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# WHY PRAGMATISM? THE PUZZLING PLACE OF PRAGMATISM IN CRITICAL THEORY

Richard Warner\*

*Critical theorists often adopt the language and methods of pragmatism in criticizing the legal system's claim to political legitimacy. In this article, Professor Richard Warner challenges these theorists and argues that pragmatism cannot be used in such a fashion. Pragmatism, properly understood as the philosophical method originating with C.S. Peirce and exemplified in the modern thought of Richard Rorty, does not permit any particular conception of justice to be non-relatively privileged over any other. Those critical theorists who endorse pragmatism can thus not appeal to any "true" conception of justice in proposing a positive political conception of legitimacy which challenges the assumptions of classical liberalism. Using Joseph Singer's influential work as a focus, Professor Warner argues that critical theorists who present alternative visions of legal legitimacy do so by referring to hidden truths about what is "really" justified. In doing so, however, these theorists are applying pragmatism inconsistently with their previous critiques of prevailing legal standards. Professor Warner concludes by urging that critical theorists acknowledge pragmatism's inability to determine which of competing (and conflicting) norms of justification are non-relatively preferable. In making positive proposals for reordering society, critical theorists have adopted, not pragmatism, but an older, Heraclitean approach.*

Pragmatism is popular among legal scholars.<sup>1</sup> Its most ardent advo-

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1. Pragmatism's popularity in the legal academy is comparatively recent. See, e.g., Robin West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 736 (1985) (lamenting pragmatism's desuetude). Steven Smith has outlined the sudden resurgence of pragmatism. Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 409-11 (1990). Smith cites the following articles as representative of pragmatism: Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Catherine W. Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541 (1988); John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986). Smith

cates are those "critical theorists"<sup>2</sup> who see it as a much needed antidote to prevailing modes of legal reasoning—modes of reasoning that, in their view, contribute to the unjust oppression of society's marginalized and disadvantaged. Although the place of pragmatism in critical theory is my focus, it is worth noting that pragmatism's popularity extends to theorists of various jurisprudential allegiances. Feminists, for example, stress the connections between feminism and pragmatism,<sup>3</sup> and those who see law as a matter of "practical reason" explain that their position is equivalent to pragmatism.<sup>4</sup> Such widespread acceptance has prompted leading scholars to proclaim a "renaissance" of pragmatism in American legal thought.<sup>5</sup> All of which, of course, led to the question of what exactly pragmatism is, a question motivated by an "emerging suspicion that if we look too closely for legal pragmatism, we might not find anything—or at least not anything worth discussing."<sup>6</sup> As Radin and Michelman

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also cites the articles in Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990) [hereinafter Symposium]. These articles and others appear in PRAGMATISM IN LAW & SOCIETY (Michael Brint & William Weaver eds., 1991) [hereinafter PRAGMATISM IN LAW].

2. My use of this term follows Joseph Singer's. Singer writes that "[b]y 'critical' theory, I mean to include the most sophisticated proponents of law and society, critical legal studies, and feminist legal theory." Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 536 (1988) (book review). See also William G. Weaver, Note, *Richard Rorty and the Radical Left*, 78 VA. L. REV. 729, 729 n.5 (1992) (using "radical Left" to identify essentially the same group of scholars and criticizing them for failing to understand the pragmatism they purport to endorse). As for a list of critical theorists, Mark Kelman is surely correct when he observes, "I am quite sure it would not be possible to label the most significant identifying works in these traditions without offending innumerable authors who have made contributions at least as significant to their development as the authors I might mention." Mark Kelman, *Emerging Centrist Liberalism*, 43 FLA. L. REV. 417, 433 n.62 (1991). "Thankfully," Kelman adds, "Professors Eskridge and Peller seemingly felt no such hesitations." *Id.* See William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 763 nn.182 & 184-85 (1991) (listing, among others, Roberto Unger, Catharine MacKinnon, and Derrick Bell as foremost in the critical legal studies canon).

3. See Hantzis, *supra* note 1, at 543; Margaret J. Radin, *The Pragmatist and the Feminist*, in PRAGMATISM IN LAW, *supra* note 1, at 127, 127 [hereinafter Radin, *Feminist*]; see also Margaret J. Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1049-51 (1991) (discussing the complementary nature of pragmatism and feminism).

4. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 323 (1990) (arguing that pragmatism and practical reasoning both emphasize "the concrete situatedness of the interpretative enterprise, which militates against overarching theories"). Daniel Farber claims that the following are essentially synonymous with pragmatism: intuitionism, prudence, institutionalism, and practical reason. Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1334-35 (1988).

5. See Symposium, *supra* note 1; see also CORNEL WEST, *THE AMERICAN EVASION OF PHILOSOPHY* 3 (1989) ("A small scale intellectual renaissance is occurring under the broad banner of pragmatism."). Talk of a "renaissance" is of a piece with the idea that "[l]egal theory is currently in a state of crisis." Robert J. Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69, 71 (1991). Lipkin says that the "crisis in legal theory reflects the crisis in academic philosophy. Metaphysics and epistemology . . . appear to have led to a cultural dead-end. . . . [P]ost-philosophical 'philosophers' have taken the conversational turn and have become kibitzers, fuzzies, or apes without tails—anti-foundationalist, anti-essentialist conversationalists." *Id.* at 71 n.5. Lipkin's view of contemporary philosophy is decidedly one-sided. Not all of us agree with the "dead-end" assessment. See *Introduction to NATURALISM: A CRITICAL APPRAISAL* 1 (Steven J. Wagner & Richard Warner eds., 1993).

6. Smith, *supra* note 1, at 410. As Smith notes, it is not easy to find a coherent account of

remark, "pragmatism . . . tends to get dismissed as a buzzword or a poor excuse for thought. 'We are all poststructuralists now' may start a row. 'We are all pragmatists now' merely gets you a yawn."<sup>7</sup> After all, if pragmatism were a substantive philosophical position with distinctive claims and implications, how could so many, who otherwise agree on so little, agree that pragmatism is true?

Suffice it for the moment to say that by *pragmatism* I mean the distinctly American philosophical movement begun by C.S. Peirce and William James, developed by John Dewey, and most recently espoused by Richard Rorty.<sup>8</sup> Pragmatism so conceived is a substantive position. But, contrary to the claims of critical theorists, pragmatism yields no privileged perspective from which we can discern the law's alleged complicity in the oppression of the powerless; rather, pragmatism yields relativism about truth and justice.<sup>9</sup> Thus, one cannot consistently endorse pragmatism in one breath, and in the next condemn prevailing modes of legal reasoning for failing to live up to the *true, non-relative* conception of justice. Yet this is precisely what contemporary legal pragmatists typi-

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pragmatism. Such an account is difficult to discern even in work as careful and insightful as Thomas Grey's. Grey endorses legal pragmatism as "not just one theory among others, but (for now, as far as we can see) the right theory, the best theory." Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1569 (1990). But Grey also remarks that "much pragmatist theory [is] essentially banal." Grey, *supra* note 1, at 814. He also insists that "[p]ragmatism in law is primarily a theory about how to use theory . . ." Thomas C. Grey, *What Good Is Legal Pragmatism?*, in PRAGMATISM IN LAW, *supra* note 1, at 9, 25 [hereinafter Grey, *Pragmatism*]. Evidently, pragmatism is not the correct theory. Ronald Dworkin interprets Grey's thought about pragmatism as a realization that our convictions are contextual (a function of time, place, and culture), and that the "soundness and importance of some idea consists . . . in its usefulness to the community . . ." Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in PRAGMATISM IN LAW, *supra* note 1, at 359, 369. However, as Dworkin points out, no reasonable person disputes the contextualism point, and the "usefulness" point is utterly empty until we are told what counts as usefulness. *Id.* at 370.

Margaret Radin offers a more definite account. She says that pragmatism "is a commitment against abstract idealism, transcendence, foundationalism, and atemporal universality; and in favor of immanence, historicity, concreteness, situatedness, contextuality, embeddedness, narrativity of meaning." Radin, *Feminist*, *supra* note 3, at 134. This definition is informative, but only to a limited extent. Radin constructs her list by rejecting one side and endorsing the other of traditional philosophical dualisms, yet she also—quite rightly—observes that "[a]nother pragmatist commitment . . . is the dissolution of traditional dichotomies." *Id.* While her classification is very helpful, it ultimately misses the pragmatist point to explain pragmatism as endorsing one or another side of traditional dichotomies.

7. Radin & Michelman, *supra* note 3, at 1031.

8. As William Weaver notes, critical theorists are "working furiously to press Rorty's pragmatism into the service of law." Weaver, *supra* note 2, at 729. Weaver notes that over 100 recent law review articles cite Rorty's work. *Id.* To give just a few examples: Margaret Radin understands pragmatism as a distinctive philosophical position (or set of positions) in the tradition of Peirce, James, Dewey, and Rorty. Radin, *Feminist*, *supra* note 3, at 134-42. Catherine Hantzis shares this understanding of pragmatism. Hantzis, *supra* note 1, at 544-61 (placing Oliver Wendell Holmes's pragmatism in the broader Peircean tradition). John Stick interprets those critical legal scholars interested in pragmatism as endorsing a Rortyan version of pragmatism. Stick, *supra* note 1, at 383-85. A peculiar feature of Steven Smith's article, *supra* note 1, is that he ignores the Peirce, James, Dewey, and Rorty lineage. This may partially explain why he fails to find a distinctive philosophical position within pragmatism.

9. See *infra* part III.

cally do.<sup>10</sup> The puzzle is why. Why do highly intelligent and sophisticated legal thinkers eagerly embrace a philosophical position so flatly—and obviously—inconsistent with the social critique to which they are committed?

A concern with political legitimacy is the answer. Critical theory has always emphasized legitimacy as a central issue.<sup>11</sup> Its *leitmotif* has been its attack on the liberal view of legitimacy. One *locus classicus* of this attack is Joseph Singer's article, *The Player and the Cards: Nihilism and Legal Theory*,<sup>12</sup> in which Singer appeals to pragmatism to support his argument that liberal modes of legal reasoning lack legitimacy.<sup>13</sup> Recently, however, critical theorists have turned from the negative task of attacking liberal conceptions of legitimacy to the positive goal of providing an alternative vision of their own. Cornel West, for example, endorses an Emersonian conception of a "modern world [of] self-sustaining and self-overcoming individuals who . . . flex their intellectual, social, political, and economic muscles in order to gain wisdom . . ." <sup>14</sup> West sees pragmatism as "a rich and revisable tradition that serves as the occasion for cultural criticism *and* political engagement in the service of an Emersonian culture of creative democracy."<sup>15</sup>

The negative critique and the positive project are my targets.<sup>16</sup> Both founder on the same rock: pragmatism's relativism. Just as the pragmatist cannot consistently condemn prevailing modes of legal reasoning for failing to live up to the "true" conception of justice, he or she cannot consistently appeal to such a conception of justice in developing a positive political theory of legitimacy. Yet legal pragmatists typically make such an appeal.

