

Book Review

Between Truth and Provocation: Reclaiming Reason in American Legal Scholarship

Daniel A. Farber and Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law*. New York and Oxford: Oxford University Press, 1997. Pp. 195. \$25.00.

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I. DÉJÀ VU, ALL OVER AGAIN

The only difference that I see is that you are exactly the same as you used to be.

—The Wallflowers¹

* Professor of Law, Western New England College School of Law. I am grateful to Dan Farber, Nancy Levit, and Chris Iijima for their very helpful written comments and discussions; to Cal Anderson, Dick Cole, Joan Mahoney, and Caren Senter for stimulating conversations about this Book Review; and especially to Bruce Miller for wide-ranging conversations about these and related topics. I wish to dedicate this Book Review to the memory of Bill Senter, who had little patience for the politically correct cult of victimhood, but who was fascinated in his own way by the implications that the theoretical questions surrounding “radical multiculturalism” might hold for achieving the goal of a just society.

1. THE WALLFLOWERS, *The Difference, on BRINGING DOWN THE HORSE* (Interscope Records 1996).

Truth has regained a strong voice in American legal scholarship. Like a groggy patient slowly emerging from a traumatic operation, legal theory is being coaxed back to consciousness by Dan Farber and Suzanna Sherry.² They are fighting the debilitating illness of radical multiculturalism and its attendant relativism; they proclaim that the cure can be found in the power of truth, the force of reason, and the integrity of the word. Unfortunately, the patient is unlikely to recover while in the care of Farber and Sherry, even though their operation must be judged a success on its own terms. By equating “reason” with “truth,” Farber and Sherry make a diagnostic error that one might expect from the country doctors who embrace right-wing legal ideologies but which is unforgivable for such talented and level-headed practitioners. Consequently, a tale foretold emerges from the Oxford University Press as predictably as the changing season: Rationality is deployed against emotional appeals, and truth is championed against relativism. It’s *déjà vu*, all over again.

Farber and Sherry’s attack on multiculturalism is only the most recent manifestation of a conflict that began at the dawn of the Western intellectual tradition in ancient Greece. The Sophists—a group of itinerant, cosmopolitan, and irreverent teachers—gained notoriety as the mythical-poetic, parochial, and aristocratic world of Homeric Greece was giving way to the self-reflective, pan-Hellenic, and democratic world exemplified by Periclean Athens.³ The Sophists contributed to the breakdown in traditional social patterns by demonstrating that all received wisdom can be challenged and reversed with rhetorical critique. They were known for teaching the skill of making the weaker argument appear stronger, which proved to be a threat to the established order because it subjected every dominant discourse to interrogation and potential rejection in favor of what initially appeared to be untenable.⁴ Plato’s philosophy, of course, was defined largely by his vitriolic attacks on the relativist implications of Sophistic teachings and by his reassertion of a stable, accessible realm of rationality rising above the fluidity of Sophistical argumentation.⁵ Plato’s defense of the philosophy of truth against the rhetoric of the probable runs through our intellectual heritage, with philosophy maintaining the dominant position for much of this

2. See DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).

3. See EDWARD SCHIAPPA, *PROTAGORAS AND LOGOS: A STUDY IN GREEK PHILOSOPHY AND RHETORIC* 56, 170 (1991); see also ALASDAIR MACINTYRE, *A SHORT HISTORY OF ETHICS: A HISTORY OF MORAL PHILOSOPHY FROM THE HOMERIC AGE TO THE TWENTIETH CENTURY* 5-13 (1966); JOHN POULAKOS, *SOPHISTICAL RHETORIC IN CLASSICAL GREECE* 11-52 (1995).

4. See POULAKOS, *supra* note 3, at 187-93.

5. See *id.* at 74-112.

history.⁶ Farber and Sherry appear on the scene of contemporary legal theory to slay again, for the thousandth time, the Sophistic serpent.

This well-rehearsed drama is not new to legal theory, of course. Paul Carrington, former Dean at Duke University School of Law, knows a thing or two about confronting a scholarly fixation with the cool voice of traditionalism. In response to the growth of Critical Legal Studies in the 1970s, Carrington penned a now-famous essay that suggested that the crits should leave the legal academy if they could not bring themselves to embrace and foster the profession of lawyering.⁷ The response from critical quarters was quick and brutal: Carrington was reduced to the Joe McCarthy of law teaching.⁸ The response from traditionalists consisted mainly of muffled applause behind closed doors and a public reduction of Carrington's thesis to the following tautology: "Those who don't believe in law shouldn't teach it."⁹ Carrington seemed to miss the point that most Critical Legal Studies scholarship, even if encumbered by page after page of

6. Vico's spirited but largely unheeded challenge to Descartes's rationalistic philosophy represents one of the important points of confrontation in this long battle. For a description of Vico's rebuttal of the Cartesian model as that model was gaining ascendancy, see JOHN D. SCHAEFFER, *SENSUS COMMUNIS: VICO, RHETORIC, AND THE LIMITS OF RELATIVISM* (1990).

7. See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

8. Ted Finman pointed out that

[s]ome of Carrington's critics have likened his proposal to the red baiting, loyalty oaths, and McCarthyism of the 1950s. Many people will summarily reject this idea; others will readily embrace it. Both positions contain elements of truth. On the one hand, the comparison with the 1950s obscures crucial differences between the anti-communism of that time and what Carrington calls for today; on the other, however, the uses to which his thesis might be put all too closely resemble what went on during those unhappy years.

Ted Finman, *Critical Legal Studies, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington's River*, 35 J. LEGAL EDUC. 180, 192 (1985) (citations omitted). Gunter Frankenberg described Carrington's article as an "unfriendly warning from the thought police [that] provoked an avalanche of liberal-minded protest from the Crits. . . . Carrington's polemic conjured up visions of a McCarthyite turn, complete with political purges." Gunter Frankenberg, *Down by Law: Irony, Seriousness, and Reason*, 83 NW. U. L. REV. 360, 367 (1989). See also Jerry Frug, *McCarthyism and Critical Legal Studies*, 22 HARV. C.R.-C.L. L. REV. 665, 685-86, 694-95 (1987) (drawing parallels between the attacks by Carrington and others on proponents of CLS to the McCarthy-era university purges). Needless to say, Carrington responded angrily to these attacks and made his own counteraccusations. See Paul D. Carrington, *Freedom and Community in the Academy*, 66 TEX. L. REV. 1577, 1583 n.11 (1988) (strenuously protesting Frug's characterization and accusing Frug of practicing "the dark art of defamation in a manner that would have made the Senator proud of Frug as a protégé"). For an overview of the reactions to Carrington's piece, see David A. Kaplan, *A Scholarly War of Words over Academic Freedom*, NAT'L L.J., Feb. 11, 1985, at 1; and Peter W. Martin, "Of Law and the River," and of *Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985) (collected correspondence of prominent figures in the debate).

9. For example, Louis Schwartz wrote that he "found Carrington's piece brilliant, civilized, and insightful," but was careful to distance himself from Carrington's call for nihilists to leave the legal academy. Letter from Louis B. Schwartz to Paul Brest, in Martin, *supra* note 8, at 19. William Van Alstyne reduced Carrington's article to a tautology that begged the questions raised by the dispute. See Letter of William W. Van Alstyne to the Committee on Academic Freedom and Tenure of the American Association of University Professors, *in id.* at 20.

contemporary continental social theory, sought to revive professionalism from the dogmatic slumbers of the day. The crits seemed to miss the point that Carrington, even when wrapping himself in a folksy Mark Twain persona, truly was concerned about the vital role that lawyers play in both perpetuating and preventing injustice in contemporary society. It seems that neither camp has yet overcome this basic misunderstanding.

Farber and Sherry's response to radical multiculturalism places them into Carrington's role in the context of contemporary debates, but their book carries far more weight and undoubtedly will have a much larger impact. First, Farber and Sherry have written an accessible manuscript that will reach beyond the narrow cloister of academics, but that nonetheless draws from a series of scholarly articles written during the past several years.¹⁰ Additionally, neither author can be dismissed as a political conservative who "just doesn't get it." Moreover, unlike Mark Tushnet's generational attack on the degradation of constitutional discourse at the hands of the new Sophists,¹¹ the book manages to maintain a respectable level of civility and analytic remove. Farber and Sherry are content to demonstrate that the radicals are wrong, and they do not share Carrington's desire to see all nonbelievers leave the academy.¹² Finally, the zeitgeist appears to be moving in their direction: Nominal liberals now appear embarrassed by the conundrums of affirmative action policy and the increasingly fractionalized world of legal theory; there is a palpable longing for the simpler days of the Great Society. As a consequence of all these factors, Farber and Sherry's book is certain to become a major point of reference in the next round of the culture wars.

In this Book Review, I argue that yet another reenactment of the Plato-Sophist battle is unproductive and even harmful to scholarly discourse. Farber and Sherry are correct to insist that the Sophistic fascination with deconstruction and variability cannot serve as a guiding principle of a vibrant community (whether political or scholarly), but they underestimate the degree to which their prescription of "reason as truth" cannot be filled without committing an equally debilitating mistake. What is needed is not another confron-

10. Coauthored articles on the topics pursued in their book are: Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN L. REV. 647 (1994) [hereinafter Farber & Sherry, *200,000 Cards of Dimitri Yurasov*].

11. See Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992); Mark Tushnet, *Reply*, 81 GEO. L.J. 350 (1992).

12. See FARBER & SHERRY, *supra* note 2, at 8.

tation of rhetoric with philosophy, but a willingness to abandon this ingrained dichotomy by acknowledging that reason in law is not exhausted by the concept of truth. What is needed is an effort to reclaim reason in American legal scholarship by steering a course between the dogmatic pursuit of truth and the self-indulgent pursuit of provocation.

A topic of this breadth and of this degree of complexity must be approached at several levels of abstraction if the discussion is to gain purchase. Farber and Sherry have adroitly selected points of entry that lead to a manageable discussion, and I am no less constrained in my efforts to structure my assessment. I begin by recounting Farber and Sherry's definition of the theoretical tenets of "radical multiculturalism," and then I demonstrate that their definition assumes away the very issues that are in dispute. By making the subject of their book that which is by definition unreasonable, they are able easily to mount an argument against radical multiculturalism that appears to be devastating. I first engage Farber and Sherry at the level of definition because to a large extent their argument is all in the naming.

In the next Part of the Book Review, I describe Farber and Sherry's analysis of the perils of multiculturalism. Their conception of perilous developments is inseparable from the preconceptions embedded in their definition of radical multiculturalism. These undefended commitments remain virtually invisible due to their ubiquity in mainstream ways of thinking. Farber and Sherry's charge that radical multiculturalism yields dangerous intellectual and political consequences requires a tacit acceptance of Enlightenment ideology by the reader. In the final Part of this Book Review, I provide a sketch of an alternative conception of reason that accepts the force of the radical critique of Enlightenment ideology without devolving into the captiousness of crude, Sophistic provocation. I contend that reclaiming reason in legal theory is a worthy project but that Farber and Sherry fail in this task. In conclusion, I outline a rhetorical conception of reason that reaches back to the Sophists and moves beyond the stale and obfuscating oppositions that Farber and Sherry reinforce.

II. WHAT'S IN A NAME?

A. Farber and Sherry's Definition of Radical Multiculturalism

Farber and Sherry emphasize that they are targeting only *radical* multiculturalist academics and do not offer a wholesale condemnation of the various political goals associated with multiculturalism. The manner in which they define the subject of their critique is essential

to their argument; therefore, their construction of radical multiculturalism merits close review. Farber and Sherry position themselves within the broad pragmatist “mainstream” that stretches from Frank Michelman to Richard Posner,¹³ and characterize the radical multiculturalists as “extremists” who, no less than Robert Bork and his fellow right-wing thinkers, demonstrate “an abandonment of moderation and a dearth of common sense.”¹⁴ In a quick and easy intellectual genealogy, they trace the critique of inherited traditions from Legal Realism, through Critical Legal Studies, to the current radicals, but emphasize that the radicals have intensified the critique by adding a preoccupation with issues relating to race and gender.¹⁵ Abandoning ordinary scholarly and political discourse and seeking to overturn the very foundations of American legal thought,¹⁶ the radical multiculturalists exhibit what, in the end, Farber and Sherry believe can only be termed a “paranoid mode of thinking.”¹⁷ This cutting diagnosis is not drawn out of context. Farber and Sherry acknowledge that their argument is barbed, but they insist that it is “unavoidably harsh”¹⁸ because the serious questions at hand demand an uncompromising description and rejection of radical multiculturalism.¹⁹

Radical multiculturalism is an umbrella term used by Farber and Sherry to reference extremists who espouse “voice” or “identity” scholarship. Feminism, critical race theory, and gaylegal theory are breeding grounds for radicals who argue that they have a unique, counterhegemonic perspective, but who in fact all share the same fundamentally flawed premises. In the broadest terms, the radicals are engaged in a fierce and uncompromising battle against the Enlightenment tradition.²⁰ Consequently, mainstream scholars who do no more than “cling to traditional Enlightenment aspirations” are now “at some risk of being labeled racists and bigots.”²¹ Whereas for Farber and Sherry, the Enlightenment represents faith in the power of human

13. *See id.* at 131-33.

