Pragmatism, Feminism, and the Problem of Bad Coherence

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PROBLEM OF BAD COHERENCE

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I. INTRODUCTION

Professor Radin bases Reinterpreting Property on her well-known and justly admired articles on property law and theory. It is a rich repository of original insight, lucid analysis, and sharp debate. None of the essays that it includes is entirely new. What is new is a long and substantive introduction that analyzes her ten-year project on property law in terms of the insights and methodological commitments of philosophical pragmatism (pp. 1-34). This manner of developing a theory — beginning with substantive positions and only later articulating the method that spawns them — is a very pragmatic and remarkably useful way to proceed. Radin begins with the struggle to say something useful about standard issues in property law. As she pursues this project, she begins to reflect on the nature of the method and techniques she is using. These reflections are themselves very interesting and provocative — both as they shed light on the nature of Radin’s own contributions to property law and as an independent contribution to the more philosophical literature on legal method.


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I have tried in this review to avoid restatements and analysis of Radin's substantive positions in property theory. These have already been the subject of much spirited debate in the literature. Instead, I have focused on the question of method and the specific contribution that Radin's pragmatism makes to ongoing questions about the role of law in achieving social transformation. To do this, I have organized my comments around three main topics: first, the nature of Radin's pragmatism; second, its connection to her feminism; and third, what she calls the problem of bad coherence.

II. PRAGMATISM

A. Anticonceptualism

One of the chief tenets of pragmatism is its rejection of conceptualism. Pragmatism originated in Peirce's formulation of the pragmatic maxim: "Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object." This maxim commits pragmatism to a form of reductionism - the meaning of abstract concepts is limited to the sum total of the empirical expectations they generate. It follows that one cannot increase the amount of our knowledge by logically dissecting the concepts we use. Conceptual methods do not work because, according to the pragmatic maxim, a concept is not the kind of thing from which we can deduce a priori knowledge. To the contrary, the suggestion that an abstract concept entails certain empirical consequences is itself an empirical hypothesis that we must test through observation. Similarly, a pragmatic theory of law will not attempt formalistic deductions of legal rules from legal concepts. It will instead treat legal concepts as potential explanations.


5. By "conceptual methods," I mean methods of reasoning that are entirely conceptual and contain no element of experiential confirmation. Obviously, conceptual methods can help us to become clearer about our semantic commitments. They can also be useful in the formation of scientific hypotheses. What the pragmatist denies, however, is that one can enrich our store of knowledge solely by abstract reasoning.

for particular doctrinal results and test them against the actual patterns of legal decisionmaking.\(^7\)

A good illustration of this difference in legal method is provided by the contrast between Radin's work in property theory and that of Richard Epstein, whose work Radin criticizes (pp. 98-119). The difficulty with Epstein's method, she argues, is that it is too conceptual:

Epstein is a conceptualist because he thinks there is a concept of property that, in fact, is the right one or the only one. He thinks, that is, that there is a conception of property that is the concept of property. He is also a formalist ... because he thinks the concept of property can be applied ... logically ... to yield results that should be obvious to readers and legal decision-makers.\(^8\)

She disputes the idea that property has "an essential, prepolitical" meaning that is "sufficiently precise and detailed to determine legal rules and outcomes in practice" (p. 99).

By contrast, Radin bases her own work upon a recognition that American property law derives from a number of distinct, intellectual traditions.\(^9\) When Radin analyzes a concept of property, she takes it as she finds it — not as an idealized concept that is unitary and unequivocal but as a concept that is replete with contradictions, inconsistencies, and real world imperfections. Thus, for Radin, theorizing about property is not simply a matter of deriving substantive rules from a single intellectual conception. Instead, property law must reconcile the conflicts generated by the diverse strands of property theory.

For example, in an essay entitled "The Rhetoric of Alienation" (pp. 191-202), Radin describes the "double meaning" ascribed to the word "property." Property, she says, is both an object owned and an attribute possessed (pp. 191-92). "Object-property" is based on the concept of ownership and is identified with the material object that is owned. "Attribute-property," conversely, is based on the idea that certain characteristics constitute identity. An entitlement to live in the White House, for example, might be considered an attribute-property of the presidency. Thus, for Radin, property theory must begin with the recognition that there are two — or

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8. P. 100. Radin concludes this observation by saying, "Epstein's tacit acceptance of conceptualism and formalism goes a long way toward explaining why he seems so blithely to believe that results many readers find breathtakingly wrong are just obvious to rational people." P. 100.

9. Among these are the labor-desert theory of Locke (p. 45), the expectation theories of Bentham (p. 43), and the personality theories of Kant and Hegel (p. 47).
more — distinct conceptions of property. Property can be understood, on the one hand, as fungible items in trade or commerce and, on the other hand, as something that constitutes the personhood of the owner. Both of these conceptions have influenced the common law of property and, indeed, the competing effects of these two concepts may well account for some of the conflicts in that tradition. Thus, Epstein's attempt to derive the substance of property law from a single concept of property is doomed to failure. Such attempts inevitably overlook the tensions that underlie existing law and impoverish our understanding of a legal tradition whose genius lies precisely in its ongoing efforts to reconcile competing conceptions.

B. Pragmatic Method

It is sometimes easier to describe what pragmatism rejects than to identify its affirmative claims. This is especially true when it comes to pragmatic method. Nevertheless, the introduction to Radin's book is suggestive. For Radin, pragmatism seems to entail two central methodological commitments. First, a theory should be useful for some particular purpose. Thus, writers must establish a dialectical relationship between theory and practice; it is not enough to formulate theory for an ideal world. Second, every theory must be held tentatively and must be subject to ongoing revision in light of further experience. I will begin by showing how Radin's work exhibits these commitments. I will then go on to consider more generally the pragmatic aspects of Radin's work.

