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Mark V. Tushnet
Georgetown University

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THE LEFT CRITIQUE OF NORMATIVITY: A COMMENT

*Mark V. Tushnet**

"In today's legal academy, the critique of normativity is associated with the left." The preceding sentence, which I have constructed to summarize the starting point of this essay, is both largely true and arguably incoherent.¹ The incoherence occurs because describing a position as "the left" connotes values like egalitarianism, which are obviously normative. This essay examines the ways in which some writers associated with the left in the legal academy have tried to resolve the incoherence.² The first Part shows that these writers can be identified with the left even in their critiques of normativity and also shows that they are reluctant to offer in their writings anything more than statements of their commitments to "the left," which in turn has for them a rather thin content. Although the writers offer a variety of policy prescriptions of a generally egalitarian sort, they are reluctant to say *why* moving in the direction of equality rather than maintaining the status quo or increasing inequality (perhaps to increase the amount of material goods available even to the worst off) is a good thing. The second Part offers several sociological explanations for the thinness of their leftist commitment. The following Part discusses some alternatives to the thinness of that commitment, such as social democracy, pragmatism, and Roberto Unger's theory of destabilization rights. The conclusion suggests that the best course for critics of normativity

* Professor of Law, Georgetown University. B.A. 1967, Harvard; J.D. 1971, M.A. 1971, Yale. — Ed. I would like to thank Andrew Altman and L. Michael Seidman for their helpful comments on this essay.

1. In political science departments, conservatives do divide over natural law and positivism, but those divisions have not significantly reached the legal academy, perhaps because there are so few conservatives there. The tension between positivism and natural law can be glimpsed in Robert Bork's work, which adopts a thoroughgoing positivism, in which what a majority prefers is the sole evaluative standard in its treatment of judicial review and seems committed to some, relatively undefended, normative stance in its occasional discussion of policy issues. Compare ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990) (discussion of judicial review) with ROBERT H. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* (1984) (The Frances Boyer Lectures on Public Policy, American Enterprise Institute for Public Policy Research) (policy discussion).

2. The essay is not concerned with a jurisprudential "school" called critical legal studies, but rather with what some writers have said. The so-called school is extremely diverse internally, and may not even properly be described as a jurisprudential tendency. See, e.g., Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991) (describing critical legal studies as a political location).

may lie in forgoing any attempt to support their leftist inclinations through rational arguments of the sort to which they are, by training, unfortunately committed as well.

I. THE LEFTISM OF THE CRITIQUE OF NORMATIVITY

In April 1991, the *University of Pennsylvania Law Review* published a symposium entitled "The Critique of Normativity."³ Three of the authors of the principal articles — Pierre Schlag, Richard Delgado, and Steven Winter — are associated with the left in the legal academy,⁴ and their political sympathies are clear in the articles they published in the symposium. But being on the left means having some normative positions. So how could they offer a "critique of normativity" as such?

The answer lies in their definition of normativity. In Pierre Schlag's terms, the "aim" of "normative legal thought" is "to articulate or develop a norm that is complete, self-sufficient, discrete, separable, trans-situational, non-contradictory, and non-paradoxical within its intellectual or legal jurisdiction."⁵ For Richard Delgado, the target is "grand normative theory."⁶

For these authors, then, "normativity" is what I label comprehensive normative rationality. They argue that the claims for comprehensive normative rationality cannot be sustained. Their reasons need not be addressed in this essay, whose topic is not the merits of the arguments deployed in the critique of normativity. Yet the articles contain a number of obviously normative statements, and those statements provide my starting point. As Margaret Jane Radin and Frank Michelman noted in their comment on the principal articles, the very statement, "We should talk more normatively,"⁷ which they quote from another of Schlag's articles, is itself a normative statement. For rhetorical purposes, Schlag gives the normative sentence, "[T]hey [certain normative questions] are the wrong ones," a prominent place in his symposium article.⁸ Delgado says that we could replace *normative*

3. Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991).

4. The fourth, Frederick Schauer, is a liberal in his personal politics, a fact rarely reflected in his scholarship.

5. Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 839 (1991) (emphasis omitted).

6. Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 934 (1991).

7. Margaret J. Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1021 (1991) (emphasis omitted) (quoting Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 171 (1990)).

8. Schlag, *supra* note 5, at 805.

legal thought by legal thought pure and simple, "actually observing it and describing it. . . . We might begin to notice things like beggars or the countless other wounded that our system throws up. We might focus for the first time on subsistence claims, appreciate the dance between huge bureaucracies and those they serv(ic)e."⁹ Winter writes that "we are saddled by a futile and increasingly counterproductive model of social order," and urges "more productive attention on fostering the kinds of conditions of community that might enable a more meaningful normative practice."¹⁰ In an earlier critique of comprehensive normative rationality, Joseph Singer offered a normative agenda that began with these paragraphs:

We should prevent cruelty. Right now, people are being dragged from their homes, in darkness, and even in broad daylight. It is someone's daughter, someone's son, someone's husband. They are tortured and raped and made to endure cruel games. Then they are killed in gruesome and inventive ways.

In some instances, the American government subsidizes the people who commit these acts. The government reprimands the people, sternly. And the subsidies continue.¹¹

These normative statements, unlike those associated with comprehensive normative rationality, are small scale. They make what have been called "local" claims about good and bad practices,¹² without attempting to offer what their authors believe will inevitably be inadequate — or futile — general, or abstract, or comprehensive, accounts of why the practices are good or bad. The problem with comprehensive normative rationality, then, must be that it is comprehensive and/or rational, not that it is normative.

Arthur Leff's famous prose poem pointed to one obvious difficulty with small-scale or local normativity. Leff concluded his skeptical critique of normativity:

As things now stand, everything is up for grabs.

Nevertheless:

Napalming babies is bad.

Starving the poor is wicked.

Buying and selling each other is depraved. Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot — and General Custer too — have earned salvation.

9. Delgado, *supra* note 6, at 959-60 (footnotes omitted).

10. Steven Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 1001-02 (1991).

11. Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 67-68 (1984) (emphasis and footnotes omitted).

12. For explication of the term *local*, see, for example, James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985).

Those who acquiesced deserve to be damned.

