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Guerrillas in Our Midst: The Assault on Radicals in American Law

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BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW. By *Daniel A. Farber* and *Suzanna Sherry*. New York: Oxford University Press. 1997. Pp. 195. $25.

On October 9, 1997, radicals everywhere celebrated the thirtieth anniversary of the death of Che Guevara, the revered Cuban and South American rebel known as much for his guerrilla manifestos as for his scraggly facial hair and the black beret positioned slightly askance.

At the same time Latin Americans and revolutionaries were marking the death of their beloved Che, Professors Daniel Farber and Suzanna Sherry were publishing their long-awaited book, *Beyond All Reason: The Radical Assault on Truth in American Law*. The professors' timing was, unintentionally, quite appropriate. Like many of Che's manifestos, the book sounds an ideological call to arms, urging liberals to root out the insurgents of radical legal theory, which threatens the very foundations of American Law, legal culture, and, indeed, life as we know it. Or so the authors would have us believe.

The very subtitle of the book — "The Radical Assault on Truth in American Law" — conjures up a vision of crazy ideologues, descending on law schools in ever-increasing numbers,[1] seeking to subvert the academy and overthrow the Enlightenment as they rush to man the barricades. Playing on an already well-developed "Che anxiety" in liberals and conservatives,[2] the authors paint radical scholars as dangerous subversives, skulking about darkly in the annals of American law reviews and planting seeds of treason against the all-sacred Truth in the minds of impressionable young law students. Thumbing through the first chapter, we can almost picture angry radical scholars, dark-skinned fanatics in their Che berets,

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1. Over 300 people attended the last national conference on Critical Race Theory, held at Yale Law School in November 1997. Conversation with Harlon Dalton, Professor of Law, Yale, and co-organizer for the Conference on Critical Race Theory, February 5, 1998.

2. *See* Paul Carrington, *Of Law and the River*, 34 J. LEG. EDUC. 222 (1984) (warning law schools to oust the nihilistic Critical Legal Studies scholars in the academy).

Army fatigues and camouflage war paint, overturning tables and toting fearsome black Uzis, with bayonets ready to slice through the most well-reasoned judicial opinion.[3] There is much to fear from these infiltrators, advise Farber and Sherry, despite the fact that radical scholars are in the minority on law school campuses. "War and ideas are difficult to contain" (p. 5).

In direct contrast to the disorder and violence of this lunatic fringe,[4] Farber and Sherry position themselves as soothingly rational and moderate, acolytes of a calm, well-reasoned pragmatism that concedes where it must, but fights to vanquish the threat of violent chaos with superior logic and reason. We picture Farber and Sherry, well-dressed not in natty bow tie and smart Nordstrom's business ensemble (as illustrated on the inside of the book jacket),[5] but in ethereal, appropriately Socratic garb — perhaps translucent white robes — with the Light of Truth and Reason shining down upon their earnest, upturned faces.

In their book, these soldier-scholars of goodness and light argue in increasingly rising tones that we cannot give up our faith in Reason and Truth — without it, we are left to the dictates of the dark side, where force, violence, and power are the only way to adjudicate competing claims. Radical theory is also condemnable for other reasons: it is anti-Semitic and it distorts public discourse. But above all else, radical theory is inevitably nihilist and politically totalitarian. Without Truth, we have no hope of protecting the disempowered or of adjudicating between competing philosophies. Without the shield of the Enlightenment, we have no response to those who would claim that the Holocaust never happened, and no defense to those who would shoot us on the spot with no explanation.[6]

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3. This description plays off of the "Heart of Darkness" metaphor, used by critics in the early 1980s to describe radical Critical Legal Studies scholars. *See* Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land,* 36 STAN. L. REV. 413, 413-22 (1984) (arguing that CLS suffers from "remorseless savagery" and a "siege mentality").

4. Actually, Judge Richard Posner argues that Richard Delgado, Patricia Williams, and Derrick Bell, all scholars of color who are targeted by Farber and Sherry, constitute the "lunatic core" of the movement; the "rational fringe" of the movement is made up of Michel Foucault, Stanley Fish, Duncan Kennedy, and Catherine MacKinnon, who, perhaps coincidentally, are all white. *See* Richard Posner, *The Skin Trade,* THE NEW REPUBLIC, Oct. 13, 1997, at 40 (reviewing *Beyond All Reason*).

5. Anyone (except for Judge Posner) who has ever met or seen pictures of some of the radical scholars discussed in the book — in particular, Kim Crenshaw (with flowing dreadlocks), Patricia Williams (also a dread enthusiast), Gary Peller (formerly sporting a long ponytail and unruly beard), and Richard Delgado (with wild, untamable mane of black hair) — would quickly figure out who the guerrillas were, based on hairstyle comparisons alone. *But see* Posner, *supra* note 4, at 41-42 (arguing that Delgado "looks like a direct descendant of Isabel and Ferdinand — he's as white as I am").

6. P. 71 (recounting the Holocaust story of a Jew who was ordered shot by the Nazis, to argue that objective concepts of merit are necessary to prevent such tragedies).

Yet something about the authors' argument catches our attention. How is it that calm rationalism beats back the dangerous nihilism of ideological radical scholarship? How is it *exactly* that reason goes about quelling the violence of Nazis and irrational radical scholars? It does not take long to figure out — once the thought occurs to us — that rationalism can displace anarchy and disorder only if it possesses some coercive power of its own. Reason and truth can only quell the terrorist assault of radical theory if reason and truth are actually weapons in a counter-counterinsurgency.[7] That is, reason and truth must possess the coerciveness and violence of Che's shiny Uzi, if truth is to function as the conversation-stopper, or right answer, that Farber and Sherry envision it to be.

And so it comes to pass that Farber and Sherry are revealed, not as the descendants of Socrates, but only as Che Guevaras in law professor clothing, brave soldiers[8] fighting a battle to defend a political and legal ideology of their own.

* * *

The foregoing introduction is meant to be a lighthearted — and therefore very serious — poke at the earnestness with which Farber and Sherry undertake their mission of warning the world against radical legal theory. Despite their penchant for drama, or perhaps because of it, *Beyond All Reason* is quite a provocative book, the first large-scale attempt to provide the rationalist response to radical legal thought. The book is a collection (with substantial revision and reorganization) of several law review articles coauthored by the authors, together with several articles written by each individually. The collection does a nice job of integrating these former articles and essays into a coherent whole, and of attempting a comprehensive indictment of radical legal theory and defense of Enlightenment rationalism.

Great organization does much of the trick. In the first part of the book, Farber and Sherry attempt to document the radical critique, "explor[ing] the tenets of radical multiculturalism" and trying "to establish that there are indeed a number of prominent legal scholars who are taking quite extreme positions about truth, merit, legal reasoning" (p. 11).

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7. *See* Gary Peller, *Reason and the Mob,* 2 TIKKUN 28, 92 (1989) ("[I]t strikes us as initially dissonant that the intellectuals are asked to 'quell' the mob. The very ability of the intellect to 'quell' suggests that in some way the intellectuals are like the mob, possessing coercive power. Yet it was the potential for the mob to coerce that justified its regulation by the intellectuals. The power of the intellect to 'quell' introduces the possibility that reason is actually a means of discipline, a coercive technology for the social regulation of passion and emotion. . . . Like the mob, reason promises a coerced social order based on a particular social desire").

8. P. 14 (noting that the authors had been warned of the danger of writing the book); Alex Kozinski, *Bending the Law,* N.Y. TIMES, Nov. 2, 1997, § 7 (Book Review), at 46 (asserting that the authors "have taken a personal risk" in publishing their book).