Part I explains what pragmatism is. Part II explains pragmatism's place in the critical theorists' attack on the theory and practice of liberal legitimacy. I defer discussion of the positive project to part IV. Part III argues that pragmatism actually leads to a relativism about moral justification that is entirely inconsistent with the use critical theorists make of pragmatism. Part IV examines Joseph Singer's excellent and insightful

10. See *infra* parts II, III.

11. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987) is the classic attempt to provide a unified, sympathetic statement and defense of the central themes of critical theory. ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990) is a comprehensive book-length critique of critical legal studies. See also Stick, *supra* note 1; John Stick, *Charting the Development of Critical Legal Studies*, 88 COLUM. L. REV. 407, 417, 424 (1988) (book review) [hereinafter Stick, *Development*].

12. Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

13. Although Singer does not specifically use the term *pragmatism*, much of his article is based upon the philosophy of Richard Rorty, the pre-eminent modern pragmatist. *Id.* at 7 n.13; see also Stick, *supra* note 1, at 336. I differ from Stick in my focus on the affirmative goals of critical theory. In addition, I also propose substantially different criticisms of the negative critique. See *infra* text accompanying notes 97-99.

14. WEST, *supra* note 5, at 16.

15. *Id.* at 239 (emphasis added).

16. See *infra* part IV.

work to diagnose why critical theorists/"pragmatists" overlook the relativism that comes with pragmatism when using pragmatism in their positive account of political legitimacy. Part V concludes that the critical theorists/"pragmatists" are not really pragmatists at all. Their philosophical vision is a much older—and non-relativistic—one.

### I. WHAT IS PRAGMATISM?

To adequately assess the uses made of pragmatism by critical theorists, we first need to see what pragmatism is. A number of different philosophical views may with equal merit claim the title "pragmatism." Sometimes the label connotes little more than taking a serious interest in practical politics and the realities of human well-being and suffering; at other times it seems to mean simply being practical, "pragmatic" in the colloquial, nonphilosophical sense.<sup>17</sup> Sometimes—indeed, this is one of the most salient themes in legal pragmatism—pragmatism means paying special attention to context.<sup>18</sup> For example, Joseph Singer argues that one crucially important point about pragmatism is that it shows us that the categories and forms of discourse we use, the assumptions with which we approach the world, and the modes of analysis we employ have important consequences in channeling our attention in particular directions. The paradigms we adopt affect what we see and how we interpret it. They determine, to a large extent, who we listen to and what we make of what we hear. They determine what questions we ask and the kinds of answers we seek.<sup>19</sup>

This is good advice. But that is all it is; it defines no distinctive philosophical position. One would hope any intellectually mature, self-reflective, and self-critical thinker accepts this advice.<sup>20</sup> The only intellectual

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17. See, e.g., Grey, *Pragmatism*, *supra* note 6, at 10 ("[T]he issue of . . . practicality hovers over the whole enterprise of pragmatist theorizing.").

18. See Smith, *supra* note 1, at 430 ("Pragmatists recurrently emphasize themes such as 'experience,' 'avoidance of abstraction,' 'intuition,' 'dialogue,' and 'contextualism.'"). Smith further notes that "upon inspection, none of these themes supplies any distinctively pragmatic way of constructing or evaluating theories." *Id.*; see also Martha Minow & Elizabeth V. Spelman, *In Context*, in PRAGMATISM IN LAW, *supra* note 1, at 247, 247.

19. Joseph W. Singer, *Should Lawyers Care About Philosophy?*, 1989 DUKE L.J. 1752, 1771 (book review).

20. Not that it is easy advice to follow. One can only have sympathy with Singer's repeated pleas that we should pay more attention to context, for as Wallace Stevens puts it:

Rationalists, wearing square hats,  
Think, in square rooms,  
Looking at the floor,  
Looking at the ceiling.  
They confine themselves  
To right-angled triangles.  
If they tried rhomboids,  
Cones, waving lines, ellipses—  
As, for example, the ellipse of the half-moon—  
Rationalists would wear sombreros.

Wallace Stevens, *Six Significant Landscapes*, in THE COLLECTED POEMS OF WALLACE STEVENS 75 (1954). The metaphor of square hats and sombreros does not merely make a point about "rational-

commitment necessary to make this advice relevant is an individual commitment to understanding one's self and others. Such reflections have led Steven Smith to suggest that pragmatists have "nothing of significance to say—or, at least, with nothing significant . . . that is characteristically pragmatic. And the question that emerges . . . is why pragmatists keep on talking. Or, more precisely, why do they keep talking *about pragmatism?*"<sup>21</sup>

### A. Pragmatism as Anti-Foundationalism

The answer is that legal pragmatists generally see themselves as having a distinctive philosophical position. And, of course, pragmatism in the Peirce, James, Dewey, and Rorty tradition *is* a distinctive philosophical orientation, as well as being the orientation most legal pragmatists have in mind.<sup>22</sup> As a *philosophical* position, pragmatism makes characteristic claims about linguistic meaning, truth, and justification. The claim about justification is the one relevant here.<sup>23</sup> The pragmatic view

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ists"; it also illustrates how, to use Singer's language, "contexts" (our "hats") condition our view of things.

21. Smith, *supra* note 1, at 440.

22. Pragmatism as a philosophical movement originated in America in the first quarter of the 20th century. The movement influenced not only academic philosophy, but also law, education, political and social theory, religion, and art. The leading pragmatist philosophers in this early period were C.S. Peirce, William James, John Dewey, George Herbert Mead, and C.I. Lewis. As developed by these individuals, pragmatism evolved into "a general philosophy of psychology and logic, a philosophy of the operation of thought in controlling future experience with knowledge qualified by values, and an empirical methodology of the use of language and the nature of inquiry and judgment." H.S. Thayer, *Introduction to PRAGMATISM: THE CLASSIC WRITINGS* 21 (H.S. Thayer ed., 1982). As a "philosophy of the operation of thought," pragmatism rejected a sharp dichotomy between theory and action, emphasizing instead the inextricable intertwining of action, value, and knowledge in guiding our response to the present and our plans for the future. In Dewey's words, "[p]ragmatism . . . presents itself as an extension of historical empiricism, but with this fundamental difference, that it does not insist upon antecedent phenomena but upon consequent phenomena; not upon the precedents but upon the possibilities of action. And this change in point of view is almost revolutionary in its consequences." John Dewey, *The Development of American Pragmatism, in PRAGMATISM: THE CLASSIC WRITINGS, supra*, at 23, 32-33. Until recently, this revolution seemed to have seen its day. Pragmatism, as a significant movement, had disappeared from the philosophical stage. Its resurgence in the last 15 years is due largely to Richard Rorty.

23. When Rorty explains pragmatism, he emphasizes pragmatic treatments of truth and justification. Rorty emphasizes that pragmatism rejects the idea that there is anything "out there" in the world that makes our claims true. As to justification, Rorty holds that "there is nothing to be said about either truth or rationality apart from descriptions of the familiar procedures of justification which a given society—ours—uses in one or another area of inquiry." RICHARD RORTY, *Solidarity or Objectivity?*, in OBJECTIVITY, RELATIVISM, AND TRUTH 21, 23 (1991) [hereinafter RORTY, *Solidarity*]. He notes that pragmatists abandon "the urge to answer questions like 'Why believe what I take to be true?' 'Why do what I take to be right?' by appealing to something *more* than the ordinary, retail, detailed, concrete reasons which have brought one to one's present view." RICHARD RORTY, *Pragmatism, Relativism, and Irrationalism, in CONSEQUENCES OF PRAGMATISM* 160, 165 (1982) [hereinafter RORTY, *Relativism*]. In a passage designed to set Platonistic teeth on edge, Rorty characterizes pragmatism as "the doctrine that there are no constraints on inquiry save conversational ones—no wholesale constraints derived from the nature of the objects, or of the mind, or of language, but only those retail constraints provided by the remarks of our fellow-inquirers." *Id.* The "constraints" are—or at least include—what we are calling norms of justification; the "remarks of our fellow inquirers" appeal to these norms. Rorty's emphasis on conversational constraints reflects American pragmatism's traditional focus on the intertwining of action, value, and knowledge.

of justification is anti-foundational, and it is just this aspect that most legal pragmatists find especially appealing. If there is any consistent refrain in modern legal pragmatism, it is wrong to think of justification as resting on a secure foundation.<sup>24</sup> But what exactly is anti-foundationalist about justification?

We can begin by noting the obvious, but important, fact that we all accept and employ various *norms of justification* in deciding what beliefs to assert and how to act, and in evaluating the assertions and actions of others. We may, of course, employ such norms unreflectively and unconsciously. Such norms delineate what counts as a justification and when one justification is better than another. *Cohen v. California*<sup>25</sup> illustrates what I mean by a norm of justification. Cohen was arrested when he appeared in the corridors of the Los Angeles County Courthouse wearing a jacket with the words "Fuck the Draft" clearly visible on the back.<sup>26</sup> The *Cohen* Court held that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."<sup>27</sup> This is a norm of justification: it tells us what counts as justifying an official usurpation of the right to free speech, and also tells us how to rank that justification against the interest in privacy: the more substantial the privacy interest and the more intolerable the invasion, the less the invasion is justified.

Intellectual and cultural history is, in part, the history of the rejection of old norms for new ones, so the question inevitably arises, "What makes the prevailing norms the right ones?" Put another way, how do we know that the assertions and actions justified by prevailing societal norms are *really* justified? Pragmatism does, in a sense, provide a means to answer this question: we can turn our norms of justification on themselves.<sup>28</sup> Of course, we cannot evaluate all our norms at once. At least some norms must remain unchallenged: some have to serve as the standard against which to assess the others. The important point is that such assessment is always *internal* to the norms in question. We assess how

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But Rorty reaches beyond American pragmatism for the roots of his views. He notes that Hegel's historicization of rationality paved the way for pragmatism. RICHARD RORTY, CONSEQUENCES OF PRAGMATISM, *supra*, at xiii, xv-xvi. The "historicization of rationality" involves both a rejection of the *a priori* (the "wholesale constraint" derived from language or the mind) and a rejection of any special epistemic status for observation (the wholesale constraint derived from the nature of objects).

24. See, e.g., Cornel West, *The Limits of Neopragmatism*, in PRAGMATISM IN LAW, *supra* note 1, at 121, 121 ("[A]ll neopragmatists are antifoundationalists . . ."); Joan Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, in PRAGMATISM IN LAW, *supra* note 1, at 155 (arguing that anti-foundationalism is the central core of pragmatism); Singer, *supra* note 19, at 1757 (pragmatism means that "there can be no neutral, non-contingent bases for our most fundamental facts or values.").

25. 403 U.S. 15 (1971).

26. *Id.* at 16.

27. *Id.* at 21.