There is in the world such a thing as evil.¹³

Leff, whose final project was the compilation of a legal dictionary,¹⁴ was too sophisticated to believe that the judgments he uttered were simple statements of brute fact about the world.¹⁵ Consider a slight modification of one of Leff's examples: "Killing babies is wrong." Then consider the use of that statement by opponents of unrestrictive abortion laws. I believe that most of the proponents of the critique of comprehensive normative rationality would reject the claim that it follows from that statement that abortion is wrong. Why? The first line of response would be that fetuses are not babies in the sense that makes the initial statement true, and the second line would be that abortion is not killing in the relevant sense. Those responses might well be correct, but the need to make them shows that small-scale or local normative statements cannot stand alone.

Similarly, those who engaged in, or at least ordered, the activity, did not think that they were "napalming babies"; they thought that they were doing something like "adopting only those military means necessary to preserve freedom." Delgado describes some people he encounters on the street as "beggars"; Charles Murray, a severe critic of public assistance policies associated with the Great Society,¹⁶ might call them "lazy," thereby using a term with different connotations and suggesting a different policy response to their situation. Something beyond merely offering a description will be needed to make it credible against competing descriptions, at least where the audience for the description is not already committed to the normative judgment implicit in it.

How can we choose between competing descriptions? In quoting Leff, I omitted his final sentences: "[All together now:] Sez who? God help us."¹⁷ Religion provides one ground for choice, though not one easily called rational, nor, of course, one that everyone would accept. The project of comprehensive normative rationality provides other grounds. Perhaps the main line of Enlightenment rationality was to develop relatively abstract criteria that would account for

13. Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249.

14. For what he had completed at the time of his death, see Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855 (1985).

15. The following argument is drawn from MARK TUSHNET, *RED, WHITE, AND BLUE* 119 (1988).

16. See, e.g., CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984).

17. Leff, *supra* note 13, at 1249. For another celebrated invocation of the deity, see ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 295 (1975).

describing an act as "torture." It then attempted to justify its criteria against competitors that accounted for a different description by showing that its criteria were more rationally defensible than those alternatives. The rational defense of descriptive criteria would then produce the comprehensive normative framework against which a wide range of practices could be evaluated.

Another ground for choosing among descriptions is an account of human nature, as in some versions of natural law theory. The heads of the armed forces might not describe what they ordered as "napalming babies." But, an outsider would note, they have particular material and perhaps psychological interests in offering a different description. If their thought processes were *purified* of these contaminating interests, we might discover that all who thought about the problem in a detached, neutral way would reach the same conclusion. Winter's interest in the conditions of community might demonstrate his commitment to this part of the project; those conditions might identify "purified" communities. But the overall critique of comprehensive normative rationality cannot easily accommodate the idea of purification. That idea rests on the assumption that there are detached and neutral ways of examining normative questions, an assumption contrary to Schlag's and Delgado's views that everyone is always already situated, with material and psychological interests that constitute them.

The critics of comprehensive normative rationality, of course, know the moves I have just made.¹⁸ Somehow, they must reconcile their commitment to small-scale or local normative judgments with their critique of comprehensive normative rationality. Two paths are obviously open: to reject rationality; or to reject comprehensiveness while retaining a commitment to some broader perspective than that of the completely localized time and place.

Radin and Michelman call the rejection of rationality *nominalist intuitionism* or *radical particularism*. Citing Robert Heinlein, they write, "What can someone in this stance give as a reason for her decision other than she just looked out at the world at the given moment and *grokked* the answer?"¹⁹ They are skeptical that this stance "can accomplish much good for human beings."²⁰ Critics of comprehensive normative rationality might respond, however, that Radin and Michelman overlook the fact that reason giving occurs by "looking

18. See, e.g., Richard Delgado, *Moves*, 139 U. PA. L. REV. 1071 (1991).

19. Radin & Michelman, *supra* note 7, at 1046.

20. *Id.*

and grokking" in particular circumstances, and the audience for the account may be receptive to or moved to do *some* good, as the particularist defines it, by the radical particularist's flat judgment. Radical particularism, that is, might be a strategic stance adopted for good pragmatic reasons.²¹ The other obvious path is to defend the small-scale normative judgments by locating them, not in the timeless and spaceless world of comprehensive normative rationality, but in a historicized world. The descriptions and implicit judgments would then be localized to some degree, but not so localized as to be radically particularist.

II. A SOCIOLOGY OF THE CRITIQUE'S THIN NORMATIVITY

This Part sketches some aspects of the social field in which the critique of comprehensive normative rationality is located; the next Part locates the critique in an intellectual field. I adopt this structure because, if normative discourse is to be displaced entirely, it will be replaced by something like sociology.²² The aim in this Part, then, is to account for the thinness of the normativity produced in the critique of comprehensive normative rationality.

One aspect of the social field is social-psychological. To some extent, the critique of comprehensive normative rationality is a generational and psychological response to the self-presentations of proponents of comprehensive normative rationality. In Robin West's useful term, those proponents present themselves as *authoritarian*.²³ So, for example, in the course of defending the project of comprehen-

21. I should note that I am extremely sympathetic to the pragmatic defense of radical particularism, because I believe that it has worked well to destabilize confidence in comprehensive normative rationality, and that destabilizing that confidence is a good thing under the present circumstances where social engineers of the right, center, and left have done so badly. My concern in this essay is with what I believe to be an impossible philosophical defense of the critique of comprehensive normative rationality, a defense that, because it must fail, may reduce the power of radical particularist presentations whose authors do not take it upon themselves to provide large-scale philosophical defenses. But maybe I'm wrong.

22. Schlag has critiqued law-and-society studies as normative: In law and society work, conceptual categories identifying institutions and institutional processes are often borrowed from the legal culture or the wider culture to describe or explain human behavior without the slightest question ever being raised as to their identity, integrity, or constitution. In both history and law and society work, the research agendas are guided significantly by the extent to which empirical evidence is available. In turn, this data-dependence results in an (unavoidable) privileging of the conceptual categories, the information retrieval systems, of the very social and cultural systems being studied. Schlag, *supra* note 5, at 813. A lot of work is done by the "often" in this critique. In my view Schlag severely underestimates the sophistication of the best law-and-society work. For a contribution to, and discussion of, such work, see David M. Trubek & John Esser, "Critical Empiricism" in *American Legal Studies: Paradox, Program or Pandora's Box?*, 14 LAW & SOC. INQ. 3 (1989).