The second part of the book levies a three-pronged pragmatist critique of radical legal theory. First, the authors argue, radical legal theory is pragmatically undesirable because of its impact on certain groups. In particular, the critique of merit is anti-Semitic and anti-Asian because "[it] implies that Jews and Asian Americans are unjustly favored in the distribution of social goods" (p. 11). Second, radical legal theory produces unacceptable distortions in scholarship and public discourse, because radical storytelling is atypical and self-interested, which makes civil dialogue with critics difficult if not impossible (pp. 72-94). Finally, radical legal theory is nihilist because it accepts all competing viewpoints and arguments and cultures as equally valid, thus eliminating any defense against those who deny the existence of the Holocaust or promote totalitarianism (pp. 95-117). In general, the authors argue, we should embrace Enlightenment rationalism because it is better at promoting equality, because it provides a way to choose between competing viewpoints, and because it provides us with a strong defense against evil.

Part I of this review sorts out the authors' rendition of radical legal theory, and then sets out a more fully-fleshed-out account of radical legal thought beyond the truncated version that Farber and Sherry have provided. Part II examines the authors' rationalist defense of merit and argues that their defense eventually undermines itself when pushed to its logical conclusion. Part III similarly deconstructs the authors' argument that radical theory degrades public discourse. Finally, Part IV reviews the authors' nihilism argument, using it as a point of departure to contrast the authors' overly conservative pragmatism with Richard Rorty's progressive pragmatism, and then with a form of pragmatism that I call radical pragmatism.

I. Punch Lines Only

In Chapters One and Two, Farber and Sherry attempt to document the views of prominent radical legal scholars, and to link their critical arguments to such revolutionary concepts as storytelling scholarship and hate speech proposals. The authors do a nice enough job of tracing the origins of radical legal theory from realism to Critical Legal Studies ("CLS"), and subsequently to Critical Race Theory ("CRT"), Radical Feminism, and, more generally, postmodernism.

The authors oversimplify a bit when they try to conflate Critical Race Theory with postmodernism. In fact, many Critical Race Theory scholars have rejected the pure postmodernist argument that race is "socially constructed" and therefore meaningless as an essential category for making sense of social experiences. Scholars

like Angela Harris argue that Critical Race Theory exhibits a tension between the postmodern argument that race is a socially constructed concept and the more modernist claim that race nevertheless forms the basis for much of a person of color's experience of social life.[9]

Farber and Sherry are also a bit off-base with their references to schools of thought and their categorizing of particular authors. With regard to the former, for example, they seem to find postmodernism, deconstruction, and "social constructionism" to be interchangeable,[10] though most scholars on those subjects would beg to differ.[11] With regard to categorizing scholars, the authors label Jerry Lopez as a critical race theorist, even though he and his writing do not clearly fall within the genre.[12] Similarly, they characterize Robert Post as a solid liberal, and not at all radical, when some of his writings on free speech appear to belie that description.[13]

All might be forgiven in the name of simplifying ideas for the lay audience, were it not for a more serious transgression that Farber and Sherry commit throughout the book. When sketching the tenets of radical theory, the authors present the radical scholars' conclusions without providing any of their underlying analysis or explanation. Of course, conclusions without any supporting analysis are about as silly as punch lines without the set-up for the joke. It may be that Farber and Sherry are rather ungenerously "setting up" the radical scholars for the critique that radical theory is just out to lunch. Or perhaps the authors are just not quite able to grasp the analysis behind the radical argument. Indeed, if the radical argument is as obviously silly as the authors suggest, one wonders why the authors devoted a whole book to responding.

To be sure, the authors openly acknowledge their penchant for cheating the radical arguments of their full force.[14] But that does

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9. *See* Angela Harris, *Afterword: Other Americas,* 95 MICH. L. REV. 1150, 1155 (1997) ("[C]ritical race theorists are constantly trying to expose the truth to the world, hoping against hope that their other, unsullied America will rise up in righteous indignation and sweep away injustice. . . . [C]ritical race theorists face a serious dilemma when they try to speak truth to power.").

10. "The radicals' core beliefs go by many names: social constructionism, postmodernism, deconstructionism. Don't let all the isms fool you . . . ." P. 23.

11. *See generally* GARY MINDA, POSTMODERN LEGAL MOVEMENTS (1995).

12. P. 39. Conversation with Gerald Lopez, Professor of Law, U.C.L.A., Jan. 25, 1998.

13. *Compare* pp. 6, 45 (Post has "applauded 'fidelity to reason'" and has criticized university hate speech regulations on the grounds of "public reason") *with* Robert G. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell,* 103 HARV. L. REV. 603, 683 (1990) (arguing that "the boundaries of public discourse cannot be fixed in a neutral fashion" but inevitably must "be defined by reference to ideological presuppositions").

14. P. 16 ("In the interest of brevity and readability, we have limited many of the direct quotations from their works to a single sentence or less. . . . For readers who want to investi-

not excuse them from their failure to engage the strongest version of radical legal theory. Take, for example, this paragraph that appears in Chapter 1:

> Harvard law professor Duncan Kennedy, a founder of CLS, has expressed 'a pervasive skepticism' about current societal standards: "We just don't believe that it is real 'merit' that institutions measure, anywhere in the system." "Judgments of merit," he says, "are inevitably culturally and ideologically contingent." Thus there can be no objective standard of merit applicable to all groups within the society. [Stanley] Fish states unequivocally that "there is no such thing as intrinsic merit." [p. 31]

Of course, without the benefit of either Kennedy or Fish's supporting argument, most readers would find this argument more than a little extreme. It appears less zany, however, in the full context of the supporting analysis and explanation. In fact, the text in Kennedy's article immediately preceding his statement about judgments of merit provides both a more substantive analysis for his argument and a more specific context for his conclusion:

> [A particular piece of scholarship] can be judged only by reference to a particular research tradition or scholarly paradigm, usually one among many that might have won dominance in the field. Yet conclusions at the level of what is valuable or interesting are very often dispositive in deciding which of two articles is better.
>
> Once we acknowledge the possible existence of different research traditions, or collective scholarly projects, we have to acknowledge that the white male occupants of faculty positions have more than the power to decide which performances are better. They have also had the power to create the traditions or projects within which they will make these judgments. It seems obvious that these traditions or projects are culturally and ideologically specific products.[15]

Whether or not one agrees with Kennedy, his conclusion that judgments of merit are inevitably ideological seems far more persuasive than extreme when resituated in the context of his full argument about research traditions.

Nor do Farber and Sherry provide Kennedy's analysis behind his first statement that none of us believes that merit really works in any system. From the rest of the article, readers discover that the "we" in Kennedy's statement is not society at large but a much smaller group of folks who have succeeded at elite institutions while

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gate the radicals' writings more fully, the endnotes provide citations for every quotation and paraphrase"). Unfortunately, the endnotes are quite sloppy. Rather than reference citations individually as they appear, Farber and Sherry prefer to endnote whole paragraphs and sort out the references via parentheticals after the quoted source. Deciphering which source goes with which reference can become quite complicated and tedious, and often is imprecise. *See, e.g.*, p. 156 n.37 and accompanying text.

15. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia,* 1990 DUKE L.J. 705, 733.

feeling alienated within them. And "we" don't believe in the idea of objective and apolitical merit, not because we have lost our minds, but because we think that

> success is a function of particular knacks, some socially desirable (being "smart") and some not (sucking up) — and of nothing more grandiose. This is not rejection of the idea that some work is better than other work. It is rejection of the institutional mechanisms that currently produce such judgments, of the individuals who manage the institutions, and of the substantive outcomes.[16]

Oddly enough, despite Kennedy's statement about some work being better than other work, Farber and Sherry preface their citation to Kennedy with a statement that radical theorists "reject the possibility that one person could *actually* be a 'better *A*' than another" (p. 31). Indeed, Kennedy concludes that there are standards for judging someone to be a better A, and that those standards are a product of the social conventions that a particular group or institution finds useful. But neither that idea nor the full flavor of Kennedy's claim comes through in Farber and Sherry's "Quotable Quotes" version of radical theory.

In fact, great chunks of Farber and Sherry's primer on radical legal theory look like a collection of provocative citations from authors, strung together for maximum effect, but without any supporting analysis. At the end of a long paragraph full of citations, for example, the authors present a partial reference to Patricia Williams: "Words such as experienced and qualified are, according to Patricia Williams, 'con words, shiny mirrors that work to dazzle the eye.'"[17] Again, the punch line without the joke looks a bit overheated. Where has the rest of Williams's argument — the substantive part of it — gone?

In the unabridged version, Williams argues that merit standards necessarily embody collective subjective preferences for certain qualities or abilities.[18] That fact does not make them necessarily evil, according to Williams. "I wonder what a world 'without preference' would look like anyway. . . . Preferential treatment isn't inherently dirty."[19] More the focus of Williams's critique is that, although merit standards are developed by particular people at a particular place and in a particular historical time, conventional thinking disguises merit standards as apolitical, objective, universal measurements of ability and achievement.

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16. *Id.* at 708.

17. P. 32 (quoting PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 103 (1991)).

18. *See* WILLIAMS, *supra* note 17, at 102 ("The fundamental isolationism of individual preference as an arbiter is quite different from the 'neutrality,' the 'blindness,' and the 'impersonality' used to justify the collectivized convenience of standardized preference.").

19. *Id.* at 102-03.

Similarly in that vein, Williams criticizes the overtly political associations that conservatives have created between affirmative action and "quotas, preference, reverse discrimination," as well as the purportedly apolitical associations between conventional merit and the concepts of "experienced" and "qualified." Williams argues that such associations are misleading — and perhaps racist — because they acontextually equate remedial affirmative action with intentional discrimination against people of color, and portray merit as though it depended on something other than collective subjective preference:

> Thus, affirmative action is very different from numerical quotas that actively structure society so that certain classes of people remain unpreferred. "Quotas," "preference," "reverse discrimination," "experienced," and "qualified" are con words, shiny mirror words that work to dazzle the eye with their analogic evocation of other times, other contexts, multiple histories. As a society, we have yet to look carefully beneath them to see where seeds of prejudice are truly hidden.[20]

When the full statement is set forth, and the entire line of argument laid out, Williams looks a little less like a member of the "lunatic fringe" the authors try to portray her as, and much more like the brilliant, sophisticated scholar that she is.

II. The Critique of Merit

One of the more important moments of the book comes in the chapter entitled "Is the Critique of Merit Anti-Semitic?"(pp. 52-71). In this chapter, Farber and Sherry devote a great amount of time to denouncing the radical critique of merit for being anti-Semitic and anti-Asian-American to boot. Initially, Farber and Sherry set out a somewhat oversimplified version of the radical critique of merit, focusing on the argument that "the powerful define standards of merit to reinforce their own dominance" (p. 53).

Farber and Sherry dispute that radical argument with the empirical claim that Jews and Asian Americans have enjoyed disproportionate success under conventional merit standards (pp. 57-58). From that premise, the authors make two points. First, they argue that the success of Jews and Asian Americans is inconsistent with the radical argument that merit standards were constructed to exclude people of color (p. 56). Second, they assert that the radical critique is anti-Semitic and anti-Asian, because the critique of merit indicts the standards under which these groups have achieved their success, and "implies that Jews and Asian Americans are unjustly favored in the social distribution of goods."[21] The better and more

20. *Id.* at 103.

21. Pp. 10-11; *see also* p. 61 ("[I]f standards of merit are socially constructed creations of a racist society, the radicals must necessarily condemn Jews and Asians *for* succeeding.").

likely argument, say the authors, is that Jews and Asian Americans have succeeded in disproportionate numbers because their cultural values happen to correspond with those required by objective merit standards (pp. 59-60). "If objective merit is wholly irrelevant, it is difficult to account for Jewish or Asian success" (p. 59).

Although the authors struggle to define "merit" and what makes it "objective," they appear to settle on the idea that merit standards measure traits with objective value like talent and achievement, rather than characteristics like race or wealth which have no such value (p. 54). To deal with the question of what constitutes objective value, the authors suggest that we as a society can settle on some widely shared criteria about what makes for a good basketball player — Michael Jordan is a star by any measure — or a beautiful performance of European classical music — Yo-Yo Ma, perhaps (p. 54).

Ultimately, the authors set forth a quite conventionally rationalist defense of objective merit:

> The meritocratic ideal is that positions in society should be based on the abilities and achievements of the individual, rather than on characteristics such as family background, race, religion, or wealth. This ideal requires that merit be objective in the sense of being definable without regard to those personal characteristics. . . . Under this conventional view, the ultimate conception of merit is color-blind and gender-blind. Its advocates believe that people are treated unjustly and discriminated against when their merit is assessed according to their status rather than according to the value of their traits or products. Thus, for instance, under this conception of merit, racial discrimination "is irrational and unjust because it denies the individual what is due him or her under the society's agreed standards of merit." [pp. 54-55] [citation omitted]

A. *Deconstructing Distinctions*

As the passage above illustrates, the authors' claims about the value of merit rely on a strong distinction between race-neutral merit and race-conscious bias. According to the passage cited above, merit is objective because it relies on standards that rationally relate to abilities and traits that are relevant to "the job" or "the educational opportunity." Bias, in contrast, is subjective because it relies on status-based traits like race or gender that are irrelevant to performance on the job or in school.

This distinction collapses, however, if merit standards themselves defer to and depend upon collective status-conscious and race-conscious social biases. And such turns out to be the case. As discussed in the next section, judgments about what counts as ability or social value in general are necessarily collective subjective assessments, which are based in large part on the historical contin-

gency of a particular social, economic, and political context. Shared norms about merit are very much a function of social power, which historically has been closely tied to the race, gender, and class of those with power.

To use the authors' reference to music, for example, only the opinions of a select group of European decisionmakers during a particular historical period counted in deciding what constitutes beautiful "classical" music. We say that Yo-Yo Ma's music has merit not only because it has aesthetic appeal but also because we defer to and depend on this European group's contingent "bias" for music with these particular characteristics. At this point, it becomes difficult if not impossible to distinguish merit criteria from bias. Accordingly, if merit is just a particular form of socially acceptable bias, then it loses the privilege with which Farber and Sherry defend it.

B. *Deconstruction Applied*

Using this deconstructive line of argument, merit standards themselves can be criticized as unfairly discriminatory. For example, under the recently implemented SP-1 admissions process, University of California law schools rely heavily on the Law School Admissions Test (LSAT) and on an applicant's grade point average to measure the applicant's potential ability to do well in law school. But the demand for high LSAT scores and GPAs constitutes subjective collective bias by legal professionals for certain skills or characteristics. More importantly, those professional biases historically were developed in an explicitly class-, gender-, and race-conscious way.