14. *Id.* at 3.

15. *See id.* at 21.

16. *See id.* at 16.

17. *Id.* at 133-37.

18. *Id.* at 13.

19. At various points in the book, Farber and Sherry are quite direct and colloquial in expressing their disdain for the message propounded by the radicals. *See, e.g., id.* at 5 (characterizing the radicals as a “motley group”); *id.* at 9 (asserting that the radicals “have relatively little interest in the nuances of philosophical theories”); *id.* at 101 (claiming that the radicals are sloppy scholars unconcerned with factual accuracy); *id.* at 119 (finding that “[b]esides being thoroughly unattractive in its implications, radical multiculturalism defies common sense”); *id.* at 127 (describing the “implausibility” of the radicals’ views); *id.* at 142 (alleging that the radicals exhibit a “paranoid style and rigidity”).

20. *See id.* at 141.

21. *Id.* at 33.

reason to rise above desire and prejudice, the radicals reject the belief that power relations can be tamed with anything so pristine and neutral.²² This radical anti-Enlightenment perspective is captured in the rallying cry that all reality is “socially constructed,”²³ a statement that Farber and Sherry interpret to mean that there are no acontextual truths to be apprehended by human reason, but instead only historically contingent relationships of power and domination.

Farber and Sherry relate several strands of radical multiculturalism that flow from this fundamental notion that reality is socially constructed. The radicals build on the traditions of Legal Realism and Critical Legal Studies by insisting that legal doctrine is thoroughly indeterminate and therefore can respond to contradictory and changing social forces. This thesis, taken alone, is unexceptional, and Farber and Sherry readily agree that the radicals are correct to attack the remaining vestiges of legal formalism.²⁴ Radical multiculturalists push much farther, however, in arguing that legal doctrine is not just indeterminate but a facilitator of “a deliberate concentration of power in the white male establishment.”²⁵ In their view, Farber and Sherry contend, recognizing the indeterminacy of legal doctrine is merely the first step in the broader project of rejecting the very presuppositions of reasoned discourse. Radical multiculturalists deny the existence of truths about which we can gain knowledge and reject the possibility of developing neutral standards by which we can make objective judgments of merit. Farber and Sherry concentrate their energies on responding to this radical attack on truth and merit.

The radicals argue that the indeterminacy of legal doctrine is only a particular manifestation of the absence of ahistorical and neutral truth. Competing claims about law, politics, and society are not descriptions that accord, more or less, with a true state of affairs that exists independently of the descriptions. Instead, Farber and Sherry state the radicals’ argument as follows: There are only competing narratives, none of which has any intrinsic superiority over the others.

If objective reality does not exist, as they suggest, then there is no need to be concerned about truth. . . . If there are no solid

22. Farber and Sherry summarize this point nicely:

The Enlightenment’s goal of an objective and reasoned basis for knowledge, merit, truth, justice, and the like is an impossibility: “objectivity,” in the sense of standards of judgment that transcend individual perspectives, does not exist. Reason is just another code word for the views of the privileged. The Enlightenment itself merely replaced one socially constructed view of reality with another, mistaking power for knowledge. There is naught but power.

Id. at 33.

23. *See id.* at 23-26.

24. *See id.* at 133.

25. *Id.* at 22.

facts, then it makes no sense to ask whether any particular narrative is true.²⁶

Working from this premise, the radicals are dedicated to developing new narratives that reverse the dominant discourse and its latent support for power relationships structured to privilege whites and males. They do not analyze racism with empirical methodologies grounded in shared, scholarly presuppositions about the nature of truth; rather, they attempt to change mindsets with emotionally compelling stories, regardless of whether the stories are factually accurate.²⁷ As a corollary, the radicals are dedicated to governmental regulation of pornography, hate speech, and other (harmful) constitutive narratives that lie behind the professed rationality of the dominant worldview.²⁸

Farber and Sherry allege that the radicals slide from these starting points to absurd conclusions. If political and scholarly discourse amount to nothing more than battles of incommensurable stories having no absolute truth value, the relativist conclusion that no story is "better" than another follows quickly. Similarly, in their view, if there are no "universal or common standards of judgment," because there is no single narrative that can claim the status of truth, then the concept of merit must be rejected as a cover for the exercise of domination by one group over another.²⁹ In particular, the radicals move well beyond the idea that affirmative action should be taken to ensure equal opportunity by adopting a thoroughgoing rejection of the possibility of neutral criteria of merit and demanding that "everything must be equally distributed."³⁰ Radicals are unwilling to accept the assertion that criteria of merit may be the result of a benign historical contingency, insisting instead that the criteria "are constructed to solidify existing power relationships."³¹ Consequently, the radicals turn our understanding of merit on its head. Achieving success is no longer the result of virtue and skill but an emblem of participation in a hierarchical system of power and privilege. This leads to Farber and Sherry's curious argument that radical multiculturalism ultimately is anti-Semitic.³²

26. *Id.* at 97.

27. Examples of stories that are deemed useful by the radicals, although not factually true, include Tawana Brawley's fabricated rape charges, *see id.* at 96, and the charge that qualified minorities are prejudiced in their efforts to obtain positions on law faculties, *see id.* at 129-31.

28. *See id.* at 40-47.

29. *Id.* at 26.

30. *Id.* at 52.

31. *Id.* at 60.

32. *See id.* at 52-71.

In summary, Farber and Sherry define radical multiculturalism as the embrace of anti-Enlightenment philosophical commitments by those seeking to further the interests of various marginalized groups (including racial minorities, women, and gays). The radicals do not believe in truth or objective criteria of merit, but instead believe that existing social structures and conventions are the result of an ongoing power struggle in which dominant groups shape the terms of the contest to ensure their continued victory. Appeals to truth and objectivity are just moves in the domination game; oppressed groups seduced by the Enlightenment promise of neutrality and objectivity will only strengthen the chains that bind them. It should come as no surprise that Farber and Sherry conclude by arguing that this wildly improbable set of beliefs evidences a “paranoid mode of thought.”³³

B. It's All in the Naming

On the basis of Farber and Sherry's definition of radical multiculturalism, the case against the radicals seems too obvious to belabor. And that is precisely the problem with their account. Farber and Sherry employ the well-known rhetorical technique of defeating their opponents by the manner in which they define their opponents' position. In its cruder manifestations, this technique is characterized as the defeat of a straw man. Because Farber and Sherry demonstrate considerable skill, though, their strategy is better described as a feint or misdirection. Before addressing their substantive arguments against radical multiculturalism, it is critical to note the extent to which their argument is accomplished simply by their characterization of radical multiculturalism. It is unnecessary to engage in a line-by-line assessment of their reporting abilities,³⁴ for the principal problem is the undefended conceptual presuppositions that drive their definition.

33. See *id.* at 133-37.

34. In some instances it is clear that they have been unfair to their targets, as when they suggest that the radicals would assert that a book denying the Holocaust is as good as a book that accurately reports the fact of the death camps. See *id.* at 120. In fact, in another chapter of the book, they clearly acknowledge that radical multiculturalists would have no patience with Holocaust deniers, but nevertheless saddle the multiculturalists with the sins of those persons who would twist and abuse multiculturalist ideas. See *id.* at 109. Using this same rationale, though, I easily could impugn their book on the basis of the simplistic and uninformed uses to which it has already been put by commentators in the popular press who are interested in generating sound bites rather than engaging in analysis. See, e.g., Heather Mac Donald, Book Review, COMMENTARY, Oct. 1, 1997, at 64; Walter Olson, *The Law on Trial*, WALL ST. J., Oct. 14, 1997, at A20; Michael Skube, *Law's Radicals Get Thrashing They Deserve*, ATLANTA J. & ATLANTA CONST., Nov. 16, 1997, at L12; see also Arnold Beichman, *Beyond the Law*, WASH. TIMES, Oct. 20, 1997, at A19 (rehashing Mac Donald's review). The Holocaust example falls flat anyway, since my perception (admittedly not based on actually reading any of this noxious literature) is that Holocaust deniers are strict objectivists who claim that the real, undeniable truth of history has been hidden by masterful storytellers pursuing political aims, thus making them completely unsympathetic to radical multiculturalist philosophy.

Farber and Sherry betray two central commitments in their characterization of radical multiculturalism: They insist both that legal practice is a pragmatic activity and also that it is objective in a way that humanistic activities are not. At several crucial junctures, Farber and Sherry emphasize that whatever appeal radical multiculturalism may hold as a theoretical framework for studying art, literature, or other humanistic endeavors, it holds no such appeal in analyzing the legal system.³⁵ Broadly characterized, Farber and Sherry's argument is that multiculturalist scholars are radicals on the basis of their own unwillingness to grant to law a place of cognitive privilege, secure from the instability of the humanities. Adopting this perspective without comment seems strange in light of the long history of the law and literature movement, which has challenged the autonomy of law in a variety of similar ways.³⁶ This presumption is no small matter of which the authors can assume acceptance by all of their readers, but instead represents an important part of the radical program that is taken seriously by a number of scholars today. Despite their repeated claims to represent a broad-based, conciliatory pragmatism,³⁷ Farber and Sherry plainly take sides in the conflict they describe between Enlightenment values and anti-Enlightenment critique. Scholars in the arts and humanities may be willing to surrender to irrational subjectivism, but Farber and Sherry insist that legal scholarship can and should continue to be defined by empirical and rational strategies designed to uncover the truth of the matter. It is not surprising that they adopt this position—undoubtedly it is widely shared by most members of the academy—but it is surprising that they do so without offering any argument.

Farber and Sherry repeatedly decline to join in the philosophical debate surrounding the critique of the Enlightenment,³⁸ even as they

35. See FARBER & SHERRY, *supra* note 2, at 34, 119. Of course, the battle between rhetoric and rationality is no less evident in the humanities, and the debate is not a replication of the debate in legal theory: *It is the same debate*. Consequently, literary theory includes a standoff between radical postmodernists, *see, e.g.*, BARBARA HERNNSTEIN SMITH, *BELIEF AND RESISTANCE: DYNAMICS OF CONTEMPORARY INTELLECTUAL CONTROVERSY* (1997); BARBARA HERNNSTEIN SMITH, *CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY* (1988), neofoundationalist critical theorists, *see, e.g.*, TERRY EAGLETON, *IDEOLOGY, AN INTRODUCTION* (1991); TERRY EAGLETON, *THE ILLUSIONS OF POSTMODERNISM* (1996), FREDRIC JAMESON, *MARXISM AND FORM* (1971); FREDRIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (1991), and defenders of the canon of high literature, *see, e.g.*, HAROLD BLOOM, *THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES* (1994). My thanks to Bruce Miller for emphasizing the importance of this point to my critique.

36. Most recently, postmodern and deconstructive approaches have achieved some notoriety, but these schools do not by any means exhaust the investigation of the juncture of law and literature.

37. See FARBER & SHERRY, *supra* note 2, at 3, 27, 122, 131-33.

38. See *id.* at 7, 9, 96-99.

describe this critique as the defining feature of the radical program. Their several explanations for refusing to do so are unconvincing. Admitting their limited abilities to engage the full philosophical depth of the debate³⁹ simply raises the question of why they took it upon themselves to write the book and suggests more than a bit of convenient humility. Without detailed argument, the claim that the radicals are rather unsophisticated in their deployment of the philosophical challenge to the Enlightenment⁴⁰ appears dismissive and, again, undercuts Farber and Sherry's stated purpose in writing the book. Surely there is nothing new in the assertion that some legal scholars have butchered an otherwise respectable and important philosophical critique, and by no means do they limit their book to such a circumspect theme.

Farber and Sherry's principal reason for avoiding the core of the philosophical debate is more subtle, but proves equally unpersuasive. They concede the philosophical critique of the Enlightenment for purposes of argument, but then test this critical perspective by making a pragmatic assessment of the "legal and societal implications of radical multiculturalist legal theories."⁴¹ In other words, Farber and Sherry argue that radical multiculturalism leads to undesirable results and should be rejected on pragmatic grounds even if the motivating philosophical premises are granted.⁴² This strategy is curious, if not bizarre, given their recurring theme that the radicals are to be faulted primarily for abandoning the quest for truth in order to achieve desirable political ends. Because the illegitimacy of this move by Farber and Sherry is deeply connected with problems in their argument, it warrants a more detailed discussion.

The first question raised by their approach is how to determine the criteria for judging the pragmatic political effects of the radical multiculturalist program. Farber and Sherry acknowledge that this implicates a seemingly insuperable difficulty, but they proceed nonetheless with an unearned air of confidence.