23. Robin L. West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531 (1988).

sive normative rationality, Owen Fiss adopts the view that "in legal interpretation there is only one school and attendance is mandatory."²⁴ More than the specific authoritarian content, there is the tone in which the project is laid out: self-assured, confident that, although some problems in reaching the goal remain, reasonable people surely must agree that the project is the only one truly worth pursuing. The attraction of rebellion against this self-confidence is evident, particularly when we consider the natural disciplinary advantages that a new generation has in defining its positions against those of its immediate predecessor.

Further, as West has argued, the authoritarian stance in constitutional law, the field with which I am most familiar, may have made sense for liberals or leftists when there was some hope that the Supreme Court might adopt liberal positions.²⁵ In the telling subtitle of an article by Susan Estrich and Kathleen Sullivan, some degree of authoritarianism may be appropriate when one is "Writing for an Audience of One."²⁶ But what can liberal scholars do when the audience — defined in authoritarian terms as the Supreme Court — is none?²⁷

One possibility is to redefine the audience as one's students. Yet that redefinition raises problems related to authoritarianism, whose so-

24. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746 (1982). Contrast this with the pluralist vision of Robert Cover, who emphasized that law is produced — and therefore interpreted — everywhere in society. Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

25. I should note, however, that I believe that West's attempt to locate constitutional authority in Congress, see Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 717-21 (1990), or, in later work, in a heroic figure like Vaclav Havel, see Robin West, *The Supreme Court, 1989 Term — Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 63-79 (1990), reproduces the authoritarianism she criticizes. I believe that only a thorough-going anarchism or abandonment of any residual normativity will avoid the difficulty.

26. Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989). The article describes the rhetorical strategies available to supporters of the right to choose in arguing that the Supreme Court, as constituted at that time, ought to find restrictive abortion laws unconstitutional. The audience of one was Justice O'Connor, then seen as the "swing vote."

27. They can of course continue to rewrite opinions that the Court has rejected, in the apparent hope that a better-reasoned doctrinal article will persuade the Court to adhere to the rejected result. When the rejected result is *Roe v. Wade*, 410 U.S. 113 (1973) — redefined on equality grounds, see, e.g., Cass Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992) — or *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989) — redefined on Thirteenth Amendment grounds, see, e.g., Akhil Reed Amar & David Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359 (1992) — the bizarre nature of the enterprise is apparent. The genre developed, I believe, to defend controversial decisions, to which the Court remained committed, against academic criticism. See, e.g., Louis Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962). Its transformation to offer alternative rationales for results the Court clearly will not reach signifies the further detachment of legal scholarship from the practice of law, in the doctrinal domain where the connections between scholarship and practice would seem closest. See J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1985-86 (1992).

lution may lie in a thin classroom commitment to the left. We attempt to avoid the authority implicit in our position in front of the class by refusing to offer explicit or detailed defenses of the political positions we nonetheless assert. A recent article by Joseph Singer indicates why the redefinition may incline legal academics on the left to a thin normativity.²⁸ Singer describes his inability to make his students appreciate the force of the argument that workers and communities have an interest, which could be protected under existing law, in the continued operation of major industrial facilities around which communities have been constructed.²⁹ Although the students could reproduce the arguments, Singer found that they did not experience the arguments as "real" or credible: They were simply mouthing the lines without understanding them. Singer then describes how he developed a hypothetical, drawing on law school experiences, that captured the important analytic features of the plant-relocation problem. When students worked with this hypothetical, Singer reports, they experienced the "vulnerability and broken trust" at work in the plant-relocation problem.³⁰ The hypothetical "created a sense of connection between the students and the workers."³¹

As nearly all published accounts of teaching experiences do, this one describes a pedagogic success, as seen by the author-teacher. And, like most such accounts, its author's perspective affects the lessons we are invited to draw. In summarizing the experience, Singer depersonalizes the subject: "The story forced the students to imagine what it would be like to be vulnerable to the whims of an institution which had a significant power to determine the shapes of their lives."³² Consider the implications of a personalized subject: "In using the story, I forced the students to imagine what it would be like to be vulnerable to the whims of an institution which had a significant power to determine the shapes of their lives." The active voice brings out the teacher's authority over the class and thereby begins to undermine Singer's suggestion that students need to "imagine" being vulnerable to the whims of an institution — or, in the classroom, a person — who

28. Joseph W. Singer, *Persuasion*, 87 MICH. L. REV. 2442 (1989).

29. For Singer's presentation of the argument to a wider audience, see Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

30. Singer, *supra* note 28, at 2455.

31. *Id.* at 2453.

32. *Id.* at 2455; see also *id.* at 2454 ("The story encouraged the students to see the world from someone else's perspective."), 2457 ("The example forced them to realize that self-reliance is not the only norm that drives the market. The story brought the students in touch with the complexity of their moral intuitions.").

has power over them.³³

Uncomfortable with exercising authority, however, Singer defers the issue of authority from himself in the classroom to an almost depersonalized "law school faculty."³⁴ As Singer makes clear, he believed that the plant-closing story was "dismal" and morally outrageous, and ought to have been legally problematic.³⁵ Again, uncomfortable with making the moral argument directly, Singer retreats to a professionalist defense of his pedagogy. Singer argues that his students "identified, consciously or unconsciously, with the corporate managers who desired the freedom to manage what they saw as their own business,"³⁶ and that he had the modest aim of improving their argumentative skills by demonstrating that, no matter what position one takes, one can make better arguments if one truly appreciates the moral force of the arguments on the other side.³⁷

Singer's example richly illustrates some sources of the thinness of the left's normative commitment. As a person of the left, Singer opposes the sort of unjustified hierarchy he finds in the management-community dynamic. But for him to say exactly that to his students would be to exercise hierarchical authority. One might even say that Singer unconsciously identifies with the managers in desiring the freedom to manage what he sees as "his" classroom, and equally unconsciously is dismayed by that identification. He could overcome that dismay by having available a comprehensive account of authority, if there is one, that would distinguish between the legitimate authority he exercises in the classroom and the illegitimate authority managers exercise. By offering a merely professionalist defense of his pedagogy, his identification with "workers" and their communities is left sentimentalized.

