the same as suspending all political values while engaged in critique. It is possible to care passionately about offering richer educational opportunities to those historically excluded from them while subjecting to ruthless critique the institutional and

discursive practices that have thus far organized that aim. It is possible to sustain a deep commitment to the vision of equality for sexual minorities in a heterosexual culture while subjecting to critique a range of techniques—from the campaign for gay marriage to the constitution of queers as genetically predetermined—advanced in the name of such equality. And even if critique reveals problematics that shake those commitments—for instance, by revealing maldistributions in education that lack the historical pedigree of racially marked ones but that strike us as urgently unjust, or by revealing that the idea of "sexual minorities" is at once so incoherent and so interpellative that it may belong under the heading "the problem" rather than the heading "the solution"—the resulting disorientation remains deeply *political*. And so, although political commitments may constitute both the incitement to critique and the sustaining impulse of it, these commitments themselves will almost inevitably change their shape in the course of its undertaking. Critique is worth nothing if it does not bring the very terms of such commitments under scrutiny, if it does not transform its content and the discourse in which it is advanced. In this volume, Judith Butler argues for just such a transformation when she warns that to remain within the existing terms of the gay kinship debates is to accept "an epistemological field structured by a fundamental loss, one that we can no longer name enough even to grieve."

So critique is risky. It can be a disruptive, disorienting, and at times destructive enterprise of knowledge. It can be vertiginous knowledge, knowledge that produces bouts of political inarticulateness and uncertainty, knowledge that bears no immediate policy outcomes or table of tactics. And it can include on its casualty list a number of losses—discarded ways of thinking and operating—with no clear replacements. But critique is risky in another sense as well, what might be called an affirmative sense. For critique hazards the opening of new modalities of thought and political possibility, and potentially affords as well the possibility of enormous pleasure—political, intellectual, and ethical.

One of the preeminent pleasures of critique is its relief effect. Rather than suppressing or banishing our political anxieties or discontents, critique invites us to take them seriously and attend to them. Rather than wait out mutely a political campaign to which we feel we in some way ought to belong but whose terms are faintly or overtly untenable to us, critique allows us a form of engagement. Critique, in short, gives us something to do other than go home when the current aims and strategies of a constituency

to which we feel some degree of belonging have choked us into silence. If, as Janet Halley argues, sex harassment law, which we as feminists once heralded as offering a crucial name and source of redress to one site of women's subordination, now appears to be on a doctrinal path of heteronormativity and sexual moralism, critique enables interlocution with sex harassment regulation. If the recently passed federal Defense of Marriage Act and state versions such as the Knight Initiative in California, which prohibits recognition of out-of-state gay marriages, strikes some feminists, leftists, and queers as having been incited by a wrongheaded ambition on the part of gays to obtain access to an institution subject to critique from many angles, critique affords us something to do besides voting for "neither of the above." Critique, in other words, offers relief from political double binds that may paralyze both action and speech, and this by itself can be an enormous source of pleasure. Indeed, there can be a kind of euphoria in being released to think critically about something that one experiences as constraining, limited, or gagging. Rather than simply live the double binds, we are enabled through critique to articulate them and, then, to begin to rework them.

But there is more than relief at stake in the relationship of critique to double binds. For even as critique brings out the tensions, problems, or binds in a particular political formation, it also has the capacity to reconnect us to our aims and hopes, as it helps us to disengage from the twisted version of those aims and hopes in particular political or legal formations. If we care deeply about the struggle for racial justice in the United States, but have grown wary of the exhaustive identification of that struggle with uninterrogated and tension-ridden affirmative action policies under siege, critique allows us to recover the kindling spirit of what has become a cynical or disingenuous relationship to those policies—the spirit that attached itself to racial justice in the first place. Here, we ask our fellow teachers: How many times have you grimaced with irony when your passionate desire to bring racial diversity to your institution got you assigned to make recruitment phone calls to the ten African American students admitted by your program (and by the counterparts to your program at every institution yours competes with)? How may times have you read an admissions file and wondered: Where did this student learn the diversity dance ("When my grandmother came to America, she never dreamed that I would be writing this essay"), and how is it hiding her real trajectory? How many times have you pondered whether the students of color you are ad-

mitting under the rubric of affirmative action are the ones most unfairly deprived of educational opportunity till now, or the ones whose lives would be most improved if they had a creamier slice of the higher-education pie? How many times have you watched an implicit requirement that your program admit the "right" number of blacks with respect to Latinos with respect to Native Americans displace the questions: Which of these students can benefit most from being here? Which have intellectual appetites that will most readily gain energy from the particular education we offer? How did this chilly, technocratic exercise in achieving "mix" become the object of our protracted labor to abrade the whiteness of our institutions and repair the injustice of race-based exclusions? And how many times, while reading with pain the work of a student of color who has radically disappointed your expectations, have you asked yourself: Sure, the stigma of being an "affirmative action baby" has been deployed by conservatives to delegitimate affirmative action, but what if we stopped denouncing the stigma as wholly illusory and dealt forthrightly with the demoralization—and alienated performance—it can produce?