How, then, might one proceed in the face of such a deep intellectual divide?

One possibility would be to debate the truth of the radical multiculturalist ideas. The problem, of course, is that the two sides espouse different theories of truth and commitments to different forms of persuasion. It is the very concept of "truth" that is in dispute.

39. *See id.* at 9.

40. *See id.*

41. *Id.* at 7.

42. *See id.* at 9-10.

We have decided to take a different tack. Rather than asking whether radical multiculturalism is good philosophical theory, we prefer to ask whether it is wise politics.

....

If we shared no political values with the radical multiculturalists, this would be an equally pointless inquiry. But in fact we believe that we do share some premises with them, or at least with many of their sympathizers.⁴³

It should come as no surprise that the “shared premises” identified by Farber and Sherry are the cornerstones of the Enlightenment tradition of liberal political thought: equal treatment of all citizens, robust public dialogue leading to increasingly deeper understanding, and evolutionary improvements fostered by the development of accurate historical understanding.⁴⁴ The entire book thus rests on the premise that their opponents do not truly embrace radical multiculturalism all the way down rather than on arguments against the merits of radical multiculturalism. It is no overstatement to rephrase their line of attack as follows: “We don’t need to dispute the philosophy of radical multiculturalism because we believe that enough adherents are committed, at a deep level, to Enlightenment principles; working from these shared principles as a starting point, we will demonstrate that radical multiculturalism is undesirable under Enlightenment criteria.” In the end, Farber and Sherry do nothing more than define the “broad consensus”⁴⁵ of true believers and then preach energetically to the converted. What gets lost is an intellectual engagement with the philosophical critique of the Enlightenment that the radicals bring forward.

In defining radical multiculturalism using these polemical terms, Farber and Sherry explicitly renew Plato’s philosophical attack on Sophistical rhetoric and thus reinvigorate the unhelpful dualism that informs our traditional understanding of rationality. They caution us that without “objective truth,” there can be nothing other than “authoritarian fiat”⁴⁶ and that without objective criteria of merit, there is no rational basis for a critique of existing practices.⁴⁷ These false alternatives are parasitic on the overarching dualism that Farber and Sherry invoke at several points in their argument: the contest between reason and rhetoric. Farber and Sherry in effect characterize their opponents as a band of neo-Sophists who teach a dangerous and

43. *Id.* at 50.

44. *See id.*

45. *Id.* at 51.

46. *Id.* at 117.

47. *See id.* at 68.

destabilizing kind of anarchical rhetoric, while they assume for themselves the mantle of the defenders of reason and true knowledge.

The radicals thus try to explode the dominant myths or received knowledge, disrupt the established order, shatter complacency, and seduce the reader. The goal of scholarship is transformation; knowledge is communicated with a flash of recognition that resonates with the recipient's experience. (Most of these descriptive terms come from their works.) The focus is on rhetoric rather than logic; indeed, rhetoric, according to one radical multiculturalist, is "a magical thing" that "transforms things into their opposites" and makes "difficult choices become obvious."⁴⁸

Farber and Sherry continue:

According to radical multiculturalists, language is used most powerfully for subconscious or rhetorical effect; scholars in their writing and government in its legislation should recognize and respond to this primarily noncognitive aspect of language. For defenders of the Enlightenment, on the other hand, language is (or should be) primarily a tool for rational argument. . . . The belief in the primacy of reason rather than rhetoric underlies much of the resistance to both the message and the medium of storytelling [as practiced by the radicals].⁴⁹

It is interesting to note the degree to which their accusations against the radicals match descriptions of the Sophist program.⁵⁰ Identifying the radicals in this manner is not a prelude to argument, but serves as the argument. Branded as an irresponsible group of what might be characterized as the new Sophists, little more need be said to persuade the reader of the bankruptcy of their thought.

48. *Id.* at 31 (quoting Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 2 (1990)).

49. *Id.* at 48.

50. Compare Farber and Sherry's description of the radical view with a recent description of the rhetorical philosophy propounded by the Sophists:

Sophistical rhetoric maintains that the world of discourse consists not of a singular, real *logos* awaiting to be discovered and distinguished from its apparent counterpart, but of *dissoi logoi*—human linguistic creations in unceasing contest with one another. This means that any instance of rhetoric constitutes only one side of a two-sided issue, one utterance without its counter-utterance. When confronted by a one-sided discourse, sophistical rhetoric gives expression to an other, an unuttered side, in effect attempting to engage a seemingly victorious discourse into yet another contest in which victory for the same side is not guaranteed.

POULAKOS, *supra* note 3, at 188.

Inasmuch as counter-utterances and third alternatives are not already part of the familiar, and therefore *appropriate* phraseology of the past, sophistical rhetoric labors to utter novel words, fresh insights, and original thoughts. As such, it can be said to intervene in the world of discourse tactically, with surprising utterances, the kind that do not add to but disrupt established norms of linguistic action.

Id. at 190.

The most disturbing aspect of Farber and Sherry's characterization of radical multiculturalism, however, is the heavy-handed manner in which they equate radical philosophy with strident race- and gender-conscious politics. Farber and Sherry grant the obvious—profoundly important questions of race and gender in modern society call for new approaches in our thinking and actions⁵¹—but ascribe the radical multicultural message to the bizarre and paranoid outbursts of minority scholars who are frustrated by the difficulty of overcoming these problems in a rational and sensible manner. Radical multiculturalism, then, is an “ideology”⁵² that weaves the social construction of reality, the critique of merit, and the debunking of the ideal of truth into a powerfully seductive, self-reinforcing perspective, a perspective that falsely promises to advance the fight for justice on behalf of racial, gender, and sexual-orientation outsiders. This ideology works first to explain away the incoherence of radical versions of affirmative action⁵³ and then to insulate the radicals from attacks by critics who adhere to Enlightenment principles of rationality.⁵⁴ Farber and Sherry leave the reader with the feeling that esoteric philosophical arguments by Foucault and others are strategically borrowed in an unsophisticated way by radicals, resulting in little more than an embarrassingly irrational stream of verbiage. Farber and Sherry stand confident that Foucault's work should hold no sway in law and that it is not well articulated by the radical multiculturalist scavengers who are in search of rhetorical devices that will justify their race-conscious political program.

There is no sound reason to address only the radical thinkers who are expressly allied with radical race, gender, and sexual-orientation politics. Farber and Sherry barely mention the work of Pierre Schlag, an outspoken philosophical radical, presumably because he is a white male who is not an advocate for particular radical political causes. Schlag's work has strong affinities with the radical multiculturalists: He adopts a theory of social construction with uncompromizing zeal and rejects Enlightenment ideals of truth and objective merit.⁵⁵ Schlag rejects any manner of normative legal theory, including critical race theory and feminist theory, for normativity is part of the ideological mindset that reaffirms the theorist as an autonomous and self-directed observer. He reveals the interlocking web of routinized

51. See FARBER & SHERRY, *supra* note 2, at 9.

52. See *id.* at 118-27.

53. See *id.* at 126.

54. See *id.* at 127-29.

55. For an extended discussion of Schlag's articles and my critical rejoinder, see Francis J. Mootz III, *Rethinking the Rule of Law: A Demonstration that the Obvious is Plausible*, 61 TENN. L. REV. 69, 104-08, 116-18 (1993).

ideological behavior that creates the modern legal self of lawyers and legal academics.⁵⁶ Farber and Sherry do not discuss Schlag and other philosophical radicals who do not fit into the prescribed story of angry “minorities” running amok on the basis of questionable, second-hand philosophy.

This same selective attention is evident in their description of William Eskridge’s work. As a leading scholar in gaylegal studies, Eskridge is an obvious and necessary point of reference in their discussion. In fact, it primarily was in a debate with Eskridge in the pages of the *Stanford Law Review* that many of the themes in the book were first developed and put to the test.⁵⁷ Farber and Sherry, however, discuss only Eskridge’s gaylegal scholarship, which has been prominently linked with his advocacy work on behalf of gays in the military. They virtually ignore his extensive and careful philosophical scholarship regarding the interpretation of statutes until the end of the book, where they call for all radicals to move in similar productive directions. They present this work as a positive example even though Eskridge introduces and defends many of the philosophical claims undergirding his gaylegal articles in these earlier works.⁵⁸ It is clear that Farber and Sherry ignore noted scholarship, scholarship that is every bit as radical as the work they do discuss, when it is not expressly allied with advocacy on behalf of political causes associated with gays, women, and minorities.

In summary, Farber and Sherry nearly complete their argument in defining the radical multiculturalist program. The radicals are anti-Enlightenment thinkers who must be defined and judged according to Farber and Sherry’s Enlightenment criteria, since any deviation from these foundational criteria must be regarded as irrational, undemocratic, and oppressive. Moreover, they surreptitiously limit the scope of radical anti-Enlightenment philosophy to those scholars advocating for radical agendas on behalf of “outsiders,” collapsing the

56. See Pierre Schlag, “*Le Hors de Texte, C’est Moi*”: *The Politics of Form and the Domestication of Deconstruction*, 11 *CARDOZO L. REV.* 1631, 1635-47, 1670-73 (1990).

57. See William Eskridge, *Gaylegal Narratives*, 46 *STAN. L. REV.* 607 (1994); Farber & Sherry, *200,000 Cards of Dimitri Yurasov*, *supra* note 10.

58. Farber and Sherry cite Eskridge’s book on statutory interpretation as an example of “a more constructive interaction with the tradition” that demonstrates the means by which only “apparent” ruptures can in fact “revitalize a tradition and maintain its legitimacy.” FARBER & SHERRY, *supra* note 2, at 142 (citing WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994)). They may be highlighting the tempering effects that producing a legal treatise has on an author more than noting a distinction between Eskridge’s gaylegal scholarship and his work on legislation. Notwithstanding his even-handedness in the treatise, his law review scholarship illustrates that Eskridge is an unrepentant believer in the tenets of radical multiculturalism as applied to statutory construction. See William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 *COLUM. L. REV.* 609 (1990); Eskridge, *supra*, note 57, at 625 n.88.

radical critique of Enlightenment rationalism into unbridled multiculturalism. The wider debate between the Sophistic challengers and the Enlightenment defenders is concealed, represented as a confrontation that need not be addressed seriously. Farber and Sherry correctly link anti-Enlightenment philosophical commitments to these radical political programs, but they deftly avoid analysis by ignoring the philosophical premises and reconstructing the multicultural political goals of the radicals in accordance with Enlightenment criteria. Not surprisingly, the radicals fare poorly when their claims are analyzed by Farber and Sherry; the critique has already been accomplished at that point. By reviewing the details of their criticisms of radical multiculturalism, however, I will underscore the manner in which they have framed their analysis from the start, thereby pointing the way to a more responsive, and therefore more responsible, assessment of radical multiculturalism.

III. WHO'S AFRAID OF RADICAL MULTICULTURALISM?

A. Farber and Sherry's Analysis of the Perils of Radical Multiculturalism

Each of the central tenets of radical multiculturalism—the deconstruction of truth, merit, and rationality—leads legal scholars to conclusions and practices that Farber and Sherry insist are not just wrongheaded but dangerous and destructive. Their assessment of the perils of radical multiculturalism is so deeply connected to the biases embedded in their definition of the radical position that their discussion of the perils does not add much to their analysis. Rather than considering the merits of their argument that significant problems result from adopting a radical multicultural perspective, it is more instructive to link their characterization of these problems to their underlying preconceptions. For now, the point is not to take issue with these preconceptions, but instead to identify them and to emphasize that they remain wholly *undefended*.

The most obvious peril of radical multiculturalism identified by Farber and Sherry flows from the thesis that objective truth is a myth and that there is nothing outside of stories and narratives constructed by those who dominate social life. Starting with Patricia Williams's assessment that the Tawana Brawley case evidenced a terrible crime even if Ms. Brawley's account of being raped was not factually correct, Farber and Sherry argue that scholarship becomes nothing more than politics, and politics nothing more than the exercise of power, when truth is subordinated to the construction of stories that reinforce the radical ideology. Radicals police the stories being told

with an eye toward political effectiveness and disregard the effects that these stories have on real people living in the real world.

