"Easy for You to Say": An Essay on Outsiders, the Usefulness of Reason, and Radical Pragmatism

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In this essay, I argue that Schlag's critique of reason fails to take into account the concerns of people of color and women in two ways. First, it fails to address the way in which the ideology of reason structures racial and gendered power. Second, it fails to consider the value of the ideology of reason for people of color and women, both of whom might extract political gain from deploying the incumbent ideology to their advantage. I offer a version of radical pragmatism that attempts to reconcile Schlag's critique of reason with these criticisms.

INTRODUCTION

Even in the era of postmodernism, old divisions seem destined to recreate themselves, albeit in new forms and with new participants. At the recent symposium on Pierre Schlag's book, *The Enchantment of Reason*, the group in attendance included a mixture of old and new—some of the old critical legal studies (CLS) crowd together with a handful of second generation critical feminists and critical race theorists (CRT). As the symposium progressed, participants recreated the lines of a dispute that had once marked the conference on critical legal studies (a dispute that some would say contributed to the movement's demise).[1]

As in those earlier days, critical feminists and critical race theorists were aligned on one side of the dispute, and Schlag and some of the CLS scholars were on the other. (Actually, it was not clear just who sat where, given the random seating arrangements and the fact that we were all quite friendly and good-natured about our differences.) The division between the Schlag supporters and the critical race and feminist scholars centered, as it always had, around the need to address the quite pragmatic concerns of disempowered outsiders. For those scholars who

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1. At a panel on new directions in legal theory, held at the AALS Annual conference in 1996, Duncan Kennedy officially pronounced the death of CLS as a political movement in the legal academy. Among the causes of death, Kennedy included the diffusion of the movement's energy caused by the split-off of the critical race theorists and the critical feminists.

were present during the opening round of arguments in the late 1980s, much of the exchange must have sounded quite familiar.

In an earlier incarnation, this dispute took the form of a disagreement between critical race theory and CLS scholars over the usefulness of rights discourse.[2] CLS authors argued that rights were fundamentally indeterminate and could not be relied upon to advance the claims of the disempowered. For example, Mark Tushnet argued that rights were radically indeterminate because they did not add anything to pre-existing social and political commitments, and because they contained contradictory and competing commitments that could be mobilized to support contradictory outcomes.[3]

Critical race theory scholars responded that, regardless of any fundamental indeterminacy, rights discourse historically was quite important to people of color in advancing political commitments to inclusion and equality. For example, Kimberle Crenshaw and Patricia Williams argued that communities of color could use rights discourse pragmatically, as the prevailing ideology, to enlist the power of the state on their behalf to advance their political commitments.[4] Williams also argued that rights were important symbols in the political rhetoric of inclusion, and thus were of great historical value for the African-American community.[5]

The Enchantment of Reason appears to resurrect much of the old division and debate around the critique of rights. As was true of the earlier CLS critique of rights, Schlag's critique of reason can also be accused of failing to take into account the needs and concerns of women and people of color, or at least of critical feminists and critical race theorists for two reasons.

First, in laying out his critique, Schlag fails to consider the way in which the ideology of reason structures racial and gendered power. Although he does examine the relationship between reason and power, he chooses to focus only on the way in which the ideology of reason creates and reinforces professional power, and more specifically, the power of the legal practitioner and the legal academic. Unfortunately, Schlag wholly ignores the way in which reason creates and reinforces racial or gendered power, either in legal academia, legal practice, or in any other legal institution.

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2. *See generally* Symposium Issue, 22 HARV. C.R.-C.L. L. REV. (1987) (presorting critical race theorists' response to the rights critique put forward by critical legal studies scholars).

3. *See* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1365, 1378 (1984).

4. *See* PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 160-64 (1991); Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331, 1367-68 (1988).

5. *See* WILLIAMS, *supra* note 4, at 164.

Second, Schlag's critique of reason fails to address the possibility that women and people of color might be able to use the ideology of reason to resist racial and gendered power. As was true of CLS critique of rights, Schlag's critique of reason invites the following charge: "Easy for you to say that rights and reason fail on their own terms. You have no pressing need to use rights discourse or the ideology of reason for pragmatic purposes to advance political commitments to your inclusion. You are (always) already included."

