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With this project, I would like to reconstruct pragmatism as a valid way of looking at legal problems and of solving them, in particular, the current legal debate over race-conscious admissions policies at state universities. Throughout this project, I will develop a working notion of pragmatism for twenty-first century legal theory and practice. Through constant application of pragmatic ideas to the concrete issues of affirmative action and race-conscious admissions policies, I will show that pragmatism is a means to craft a more just legal system, and as a result, a more just society.

In this project I will use the ideas of the some of the most important classical pragmatists: Charles Sanders Peirce, William James, John Dewey, and Jane Addams. The work of Supreme Court Justice Oliver Wendell Holmes is also important to this project although Holmes shunned the appellation "pragmatist." The lives of all five thinkers form a web of interrelated relationships and thought. Peirce, James, and Holmes developed relationships through their intellectual lives in Boston. For a time, Dewey was a student at Johns Hopkins University while Peirce was a lecturer there. James and Dewey were intellectual compatriots in the area of psychology and philosophy. Dewey and Addams, both eventual residents of Chicago, developed a friendship and philosophical relationship. Their community of thought embodies the pragmatic notion that discovery and learning are communal processes.

Pragmatism suggests that the more perspectives we gather, the closer we can come to a valuable truth. The law as it stands in practice deliberately excludes a majority of voices from consideration. Like the courtroom, a classroom is a focal point of authority; too often the voices of those who are perceived as outsiders are excluded from places of learning. The most valuable contribution that pragmatism can make to both legal theory and pedagogy is the insistence that legal insiders and educators insure that all perspectives be given voice. The Supreme Court decision *Grutter v. Bollinger* (2003) promises "diversity," but it is up to each of us to see the promise through.

ACTIONS IN THE AFFIRMATIVE: PRAGMATISM, PEDAGOGY,

LAW, AND THE AFFIRMATIVE ACTION DEBATE

by

Katie Rose Guest

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Approved by

_____
Hephzibah Roskelly, Committee Chair

This dissertation has been approved by the following committee of the Faculty of

The Graduate School at The University of North Carolina at Greensboro.

Committee Chair   _____
                 Hephzibah Roskelly

Committee Members   _____
                  Stephen R. Yarbrough

                  _____
                  Christian Moraru

_____
Date of Acceptance by Committee

_____
Date of Final Oral Examination

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TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

a. Pragmatic Truth and "High Objectivity"

The manner in which a person ascertains truth is arguably the central facet of a

person's way of thinking about the world. First, one must decide on what is true, and

from there the rest follows. René Descartes settled on one principle of truth, the *cogito*,

and built his philosophy upon this notion of thinking-about-thinking. Romanticism

grounded truth in the individual's emotions and aesthetic experience. Pragmatism, a

philosophy born in late 19th century and early 20th century America, grounds truth in

human experience. Thus, for pragmatists, truth is contingent, perspectival, and

mutable—though no less valid for it. However, for those unfamiliar with the pragmatic

theory of truth, it can seem unprincipled or infinitely subjective and relative.

For example, in *The Alchemy of Race and Rights*, law professor Patricia J.

Williams recounts the story of watching a family walk down Fifth Avenue in New York.

She overhears the son, who is four or five years old, tell his parents that he does not like

big dogs. Williams writes:

> The mother was saying, "But why are you afraid of big dogs?" "Because
> they're big," he responded with eminent good sense. "But what's the difference
> between a big dog and a little dog?" the father persisted. "They're *big*," said the
> child. "But there's really no difference," said the mother, pointing to a large
> slathering wolfhound with narrow eyes and the calculated amble of a gangster,
> and then to a beribboned Pekinese the size of a roller skate. […] "See?" said the

1

father. "If you look really closely you'll see there's no difference at all. They're all just dogs."