The radical multiculturalist dismissal of the possibility of objective truth is fraught with peril. With no possibility of appeal to a standard of truth independent of politics, there is no way to mediate among truth claims except by recourse to authoritarian fiat. This resort to power risks silencing not only dissenters from the radical multiculturalist party line, it also hurts innocent bystanders, such as the men Tawana Brawley falsely accused.⁵⁹

This failing is not limited to “he said/she said” accounts of discrete events; it also infects the resolution of matters of social policy. Farber and Sherry argue that political advocacy leads radicals to ignore the fact that single parent households are less desirable for children,⁶⁰ to disregard the fact that there is no empirical evidence that racial minorities are disadvantaged by the current hiring practices of law faculties,⁶¹ and also to ignore the real situation of working women in the quest to maintain the feminist party line.⁶²

The nonchalant attitude of radicals toward factual accuracy is simply a particular manifestation of a broader attack on the notion of historical truth. Farber and Sherry do not claim that establishing an historical fact is unproblematic, inasmuch as they accept a distinction between events and their subsequent interpretation, but they do emphasize that some interpretations of factual events are simply untrue.⁶³ It remains ambiguous whether they believe that there are a number of interpretations that have varying truth values in evolving contexts, or whether there is a single truthful interpretation that is difficult to capture once and for all in light of human limitations. “The past should not be viewed as infinitely malleable. Whether or not we can ever actually achieve objective truth, some stories come closer than others.”⁶⁴ Either way, they demarcate a line between the reality of historical events and the moderately destabilizing indeterminacy of interpretation within particular social contexts.

The peril presented by losing objective history, of moving forward without a firm factual foundation supporting social life, is that social constructionism becomes a self-fulfilling prophecy. When radicals achieve a degree of power, even if only in the limited sphere of an

59. FARBER & SHERRY, *supra* note 2, at 117.

60. *See id.* at 101.

61. *See id.* at 76-77.

62. *See id.* at 104-05.

63. *See id.* at 108-11. They discuss the work of Hayden White in connection with this line of analysis. *See, e.g.*, HAYDEN WHITE, *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* (1987).

64. FARBER & SHERRY, *supra* note 2, at 111.

academic field, they begin to construct a pseudo-reality with frightening implications for those within the field. Evoking images of the Stalinist horror in which ideology ruled and facts were produced by the state to further ideological ends, Farber and Sherry describe the brutal professional retaliation against a female historian who testified as an expert on behalf of a corporation fighting a Title VII claim. She argued that women are culturally conditioned to be less likely to seek certain kinds of employment.⁶⁵ The subsequent attacks by radical feminists allegedly were not motivated by inadequacies in the historian's methodology but by the political implications of her research. The true situation of working women is secondary to the radicals, Farber and Sherry argue, because the radicals aim only to construct an empowering feminist narrative that they then defend viciously without regard to its empirical truth.

Farber and Sherry argue that the critique of merit that flows from the rejection of truth and historical objectivity similarly has unacceptable results. If judgments of merit are not grounded in objectivity, but are rather implementations of social power by advantaged members of society, radical multiculturalist ideology necessarily must regard successful persons as oppressors. This perspective leads inevitably to anti-Semitism, they contend, since Jews are disproportionately meritorious according to current standards and therefore will be regarded as a group particularly aligned with the forces of social oppression. Initially, this seems plausible insofar as any attack on those achieving success will fall disproportionately on different groups. Farber and Sherry, however, do not argue simply that radical multiculturalism will prove to be bad for the Jews, but also contend that it is anti-Semitic. This allegation requires detailed analysis.

Jews historically are linked with Enlightenment values and the triumph of universalized rationalism over parochial prejudices in public life; Farber and Sherry thus assert that there is a natural convergence of anti-Enlightenment thinking and anti-Semitism.⁶⁶ More importantly, characterizing standards of merit as socially constructed and "merely the exercise of group power" inevitably leads to the conclusion that disproportionate "Jewish success" is "the fruit of Jewish power" in contemporary society.⁶⁷ Farber and Sherry claim that the radicals reject an alternative reading of Foucault—a reading arguing that power practices operate at a level deeper than the conscious machinations of powerful interests⁶⁸—which would permit

65. See *id.* at 104-05; see also *infra* note 105.

66. See FARBER & SHERRY, *supra* note 2, at 71.

67. *Id.* at 56.

68. See *id.* at 67.

them to explain the success of Jews and Asians as the result of a meshing of their cultural values of education and entrepreneurship with the needs of modern society.⁶⁹ In contrast, describing power practices as the fruit of group conspiracies leaves the radicals with only three possible explanations of Jewish and Asian success, all of which are irremediably discriminatory. Jews and Asians are surprisingly successful because they are the hidden conspirators in defining standards of merit (the grossest form of anti-Semitism and anti-Asian ideology); because they successfully mimic Caucasian oppressors like parasitic lackeys; or because they are permitted to succeed by Caucasian oppressors interested in promoting the ideology of egalitarianism by creating a symbol of minority achievement. All of these explanations evidence racist beliefs that undermine the public space of neutrality and achievement—hallmarks of the Enlightenment era. Farber and Sherry conclude that “to the extent that the radicals reject the traditions of the Enlightenment, they invite the recurrence of pre-Enlightenment evils” like rabid anti-Semitism.⁷⁰

Farber and Sherry allege that the corrosive effects of radical multiculturalism extend beyond the creation of scapegoats. Ultimately, radical multiculturalism undermines the ability of radicals to promote their agendas because it destroys the public forum of scholarly discourse. When rational arguments are replaced by stories that primarily hold emotional appeal, scholarship is replaced by a “warped discourse” in which knowledge is “personalized rather than objective.”⁷¹ Storytelling works to insulate radical scholars from criticism by mainstream scholars who do not share their presumed distinctive voice,⁷² creating a self-referential body of scholarship that is neither challenged nor tested and so ultimately devolves into absurdity.⁷³ Radical multiculturalism distorts public discourse and makes academic power politics, rather than reasoned debate, the only means for advancing its cause against the protests of Enlightenment scholars.

Even within the sealed world of radical scholarship, the disregard for truth works to undermine the possibility of discourse by preventing even minority scholars from engaging in debate with the radicals. Farber and Sherry describe several famous public bloodlettings and

69. See *id.* at 53-54.

70. *Id.* at 53; see also Peter Margulies, *Inclusive and Exclusive Virtues: Approaches to Identity, Merit, and Responsibility in Recent Legal Thought*, 46 CATH. U. L. REV. 1109, 1127 (1997) (explaining that Farber and Sherry believe that the problem with replacing the Enlightenment commitment to “reason and cognition” with appeals to “rhetoric and emotion” is that “the monsters of our unreasoning imagination—anti-Semitism, Holocaust revisionism, and religious fanaticism—will take center stage”).

71. FARBER & SHERRY, *supra* note 2, at 73.

72. See *id.* at 87-88.

73. See *id.* at 72-73.

conclude that “to disagree with radical multiculturalists is not merely to be incorrect but to be a traitor or apostate.”⁷⁴ “This violent rejection of dissenters is obviously not conducive to open inquiry and discussion of highly charged issues.”⁷⁵ Moreover, discussions among the radicals often devolve into absurd parodies, since storytelling is such an indeterminate means of presenting an argument that an inordinate amount of energy is spent supporting their readings of prior radical work. “The point of these stories remains obscure in part because of the paucity of explicit reasoning connecting them to a clear conclusion. . . . [T]he story merely lies on the table, offering an aesthetic experience like a coffee table ornament, but fails to move the discussion forward.”⁷⁶ When there is a conflict over the meaning or merit of a story, rational discourse is replaced by ad hominem attacks on the storyteller and the competing critics, resulting in a “postmodern fiasco.”⁷⁷

The ideology of radical multiculturalism thus produces an academic world unmoored from truth and history. Power politics is the name of the game; merit and truth are just tools of oppression used by those currently wielding the upper hand. The ugly, even if largely unexpressed, byproduct of this ideology is racism, racism directed against distinct and small minorities who succeed disproportionately in what is now viewed as a battle of group interests. The more noticeable effect of this ideology is the complete unraveling of public discourse about these issues. Over time, radical multiculturalism becomes more hermetic and is marked by an increasingly vicious fight to define the political agenda on behalf of minority scholars. Ultimately, radical multiculturalism must collapse as a consequence of its own absurdities or—and this seems to be the deep fear that motivates Farber and Sherry—it must so infect wider scholarly discourse that the scholarly enterprise itself is imperiled.

B. Beyond Fear and Loathing in Scholarly Discourse

Farber and Sherry issue an indictment that is well presented in its theme and particulars, and that merits a serious assessment. It is important to recognize, though, that their rhetorical success is purchased by assuming precisely what is in question. Farber and Sherry depend on their reader’s strong identification with their own

74. *Id.* at 80.

75. *Id.* at 81. Farber and Sherry describe the controversies arising out of the attempts by Randall Kennedy, a black professor at Harvard Law School, and Jim Chen, an Asian professor at the University of Minnesota Law School, to raise questions about the merits of radical multiculturalism. *See id.* at 80-81.

76. *Id.* at 86.

77. *Id.* at 93.

definition of the Enlightenment values at stake in the debate, first by defining the radicals as those who oppose such values, and then by describing the danger of radical multiculturalism as the abandonment of these same values. It is as if the conversation stops if Enlightenment values are questioned: You are either for or against, and the analysis unfolds for either side once a commitment is made. Without this prior commitment in place, their book simply does not exert any persuasive force. For this reason, their book amounts to an elaborate form of whistling in what they perceive to be a postmodern darkness.

It is possible that Farber and Sherry see no need to defend the Enlightenment view that is under attack by the radicals because they construe the recourse to obscure French philosophy as an implausible instrumental move to achieve certain (irrational) political goals. However, the critique of Enlightenment ideology raises very real and challenging questions that should be addressed.⁷⁸ The concepts of historical truth and objectivity are far more complex than they appreciate, as evidenced by a growing body of philosophical work that concludes that radical challenges to standard conceptions of historical truth must be addressed. For example, Joseph Margolis recently presented a sustained argument that several contemporary philosophical currents (controversial in themselves) are moving haltingly toward a radically historicist conception of truth, reason, and science. Margolis contends that the central problem for contemporary philosophers is the resolution of the relationship between flux and invariance in human experience. This problem emerges from the "Enlightenment vision" of history as a flux of unique events that are assessed by human reason, which itself exists outside this flux as an invariant dimension of reality.⁷⁹ Margolis demonstrates that a radical critique of this Enlightenment perspective can be both coherent and persuasive. He begins by arguing that the "nature" of persons as reasoning beings is a "direct function of a social, narratized memory of how they themselves have been identified and could be re-identified,"⁸⁰ with the result that "coherence—the rules of reason and the laws of the world—is itself historically constructed, an artifact of the dawning possibilities our horizoned experience happens to

78. Although they do not describe what they mean by claiming a "pragmatist" perspective, robust pragmatic accounts generally involve a critique of the strongest claims of the Enlightenment period, even when they remain committed to empirical analysis conducted by a community of individual observers. Consequently, their philosophical disposition probably is allied, if weakly, to some features of the critique that motivates radical multiculturalism. A nuanced discussion of such issues is foreclosed by Farber and Sherry's argument that the critique of Enlightenment ideology by the radicals paves the way for unreasoning and emotional scholarship that imperils fundamental features of social life.

79. See JOSEPH MARGOLIS, *THE FLUX OF HISTORY AND THE FLUX OF SCIENCE* 15 (1993).

80. *Id.* at 139.

disclose.”⁸¹ Margolis does not regard this insight as particularly unsettling to humanistic inquiry, since “objective” natural sciences similarly emerge from the historical and horizoned flux of human existence.⁸²

From this recognition, Margolis derives the insight of radical historicism: History (along with all other human undertakings) does not refer to fixed data that can be recounted in a “true” manner for all time (irony exists when we view history as timeless).⁸³ Part of his thesis appears surprising initially but follows nonetheless: History is not fixed and unchangeable in the way that a discrete physical event in the past is unchangeable.⁸⁴ Rather than “a narrative construction

81. *Id.* at 205.

82. Margolis summarizes:

[We sense in everyday life that] though we “make” the world, we cannot make it any way we please. We open our eyes and see a world we cannot ignore: still, what we see is due to what we are; and what we are we are is a result of our continuous self-formation and transformation within a larger history and the larger processes of nature. So the “resistance” of the encountered world is not at all incompatible with its being “constituted.” On the contrary, a temperate realism now requires such a compatibility. Put in the simplest terms: the apparent invariances of physical phenomena are just such invariances noted under the changing, formative conditions of human history. We posit them, from within that history, as realities independent of that history. . . .

. . . If this holds for physical nature, it cannot fail to be even more compelling when applied to cultural phenomena.

JOSEPH MARGOLIS, INTERPRETATION RADICAL BUT NOT UNRULY: THE NEW PUZZLE OF THE ARTS AND HISTORY 91-92 (1995).

83. Margolis defines radical historicism in a refined exposition that matches what Farber and Sherry criticize as the thesis of social construction.