It is commonplace for pragmatists to insist upon a close connection between theory and practice. This seems sensible. A theory that has no intersection with practical things has little to offer us. Furthermore, speculative theorizing is often unreliable. Theories that are too abstract encounter the risk of collapsing into a muddle of imprecise concepts, unmarked and unsupported assumptions, and mistaken reasoning. By contrast, a theorist who routinely compares abstract conceptions with practical experience can avoid these problems because this process entails continuous attention to the requirements of rigor and precision.

Radin's commitment to the usefulness of theory is well illustrated by her attempt to relate her theoretical claims to the ongoing

10. In this chapter (The Rhetoric of Alienation, pp. 91-202), Radin emphasizes two distinct conceptions of property. In other contexts, her views are more complex. See infra text accompanying note 21.


12. See, e.g., p. 4 (describing the evolution of Radin's theories).

13. See, e.g., p. 29 ("Rather, for the pragmatist, theory is immanent and evolving; its development goes hand in hand with practice.").
development of property doctrine. In law, the connection between
theory and practice can be very difficult to maintain. The law is a
seamless web with many layers and types of theory and many odd
doctrinal problems. A good legal theorist is therefore required not
only to scale an entire mountain range of abstractions but also to
catalogue carefully the trees and boulders she encounters on the
way. This is slow and patient work that requires a rare combination
of lofty spirit and a passion for particularity. Indeed, Radin's work
exhibits both these qualities. She is able to ascend the peaks of high
theory with great skill and dexterity and, at the same time, to illumi­
nate the rich terrain of common law decisionmaking.

Another illustration of Radin's commitment to the usefulness of
theory is her bifurcation of normative analysis into two questions:
(1) What should happen in an ideal world?; and (2) What should
happen in this less than ideal world? For example, Radin uses this
distinction in her analysis of the takings problem:

By ideal issues I mean issues about how we should decide the tak­
ings problem in a frictionless world of perfect good faith and perfect
knowledge, including knowledge of justified theories of property and
politics. In the ideal world of theory, those charged with carrying out
law unfailingly do it correctly. By nonideal issues I mean issues con­
cerning how we should decide the takings problem in our world of
ignorance, including theoretical disagreement and uncertainty, mis­
takes, and bad faith. The problem of transition concerns how much
deviance from our ideals we should mandate in practice in our pre­
sent nonideal world to make the best progress toward our ideal world
of theory. [p. 162]
The distinction between ideal and nonideal theories is important to
Radin because thinking about the ideal world enables her to de­
velop a coherent set of values whereas thinking about the nonideal
actual world prevents her from slipping into the problems of utopi­
anism. But she does not overlook the fact that this approach is
fraught with difficulties:

It cannot be denied that this kind of strategic choice, like all of our
political choices, involves a potential double bind. Attempting to
transcend the deeply entrenched meaning of property might result in
no progress, or in only illusory progress. . . . But provisionally ac­
cepting the entrenched meaning might further reinforce and entrench
that meaning in our culture, and make future evolution even more
difficult.14

14. P. 27. Radin explains the intractability of the takings issue as in part arising
from our inability to specify in any general way when we should be governed by the
ideal and when we should pay attention instead primarily to the nonideal. Always in the
midst of the transition, we are always unsure when we should lean toward theory and
our hopes for progress and when toward practical politics and our realistic appraisal of
the world as it is.

P. 162.
Nevertheless, her way of handling these questions is typically contextual and pragmatic: "I believe these double binds are a defining mark of political life, and I believe that they have no a priori theoretical solution. In practice, we must judge which alternative is better on the whole, and we must keep reconsidering as circumstances change" (p. 27).

The second of Radin's methodological commitments — the recognition that all beliefs must be held tentatively — is a central feature of her work, although she acknowledges that she has not always been clear on this point. Thus, she describes her earliest essay — "Property and Personhood" (pp. 35-71) — as follows:

In my essay, I said that even if someone is bound up with a "thing," we nevertheless should not treat that "thing" as personal "when there is an objective moral consensus that to be bound up with that category of 'thing' is inconsistent with personhood or healthy self-constitution. (p. 4)

She then criticizes her own use of terms such as "objective," "consensus," and "healthy." She used these terms, she says, because she had not, at the beginning, fully understood her own pragmatic method. With a clearer understanding of her pragmatism, she would now want to phrase her pragmatism differently — "objective" understandings are those "shared understandings that are, for now, too entrenched to be revisable by individuals" (p. 5). Her basic point is this: we begin with certain understandings about property that are too fundamental to be seriously questioned. These understandings are not "objective" in the sense that they describe timeless truths. Nor does their special status rely upon the notion of consensus. Instead, such understandings are an appropriate starting point solely because they are, in fact, the only place we can begin with true sincerity. Moreover, if someone questions such a starting point, we can merely restate the premise and say, with Wittgenstein: "[We] have reached bedrock, and [our] spade is turned." 16

Although I have shown how Radin's work conforms to her understanding of the commitments of pragmatic method, the discussion thus far has failed to capture the fullness of Radin's method. Pragmatic method requires a certain complexity of analysis. The