And I thought: Talk about your iron-clad canon. Talk about a static, unyielding, totally uncompromising point of reference. These people must be lawyers. Where else do people learn so well the idiocies of High Objectivity? (<u>Race & Rights</u> 12)

What Williams calls High Objectivity has gone by other names, some of which Williams provides here: "iron-clad canon;" "unyielding…point of reference." The parents describe a truth devoid of experience, *a priori* truth, metaphysical truth, Truth with a capital T. This truth lacks perspective and the knowledge of experience. It blinds the parents to the bodily, substantive differences between a wolfhound and a Pekinese. Although one might argue which breed is more likely to bite, the dogs are not the "same." One is large; one is tiny. Furthermore, this "truth" blinds the parents to the reality of the child, a small person, one whose perspective is free to be ignored or even manipulated by those in power. Williams indicts the law and lawyers for clinging to beliefs even when their fallibility is staring them in the face—or growling at them, as the case may be. Williams's example requires *a priori* knowledge to give way to experience and nuance— it supports a call for pragmatism.

With this project, I would like to reconstruct pragmatism as a valid way of looking at legal questions and of solving them. In particular, I apply pragmatism to the current legal question of the validity of race-conscious admissions policies at public universities. Throughout this project, I will develop a working notion of pragmatism for twenty-first century legal theory and practice. Through constant application of pragmatic

2

ideas to the concrete issues of affirmative action and race-conscious admissions policies,

I will show that pragmatism is a means to craft a more just legal system, and as a result, a

more just society. Part of the work of legal pragmatism includes figuring out, via

practical application, just what we as a society mean by words like "justice" and

"fairness," filling these rather abstract terms with "substantive sustenance … through

experiential inquiry" (Sullivan and Solove 704).

Pragmatism arose as a philosophy that marries theory and practice. One of the

founders of pragmatism, William James, explains that thinking people seek "a philosophy

that will not only exercise [our] powers of intellectual abstraction … but that will make

some positive connection with this actual world of finite human lives" (Pragmatism 9).

With these words, James takes the philosophical split of mind and body and brings the

two parts back together. For James, the mind, our powers of intellectual abstraction,

should be reconnected with our bodies, the world of finite human lives. For classical

pragmatists of the late nineteenth and early twentieth centuries, experience was the only

path to truth. Pragmatism shows that High Objectivity and its *a priori* truth claims tend

to fall apart when human experience is taken into consideration.

Connecting the abstract to the finite reveals that "truth" is always partial, always

contingent. The pragmatic method thus creates a kind of radical uncertainty. In what is

now considered one of the founding texts of pragmatism, "How to Make Our Ideas

Clear" (1878), Charles Sanders Peirce sets forth the pragmatic process of truth. He

writes: "The principles set forth … lead, at once, to a method of reaching a clearness of

thought of a far higher grade than the 'distinctness' of the logicians. We have there found

that the action of thought is excited by the *irritation of doubt,* and ceases when belief is

attained; so that the production of belief is the sole function of thought" ("Ideas Clear"

30). For Peirce, "thought" is reflection upon experience and empirical observation. As he

explains, through thinking, our beliefs may become unsettled, or irritated. This irritation

forces us to act: we can either suppress the irritation and cling to old beliefs, or listen to

the irritation and examine its cause. A good pragmatist learns to welcome the irritation of

doubt, to question what has until that moment appeared natural. One becomes willing to

let go of rituals and beliefs in order to take on new ones that work better. These new

beliefs are then tested against experience, and the cycle of progress starts again.