Critique begins by allowing such torments, worries, and questions—those surfacing from practice, from engagement, from experience, as well as from theoretical quandaries—to shape its pursuit. Katherine Franke's anxiety about the overreach of sexuality as an analytical category of power and Wendy Brown's distress about the regulatory dimensions of many feminist rights claims are examples of just such beginnings. The gesture can relieve these worries of their shadowy, traitorous, and often suppressed status as it crafts them into a project that insists on understanding by precisely what paths, mechanisms, and contingencies we have come to a particular troubling pass. It embodies a will to knowledge, *it really wants to 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. And in this work, 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. Thus Brown details the contradictions that seemingly beset feminist identity-based rights claiming in order to argue that they are not double binds that should constrain feminist justice seeking, but rather paradoxes that can extend its diagnostic and utopian reach if we read and navigate them carefully. Drucilla Cornell offers a ruthless critique of liberal legalist bases for abortion access in order to arrive at

politically more satisfying if in some ways also riskier arguments for abortion rights. As Halley and Ford seek to peel away cultural regulatory projects imported into the antidiscrimination regime when we made hostile environment, sexual harassment, and discrimination against "racial cultures" actionable, they aim in part to return priority to sex and race antidiscrimination. And David Kennedy shows how international law systematically captures renewal efforts so that he can illuminate the political stakes of a breakaway effort that engaged scholars and practitioners in agonized and ecstatic social practices of critique and professional engagement.

Critique offers another source of pleasure related to this one. 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. Far from being the isolated reproach of a malcontent, critique can conjure intellectual community where there was none, where the hegemonic terms of political discourse only set one for or against a particular issue or campaign but did not permit of alternatives. The relief effect, in other words, can be contagious, releasing from political and intellectual constraints not only the authors of critique but an audience interpellated by it. To consider this in terms of the concrete project of this book: if part of the reason the left feels so small and beleaguered today pertains to the fact that legalism has nearly saturated the entire political culture, thus making left projects nearly indistinguishable from more mainstream liberal ones, then critique of the sort this book features enables the possibility of discerning and reclaiming left projects within liberalism, thereby connecting with one another those who have a common concern with certain kinds of political problems, constraints, and ideals. In this light, critique bids to operate as the basis of the resuscitation of left communities; it can be formative and potentially connective, an image which stands in sharp contrast to the now conventional view of critique as either destructive or irrelevant.

This discovery of others who share one's worries and discontents with existing political practices or reform strategies, this opening of conversation outside the lines of existing practices also sketches a sensibility that itself might be worth cultivating both politically and intellectually. This is a sensibility extralegal in character, one that presses against limits in part to understand their binding force, one that is irreverent toward identity categories and other governing norms, and above all, one that is unattached to

the intellectual suffering that attends intellectual isolation. It wants to recover the pleasure of connection in intellectual and political work; indeed, it casts pleasure as that which makes such work both rich and compelling.

Of course, there are those who would render this very valuation of pleasure an objection to the work we are attempting to cultivate and promulgate, who would treat attention to suffering rather than pleasure as an index of the value of all intellectual and political work. There are those who not only cast progressive politics as necessarily bound to the relief of suffering but regard any pleasure taken in intellectual or political work with suspicion, as a sign that the work is not serious in its range or reach, that it is not committed to the downtrodden, that it does not depict the world from their point of view. In this hydraulic model of suffering and pleasure in politics, in which the presence of each signifies the absence of the other, pleasure is presumed to be indifferent to or to erase suffering. The sign of true political commitment is unstinting, self-effacing devotion to a cause of misery, and where there is misery, no pleasure can be had.