15. The phrase "for now, too entrenched to be revisable by individuals" may suggest to some that Radin bases her theory on certain fundamentally shared values. I think this is a misreading. The fact that values are embedded in our language does not make them objects of universal assent because at the moment they are articulated many might wish to express their dissent. The values are entrenched not because they command universal assent but because they are so essential to an understanding of current practices that they cannot easily be forewarned until there is a full-bodied alternative.

following quotation from Peirce perhaps best conveys that complexity:

Philosophy ought to imitate the successful sciences in its methods, so far as to proceed only from tangible premisses which can be subjected to careful scrutiny, and to trust rather to the multitude and variety of its arguments than to the conclusiveness of any one. Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected.17

The above description might well evoke Radin's critique of Epstein described earlier.18 Epstein was wrong, she argued, in trying to deduce the normative outlines of property law from an intellectual conception of property. Instead, property law must be understood in a number of different contexts. On the one hand, property law is the embodiment of many different political and legal traditions. On the other hand, it is also profoundly shaped by culture, by custom, and by the ever shifting realities of daily life. This fact requires Radin to analyze property law in relation to the diverse aspects of human experience, and the complexity of this task, in turn, requires her to reject the traditional "chains" of conceptual theory in favor of a "cable" of "slender" but "numerous" fibers.

The cable that Radin is constructing is the general concept of property as personhood (pp. 35-71). Her development of this theme proceeds in pragmatic fashion. She begins with an intuitive understanding of the way in which we invest our personhood in particular items of property. She then develops this intuition by tracing its roots in the personality theory of property.19 In discussing this theory, she is neither proponent nor radical critic. She is not proposing to solve the dilemmas of modern property law by adopting the values of Hegel and Kant — whatever endorsement she gives these values is ambivalent at best. Rather, her technique is to appropriate the German tradition for her own purposes or, in her more modest characterization, to "build upon some of Hegel's insights" (p. 47). At the same time, she is careful to separate the German concept of personhood from the intuitive personhood conception she is proposing. We should distinguish the German conception, she argues, from the intuitive conception because the German view "assumes away" many of the attributes of per-

17. 5 Peirce, supra note 4, ¶ 5.265.
18. See supra section II.A.
sonhood that are a vital part of the intuitive conception. Nevertheless, the German concept has continued vitality in its resonance with the intuitive understanding of property as personhood. It is this resonance that reinforces Radin’s claim that property must be understood in the context of its emotional connection to human experience and, in turn, supports her conclusion that property must sometimes be protected because of this emotional connection (pp. 70-71). Thus, Radin uses the German concept — imperfect though it may be — to illuminate contemporary property practices and to argue for their reform.

It should be obvious from the above that we should not look at Radin’s work as the embodiment of a single analytical structure — she is not simply applying German property theory to modern problems in property law. Instead she is, in Peirce’s terms, weaving a “cable” of property theory from many different “fibers” — from intuition, ordinary experience, tradition, and doctrine, as well as from abstract philosophical thought. But, with all these “fibers,” we should not lose track of the general purposes that govern her work. Her examination of contemporary property law is not simply descriptive. The point of looking at the law’s relationship to so many different things — to the various intellectual theories of property, to our evolving cultural commitments with respect to property, to our ongoing practices with respect to property relations, and to the activities of courts in ruling on property claims — is to criticize current practices and to propose reforms. Where then, we might well ask, does Radin obtain the values that underlie her criticism and her claims for reform? As a pragmatist, Radin surely rejects the idea that value comes from abstract intellectual conceptions: all theories — even theories of value — must come from real world practices. Thus, it is necessary for Radin to identify the ideals and aspirations that underlie our current practices while at the same time using these ideals to formulate a critique of these same practices. In the next section, I will consider the bootstrapping difficulties that this entails.

C. Facts and Values and the Problems of Relativism

In her Introduction, Radin places considerable emphasis on her belief that there is no “sharp distinction” between fact and value (p. 3). She writes:

Both descriptive and evaluative understandings are constructed from the totality of the circumstances in which we find ourselves. Our circumstances include, blurred together, both the problems we need

20. P. 44. Further, she argues, we must sever the German concept from its undesirable connection to the idea that respect for property and possession is simply a matter of respecting an individual human will. Pp. 45-47.
tools to solve and our visions and desires for a better future. Observations about the world we face "out there" help to construct our values, and our values help to construct our observations about the world. [p. 4]

The committed pragmatist will find this a nice statement of one of the central features of a pragmatic philosophy.21 For the uncommitted, however, such statements are the source of much frustration. For such a person, the denial of a distinction between fact and value may seem like a descent into avoidable confusion. Alternatively, it simply may seem mistaken. To be sure, facts and values are different. Indeed, using the phrase "denying the distinction" in this context is in some respects an overstatement.

What is really happening when pragmatists "deny the distinction" is that they are rejecting the claims of a particular kind of empiricist theory.22 These theories describe the distinction in terms that are loaded with epistemological significance. Thus, for example, these theories characterize factual judgments as empirical, descriptive, and objective. Value claims, conversely, are nonempirical, normative, and subjective. Furthermore, the contrast between these two terms goes beyond such characterizations. Factual judgments, properly phrased and tested, are said to command high degrees of consensus. Normative judgments, by contrast, are considered to be highly controversial. Factual judgments, these theories continue, are unable by themselves to motivate or justify human action in the absence of a commitment to certain values. Values are an essential touchstone for judging the desirability or correctness of any course of action. These distinctions might be summarized in two columns:

<table>
<thead>
<tr>
<th>FACT</th>
<th>VALUE</th>
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<tbody>
<tr>
<td>science</td>
<td>ethics</td>
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<tr>
<td>descriptive</td>
<td>normative</td>
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<tr>
<td>objective</td>
<td>subjective</td>
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<tr>
<td>consensus</td>
<td>controversial</td>
</tr>
<tr>
<td>not motivational</td>
<td>motivational</td>
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21. Radin follows this statement with a quotation: "This insistence on the total entanglement of the particular with the universal, the so-called factual with the so-called normative, is at the heart of pragmatism." P. 4 (quoting Hilary Putnam, in Afterword: Symposium on the Renaissance of Pragmatism in American Legal Thought, 63 S. Cal. L. Rev. 1911, 1915 (1990)).