Pragmatism is a philosophy of progress and ingenuity. Yet how does one justify

applying pragmatism and its notions of change and progress to a legal system founded

upon backward-looking tenets such as *stare decisis* ("let the decision stand")? How do

we bring pragmatism into alignment with judicial respect for America's two-hundred-

and-twenty-year-old Constitution? In short, what can pragmatism do for the law? John

Dewey explains that the way the judiciary thinks it makes decisions and the way it

actually does—or should—make decisions are very different. Judges, lawyers, and even

laypersons might think that the law is made up of processes "anterior to and independent

of concrete subject-matters" ("Logical Method" 565). However, Dewey explains, this is

not how people, even people who are lawyers, actually think: "men do not begin thinking

with premises. They begin with some complicated and confused case" ("Logical

Method" 567). Lawyers start with a conclusion favorable to their clients and work backwards, creating premises along the way ("Logical Method" 567). Dewey acknowledges the importance of predictability in the law so that members of a community will know "the consequences which society though courts will attach to their transactions" ("Logical Method" 569). But he demarcates the difference between "theoretical certainty and practical certainty" ("Logical Method" 569). Theoretical certainty, based on fixed principles and immutable laws, is impossible for human society as it is constantly in flux. Instead, Dewey proposes "that general legal rules and principles are working hypotheses needing to be constantly tested by the way in which they work out when applied to concrete situations" ("Logical Method" 571). In other words, as in any other field of inquiry such as the sciences or mathematics, our beliefs must be tested against reality. Even the law is not exempt from empirical data.

As Dmitri Shalin explains, we have the greatest need for "consequence-oriented yet constitutionally grounded legal reasoning"—legal pragmatism—at cultural moments of change, "when new principles are invoked to offset old ones and fresh metaphors deployed to fire up moral imagination and spur legal creativity" (461). Legal pragmatism is consequence-oriented, that is, grounded in substantive results; but it is also "constitutionally grounded," or principled and theoretical. Yet since human principles are contingent because they are grounded in human lives and history, they are shaken by doubt at moments of cultural crisis—and the legal creativity such crises inspire, when judges make the choice to welcome the irritation of doubt, can be awe-inspiring.

Pragmatism can help us balance the old and new in American jurisprudence because it looks at consequences, past and future, of judicial decisionmaking. Pragmatism has been accused of being unprincipled, and therefore unfit for work in jurisprudence, where objective principles ought to reign. However, as Shalin writes, "as sense-making creatures we all take part in the production of social reality as objective and meaningful" (461). Often what one considers "objective" is simply the subjective perspective of a powerful few given force as truth. Within this creation of truth, of reality, lie serious ethical implications. As Dewey writes, "Political facts are not outside human desire and judgment" (Public & Problems 6). Rather, empirical data—scientific or political—is gathered and interpreted with particular ends in mind. Usually, these are the ends of the white, wealthy, male, and politically powerful.

When the parents on Fifth Avenue tried to persuade their son that the wolfhound and the Pekinese were the same, empirically, because they were both dogs, they tried to craft reality for their son based on their own beliefs. When their beliefs collided with the beliefs of their son, a moment of irritation, of doubt, ensued for both sides. Here was a chance for pragmatism to do its work. The parents, the parties in power, could have chosen to listen to their son, to a different perspective. Instead, they chose to ignore him. Not only did they ignore their son, they ignored the voice of their own experience. Their beliefs collided with their own observations; the parents had to work hard to deny what was right before their eyes: the obvious physical differences in the sizes of the dogs. This sort of antipragmatic cognitive labor to deny the knowledge of experience happens all the

6

time. On a larger scale, it led some Americans to believe for decades, for example, that global warming was a myth.

Pragmatism does not require the parents to listen out to their son's point of view out of beneficence, but rather out of a duty to gather the perspectives and opinions of all people, including the small and powerless. This is the duty of a democracy. Dewey emphasizes the duty of public officials to gather the diverse opinions of the public:

> Unless there are methods for detecting the energies which are at work and tracing them through an intricate network of interactions to their consequences, what passes as public opinion will be 'opinion' in its derogatory sense rather than truly public, no matter how widespread the opinion is. … Opinion casually formed and formed under the direction of those who have something at stake in having a lie believed can be *public* opinion only in name. (Public & Problems 177)