By radical history, I mean at least: first, that we have no reason to think the real world is invariantly structured in any fixedly essential or necessary way; second, that, if that is so, knowledge and inquiry never discern an invariant order or an order not already dependent on the contingent symbiosis of knower and known; third, that knower and known are themselves historically preformed in a tacit and blindly perspectived way; fourth, that reference and predication are effective in practice despite our lacking any principled criteria for fixing the unique identity of this and that and despite our lacking changeless universals in virtue of which (alone) particular ascriptions and interpretations are rendered intelligible and true; fifth, that the referents of discourse need not possess, or have assigned to them, fixed natures, but may change (in) the “natures” or histories or “historied natures” they are assigned, without disabling reference or reidentification; and sixth, that, as a consequence, even the physical sciences, even logic and mathematics, are, as far as their lawlike and formal invariances are concerned, similarly bound by the conditions mentioned.

Id. at 112-13.

84. Developing the fifth element in the definition quoted in the preceding footnote, Margolis argues that history is not bound by an invariant “event of history” lodged in the past:

Is it always true that a change in judgment or interpretation about the past does not alter the past? Could it possibly be true that *sometimes*, an interpretation of the past *alters the past without reversing time, without undoing the physical past?* The surprising answer is: (1) it is at least a coherent view; and (2) it may also be a reasonable view.

MARGOLIS, *supra* note 79, at 157.

Margolis contends that “the historical past *entails* the physical past, but is not reducible to it,” and so “*history (and the historical past)* need not be “finished” or “closed”—in the sense in which *the physical past is closed* (or is past or has passed or is gone or is no more).” *Id.* at 158. This thesis is controversial to say the least, but Margolis argues persuasively that the radical interpretation of current philosophical themes provides a more coherent and satisfying account than the typically cautious expressions by leading opponents of Enlightenment ideology.

extrinsically imposed on the passage of time," the historical past is a feature of our presently lived experience and therefore is not "closed."⁸⁵ It is unnecessary for present purposes to defend Margolis's claim in detail; it is important to note only that he weaves his radical argument from many of the philosophical resources of our day: not merely Foucault, Derrida, and Gadamer, but Putnam, Habermas, Kuhn, and Quine as well. Farber and Sherry simply cannot wish away the challenge posed by radical conceptions of history and historical truth by making minimal concessions to Hayden White's confused bifurcation of reality and historical narrative.⁸⁶ Margolis demonstrates quite persuasively, if paradoxically, that our ability to distinguish history and fiction rests on our willingness to confront radical historicism openly.⁸⁷ In the final Part of this Book Review, I shall offer a positive account of reason that is congenial to Margolis's claims and the philosophical critiques voiced by the radicals.

It will not do to allege that the radicals reject familiar conceptions of historical truth and objectivity and to consider the matter closed. Farber and Sherry need to confront the contemporary critique of Enlightenment ideology in which reason is thoroughly historical and history is narratively constructed.⁸⁸ Farber and Sherry do not describe a single instance of a radical thinker doubting the laws of physics or disbelieving the reality of the gas chambers; indeed, they could not hope to find such unpersuasive claims in the scholarship that they survey. But neither do they engage the more challenging thesis, advanced in varying degrees by many philosophers over the past century, that history is a social activity rather than a fixed object of study. The gas chambers existed as physical objects and the victims of Nazi terror surely died there, but the historical reality of the Holocaust is subject to change because it is not and has never been invariant. Creating a powerful story about the Holocaust is not a strategy that supplements the writing of history, because history is a presently lived narrative, all the way down. The important point is that this acknowledgment, despite its radical character, does not in principle disable us from arguing with justification that some stories are better than others and that some stories are positively vile.

85. *Id.* at 159.

86. Margolis attacks the "muddle" left by White's halting concessions to radical historicism for undermining the notion that human events in the past or present are real, thus creating more problems than a radical confrontation with the historicity of understanding would pose. *Id.* at 188-93.

87. See Margolis, *supra* note 82, at 201-32.

88. This is meant to claim much more than the commonplace view of invariant history being subjected to interpretive narratives that are shaped by contextual factors. History under the radical view is not a topic of study but a mode of being.

Consider the weakness of Farber and Sherry's criticism of William Eskridge's history of the Perry Watkins case against the Army.⁸⁹ Eskridge recounts the Watkins case in its official, juridical guise, but then explodes the myth of this story by detailing how Watkins was both an extremely effective sailor and an openly, even flamboyant, gay man who represented a fundamental challenge to traditional gender roles.⁹⁰ Farber and Sherry do not impeach the accuracy of the events described by Eskridge, but they contend that Watkins presented an atypical profile of a gay man in the military. They question whether Eskridge is attempting to (re)define the "archetypal gay experience" by mistakenly claiming that Watkins represents "a prevalent phenomenon."⁹¹ By reading Eskridge through their "historical objectivity" lens, though, they have profoundly misread his article. Eskridge does not assert that Watkins's experiences in the military represent a prevalent phenomenon but that the experience of strongly heterosexual men seeking sex from gay men during periods of isolation and stress itself represents a prevalent phenomenon known as situational homosexuality.⁹² In fact, Eskridge demonstrates that Watkins's quite fantastic story of being an openly gay man permitted to reenlist during the Vietnam War but run out of the military during the 1980s purge of homosexuals is wholly suppressed in the process of creating a case history on appeal. Farber and Sherry do not appreciate that the ideal of typicality can be a means of deceptively and selectively packaging real life as historical truth. Moreover, they are blind to Eskridge's demonstration that the legal construction of history in the form of factual findings is a fitting metaphor for, if not an object lesson of, the social construction of history and culture writ large.

Farber and Sherry demonstrate the same misunderstanding when they criticize Patricia Williams for insisting that Tawana Brawley was the victim of "some unspeakable crime" notwithstanding the conclusion of legal authorities that she fabricated her story about being gang-raped.⁹³ Regarding the truthfulness of Brawley's account as irrelevant to the project of cultivating race victimhood insults the victims of sexual abuse and undermines the integrity of scholarship, they contend. But this reading is perverse, in that it conflates Williams's views with those of Al Sharpton. Williams never advocates

89. See *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), *vacated*, 875 F.2d 699 (9th Cir. 1989) (en banc).

90. See Eskridge, *supra* note 57, at 611-12 (the "conservative pragmatist" account); *id.* at 621-22 (the "prophetic pragmatist" account that can be utilized by social constructionists).

91. FARBER & SHERRY, *supra* note 2, at 79.

92. See Eskridge, *supra* note 57, at 627 n.100.

93. FARBER & SHERRY, *supra* note 2, at 96.

ignoring the falsity of Brawley's account, but instead attempts to get at the truth behind the lie by inquiring into the bizarre circumstances surrounding a fifteen-year-old girl's fictionalized expression of some untold (and potentially untellable) violence. In recent commentary on the civil defamation suit against Brawley and her advisors, Williams cogently explains that the issue is what "truth" the law is willing to hear and is capable of confronting.⁹⁴ There is no philosophical relativism in this account, although plainly there is a philosophical pluralism implied in the radical critique of the socially constructed range of questions that we pose in response to events. Williams problematizes rather than disputes the truth, arguing that there are multiple truth-seeking questions and that canonized thinking can skew truth even if it does not provide false answers.

Granting the plausibility, if not the persuasiveness, of the social constructionist critique of the Enlightenment views of history and truth would appear to reinforce the concerns about anti-Semitism voiced by Farber and Sherry. If there will in fact be a tendency to paint Jews and Asians as social manipulators once the objectivity of the criteria of merit are undermined, there is a sufficient starting point for their argument. Inflammatory allegations of anti-Semitism are simply unwarranted as a generic critique of the radicals, however, even if it is prudent always to remain on the watch for specific incidents of anti-Semitism, whether express or latent.⁹⁵ On its own

94. See Patricia Williams, *Through a Glass Darkly*, NATION, Jan. 12, 1998, at 10. Her original discussion of the Brawley case that Farber and Sherry criticize is no less reasonable. Williams skillfully highlights the racism and sexism displayed by the various "players" in the Brawley affair and the apparent lack of concern about what in fact had happened, even if Brawley had done everything to herself. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 168-78 (1991). This is highlighted by Williams's comparison of the reaction to Brawley and the reaction to Charles Stuart, a white man who killed his pregnant wife and then falsely alleged that a black man had committed the crime. See *id.* at 242 n.5.

95. Farber and Sherry clearly assert that radical multiculturalism as a philosophical position leads to anti-Semitism, not just that some radical multiculturalists have anti-Semitic sentiments. Not only do they fail to demonstrate that this is the case, however, despite devoting an entire chapter to the topic of anti-Semitism; they also do not provide even one convincing example. They do contend that Derrick Bell's attack on the concept of merit has "anti-Semitic implications" because, after conceding the disproportionate success of Jews in securing posts on the Harvard faculty, he argues that this example of minority success does not change the fact that rigid adherence to criteria of merit is no less an illegitimate tool of exclusion than prior anti-Jewish quotas. FARBER & SHERRY, *supra* note 2, at 58 n.10. This example of alleged anti-Semitism is wholly unconvincing on its face and falls flat in their book even if one disagrees with Bell that the ideology of meritocracy is "no less illegitimate" than consciously discriminating against Jews. Elsewhere, they criticize Bell's depiction of Jews in his story *The Space Traders*, see *id.* at 4, and also his contextualist defense of Louis Farrakhan's anti-Semitism as an understandable expression of black rage, see *id.* at 44. As to the first instance, Bell has employed his controversial and provocative "interest convergence" thesis to question the altruism of groups other than Jews, and so it does not appear to be inherently anti-Semitic except in the very attenuated sense that Jews will be disproportionately targeted to the extent that their social power is disproportionate. Moreover, the story describes Jews acting for the good in accordance with their self-interest (unlike the very unfavorable depiction of Christian groups by Bell) until

terms, their case for the anti-Semitic nature of radical multiculturalism is hopelessly confused. Their analysis depends upon a conspiratorial theory of socially constructed criteria of merit, but they never effectively demonstrate that the radicals intend to adopt such a crude, modernist model of social constructionism. In fact, elsewhere in the book, Farber and Sherry attribute the embrace of emotional storytelling (which they sharply distinguish from rational analysis) and the demand for interventionist activities by the government to the claim by radicals that racism and sexism are precognitively structural and unconsciously embedded.⁹⁶ To make their anti-Semitism charge stick, Farber and Sherry suppose that power structures must either be conscious creations of those wielding power or entirely arbitrary accidents of history, and they then link the radicals to the former conception. It is clear, however, that the most persuasive analyses of power practices are somewhere in the middle of this range.⁹⁷ Much more is required of Farber and Sherry to support their “conscious conspiracy” reading of radical multiculturalism.

Moreover, Farber and Sherry describe merit in very conventional terms, tracking the economic success of various groups as a measure of the merit demonstrated by members of these groups. But this narrow (even by American standards) measure of success does not tell the full story. Writing about the stunning economic success of Korean immigrants in New York City, a commentator recently noted the obvious: Envisioning a Korean candidate for mayor amounts to “sheer

they are brutally suppressed by the majority—hardly the traditional mode of anti-Semitic proselytizing. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 186-87 (1992). As to Bell’s assessment of Farrakhan, Farber and Sherry properly raise questions about Bell’s judgment, although they fall well short of demonstrating that his commitment to radical multiculturalist philosophy breeds anti-Semitism. See FARBER & SHERRY, *supra* note 2, at 4. In fact, Bell’s dialogue about Farrakhan suffers from another “failing” attributed by Farber and Sherry to radical multicultural scholarship: it is equivocal and unsettling rather than categorical and partisan. Ironically, Bell is not really discussing Farrakhan at all but is instead noting the insistent demand by the white majority that prominent blacks speak out against Farrakhan in order to maintain their “standing.” See BELL, *supra*, at 118-25.

96. See FARBER & SHERRY, *supra* note 2, at 45-47. Ironically, by claiming that anti-Semitism naturally follows from the philosophy of radical multiculturalism despite the professed commitments against anti-Semitic policies by the radicals, Farber and Sherry appear to be embracing the presuppositions that lead some radicals to urge regulation of hate speech. It is as if they believe that the seductive power of radical multicultural arguments overcome reason and drive those who adhere to these arguments to intolerant beliefs that threaten the fabric of society. See Margulies, *supra* note 70, at 1150.