28. Robert Lipkin overlooks this point when he remarks that "[w]hat normal conversation will not countenance is an attempt to justify itself." Lipkin, *supra* note 5, at 90.



well our norms work by using those very norms. The distinctively pragmatic claim about justification is that there can be no *external* standard of evaluation: our norms of justification neither have nor need a ground outside themselves.<sup>29</sup> An essential point: The norms I mean are the norms we actually use day in and day out. Only these norms neither have nor need a ground outside themselves. The focus on norms actually used in the day-to-day functioning of society is characteristic of a Deweyan/Rortyan version of pragmatism. Not all pragmatists agree. Some, most notably C.S. Peirce, permit evaluation of everyday norms in light of a standard that we do not use, an *ideal* norm that society does not have but could in principle construct.<sup>30</sup>

Which pragmatism is the one legal pragmatists endorse? Some favor—or at least refrain from rejecting—Peircean pragmatism.<sup>31</sup> This is a mistake—as is clear as soon as we realize what Peircean pragmatism involves. Peircean pragmatism makes sense against the background of Peirce's views about rational inquiry.<sup>32</sup> Peirce envisions a multitude of different inquirers beginning their respective investigations with different and conflicting views. He contends that if all inquirers follow correct methods of rational inquiry, their views will—in the infinite long run—converge on a single theory. According to Peirce, this theory will completely express all that we are ideally justified in believing. After all, how could it not? It is the unique result of the correct application of rational methods of inquiry over the infinite long run; everything reason ulti-

29. Rorty regards as "dubious and self-deceptive" the notion that we have "access to something which 'grounds' current practices of justification in something else." RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 361 (1979). The lack of any ground for current justificatory practices is part of Rorty's point when he denies the existence of constraints stemming from an innate nature or ideal form or object, mind, or language.

30. Peirce argues:

[H]uman opinion universally tends in the long run to a definite form, which is the truth. Let any human being have enough information and exert enough thought upon any question, and the result will be that he will arrive at a certain definite conclusion, which is the same that any other mind will reach under sufficiently favorable circumstances. . . . There is, then, to every question a true answer, a final conclusion, to which the opinion of every man is constantly gravitating. . . . This final opinion, then, is independent, not indeed of thought in general, but of all that is arbitrary and individual in thought; [it] is quite independent of how you, or I, or any number of men think. Everything, therefore, which will be thought to exist in the final opinion is real, and nothing else.

8 CHARLES PEIRCE, *COLLECTED PAPERS OF CHARLES SANDERS PEIRCE* § 8.12, at 16-17 (Arthur W. Burks ed., 1958). The "final opinion" to which Peirce refers is the ideal norm, which exists independent of how an individual or any number of people think. Rorty, initially attracted to Peircean pragmatism, now rejects it. RORTY, *CONSEQUENCES OF PRAGMATISM*, *supra* note 23, at xxv.

31. See Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1904 n.207 (1987) (distinguishing Deweyan from Peircean pragmatism and saying that she "remains uncommitted between the two"); Stick, *supra* note 1, at 341 n.27 (distinguishing the two kinds of pragmatism and endorsing Peircean pragmatism); West, *supra* note 24, at 122 (distinguishing Deweyan and Peircean pragmatism and suggesting that to forsake Peircean pragmatism is to "slide down the slippery slope of sophomoric relativism"). *But cf.* Singer, *supra* note 19, at 1754 (endorsing a specifically *Rortyan* conception of pragmatism). Puzzlingly, Singer also subsequently endorses a more Peircean conception. *Id.* at 1757. For a more in-depth look at Singer's views, see *infra* part IV.

32. See *supra* note 30 and accompanying text.

mately validates is in the theory, and everything reason ultimately rejects is not. Peirce holds that what is ultimately justified in this way is true; this is how Peirce *defines* truth. To be true just *is* to be included in the ultimate theory.<sup>33</sup>

The views of legal pragmatists are generally inconsistent with Peircean pragmatism. Most legal pragmatists would deny the existence of methods of rational inquiry which, if consistently applied, would ensure that initially disagreeing inquirers ultimately concur on a single theory. Divergence, not convergence, is the theme. Legal pragmatists emphasize diversity; they appreciate the divergent viewpoints and methods of different cultures, social classes, races, and genders. Martha Minow and Elizabeth Spelman, for example, state that pragmatists "assault each of [the following] conceptions[:]"<sup>34</sup>

particular conceptions of the sovereign rational subject, the distinction between objectivity and subjectivity, the source of knowledge and morality in either natural order or natural languages and cultural development, and the possibility and verifiability of human progress. . . . A [pragmatist] casts doubts on the possibility of sovereign reason, removed from historical situations . . . .<sup>35</sup>

But if we deny that rational inquiry converges on a single theory, we tear the heart out of Peircean pragmatism, for such convergence is what defines the ultimately justified theory.<sup>36</sup> Thus, most legal pragmatists cannot consistently be Peircean pragmatists.

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33. One would have thought that Quine disposed of Peircean pragmatism over 30 years ago: Peirce was tempted to define truth outright in terms of scientific method, as the ideal theory which is approached as a limit when the (supposed) canons of scientific method are used unceasingly on continuing experience. But there is a lot wrong with Peirce's notion, besides its assumption of a final organon of scientific method and its appeal to an infinite process. There is a faulty use of numerical analogy in speaking of a limit of theories, since the notion of limit depends on that of "nearer than," which is defined for numbers and not for theories. And even if we by-pass such troubles by identifying truth somewhat fancifully with the ideal result of applying scientific method outright to the whole future totality of [experience], still there is the trouble in the imputation of uniqueness ("the ideal result"). For . . . we have no reason to suppose that [experiences] even unto eternity admit of any one systematization that is scientifically better or simpler than all [the rest]. It seems likelier . . . that countless alternative theories would be tied for first place. Scientific method . . . affords . . . no unique definition of truth. Any so-called pragmatic definition of truth is doomed to failure . . . .

WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* 23 (1960) (footnotes omitted).

34. Minow & Spelman, *supra* note 18, at 251.

35. *Id.*

36. A comparison with Habermas is instructive. For Habermas, to say that a statement is true is to say that a "consensus on the validity [truth] of the statement . . . is to be reached everywhere and always, whenever we enter into discourse." JÜRGEN HABERMAS, *VORSTUDIEN UND ERGÄNZUNGEN ZUR THEORIE DES KOMMUNIKATIVEN HANDELNS* 60 (1984) (translated by author). Essentially, his idea is that truth is a matter of intersubjective consensus. Of course, not just any consensus will do. Truth requires a consensus of fully informed communicators freely communicating in an ideal speech situation, one in which communication occurs without distorting influences. This is the sort of consensus that under the right conditions would ultimately be "reached everywhere and always." But how can we tell when a living, breathing consensus is one that would be reached "everywhere and always"? Habermas has no answer to this question. See JANE BRAATEN, *HABERMAS'S CRITICAL THEORY OF SOCIETY* 24-27 (1991) (arguing that Habermas makes truth an unspecifiable ideal). Habermas responds by conceding that the ideal is not fully specifiable, but he

From this point on, I mean by pragmatism the *Dewey/Rorty* variety; a version that is, at least for our purposes here, characterized by the assertion that the norms of justification actually used in society neither have nor need a ground outside themselves. I will—despite some indications to the contrary—assume that legal pragmatists espouse this form of pragmatism.

### B. *Is Pragmatism Plausible?*

Any exposition of pragmatism would be incomplete without giving at least some attention to pragmatism's plausibility. Pragmatism is, after all, controversial. I quote Ronald Dworkin quoting Bernard Williams's summary of Hilary Putnam's critique of Rorty:

[Rorty's views] simply tear themselves apart. If, as Rorty is fond of putting it, the correct description of the world (for us) is a matter of what we find it convenient to say, and if, as Rorty admits, we find it convenient to say that science discovers a world that is already there, there is simply no perspective from which Rorty can say, as he also does, that science does not really discover a world that is already there, but (more or less) invents it.<sup>37</sup>

Our formulation of pragmatism simply sidesteps this particular criticism. We have taken no position about what counts as a "correct description of the world" except to assert that justification is anti-foundational; moreover, we can acknowledge that the pragmatist cannot assert anti-foundationalism in an absolute, non-relative way. It is only relative to the pragmatist's norms of justification that all justification is relative.

But there are other problems. Some, and I am among them, reject pragmatism for other reasons. Some reject pragmatism because they think that there are some truths that *any* person must accept if that person is to qualify as rational.<sup>38</sup> These truths provide an external standard

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argues that we should adopt the ideal nonetheless. *Id.* at 26; see also Jürgen Habermas, *A Reply to My Critics*, in HABERMAS: CRITICAL DEBATES 219 (John B. Thompson & David Held eds., 1982).

Peirce does not face such difficulties, for he assumes that *actual* communication among rational inquirers *in fact* converges on the final consensus. We identify that consensus as the end result of inquiry. Habermas shows what happens when we eliminate this Peircean assumption. It is worth remarking that Habermasian-like themes have surfaced in Rorty's work. Rorty remarks that "[a] liberal society is one which is content to call 'true' whatever the upshot of [free and open] encounters turns out to be." RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 52 (1989) (emphasis omitted). I call Rorty's position Habermasian-like because Rorty counts the upshot of an actual consensus as true; for Habermas, in contrast, truth requires an ideal consensus. For Rorty's views on Habermas, see RICHARD RORTY, *Habermas and Lyotard on Postmodernity*, in *ESSAYS ON HEIDEGGER AND OTHERS* 164 (1991).

37. Dworkin, *supra* note 6, at 360-61 (quoting Bernard Williams, *Terrestrial Thoughts, Extraterrestrial Science*, LONDON REV. BOOKS, Feb. 7, 1991, at 12, 12 (book review)).

38. I do not want to overemphasize my disagreement with Rorty on this point. My conception of the "rationally unrevisable" is much like Stuart Hampshire's. See STUART HAMPSHIRE, *THOUGHT AND ACTION* 11-25 (1959). Hampshire's views are far removed from traditional views of the *a priori*. Another reason I have for rejecting an unqualified pragmatism is that I have reservations about denying a special epistemic status to observation. See *supra* note 23.

of evaluation for norms of justification.<sup>39</sup> But this controversy does not really matter for our purposes, because even those who argue for a rationally unrejectable framework of truths must still admit that the framework leaves a vast array of questions unanswered. Consider again, for example, the norm from *Cohen v. California*: "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."<sup>40</sup> Reasonable minds can differ here. One can easily imagine a society less tolerant of offensive speech, but such a society would not thereby convict itself of irrationality. Mari Matsuda, for example, argues that our society should be less tolerant than it is of at least some forms of offensive speech.<sup>41</sup> While I disagree, I certainly do not think that Matsuda's position shows her to be irrational. Any framework of rationally unrejectable truths leaves open the question raised by *Cohen* as well as innumerable other situations.<sup>42</sup>

The vast majority of legal decisions involve these questions about which reasonable minds may differ. In answering such questions we (at least try to) conform to norms of justification we have previously accepted. Typically, as in *Cohen*, reasonable minds may differ as to the acceptability and applicability of those norms. Pragmatism is very plausible as a view of the status of such norms: they neither have nor need a ground outside themselves. This is one good reason pragmatism *should* appeal to lawyers, and I think it is also one reason it *does* appeal—although one rarely finds any philosophical argument for pragmatism in the writings of the legal pragmatists. They seem to take it for granted that pragmatism is capable of withstanding vigorous objections. For present purposes, I will too, or at least I will assume that the limited form of pragmatism just sketched is both plausible and widely held. Not that I think it is unimportant to present arguments for or against pragmatism. Quite the contrary; we should not embrace philosophical fashions without considering the actual arguments. The arguments reveal whether the fashions will last, or quickly turn threadbare. The task of arguing for pragmatism, however, is beyond the scope of this essay. Our focus instead is on the role of pragmatism in critical theory.