Is it fair to fault Schlag for failing to address the relationship between reason and racial and gendered power? Could we critical feminists and critical race theorists be guilty of expecting Schlag to take on a job that is more properly ours?

A sympathetic defense could offer several arguments on Schlag's behalf. First, one could argue that Schlag has merely mounted an internal critique, to demonstrate to the formalists that their argument for reason fails on its own terms. Under this view, it might not be fair to criticize Schlag for failing to address "outsider" needs, as those concerns are literally outside the scope of his argument.

Similarly, one could argue that it is not Schlag's job to take up the outsider's perspective because he would not be particularly good at it. Indeed, as Schlag pointed out himself during the symposium, he is not in a particularly good position to address outsider concerns given his identity, his interests, and his history. Finally, one could argue that Schlag indirectly does address the concerns of women and people of color when he levies his critique of reason against pragmatism, and in particular against Margaret Radin's work.

I will address each defense in turn. Then, in the final section, I will sketch a version of pragmatism that tries to navigate the space between Schlag's critique of reason, and the pragmatic needs of people of color and women.

I. INSIDE AND OUTSIDE THE FACULTY LOUNGE: THE "INTERNAL CRITIQUE" ARGUMENT

Why have we blamed Schlag for failing to consider the way in which reason structures racial and gendered power? One might argue on Schlag's behalf that he is merely mounting an internal critique, and the subject of racial and gendered power lies outside the scope of that critique. More specifically, one might argue that Schlag seeks to undercut from within the standard arguments on behalf of reason. Under this view, the role reason plays in creating racial and gendered power is not at all on point.

While I am moderately sympathetic to that argument (as the following section makes clear), I find it a bit disingenuous. Indeed, Schlag cannot put forward the defense without acknowledging that he devotes an entire first chapter to the various ideological roles that reason plays in the law. That chapter explicitly addresses the political relationship between reason, law, and power. It then becomes fair, in my mind, to question his choices about which professional power relationships he criticizes, and which power relationships he ignores altogether.

To be more specific, I think it fair to fault Schlag for choosing to discuss the role reason plays in creating professional power, without also examining the racial and gendered dimensions of that professional power. Early in the book, Schlag discusses at some length the political way in which reason and law serve to reinforce the power of legal academics and legal practitioners. According to Schlag, reason occupies the field of law because it makes legal academics out to be experts and gives the practitioner a weapon to wield on behalf of his client:

> The legal academics are quite willing to recognize the reason of law because reason is the handle that gives academics the authority to say what the law is. It is by insisting that law is the work of reason that legal academics as the custodians of reason can insist to others that their word is law.
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> The practitioners, meanwhile, are very much interested in representing law as reasoned, for their main rhetorical strategy in court . . . is to praise the law. To attribute reason to law allows practitioners at once to praise the law and also to extend or contract it so that the law (duly regulated by reason) comes to include their client's cause or interest.[6]

Unfortunately, Schlag never extends his range to consider the political role that reason plays in maintaining the racial and gendered borders of professional power in law. Why does Schlag fail to consider how reason and law help keep the chaired positions in the faculty lounge and the law firm partnership meetings predominately white and largely male? It would have been relatively simple for him to consider the ways in which reason and law have played a role in placing white men at the reins of power in judges' chambers, law enforcement offices, state and federal legislatures, dean's offices, and a whole host of other legal institutions.

Indeed, there were a number of points that Schlag could easily have made in describing reason's legitimating role in legal professional power. In addition to legitimating the power of the academic and the practitioner, reason also legitimates the professional power of whites and men in law. Under the mantle of "reason," law faculties, as well as

6. PIERRE SCHLAG, THE ENCHANTMENT OF REASON 24-25 (1998).

promotion and tenure committees, claim that critical feminist scholars and critical race theorists do not deserve promotions or chaired professorships because their scholarship is not "well-reasoned," but merely narrative storytelling. Under the mantle of reason, those in power can exclude people of color and women from judge's chambers, law enforcement offices, legislatures, and other legal institutions by disregarding as "irrational" alternative ways of deciding what the law ought to be or how to enforce it.