22. The logical positivism of the mid-twentieth century typifies the kind of theory that pragmatists reject. See, e.g., ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC (1952). While few people would describe themselves today as positivists, the movement survives in many common philosophical moves including the assertion of a particular kind of distinction between fact and value.
The pragmatic attack on the fact-value distinction is not so much an attack on the distinction itself as it is an attack on the bundling of this group of distinctions. Descriptive statements may differ from normative statements, but, according to the pragmatist, the difference is merely one of degree and is fundamentally misdescribed by the above bundle of characterizations.

There are many philosophers who would agree with the pragmatist's rejection of this bundle of contrasting characteristics. For example, there are some moral theorists who would disagree with the claim that value judgments are inevitably subjective. Kant, for example, asserts the possibility of objective moral judgments based on reason.23 Similarly, many contemporary legal theorists argue for the objectivity of normative claims.24 What is distinctive about the pragmatist position is that it does not rest upon a simple assertion of the objectivity of normative judgments. Rather, pragmatism questions the fundamental bifurcation between fact and value. First, it does this by recognizing that value judgments are an inherent part of empirical inquiry. Science is regulated by logic, by reason, and by the requirements of the scientific method. These requirements are normative in character, and yet there could be no scientific or empirical knowledge without them. Second, pragmatism denies the standard of objectivity that is purportedly set by empirical science. Science, in a pragmatic theory, is a tentative system of interdependent judgments that must always be revised to account for additional data. No individual judgment is beyond the scope of this revision except as we choose to make it so. Objectivity, on this account, is a conception that is not based on some God-like accuracy or upon the notion of unshakable foundations but rather upon the ideas of coherence and consensus. Human perspectives will always be partial — what makes some judgments better than others is not their objectivity but the fullness of the perspectives from which they are made.25 Thus, under the pragmatic conception of truth, it makes sense to speak of truth as being relative to a perspective or to a preexisting set of theories.

This conception of truth raises three distinct problems. The first is the problem of starting points — how do we choose our background theories and perspectives? The second is the problem of relativism — how do we justify our conclusions when they are admittedly relative to a somewhat arbitrary starting point? The third problem is motivational — if truth and values are relative to who

23. KANT, supra note 19.
25. For a fuller discussion of this concept of objectivity, see THOMAS NAGEL, Subjective and Objective, in MORTAL QUESTIONS 196 (1979).
we are, what motivation could we ever have to transform ourselves or our political practices?

To address the first problem, Radin makes a typically pragmatic move. I noted earlier that Radin's starting point is the current set of beliefs and practices with respect to property law.26 Thus, her analysis begins with what she takes to be our current understandings — those "that are, for now, too entrenched to be revisable by individuals" (p. 5) — and uses these as a kind of baseline for her inquiry. This is, no doubt, a sensible starting point, but it does not provide us with much help in resolving the second and third problems described above. Pragmatic theories are progressive and prophetic27 and thus require an ability to assert the desirability of certain outcomes. It is fine to say that we should begin our analysis with current beliefs, but it is another thing to say that these beliefs provide an adequate basis for a critique of contemporary practices. After all, this forces us to choose between the imperfections of our current beliefs and those of our current practices. We may be more committed to our beliefs than to our practices, or vice versa, but this psychological fact falls short of providing a justification for permitting beliefs to dominate over practices. These problems are commonly thought to be the Achilles heel of pragmatism: if rational thought cannot provide a foundation for both empirical and normative claims then how can the law — or, for that matter, life itself — be anything other than a mindless repetition of current practices. In other words, a pragmatic method seems a salient way to analyze current practices but a less salient way to articulate reforms of these same practices.

How do we, as pragmatists, propel ourselves forward and improve our situation? How do we engage in progressive thought and activity? The pragmatic response to these questions is often vague and not very satisfactory. Commonly pragmatists say something like the following: as pragmatists we struggle with the inconsistencies between our convictions and our practices and, over time, become clearer and more coherent about the nature of reality and our part in it. But this is only a partial answer. In the final section, I will return to these questions and consider Radin's own particular response to these issues.