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39. Ironically, Steven Smith accepts the idea of rationally unrejectable truths, and then proceeds to use certain purported truths of this sort as a foundation to argue *for* pragmatism. Smith, *supra* note 1, at 420. Smith argues for "pragmatism . . . understood as asserting that we—or judges—should do what will produce the most good in the future, *using* the past but not counting it as valuable for its own sake . . ." *Id.* As Smith rightly points out, it is very hard to disagree with this. Then again, this conception is not pragmatism, at least not understood as the distinctive philosophical position of the Peirce, James, Dewey, and Rorty tradition.

40. *Cohen v. California*, 403 U.S. 15, 21 (1971).

41. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2380 (1989).

42. See generally STUART HAMPSHIRE, *MORALITY AND CONFLICT* (1983).

## II. THE PLACE OF PRAGMATISM IN THE CRITIQUE OF LIBERAL LEGITIMACY

The critical theorists' positive conception of legitimacy has its roots in their negative critique of liberalism's conception of legitimacy, so we should begin by analyzing their attack on the liberal conception. Pragmatism figures prominently in this attack. I will first sketch the general outlines of the attack and next explain the pre-eminent place of pragmatism in the critical theorist's arsenal.

### A. Two Concepts of Legitimacy

Two distinct (but related) concepts go by the name *legitimacy*. One concept figures prominently in classical liberalism; the other, in the writings of the critical theorists. I will explain the classical liberal notion first; doing so provides background essential to understanding the critical theorists' discussion of legitimacy. In classical liberal political philosophy, a government is legitimate when (and only when) citizens, or at least most of them,<sup>43</sup> have a general *prima facie* obligation to obey the government's commands.<sup>44</sup> Judicial legitimacy—the legitimacy of the adjudicative process—is a special case of overall governmental legitimacy: judicial decisions are legitimate when (and only when) most citizens have a general *prima facie* obligation to obey those decisions.<sup>45</sup>

The critical theorists' conception of *legitimacy* differs from that of classical liberal theory. The notion that figures most prominently in critical theory has its roots in Weberian sociology.<sup>46</sup> Legitimacy for Weber is a matter of having a particular type of reason to conform: a social order is legitimate if most citizens believe that conforming to that order is obligatory, where this belief is a reason for their so conforming.<sup>47</sup>

43. The qualification is necessary; otherwise, legitimacy becomes an ideal with little practical application. See WILLIAM GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 298 (1991) ("Legitimate authority does not entail an obligation to obey on the part of all individuals . . . . A society can be legitimate if the preponderance of its members conscientiously subscribe to it . . . .").

44. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 23-25, 100-01 (1986); A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 6-7, 12, 195-96 (1979); RONALD DWORKIN, *LAW'S EMPIRE* 191 (1986); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 285 (1989); cf. Rolf Sartorius, *Political Authority and Political Obligation*, 67 VA. L. REV. 3 (1981) (arguing that a government's moral authority to rule does not obligate citizens to obey the government's commands). Raz decisively criticizes Sartorius in RAZ, *supra*, at 23-24.

45. See Steven J. Burton, *Judging in Good Faith* (1992) (specifically discussing the legitimacy of adjudication); Kress, *supra* note 45, at 285 (same).

46. See generally Alan Hyde, *The Concept of Legitimacy in the Sociology of Law*, 1983 WIS. L. REV. 379, 380-86 (discussing the use of Weberian notions of legitimacy by critical theorists).

47. See MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (A.M. Henderson & Talcott Parsons trans., 1947). According to Weber, an order's validity "means more than the mere existence of a uniformity of social action determined by custom or self-interest. . . . [A]n order will only be called 'valid' if [conformity to it is] binding on the actor or the corresponding action constitutes a desirable model for him to imitate." *Id.* at 124. This Weberian notion may at first seem a less-than-perfect fit with what critical theorists say about legitimacy. Mark Kelman, for example, says that legitimacy means "at a minimum that members of the population almost invariably acquiesce in the existing distribution of perquisites and power, even when the distribution doesn't

When critical theorists speak of legitimacy, they generally have *some* version of the Weberian notion in mind.<sup>48</sup>

In order to maintain consistent terminology, and avoid undue confusion, let us stipulate that by *legitimacy* we shall mean the classical liberal notion: legitimacy is a matter of most citizens having a general obligation to obey judicial decisions. This is not to brush aside the critical theorists' concerns about legitimacy; it is simply to rename them. Renaming is easy, for, in fact, the conceptual framework of the critical theorists and that of classical liberalism are not all that different. From the point of view of classical liberalism, the critical theorists use *legitimacy* for what it would be natural to call *perceived (classical liberal) legitimacy*.<sup>49</sup> Liberals can and do recognize that citizens may *perceive* that decisions are legitimate and conform for that reason.<sup>50</sup> This empirical claim about perceived legitimacy is typically combined with a moral claim about legitimacy proper. The moral claim is that judicial decisions are not just perceived to be legitimate but really *are* legitimate—that citizens really are obligated to obey judicial decisions.<sup>51</sup> The empirical claim is controversial,<sup>52</sup> but it is a controversy we can put to one side. Our focus is the moral claim.

Critical theorists attack the moral claim.<sup>53</sup> Their attack construes

seem inevitably to redound to each obedient person's benefit." KELMAN, *supra* note 11, at 263. There is no mention of an *obligation* to conform, and Weber's concept is built around the notion of obligation. But as Kelman notes, "[a]cquiescence is contrasted sharply with *obedience*, which could presumably be grounded in a purely self-interested fear of the force of those who both control and get the benefits of the state's exercise of power." *Id.* What then is acquiescence? Kelman does not say, but the natural implication is that to acquiesce is to comply because *one believes that one has a reason*, other than fear of force, to do so. Of course, this is only to characterize the reason negatively as "other than the fear of force." What is the positive characterization? Here the obvious and natural answer is that citizens believe they have a reason because they believe they are obligated. And this brings us back to Weber.

48. See Hyde, *supra* note 46, at 380-86 (interpreting critical theorists as endorsing the Weberian notion).

49. It is so natural to talk this way that it is easy to slip from the Weberian concept to the classical one without noticing it. David Kairys, for example, writes:

[T]he legitimation function [in the sense of Weberian legitimacy] is crucial to an understanding of its doctrines, rationalizations, results, and social role . . . . The law is a major vehicle for the maintenance of existing social and power relations by the consent or acquiescence of the lower and middle classes. The law's *perceived [classical liberal] legitimacy* confers a broader legitimacy [i.e., perceived legitimacy] on a social system and ideology . . . most fairly characterized by domination by a very small, mainly corporatized elite.

*Introduction to THE POLITICS OF LAW 7* (David Kairys ed., 1990) (emphasis added).

50. Hyde makes this point. Hyde, *supra* note 46, at 383.

51. *Id.*

52. Alan Hyde sharply criticizes the empirical claim. See Hyde, *supra* note 46. However, empirical studies suggest Hyde may be wrong. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 64 (1990), where Tyler argues that the results of his study strongly support what we have called the "empirical claim." See also KELMAN, *supra* note 11, at 263-68 (criticizing Hyde).

53. Andrew Altman interprets the critical legal studies movement as attacking the liberal claims that courts impose a rule of law. See generally ALTMAN, *supra* note 11. While it is certainly true that the Critical Legal Studies (CLS) literature attacks liberal claims about the rule of law, for reasons that will emerge shortly (see *infra* note 57), I prefer my interpretation which sees the attack as on legitimacy generally. This is not to ignore the attack on the rule of law, for that attack is essential to critical theorists' attack on judicial legitimacy, a point Altman makes clear. *Id.* at 9-13,

liberalism broadly, not just as a political philosophy, but also as a related practical political orientation which actually guides legal reasoning.<sup>54</sup> They point out that liberalism defines its own standards for legitimacy, and argue that the judicial system systematically violates and undermines the very standards liberalism has established. The point is to show that, even on liberalism's own terms, the system lacks legitimacy.<sup>55</sup> For example, Joseph Singer holds that liberals "claim that law is, or should be neutral[,] . . . [that] the legal system should be based on independent principles of justice that do not themselves presuppose any particular conception of the good."<sup>56</sup> Singer next argues that liberalism undermines neutrality by continually appealing to particular conceptions of the good. He also contends that liberalism not only systematically conceals this fact, but also that such concealment is one, albeit perhaps not fully conscious, goal of the theory.<sup>57</sup> As Mark Kelman remarks in the same vein,

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98-101. Altman's narrow focus on the rule of law forces him to relegate the critical theorists' concern with legitimacy to the back burner; *legitimacy* does not even make it into the index. John Stick shares my view of the importance of legitimacy in critical theory; he remarks that Weberian legitimation theory "is central to the dominant tradition in CLS," and he notes that "Kelman, in discussing legitimation [in KELMAN, *supra* note 11], properly brings together a group of seemingly unrelated topics in CLS writing." Stick, *Development*, *supra* note 11, at 417.

54. Altman interprets the critical legal studies movement as attacking "[l]iberal law—and not merely liberal theorizing about law . . ." ALTMAN, *supra* note 11, at 104.

55. See, e.g., KELMAN, *supra* note 11, at 242-68; Singer, *supra* note 12, at 6 ("By its own criteria, legal reasoning cannot resolve legal questions in an 'objective' manner . . .") (emphasis added); see also Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 214-17 (1987); Duncan Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1, 14 (1983); Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 711-32 (1988).

56. Singer, *supra* note 12, at 40; but cf. Steven Shiffrin, *Liberal Theory and the Need for Politics*, 89 MICH. L. REV. 1281 (1991) (arguing that liberals generally do not insist on neutrality). The accuracy of Singer's characterization of liberalism is not at issue. Mark Tushnet has recently noted the liberalism that critical theorists focus on is really "amateur political theory." MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 4 n.9 (1988). He remarks that "[m]ost systematic political thinkers have had a more subtle understanding of the problems than those [problems] I will describe as inherent in the tradition." *Id.* This seems odd. Why bludgeon the amateurs? Why not play with the pros?