So far I have argued that the left's position in the legal academy, first as a new generation and second as classroom teachers, makes some of its members uncomfortable with authority and leads them to a thin expression of their leftist values. A third reason for that thinness

33. I suspect as well that Singer underestimates the sophistication of students in "scoping him out." I would guess that in prior years Singer's presentation suggested to students that he wanted them to be able to produce the competing arguments, which they did, in compliance with what they perceived to be his desires. The new version may well have indicated to students that Singer wanted them not only to produce the arguments but to internalize them and demonstrate empathy with the workers. So, again in compliance with what they perceived to be his desires, the students acted as if they had internalized the arguments and empathized with the workers.

34. The faculty is not entirely depersonalized, because at some level Singer undoubtedly appreciated that he was part of the faculty whose actions he hypothesizes.

35. See Singer, *supra* note 28, at 2445.

36. *Id.* at 2457.

37. See *id.* at 2447-48.

arises from the way in which the left in the legal academy has been constituted and is being reconstituted. Demographic changes in the legal professoriate — the expansion of the numbers of feminist and minority scholars — have changed the composition of the left. The distinctive legal theories that these scholars have produced place comprehensive normative accounts under severe pressure. Yet, I argue next, as feminist and minority jurisprudence has developed, it has threatened to produce a radically particularist account of value inconsistent with the leftist commitments of most of its producers and of most of the white male scholars sympathetic both to the demographic changes and to the new jurisprudence. The tension between the critique of comprehensive normative rationality associated with feminist and minority jurisprudence, and leftist commitments, has led, at this point at least, to left scholars' willingness to indicate only their thin leftist commitments.

The conventional account of recent developments in jurisprudence begins by arguing that feminist jurisprudence has insisted that women and minorities contribute a distinctive voice to legal theory.³⁸ Like all conventional accounts, this oversimplifies but retains a core truth. Feminist and minority jurisprudence recharacterized the prevailing mode of jurisprudence, with its comprehensive normative discourse, as distinctively male.³⁹ In doing so, it denied that jurisprudence's claim to comprehensive scope. It then filled in the space thereby opened with what it argued were the distinctive positions of women and people of color. At that point, however, feminist and minority jurisprudence faced a number of problems. First, having characterized the prevailing mode of jurisprudence as male, it ran the risk of essentializing the voices of women and minorities: Just as, and to the extent that, the prevailing jurisprudence was essentially male, so the alternative jurisprudence was essentially female. But, having emphasized the importance of interjecting a new voice into jurisprudence, feminist and minority jurisprudence found it difficult to sustain the essentialist claim that there was only one new voice. The demographic changes I have mentioned made this all too clear: The new voices came from women taken as a gender group, white women, women of color, men of color.⁴⁰

38. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

39. In early work in feminist jurisprudence, the prevailing mode was described as male, rather than as male and white, because adding the racial description would have problematized the voice of the (mainly white) feminist authors themselves.

40. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

Second, the normative status of the substantive claims made in feminist and minority jurisprudence, taken in conjunction with essentialist arguments, was unclear.⁴¹ If the prevailing jurisprudence was flawed because it embodied a distinctively male perspective, why should that trouble the men who produced that jurisprudence? Any satisfactory answer would have to appeal to some feature of normative discourse that transcended gender and racial difference. Yet that threatened to reinscribe the comprehensive normative discourse against which feminist and minority jurisprudence set itself.

Third, feminist and minority jurisprudence took a stand against the essentialism of comprehensive normative discourse. But its antiessentialism raised another difficulty. If normative views had to be indexed — to gender, race, and the like — why should they not be indexed to each person in her or his particularity? Antiessentialism meant that no one could rightly claim the universal validity of any normative proposition without simultaneously noting that the claim of universal truth was made by a man, a white woman, a woman of color, and the like. Taken a step further, it might have meant that when such claims were made, one would also have to note that they were made by a white woman teaching at an elite law school, or by a white man teaching at a nonelite law school, and so on down the line to a radically particularized index: claims made by this particular person who had this particular, and unique, history.

The descent into radical particularism had two facets. One was philosophical. Particularism in normative discourse seemed solipsistic, and the defects of solipsism there are well known.⁴² The other was political. Particularism to that degree was individualistic, and individualism was a position associated with the right rather than the left.

Retreating from comprehensive normative discourse while continuing to assert the claims of a diminished leftist commitment was at least a way station to a solution to these difficulties. The slide to complete individualism could be halted by noting that, in every particular historical situation, one could identify groups whose members did as a matter of brute fact tend to hold distinctive views. Those groups were not defined by any essential characteristics such as race or gender, though; they were instead socially constructed, and at any particular time there were only a limited number of them.

Treating voices as socially constructed, however, did not solve the

41. This argument has repeatedly been pressed on me by L. Michael Seidman. I have come to think that it makes sense in, but only in, the context discussed in the text.

42. Here antiessentialism converged with the radical particularism discussed above, *supra* text accompanying notes 19-21.

underlying normative difficulty. It eliminated the extreme possibility that the society shared a single normative view and the competing extreme possibility that there were as many normative views as there were people. It did not explain why one or a few of those normative views demanded special attention. The solution lay in making intersectionality the analytic key.⁴³ Intersectionality describes those who share a group of socially constructed characteristics — women of color, African-American gay men, and the like. At the programmatic level, the scholarship of intersectionality deals with groups with characteristics each of which has been historically subject to subordination. But, at the analytic level, the scholarship suggests that, despite the existence of socially constructed groups whose members differ in their normative views, there are intersections where some agreement can be found. Then, the implicit normative claim becomes, careful attention to the intersections at which everyone can be found — “the human condition” — will disclose some common normative ground. Feminist and minority jurisprudence began as a critique of the prevailing mode of jurisprudence, and could not (without abandoning its critical impulse) claim that this intersection was sufficiently large to accommodate the comprehensive normative claims made in that mode. The result, again, was a thin leftist discourse.

III. ALTERNATIVES TO THE CRITIQUE'S THIN NORMATIVITY

I find two possible responses to the thin normativity of the leftist critique of comprehensive normative rationality particularly interesting, and this Part examines some variants of these responses.⁴⁴ The first response accepts the critique of comprehensive normative rationality but argues that that critique does not undermine anything of interest in the claims of traditional liberalism. The second response might be seen as contending that the intersections that the critique relies on to halt the slide to particularism actually support more comprehensive programs than the thin one I have associated with the critique.