Just how easy would it have been for Schlag to make those arguments in his first chapter? The following section discusses the notion that Schlag may not have been in a particularly good position to do so.

II. THE "IT'S NOT MY JOB" ARGUMENT

During the symposium critical feminists and critical race theorists complained that Schlag had not discussed the implications of his pervasive critique for their groups. In response, Schlag offered a version of the argument that it was not his job to take up those issues and pointed out that he was not in a particularly good position to do so.

The "it's not my job" argument—the notion that Schlag is not in a good position to address the potential usefulness of reason for outsiders (and outsider scholars)—is, for me, the most intuitively appealing. Schlag's position, as a white male academic concerned primarily with a CLS-style internal critique of reason, reinforces the notion that he might not be best suited to address the relationships between reason and law and racial or gendered power.[7]

For several reasons, I find the question of whether it is Schlag's job to be far more interesting than the actual answer. First, the question raises the larger issue of the relationship between the veterans of the now-defunct critical legal studies movement, the slightly younger participants in the critical race theory movement, and the fem-crit movement.[8] Recalling the way in which those divisions played out historically among the original participants, which is to say not very well, one wonders whether these groups are forever destined to accuse each other of not taking the arguments seriously.

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7. Patricia Williams has argued that CLS scholars have failed to consider outsider perspectives because of their relatively privileged positions as insiders within legal academia. *See* WILLIAMS, *supra* note 4, at 164 (arguing that the CLS critique of rights ignored the implications of the critique for communities of color).

8. Those in the defunct or soon-to-be-defunct category have had no major conferences since the mid-1990s—CLS in 1995, and CRT in 1997. In the CLS category, I do not count the symposium organized around Duncan Kennedy's book, *A Critique of Adjudication*, held two years ago in Miami. It was a small, invitation-only event, and in any case the weather was too fine and the dress code and outdoor seating entirely too casual to really call it a major conference.

Second, and more importantly, the question provokes debate about why critical feminists and critical race theorists would expect Schlag to address these concerns in the first place. One could argue that progressive political commitments common to CLS, the fem-crits, and race-crits—commitments on the left to resistance, antisubordination, and anti-discrimination, among others—might sufficiently justify at least a token nod from Schlag in the outsiders' direction.

Nevertheless, it is equally important to note that significant theoretical differences, and not just identity politics, divide the two groups. For example, certain CLS scholars with a postmodern bent (like Schlag) argue that it would be theoretically inconsistent to offer some replacement programmatic theory after they have "trashed" the incumbent theory by way of internal critique.[9] Critical race theory scholars, in contrast, have openly declared the need for pragmatic prescriptions and reconstructive programs. Perhaps it would be unfair to expect Schlag, as a postmodern CLS critic, to reconstruct reason for outsiders' use, or to mourn the loss of an affirmative program like rights discourse. We might do well to recognize our theoretical differences in pursuing progressive political commitments. Perhaps we must accept that it is not Schlag's job to explain the relationship of reason to race and gender.

III. RADICAL PRAGMATISM AND THE OUTSIDER

A. *Schlag's Critique of Pragmatism*

In this section, I first want to acknowledge, and then address, the very brief and indirect way in which Schlag discusses outsider concerns in his critique of pragmatism. I then want to defend a version of pragmatism—radical pragmatism—that attempts to navigate the tension between Schlag's critique and the potentially useful role that reason might play for disempowered outsiders.

Schlag's critique of pragmatism runs along two basic lines—false modesty and inadequacy. First, Schlag argues that the neopragmatists suffer from false modesty because they continue to privilege reason and foundationalism even as they purport to do the opposite.[10] According to Schlag, pragmatists like Stephen Toulmin, Margaret Radin, Richard Posner, and Joe Singer all pretend to acknowledge that reason does not constitute an adequate foundation, but then covertly replace reason with some other foundationalist metanarrative. In Schlag's view, these scholars have merely substituted one foundationalist program for another.

9. *See, e.g.*, Phillip E. Johnson, *Do You Sincerely Want to be a Radical?*, 36 STAN. L. REV. 247, 248 (1984).

10. *See* SCHLAG, *supra* note 6, at 81-86.