57. See Singer, *supra* note 12, at 6 (critical theorists propose that "legal reasoning is a way of simultaneously articulating and masking political and moral commitment."). Such analysis has, at least since Marx, been directed toward society as a whole. Marx's labor theory of value is supposed to reveal that capital is reified labor, a fact that, according to Marx, capitalist ideology conceals. Stuart Hampshire sees such criticism as inherent in practical reason itself. He argues:

The function of social myth has always been to restrict the area in which practical reasoning can operate for human improvement, by representing the particular social arrangements of particular societies as unalterable parts of the natural or divine order of things. Practical reason becomes innovative in human affairs when it demands reasons for practices which have been so represented, such as poverty or the subordination of women. In previous ages of which we have record the fallacy of false fixity, as it may be called, is almost always at work, disguising the injustices attached to particular ways of life. It should now be possible to assess the particular costs in injustice of present ways of life . . . without self-protecting blinkers.

STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 57 (1989). I think Hampshire is clearly right about the role of practical reason. This is why I think Altman's focus on the critical theorists' attack on the rule of law is too narrow. See ALTMAN, *supra* note 11. That attack is instead part of a broader attempt, to use Hampshire's language, to make "practical reason . . . innovative in human affairs" so that we can see injustice "without self-protecting blinkers." The critical theorists attack the rule of law as one of many instances of the "fallacy of false fixity."

liberalism "creates and reinforces ideology that makes it difficult, in a cognitive sense, to perceive both [law's] injustices and its mutability."<sup>58</sup> In brief, the ideology of liberalism creates the illusion of justice.

### B. Pragmatism as Illusion-Dispelling

Many critical theorists tout pragmatism as the antidote to illusion;<sup>59</sup> pragmatism is supposed to help us see how the law conceals the way in which it undermines its own legitimacy. Rorty has aptly characterized the attitude of many critical theorists/pragmatists:

[they] think that there is a basic mistake being made, a mistake deep down at the roots. They think that deep thinking is required to get down to this deep level, and that only there, when all the superstructural appearances have been undercut, can things be seen as they really are.<sup>60</sup>

Many critical theorists believe that pragmatism will help cut through the appearances and reveal reality. This is precisely how Minow and Spelman wish to use pragmatism.<sup>61</sup> They emphasize that pragmatism requires careful attention to the details of the particular contexts in which we find ourselves, and they argue:

[T]he emphasis on context often means identifying structures that extend far beyond the particular circumstance. But perhaps it is not so surprising that this should be named a contextual move against the backdrop—the context by default—created by Western liberal legal and political traditions that emphasize as ideals individual free-

58. See KELMAN, *supra* note 11, at 263. Kelman makes this remark about "law," but in the context the "law" he has in mind is law influenced by liberal politics.

59. Critical theorists have long sought ways of breaking through the illusions they think are created or supported by standard legal reasoning. Pragmatism is merely the currently fashionable tool. Among those who think pragmatism offers a way to break through the illusion are Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1763-64 (1990); Minow & Spelman, *supra* note 18, at 256-58; Radin, *Feminist*, *supra* note 3, at 140-44; Joseph W. Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1821-22; West, *supra* note 24, at 123-25; Allan C. Hutchinson, *The Three 'Rs': Reading/Rorty/Radically*, 103 HARV. L. REV. 555, 563-66 (1989) (book review); Singer, *supra* note 19, at 1765-66. For a more balanced view of pragmatism's significance to law, see Williams, *supra* note 24. See also Lynn A. Baker, "Just Do It": *Pragmatism and Progressive Social Change*, 78 VA. L. REV. 697 (1992). Rorty replies to Baker in Richard Rorty, *What Can You Expect from Anti-Foundationalist Philosophers?: A Reply to Lynn Baker*, 78 VA. L. REV. 719 (1992).

60. Richard Rorty, *Feminism and Pragmatism*, 30 MICH. Q. REV. 231, 239-40 (1991). Smith makes a similar point.

Perhaps pragmatism [is attractive] because it is one version of the old dream that the questions which plague and divide us might somehow be banished if we could just get answers directly—without distorting conceptual mediation—from nature itself. . . . [L]egal pragmatists . . . act as if through the incantatory repetition of sacred words—"experience," "context," "perspective," "dialogue"—self-validating answers would finally, somehow, just spring forth. Smith, *supra* note 1, at 440.

61. Minow & Spelman, *supra* note 18, at 250-51. Although they call their view "contextualism," Minow and Spelman are better characterized as pragmatists. See Michael Brint & William Weaver, *Introduction to PRAGMATISM IN LAW*, *supra* note 1, at 5. Singer also takes "contextualism" to be a version of pragmatism. Singer, *supra* note 19, at 1770.



dom, equality, universal reason, and abstract principles. Because persistent patterns of power, based on lines of gender, racial, class, and age differences, have remained resilient and at the same time elusive under traditional political and legal ideas, arguments for looking to context carry critical power.<sup>62</sup>

Pragmatism is supposed to break down the resilience and trap the elusive reality masking the abuse of power.

Cornel West expresses similar ambitions for pragmatism. To West, pragmatism "consists of an emancipatory experimentalism that promotes permanent social transformation and perennial self-development for the purposes of ever-increasing democracy and individual freedom."<sup>63</sup> Pragmatism "analyzes the social causes of unnecessary forms of social misery, promotes moral outrage against them, organizes different constituencies to alleviate them . . . ."<sup>64</sup> As Minow and Spelman remark approvingly, Cornel West "is interested in pragmatism as a *philosophic method* that . . . will enable forms of cultural criticism that can challenge hierarchical political arrangements that have harmed people of color, women of all races, and poor and working class peoples."<sup>65</sup>

This attempt to use pragmatism as a "philosophic method" revealing the hidden truth about injustice shows that critical theorists/pragmatists still have at least one foot lingering near the camp of classical liberal political philosophy. The liberal ideal of legitimacy represents the state as speaking (when legitimate) with a special authority to its citizens: they are under a special political obligation to obey its commands. The critical theorists wish to speak, and, more importantly, wish the state to speak, with a special authority, the authority of the True Moral Vision. Mari Matsuda entertains such hopes for pragmatism as a "philosophic method"; she writes that "[a]ll is not well; there is pain at so many levels of our lives—personal and political, individual and collective. We can save ourselves and each other by listening to the pain and to the dream of human dignity we have sustained alongside it."<sup>66</sup> Pragmatism is supposed to help us listen "to the pain and to the dream." When we listen, the truth is revealed. We learn, for example, that "[w]e can attack racist speech—not because it isn't really speech, not because it falls within some hoped-for neutral exception [to the First Amendment], but because it is wrong."<sup>67</sup> Matsuda would even consider restricting school curriculums to eliminate Mark Twain on the ground that the "[t]here is a danger of some students missing . . . the ironic message and simply enjoying a racist dialogue on its face."<sup>68</sup> We should, however,

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62. Minow & Spelman, *supra* note 18, at 269-70.

63. WEST, *supra* note 5, at 214.

64. West, *supra* note 24, at 124.

65. Minow & Spelman, *supra* note 18, at 257 (emphasis added).

66. Matsuda, *supra* note 59, at 1782.

67. Matsuda, *supra* note 41, at 2380.

68. *Id.* at 2369.

allow Spike Lee to use racist epithets in his film *Do The Right Thing*<sup>69</sup> because such language is an “incisive anti-racist critique of racist speech.”<sup>70</sup> How do we know that we should censor Twain but allow Lee? “[T]he experience of victim-group members is a guide.”<sup>71</sup> When we learn to listen to the stories and voices of the traditionally oppressed, “all the superstructural appearances [are] undercut, [and] things [can] be seen as they really are.”<sup>72</sup> Matsuda envisions the privileging of certain types of speech based not on content, but on the identity of the speaker. This is what she has in mind when she says she wants to “bend pragmatism toward liberation.”<sup>73</sup>

To bend pragmatism in this way is to break it. Pragmatism is not, and cannot be, such a “philosophic method.” Indeed, the moral of pragmatism is that no such method can exist.<sup>74</sup> Pragmatism leads to relativism about justification. This relativism destroys any hope of finding in pragmatism a philosophic method that reveals “The Truth.”

### III. PRAGMATISM’S INEVITABLE RELATIVISM

Pragmatism leads to relativism because norms of justification can, and do, conflict. The following example illustrates the relevant sort of conflict. In *Moore v. Regents of the University of California*,<sup>75</sup> a UCLA medical center doctor removed John Moore’s spleen in the course of treating Moore’s leukemia. The spleen contained abnormal genetic material of great commercial value. Without obtaining Moore’s consent, the doctor and medical center marketed the material for a considerable profit.<sup>76</sup> Moore sued, claiming (among other things) that he had a property right in the marketed material. In dissent, Justice Mosk agreed with Moore’s position on the ground that marketing the genetic material (without Moore’s consent) was inconsistent with a basic, widely recognized value—the dignity and sanctity of human beings.<sup>77</sup> The majority, however, denied Moore’s claim to a property right.<sup>78</sup> The majority acknowledged the importance of the dignity and sanctity of human beings,

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69. DO THE RIGHT THING (Universal Pictures 1989).

70. Matsuda, *supra* note 41, at 2369.

71. *Id.*

72. As Charles Collier remarks, “Matsuda speaks with the sovereign confidence and authority of one who knows which ideas are worthy of being thought and which are unthinkable, which words may be spoken and which are unspeakable.” Charles Collier, *Cultural Critique and Legal Change*, 43 FLA. L. REV. 463, 468 (1991).

73. Matsuda, *supra* note 59, at 1764.

74. Rorty has repeatedly made the point that pragmatism provides no special insight into a purported moral or political reality. A typical Rortyeian remark: “On my view, pragmatism bites other philosophies, but not social problems as such—and so is as useful to fascists like Mussolini . . . as it is to liberals like Dewey.” Rorty, *supra* note 60, at 255 n.23.

75. 793 P.2d 479 (Cal. 1990).

76. In exchange for this material, the doctor was given 75,000 shares of stock in the private company that bought the material and became a paid consultant for the company. In addition, the doctor and UCLA together were given more than \$1,000,000 over a three-year period. *Id.* at 482.

77. *Id.* at 515-16.

78. *Id.* at 488-89.

but did not find this to be a ground for recognizing the property right.<sup>79</sup> Mosk and the majority differ on what counts as a justification—which is just to say that they subscribe to different norms. Mosk thinks that human dignity justifies recognizing the right; the majority does not.

Sometimes such disagreements are resolvable. If the opposing parties agree sufficiently on norms of justification, one side may produce arguments for its position that the other side finds compelling. But differences in norms may not be resolvable in this way. As the philosopher Stuart Hampshire emphasizes, conflicts cannot always be resolved by the “judicious balancing of competing moral claims.”<sup>80</sup> As Hampshire notes, we do not live “within morality, and within the moral conventions of a particular society, as within a stable building with secure foundations. In this century it is impossible to preserve this picture of stability.”<sup>81</sup>

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79. The majority denied the claim primarily on the ground that thousands of researchers use human cell lines stored in tissue repositories; to recognize Moore's claim as valid would expose these researchers to similar legal claims. The resulting liability explosion would greatly hinder research. *Id.* at 495-96.