But what if pleasure is itself a crucial source of political motivation? The desire and energy to make a better world, one in which one really wants to live, cannot be easily generated from an ethos that casts pleasure as a luxury. Moreover, what if pleasure and the relief of suffering are not opposites? What if they can be intermixed in complex and productive ways? And what if the relief of suffering is not the sole basis of worthy political work? Some emancipatory and egalitarian visions may require more of us than the present demands. Some might even induce a certain suffering, for example, more intense involvement in the making of collective life, more responsibility for others, more limitations on wealth or in the use of the earth's resources. Similarly, some of these projects may have little to do with what ordinarily qualifies as suffering but may pertain instead to challenging regimes of domination in which palpable suffering is largely imperceptible. Let us suppose for a moment that most people actually enjoy life under capitalism, that most women do not experience the unequal sexual division of labor as a source of pain, that most slaves were happy most of the time: Would that disable a left critique of capitalist regimes for the domination, alienation, inequality, and wasteful production that they entail? Would that preclude feminists from seeking to restructure a gendered political economy? Would that foreclose systematic critiques of sheer domination?

We wish to challenge yet another constraint on critique issued by the suffer-mongerers. In the insistence that all political intellectual work must be directly addressed to suffering and its potential redress, there is a radical foreclosure of the very intellectual range and reach that we have been arguing for as that which is opened and pursued by critique. An intrepid inquiry into the discourses that organize suffering and political life more generally, or the genealogical, deconstructive, historical, or discourse analytical exercises that allow us to rethink the constitutive terms of particular political problems—this kind of work is often ruled out by presuppositions about what constitutes political work, what suffering is, and what its mandates are. So it is not simply that we wish to demote suffering from its pride of place as an organizing value for political intellectual work, not simply that we refuse the antinomy between suffering and pleasure, not simply that we want to recuperate the value and practice of pleasure in intellectual and political life, not simply that we want political thinking to be unrestricted by moralistic mandates unselfconscious about their own origins and energies. The cultivation of critique also upends the semiotic and political fixity and stability of suffering itself.

If it seems we are simultaneously arguing *for* the politically enriching dimensions of critique and *against* the direct subordination of critique to politics—against a construction of the intellectual as a political service worker—then we have achieved precisely the tension we want. Critique potentially reinvigorates politics by describing problems and constraints anew, by attending to what is hidden, disavowed, or implicit, and by discerning or inventing new possibilities within it. But critique can do this only to the extent that it is unbridled from the terms of the political problem that animate it. Similarly, while political life requires responses according to its own contingencies and temporalities, critique cannot bear fruit if it is unilaterally submitted to that urgency, if seamless reconciliation of political and intellectual life is demanded, if we bestow the power of foreclosure on the questions Where is all this going? What are the political implications? What is to be done?[8] Not only will the intellectual reach of critique be dramatically foreshortened by such demands, but both its political inventiveness and the richness of intellectual pleasure that it offers will be curtailed as well. In short, we want to affirm and articulate the important relation between critique and political work without identifying or collapsing the two projects.

The Essays

The work gathered here indicates that left internal critique is alive and well, if dispersed and perhaps undervalued. It also suggests that current left critiques of left legalism are both wide-ranging and felicitously free of a univocal line or approach. Duncan Kennedy offers a relentless exposé of rights as double-bound by the same contradictions that plague adjudication; he is sustained in this destructive work by a vision of a vital left undertaking that resists rather than acquiesces in these traps. Compare with this Drucilla Cornell's effort to wrestle from conventional rights discourse a new set of possibilities for women's equality, her effort to simultaneously feature subjectivity, semiotic indeterminacy, linguistic power, and individual experience in a discourse that, Duncan Kennedy might say, *must* elide these things. Wendy Brown and David Kennedy are cartographers: both map the discursive forms that drive the articulable in two vastly different legal domains (identity-bound rights for Brown, international law for Kennedy). But Brown's argument that paradox is the inherent condition of left-oriented rights work contrasts with David Kennedy's opening dare—let's think "*against* the box"—and his concluding promise to dance across a field of double binds if someone will just start the music.

Or consider the shared commitment of Mark Kelman and Gillian Lester on one hand and Lauren Berlant on the other to revive rights critique. Both projects expose to withering criticism recent productions of identity founded on injury (Kelman and Lester the idea that "the learning disabled" are "discriminated against"; Berlant the personhood defined by trauma). But these essays diverge acutely in the academic locales they inhabit, the disciplinarity they make use of, and in the degree of normativity they avow in their own projects: Berlant is most concerned to criticize the normativity at work in legal discourses of injury, while Kelman and Lester regard norms as inescapable in determining school expenditures for different kinds of learners. Richard T. Ford and Katherine Franke both explore how certain categories intended to classify and represent a subordination—in the one case "racial culture," in the other "sexuality"—actually serve as what Foucault called "dense transfer points for power." Thus, although racial culture and sexuality may depict a congealed, hierarchical subordination, they may obscure other and more mobile relations of power coursing through them. Ford and Franke both examine how these reifications gain ominous force when installed in legalism. Yet their ends vary as much as