26. See supra section II.B.

27. One author uses the term "prophetic" to "harken back to the rich, though flawed, traditions of Judaism and Christianity that promote courageous resistance against, and relentless critiques of, injustice and social misery." Cornel West, The Limits of Neopragmatism, 63 S. Cal. L. Rev. 1747, 1750 (1990).
III. FEMINISM

While Radin spends the Introduction trying to define her pragmatism, she says virtually nothing about the relationship between her work and feminism.28 This omission is notable because Radin is a self-proclaimed feminist whose work is richly interlaced with feminist insight.29 Indeed, feminist theorists widely recognize her as a colleague and an inspiration.30 It is therefore not surprising that there is much in Radin’s work on property that is both deeply feminist and closely related to concerns that are part of the traditional feminist agenda. Nevertheless, I should be clear that Radin’s work is not “feminist theory” in any stereotypical way. Overly simplistic conceptions of feminist theory tend to restrict feminism to insights that are based upon women’s unique experience. Alternatively, they imagine that feminist theory must focus on issues that are traditionally of greater concern to women than men — issues such as sexual harassment, domestic violence, job discrimination, or child care. In addition, there is frequently a simplistic notion that feminist theory paradoxically rejects theory — that it is “antitheoretical” in the sense that it attacks all forms of abstraction and theorizing.31

None of these stereotypes would be accurate descriptions of Radin’s work. While she insists that theory have a close and dialectical relationship with experience,32 and while she certainly believes that all experience is gendered in the sense that it “belongs” to a person who is one gender or another, her theories of property do not claim to be specially privileged by her own female-type experience. Nor does Radin confine her insights to issues that are of special interest to women — her subjects are the standard problems of property law. Finally, one could never characterize Radin’s work as antitheoretical. She generously strews her texts with references to the canon of western legal and political thought. Indeed her work on property is greatly enriched by her familiarity with such traditional “male” writers as Hegel, Kant, Locke, and Bentham.

28. Indeed the index does not even have entries for feminism or gender.
32. See infra Part IV.
That Radin does not embrace an oversimplified version of feminist theory can hardly be considered a deficit. During the past ten years, the simplified forms of feminist theory have encountered a number of problems. Feminist theory has an important agenda. Beginning with Simone de Beauvoir, modern feminists have pointed to the obvious — gender is such a pervasive feature of the human enterprise that whether one experiences the world as a woman or as a man makes a substantial difference in one’s perceptions. Because modern empiricism holds that all science and theory rest upon experience, it follows that science and theory done exclusively by men will not include “women’s experience” and, as a result, such theories will be only partial — they will adapt well to the needs of men but poorly to the needs of women. As a corrective, feminists have offered a thorough articulation of “women’s experience” and a systematic attempt to revise contemporary wisdom in a way that will include women’s wisdom and women’s interests.

In the legal arena, there is much to be said for this agenda. When the criminal law considers rape exclusively from the viewpoint of the alleged perpetrator, it does an injustice to female victims. In addition, when we classify job-related sexual harassment as “personal” conduct, we miss a very important aspect of sex discrimination. Nevertheless, there are deep and substantial problems with this approach. Perhaps the most important for feminist theory is the problem of essentialism. Theories that are based upon “women’s experience” must face the difficulty that “women’s experience” is not a unitary thing. There are many women, many different kinds of women’s experience, and thus, some argue, many feminisms. When a feminist speaks in terms of a single, uniform “women’s experience,” the result may be to suppress further the experience of women who are different from her — often women who are silenced not only by their gender but also by their race, their class, their sexual orientation, or even by a simple lack of access to scholarly debate. For this reason, feminists who fail to deal concretely with the problem of essentialism may end up freeing their own voices at the expense of those women who are multiply oppressed by the wider society.

33. This is the general argument that de Beauvoir makes in The Second Sex. SIMONE DE BEAUVOIR, THE SECOND SEX (H.M. Parshley ed. & trans., Bantam Books 1961).

34. See SUSAN ESNUCA, REAL RAPE (1987).

35. See CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).


37. See, e.g., PATRICIA A. CAIN, FEMINIST JURISPRUDENCE: GROUNDING THE THEORIES, 4 BERKELEY WOMEN'S L.J. 191, 204-14 (1989-90); ANGELA P. HARRIS, RACE AND ESSENTIALISM IN FEMINIST LEGAL THEORY, 42 STAN. L. REV. 581 (1990); see also SPELMAN, supra note 36, at 114-32.
The oversimplified model of feminist theory creates a second problem by its supposed rejection of abstract theorizing. By embracing the concrete, feminism insists that legal debate be based upon the lived realities of real people. Experience, feminism reminds us, should not be read through the filtering lens of male institutions and male intellectual constructs. One of the ways in which women have been silenced, however, is that few theorists have generalized and abstracted their experience in such a way that it can be adequately addressed in mainstream debates about normative theory.

"Male experience" is frequently the focus of theoretical distinctions that operate in the legal arena. For example, under certain circumstances, the common law reduced the crime of murder to manslaughter if it happened in the course of a barroom fight or if it was provoked by marital infidelity. Among provocations for violence, these situations were relatively common and the rules that governed the availability of these doctrines were technical and complex. For women, though, domestic abuse is a far more common provocation for murder. The tendency, however, is to treat all domestic abuse as one psychosocial syndrome. There are few distinctions made between types of abuse and little attempt made to consider the limits on the extent of excuse and justification that specific instances of abuse might offer. Thus, most of the jurisdictions that recognize a "battered woman defense" do so only in accordance with the standard requirements of self-defense and insanity doctrine. This is not surprising — to the extent that "women's experience" is undertheorized and underanalyzed, it is not fully comprehensible to those who settle legal controversies. For this reason it would make sense for feminism to move beyond the rejection of "male theories" and to move forward with a project of retheorizing "women's experience."