John Rawls' recent work illustrates the first response. Some critics

43. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Judith Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

44. To avoid certain obvious difficulties, I have come to describe the kind of argument developed in this Part as “informal political theory.” Mark Tushnet, *Rights: An Essay in Informal Political Theory*, 17 POL. & SOC'Y. 403 (1989). I am interested, that is, in the ways arguments are actually used in particular discourses, not in whether those arguments are “well-founded” in some ultimate sense.

of Rawls' *A Theory of Justice*,⁴⁵ many associated with a communitarian strand of leftist thought,⁴⁶ argued that his work rested on unsupportable assumptions about personality. They read him as developing a theory that required real people to "bracket" aspects of their personhood that constituted them as people and argued that no theory with such severe constraints could be acceptable. Rawls responded by claiming that his critics had misread him. His theory, he argued, was "political, not metaphysical."⁴⁷ For him, a theory of justice dealt with the restricted domain of the fundamental institutions of political society. It was designed to specify those relatively few institutions that had proven essential to preserving social peace in a world of ineradicable differences about the Good. Liberal theory would succeed, on Rawls' more recent view, if it described institutional arrangements that promised to avoid the evils of social disorder and widespread misery historically associated with such differences.⁴⁸

When those who have produced versions of the left critique of normativity have addressed Rawls, they have insisted that there is no change between the comprehensive claims they attribute to his early work and the more restricted claims he is quite clearly making at present. James Boyle, for example, writes that he is "completely unconvinced" by a paraphrase of Rawls' position because

[n]eeding "only" to be able to postulate universal qualities that we should attribute to personhood within a theory of justice, seems to me just as demanding as the task of postulating a universal subject, *tout seul*. . . . It is no easier to build a small perpetual motion machine than a large one.⁴⁹

45. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

46. For a discussion, see Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985).

47. John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985). For the most important later development, see John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987). I am not interested here in the hermeneutic question of whether the critics misread *A Theory of Justice*. Given how widespread the communitarian critique became, it seems clear that the book at least lent itself to the reading on which the critique rested.

48. This restriction of justice's domain might have been apparent from the outset. Rawls had been quite explicit in *A Theory of Justice* that his theory was compatible with economic institutions ranging at least from those of modern social democracy, in which collective authority is widely deployed to regulate excesses, including wide disparities in wealth resulting from individual control of the means of production, to those of relatively laissez faire capitalism. See, e.g., RAWLS, *supra* note 45, at 271-74.

49. James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489, 507-08 n.45 (1991). I should note that I find the dismissive tone disturbing in a work by a serious scholar like Boyle. Such a tone, which I have sometimes adopted, might be defended on strategic grounds as a way of suggesting to readers that someone who they might initially think ought to be taken seriously actually need not be. Boyle's presentation does not seem to me designed for that purpose.

While Boyle's criticism is sound when directed at the paraphrase, it does not deal with Rawls' position.

This dismissal might at first seem odd, because the thinness of Rawls' recent claims converges with the thinness of the critique of comprehensive normative rationality. Yet the dismissal might still be justified, depending on how Rawls' recent work is taken in the overall community of discourse about comprehensive normative rationality. It might be read to establish that normative rationality yields important results in a particular domain and to suggest that normative rationality could produce similarly important results in any other domain. For example, while Rawls' work might not have any implications for selection among modes of economic organization, it might suggest that normative rationality might produce a "theory of economic order" to occupy that domain in the way that Rawls' theory of justice occupies the political domain. Then, as normative rationality moved from one domain to the next, it would reconstitute itself as comprehensive. In short, Rawls' recent work, while explicitly restricted in its claims, might threaten a resurgence of comprehensive normative rationality. The leftist critique of comprehensive normative rationality could claim Rawls as an ally, but perhaps, in the particular intellectual and social circumstances of the present era where leftism is threatened with being swallowed by moderate liberalism, its refusal to do so is understandable.

Rawls may have been rejected as an ally, but not the modern pragmatists⁵⁰ who similarly scale down the claims of normative rationality — indeed, I believe, almost to the vanishing point. Margaret Jane Radin and Frank Michelman have explicitly addressed the leftist critique of normativity and, while finding "much that is compelling," defended the pragmatic alternative.⁵¹ For them, "[t]he pragmatist moment in critical practice is . . . empirical, epidemiological, and local. It notices characteristic kinds of errors or biases that recur when target discourses are deployed by nonideal — incompletely committed and assiduous — practitioners caught in specific cultural environments."⁵² Radin and Michelman illustrate the pragmatic mode in suggesting that proponents of "instrumentalist economics" typically "suppress certain kinds of . . . obstreperous values," "ignor[e] costs, like disruption of community, that power-wielders . . . cannot handle according to rule," and "seem either not to notice or not to care that

50. See William G. Weaver, Note, *Richard Rorty and the Radical Left*, 78 VA. L. REV. 729 (1992).

51. Radin & Michelman, *supra* note 7, at 1020.

52. *Id.* at 1031.

the 'political' processes to which they buck the obstreperous value issues . . . may very possibly never seriously consider these issues."⁵³ They further point out that the pragmatic mode has its own characteristic flaws: "[r]adical particularism,"⁵⁴ "taking the status quo for granted,"⁵⁵ and "complacent or aggressive conventionalism or traditionality."⁵⁶ A pragmatist might, for example, overlook the background "fact that hierarchies of race and sex remain cruelly entrenched . . . in American life."⁵⁷ "Only by constant attentiveness to the commonplace," they conclude, "can pragmatist critical practice keep faith with its postmodernist commitments to suspect facile consensus and pursue epistemic openness."⁵⁸

Perhaps the first thing to note about Radin and Michelman's argument is its tone. Just as proponents of comprehensive normative rationality embody their intellectual positions by presenting themselves as self-assured, Radin and Michelman embody pragmatism in their tentativeness and in their carefully qualified defense of pragmatic critical practice. Further, the smaller-scale claims that pragmatists make about normativity are entirely consistent with the leftist critique of comprehensive normative rationality. And, of course, their own leftist commitments are evidenced by the examples of injustice they offer.

Yet Radin and Michelman's pragmatism cannot displace the claims of comprehensive normative rationality. In his pragmatic mode, Justice Oliver Wendell Holmes wrote of the First Amendment's free speech guarantee, "It is an experiment, as all life is an experiment."⁵⁹ But because the scope of the experiment — "all life," or, in the present context, the social order — is so broad, pragmatists can supply little assistance in deciding whether to undertake the next variant on the experiment. Consider, for example, Reaganism/Thatcherism as an experiment. When those programs are proposed, what can a pragmatist tell us? "Maybe they'll work, maybe they won't"? This seems unhelpful.⁶⁰

53. *Id.* at 1034-35.