their objects of study: Franke returns to a legalistic project of affirming a reform in international human rights, and Ford's aim is to invoke a self-critical attitude in critical race theory and, with it, a skepticism about current reform projects. Now compare Michael Warner and Janet Halley. Warner's critique of the gay-centrist arguments for same-sex marriage and Halley's critique of sex harassment regulation emerge from very similar engagements with queer thought: both chart the dangers of assimilating queers into legal regimes saturated with heterosexual and conventionally gendered norms; both seek to minimize legal regimes that threaten mobile sexualities with fixity. But whereas Warner grounds his critique in a strong queer normativity that has propositional content and an authoritative origin in Stonewall sexual liberation, Halley attempts to launch hers from a critique of the very practice of knowing sexuality and its normativities.

Finally, many of the essays collected here reflect on the social practices of left legalism and on the affiliative life of critique. Warner sheds his academic robes to denounce the political and intellectual project of gay centrists seeking same-sex marriage—a direct engagement in a current political question and an explicit effort both to invoke a certain gay public and to persuade it to heed certain gay norms. Butler, engaging the same political question, is also concerned that queer politics not regulate affiliative desires. But Butler seeks to suture a cold critical assessment of the state-centered gay marriage project with a commitment to recognizing the yearnings for visibility, intelligibility, and legitimacy that give rise to this project. Duncan Kennedy delicately introduces the idea that a "loss of faith in rights" is a fatality to which critique has exposed him, one which cannot be undone any more than a loss of faith in God can be undone, and one which raises a series of problems—problems which should be named, not hidden, he implies—in his relations with left allies who have not, or who refuse to, undergo a similar critical turn. David Kennedy situates in a critical sociology of the field of international law the comico-tragical story of a left intellectual collectivity, the NAIL (New Approaches to International Law), a story full of celebratory energy and intense mourning, which he tells "to make known the dark side of the box."

Certainly these are not easy or easily met bids for new affiliations and affinities. Nor do they converge perfectly with one another. We propose that these diverse demands for difficulty do not fragment what remains of the left; instead, they can reawaken our desire to dodge the constraining orthodoxies often locked into left thinking. There is no new school to be

formed here, 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. There is neither a demand that there must be a solution for every critique advanced, nor a conceit that solutions are mere practical things having no place in scholarly work. What unites these projects is 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.

Notes

1. Lama Abu-Odeh, "Post-Colonial Feminism and the Veil: Considering the Differences," *New England Law Review* 26 (1992): 1527.

2. See Karen Engle, "What's So Special about Special Rights?" *Denver University Law Review* 75 (1998):1265, for an excellent discussion of this double bind in equality discourse.

3. We use "status" here in the classic sense, as "a legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned." *Black's Law Dictionary,* 5th ed. (St. Paul, MN: West Publishing, 1979). Think king, serf, felon, wife.

4. Catharine A. MacKinnon often challenged audiences: If you are for women, you are against pornography. The analysis behind this challenge appears in her book *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987): "Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as whom they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way. . . . The feminist critique of pornography . . . proceeds from women's point of view, meaning the standpoint of the subordination of women to men" (197). "Pornography turns a woman into a thing to be acquired and used" (199). "In a feminist perspective, pornography is the essence of a sexist social order, its quintessential social act" (204).

5. Tim Walters, *Critique* (Ph.D. diss., University of California, Berkeley, in progress).

6. Ibid.

7. Martin Heidegger, *What Is a Thing?* trans. W. B. Barton Jr. and Vera Deutsch (Chicago: H. Regenery, 1967): 119–20.

8. There is a moment in Plato's *Crito,* after Socrates has been sentenced to death but before he has drunk the hemlock, in which a group of Socrates' friends visit him in prison with an escape plan. To decide whether to go with them, Socrates insists on thinking through both his obligation to Athens and especially to its laws (which he would be breaking if he escaped) and the nature of death (which he would be deferring if he escaped). As Socrates begins to frame the importance of deliberating about the rights and

wrongs of escaping, Crito responds impatiently: "I agree with what you say, Socrates; but I wish you would consider what we ought to *do*" (48d; emphasis added). The implication is that the question of what action to take is so urgent that the basis for the action cannot be examined. The implication is also that thinking, questioning, and theorizing are orders of activity different from action, and without bearing on it. Crito's attitude, supplemented by a certain moralism, has gained an ascendency in contemporary American political life, where too often it precludes the deep questioning that Socrates stubbornly insisted on.