As I have argued elsewhere, law school admissions standards, and more generally many of the professional values in the legal community were developed at a time when the profession affirmatively and deliberately excluded blacks, Latina/os, and white women.[22] Moreover, legal educators developed the earliest prototype of the LSAT in conjunction with a more general societal move toward ability testing, a process explicitly designed to justify excluding people of color and southern and eastern Europeans from educational and professional opportunity.[23] In short, the professional values and merit standards that continue to govern the legal profession today are the offspring of this race- and gender-conscious decisionmaking by the elite white male leaders of the profession, who protected their status by excluding white women and people of color from their ranks. In light of such history, it should come as no

22. *See* Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1476-91 (1997).

23. *See id.* at 1487-91.

great surprise that selection criteria like admissions standards for law school continue to exclude people of color disproportionately.

In the context of law school admissions, then, Farber and Sherry's argument in favor of merit can be used to challenge the very merit criteria they seek to defend. If, as Farber and Sherry argue, bias is to be condemned because it is race-conscious, status-oriented, arbitrary, and irrational, then as a matter of logic, race-conscious, status-oriented law school admissions standards ought to be condemned for the same reasons. Unfortunately, because "probing intellectual analysis" lies outside Farber and Sherry's area of expertise (their words, not mine),[24] they do not offer any response at a theoretical level to this radical critique of merit.

C. *The Model Minority Question: "If We Can Do It, Why Can't You?"*

Farber and Sherry's initial question remains: If professional values and merit standards were developed in a race-conscious context and in conjunction with affirmative efforts to keep immigrants and blacks out of the profession, how is it that Jews and some groups of Asians have enjoyed disproportionate success (pp. 59-60)? As a preliminary matter, readers should question the inquiry's empirical premise. In framing their question, Farber and Sherry inappropriately lump all Asian-American groups and Asians into the group "Asians," and do not differentiate Chinese, Korean, and Japanese Americans or foreign nationals, who for some professions have enjoyed disproportionate success, from other Asian-American groups like Laotians, Cambodians, Hmong, and Vietnamese, whose income levels and levels of success are far below that of either whites or Chinese Americans and Japanese Americans.[25]

In addition, Farber and Sherry inappropriately lump all people of color together when they argue that Asian and Jewish success undermines the social construction theory of merit. Farber and Sherry themselves acknowledge the possibility that differences in cultural history between Jews and some Asian groups on the one hand, and blacks and Latino/as on the other, might explain the difference in success rates under socially constructed merit standards. But they minimize that possibility by arguing that this explanation is theoretically incompatible with the radical critique of merit.

First, they suggest that if cultural differences in fact do explain differential success rates, it is because those differences are adap-

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24. P. 9 ("Although not itself a theory, an ideology will typically be associated with fully developed theories, which in turn can be subjected to probing intellectual analysis. Such a critique [of radical multiculturalism] lies outside our expertise . . .").

25. *See* Robert S. Chang, *Toward an Asian-American Legal Scholarship,* 1 ASIAN L.J. 1, 21 (1994).

tive. That is, Jewish and Asian cultural values — perhaps an emphasis on completion of formal education or mastery of the written text — coincide with mainstream merit because Jewish and Asian cultural performances are objectively meritorious cultural performances (p. 60). That argument of course completely sidesteps the original radical point that there exists no such creature as objective merit.

Second, Farber and Sherry suggest that Jewish and some Asian groups' disproportionate success is incompatible with the notion of social construction. In particular, if white gentiles had indeed constructed merit standards, they would not have allowed Jews and some Asians to overtake them. "If the elite do construct the standards for their own benefit, then white gentiles might allow Jews and Asians to *succeed,* but they would not allow them to *surpass*" (p. 60).

Farber and Sherry, however, do not take that analysis far enough. It is possible that dominant groups historically constructed merit standards that naturally favored their own cultural performances, but that after formal discrimination was outlawed, groups like Jews and some Asian groups in some professions began to outperform them on the measures they constructed. In contrast, other groups like Latino/as or African Americans, who had entirely different social, political, and cultural histories, continued to be excluded by those standards. This alternative explanation, completely ignored by the authors, is perfectly consistent with the radical critique of merit.

Moreover, there is evidence that dominant groups have attempted to exclude those groups that might outperform them on merit-based measures. The authors themselves recognize that, at least with regard to educational admissions, significant efforts have been made to prevent Jews and Asians from "surpassing," by expanding merit to include "character" and "geographic diversity," and to keep out Asians and Asian Americans who score disproportionately well on standardized tests by including criteria of "leadership" and "social and community involvement."[26] Similarly, negative stereotypes of Jews and Asians who succeed at certain professions lend support to the idea that the dominant majority has tried to prevent certain groups from outperforming them by stigmatizing them for their success.[27]

In any event, it would have been far more productive for Farber and Sherry to undertake a historical inquiry about the groups they discuss — to determine how Jews and some Asian and Asian-

26. Pp. 60-61. Farber and Sherry believe that such efforts are atypical and unrepresentative. *Id.*

27. *See generally* Chang, *supra* note 25.

American groups have participated in the development, or fared under the operation, of conventional merit standards.[28] Ahistorical comparisons seem to be of little help, and appear to suggest that all people of color are interchangeable, rather than members of different groups with different histories, different cultural traditions, and different identities.

Farber and Sherry's analysis of Jewish and Asian success provides evidence for, and not an argument against, the idea that different racial and ethnic groups achieve different rates of success. Indeed, their analysis reinforces Duncan Kennedy's earlier argument that merit standards are in some way tied to the acquisition of cultural capital or to the history of a particular group or ethnicity. To acknowledge that claim in no way discounts the value of Jewish and Chinese-, Korean-, and Japanese-American achievement; it simply recognizes that the assessment of what constitutes a good indicator for achievement in a particular profession, what constitutes appropriate education in that profession, and indeed how the profession itself is structured, are all collectively subjective judgments that are inevitably culturally and historically specific.

III. Degrading Public Discourse: The Critique of Storytelling

In Chapters Two and Four, Farber and Sherry pack a pretty provocative punch when they argue against the genre of scholarship called storytelling. Storytelling is a type of scholarship that relies on descriptive narrative to redescribe conventional legal argument or doctrine, and to expose new and fresh insights about legal institutions. Some good examples of critical legal storytelling include Patricia Williams's work, Richard Delgado's Rodrigo Chronicles, and Derrick Bell's fictional narratives.[29]

The authors denounce storytelling for several reasons. First, they argue that because radical stories tend to be about law professors, lawyers, or litigants, those stories are atypical and unrepresentative, and thus distort rational debate on issues like merit (pp. 73, 77-78). Second, according to the authors, the stories overly emphasize the unique perspective of radical authors (their "authentic perspective"), and communities of color and white women frequently end up fighting over who has the right to speak on behalf of

28. For an example of such an inquiry related to Jewish success, see Deborah Malamud, *The Jew Taboo: Jewish Difference and the Affirmative Action Debate*, 49 Ohio St. L.J. (forthcoming). For an example of a historical inquiry relating to Asian Americans, see The Asian-American Educational Experience (Don T. Nakanishi & Tina Yamano Nishida eds., 1995).

29. *See generally* Williams, *supra* note 17; Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 Harv. L. Rev. 4 (1985); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 Geo. L.J. 1711 (1995).

particular groups (pp. 73, 78-83). Third, unlike conventional legal argument, say the authors, stories are subject to multiple interpretations because they lack clarity and analysis.[30] Finally, Farber and Sherry claim that radical authors tend to misinterpret and take too personally any critique of their autobiographical stories as *ad hominem* attacks, which makes any real exchange of ideas difficult, if not altogether impossible (pp. 73-74, 88-94).