High Objectivity masquerading as truth is a powerful master. It pushes willful blindness. Worse, though, is the brutish behavior of the parents in Williams's story, when they try to impose their blindness on their son. Even though their imposition was motivated by beneficence—after all, they were simply trying to assuage a child's fears—they denied their son's humanity when they refused to listen to his point of view. The pragmatic method of truth requires the gathering of the perspectives of the most number of people in order to approach truth. As William James writes, "when as empiricists we give up the doctrine of objective certitude, we do not thereby give up the quest or hope of truth itself. We still pin our faith on its existence, and still believe that we gain an ever better position towards it by systematically continuing to roll up experiences and think" ("Will to

Believe" 15). Pragmatism requires a willingness first to be irritated by doubt, then to choose the path of progress which may bring one face-to-face with the brutally new.

b. Classical Pragmatists

In this project I will use the ideas of the some of the most important classical pragmatists: Charles Sanders Peirce, William James, John Dewey, George Herbert Mead, and Jane Addams. The work of Supreme Court Justice Oliver Wendell Holmes is also important here although Holmes shunned the appellation "pragmatist." The lives of all six thinkers form a web of interrelated relationships and thought. Peirce, James, and Holmes developed relationships through their intellectual lives in Boston. For a time, Dewey was a student at Johns Hopkins University while Peirce was a lecturer there. James and Dewey were intellectual compatriots in the areas of psychology and philosophy. Dewey and Addams, both eventual residents of Chicago, developed a friendship and philosophical relationship. Dewey and Mead were professors at the University of Chicago and close intellectual friends. The community of thought of this group embodies the pragmatic notion that discovery and learning are communal processes.

Cornel West calls C. S. Peirce (1839-1914) "the most profound philosophical thinker produced in America" (Evasion of Philosophy 43). Peirce was a mathematician, statistician, and semiotician; he also coined the word "pragmatism." He first used the word when discussing his maxim of pragmatism, a logical formula. Put simply, the

8

maxim suggests that the effects of something are the only thing that matter. He writes, in "How to Make Our Ideas Clear" (1878): "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" ("Ideas Clear" 36). William James points to this essay as a founding text of pragmatic philosophy (Pragmatism 20). James and Peirce were lifelong friends and together founded the philosophical discussion group known as the Metaphysical Club in January of 1872 (Menand 201). Decades later, in 1907, James helped arrange an income for the impoverished Peirce to support him until his death (Menand 435).

William James (1842-1910) put pragmatism into popular consciousness. His 1906 Lowell Institute lectures on pragmatic philosophy were published as a book titled *Pragmatism: A New Name for Some Old Ways of Thinking* in 1907. In this book the word "pragmatism" first appears in print—although James gives credit to Peirce for its coinage (Pragmatism 20). James re-articulates Peirce's pragmatic maxim with these words: "There can *be* no difference anywhere that doesn't *make* a difference elsewhere— no difference in abstract truth that doesn't express itself in a difference in concrete fact and in conduct consequent upon that fact, imposed on somebody, somehow, somewhere, and somewhen" (Pragmatism 22). In his academic career James specialized in psychology as well as philosophy, publishing *Principles of Psychology* in 1890. He taught psychology and philosophy at Harvard University from 1873 until he achieved emeritus status in 1907. During the latter part of his career, James actively exchanged

letters with the younger John Dewey regarding Dewey's work in psychology and philosophy, and came to the University of Chicago at Dewey's request to give a lecture there (Menand 360).

As a member of the discussion groups of James and Peirce, Oliver Wendell Holmes (1841-1935) came to be associated with pragmatic thought, although he rejected the label "pragmatist." (Menand 432). However, his approach to deciding legal decisions, articulated in his scholarly writing on the law, rings similarly to pragmatic philosophy. As Menand explains, "Holmes believed that political opinion should be protected because that is the only way for democratic government to maintain legitimacy" (Menand 432). This notion bears similarities to Dewey and Addams's ideas regarding the importance of perspective in social democracy. Holmes was appointed to Supreme Court in 1902 by President Theodore Roosevelt. During his life, he maintained correspondence with William James and saved the letters throughout his life (Menand 436). He also admired the philosophical work of Dewey, believing "he had found in Dewey a philosopher whose conception of existence seemed to match his own" (Menand 437).