80. HAMPSHIRE, *supra* note 42, at 168. Many take it for granted that disagreement on norms of justification is pervasive. See, e.g., Singer, *supra* note 19, at 1764 (alleging that Rorty fails “to recognize the existence of conflicts of values and perspectives within society”). We should distinguish the empirical claim that people have unresolvable disagreements over norms of justification from the philosophical thesis that morality presents us with conflicting and unresolvable moral claims. The empirical claim is about a clash between two or more opposing points of view about norms of justification. The philosophical claim is that even within a *single* point of view unresolvable conflict may be unavoidable. There is a considerable philosophical literature on both claims. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE* (1981); RAZ, *supra* note 44, at 357-66; Stuart Hampshire, *Public and Private Morality*, in *PUBLIC AND PRIVATE MORALITY* 55-73 (Stuart Hampshire ed., 1978); Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 *PHIL. & PUB. AFF.* 160 (1973); Bernard Williams, *Conflicts of Value*, in *THE IDEA OF FREEDOM* 221-32 (Alan Ryan ed., 1979).

81. HAMPSHIRE, *supra* note 42, at 168. Some will object that we are not deeply divided over norms of justification. This is not to deny that we disagree, nor is it to deny that disagreement is widespread. All the objection denies is that *unresolvable* disagreement is widespread. The objection contends that most of us agree sufficiently on norms of justification that one side can produce arguments for its position that the other side finds compelling. In this way our disagreements would be resolvable in light of shared norms of justification.

The problem with these reassuring reflections is that they are false. Unresolvable disagreement is widespread. The extent of unresolvable disagreement is, of course an empirical issue. But it is an empirical issue for which ample evidence confronts us in our daily lives and in the record of history. In our daily lives, we disagree about the distribution of scarce resources, about the punishment of criminals, about how to deal with environmental problems, about how to structure public education, in short, about virtually every substantive aspect of public policy. Often, we disagree as much as we agree on norms of justification, on what counts as a justification and what makes one justification preferable to another. I see no reason to assume that we share a sufficient number of norms of justification such that disagreements are always or even typically capable of resolution. Broadening the perspective from daily life to history confirms this conclusion. The intellectual history of the last three centuries is in part the history of the breakdown of any consensus about what justifies a moral or political judgment. Rawls has emphasized these same points:

[L]ong historical experience suggests, and many plausible reflections confirm, that . . . reasoned and uncoerced agreement is not to be expected [concerning moral and political issues.] . . . Our individual and associative points of view, intellectual affinities and affective attachments, are too diverse, especially in a free democratic society, to allow of lasting and reasoned agreement. Many conceptions of the world can plausibly be constructed from different standpoints. Diversity naturally arises from our limited powers and distinct perspectives; it is unrealistic to sup-

How does pragmatism handle such conflicts? Pragmatism's anti-foundationalism towards justification denies a neutral perspective independent of either set of norms from which both sets can be evaluated. Confronted with conflict, all that pragmatists can say is that the assertions and actions our norms validate are justified relative to those norms. Those on the other side, intellectually speaking, can make the same claim with respect to *their* norms. We are forced to a relativism about justification.<sup>82</sup> *There is no way to reject this relativist conclusion and remain a pragmatist.* Nonetheless, many—indeed, perhaps most—legal pragmatists deny that pragmatism leads to relativism. Joan Williams is one of the few who do not, and as she remarks, “[i]n roughly half of my conversations about Rorty, someone ultimately dismisses his ‘radical relativism.’ ‘Of course,’ I’ve been told innumerable times, after a long discussion of ethics or epistemology, ‘I don’t go as far as Rorty.’”<sup>83</sup> Being a (Dewey/Rorty) pragmatist and not going as far as Rorty is a peculiar attitude. A decision to avoid the consequences of Rorty’s thought is not really a matter of choice, for Dewey/Rorty pragmatism *entails* relativism; one cannot exist without the other.

A better reaction is to try to defuse relativism. One popular way is to point out that a pragmatist cannot consistently assert relativism; that is, he or she cannot assert as *non*-relatively justified, “All justification is relative.”<sup>84</sup> But pragmatism does not lead to relativism in this sense; it does not and cannot lead to the position that all justification is relative. The point is not that a pragmatist might carelessly slip into contradiction, the point instead is to reject the traditional philosophical dualism of relative versus absolute. There simply is no neutral perspective from which we can say that one view is “really, non-relatively” justified. The accusation, “You are a relativist” is no accusation at all because there is no other option. It is nothing but illusion to think otherwise.

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pose that all our differences are rooted solely in ignorance and perversity, or else in the rivalries that result from scarcity. [The appropriate view of social organization] takes deep and unresolvable differences on matters of fundamental significance as a permanent condition of human life.

John Rawls, *Kantian Constructivism in Moral Theory: Rational and Full Autonomy*, 77 J. PHIL. 515, 542 (1980); see also Lipkin, *supra* note 5, at 87-88 (arguing that a “consensus theory of truth” fails for lack of sufficient consensus).

82. Some of Rorty’s explicit commentary on relativism is very puzzling. He says that relativism “is the view that every belief on a certain topic, or perhaps about *any* topic, is as good as every other.” RORTY, *Relativism*, *supra* note 23, at 166. Rorty rightly notes that no one will even say they hold this position, except for the “occasional cooperative freshman.” *Id.* Rorty then continues by stating that the “philosophers who get called ‘relativists’ are those who say that the grounds for choosing between such opinions are less algorithmic than had been thought.” *Id.* What is so odd is that Rorty’s position in the passage quoted in the text is clearly a version of relativism about justification, an obvious and well-known form of relativism. See, e.g., HAMPSHIRE, *supra* note 42, at 36. Rorty corrects this misstep in RORTY, *Solidarity*, *supra* note 23, at 21. He notes that *relativism* is often used for the thesis that “there is nothing to be said about either truth or rationality apart from descriptions of the familiar procedures of justification which a given society—ours—uses in one or another area of inquiry.” *Id.* at 23. Rorty prefers to call this *ethnocentrism*, not *relativism*. *Id.*

83. Williams, *supra* note 24, at 155 (emphasis omitted).

84. Rorty makes this point in RORTY, *Solidarity*, *supra* note 23, at 23-24.

Still, this conclusion does not do much to defuse relativism. A pragmatist must admit that, relative to his or her norms of justification, there simply is no neutral perspective from which we can say that one view is "really, non-relatively" better justified. So how, under a pragmatist theory, do we adjudicate between conflicting norms of justification? The only possible response is that our assertions and actions are justified *relative to our norms*. Those on the other side can say the same thing. Rorty has acknowledged, indeed, emphasized, this point. Consider his advice to politically active pragmatists:

[D]o not charge a current social practice or a currently spoken language with being unfaithful to reality, with getting things wrong. Do not criticize it as a result of ideology or prejudice, where these are tacitly contrasted with your own employment of a truth-tracking faculty called "reason" or a neutral method called "disinterested observation." Do not even criticize it as "unjust" if "unjust" is supposed to mean more than "sometimes incoherent even on its own terms."<sup>85</sup>

The consistent pragmatist cannot do more, for, to make the point again, no neutral perspective exists from which to evaluate conflicts between norms of justification.<sup>86</sup> This has seemed to many to be enough of a relativism to worry about.

It *should* worry critical theorists, however, for it is the death knell for their hopes to use pragmatism as a teleological tool. Pragmatism's relativism ensures that pragmatism cannot serve as the philosophical method in the manner envisioned for it by most critical theorists. Pragmatism cannot reveal the real, hidden truth about injustice, for there is no such "truth" to reveal. There are simply differing norms of justification, and no neutral perspective from which one can say whether conduct that is seemingly justified by a given set of norms is "really" justified. Nevertheless, to lose pragmatism as a philosophic method of revealing reality is not really so much of a loss. Why expect a philosophical theory about justification to reveal that, or why, the world is full of suffering and injustice? To see *that* suffering exists, one hardly needs philosophy; open eyes (or an open heart) will do. As to *why*, surely—to take just a few examples—lust for power and domination, cruelty, lack of imaginative projection into the suffering of others, and sheer stupidity—contribute far more to injustice than any philosophical conviction that one's norms of justification are grounded outside themselves.

85. Rorty, *supra* note 60, at 242.

86. Some have found this lack of a neutral perspective one of the chief *virtues* of pragmatism. See Lipkin, *supra* note 5, at 71-72 ("From diverse quarters comes a call to abandon the dogma of legal reasoning and to replace it with . . . 'conversationalism' . . . [which] is reputed to be vastly superior to reason because it does not rely on the quixotic attempt to formulate a neutral perspective from which to evaluate competing legal theories.").

#### IV. NEGATIVE TO POSITIVE: THE PLACE OF PRAGMATISM IN CRITICAL THEORY'S POSITIVE CONCEPTION OF LEGITIMACY

It is obvious that pragmatism leads to relativism, and it is equally clear that, given relativism, pragmatism cannot reveal any hidden truth about injustice. Why, then, have extremely intelligent legal theorists overlooked such an obvious point? What intellectual motive makes them blind? A concern with legitimacy is the answer. Pragmatism—or more accurately, pragmatism misconceived as a guiding light to The Truth—plays a crucial role in the positive conception of legitimacy critical theorists offer. This use (although *misuse* may perhaps be a better term) of pragmatism is typical of critical theory.<sup>87</sup> Joseph Singer's work provides an excellent example. Singer has recently argued that critical theorists must attempt to provide a positive conception of what counts as legitimate political action.<sup>88</sup> In the remainder of this part I will focus exclusively on his views. Singer's views have the merit of being clear, well argued, and representative.<sup>89</sup> Moreover, his position also merits serious consideration in its own right, and I present my discussion of Singer as a case study of a particularly thoughtful and concise critical theorist.<sup>90</sup>

##### A. *Singer on Conflict and Legitimacy*

Singer's positive conception of political legitimacy rests on the idea that pragmatism is a vehicle to The Truth. To see how and why, we first need to see how Singer's positive conception of legitimacy arises out of

87. West, for example, thinks of pragmatism as providing a method that ultimately reveals The Truth. He contends that to think otherwise is "[to] slide down the slippery slope of sophomoric relativism." See West, *supra* note 24, at 122; see also *supra* notes 59-65 and accompanying text.

88. Singer, *supra* note 2, at 539-44. Singer explicitly rejects as "contradictory" the "critique of legal studies . . . as nihilistic." *Id.* at 539. Singer cites several authors as offering positive pictures of legitimate political organization and action, including Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324-25 (1987); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 406, 429 (1987). Singer, *supra* note 2, at 544 n.263. Other work along these lines includes: Milton Fisk, *Punishment and Legitimacy*, in PRAGMATISM IN LAW, *supra* note 1, at 197 (considering the role of pragmatism in the legitimation of punishment); Hillary Putnam, *A Reconsideration of Deweyan Democracy*, in PRAGMATISM IN LAW, *supra* note 1, at 217 (espousing a justification of democracy that arises out of a consideration of Dewey's pragmatism); Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1680-85 (1988) (arguing that pragmatism is consistent with rule of law values); Catherine P. Wells, *Improving One's Situation: Some Pragmatic Reflections on the Art of Judging*, 49 WASH. & LEE L. REV. 323 (1992) (arguing that pragmatism places substantive constraints on legitimate judicial decision making); Williams, *supra* note 24, at 174 ("[O]ne key attraction [of pragmatism] is its implication that intellectual life holds the potential for inspiring political action.").