Throughout Farber and Sherry's argument, the reader detects a distinct discomfort with attaching the label of legal scholarship to any argument that does not take the conventional form. Indeed, Farber and Sherry would appear to cast doubt on much legal argument that is not perfectly statistically representative, does not proceed in linear fashion from argument to definitive conclusion, or is not detached in a modernist, scholarly "we-are-just-stroking-our-chins-and-exploring-these-interesting-ideas" kind of way.

More importantly, the authors appear not to get, or at least to be talking past, the point of storytelling as a genre of legal scholarship. That is, they wholly miss the radical argument that the choice of which stories are "accurate," "valid" or "good scholarship" is a political choice, which for its validity requires the suppression or marginalization of alternative "counterstories" or descriptions that are equally useful.

Take for example the authors' challenge to three "merit" stories about discrimination in law faculty hiring. The authors take particular issue with a fictional story told by Derrick Bell in 1985 about hiring black recruits, a 1991 story by Patricia Williams about Harvard's failure to hire a woman of color, and conflicting accounts of an unsuccessful interview of a minority told by Richard Delgado in 1988 (pp. 75-77). According to the authors, those stories are not representative in light of the results of an American Association of Law Schools ("AALS") study, in which the AALS collected data on approximately half of law faculty hires.[31] The authors choose to privilege the AALS study, despite its limited scope and the fact that it was conducted significantly later than the time period in which the authors told their merit stories. The authors' AALS story about "objective merit" becomes an ideological myth, which for its power requires the suppression or marginalization of alternative counter stories. And critical scholars are not the only ones telling those counter stories. They are also told by authors like Richard Chused

30. Pp. 73, 84-86. In a rather bizarre moment, the authors tell two versions of a quite disturbing story about Suzanna Sherry's mother, ostensibly to make a point about truth-telling. Pp. 112-16. I suspect, however, that Sherry's mother could not have been too happy about either version of the story making it into print.

31. *See* pp. 77, 173 n.7 (citing Richard A. White, *Statistical Report on the Gender and Minority Composition of New Law Teachers and AALS Faculty Appointments Register Candidates*, 44 J. LEGAL EDUC. 424, 429-30 (1994)).

— who, like Delgado, found in 1988 that minorities were woefully underrepresented on law faculties,[32] and Deborah Merritt — who, like Williams, found in 1997 (six years after Williams's work) that women of color still suffered from a significant disadvantage in the hiring process relative to white men and women.[33] The authors also fail to point out that Harvard did not hire a tenure-track or tenured woman of color until this year, a full seven years after Williams's 1991 story.[34]

Farber and Sherry's more general argument is that storytelling makes for bad scholarship because it deprives scholars of a common agreed-upon language, in which facts can be empirically verified as "true or false," stories have only one meaning, and the identity of the author or the viewpoint of the reader is irrelevant to that meaning (p. 87). But in defining scholarly discourse in this way, Farber and Sherry imply that the only knowledge worth being produced by the legal academy is an argument that is authorless and readerless,[35] that admits only of one meaning (traceable to the "plain meaning" of the words that are used), and that is independent of time, place, or history. To achieve their so-called universal language for scholarship, the authors must exclude and marginalize stories that depend for their "knowledge value" on information about the writer, on the interpretive lens of the reader, or on analysis of a particular time, place, or event that may not be representative for all people at all times. Farber and Sherry cannot really mean that nothing of knowledge value is contributed when Patricia Williams points out, in a voice that betrays her personal anger and frustration, that as of 1991 Harvard had yet to hire permanently a woman of color for a tenure-track position.

One final and relatively minor note. Despite Farber and Sherry's implication to the contrary, radical scholars do not have a monopoly on what the authors characterize as *ad hominem* attacks. In fact, the authors engage in a bit of polemic themselves when they lead off with a quote from Salman Rushdie, who thinks it important to "name rubbish as rubbish,"(p. 1) and when they diagnose radical theorists with a mild-to-extreme case of paranoia (p. 135).

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32. *See* Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988).

33. *See* Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997).

34. Harvard hired Lani Guinier in January 1998. *See Harvard Hires Ex-Clinton Nominee*, ARIZ. REPUBLIC, Jan. 24, 1998, at A7.

35. *See* Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 456 (1996) ("[N]either the identity of the speaker nor her institutional role should be relevant to the persuasiveness of an argument.").

Judge Richard Posner, a fellow critic of radicals, cranks up the level of polemic several steps on behalf of the authors in his review of their book:

> By exaggerating the plight of the groups for which they are the self-appointed spokesmen, the critical race theorists come across as whiners and wolf-criers. By forswearing analysis in favor of story-telling, they come across as labile and intellectually limited. By embracing the politics of identity, they come across as divisive. . . . Their lodgment in law schools is a disgrace to legal education, which lacks the moral courage and the intellectual self-confidence to pronounce a minority movement's scholarship bunk.[36]

Posner's florid but forcefully phrased "attack prose" demonstrates that even a strictly empirical law and economics scholar can degrade scholarly discourse with the best of them (and can throw around fancy words like "lodgment," which like "hegemonic" evokes a notion of being particularly well-entrenched). Indeed, after reading Posner's exposé on radical scholars' so-very-obvious lack of merit, one wonders why Ivy League schools do not toss con-artists like Patricia Williams and Duncan Kennedy out into the street. More darkly, one wonders why it is that, for Posner, these scholars do not enjoy the presumption of merit that credentials like Columbia and Harvard typically confer. Ultimately, Posner's "scholarship" serves its purpose — it lays out very clearly his deeply political conclusions about critical race scholars and minority law professors. Neither he nor Farber and Sherry, however, have left themselves much room to protest when a forthcoming response is equally politicized and forceful.

IV. "The Last Time I Saw Richard": Richard Rorty and Radical Pragmatism

In Chapter Five, which is in many ways the centerpiece of the book, Farber and Sherry contend that the radical critique of truth and merit ought to be rejected because it destroys the notion of democracy, and because it is nihilist and will lead to Holocaust denial and totalitarianism.

At the beginning of their penultimate chapter, the authors again claim that they do not take a position on the idea of Truth with a capital T, nor do they engage in the metaphysical inquiry into whether one could ever verify the existence of external reality (p. 96). But the authors' failure to take a theoretical position on the existence of truth and objectivity is, perhaps somewhat misleadingly, buried amidst foundationalist rhetoric. Because Farber and Sherry want to be thought of as at least quasi-strong objectivists by their mainstream public readership, lest they seem as crazy as the

36. Posner, *supra* note 4, at 43.

authors they attack, they take some pains in the book to adopt what appears to be the conventional line on rationalism. "What should we seek and what should we speak if not the truth?" ask Farber and Sherry. "The unhappy answers are politics, and political power" (p. 102).