In describing these two problems, I do not mean to suggest that feminism is a doomed enterprise. I only suggest that the easy and

38. Note how the use of the phrase "their" experience assumes a certain kind of essentialism.


41. The reader will note that I continue to use the phrase "women's experience" surrounded by scare quotes. The reason for this is to highlight the fact that, as the problem of retheorizing women's experience becomes more pressing, the problem of essentialism becomes even more difficult. If feminism were simply a matter of articulating experience on a concrete level, there would be room for many different windows on women's experience and consequently room for many feminisms. If generalization, abstraction, and the doing of theory are necessary parts of the plan, however, then the substance of these abstractions may well become contested ground among the many feminisms.
swers to the question — "What is feminist theory?" — are fraught with difficulty. Furthermore, these difficulties might prompt us to take a somewhat more pragmatic approach to defining the enterprise. Instead of trying to analyze Radin's work in terms of the traditional understandings about feminist theory, it might be more useful to start with the idea that feminist theory is what feminists like Radin do. Understanding the strength of her work may well improve our understanding of the potential for feminist theory and, at the same time, suggest how feminists might begin to address the twin problems of essentialism and the undertheorization of "women's experience." In short, if we are currently unclear about what feminist theory is or about what it might aspire to, then perhaps we can make some pragmatic progress by determining what it is about Radin's work that makes it successful as feminist theory.

Before examining Radin's feminism, we must recognize that Radin's property theories stand in a particular relation to traditional "male" theories. I noted earlier that she uses the work of Kant and Hegel to elucidate her own intuitive conception of property as personhood. By doing this, she provides a certain familiarity and resonance to her own intuitive conceptions. From a feminist perspective, however, there is a definite downside to this use of traditional theory. The references to Hegel and Kant seem to suggest that intuitions about property are largely gender-neutral. If they were not, Radin's use of these writers in such a central expository role might be a threat to the integrity of her own "feminist" insight. Did it not worry her, a feminist might ask, that the intuitions born of her "women's experience" might be hopelessly confounded by associating them with such abstract "male" theories of property?

Much of feminist theory has been concerned with insisting upon the uniqueness and incomparability of male and female experience and the theories these experiences generate. But Radin's more pragmatic brand of feminism seems to reject this move. For Radin, there is a realm of theoretical discourse that is accessible to both men and women and is, at the same time, an important tool for understanding the world around us. The possibility of such a realm follows from her particular combination of pragmatism and feminism. As a pragmatist, she recognizes that there is a dialectical relation between theoretical discourse and experience — that certain pervasive "male" theoretical terms play an important role in constructing "female" experience. As a feminist, she recognizes that

42. See supra notes 19-20 and accompanying text.
44. For a pragmatist, all knowledge is held relative to a preexisting web of beliefs, attitudes, and theoretical constructs. Women, therefore, have no choice but to utilize familiar
differences in “male” and “female” experience may lead to different theoretical constructs. The combination of these beliefs entails a more realistic feminist epistemology: as feminists, we must begin with our actual experience — experience that is constructed both by our female situation and by the traditionally “male” theories that dominate our culture. For this reason, Radin is not concerned with leaving traditional theories behind in favor of a pure breed of feminist theory. Instead she attempts to appropriate traditional theories and to redirect them toward her own feminist project — the reconceptualization of property doctrine in ways that make its relationships to gender and power explicit.

Keeping in mind that Radin’s feminism is pragmatic in the sense described above, I will turn now to a description of the feminist aspects of her work. I will examine, in particular, three characteristics of her work that seem to give it power and depth and that are, at the same time, obviously related to the feminist enterprise.

The first characteristic related to the feminist enterprise is the fact that her work is firmly rooted in a world of human experience and emotion. Radin does not purport to articulate “the view from nowhere.” Her voice is theoretical, to be sure, but it is neither detached nor rigidly conceptual. Her analysis is well focused on the dialectical relationship between law and human life. Radin’s personhood theory is a good illustration of this. Her theory stems from the intuition that property interacts with people in many different ways. People may feel one way about widgets and gas caps but entirely differently about wedding rings, homes, and pictures of their children. Although it is true that some property is held instrumentally, it is also true that some is not. Some property interacts with its owner’s self-perception in such a way that it carries a real investment of the owner’s personhood. Radin argues that such property must be protected precisely for this reason (p. 71). The result is a theory that not only analyzes property as an intellectual concept but also examines its ongoing interaction with human experience. Thus, for Radin, the point of legal theory is to focus upon the complex dialectic between law and daily life and to define a normative world that is responsive to the emotional and practical realities that arise from this dialectic. Certainly, Radin’s pursuit of such a world is one of the things that gives her work its feminist tone.

The second characteristic of Radin’s work related to the feminist enterprise is that she keeps issues of gender and power in the forefront when she describes the relationships between property concepts and categories as they experience the world from within this web and interpret their experience within its framework.

and human experience. This does not mean that she focuses particularly on issues that have a gender bias. She is not, for example, particularly concerned with alimony or with the rules of dower and courtesy. In fact, her analysis seems to transcend gender. Property as personhood, for example, is a concept equally applicable to female and male experience. Even so, there are feminist consequences of this kind of analysis. Once we view property as a part of the web of human experience and emotion, its relationships to gender become apparent. Indeed, Radin’s articulation of the personhood aspects of property relations is a good example of this kind of feminist insight. Without the connection to personhood, the abstract concepts of property and ownership may seem to be gender-neutral — property is property whether it belongs to a man or a woman. Once we understand that people invest a part of themselves in certain property, however, we can see that relationships to property are inherently related to issues of gender and power. Thus, Radin helps us to understand that property has to do not just with wealth, but also with self-esteem and self-confidence, human happiness, and human flourishing. Property is one of the tools that facilitates life. It is one of the things we use to make our way in the world. Thus, in Radin’s theory, a misallocation of property will not simply deprive a person of material objects; it will also affect fundamental issues of empowerment.

