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Leslie Green

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What’s Left of Critique?

Wendy Brown and Janet Halley, eds., Left Legalism / Left Critique. Durham, NC: Duke University Press, 2002. Pp. vii, 448. $64.95 (cloth); $22.95 (paper).

Leslie Green

Wendy Brown and Janet Halley think that “the left’s current absorption with legal strategies means that liberal legalism 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.” As an antidote, they have assembled eleven, mostly reprinted, essays that range widely but have overlapping worries about

* Professor, Osgoode Hall Law School and Department of Philosophy, York University, Toronto; and Visiting Professor, School of Law, University of Texas at Austin.


2. By Richard Ford, Janet Halley, Lauren Berlant, Mark Kelman and Gillian Lester, Duncan
legal rights, identity politics, and the prospects for political argument. They express no similar doubts about the various postmodernisms that inspire most of them.

Brown says, "[R]ights secure our standing as individuals even as they obscure the treacherous ways that standing is achieved and regulated." For one thing, rights have costs for others, as illustrated in a fine piece by Mark Kelman and Gillian Lester. They ask why students with learning disabilities should get more resources than other students who do poorly through no fault of their own. "Left multiculturalism," they think, wrongly pushes their claims to the front of the queue by representing them as rights to cultural difference. Rights may also have costs for the rights-holder. Should gay people seek the right to marry? Michael Warner sketches some obvious risks: for example, same-sex marriage could demean the gay singletons and polygamists who choose to remain outside it. Puzzlingly, he also thinks this concern is "almost unheard." And Judith Butler echoes, the "intensification of normalization is not widely recognized as a problem in the mainstream lesbian and gay movement." In fact, almost every story in the gay press about marriage worries, "Will it make us too straight?" Indeed, just about the only thing that the mainstream lesbian and gay movement fears in the problematic institution of marriage is the "intensification of normalization." And thus the debate is always about whether one can have equality while remaining outside it, through private agreements or civil unions. The alternative—equality by leveling down and abolishing civil marriage entirely—is what is unheard and untested in theory, let alone in practice.

Several contributors explore the risks of identity and cultural politics. Identities can constrain. That small truth provokes large exaggerations. Richard T. Ford thinks that "the image of minority cultures and identities as the helpless victims of thuggery and genocide by the mainstream" is "overshadowed in importance by its less overt but more oppressive photo negative, the production and compelled performance of difference." Now, even to moot that the genocide of indigenous peoples is overshadowed by

Kennedy, Judith Butler, Michael Warner, Katherine Franke, Drucilla Cornell, David Kennedy, and Wendy Brown.

3. Wendy Brown, Suffering the Paradoxes of Rights, in LEFT LEGALISM / LEFT CRITIQUE, supra note 1, at 420, 430.


the way some of their descendents feel compelled to wear their hair in braids would be, well, obscene. But Ford is probably not thinking of Native Americans—or Kurds, Jews, or Armenians—when he says that the compulsion to differentiate overshadows the image of victimization by genocide. Perhaps one might believe cultural genocide of African slaves in the Americas—the now remote loss of their languages and ethnicities—to be overshadowed by current pressures to “perform” blackness. But that is explained less by the productive power of identity discourse than by the difference between things we can still change and things we cannot.

Left critique’s relationship to normative political theory is also perplexing. Butler, for instance, declares that rights to marriage and adoption “ought to be secured for individuals and alliances outside the marriage frame” while insisting that that is only part of the story, and that we must not allow any sort of view about marriage, family or kinship to dominate our sexual lives. Fair enough. But what is the ground for her judgments? We can be sure about an “ought” when we have a sound normative argument for it. Can critique help with that? Butler says “politics . . . demands that we take a stand for or against gay marriage; but critical reflection, which is surely part of any seriously normative political philosophy and practice, demands that we ask why and how this has become the question.” Notice how the acknowledgement that critique needs a “seriously normative political philosophy” is immediately silenced by genealogy: how did we get here? Butler explores how vulgar theories of sex difference made a come-back in French debates about civil unions. What she has to say is, as always, intriguing, yet a seriously normative theory needs to explain not why these theories came back, but why they are wrong. In addition to whatever critique can provide by way of genealogy, this explanation will take factual and moral argument. This applies also to Ford’s speculations about multiculturalism. He mentions that forcing bilingual Spanish speakers to only use English at work is “a requirement that bilingual employees are perfectly capable of complying with.” Ignore the factual error (“perfectly”) and consider an analogy. Is there anything wrong with a requirement that bisexual women have sex only with men—a requirement they are (perfectly) capable of complying with? Are we tempted to say, “not necessarily”—on the ground that “[t]o be encouraged or pressed to change in response to new circumstances is not necessarily an assault on one’s dignity”? But political morality turns, not on what is necessarily true, but on what is contingently and actually

8. Butler, supra note 6, at 255.
10. Ford, supra note 7, at 54.
11. Ford, supra note 7, at 66.
true. When I was last at the Alamo the only Spanish sign was in the men’s room: “Cuidado—Piso Mojado.” Perhaps monolingualism at a national monument in a city that is more than 40% Spanish-speaking is not necessarily an assault on anyone’s dignity. But in the social context of San Antonio, it is one contingently, and if critique cannot see why—and why that is relevant to any progressive thought about linguistic and cultural rights—then the left needs more than critique.

Maybe we could improve things by adding to critique some social science and moral theory, as in Drucilla Cornell’s interesting discussion of abortion. She thinks the best psychology is Lacanian, the best morality broadly Kantian, and that their combination grounds a “universal” argument for the importance of abortion rights for women’s individuality and bodily integrity. Whatever one thinks of the details, this sort of amalgam might seem more normatively promising than the inert pedigrees of genealogy. So why isn’t there more like it? Perhaps because it needs epistemic commitments that many practitioners of left critique reject. Certainly no Cornell-style project could manage on the editors’ deflationary terms: “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.”