Each author simply exchanges the metanarrative of reason for an alternative metanarrative: adopting the perspective of the oppressed (Radin, along with Elizabeth Spelman and Martha Minow), furthering economic efficiency (Posner), or engaging in cross-historical and cross-cultural comparison (Toulmin).[11]

For the moment, I want to focus on Schlag's critique of Margaret Radin and her pragmatic call to adopt the perspective of the oppressed. It is here that Schlag at least partly takes up the relationship between reason and the disempowered outsider.

Radin has argued in much of her work that the pragmatist should seriously consider the perspective of the oppressed when engaged in pragmatic policymaking.[12] In Radin's view, the call to consider the oppressed confronts the complacent tendency inherent in pragmatism and guards against bad coherence. Radin argues that because pragmatism adopts a coherence view of truth, rather than one centered on correspondence to external reality, pragmatism runs the risk of conservatism and bad coherence. For example, Radin points out that although a system like slavery or sexism might cohere within itself from the viewpoint of the dominant group, it nevertheless might be incoherent or produce suffering when viewed from the perspective of the community's more marginalized members.[13]

Radin asks pragmatist decisionmakers to consider the perspective of the oppressed in order to counter the possibility of bad coherence. For Radin, considering the perspective of the oppressed makes possible the pluralist understanding that there is not one "we," but many. Moreover, "[o]ne 'we' can have very different conceptions of the world, selves, communities, than another."[14] In her view, by taking seriously the perspective of the oppressed, the dominant group can come to understand that its perspective is not the only possible point of view. Thus, considering the perspective of the oppressed is a pragmatic corrective, designed to confront pragmatism's conservative tendency and to move it in the direction of progressive social change.[15]

Schlag argues that, like the call to consider efficiency or cross-cultural comparison, Radin's argument to consider the perspective of the

11. *See id.* at 82-83.

12. *See* Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1711 (1990) [hereinafter *Feminist*]; Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019 (1991) [hereinafter *Poststructuralist Critical Legal Practice*]; Margaret Jane Radin, *Lacking a Transformative Social Theory: A Response*, 45 STAN. L. REV. 409, 411 (1993) [hereinafter *Lacking a Transformative Theory*].

13. *See Feminist, supra* note 12, at 1710, 1718.

14. *Id.* at 1711.

15. *Id.*

oppressed is just as foundationalist a metanarrative as reason, and as such is equally problematic.[16] In Schlag's opinion, Radin's approach is "dogmatic" and "threatens to obliterate the perspectivalism, the relativism, the contextualism, that made pragmatism seem so modest in the first place."[17]

Schlag's critique, however, does not fairly represent Radin's argument. Although adopting the perspective of the oppressed might be a replacement metanarrative in some highly abstract sense, I do not think that Schlag can put Radin's approach into the same foundationalist camp as Truth with a capital "T" or Reason with a capital "R." Radin makes clear that her call to consider the oppressed is not an ideological imperative adopted for its truth value, but rather is a strategic corrective to direct pragmatism away from its conservative tendencies. Judging from her work, I am guessing that Radin would be the first to abandon this approach if it recommended some replacement foundationalist metanarrative. Indeed, Radin repeatedly argues against any over-arching theory to ground decisionmaking, and instead urges a pragmatism that is nothing if not ad hoc, perspectival, relativist, and contextualist.[18]

After arguing that pragmatism is falsely modest because it is too rationalist, Schlag then switches gears to argue (from the formalists' perspsective) that pragmatism is insufficiently rationalist. According to Schlag, neopragmatists champion a "neither this nor that" solution, a dialogic oscillation between binary oppositions that takes no position.[19]

> The raw irony in this procedure is that because the pragmatic moment of modesty is indeed genuinely modest (verging toward emptiness), when it comes time to produce the solution pragmatism can be made to mean or to require just about anything. Not too cold, not too hot, just right—does indeed mean just about anything.[20]

Thus, for the formalists, the problem is that pragmatism's "neither/nor-ism"[21] is infinitely protean and anything but objective. Pragmatism can be used to defend multiple and contradictory outcomes, the particulars depending, of course, on which pragmatist you choose to follow.[22]

It is important to note that, again when it comes to Radin, Schlag's description is a bit of a mischaracterization. Radin does not argue a "middle way" as some sort of Goldilocks synthesis or hybridization of

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16. *See* SCHLAG, *supra* note 6, at 84, 86.