97. For an excellent synthesis of Foucault’s analysis of symbolic structures and systems of power relations and Gadamer’s hermeneutic philosophy in a manner that provides strong support (as yet unnoticed by legal scholars, as far as I can determine) for the work of many radical multiculturalists seeking to establish the power of preconceptions without abandoning the power of critique, see HANS HERBERT KÖGLER, *THE POWER OF DIALOGUE: CRITICAL HERMENEUTICS AFTER GADAMER AND FOUCAULT* (Paul Hendrickson trans., MIT Press 1996) (1992).

fantasy.”⁹⁸ Despite general Asian-American economic success, it should come as no surprise that there is a lively and growing body of critical race scholarship by Asian-American theorists concerned about hegemonic power practices and the insidiously misleading construction of Asians as the model minority.⁹⁹ Farber and Sherry translate the argument over merit and achievement solely into economic terms, whereas most critical race theorists and feminists would regard differential economic success as being only a general and imperfect symptom of a society that is structured in significant ways by racial and gender ideology. For example, Gabriel J. Chin has suggested that Asian Americans may not have faced the same debilitating Jim Crow obstacles confronting African Americans because racist immigration policies and laws had successfully kept the Asian population in this country extremely small and relatively unthreatening.¹⁰⁰

Finally, the meaning of disproportionate Jewish and Asian success is no less problematic for Farber and Sherry than it is for the radicals. Do Farber and Sherry mean to claim that Jews and Asians are more meritorious than members of other groups, even if they would claim that this imbalance is the result of arbitrary historical events favoring certain traits over others? Farber and Sherry remain quite willing to reconsider specific elements of the meritocracy in place and to monitor vigilantly whether the criteria are being applied evenly, but the broad contours of our conceptions of merit are placed beyond discussion by the assumption that merit exists but is attacked by disgruntled group members who don't measure up to the standards. Yet Farber and Sherry's very description of Jewish success betrays what they refuse to acknowledge: that socially defined conceptions of merit are deeply intertwined with ongoing political, economic, and class struggles. Farber and Sherry report that Jews, regarded in terms of an historically conditioned group identity, are aligned with the values of the Enlightenment because those values provide an

98. Jeffrey Goldberg, *The Overachievers*, N.Y., Apr. 10, 1995, at 43, 46.

99. See, e.g., Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1995); Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1 (1994). The fact that Asian Americans are not given any preferential treatment under many affirmative action policies, see, e.g., Alfred C. Yen, *Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 ASIAN L.J. 39 (1996), despite pervasive racism against them, raises a number of problematic issues that are not resolved by adopting the simple view of Asians as the "model minority" that have overcome all effects of racism, see Pat K. Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 ASIAN L.J. 8 (1996); Harvey Gee, *Changing Landscapes: The Need for Asian Americans to Be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621 (1997); Frank Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995).

100. See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. (forthcoming Oct. 1998).

explanatory cover for their success and fend off anti-Semitic attacks on any accumulation of power and/or wealth.¹⁰¹ Because Farber and Sherry accept the premise that Jews have aligned themselves with a cultural model that favors their precarious position within a prejudiced society,¹⁰² they contend that Gary Peller's claim that Mark Tushnet recoils on account of his American Jewish perspective is, in some important respect, "insightful."¹⁰³ Unless one is ready to accept a definition of "neutral and objective" as that which permits the Jews to flourish, Farber and Sherry raise more questions about the "naturalness" of criteria of merit than they answer.¹⁰⁴

The final peril of radical multiculturalism—the degradation of scholarly discourse—hardly seems important in comparison to abandoning truth or embracing anti-Semitic ideology, but Farber and Sherry make their strongest point in connection with this claim. There is no basis to believe that academic battles between radicals are any less civilized than between other academics, for ad hominem bloodbaths and struggles to define orthodoxy are more or less par for the course—consider the intellectual history of Freudian psychology, Marxist political economy, or quantum mechanics. Because a stagnant intellectual tradition is most conducive to civility and incremental scholarship, the bulk of the fireworks that Farber and Sherry identify might be attributed to the fact that the radicals are seeking to disrupt current thinking rather than to the substance of the radicals' alternative vision. Although Farber and Sherry may have overstated the connection between radical multiculturalism and the breakdown of scholarly discourse, their assessment that the radicals seem philosophically disposed to unproductive scholarly exchanges rings somewhat true in light of notorious confrontations between scholars.¹⁰⁵ On close inspection, however, it becomes clear that the

101. See FARBER & SHERRY, *supra* note 2, at 71.

102. See *id.* at 92.

103. Farber and Sherry report Peller's claim that Jews have maintained a beneficial "compromise" with the Christian majority in order to preserve a private cultural sphere of Jewish belief and a safe public sphere of Jewish success. *Id.*

104. See *id.* Richard Posner feels compelled to interrupt his journalistic cheerleading in a recent review of the book to note the incongruity between Farber and Sherry's attack on identity politics and the manner with which they address Jewish identity and the alleged anti-Semitism of radical scholars. See Richard Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40, 42 (arguing that Farber and Sherry do not uncover true anti-Semitism and suggesting that they too may be infected by the "postmodern virus" that they are criticizing).

105. Farber and Sherry refer to the years of bickering that followed the expert testimony by feminist historian Rosalind Rosenberg on behalf of a defendant in a major gender discrimination lawsuit. Rosenberg testified that women are culturally conditioned not to seek certain types of high-paying sales positions. Because the government argued its case on the basis of statistics, Rosenberg's testimony was an important factor in the defendant's victory. Rosenberg was later attacked for undermining the cause of gender equality.

As always, however, there are two sides to the story. Farber and Sherry describe a vicious campaign against Rosenberg by ideological feminists upset at her unwillingness to ignore the

radicals evidence these traits because their philosophical commitments are not radical enough.

The central problem for scholarly discourse under a radical multiculturalist agenda, Farber and Sherry contend, is that polysemic stories employed to achieve political goals are substituted for rational argumentation subject to verification. If radicals tell stories about (real-life or fictional) events in their lives and then sit around and argue about the essential deep meaning of these stories, Farber and Sherry are quite correct to bemoan this development. Patricia Williams's infamous Benetton story has followed this unfortunate trajectory, Farber and Sherry argue, because the point of the story "remains obscure in part because of the paucity of explicit reasoning connecting [it] to a clear conclusion."¹⁰⁶ The pseudo-literary fixation on the Benetton story is regrettable and represents a shallow reduction of the thesis that law is one of several socially constructed narratives that constitute modern life. The philosophical importance of the narrative movement is not to encourage the telling of clever literary stories and the critical parsing of them, but to emphasize how scholarly discourse and legal discourse are both socially constructed narratives that deny their rhetoricity with false claims to objectivity and necessity.¹⁰⁷ To the extent that radicals simplistically conceive of their scholarship as telling short stories and then discussing the

facts in favor of a political cause. But the feminist historian who testified for the government in opposition to Rosenberg's testimony argues that the contretemps was brought on at least in part by Rosenberg's own behavior. See Alice Kessler-Harris, *Academic Freedom and Expert Witnessing: A Response to Haskell and Levinson*, 67 TEX. L. REV. 429, 430-31 (1988) (stating that Rosenberg's surrebuttal testimony was a strongly partisan attack on Kessler-Harris's scholarly abilities that misrepresented her work and painted an unfair picture of her as an opportunistic ideologue, leading to the unfortunate name-calling and personal attacks by third persons that followed).

106. FARBER & SHERRY, *supra* note 2, at 86.

107. Richard Delgado's famous series of "Rodrigo Chronicles" might foster this mistaken view about the implications of the narrative critique of Enlightenment models of rationality. See RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995). Delgado makes very strong and persuasive arguments, but he feels compelled to embed them in rather superficial and uninteresting dramas that prove to be distracting, if not downright irritating. The idea that conveying an argument within a heavily constructed "story" remains true to the philosophical insights of the narrative movement is just wrongheaded, since the philosophical thesis is that all discourse is narratively structured, not just expressly literary undertakings. It is unnecessary to be the next Kafka in order to write about law; this is fortunate since no law professor appears likely to assume this role.

On the other hand, by rejecting the traditional model of abstract legal scholarship and choosing instead to communicate through an exchange of views by "characters," Delgado is able to dramatize the fact that reason is social and argumentative, rather than disembodied and "pure." Cf. HANS-GEORG GADAMER, *DIALOGUE AND DIALECTIC: EIGHT HERMENEUTICAL STUDIES ON PLATO* (P. Christopher Smith ed. & trans., 1980) (demonstrating that the Socratic dialogues are important because they reveal the dialogic character of reason). What we can learn from Delgado is that mainstream legal scholarship is composed of equally heavily constructed stories that are distracting to many readers because of the clumsy rhetorical strategies they employ to deny their own rhetoricity.

meaning of the stories, they risk reinforcing the mistaken view that there is an indeterminate storytelling realm that is distinct from the reality about which they write, thereby adopting a very traditional conception, that even Farber and Sherry are willing to endorse, of stories as subsidiary complements to analytic reasoning.¹⁰⁸

Finally, any tendency by radicals to be dismissive toward traditional scholars who lack access to the unique voice available only to minority radicals certainly would be disappointing. One would hope that the radicals would learn from the thesis of narrative construction that, in principle, there can be no privileged rules of discourse. This is not to say that the radicals must conform their scholarship to the majority discourse, but only that their work should speak to those who engage it openly. Dismissive refusals to engage others in dialogue by remaining silent or launching attacks, especially when issued from the loftiest heights in academia, represent the worst forms of pseudo-objectivism that the radicals profess to eradicate. Any examples offered by Farber and Sherry of such closed attitudes toward discourse would represent more of a relapse to modernist conceptions of knowledge than an excess inherent in radical multiculturalism. Farber and Sherry are no less guilty of this tendency; as I have argued at length, they engage their targets only on their own Enlightenment-based grounds and do not address openly the deep challenges issued by radical multiculturalism even as they describe the dangers of the radical philosophical program.

The perils of radical multiculturalism identified by Farber and Sherry are either identified as perils simply because they deviate from Enlightenment values or are very real perils that are not intrinsically connected with the radical perspective. The loss of invariant history and universal objective truth is not particularly distressing when the very point of the critique under discussion is to challenge those notions. Detecting an incipient anti-Semitism is not particularly surprising either, when Enlightenment values are equated with overcoming anti-Semitism. Finally, the degradation of scholarly discourse poses legitimate concerns but, nevertheless, is not necessarily tied to the philosophical underpinnings of radical multiculturalism. Although Farber and Sherry write intelligently about a number of issues that should concern legal academics, they are completely unpersuasive—almost tautological at points—in connecting these issues to the rise of radical multiculturalism. In the end, one suspects that Farber and Sherry are wholly unimpressed with the work of the radicals that they have encountered, but that they choose to

108. See FARBER & SHERRY, *supra* note 2, at 122.

attribute these failings to radical multiculturalism as a philosophical program rather than to the capabilities of individual scholars. If they had decided to criticize individual scholars, they might have made an important contribution to current debates; by attempting to undermine radical multiculturalism as a philosophical perspective without directly assessing its tenets, however, they have simply failed to join the debates.

In the final part of this Book Review, I wish to take up the question that Farber and Sherry avoid throughout the book: whether it is plausible to embrace the theses of radical multiculturalism as a critical perspective on the American legal system. The philosophical commitments endorsed by the radicals do not necessarily translate into the abandonment of reason in favor of relativism. They may instead point to a new conception of human reason as a social process always subject to bias and abuse even as it contains within itself the resources for recognizing and working through such failings. Because Farber and Sherry target the philosophy behind radical multiculturalism instead of exposing deficiencies in individual thinkers, I do not attempt to rehabilitate any particular radical scholars. I am ready to concede that the radicals (no less than other groups that challenge a majority discourse) may contain within their ranks flamboyant Sophists who strike provocative poses in order to garner a following and fifteen minutes of fame. My claim is that the tenets of radical multiculturalism provide a persuasive philosophical challenge to the Enlightenment values that figure so prominently in the story that Farber and Sherry weave, and that this challenge is an important step in reclaiming reason in legal theory.

IV. RECLAIMING REASON IN LEGAL THEORY

The modernist attempt to get along with fewer than all of the resources of human reasoning puts one in mind of the Midwestern expression, "few bricks short of a load." It means cracked, irrational. The modernist program of narrowing down our arguments in the name of rationality was a few bricks short of a load. To admit now that metaphor and story figure also in human reasoning is to become more, not less, rational, because of putting more of what persuades serious people under scrutiny. Modernism was rigorous about part of reasoning and angrily irrational about the rest.

—Donald N. McCloskey¹⁰⁹

109. Donald N. McCloskey, *The Rhetoric of Economic Expertise*, in *THE RECOVERY OF RHETORIC: PERSUASIVE DISCOURSE AND DISCIPLINARITY IN THE HUMAN SCIENCES* 137, 146

Reason must regain a strong voice in American legal scholarship. Not reason in the narrow sense of pursuing rational truths, but reason in the widest sense of wisely deliberating and making sound judgments. If we seek to cultivate reason, then attention surely must be given to the narrative structure of reason, which is woven into social practices that embody asymmetrical power relationships. It is equally clear, though, that the internal integrity of narrative structures cannot be ignored. “Just telling stories,” like engaging in “mere political rhetoric,” refers to an activity in which the scholar adopts an ethical and epistemic comportment that is inconsistent with the pursuit of independently formulated political ends by any available means. This is just to say that reason is neither acontextual and apodictic nor infinitely malleable in the hands of self-directing subjects. Reason is not as definitive in such matters as we would like, but neither is it as impotent as we fear.