89. Singer himself has offered a summary of the views of the critical theorists, and the views I attribute to Singer are views he attributes to critical theorists generally. See generally Singer, *supra* note 2. Since I will be rather critical of Singer's work, let me acknowledge here the considerable debt I owe to Singer's insightful writings. I have learned a great deal from them.

90. Singer seems fated for this treatment. John Stick casts him in the same role in Stick, *supra* note 1. Such is the price of clarity.

his negative critique of modern liberalism's treatment of legitimacy. This negative critique is rooted in Singer's conviction that conflict among norms of justification is pervasive and substantial.

Singer says:

The critical theorists' goal is to understand legal reasoning as incorporating within itself all the competing political perspectives that find expression in the political system . . . . Judges, therefore, act unjustly if they decide cases without coming to terms with the fact that they have to exercise judgment with the contours of a given legal tradition and that such judgment requires hard choices in the face of contradictory moral impulses.<sup>91</sup>

Singer talks about "contradictory moral impulses," not about conflict of justificatory norms, but the point is the same: Our views about justification inevitably conflict. Indeed, Singer emphasizes that modern political culture is a battleground of conflicting ideologies; he argues that these same controversies figure centrally, if often in a disguised form, in legal decision making.<sup>92</sup> His conviction that ideological conflict pervades society leads Singer to deny that it is even "theoretically possible to achieve a rational consensus among interlocutors that will tell us, once and for all, how we should go about deciding moral and legal questions."<sup>93</sup>

This critique of "rational consensus" lies at the heart of Singer's critical approach to liberal views about legitimacy. Singer labels these views "traditional sources and methods of legal reasoning,"<sup>94</sup> and claims that assuming the theoretical possibility of a rational consensus is the fundamental premise underlying these traditional sources of legal doctrine. Singer further argues that this premise "must be taken apart because it is at once the heart of traditional legal theory and its Achilles' heel."<sup>95</sup> The dart Singer aims at liberalism's Achilles' heel is the observation that

[there is] substantial political and moral controversy about what we should allow people to do with themselves and each other. Since legal reasoning includes and systematizes all of the conflicting arguments that people find plausible, there is no reason to expect it to provide a basis for decisionmaking that transcends these ordinary value conflicts.<sup>96</sup>

He insists that "it is not possible to identify a 'common point of view' to answer normative questions that can be based on shared values and also be sufficiently definite to generate answers in particular cases."<sup>97</sup>

91. Singer, *supra* note 2, at 536-37.

92. See *supra* notes 57-58 and accompanying text.

93. Singer, *supra* note 12, at 28. Singer regards the rejection of the possibility of a rational consensus as characteristic of critical theorists. Singer, *supra* note 2, at 536.

94. Singer, *supra* note 12, at 28.

95. *Id.*

96. *Id.* at 39.

97. Singer, *supra* note 2, at 536. John Stick does not sufficiently emphasize this point in his otherwise excellent discussion of Critical Legal Studies in Stick, *supra* note 1. He accuses Singer of

My aim is to expound, not defend, Singer, but it aids exposition to defend Singer against the following objection. One criticism of Singer's denial of rational consensus is that the relevant "common point of view" is in fact easy to identify. It is the point of view of *lawyers and judges*.<sup>98</sup> The bench and bar often agree on what a statute or precedent dictates in the case at hand, and such an agreement surely shows that lawyers and judges do not disagree to any great extent about the norms of justification relevant to deciding any legal case. This objection, however, misses Singer's point. Singer can grant the point about shared norms because it still does not follow that those norms are widely endorsed in *society as a whole*. The norms used in the discourse of lawyers and judges are a product of law school and professional legal culture. There is no reason to think these norms are widely shared by a general public whose "knowledge" of law and legal culture is largely the product of dubiously accurate television portrayals. There is no reason to single out the norms possessed by lawyers and judges as having a privileged status unless those norms have some special claim to be the *right* norms. And that, under a pragmatic position, is precisely what they cannot have.<sup>99</sup>

To return to the exposition of Singer's views, he acknowledges that

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thinking that traditional liberal approaches to legal reasoning presuppose a deductive model of justification. Stick says, "Singer appears to believe that legal reasoning, to be rational, must operate by means of deductive proof and agreed-upon first principles, which function like the axioms of Euclidean geometry." Stick, *supra* note 1, at 346. The passages Stick points to in support of this claim are better explained, however, by Singer's concern with, and rejection of, rational consensus.

Stick points to Singer's assumption that "any contradiction in the premises infects and invalidates the entire argument flowing from those premises." *Id.* at 347. Stick argues that this is characteristic only of deductive systems, so Singer must therefore be advocating a deductive model of legal reasoning. An initial difficulty with Stick's criticism is that the feature he singles out is not a characteristic unique to deductive logic; rather, it is a feature inherent in any model of reasoning. If one's "justification" for a conclusion relies on the truth or acceptability of two contradictory claims, one has provided no justification at all. Stick's main point, however, is more subtle. Suppose one's justification relies on only one of two contradictory legal precedents. Then—under a coherence theory, for example—the existence of the other contradictory precedent does not necessarily invalidate the conclusion. Stick argues that because Singer thinks invalidation necessarily arises from the presence of contradictory norms, Singer must therefore be thinking of legal justification as deduction from a consistent set of axioms. But this is a non sequitur. There is another plausible explanation. Suppose our aim is to achieve "rational consensus among interlocutors that will tell us, once and for all, how we should go about deciding moral and legal questions." Singer, *supra* note 12, at 28. To achieve this goal, we will want to resolve any contradiction, not because we are addicted to deductive reasoning, but because our aim is a rational consensus.

Stick's other reason for believing that Singer assumes a deductive model is Singer's assumption that "complete rules . . . can easily be picked out from among legal arguments. A complete rule . . . has two parts: the first describes the factual situations in which it applies; the second describes the legal consequences to be drawn from such a situation." Stick, *supra* note 1, at 347 (footnotes omitted). Stick notes that while the idea of complete rules is "consistent with" (but certainly not required by) a deductive system, many models of legal rules are inconsistent with the idea that rules are complete rules. But again, suppose our aim is to achieve rational consensus. If so, we will need to have complete rules. Singer rejects the possibility of complete rules as part of his critique of the idea that rational consensus is possible. Singer, *supra* note 12, at 59.

Despite my criticisms, I owe a great debt to John Stick's very fine work.

98. See Stick, *supra* note 1, at 371.

99. John Stick overlooks this point when he remarks that lawyers and judges are "the group that sets the standards for objectivity in the law." *Id.*



it is worrisome to deny even the theoretical possibility of a rational consensus. As he explains the potential difficulty: "[i]f law organizes all the conflicting values and social visions that exist in our political system, power holders can impose any vision they like and run with the wind."<sup>100</sup> Singer's response is to insist that "*legitimate* normative argument about justice [is] both possible and desirable."<sup>101</sup> Of course, those in power could "run with the wind" even in the face of a "legitimate normative argument." Mere arguments cannot restrain those bent, come what may, on the naked exercise of power. But *some* of those in power will listen, and these individuals will restrain their otherwise self-interested behavior when presented with convincing justifications for doing so. In the case of those who will not listen, we could take appropriate steps against them on the ground that their harmful conduct is not adequately justified. This is, I take it, what Singer has in mind when he says that "legitimate normative argument is . . . desirable." What is striking is *not* that Singer thinks that it is desirable; what is striking is that he thinks it is *possible*. To assert the possibility of fruitful normative debate is to take a step away from the negative critique of liberal legitimacy toward the constructive task of showing *how* legitimacy can be attained.

This is where pragmatism comes in. Pragmatism—or, better, pragmatism misconceived—is essential to the constructive task, for it provides the solution to an otherwise difficult puzzle. The puzzle is simply: What can Singer mean by *legitimacy* when he says that legitimate normative argument is possible? He cannot (consistently) mean liberal legitimacy. According to Singer, legitimacy in that sense requires the possibility of a rational consensus, a possibility that he thinks is an illusion.<sup>102</sup> Moreover, Singer cannot be appealing to the Weberian notion of legitimacy as the result of the citizenry's perceived obligation to obey governments. Singer cannot merely mean that *this* is possible and desirable. He thinks liberalism has been by and large successful in making

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100. Singer, *supra* note 2, at 540. It is instructive to compare Singer and Karl Llewellyn. Llewellyn remarks:

[The law] presents over most, if not all of its bulk, the phenomenon of clashing interests, of antagonistic persons or groups, with officials stepping in to favor some as against some others. . . . Hence the eternal fight for control of the machinery of law . . . whereby the highly interested *As* can hope partially to force their will upon the equally but adversely interested *Bs*, and to put behind that control the passive approval and support of the great body of *Cs*—who happen to be disinterested, or, what is equally to the point, uninterested.

Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 461 (1930). Llewellyn notes that the "law purports peculiarly among our institutions to 'represent' the whole. There is, amid the welter of self-serving groups, . . . some sense of responsibility which outruns enlightened self-interest, and results in action apparently headed (often purposefully) for the common good." *Id.* This vision of law and society does not particularly disturb Llewellyn, but it does disturb Singer. Part of the explanation of the difference is that Singer, unlike Llewellyn, does not have faith in the possibility of the common good being served by some amorphous and altruistic "sense of responsibility" immanent in law.

101. Singer, *supra* note 2, at 536 (emphasis added). Singer also takes this claim to characterize critical theorists generally. *Id.*

102. See *supra* notes 53-57 and accompanying text.

itself appear legitimate, and he is at pains to explode the illusion. It is not merely "perceived" legitimacy that Singer is after.

But what is Singer's positive conception of legitimacy? The following passage provides Singer's most explicit answer:

Law is based, to some substantial extent, on our intuitive judgments of right and wrong, fairness and unfairness, justice and tyranny. Yet it is inaccurate to describe intuitive judgments as "just your opinion." They are inevitably the opinion of someone situated in our society, with experiences shared with others. The reasons we can give for our moral intuitions will also be based on a shared cultural heritage of what constitutes a good argument for a proposition. . . . [We need] a language that allows us both to understand alternative social visions and to judge them. There is no single best way to do this. Our goal should be to generate competing visions of social justice. . . . We must talk to each other about our competing visions of the good society if we want to achieve justice.<sup>103</sup>

Singer intends the passage to explain, or at least to suggest, how legal decisions need not, as he says, be "just your opinion" but can instead be "legitimate." The passage, however, raises more puzzles than it solves. To begin, Singer appeals to "a shared cultural heritage of what constitutes a good argument for a proposition" as a way of showing that "intuitive judgments" are more than just someone's "opinion." But it is just this appeal that Singer earlier criticizes in his discussion of what he calls liberal theories: liberals "[b]y appealing to existing community practice . . . are in fact conservative. They make it easier to identify the status quo—a contingent form of social life—with reason itself."<sup>104</sup> Indeed, it is puzzling why Singer thinks we have any shared cultural heritage that would yield uncontroversial decisions in legal cases. After all, he argues that "it is not possible to identify a 'common point of view' to answer normative questions that can be both based on shared values and sufficiently definite to generate answers in particular cases."<sup>105</sup> He makes a similar point when he says that "there is no single best way" to understand and judge competing visions of social justice.