17. *See id.*

18. *See generally Poststructuralist Critical Legal Practice*, *supra* note 12; *Lacking a Transformative Theory*, *supra* note 12.

19. *See* SCHLAG, *supra* note 6, at 84-85.

20. *Id.* at 85.

21. *Id.* at 84 (attributing the term to Roland Barthes).

22. *See id.*

both poles of the Derridean binary opposition. Rather, Radin argues that the pragmatist will choose sometimes one pole in the dichotomy, and sometimes the other, and that there is no set of methodological rules to tell the pragmatist in advance which to choose.[23] To the extent that the rationalists are looking for some foundationalist anchor to predict outcomes in advance, pragmatists like Radin would have no problem conceding that there is none to be had.

More importantly, as will become apparent in the next section, the "neither-nor" problem is only a problem for the formalists. The postmodernists are not necessarily bothered by the criticism that it is not possible to predict outcomes in advance. It is precisely the contingency and perspectivalism of pragmatism, and its attention to the particulars of identity, time, place, and history, that make it useful for the postmodernist.

B. *Radical Pragmatism*

The version of pragmatism I want to defend against Schlag's critique differs quite significantly from the versions of neopragmatism targeted by Schlag. Like neopragmatism, which is certainly a reconstructive project, radical pragmatism also finds it useful at times to focus on the inquiry, "What works for the community?" But radical pragmatism does not necessarily depend on reason to answer that question. Nor does it have a unifying method or propose some replacement metanarrative for producing a determinate answer. Rather, radical pragmatism acknowledges that sometimes, maybe even often, something outside reason—be it political and/or ethical commitments of varying sorts, intuitions, passions, experiences, or sentiments—may drive the constructive answer to that question. At other times, and in other circumstances, reason may be useful.

In addition, radical pragmatism also differs in its focus on the "disempowered community" rather than some more universal concept of community. Building on Radin's call to adopt the perspective of the oppressed, radical pragmatism focuses on the question, "What works for the disempowered community?" This focus is not designed to confront pragmatism's tendency toward conservatism. Rather, working from Radin's conception of pluralist perspectives, radical pragmatism finds it more useful to consider the disempowered community separately from the dominant group in order to focus on differing needs, political commitments, and preferred measures of usefulness.

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23. *See Feminist*, *supra* note 12, at 1718.

1. THE CONSTRUCTIVE QUESTION: "WHAT WORKS FOR THE DISEMPOWERED COMMUNITY?"

Radical pragmatists think that often it might be useful to ask the question, "What works for the community?" and more specifically, "What works for the disempowered community?" As Richard Rorty points out, to the extent that these questions are useful, it is primarily because they shift habits of thought and conversational focus away from less useful and often pointless conversations surrounding "What is true?" or "What is reasonable?"[24] Those latter questions generate answers that can never be verified. Conversations about truth or reason frequently get bogged down or stop altogether when someone argues that something is illogical or contrary to the dictates of reason. The question, "What works?" shifts the conversation onto different and potentially more productive ground.

It is important to note, however, that radical pragmatism has limited ambitions. Radical pragmatism is offered not as a universalist, ahistorical prescription, but as a suggestion for what might be useful for disempowered communities in the current political, social, economic, and legal climate. At the moment, it may well be useful for the disempowered community to move away from an exclusive reliance on universalist discourses like reason and truth, toward something both more pragmatic and postmodernist. (At another moment, in another place, it may be less useful.)

What is the role of reason in this postmodern pragmatist inquiry? Radical pragmatism acknowledges Schlag and Stanley Fish's point that reason has little to say about the affirmative question of what works for the community, disempowered or otherwise.[25] At the same time, reason historically has often played a decidedly political role in policing the borders between inside and outside, between empowerment and disempowerment. Thus, radical pragmatists might explore the ways in which insiders have used reason and law to exclude a particular disempowered community.