The most remarkable aspect of Farber and Sherry’s book is that even as they characterize their targets as unsophisticated hacks who propound absurd theories, they insist that radical multiculturalism raises matters of grave importance—matters that they choose not to address on the merits. If their opponents merit a response, they merit one that is responsive. Not all radical multiculturalists are good scholars, and certainly their enterprise is subject to important and thoroughgoing challenges and criticisms. There are dangers lurking within these radical theories, but it will serve us well to confront these dangers openly and without fear and loathing. Like seasoned trial lawyers, legal theorists interested in defending the possibility of legal reasoning should believe that they can win their case without all of the available evidence incontrovertibly supporting their strongest and most hopeful claims.

I will offer only a brief sketch of one potential defense of “postmodern reason.” My defense is postmodern because it concedes the force of the radical attack on the integrity of the rational subject (inevitably cast as an upper-middle-class white male) as a surveyor of objective truths, but it is also a defense of the possibility and desirability of social reason. My argument is that the anti-Enlightenment philosophical critique is correct, but that we need not consider a rejection of the totalizing conception of rationality developed and solidified in the Enlightenment period as a denial of the possibility of enlightenment through the use of reason. To reclaim reason in legal theory, it is necessary to abandon the narrow conception of rationality

that the radicals so doggedly target but also to avoid becoming consumed by the deconstructive exuberance of critique.

Returning to the unanswered challenges posed by the Sophists may be the best means of addressing the issues that Farber and Sherry sidestep. As the communities of ancient Greece confronted their own multicultural challenges, itinerant Sophists adopted the role of professional provocateurs in challenging the conventions of each community that they visited. As John Poulakos nicely summarizes, “philosophers articulated positions while the Sophists provided only *op*-positions.”¹¹⁰ Such rootless oppositionism holds little appeal for most scholars; thus, the opponents of postmodern, deconstructive, or radically critical philosophical approaches find it convenient to brand their adversaries as the new Sophists. But this does not tell the whole story of the significance of the Sophists. Protagoras and Isocrates offered a challenge to the nascent philosophical tradition given voice by Plato and Aristotle by promoting rhetorical engagement in the public square as an alternative *logos* that did not collapse into relativism and endless deconstruction.¹¹¹

In a much maligned fragment of text that survives only in the rebuttals offered against it, Protagoras credits the Sophists with the ability to make “the weaker account stronger,” thereby raising the specter of public discourse being overcome by the use of rhetorical trickery to gain adherence to an inappropriate argument. However, recent commentators contend that Protagoras was championing the process of persuasion in which the dominant discourse of the day can be dismantled to show that what appeared to be weaker arguments are in fact better arguments for present purposes.¹¹² Protagoras did not seek singular rational truths in human affairs but began with a conception of the world as constituted by *dissoi logoi* (contending discourses) that can be resolved only as a matter of collective judgment.¹¹³ Similarly, Isocrates stood between the imperial tradition of the Socratics and the wholly destructive attitudes of some Sophists by according significant epistemic value to practical public dialogue in which political questions are rhetorically tested. He rejected the false hope that social issues could be resolved by recourse to logic and truth, strictly construed, or that an invariant realm of

110. POULAKOS, *supra* note 3, at 189.

111. *See, e.g.,* SCHIAPPA, *supra* note 3. The battle lines marked out by Protagoras and Plato constitute, in very important ways, the enduring conflict of philosophy that now defines many of the contemporary philosophical questions motivating some of the work by radical multiculturalists. *See* MARGOLIS, *supra* note 82, at 1-2, 62-71. Margolis contends that “Aristotle’s argument against Protagoras is the supreme feint that has inspired the defensive line for twenty-five hundred years.” *Id.* at 69.

112. *See* SCHIAPPA, *supra* note 3, at 103-16.

113. *See id.* at 92, 185.

rationality could secure and stabilize the flux of human existence from the "outside."¹¹⁴ Protagoras and Isocrates were the original social constructionists: They embedded their teaching not in the individual skill of the rhetor to trick her listeners about what is real but in the communal process of creating the real in dialogue. In so doing they provided an epistemic vision of rhetoric and discourse that anticipated many of the philosophical tenets that gird the radical program.

Contemporary rhetorical philosophy revives these ancient insights by describing argumentation as a social activity subject to an informal logic that operates on the basis of presumed agreement and works toward resolutions the merits of which are only probable rather than certain.¹¹⁵ Rhetorical practices are not the unavoidable poor cousins of rational demonstration, however, inasmuch as rhetorical engagement represents the very process of thinking and judging that underlies all knowledge.

The theoretical point is that cognitive processes are not simply anterior to argumentation, but, as anticipations of arguments, they are themselves constituted by socially observable arguments. In this sense, as the social constructivists emphasize, human thinking is socially constituted. . . . The rhetoricians, in teaching their pupils the skills of debate, were also teaching the skills of thinking.

. . . .
 . . . [D]ialogue, with its immediate interruptions and contradictions, can be seen as the process of thinking. . . . Therefore, thinking can be seen as a social, argumentative process, rather than a monological, individual one.¹¹⁶

A rhetorical conception of law and society potentially opens everything to questioning and rejection, but argumentation *actually* proceeds only on the basis of extensive and widely shared presuppositions ("commonplaces") and never proceeds *ex nihilo*.

Conceiving radical multiculturalism as part of the "rhetorical turn" back to the Sophist conception of truth as a plurality of discourses yields perspective and clarity. Much of the work by critical race

114. See POULAKOS, *supra* note 3, at 113-49.

115. For a variety of views on this "rhetorical turn" in philosophy, see generally THE CRITICAL TURN: RHETORIC AND PHILOSOPHY IN POSTMODERN DISCOURSE (Ian Angus & Lenore Langsdorf eds., 1993); RECOVERY OF RHETORIC, *supra* note 109; RHETORIC, SOPHISTRY, PRAGMATISM (Stephen Mailloux ed., 1995); Jeffrey Bineham, *Displacing Descartes: Philosophical Hermeneutics and Rhetorical Studies*, 27 PHIL. & RHETORIC 300 (1994); Richard J. Burke, *A Rhetorical Conception of Rationality*, 6 INFORMAL LOGIC 17 (1984); and William Kluback, *The Implications of Rhetorical Philosophy*, 5 LAW & PHIL. 315 (1986).

116. Michael Billig, *Psychology, Rhetoric and Cognition*, in RECOVERY OF RHETORIC, *supra* note 109, at 124; see also HANS-GEORG GADAMER, *To What Extent Does Language Preform Thought?*, in TRUTH AND METHOD 542 (Joel Weinsheimer & Donald Marshall trans., Crossroad 2d ed. 1989) (1960).

theorists, radical feminists and gaylegal scholars can be recast productively in terms of the renewed theoretical interest in rhetorical practices as an alternative to traditional philosophical discourse. The radicals all seek to displace the conceit that law operates as a rational enterprise, not by claiming that law is hopelessly irrational, but by demonstrating that law often requires a reasonable judgment as between two or more logically acceptable resolutions of a given issue. The radical critique discloses connections between the seemingly “natural” presuppositions of judgment by tracing them to constitutive social processes that embody contingent and debatable beliefs about, *inter alia*, race, gender, and sexual orientation. It is easy to brand the radicals as the new Sophists; it requires a far more nuanced approach to assess whether the radicals play out the Sophistic tradition in a productive manner and to remain willing to respond to their efforts. If multiculturalist thinkers were to claim that they have gained access to a new “truth” about the “natural” arrangement of social relations, they would repeat the Enlightenment fantasy, but by offering arguments that support better conceptions of social life and reveal the unproductive presuppositions shaping current discourse, they enter the rhetorical arena first described by Protagoras and Isocrates.

If multiculturalism is understood as an acknowledgment of pluralism rather than a surrender to balkanization, critical deconstructions of entrenched social conceptions do not necessarily devolve into an irrational power play by one group against another. Under conditions of pluralism, persuasion is predicated on rhetorical inventions that are a form of social reason, exhibiting what might be termed a “strong hermeneutics.”¹¹⁷ If social life is neither a manifestation of competing camps locked in a noncommunicative struggle for power nor a homogeneous community bound (meaning both joined and constrained) by ahistorical rationality, then there is a demonstrable need for modern-day Sophists who can facilitate the hermeneutical appropriation and rhetorical elaboration of an inherited, diverse tradition. Contemporary scholars who investigate law in a “radical” manner—in the sense of exploring the root of legal experience and understanding rather than merely advocating for extreme political change—have developed a multicultural account of the human condition that serves this end. Radical multiculturalism begins with the recognition that alterity (otherness) and commonality

117. Cf. NICHOLAS H. SMITH, *STRONG HERMENEUTICS: CONTINGENCY AND MORAL IDENTITY* (1997) (arguing that the ontological approaches of Hans-Georg Gadamer, Charles Taylor, and Paul Ricoeur succeed in developing an ethical theory that overcomes Enlightenment fundamentalism without degenerating into a postmodern subjugation of all meaning to radical contingency).

(unity) are irreducible and eradicable features of social life that remain in constant dynamic tension, and it concludes with the commitment to face this tension as openly as possible.¹¹⁸ Rhetorical trickery may exploit the tension on occasion, but rhetorical engagement is our only means of mediating the tension.

The rhetorical engagement that radical multiculturalism seeks to foster need not be characterized as strategic behavior by individuals, for it is the commitment to a view of rhetoric as a social activity that places the radical multiculturalists between the Enlightenment ideology of truth-finding and the postmodern ideology of rootless provocation. Emerging from the flux of lived existence and the preunderstandings embedded in patterns of social discourse and interaction, rhetorical inventions produce new understandings in a way that habits and customs do not. Postmodern skepticism is avoided by recognizing that decentered agents, who are engaged in ongoing communicative exchanges and meaning-laden actions that traverse various discourses and repertoires of behavior, are underwriting subjective experience only by constantly renewing shared meanings. We can put to rest the relativistic fears raised by Protagoras's claim that "man is the measure of all things" by emphasizing that "man" need not be read as an insular individual who rises above all claims to objective truth. Instead, a provocative reading emerges when we construe "man" as a plural noun encompassing all of humanity.¹¹⁹ Multiculturalism is not a collapse into a relativistic chaos of incom-

118. Gadamer's philosophical hermeneutics is devoted in large part to this project, addressing this tension as it exists diachronically and synchronically within a culture, as well as in the cross-cultural encounters that accelerated with the advent of modern colonization by the West and blossomed with the so-called age of globalization. See Fred R. Dallmayr, *Self and Other: Gadamer and the Hermeneutics of Difference*, 5 YALE J.L. & HUMAN. 507 (1993). See generally FRED DALLMAYR, *BEYOND ORIENTALISM: ESSAYS ON CROSS-CULTURAL ENCOUNTER* (1996) (developing a Gadamerian model of cross-cultural encounter that does not hypostatize global uniformity nor surrender to radical perspectivism). Working from Gadamer's premises, Richard Bernstein summarizes this project as one of the central features of ethical-political practice and theory in the postmodern age.

We can never escape the real practical possibility that we will fail to do justice to the alterity of "the Other." But the response to the threat to this practical failure should be an ethical one—to assume the responsibility to acknowledge, appreciate and not to violate the alterity of "the Other." . . . We must resist the dual temptation of *either* facetiously assimilating the alterity of "the Other" to what is "the Same" . . . *or* simply dismissing (or repressing) the alterity of "the Other" as being of no significance—"merely" contingent. . . . It makes no sense to even speak of a "final solution" to this problem—the problem of human living. No one can ever fully anticipate the ruptures and new sites of the upsurge of alterity. This is a lesson that we must learn again and again. And it has been painfully experienced in our time whenever those individuals or groups who have been colonized, repressed, or silenced rise up and assert the legitimacy and demand for full recognition of their own non-reducible alterity

RICHARD J. BERNSTEIN, *THE NEW CONSTELLATION: THE ETHICAL-POLITICAL HORIZONS OF MODERNITY/POSTMODERNITY* 74-75 (MIT Press 1992) (paragraph numbering omitted).

119. See Tom Cohen, *The "Genealogies" of Pragmatism*, in RHETORIC, SOPHISTRY, PRAGMATISM, *supra* note 115, at 94, 107.

measurable group identities, but rather a confrontation with the social construction of the world in which we continually participate and that girds the experience of subjectivity.

Claims for recognition by those who effectively have been silenced—and can anyone seriously doubt that women, racial minorities and homosexuals are (differently) silenced?—proceed from presuppositions that they share with those who do the silencing, or the claims would not be heard. Radical multiculturalism, as the practice and theory of rhetorical invention, challenges only by drawing upon deep-seated, communal agreements that largely remain tacit even in the midst of vigorous criticism. There is no inconsistency in the fact that many radicals recycle familiar ideas in the course of their criticisms, for that is the essence of rhetorical argumentation and critical thinking. The important point is that the radicals, like the Sophists of old, demonstrate that familiar formulas can be disrupted and rendered alien and opaque as a prelude to offering new accounts that rest more firmly on evolving shared conceptions.¹²⁰ A difficulty arises, though, if the radicals abandon persuasive argumentation in a fruitless quest for a complete break with the status quo. It is this temptation that threatens to draw radicals beyond all reason.