54. *Id.* at 1046.

55. *Id.* at 1047.

56. *Id.*

57. *Id.* at 1048.

58. *Id.*

59. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

60. The difficulty is obviously exacerbated when we are considering developments on a national or other system-wide level. That is a pragmatic reason for preferring localized decisions: errors have a smaller scope and perhaps can be corrected more easily. See *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (defending federalism as providing states as "laborator[ies]" for "novel social and economic experiments without risk to the rest of the country").

Some pragmatists might respond that Reaganism/Thatcherism were flawed precisely because they were experiments on a grand scale. Pragmatists, that is, might be systematically inclined to incremental changes in the social order. Having ordinary levels of risk aversion, they might note that errors are inevitable and that mistakes made in taking small steps can be corrected more readily than mistakes made in taking large ones. Incrementalism, though, no matter what its other attractions, cannot be associated with the political agenda of pragmatism. Sometimes, large steps work better than small ones: compare the successful prompt desegregation of the U.S. armed forces under President Harry Truman with the painful and largely unsuccessful effort to desegregate the public schools gradually after *Brown v. Board of Education*.⁶¹ And, of course, people are risk averse to varying degrees, in part depending on how badly off they are under the status quo.

Radin and Michelman argue that pragmatists can alert us to the characteristic errors made by policy promoters, including the error by some policymakers of believing that incremental changes are likely to work better than large ones. My discussion of pragmatism and incrementalism draws attention to a more fundamental difficulty. Even pragmatists will disagree about what count as characteristic errors. Leftist pragmatists like Radin and Michelman will identify one set of errors that they contend are characteristic of the present era, and conservative pragmatists like Richard Posner will identify another set.⁶² Radin and Michelman hint at this difficulty when they distinguish between background and foreground. "Pragmatists," they say, "do recognize that most of the background must be taken as given in order for the foreground to present itself for work. Yet it is we who partition the world's features into foreground and background. . . ."⁶³

The problem goes deeper than that. Radin and Michelman's formulation presupposes that the world *has* features that we then partition. But, as I argued above,⁶⁴ often what is at stake is how to describe the world's features. With the world described in one way, we will see one set of characteristic errors, but with another description we will see another. For example, if a traditional conservative describes the modern world as the product of Enlightenment rationality, perhaps the characteristic errors would be overestimating the human capacity

61. 347 U.S. 483 (1954).

62. For Posner, see RICHARD POSNER, PROBLEMS OF JURISPRUDENCE 455-67 (1990).

63. Radin & Michelman, *supra* note 7, at 1048.

64. See *supra* text accompanying notes 16-18.

to deploy reason in the service of human goals.⁶⁵ But if a neo-conservative describes it as the product of natural processes of social evolution and “natural” selection, the characteristic errors might lie in underestimating the human capacity to deploy reason in the service of human goals.

These examples suggest another difficulty with Radin and Michelman’s pragmatism. They point out that pragmatists examine “the tendency of . . . discourse, *in its cultural setting* . . .”⁶⁶ Again, however, discourses do not *have* cultural settings in the way this statement suggests; rather, the very act of examining them places them in cultural settings. How widely one describes the cultural setting — the United States in the Reagan-Bush era, the industrialized economic powers in the 1990s, or the post-Enlightenment West — will strongly incline one to select different sorts of characteristic errors: from “overestimating the reasonableness of market processes as a mode of social organization” to “overestimating the power of reason itself.”

How can these pitfalls be avoided? The program of comprehensive normative rationality is a promising solution. That is, by pursuing the ambitions of comprehensive normative rationality, we might end up identifying the “right” way to describe the world’s features and “its” culture. I am not entirely convinced that pragmatism really helps us to think about the problems of social order that present themselves on the low level of daily life, except by alleviating anxiety that we find ourselves forced to choose without much confidence that we know what we are doing. Even if pragmatism helps, however, it seems likely that a satisfactory philosophical agenda will have to supplement pragmatism with comprehensive normative rationality.

Interest in intersectionality may also lead back to the project of comprehensive normative rationality. In some traditional versions, indeed, that project grew out of precisely such an interest. What, after all, lies at the intersection of all our lives but “human nature as such”? In the Enlightenment vision of human nature, what constituted us as humans was our universal capacity for reason. Proponents of comprehensive normative rationality described themselves, accurately, as “the party of humanity.”

For many years mainstream social-democratic parties sought to achieve the project of the party of humanity. Reason applied to human affairs indicated what, in particular historical circumstances, were worthwhile reformist efforts to alleviate the misery social demo-

65. For a version of this critique of modernity, see MAX HORKHEIMER & THEODOR W. ADORNO, *DIALECTIC OF ENLIGHTENMENT* (John Comming trans., 1972).

66. Radin & Michelman, *supra* note 7, at 1031 (emphasis added).

crats saw associated with the irrationality of traditionalism on the one side and capitalism on the other. Largely, I believe, because the social democratic tradition has been notoriously weak (and, when not weak, subject to serious red-baiting) in the United States, leftist legal academics have not seen social democracy as a viable project. Lacking connection to social democratic parties, they have seen "reforms" floating free, and instead of finding such proposals inadequate because they were unsystematic, they have chosen to revel in the disconnected variety of reformist proposals. Again the language of pragmatism and experimentation helps here, but again it leads to only a thin and largely sentimental connection to interests ordinarily associated with the left.⁶⁷

I believe that Roberto Unger's work can be interpreted in the framework developed here as relying on an alternative to the capacity for reason as the human characteristic that lies at the intersection of all human life.⁶⁸ On this interpretation, the core human capacity is the ability to transcend all contexts, to choose and rechoose our forms of life. Unger, defending what he calls empowered democracy,⁶⁹ offers his "destabilization rights" as the institutional embodiment of this capacity.⁷⁰ These rights, modeled on the rights used in U.S. constitutional law to restructure major bureaucracies like prisons and public assistance systems, "protect the citizen's interest in breaking open the large-scale social organizations . . . [that] sustain insulated hierarchies of power and advantage."⁷¹

William Galston and Cass Sunstein challenge Unger's vision of human nature from perspectives that give the capacity for reason a larger place. Examining their criticisms may indicate how even those like me who find Unger's vision invigorating might pursue the project of comprehensive normative rationality. For Galston, Unger's desire to "open hierarchies up to the possibility of scrutiny and revision" ignores the idea that "[s]ome hierarchies are both rationally justifiable and conducive to individual self-assertion" and that "some revision-resisting contexts actually liberate us."⁷² Galston adds that "the

67. A good example, I believe, is Singer, *supra* note 28.

68. I have phrased this statement carefully, to avoid making claims that would introduce exegetical controversy about whether my reading of Unger is "correct," faithful to his intentions, and the like.