More importantly, radical pragmatists might explore the way in which outsiders can use reason to their political advantage. In some cases, a radical pragmatist might use reason as one implement in the pragmatist's toolbox in order to advance a particular political commitment. Sometimes, but certainly not always, using the language of reason might be useful in making an argument about what works for the disempowered community, or in framing the parameters of the inquiry. At

24. See RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 6, 14-15, 55 (1989).

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

other times, one might prefer to argue on the basis of experience or tradition, or make decisions on the basis of intuition or common sense. As Radin notes, whether to use the language of reason as the prevailing ideology "depends on whether we think that under current circumstances, our best chances for improving the situation lie in trying to dislodge the ideology or in trying to extract political gain from those who accept the ideology and cannot be dislodged from it."[26]

It is not possible to determine in advance whether one should use reason as the prevailing ideology or try some other strategy. Similarly, on those occasions when one uses reason to frame the argument, it is not possible to predict whether doing so will produce a useful outcome so far as the disempowered outsider is concerned. For example, one could imagine a way in which using the rhetoric of reason and rights discourse might advance political or ethical commitments to equality, empowerment, or inclusion.

It might be useful, for example, to challenge the South African practice of charging user fees for public education by using the constitutional affirmative right to education or the right to equality, and to mobilize the rhetoric of reason in support of those arguments.[27] Alternatively, it might make more sense to mobilize the frustration and outrage of black South Africans, and to mount a grassroots organizing campaign directed towards forcing the government to guarantee free education.[28]

The question of which path best advances black political commitments in connection with education in post-transformation South Africa depends on a whole host of contingent and contextual factors: luck, diligence, timing, history, and place, the political commitments of the particular disempowered community. There are no underlying foundationalist principles to guide pragmatic decisionmaking.

Political commitments cannot serve as the anchor for decision, nor can the identity of the disempowered community or the definition of "useful" or "good outcome." Particular political commitments both derive from and create the identity of a community, and both of these concepts similarly reflect and reinforce how one measures usefulness and what particular outcomes might be preferred. As the following section will highlight, the decision is thus contingent in a radical and fundamental way, and no methodological rules are available to impose predictability on that contingency.

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26. *Lacking a Transformative Theory, supra* note 12, at 416.

27. *See generally* Daria Roithmayr, *Challenging the Use of User Fees in South African Public Education* (2002) (unpublished issue paper) (on file with author) [hereinafter Roithmayr, *Issue Paper*].

28. *Id.*

The point I am making here is that reason can possibly play a role in the argument, and one should not foreclose that possibility, though it might be prudent to acknowledge that reason does not appear currently to be a particular useful tool for disempowered communities. Nevertheless, rights discourse and the rhetoric of reason should be in the activists' tool box, even if not the central tool.[29] To paraphrase Schlag, reason is something, just not everything.[30]

Some might argue that to use reason in this way, without really "believing" in its foundationalist underpinnings, is instrumentalist or an exercise in bad faith.[31] Indeed, Schlag himself argues against the possibility of using legal doctrines "as if" they had some binding power without really coming to believe in their metaphysical power.[32] But for the radical pragmatist, the question of belief or non-belief is really beside the point, an old habit of thought that she is discarding in favor of new ones that pertain to usefulness. It is not that the radical pragmatist forecloses the possibility of proving the foundationalist underpinnings of reason. Instead, she has changed the subject and moved on to another potentially more useful approach.

2. THE DECONSTRUCTIVE QUESTION(S)

Radical pragmatism is constructively pragmatic because it focuses on the question "What works for the disempowered community?" as a potentially more useful question to ask in comparison to "What does reason dictate?" At the same time, radical pragmatism is radical, and differs from conventional pragmatism in that it focuses just as intently on the potential disruption of the very categories that make up the question "What works for the disempowered community?"

In particular, radical pragmatism may find it useful to examine disruption at three possible points: (1) Who constitutes the disempowered community under consideration, and how is that community defined? (2) What do we mean by useful? (3) When we say useful, useful for what (and whose) purpose or political commitment? I have written elsewhere about the potential usefulness of these particular points of

29. *See* Daria Roithmayr, *Leftover Rights*, 22 CARDOZO L. REV. 1113 (2000) (discussing similar arguments on rights discourse).