In earlier articles, however, Farber and Sherry have been a bit more open about the fact that theirs is only a pragmatist defense of truth — they do not defend the existence of objective truth, but rather argue that it is pragmatically useful to assume that objective truth exists, or that we create truth as ways of organizing what otherwise would be chaotic experience.[37] As Sherry puts it, even if there really is no such thing as objective reason, "unconnected to power relationships, we tend to — and perhaps we must — behave as if there were."[38]

Downplaying that quite radical-sounding argument, in *Beyond All Reason* Farber and Sherry make two broad pragmatic claims in defense of objective truth and merit. First, they argue that without the idea of objective truth and the scientific method, democratic constitutionalism would not be possible (pp. 107-08). Second, they claim that rationalism is essential because it gives us our best defense to atrocities like the denial of the Holocaust, totalitarianism, and moral relativism.[39]

Setting forth the first claim, Farber and Sherry contend that by questioning the existence of truth, radical theory risks the end of democracy and the collapse of rational civilization. Radical critique, according to the authors, "has affinities with totalitarianism. As part of the attack on the Enlightenment, the critique of truth suffers from a tendency to reinforce pre-Enlightenment despotism" (p. 106). In this quite formally rationalist vein, the authors argue that democracy relies on objective truth and the scientific method for its very existence:

> [T]he aspiration toward truth and objective methods of seeking it are integral to democratic constitutionalism. The two progeny of the Enlightenment, democracy and the scientific method so disparaged by the radical multiculturalists, are indeed siblings. Both democracy and the scientific method — empirical experimentation designed to ap-

37. *See* Sherry, *supra* note 35, at 472-73 (arguing that it would be pragmatically better to pretend as though such things as objective truth and reason really did correspond to the world around us). *See also* Daniel A. Farber, *Legal Pragmatism and the Constitution,* 72 MINN. L. REV. 1331, 1338-39 (1988) (rejecting as overly foundationalist the idea that a determinate legal meaning can be deduced from original intent or shared community norms).

38. Sherry, *supra* note 35, at 473.

39. P. 108 ("[S]ocial constructionism creates a dilemma for those who believe that with regard to the Holocaust, some claim to 'truth' appears particularly imperative: postmodern thought's rejection of the possibility of identifying some stable reality or truth beyond the constant . . . self-referentiality of linguistic constructs challenges the need to establish the realities and the truths of the Holocaust") (internal quotes and citation omitted).

> proach objective truth — are closely related in their preference for intellectual authority over institutional authority, their insistence on universalism and objectivity, and their intellectual skepticism. In science as in democracy, what matters is not who says it but whether it is right. [pp. 106-07]

In a quite scholarly way, Farber and Sherry preface this argument with a quote from Richard Rorty, who at first glance appears to support them in their anti-democracy, Holocaust-denial argument: "Richard Rorty observes that although this insight is 'hard to live with[,]' social constructionism means 'that when the secret police come, when the torturers violate the innocent, there is nothing to be said to them of the form 'There is something within you which you are betraying'" (pp. 105-06).

In linking up radical theory with nihilism and Holocaust denial, the authors do not argue that radical theorists are engaging in Holocaust denial or advocating totalitarianism, though they come close to accusing at least one Continental scholar of sympathizing with Nazis.[40] Rather, the authors claim that the radicals' denial of objective truth can be misused in nihilistic fashion, to deny the existence of the Holocaust, among other atrocities (p. 109). It is pragmatically useful to assume the existence of objective truth, the authors conclude, because to do otherwise risks nihilism and anti-Semitism.

Skimming through the argument, the citation to Richard Rorty catches our eye. Wait a second, back up just a bit. Isn't Richard Rorty the pragmatist who promoted the idea that truth is socially constructed, and who argued that democracy does *not* depend on or require a theory of objective truth? Isn't he the same scholar who argued that there is no such thing as nihilism if one no longer accepts the idea of truth and objectivity? Why is it that the authors' citation to Rorty makes no mention of the above? And why is Rorty absent from the authors' lineup of radical scholars?

Rorty's antifoundationalist critique of objectivity and truth surely is well-known to Farber and Sherry.[41] Like the other radicals whom the authors target — and perhaps the authors themselves in their secret heart of hearts — Rorty argues that there is no Archimedean point outside of language and social convention from which to evaluate whether our ideas correspond to objective reality or to some objective "out in the world" truth about the human personality. Rorty argues that truth is the property of sentences in language that describe the world, and not a property of the world itself: "The world is out there, but descriptions of the world are

40. P. 64 (repeating the off-levied charge that Paul De Man, a noted deconstructionist, demonstrated Nazi sympathies when he wrote essays in a Belgian newspaper repudiating Jewish influence in literature).

41. Farber cites to Rorty in several of his earlier articles. *See, e.g.*, Farber, *supra* note 37, at 1337 & n.29 (citing Rorty for a good introduction to the tenets of pragmatism).

not. Only descriptions of the world can be true or false. The world on its own — unaided by the describing activities of human beings — cannot."[42] For the pragmatist, "there is no pragmatic difference, no difference that makes a difference, between 'it works because it's true' and 'it's true because it works.'"[43] Rorty carefully points out, however, that he is not arguing that there is no such thing as "the world out there," but only that we cannot ever know whether our perceptions of the world correspond with what is out there.[44]

To the extent that we can never know whether our ideas about merit or math or mountains match up to some objective "out there in the world" or "human condition" reality, Rorty recommends that we give up trying to find out, because the inquiry does not appear to be particularly important, interesting, or useful. Rather than trying to make our social conventions and ideas correspond with objective truth, argues Rorty, we should concentrate on what we do know — whether engaging in certain practices and describing things in a particular way is useful or productive for a particular community, that is, whether it helps us to control or predict our environments and lead happy lives.[45]

Like Rorty, the authors appear to favor (at least when they are being "truthful") an approach to legal analysis that can be called pragmatism. But the authors' version of pragmatism differs significantly from Rorty's. Farber and Sherry believe that our current conceptions of truth, objectivity, and merit — as they correspond to the real world out there — are essential and should be preserved even if we don't "really" believe in them. In that sense, Farber's and Sherry's pragmatism is a very narrow, conservative kind of pragmatism that preserves much if not all of the conventional worldview, and advocates little change, if any.[46]

In contrast, Rorty believes that truth and objectivity are not at all useful for evaluating alternative frameworks of thinking, and in fact he finds them quite counterproductive.[47] Rorty's pragmatism finds it much less important, at least at the level of the individual person, to preserve conventional frameworks of thinking, and thus allows for more far-reaching, thinking-outside-the-box progressive change.

In addition, in terms of method, conservative pragmatists like Farber and Sherry prefer to assimilate new and potentially contradictory information into old frameworks in order to disrupt them as

42. RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 5 (1989).

43. *Id.* at 8.

44. *See id.* at 5, 13.

45. *See id.* at 6, 14-15, and 55.

46. *See* William N. Eskridge, *Gaylegal Narratives*, 46 STAN. L. REV. 607, 612-13 (1994).

47. *See* RORTY, *supra* note 42, at 5.

little as possible.[48] In contrast, progressive pragmatists like Rorty find it desirable, at least at the level of the private individual, to break free from or to transcend those pre-existing frameworks or worldviews. From a Rortian perspective,

> [e]ach individual is a dynamic player in this game and makes her own choices about which script to follow and what metaphors to employ. While most individuals make conventional choices and accept the descriptions handed down to them, the triumphant player seeks escape from inherited descriptions and formulates a cognitive framework of her own. This redescription is valuable insofar as it is productive for her life . . . .[49]

How does Rorty help us to respond to Farber's and Sherry's pragmatic arguments in favor of rationalism? First, Rorty directly contradicts the authors' initial argument that rationalism is required to lay the foundation for democracy. In particular, Rorty argues that "the vocabulary of Enlightenment rationalism, although it was essential to the beginnings of liberal democracy, has become an impediment to the preservation and progress of democratic societies."[50] According to Rorty, the argument that democracy requires rationalism might have been useful when rationalism and the scientific method were in their heyday, but it is less useful post Kuhn and Feyerabend, when the value of the scientific method is neither well-defined nor a particularly interesting source of description.[51] For Rorty, it is more useful to describe democracy as a collection of shared beliefs about human solidarity and the need to reduce cruelty than as an institutionalized expression of rational thought.[52]

Second, Rorty helps us to deal with the authors' claim that radical theory inevitably results in nihilism. The authors argue that without objective reason, there is no way to choose between competing claims or descriptions of the world, no way to refute Holocaust denial or to denounce anti-Semitism. According to Rorty, that argument begs the initial question: the nihilism argument persuades the reader only if she has already decided that rationalism is useful in adjudicating between competing language games. Only those who already accept an Archimedean point from which to choose the more "real" or "true" claim will find the idea of choosing a metaphysically grounded option to be a productive exercise.[53]

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48. *See* Eskridge, *supra* note 46, at 613.