Contrast Cornell: “It is only from within such a psychoanalytic framework that we can see how Other-dependent the sense of self is.” Whether or not we call that a “truth” about “discourse” doesn’t much matter—the sticking point is that by “only” Cornell means only. That is not going to sit well with the sort of post-modernisms the editors indulge.

Things get even murkier when critique combines object-level fluidity (“sexualities are constructs”) with theory-level solidity (“as Foucault has shown”). In principle, left critique could reflexively destabilize even the theories on which it stands; in practice it holds its fire. In Duncan Kennedy’s account of the collapse of Critical Legal Studies he says: “Leftism aims to transform existing social structures on the basis of a critique of their injustice,” while “[m]odernism/postmodernism is a critique of the characteristic forms of rightness of this same culture and aims at liberation from inner and outer experiences of constraint by reason.” Critique therefore cannot yield new truths or new values, but only new emotions, and especially “the pleasure of shedding Reason’s

12. Drucilla Cornell, Dismembered Selves and Wandering Wombs, in LEFT LEGALISM / LEFT CRITIQUE, supra note 1, at 337, 340.
dead skin." This is not nihilistic; it can remain on the left to the extent that it leaves both faith and friendship intact: "we can make the leap into commitment or action" and enjoy the company of those leftists we "prefer to hang with." But no one ever worried that sloughing off reason would leave us without prayers or parties. They worried that it would mean an end to arguments that one could responsibly put to people who are not already our friends as grounds for acting and believing other than they already do. In a thoughtful essay, Lauren Berlant deplores the sentimentalization of politics, including the "Hallmark-style sentimentality" of American privacy jurisprudence and leftish demands to acknowledge the pain of others. Perhaps Kennedy's celebration of emotion could benefit from the cynical acid of Berlant's anti-sentimentalism.

Sometimes critique's complaint is basically practical. Warner says that the push for same-sex marriage doesn't even work: Baehr v. Lewin produced backlash, not weddings. Isn't that indictment enough? Well, left legalism also led to Halpern v. City of Toronto, and a court order that has already produced over a thousand same-sex marriages in Ontario. Why does one project get results where another fizzles? It explains nothing to say that the culture in the United States is so much more conservative, and the appetite for intrusive social regulation so much greater, than it is in Canada (or in Belgium, or the Netherlands, or much of the capitalist, patriarchal, heterosexist West). That is true. But we still need to explain that. What produces a political culture in which people are actually willing to amend constitutions just to stop lesbians and gay men from marrying? Could it have anything to do with the influence of decadent forms of Christianity in American politics? Oddly, in over 400 pages touching frequently on issues like abortion and homosexuality, the role of old-time religion never comes under the gaze of left critique. The only mention of faith is inadvertently deferential. Duncan Kennedy says that Critical Legal Studies has no disproof of the rationality of legal reasoning; it simply lost faith in it. He analogizes: "It wasn't that someone had proved to them that God did not exist." Rather, "[t]he question was 'over' or 'parked.' They were post-God." This is only an analogy. But it is strikingly assumes that atheism needs a disproof of God's existence. Perhaps this has the

16. Id. at 220.
17. Id. at 222, 224.
18. Lauren Berlant, The Subject of True Feeling: Pain, Privacy, and Politics, in LEFT LEGALISM / LEFT CRITIQUE, supra note 1, at 105, 115.
22. Id. at 193.
advantage of being less offensive to believers: no one can (dis)prove God's existence, so we can just pass over in silence. In fact, atheism rests, not on disproofs, but on the absence of any positive grounds for belief. Compare: to establish that a couple are married, we may ask for their marriage certificate. But to establish that they are not we do not need their Certificate of Unmarriage, and having no marriage certificate does not make them post-marriage—it makes them unmarried. Similarly, absent evidence for the existence of God, the epistemically responsible thing is not to "park" talk of God, but rather to dump it—and if there are no reasons for belief in the coherence or determinacy of any legal arguments, then the epistemically responsible position is skepticism there too.

Although the editors and contributors offer some illuminating ideas about the hazards of legal projects, they add less to our understanding of why reformers are attracted to them. If we are curious about why litigation and reform appeal to Americans on the left, it might help to consider the alternatives. The editors caution: "In pursuit of racial justice by means of civil rights, the American left entered into a deep collaboration with a liberal legalistic project." 23 But what was the American left supposed to do, vote? It is not as if there was a vital socialist, or even social democratic, tradition to support. Even the public commitment to liberalism was shallow, as is now obvious to everyone. In that context, it is surely intelligible that African-Americans would try anything that stood a chance of improving their status: legalism, separatism, "multiculturalism," or even, if they could get enough capital, capitalism. If any of those strategies brought even mixed results, others would try it too. Who could blame them?

Legalism moves in the world of action, critique solely in the world of thought. Little wonder then that the former is marked by simple ideas, stark principles, and a fixation on the bottom-line ("Is it good for the gays?"). The editors are understandably frustrated by their encounters with that world. But vices in thought can be virtues in life. "Freedom to choose" is a bad argument for a right to abortion. But it is an excellent name for one. The left needs not only book-sized theories, but also banner-sized slogans. These have different functions and need to be assessed on different grounds. Brown and Halley have tested the slogans and simple precepts of the legalistic left, and "upon close examination" certify them "almost always intellectually incoherent." 24 If this seems harsh, we might console ourselves by noticing that in a world of open-ended and unstable critique, it expresses commitment to at least one universal truth. Perhaps we can build on that.