30. *See* SCHLAG, *supra* note 6, at 75 ("[Critical reflexivity and rational frame construction] are not pointless. It's just that they are not everything.").

31. In conversation, Stanley Fish made something very close to this argument during a visit to the University of Illinois College of Law in 2000. In contrast, at the critical theory symposium held two years ago in Miami, Karl Klare speculated that the disempowered community stands to lose too much if it uses rights discourse on its own behalf because to do so reinforces a rights discourse that currently is tilted in favor of the privileged, at least in contemporary, post-affirmative action United States.

32. SCHLAG, *supra* note 6, at 110-11.

undecidability.[33] For example, I have explored the potential usefulness of deconstructing the definition of the disempowered community to examine the inevitable play of "differance" between inside and outside, that is, between who is included in the framework of the disempowered community and who is excluded.[34] Similar points of undecidability might be located in the framing of political commitments and the measurement of usefulness.

What produces this undecidability and disruption? It appears to be very much the nature of decisionmaking itself, in which decisions are made amidst the terrain of undecidability and contingency. As Ernesto Laclau points out, there is an inevitable play of differance between radical undecidability and the moment of decision, as each makes the other both possible and impossible.[35] In a field of radical undecidability, decisions are and must be taken. Derrida calls this decision in a field of undecidability a moment of "madness."[36] At the same time, the moment of decision is inevitably inhabited by radical undecidability, which immediately destabilizes the decision even as it is (per)formed.[37]

I am arguing, first, that radical undecidabilities will destabilize many of the choices around radical pragmatism. In that regard, the radical pragmatist might have something to say about the role of law and other discourses in constructing the borders—the inside and outside—of the disempowered community, and the hierarchies of priority and dissent that disrupt an apparently homogenous community. She might also have something to say about how individual identity and group identity is "differantially" constituted by both agency and social construction. Many sorts of radical undecidabilities can be located in the process of defining a disempowered community.

The easiest undecidability to discuss, of course, is inside versus outside—i.e., the undecidability about whom to include and whom to exclude. So, for example, the way in which the Mexican-American community defined itself in the early 1960s in the United States as "Chicanos,"[38] to exclude connection to people from other Latin American countries, may look nothing like the way Mexican-Americans currently define themselves and others as part of a broader pan-ethnic

33. *See generally* Roithmayr, *supra* note 29.

34. *Id.*

35. *See* Ernesto Laclau, *Deconstruction, Pragmatism, Hegemony, in* DECONSTRUCTION AND PRAGMATISM 52-53 (Chantal Mouffe ed., 1996).

36. *See id.*

37. *See id.*

38. For a useful description of the formation of the Chicano movement, see Ian F. Haney Lopez, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205 (2001).

community called "Latinos."[39] Moreover, the "Chicano" community itself contains disrupting internal fractures. For instance, in the 1960s the term Chicano was contested along the lines of race, skin color, and national identity, much as the term Latino is similarly contested today.

In focusing on the disruption and the fluidity of definitional borders, I am by no means counselling for a second-guessing, or a lack of conviction in defining one's community, political commitments, or measures of usefulness. Nor am I arguing for the constant deconstruction of the parameters of inquiry.

Rather, I am arguing that under certain circumstances, disempowered communities likely will find it useful as outsiders to subvert different aspects of the pragmatic inquiry at different points. It may be useful, for example, to argue about political commitments while attempting to keep the definition of community relatively more stable. At other times, it might be useful to redefine community, usefulness, and political commitments all at the same time. No set of methodological rules can tell us in advance which might be the more useful strategy.[40]

Second, I am arguing that amidst radical undecidability, inevitably there are points of decision, moments in which undecidabilities are nevertheless decided. Inside and outside become momentarily defined or performed as such, even if the definition or performance dissolves in the very next moment. It is these moments of deciding the undecidable that make social change possible and give radical pragmatism its pragmatic quality.