The third characteristic of Radin’s work related to the feminist enterprise is that her writing is fundamentally strategic. Property law raises a wide range of issues and Radin’s choice of issues is quite distinct — even conventional issues are framed in unconventional ways. Although it is no doubt true that these choices were largely instinctive, the book provides a fine opportunity for her to explore, ex post facto, why she made the choices she did. Not surprisingly, she concludes that her choices were largely practical — that she had instinctively directed her attention to those areas of the law in which it appeared to her that a better understanding would be “useful” (p. 3). This, of course, poses the pragmatic question: “Useful for what?” “What problem,” she asks, “is best solved by understanding the social world in this way?” (p. 3).

For Radin, such inquiries inevitably implicate the concept of human flourishing, and this concept, in turn, raises even more fundamental issues:

To what extent do “we” possess a persuasive conception of human flourishing? Or is the concept of human flourishing too deeply con-

46. For example, the connection between property and personhood is not gender-specific. If the example of wedding rings tends to suggest that women may have more personhood interest in property, one need only consider the relationship of many men to their cars, their stereos, or their tools.
tested to admit of one conception that is properly "ours"? In light of this conception (or, these conceptions), what property relations — if any — are appropriate? [p. 6]

These are strange questions for a feminist. Some feminist theories may seem to suggest that gender differences are a zero-sum game — what is one person’s empowerment is inevitably someone else’s subordination. Radin does not, however, embrace this view. She does not propose to overthrow the rule of law or to engage in radical reconstructions of legal doctrine. Rather her project is more reformist and pragmatic. She begins with law largely as it stands and proceeds to suggest ways in which it could be adapted to the needs of real people. Thus, despite the lack of radical critique,47 Radin’s work has an indisputably radical purpose — to reconceptualize the abstractions that constitute property law in terms of their genuine connections to the lives of real people. Moreover, because it is frequently subordinated people who are most disempowered by the detached abstractions of traditional legal theory, this is a program with substantial political consequences.

To summarize, there are at least three areas in which Radin’s pragmatism coincides with her feminism. First, her theories are situated in the daily realities of human experience. Second, because her theories are so situated, they recognize the tangible reality of gender and power. Third, her writing is strategic — it is meant to be useful to an ongoing project of appropriating legal theory to the needs of real people. Yet, as Radin is a pragmatist, her feminism is distinctive in its recognition of the moral ambiguities of daily life and in its placement of these ambiguities at the very center of its analysis. Many feminist writers tend toward the utopian. There are some, for example, who are uncompromising in their rejection of prevailing culture. In addition, there are some who seem to glorify a pure and essential conception of “women’s experience.” Finally, there are some who debate gender issues in teleological terms: What is our ultimate goal? Are we fighting for special or equal treatment? Do we want a society that is androgynous or one that is dominated by female norms and ideals? As interesting as these questions are, they seldom lead to real advances in the material conditions that oppress women. These questions are too abstract and those who ask them are too little mindful of the realities that confront subordinated people. Radin, however, as a pragmatic feminist, treats feminism as one of a number of progressive forces

47. This is essentially the criticism Stephen J. Schnably offers in Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood, 45 Stan. L. Rev. 347 (1993). Radin’s reply can be found in Margaret Jane Radin, Lacking a Transformative Social Theory: A Response, 45 Stan. L. Rev. 409 (1993).
in a world that is complicated by double binds\textsuperscript{48} and the inevitable political compromise of participation in the surrounding culture.

\textit{But}, as I indicated earlier,\textsuperscript{49} the pragmatic approach brings its own set of problems. Its very lack of utopianism seems to disable it from becoming a vehicle for substantial change. Radin is forthright in her description of the problem:

Some [critics on the left] consider pragmatism to be inherently conservative, primarily for two reasons. First, if there can be no transcendent transformative theory by which all progress is measured, then (it is argued) the pragmatist meliorist spirit results not in real progress but rather only in ineffectual tinkering. Second, if pragmatism measures the goodness of the law, or of proposals for change, or of theories of social justice, by “coherence” or “fit” with what we already accept, then the more firmly entrenched is the status quo the harder it will be to avoid blindly reaffirming it. \cite{p. 29}

These observations lead her to confront what she calls the problem of bad coherence.

\section*{IV. THE PROBLEM OF BAD COHERENCE}

Radin describes the problem of bad coherence in the following terms:

Some pragmatists endorse coherence theories of truth or goodness, in which any given proposition or value is judged by how well it hangs together with the whole system of propositions or values to which we are committed. If a pragmatist defines truth or goodness by means of coherence, then how can the pragmatist recognize a system that is coherent but \textit{bad}, such as institutionally coherent and pervasive racism or sexism? \cite{pp. 29-30}

As such, she diagnoses the problem as resulting from an incomplete pragmatism:

\textit{P}ragmatists who rely on institutional coherence this way are incomplete pragmatists. They are throwing out the other half of the pragmatist spirit — the importance of our critical visions and imaginative recreations of our world. Inconsistent pragmatists are disabled from critique, but consistent pragmatists are not. \cite{p. 30}

What this comes to is a little puzzling.\textsuperscript{50} What does she mean by “critical visions and imaginative recreations”? Where in the pragmatist’s universe do they come from? Without doubt, imagination

\textsuperscript{48}. Radin believes that political double binds are a pervasive aspect of our political situation. On the one hand, attempting to transcend deeply entrenched meanings may create such a division between theory and practice that we are unable to make any real progress. On the other hand, a failure to challenge deeply entrenched meanings may reinforce ideology and make future progress that much more difficult. \textit{See supra} note 14 and accompanying text.