### B. Pragmatism as the Apparent Solution

We still do not know exactly what Singer means by *legitimate*, and we will not find any more explicit answer in his work.<sup>106</sup> But we can find an implicit answer in Singer's views about pragmatism. In fact, part of the appeal of pragmatism to Singer is surely that it appears to provide an

103. Singer, *supra* note 2, at 542-43 (footnote omitted). This passage begins a section of Singer's article entitled "Where Do We Go From Here?," a question Singer raises only after having endorsed the Conflict Thesis and rejected the possibility of an ideally best justification.

104. *Id.* at 540.

105. *Id.* at 536.

106. Lipkin notes essentially this problem. Commenting on Singer, *supra* note 12, Lipkin remarks that "while I agree with much of Singer's article, I do not see that he has offered anything to replace the traditional legal epistemological notions." Lipkin, *supra* note 5, at 104.

answer. Pragmatism seems tailor-made for the situation in which Singer thinks we find ourselves, for pragmatism provides "a language that allows us both to understand alternative social visions and to judge them."<sup>107</sup> Of course, it is not literally a "language"; it is a philosophical framework, but I assume pragmatism is what Singer means by "language" in this context.

Pragmatism does plausibly provide the desired "language." Pragmatism emphasizes that we engage daily in justificatory practices that routinely invoke norms of justification, and it permits us to acknowledge that these norms can be vague, indeterminate, and conflicting. It does not make these norms into more than they are. Pragmatism can also readily acknowledge that there is no single best way to judge competing social visions, and accepts that our goal instead should be to create competing visions of social justice and to adequately discuss among ourselves the implications of those potential outcomes.

But, like most critical theorists/pragmatists, Singer thinks that pragmatism does more, that it provides a philosophic method that will reveal the hidden truth about what is "really" justified. He believes pragmatism aids us in our quest to "affirmatively . . . think about justice and to establish it in the world—to elaborate the democratic values embedded in our culture[.]"<sup>108</sup> We can accomplish this by attaining the

pragmatic goal of understanding the effects of our ways of thinking about the world, and to accept responsibility for the consequences of what we do . . . . We need to focus on the ways in which our categories, discourse, and modes of analysis reinforce illegitimate power relationships by embodying the perspectives and concerns of those who are powerful and suppressing members of oppressed groups.<sup>109</sup>

The "language" is supposed to accomplish this by allowing us to understand visions of social justice and profitably compare them. As Singer says, "Truth and justice are both partly a matter of experimentation, of finding out what works and trying out different forms of life. *The process of discerning the truth* is not passive. . . ."<sup>110</sup> Singer thinks of pragmatism as a process of discovering "the truth."

This is the key to understanding Singer's discussion of legitimacy. If we were to actively engage in "conversation," carefully observing the appropriate pragmatic strictures such as paying attention to context, we would ultimately be led to a vision of the "truth," in which we see what is and is not *really* justified. This idea allows us to explain what Singer most likely means by *legitimate*: legitimate normative argument aims at knowing what is really justified, and carries out this aim by engaging in

107. Singer, *supra* note 2, at 543.

108. Singer, *supra* note 19, at 1757. Note the similarity to West's Emersonian vision of a "modern world [of] self-sustaining and self-overcoming individuals who . . . flex their intellectual, social, political, and economic muscles in order to gain wisdom." WEST, *supra* note 5, at 16.

109. Singer, *supra* note 19, at 1769.

110. *Id.* at 1757 (emphasis added).

the conversation *under the appropriate pragmatic constraints*. To obey and acknowledge these limitations is to participate in good faith in the "process of discerning the truth." Singer never explicitly expresses himself in this way; nonetheless, this is the best interpretation of what he does say.<sup>111</sup> It removes the puzzle about what he means by "legitimate" and fits in perfectly with his views about pragmatism. Some may object that this interpretation is inconsistent with his insistence that the "pragmatic attitude toward truth asks us to accept the fact that there can be no final answers to our most important questions."<sup>112</sup> But I take this simply to mean that we never really reach the "final truth"; we pursue it as an ideal.<sup>113</sup>

Many critical theorists—not just Singer—implicitly endorse such a conception of legitimacy,<sup>114</sup> so it is worth being fully explicit. Thus, *judicial decisions* are legitimate provided that the courts making those decisions are attempting in good faith to know what is really justified, and furthermore are carrying out this aim by engaging in the relevant "conversation"—the process of legal argument and decision making—under the appropriate pragmatic constraints (such as paying careful attention

111. Singer sometimes comes close to explicitly stating the position I attribute to him. He says: Legal reasoning . . . consists of conversation. Legal reasoning is not an accurate representation of natural rights or sovereign commands. . . . Traditional legal theorists assume that if legal reasoning is neither accurate representation nor an intersubjective decision procedure, then we are left intolerably free to say anything.

Singer, *supra* note 12, at 51. Singer rejects the assumption of "traditional legal theory." He does not believe we are "intolerably free," but rather thinks that the conversation is constrained—pragmatically—in ways that show that legitimate normative argument is possible.

112. Singer, *supra* note 19, at 1757.

113. Unless we interpret Singer this way, his references to truth are difficult to understand. Singer clearly has abandoned his early claim that "morality is not a matter of truth . . . . It is a matter of conviction based on experience, emotion and conversation." Singer, *supra* note 12, at 39. Singer, *supra* note 2, and Singer, *supra* note 19, are replete with references to truth and justice—i.e., to what is really true and really just.

114. See, e.g., Radin, *Feminist*, *supra* note 3, at 146-50 (arguing that the law must make a good faith effort to take multiple perspectives into account if the law is to achieve justice). Michelman discusses Radin's views in Frank Michelman, *Private Personal But Not Split: Radin Versus Rorty*, 63 S. CAL. L. REV. 1783 (1990). He says that feminist/pragmatists like Radin imagine that by "[c]onfronting each other politically, we contend over the idioms through which our diverse understandings of world and self, of need and possibility, are refracted into common, public discourse." *Id.* at 1788. The politics of confrontation "always involve[] perspectival conflicts among apprehensions of the world, society, and self." *Id.* at 1789. The result is that "epistemic democracy," *id.* at 1790, seeks a legitimate basis for law by ameliorating "the repressive and discriminatory effects of the bias of idioms." *Id.* The conception is the same as Singer's: legitimate government requires engaging in political dialogue under the proper constraints. See also Scott Brewer, *Pragmatism, Oppression, and the Flight to Substance*, 63 S. CAL. L. REV. 1753 (1990) (raising the question of what weight the different voices carry in the political dialogue); and the exchange between Scott Brewer and Mari Matsuda in *Afterword*, 63 S. CAL. L. REV. 1911-12 (1990) (Brewer questions the weight Matsuda gives to the voices of the oppressed in Matsuda, *supra* note 59). Note that the underlying assumption throughout these articles is that an appropriately constrained political dialogue arrives at a true sense of justice. For a well worked-out "conversational" conception of legitimacy that avoids assuming the existence of an absolute conception of justice, see JAMES S. FISHKIN, *THE DIALOGUE OF JUSTICE* (1992). Fishkin's work may not appeal to critical theorists, however, since he does not focus on how our present society might be transformed into a legitimate one, but instead focuses on "ideal theory, on the question whether a theoretical solution satisfying all of our criteria is possible, at least under favorable conditions." *Id.* at 117.

to context).<sup>115</sup> As for *political legitimacy in general*: governmental decisions are legitimate if decision-makers are making a good faith effort to discover principles and precepts that can be non-relatively justified, and in doing so are engaging in "the conversation"—the decision process—under the analogous pragmatic constraints.

Of course, this conception of legitimacy is flatly inconsistent with Dewey/Rorty pragmatism. For a Dewey/Rorty pragmatist, our norms of justification neither have nor need any ground outside themselves; there is no "truth" to discern. But then, Singer is not really a Dewey/Rorty pragmatist. His position is much closer to *Peircean* pragmatism; the leading idea behind the positions of both Singer and Peirce is that by following the right investigative methods, we reach that which is "really" justifiable. This is just the position that a Dewey/Rorty pragmatist, correctly, rejects. From that point of view, the pursuit of what is "really" justified is the pursuit of a chimera. Critical theorists in general have pursued this mythic beast and in doing so, have failed to give a genuinely pragmatic picture of the law.

#### V. THE PRICE OF PRAGMATISM

Why have critical theorists pursued the illusion of the "really" justifiable? The answer, I suggest, is that they do not think that it is an illusion. *From a pragmatic point of view*, it is an illusion, but the critical theorists' philosophical vision is not really the vision of Dewey/Rorty pragmatism; it is a much older—and still respectable—vision. It is the Heraclitean vision Stuart Hampshire describes when he urges that

[w]e should look in society not for consensus, but for ineliminable and acceptable conflicts, and for rationally controlled hostilities, as the normal condition of mankind; not only normal, but also the best condition of mankind from the moral point of view, both between states and within states. This was Heraclitus's vision: that life . . . consists in perpetual conflicts between rival impulses and ideals, and that justice presides over the hostilities and finds sufficient compromises to prevent madness in the soul, and civil war or war between peoples. Harmony and inner consensus come with death, when human faces no longer express conflicts but are immobile, composed, and at rest.<sup>116</sup>

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115. Of course, determining the content of the right constraints applicable to judicial decision making is unclear and controversial. Some commentators want to give special weight to the views of society's marginalized and oppressed. See, e.g., Matsuda, *supra* note 59. Such views reach a dangerous extreme when they accord a special weight to the views of the marginalized and oppressed and deny any significant weight to opposing views. An opponent, or at least a person disagreeing with these newly privileged views is counted out as mistaken, confused, self-deceived, or worse. This is a prescription for intolerance: those who disagree with "us"—whomever the relevant "us" happens to be—can be denied a significant role in political decision making. Historically, such views have led to the worst horrors of totalitarianism—as Isaiah Berlin points out in his classic essay, *Two Concepts of Liberty*. See ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

116. HAMPSHIRE, *supra* note 57, at 189.

It is the Heraclitean vision, not the pragmatic one, that truly underlies Singer's work, and the work of many critical theorists/"pragmatists." They see a world of conflict and urge us to make it instead into a practical political reality where "justice presides over the hostilities."

Dewey/Rorty pragmatism, of course, denies any perspective-neutral position from which "justice" can preside. This is the price of pragmatism, a price most critical theorists/"pragmatists" have not been willing to pay. Nonetheless, the price must be paid. If we are to give a truly pragmatic account, we must acknowledge the pervasiveness of conflict in norms of justification, and we must do so without seeking comfort in the—illusory—vision of an eventual resolution of conflict in some longed-for conversational apotheosis.