For example, the term "Chicanos" took on a certain radical meaning in the late 1960s and early 1970s in the southwestern United States. That radical meaning may have contributed to the direction of some of the strategies that Chicanos pursued to advance commitments to "brown power."[41] The relative success of the United Farm Workers' grape boycott may have resulted in part due to that radical definition of disempowered community.[42]

The point here is that history happened. Community activists and policymakers made decisions. Even with radical undecidabilities, some

39. For a description of the diversity and divisions among the Latina/o community, see Elizabeth Iglesias, *Out of the Shadow: Marking Intersections in & between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 40 B.C. L. REV. 349, 355 (1998).

40. *See Lacking a Transformative Theory*, *supra* note 12, at 416 (arguing that deconstruction can sometimes be useful but only situated judgment can tell the pragmatist when it would be useful).

41. *See* MANUEL GONZALEZ, *Chicano Movement: 1965-75*, *in* MEXICANOS 191-222 (1999).

42. *See id.*

definition of disempowered community formed, some part of that community pursued certain political commitments, and ultimately they produced outcomes that some people found useful.

Of course, radical undecidability inevitably inhabits, or re-inhabits, the moment of decision and the moments following. Meaning also changes as time passes, and as context and political commitments change. But contingency is possible only because of decision, even as decision is only possible because of contingency. It is the moment of decision that makes radical pragmatism pragmatic. It is the moment of radical undecidability that puts the "radical" in radical pragmatism.

C. *Reconciling Schlag and Radical Pragmatism*

Radical pragmatism does not suffer from either of the critiques that Schlag levies at pragmatism more generally. First, it does not suffer from false modesty, because it does not resurrect reason or some rationalist metanarrative as the anchor for the pragmatic inquiry. To the extent that radical pragmatism asks what works for the disempowered community, it does so without relying on reason (or anything else) to provide an answer. Moreover, to the extent that reason may play a role in pragmatic decisionmaking, it does so only when one suspects that reason might be helpful or useful in the process. But reason does not serve as a metaphysical foundation. Nor does the definition of disempowered community, political commitment or usefulness, or any other replacement metanarrative.

Second, radical pragmatism actually embraces the complaint that it does not live up to the demands of the formalists. Radical pragmatism does not want to live up to those demands (and if it did, it would hardly be called radical). I will leave aside for the moment the question of whether Schlag sets an unattainable standard for formalist reasoning, though I suspect that such may be the case. Indeed, I will accept for the sake of argument that most of the neopragmatists Schlag mentions have quite lofty ambitions for the pragmatic rationalist program. In contrast, radical pragmatism wants to be protean, unobjective, and unanchored in its ad-hoc and improvisational approach.

CONCLUSION

Radical pragmatists see contingency and improvisation as a virtue much of the time. Relative to the conversations generated under the framework of reason, it may be more useful to have robust arguments about other ways of knowing and experiencing. It may be more useful at times to talk about how we define a disempowered community and how we define our political commitments. Moreover, it may be more

useful to talk about all of these things in the context of a particular set of circumstances. For example, in post-transformation South Africa, it may be more useful to politically organize to address inequality in education rather than litigate the constitutionality of government policies.[43]

More generally, it may be more useful for the disempowered community to consider all sorts of tools and strategies, including reason. To be sure, at times, in pushing for social change, it may be less useful to depend on reason, and more useful to talk about what works for the disempowered community. It may be more productive, at the same time, not to foreclose reason (or any other way of knowing or deciding) as a tool that might end up being quite useful in a particular time and place. In short, it is actually good to acknowledge the improvisational nature of decisionmaking, because it frees one from what Tom Grey calls "theory guilt,"—the constraining force of thinking, for example, that one has to use reason as a one-size-fits-all tool.[44]

I am not sure whether Schlag would acknowledge that reason has a place in the pragmatist's toolbox. Judging from his extended critique, I am guessing that Schlag would rather the pragmatists be locked up along with their toolboxes. But until Schlag responds to the very real needs of women and people of color for some way to resist racial or gendered power and gain entry into the faculty lounge, radical pragmatism—with its willingness to use reason in order to extract political gain—might offer those disempowered communities a potentially useful way of moving towards inclusion and empowerment.

43. *See* Roithmayr, *Issue Paper*, *supra* note 27.

44. *See* SCHLAG, *supra* note 6, at 86.