69. ROBERTO M. UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* 27 (1987).

70. *See id.* at 530-35.

71. *Id.* at 530.

72. William A. Galston, *False Universality: Infinite Personality and Finite Existence in Unger's Politics*, 81 Nw. U. L. REV. 751, 761, 762 (1987).

structural context of political life — the ‘constitution’ — . . . [aims] to locate the appropriate mean between rigidity and anarchy.”⁷³

Sunstein gives more detail to the constitutionalist challenge to Unger. Constitutions, to Sunstein, are forms of “precommitment,” which cannot be effective if they are routinely open to destabilization: Precommitment cannot work if any participant can renege as she pleases, by invoking her destabilization rights.⁷⁴ But, according to Sunstein, precommitments can facilitate democracy by temporarily taking off the table issues that might otherwise occupy attention so that different issues, arguably more important but sometimes tending to be overlooked, can be addressed through democratic processes. Consider, for example, that a social democratic state might be able more readily to address the questions raised by concentration of power in the economic sphere if issues of representation were taken to be settled for the moment. Those who benefit from the rigidified hierarchies of the economic order could invoke their right to destabilize the system of representation, and thereby perpetuate their economic power.⁷⁵

The constitutionalism that Galston and Sunstein defend is, I believe, clearly preferable to anarchy or even a political order in which the threat that disorder will materialize is ever-present.⁷⁶ It is not, however, inconsistent with what I take Unger’s project to be. Consider first Galston’s examples of “revision-resisting contexts [that] actually liberate us” — baroque harmony, the sonnet, and the blues.⁷⁷ I believe that these contexts liberate us precisely to the degree that we know that we can choose to operate within them or outside them: In a world where the only musical form is baroque harmony or the only poetic form the sonnet, musicians and poets are not liberated by conforming to the only form they are allowed to use.⁷⁸ Similarly, when we precommit ourselves to particular constitutional forms, action within those forms has value precisely because we chose to use them and — at the moment of choice — could have chosen otherwise.

73. *Id.* at 762.

74. Cass R. Sunstein, *Routine and Revolution*, 81 NW. U. L. REV. 869, 889-92 (1987); see also Galston, *supra* note 72, at 762 (“the structure itself cannot be challenged — at least not in the same way”).

75. See Sunstein, *supra* note 74, at 887 (referring to “the power of self-interested private actors”). In doctrinal terms, this is the problem raised by the state action doctrine in constitutional law. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1660-61 (2d ed. 1991).

76. Whether constitutionalism in the United States avoids this latter threat is, I believe, a separate question, to which I find the answer quite unclear.

77. Galston, *supra* note 72, at 762.

78. This is true even if they perform within that form at a higher level than other musicians or poets.

Galston offers another example: "In social relations, such institutions as indissoluble marriage may promote intimacy and personal growth"⁷⁹ I find this puzzling but suggestive. Of course, when spouses decide not to dissolve their marriage, and in that sense treat it as indissoluble, they may find new opportunities for intimacy and personal growth, as they struggle with the tensions that raised (momentarily) the possibility of dissolving the marriage.⁸⁰ But those opportunities open up precisely because the spouses know that they could dissolve the marriage. Nor, I think, is the case substantially different if social institutions provide no formal escape from the marriage. The risk of exit, either physical or emotional, is always present, and the opportunities for intimacy and growth arise when spouses confront that risk.⁸¹

The analogy in constitutionalism should be apparent. Our commitments to constitutional forms are valuable because, and to the extent that, we know that we have made and continue to make them. Destabilization rights give us that knowledge. Galston and Sunstein suggest that people with destabilization rights will regularly invoke them to preserve existing systems of domination.⁸² For me, however, the point of destabilization rights comes home when people do *not* exercise them. Then their social institutions are truly *theirs*.⁸³ Like the programs of traditional social democratic parties, Unger's scheme provides a thick left program associated with an argument about human nature, although he differs from social democracy in his claims about what constitutes human nature.

I have argued that the antiessentialist and neopragmatist positions,

79. Galston, *supra* note 72, at 762.

80. The complexities of "deciding" not to dissolve a marriage are carefully discussed in Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991). I merely note the difficulty of spelling out the way in which indissoluble marriage promotes intimacy and personal growth for battered wives.

81. I mean the plural seriously here. My guess is that Galston is misled by an image of an indissoluble marriage where the cost of physical or emotional exit is quite high, compared to one where that cost is relatively low. In both, I believe, the opportunities for intimacy and growth are opened up by the risk of exit. In the former, the costs of exit create two populations within preexisting marriages: those who stay in a lifeless marriage and those who seize the opportunities. In the latter, there are again two populations: those who leave and those who seize the opportunities. The first group involves "failed" marriages, while the second, I suspect, looks as if it involves untroubled marriages. If so, the opportunities for intimacy and growth would appear to arise only where the cost of exit was relatively high.

82. See Sunstein, *supra* note 74, at 890 ("If the fundamental structure is subject to revision, the system may dissolve into one of factionalism and impasse with no questions, fundamental or not, capable of resolution.").

83. Unger is a utopian thinker, and I do not take to be a serious objection to his work that it is implausible to believe that if we immediately put in place his scheme, including its destabilization rights, we would discover that people were invoking their destabilization rights willy-nilly.

when combined with leftist commitments, lead by a complex route back to the project of comprehensive normative rationality. Social and empowered democracy, premised from the start on a theory of human nature, never departed from that project. Are there other alternatives?