49. *Id.* at 623.

50. RORTY, *supra* note 42, at 44.

51. *See* RORTY, *supra* note 42, at 51-52. Farber himself appears to agree with this proposition, at least partially. *See* Farber, *supra* note 37, at 1335-36 (citing with approval the intellectual move from unitary scientific method to a nonfoundationalist view of the scientific enterprise).

52. *See* RORTY, *supra* note 42, at 141-98.

53. *See id.* at 44-45, 48-49.

Of course, progressive is one step down from radical. Rorty himself is open to the criticism that he is too conservative, because he claims that one should experiment with alternative vocabularies only at the level of the private individual, but not at the collective level.[54] In the next section, I try to sketch the outlines of a radical pragmatism — not the conservative pragmatism of Farber and Sherry, nor the progressive but ultimately limited pragmatism of Rorty, but something that extends Rorty's progressive vision beyond the private endeavor to social institutions.

A. *Radical Rorty: Progressive Pragmatism Modified*

Pragmatism need not suffer from conservatism, banality, and lack of ambition, nor from the limitations of a private individualist pragmatism. In this section, I want to propose that, by highlighting the way in which institutions gloss over difference and diversity in the name of commonality and universality, radical theory can reinvigorate pragmatism and rescue it from Farber and Sherry's tendency toward complacency and from the limits of Rorty's one-person revolution.

My version of radical pragmatism can be characterized by two central propositions. First, in determining whether some particular social practice is useful to an interpretive community, outsider scholars should expose and highlight group differences within social institutions. Radical pragmatists should seek to identify within an interpretive community conflicts about what it means to be "useful," for whom something ought be useful, and what purposes social institutions ought to serve.

Second, in generating scholarship that advocates for social change, radical scholars should explicitly engage in a very local and instrumentalist political argument. Radical pragmatists should generate politically effective claims from the perspective of the outsider, in order to advance those political commitments toward including outsiders in the community, including alternative purposes in social institutions, and including revolutionary visions of what it means to be "useful" in mainstream discourse.

1. *Problematizing Pragmatism: Identifying Difference*

Pragmatism's central project — for both Rorty and the authors — lies in describing practices or vocabularies in terms of whether they are useful for a particular interpretive community in helping to predict and control the community's environment. Radical pragmatism problematizes that inquiry, to highlight not commonality

54. *See e.g.*, Joan C. Williams *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 Wis. L. Rev. 131; Joseph William Singer, *Should Lawyers Care About Philosophy?*, 1989 Duke L.J. 1752, 1757-59 (book review).

and universality but difference and conflict within social institutions. Beyond seeking to find what is useful for a community, radical pragmatism asks three additional questions that are designed to take into account the exercise of social and institutional power.

Initially, radical pragmatism adds the question "useful for what purpose or political commitment?" Posing that question should help to expose the internal power conflicts that might beset an interpretive community in coming to consensus on the purpose of a particular social institution. For example, Farber and Sherry might argue that the purpose of selection processes like law school admissions standards should be to maximize human productivity in a fair way. Rorty and his cohorts might argue that the purpose of selection processes should be to minimize cruelty and suffering for those who are traditionally disenfranchised. Radicals might argue that, in light of historical patterns of exclusion, selection processes should be designed to enhance the participation of all groups in human institutions.

All three visions might co-exist in the same community. Hence, in working through pragmatic inquiries, it is important to expose the conflicting political commitments about the appropriate purpose of a social institution. Asking the "useful for what purpose" question helps to identify and then contest the suppressed conflicts behind a purportedly common purpose.

To be sure, purposes are often not fully articulable until after the social institution has been around for awhile. Asking the "for what purpose" question will reveal that purpose is often still in evolution. As Rorty points out, often we cannot articulate the purpose of a vocabulary or language game until after the vocabulary has fully developed.[55]

Second, radical pragmatism asks "useful for whom? Who is included in the relevant community and who is excluded?"[56] By asking that question, radical pragmatism exposes the exclusion that necessarily must take place when defining a purportedly universal community (for example, "the global economy," "Americans"). The notion of community has meaning only if it includes a defined set of people, which necessarily requires excluding a defined set of other people. Our American political community, for example, excludes for certain political purposes foreign nationals, immigrants who have not been authorized to immigrate, children, people with mental disabilities, and criminals. Likewise, the American community may have defined its American-ness by excluding communities of color from the political community.

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55. *See* RORTY, *supra* note 42, at 12-13, 55.

56. *See* Margaret Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1710 (1996) (asking the question "who is we?").

In defending conventional meritocracy, Farber and Sherry appear to define meritocracy in a way that includes Jews — and to a lesser extent Asian Americans — who have achieved under traditional merit standards. Indeed, the authors acknowledge that it is legitimate to evaluate an institution on the basis of its usefulness for — or impact on — certain social groups like Jews or Asians. To be sure, preserving conventional meritocracy might be useful for those groups, and for the dominant majority in the privileged position at the top. But it appears far less useful for Latina/os and blacks, who are disproportionately excluded by conventional merit standards.

Finally, radical pragmatism asks "what does it mean to be useful?" During a recent debate at the University of Illinois College of Law between Professor Farber and myself, we agreed that it was important to ask whether conventional meritocratic law school admissions standards were useful to blacks and Latina/os, as well as to Jews and Asians, but we disagreed on what we meant by useful.[57] I argued that usefulness should be measured by whether selection criteria put people of color immediately into positions of power and responsibility, so that they could decide what counts as merit and what the legal profession should look like. Farber thought that such a measure was short-sighted and argued that it would be more useful to measure success by conventional merit standards, and to promote long-term success via education.[58]

Certainly, we could not resolve our disagreement purely by reference to empirical or rationalist analysis. Ours is a disagreement that springs from our differing political commitments. But by asking the question of what it means to call a practice "useful," we were able to expose that important political difference and debate it.

The answers to these questions — what does it mean to be useful, useful for whom, and for what purpose — invariably will be a function of differing political commitments, group affiliations and worldviews. The differences that these questions expose are thus "rationally undecidable," because choices between them cannot be grounded in anything outside of contingent political commitments, affiliations or worldviews.

Once uncovered, those differences can become the locus of struggle at the collective level. Unlike conservative pragmatism, which seeks to preserve conventional frameworks of thinking, and progressive pragmatism, which seeks to transcend convention at the private level, radical pragmatism seeks to transcend convention at the level of the social institution, so that difference can become the

57. *See* Debate Between Daniel Farber and Daria Roithmayr, University of Illinois College of Law (Oct. 10, 1997).