One of the most interesting radical legal theorists today is Pierre Schlag, a trenchant postmodernist who meets many of Farber and Sherry's defining criteria for radical multiculturalism and who therefore carries forward the deconstructive mission of the Sophists. I have criticized Schlag's radicalism for devolving into a self-devouring critique that ultimately undermines the attack on Enlightenment values with which he begins; I argue that he tends to be a Sophistic provocateur more than a proponent of a rhetorical *logos*. This critique is most strongly voiced in an essay in which I argued that Schlag adopts what I characterize as a "paranoid style" of analysis in his effort to overcome normative thinking and discourse, a characterization that closely anticipated similar charges made by Farber and Sherry against the radical multiculturalists.¹²¹ But my critique of Schlag is worlds away from Farber and Sherry's critique of the radicals: I am arguing on behalf of the best contemporary reading of the Sophistic legacy, while Farber and Sherry champion the Enlightenment rejection of the Sophistic legacy. This distinction is wholly ignored in their book. If certain radicals, like Schlag, provide unpersuasive accounts of the task of legal theory and the situation of

120. See CALVIN O. SCHRAG, *THE RESOURCES OF RATIONALITY: A RESPONSE TO THE POSTMODERN CHALLENGE* 136-40 (1992).

121. See Francis J. Mootz III, *The Paranoid Style in Contemporary Legal Scholarship*, 31 *HOUS. L. REV.* 873 (1994).

contemporary legal actors, it will not do to reject out-of-hand the general critical presuppositions from which they are working; these presuppositions are insightful and should be engaged directly, even if they have been developed in less-than-satisfactory ways. Moreover, the project of reclaiming reason in legal practice requires the critical rejection of the narrow Enlightenment conception of rationality without succumbing to paranoid excesses. Schlag's legal theory is far more nuanced and realistic than Farber and Sherry's traditionalist fantasy of just getting the facts right and then acting rationally, despite his efforts to escape completely from the "maze" of normative discourse that just is the human condition.

Farber and Sherry are well aware of the danger that lurks in the murky middle ground that I am attempting to survey. Lacking the safety net of the Enlightenment model of discourse, they ask how scholarly discourse can proceed. More specifically, they might ask how my dispute with Schlag can be adjudicated if we both adhere to the thesis that we live in a socially constructed world infused with power practices that provides no firm ground of historical fact or objectivity from which truth is apprehended. But addressing this fear is precisely the point of my dispute with Schlag: I argue that argumentation is *logos*, and that contingent structures constructed within the flux of human existence provide sufficient resources for the continuing project of social reason. The rhetorical means of crafting and judging arguments are available *because of*, not in spite of, cultural heterogeneity and historical contingency. The purpose of dialogue under these conditions is not that far removed from the purpose of dialogue under the Enlightenment conception. Instead of serving as an external check on our individual ability to amass and assess all relevant facts in a rational manner, dialogue is the social process by which we construct, maintain, and assess the "facts" (e.g., the situation of working women and the problems of discrimination) in a reasonable manner. Whereas the Enlightenment approach tends to hide this social process under the rationalist rug, evidencing what Gadamer has termed the "prejudice against prejudice itself, which denies tradition its power,"¹²² the radical challenge to the Enlightenment model embraces the contingent (or "prejudiced") social starting point of reason and brings this unavoidable process within the scope of debate.

The project of reexamining the social process of rhetorically constructed knowledge does not require a neutral investigator able to take an objectifying view of others (as championed in the Enlighten-

122. GADAMER, *supra* note 116, at 270.

ment era); neither does it necessarily collapse into solipsism or mere assertions backed by power. Gadamer's hermeneutic philosophy is prominently linked to the attack on Enlightenment ideals, but Gadamer finds in this antifoundationalist situation a simultaneous reinforcement of the diversity of life and of the operation of reason in discourse. Gadamer writes that "hermeneutic philosophy understands itself not as an absolute position but as a way of experience. It insists that there is no higher principle than holding oneself open in a conversation."¹²³ This is not an idealist plea informed by an ethical vision; it is an ontological claim about our situation in the post-Enlightenment world. Rhetoric is not just a tool used strategically by self-directing individuals, for underlying any such strategic behavior is a social experience in which one engages in a practical deliberation, whether it be politics, law, or literary criticism. The radicalism of the social constructionist attack on calcified notions of truth and objectivity is its call to place these dialogically secured conceptions in dispute by broadening the scope of rhetorical practices. Therefore, when a prominent critical race theorist rebukes me for criticizing his angry and accusatorial tone and asserts that he need not write just for the white professoriate,¹²⁴ I do not see an example of radical multiculturalism run amok, but rather the self-satisfaction of Enlightenment ideology grafted onto a dissembling intellectual culture. In other words, I see the worst of both worlds.

If reason and truth do not stand outside the flux of human existence, then it is within the flux itself that we shall recover reason as a fact of our social existence. The contemporary debate about the literary canon is an apt synecdoche for the distinctions that I am attempting to draw.¹²⁵ Radical critics undoubtedly are correct to argue that the canon of "great literary works" is indelibly stamped with the history of oppression, bias, and ignorance. Nevertheless, the very mode of critical thinking that impeaches the canon is itself deeply shaped by canonical forces. This paradox is explained by the fact that socially constructed reality cannot be demolished in a day and replaced by completely different structures. Social construction is an ongoing project that can be only modestly facilitated or hindered

123. HANS-GEORG GADAMER, *On the Origins of Philosophical Hermeneutics*, in *PHILOSOPHICAL APPRENTICESHIPS* 189 (Robert K. Sullivan trans., 1985); see also *supra* note 118.

124. See Jerome McCristal Culp, *Telling a Black Legal Story: Privilege, Authenticity, "Blunders," and Transformation in Outsider Narratives*, 82 VA. L. REV. 169, 193 n.3 (1996) (criticizing Francis J. Mootz III, *Legal Classics: After Deconstructing the Legal Canon*, 72 N.C. L. REV. 977, 998-99 (1993), and claiming that I have a "difficult time grasping" the point of legal narrative and that I do not recognize that not all legal writing "can or should be directed at the white majority").

125. See generally Mootz, *supra* note 124 (providing a Gadamerian analysis of the "canon debate" and its relevance to legal theory).

by applying a theoretical understanding of how the construction proceeds. The literary canon does not provide a universal rule of evaluation that determines in advance which texts are meritorious, but it does constitute a bounded cultural arena within which an evolving process of judgment takes place. The literary canon is not a timeless list of masterpieces that might occasionally be supplemented; instead, it is a shifting repertoire of normative exemplars necessary to the ongoing maintenance of public life. Denying essentialism and timeless objectivity should focus attention on processes of cultural sedimentation that never are completed and always remain subject to challenge rather than devolving into an “anything goes” anarchy of irrational preferences. The same holds true for radical multiculturalism in legal theory: Radically disrupting the claims of necessity and naturalness used to justify the dominant discourse does not eradicate meaning; it cultivates an appreciation of the wider field of narrative play from which meaning emerges.

My claim that radical multiculturalism provides a plausible means of recovering the operation of reason within the rhetorical construction of social narratives is best explored by considering an example. Farber and Sherry characterize William Eskridge’s endorsement of “gaylegal narratives” as a deviation from reasoned discourse, but a close reading of the text that they criticize underscores my theme. Eskridge uses the Perry Watkins case against the Army’s policy of discriminating against homosexuals as a means of exploring different approaches to law.¹²⁶ He first describes and rejects the “conservative pragmatism” that Farber and Sherry embody, arguing that it permits only incremental changes within currently dominant patterns of thought. He then argues that a “social constructionist” view of the nature of human existence and social institutions is a better means of assessing the Watkins case.

Social constructionists study and support the liberatory counter-movements created by people marginalized by dividing practices [that purport to be “neutral,” if not “natural”]. Such groups must first identify the practices oppressing them, then come to understand that the practices are socially constructed rather than natural, and finally create their own consciousness of resistance.¹²⁷

Given the instability of socially constructed norms, the radical theorist seeks a “rupture” with prevalent modes of thinking and a “conceptual

126. See Eskridge, *supra* note 57 (discussing *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), *vacated*, 875 F.2d 699 (9th Cir. 1989) (en banc)).

127. *Id.* at 635.

reorientation” that amounts to a renegotiation of certain features of social life.¹²⁸ The story told in the Watkins case will vary depending upon the strategy adopted, with a social constructionist perspective leading to a story that undermines rigid gender and sexual orientation categories and a more conservative story culminating in a legislative compromise such as “don’t ask, don’t tell.”

It is important to understand that Eskridge is not attempting to launch a wholesale revolution in thinking according to a script that can be imposed on society from “outside” its traditional prejudices. Such a massive conceptual reorientation would be beyond rupture; it would amount to repudiation. But Eskridge well understands that repudiation of this magnitude would require a subject powerful enough to escape the social determinants of life—in other words, the very subject presumed in Enlightenment ideology. Eskridge’s understanding of the contextual operation of radical theory is clearly evident when he compares the contemporary situation of gays in the military to the situation of blacks in the military prior to World War II; his radical claim is that socially constructed reality once again can undergo a major revision.

The story of the military’s racial desegregation illustrates the possibility of rupture in old thought patterns. . . . In General Colin Powell’s terms, while race is now “benign” in that it is not thought to disrupt unit cohesion, sexual orientation remains “fundamental,” in that it is perceived to be disruptive. But Powell’s distinction between “benign” and “fundamental” is socially created rather than natural; after all, race was considered “fundamental” less than fifty years ago.

Social construction teaches that what was once fundamentally divisive can become benign.¹²⁹

As a sophisticated radical thinker, Eskridge does not purport to have the final word on the proper contours of social relations. After pretenses to neutrality and timeless truths have fallen away, persuasive argumentation in a changing and indeterminate social sphere remains. He readily admits that “constructed dividing practices [“prejudices” in Gadamer’s terminology] permeate society” and that “some such practices may be legitimate,” but he insists that this acknowledgment does not disable efforts to distinguish “productive” practices from “oppressive” practices in an argumentative forum that does not suffer the authoritarian compelling force of logic and pure rationality.¹³⁰

128. *Id.* at 641-44.

129. *Id.* at 643.

130. *Id.*

The theory of social constructionism leads Eskridge to advocate vigorous rhetorical challenges within a public sphere. There is no escape from the social situation in which Perry Watkins finds himself, but there are rhetorical means for reshaping this situation through argumentative appeals. In the end, Eskridge admits, “rupture needs to be followed by reintegrating new and old scripts.”¹³¹ Eskridge continues: “The multiplication of voices may threaten American law with cacophony, but it also challenges scholars to orchestrate a richer legal symphony.”¹³² Recognizing that reality is a socially constructed plurality in both its legal and nonlegal elements is liberating, but it also amounts to a recognition that the timeworn hope for complete liberation from the flux of the human condition is no more available to the radical multiculturalist than it is to the adherent of Enlightenment rationalism. If Eskridge is touting radical multiculturalism with this line of analysis, it is difficult to understand why Farber and Sherry attribute such dire consequences to its ascendancy in legal theory.

Farber and Sherry fall short of their stated goal to impeach radical multiculturalism as an expression of an implausible philosophy that yields dangerous political tendencies. Although the social construction of reality and the contestable nature of truth and history appear to be frightening and nearly absurd ideas at first glance, careful work by a number of scholars in many disciplines proves that we have much less to fear than is generally supposed. There is nothing to be gained from yet another attempt to suppress the Sophistic alternative to rationally determined and univocal truths; knee-jerk denials hold no power over an examination of how we live and interact in society. Reality is socially constructed—history and truth are narratively structured and rhetorically negotiated—but reasonable appeals and judgments are possible within this postmodern situation. The sooner that we acknowledge that reason is inextricably bound up with the theses that Farber and Sherry characterize as radical multiculturalism, the sooner we will be able to reclaim reason in American legal theory. Farber and Sherry’s instinctual fear of radical multiculturalism brings to mind Lon Fuller’s retort to theorists afraid to abandon the (still) deeply entrenched bifurcation of fact and value in traditional philosophical discourse: “Some people feel great discomfort in the presence of [such] a [radical] view. . . . But it is suggested this discomfort is really the discomfort of being alive.”¹³³

131. *Id.* at 644.

132. *Id.* at 646. Farber and Sherry quote Eskridge out of context and mislead their readers into believing that Eskridge favors jettisoning our legal heritage in its entirety, a ridiculous notion for any social constructionist to entertain. See FARBER & SHERRY, *supra* note 2, at 16.

133. L.L. Fuller, *The Philosophy of Codes of Ethics*, 74 ELEC. ENG’G 916, 917 (1955).