IV. CONCLUSION: ALTERNATIVES TO LEFT ANTINORMATIVITY

Responding to the criticisms leveled against the critique of normativity by Radin and Michelman, Richard Delgado points out that "[t]here is nothing self-contradictory about using a tool to dismantle a structure and then using a different tool to build a better one."⁸⁴ Delgado, for example, has been an active proponent of the emerging school of narrative jurisprudence,⁸⁵ which replaces the standard forms in which comprehensive normative rational discourse have traditionally occurred with forms of discourse traditionally associated with imaginative literature. The claims made for narrative jurisprudence are exciting, and some of the articles in that school are among the most stimulating recently published.⁸⁶ Narrative jurisprudence offers the forms of imaginative literature as a way of tapping or mobilizing "sentimental" or "emotional" inclinations.⁸⁷ Its project, seen in the terms I have been using, would be to reconstitute sentiment and emotion as the basis for left politics. Yet structural barriers lead me not to expect too much from narrative jurisprudence. In particular, the motivational and screening mechanisms that create the legal academy are unlikely to produce many legal academics who are particularly noteworthy writers of imaginative literature.⁸⁸ The mechanisms, that

84. Richard Delgado, *Moves*, 139 U. PA. L. REV. 1071, 1073 (1991).

85. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

86. Although, in my querulous mode, I sometimes wonder whether the rate at which the work is exciting is higher than the rate at which work associated with comprehensive normative rationality is exciting (particularly when one discounts for the fact that young scholars, of whom more seem to be associated with narrative jurisprudence, tend to do more exciting work than older ones).

87. The scare quotes are needed to signal that narrative jurisprudence, in this mode at least, denies that the distinction between "reason" and "emotion" or "sentiment" is coherent.

88. For a more particularized discussion, see Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. (forthcoming 1992). Duncan Kennedy early remarked on the widespread fantasy among successful law students, feeling the strains of legal education, that they could be terrific authors of imaginative literature. Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71, 77 (1970). Kennedy argued that this fantasy expressed the private side of a psychological split in which the public side was expressed through the law student's "legal" work. Narrative jurisprudence might be seen as an attempt to overcome this split. Mark Kelman of Stanford Law School is the author of a commercially unsuccessful novel; there may be some law professors or former law professors who have succeeded as authors of imaginative literature, but surely not more than a handful. In light of Kennedy's observations, perhaps we ought to understand narrative jurisprudence as a means by

is, are likely to make law professors systematically better at comprehensive normative rationality than at narrative jurisprudence.

Pierre Schlag hints at a different way of understanding the thin normativity of the left critique of normativity. He criticizes Martha Minow and Elizabeth Spelman, whom he calls "neo-pragmatists," for failing to "explor[e] the context of academic legal thought or law review writing or conference papers," and asks that we consider "the scene of the writing."⁸⁹ I have treated the left critique of normativity as an intervention in normative discourse, but there is an obvious alternative characterization: It is a series of law review articles, subject to the constraints of the form and located in a particular historical and disciplinary context.

Schlag, Delgado, and Winter clearly understand the pull of normativity in law review articles, and whether consciously or unconsciously they may have succumbed to that pull in their thin normative statements.⁹⁰ More interesting, perhaps, is the possibility that we could understand the left critique of normativity by considering its primary audience. Treating these works as performances, I believe that their primary audience is other left legal academics, who accept descriptions like *beggars* and *torture* without considering the implications of that acceptance. And in the circumstances of their production, the articles might be political interventions, aimed at shoring up confidence among left legal academics at a time when their project seems unpromising in the arena of politics and unsustainable in the arena of intellectual discourse. The message is, "Don't worry, you can be a left legal academic anyway." The thin left commitments expressed in the articles would serve to identify the audience and defuse concern that the intellectual project outlined by the critique of normativity could support right-wing commitments just as readily as it does left-wing ones.⁹¹

To use Delgado's terms, though, one might find another *tool* for rebuilding normative discourse. It is to relinquish any normative

which people can do what they really want to do in the field into which circumstances have led them.

89. Schlag, *supra* note 5, at 889.

90. I should note that one dimension of this pull is the desire on the part of student law review editors for articles that contain normative statements. I wonder whether the editors of the *University of Pennsylvania Law Review* would have accepted the symposium on which I have focused had it been relentlessly nonnormative.

91. Another reading of these articles is that they are strategically designed to push their audience away from normativity — even small-scale normativity — entirely, but that their authors understand that the audience is as yet too committed to making normative judgments to be moved by articles unless they demonstrate some modest normative commitments.

claims for leftist inclinations.⁹² Left legal scholarship would be exclusively critical, deconstructing the normative claims made elsewhere in legal scholarship but offering nothing at all in their place. This project, too, seems difficult to sustain. Left legal academics walk into classrooms every day in which students demand that we say what our views are on controverted issues. A stance of unrelenting critique will not satisfy them. To face such dissatisfaction routinely is simply uncomfortable. Thus, even a leftist teacher committed to "only critique" is likely to succumb in the classroom.⁹³ Because the classroom is where we try out many of our ideas, it seems likely that the normativity to which this teacher is pushed in the classroom will come to infect his or her scholarship.

There is, of course, an alternative. Perhaps the critique of normativity goes all the way down, in which case the "only critique" stance is the only one an intellectually honest legal academic can take. But perhaps the critique of normativity is wrong. Legal academics might then remain committed to the project of comprehensive normative rationality, and their modest normative gestures would be promissory notes to be cashed in elsewhere, in the development of a comprehensive normative theory.⁹⁴

92. I am committed to using this tool, though I acknowledge the difficulty of doing so. See TUSHNET, *supra* note 15, at 318 ("Critique is all there is.").

93. In addition, the purely critical stance may well be quite unsettling to left-liberal students, whom leftist teachers want to encourage. To satisfy that segment of our audience, which we regard as especially important, we may be compelled to inject normativity into the classroom.

94. Andrew Altman has suggested to me the alternative of a division of labor, in which law professors would develop small-scale leftist reforms and would leave to philosophers the task of justifying leftism more comprehensively (leaving open the possibility, Altman points out, that in the end the theorists will demonstrate that leftism "won't wash"). Altman's comments suggest that the leftist critique of normativity might best be understood as yet another version of the familiar "lawyer as astrophysicist" problem. See Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law in the Seventies*, 57 TEXAS L. REV. 1307 (1979) (describing law professors' confidence that they can perform at high professional level in any field to which they direct their attention).