58. *See id.*

subject of political struggle. By highlighting difference, radical pragmatism attempts to avoid the relative complacency that characterizes conservatives like Farber and Sherry, who are more interested in refurbishing existing institutions with new pragmatic justifications. By extending the pragmatic inquiry to the level of the social institution, radical pragmatism seeks to transcend the limits of Rortian pragmatism, which promotes the private pursuit of pragmatism while preserving social life in the conventional liberal mold.

2. *Deciding the Undecidable: Political Persuasion*

The essence of political struggle is trying to come to terms with those rationally undecidable differences amidst the exercise of social power. Stanley Fish writes that radical theory has had little if anything to say about the all-important political argument, which takes place after radical theory has cleared from the table claims to "truth" and "objectivity."[59] How then ought radical pragmatists to engage in political struggle?

Of course, the most difficult political struggle involves competing political commitments and mutually exclusive positions, particularly where one commitment enjoys a privileged position over an "outsider commitment." To resolve that difficulty, Farber and Sherry claim that reason constitutes the universal language that cuts across, and can resolve all differences between, conflicting perspectives. "[B]ecause we are all engaged in a common search for truth, 'political decisions [must] be made through persuasion by a shared language . . .' (p. 107).

From the progressive pragmatist perspective, Rorty argues that consensus about conflicting vocabularies or approaches is generated through a conversation undistorted by power in which each participant appeals to the commitments of the other, a sort of dialectical give and take in a "free and open encounter."[60] To give the open and free encounter some hope of usefulness, Rorty relies on what he sees as a human ability to empathize or identify with the outsider who does not share conventionally privileged political commitments, group affiliations, or worldviews.[61]

In contrast, radical theorists like Ernesto Laclau point out that consensus will only form when one group is able to exercise power over other groups, by suppressing other alternative descriptions of

59. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO 178-79 (1994).

60. RORTY, *supra* note 42, at 60.

61. *See id.*

the world and painting their approach or vocabulary as natural or inevitable.[62]

My version of radical pragmatism does not depend either on Farber and Sherry's universal reason or Rorty's undistorted, empathetic conversation to promote the interests of the disenfranchised. Radical pragmatist method takes its direction more from Laclau's vision of the exercise of political power. However, radical pragmatism does not prescribe only one way of struggling against that power.

Rather, radical pragmatism — from the perspective of the outsider — is explicitly, perhaps crassly, instrumentalist. It exhorts people of color and other outsiders to focus on the objective of advancing radical political commitments to empowerment and emancipation. Depending on the particular and local context, we radical scholars ought to use conservative, progressive or radical pragmatist methods, or some combination thereof, when it would be useful in advancing radical political commitments to do so.

For some issues and in certain historical, social, and economic and political circumstances, radical scholars may want to (and do) engage in political argument in a relatively conservative way, by pointing out where certain radical political commitments already exist in mainstream thought. For example, in a forthcoming article I want to defend affirmative action programs as a species of antitrust intervention, designed to break up the monopoly that whites have in the competition for resources and opportunities. Such an argument makes use of existing categories of legal thought to advance a radical political commitment to affirmative action.

In other circumstances, given other histories and social forces and economic pressures, radical scholars should (and do) spend time in coming up with progressive or even revolutionary social metaphors, in the hopes that some of these redescriptions will prove useful to particular people. For example, radical scholars have generated a multitude of innovative ways to think about race relations. Critical race scholars recently have redescribed the state of contemporary race relations by hybridizing the concept of race with geography or post-colonialism.[63] Using theories of cultural pluralism, Professor Duncan Kennedy has argued that affirmative action programs are necessary to put into positions of power and responsibility people of color, who have been excluded from all

62. Ernesto Laclau, *Deconstruction, Pragmatism, Hegemony, in* DECONSTRUCTION AND PRAGMATISM 60-61 (Chantal Mouffe ed., 1996).

63. *See* JOSE D. SALDIVAR, THE DIALECTICS OF OUR AMERICA: GENEALOGY, CULTURAL CRITIQUE, AND LITERARY HISTORY (1991) (discussing race and postcolonialism); Richard T. Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation,* 49 STAN. L. REV. 1365 (1997); Eric Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice,* 33 ASIAN PAC. AM. L.J. 33 (1995) (discussing post-colonialism).

previous decisionmaking about what counts as merit.[64] Radical theory — which demonstrates the contingency of descriptions, their historical role in perpetuating the exercise of social power, and their revisability — opens the possibility of completely revolutionary vocabularies to capture the social imagination and incite social transformation.

But pragmatic inquiry should guide the postmodernist approach to social change. Radical scholars should decide whether, in a particular local context, political commitments towards including outsiders might be better advanced through revolutionary social rupture — when it might be useful to dispense wholesale with conventional ways of thinking — or whether a more progressive or conservative approach might better serve radical aims. Revolutionary redescription may be the most advisable option in some cases but also may be the least advisable in others.

Toward that end, radical scholars should generate in neo-Darwinist fashion as many new metaphors about outsider/insider relations as possible — some deconstructive, some progressive, some conservative — to increase the likelihood that one of these metaphors will "take," that is, will advance radical political commitments and move us in new, more useful directions. Radical scholars should also work to change the social, political and economic environments in which those metaphors will be received. But the lodestar that ought guide radical scholars in our choice of how to engage in political struggle is "what works to advance radical political commitments to outsiders' emancipation?"

Conclusion: "It's You and Me Against the World"

As the previous section indicates, I found Farber and Sherry's book a quite provocative point for starting important and serious conversation about how we ought to think about our social institutions.

I should also point out that there are several areas on which I agree with the authors. For example, as the foregoing section indicates, I think that they are right in focusing political disagreements on pragmatic questions of usefulness, though they do so in a disingenuous fashion and with a brand of pragmatism that is too conventionally rationalist. I also agree, although they do not make this point explicitly, that radical scholars ought to devote far more attention to engaging in political struggle with the mainstream, rather than talking — as law professors are wont to do — only to each other.

64. *See* Kennedy, *supra* note 15, at 712-14.

I do not know whether I would put Farber and Sherry on the other side of the front line of the battle between radicals and rationalists. It certainly seems as though the authors themselves, and their comrades, would position them there. In his review of *Beyond All Reason* for *The New York Times,* Judge Alex Kozinski paints a picture of impending radical takeover very similar to that portrayed by Farber and Sherry in their book. He lauds the authors as brave pioneers, willing to risk their own professional hides and speak out despite the potential personal cost:

> While traditional liberals still dominate the law schools in terms of numbers, they are mostly a cowardly lot, unwilling to risk their peaceful careers to tell the alarming truth to the world outside. In writing this book, Farber and Sherry have taken a personal risk. If those of us outside the academy fail to take heed, we will not be able to say we were not warned.[65]

In the law school war between radical and rationalist academics, has the radicals' position on radicalism really begun to sweep the legal academy? If not, then the authors themselves must suffer from a bit of paranoia. If so, isn't it Farber and Sherry who now have become the radicals, at least in the academic world? If (as Judge Kozinski argues) academics all agree that there is no such thing as objective truth and the concepts of equality and merit are "a bit quaint and dated — like stale granola,"[66] Farber and Sherry would appear to be just two radical dissenters seeking to overthrow the postmodern views of the academic world. Perhaps we ought to buy them each a beret.

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65. Kozinski, *supra* note 8, at 46. Similarly, as discussed *supra* note 8, Farber and Sherry note that, prior to taking on the book, they had been warned against making their argument (obviously, to no avail). P. 14.

66. Kozinski, *supra* note 8, at 46.