\textsuperscript{49}. \textit{See supra} note 27 and accompanying text.

\textsuperscript{50}. Nor are we helped by an earlier discussion of the problem: “A pragmatist does not suggest that all ideal theory is impossible or that we can somehow do without it altogether. Rather, for the pragmatist, theory is immanent and evolving; its development goes hand in hand with practice.” \textit{P. 29}. If theory is “immanent and evolving,” how can it be at the same
is a good — perhaps even a pragmatic — thing. Under some circum­stances, it may well help us to define the possibility of social change. It cannot, however, establish its desirability. Thus, Radin’s response to the problem of bad coherence is not entirely satisfac­tory. Radin is correct in her charge that the problem of bad coherence is a problem of partial pragmatism. She errs, however, in thinking that imagination and critical vision supply the missing part. Either truth and virtue are solely matters of consensus and coherence, or they are not. If they are, then human beings will inevitably be stuck with many deeply entrenched but backward conceptions. If they are not, then there is indeed something besides imagination missing from Radin’s account of the pragmatic conception of truth. In other words, pragmatists are stuck on the horns of a dilemma. If everything is “contingent” and “socially constructed,” then all of our norms and ideals are nothing more than temporary resting places in an ongoing process of social negotiation — resting places that have more to do with the realities of privilege and power than with aspirations for truth and justice.

Among contemporary pragmatists, there is a dispute that sheds some light on this problem. On one side, there are pragmatists such as Richard Rorty who are uncompromising in their rejection of foundationalism. These pragmatists believe that what we call “truth” is nothing more than consensus and coherence. On the other side, there are pragmatists such as Hilary Putnam who, like Peirce and James, are committed to the use of a pragmatic method. This type of pragmatism insists upon more than consensus and coherence. Beliefs are only true if they are arrived at in accordance with a certain method — the method that forms the basis of scientific practice. This results in a more robust notion of truth, but, at the same time, it reopens the question of foundationalism — if there is a uniquely correct method of inquiry, does it not function as an unquestioned, and unquestionable, foundation for human knowledge? To put it somewhat differently, if we canonize the contemporary understanding of scientific methodology, then have we not made a substantial retreat from our pragmatism?

This dilemma and the dispute it prompts are central topics for pragmatic philosophers. Although it is obvious that Radin has not resolved these issues, there is much in her work that suggests possible resolutions. In particular, it is useful to think about her suggestion that the feminist practice of consciousness-raising is a model of “pragmatist . . . reconceptualization” (p. 30). Consciousness-raising

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51. Afterword, supra note 21, at 1917.
52. Id. at 1914.
is not high theory. Women do it by talking about their lives in the simplest possible terms. Their focus is on careful observation of their own experience. In telling their stories, they question normally unquestioned assumptions and reject interpretations that are formulated in ordinary, patriarchal discourse. Consciousness-raising can challenge false consciousness and bad coherence precisely because of its commitment to an extremely rigorous form of empiricism. In a similar fashion, the depth and relentlessness of pragmatism's own commitment to empiricism may provide a partial answer to the problem of bad coherence. If a belief coheres with our pre-existing beliefs and attitudes, we are inclined to call it true. But as pragmatists, we should not take this as the end of the story. We must understand the belief in terms of its empirical consequences, and, if it concerns a matter that is important to us, we must test it aggressively against the onslaught of future experience. Thus, pragmatism and feminism, properly understood, share a deep commitment to a rigorous form of empirical inquiry.

In short, one answer to the problem of bad coherence resides in the pragmatic maxim itself: "Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object." The maxim prescribes not so much a method as a form of disciplined thinking. Abstract conceptions must be rigorously compared to practical expectations. Expectations must be continuously compared to actual experience. Ideological tones must always be mistrusted. Thus, while bad coherence is inevitable, it will never be permanent so long as we continue to think in the manner that is prescribed by the maxim.

V. CONCLUSION

I have examined a number of problems that arise in the context of Radin's pragmatism. Each of these problems relates to the nature of ideals and their relationship to progressive social change. One problem is the problem of meaning: where do ideals come from? If meaning is always to be understood in terms of practical consequences, what are the practical consequences that attach to statements about ideals? Another problem is the problem of relativism: what reason could there be for preferring our current ideals to our current practices? Yet another is the problem of motivation: if our visions of truth and justice are relative to our own individual history and perspective on the world, what motives could we —

53. Peirce, supra note 4, ¶ 5.402.

54. It is tempting to answer this question by saying that ideals are descriptions of individual dispositions towards certain kinds of behavior. If this is all that ideals are, however, they can explain human actions but not justify them.
either individually or as a society — ever have for genuine self-transformation? A final problem is the problem of bad coherence: what do we do about the fact that consensus and coherence are often the products of dominance and coercion rather than sustained rational inquiry?

None of these problems is unique to Radin; they are part and parcel of her commitment to pragmatism. Nevertheless they are serious problems. Indeed, the continuing usefulness of pragmatic analysis to matters of legal theory depends crucially upon on their resolution. But resolutions are hard to come by. Radin, in fact, does as well as any have done in addressing these issues — she has addressed them honestly and straightforwardly. But ultimately what she offers is not so much solutions as the hope of solutions to come — solutions that will come only if we are rigorous and relentless in our continuing commitment to a pragmatic method.