John Dewey (1859-1952) earned his doctorate in philosophy from Johns Hopkins University in 1884. Ten years later, he took a position as a professor at the University of Chicago. Today, Dewey is best known today as an educator. In January of 1896, he founded the Laboratory School at the University of Chicago which he used to test his theory of "the unity of knowledge" (Menand 322). Dewey believed "that knowledge is

inseparably united with doing" (Menand 322). His pedagogical theories influenced the creation of progressive education in the United States. He sets out his theories of education in many writings, including *Democracy and Education* (1916) and in a reflective piece on progressive schools titled *Experience and Education* (1938). Dewey also wrote extensively on political history and theory, publishing many books and lectures during his ninety-three years. He taught at the University of Michigan, the University of Chicago, and Columbia University. While living in Chicago, he developed a close relationship with activist and pragmatist Jane Addams.

Although George Herbert Mead (1863-1931) published no books during his lifetime, the variety and depth of his thought have been preserved in the many articles he published and the books of his essays and lectures that have appeared since his death. After graduating from Harvard, Mead met John Dewey while working as an instructor in philosophy and psychology at the University of Michigan. In 1894, Mead came to the philosophy department of the University of Chicago and together with Dewey formed the core of the "Chicago Pragmatists." He worked as a professor of philosophy at Chicago until his death. Mead's intellectual and personal friendship with Dewey was central to his work as a philosopher.

Unlike her pragmatist contemporaries, Jane Addams (1860-1935) was an activist first and a philosopher second. This arguably makes her the most pragmatic of all the classical pragmatists, since her extensive writings are deeply rooted in her experiences as director of the Hull-House Settlement in Chicago. Addams co-founded Hull-House in

1889 with Ellen Gates using inheritance from her father's death (Knight 179). Addams's

work was firmly grounded in a belief in democracy, particularly the social democracy of

the late 19th century: "a 'sentiment,' a feeling of equality among people from all walks of

life" (Knight 188). Dewey and Addams shared these social democratic sentiments as

well as a close friendship for many years: Addams invited Dewey to join to board of

trustees of Hull-House in 1897; Dewey and his wife named one of their children after

Addams (Knight 240). "The influence of the two friends on each other was profound,

and, in many of its various parts, untraceable to one party or the other" (Knight 240).

Dewey lectured at Hull-House; he and Addams corresponded for many years; and they

engaged in philosophical debates of which we have too few records (Menand 310-11).

The genealogy of American classical pragmatism involves many lives closely

intertwined, and to attempt to talk about the work of these thinkers separately from one

another, as I will do here, is in some ways misleading. Louis Menand, in his historical

account *The Metaphysical Club* (2001), attempts to portray how closely tied together the

work of Peirce, James, Holmes, Dewey, and Addams actually was. The larger scope of

this project explores the misguided contemporary pedagogical emphasis on

individualistic labor. I suggest that one means toward meaningful equality under race-

conscious university admissions involves embracing notions of cooperative, rather than

competitive, learning. The work of the classical pragmatists demonstrates by example

just how askew our contemporary conception of the solo thinker and creator can be. This

quick review is also vital as we turn to contemporary legal pragmatism, so we may

recognize how today's legal pragmatists have omitted certain classical pragmatic work from contemporary consideration. I argue that these omissions are to the detriment of today's legal thought and suggest instead a consideration of the full possibilities of classical pragmatism.

c. Posner, Fish, West, and Contemporary Legal Pragmatism

A lot of work occurs under the heading of legal pragmatism today, by scholars such as Richard Posner, Brian Z. Tamanaha, David Luban, Stanley Fish, and Thomas C. Grey. However, some of what goes for contemporary legal pragmatism ignores or disavows crucial aspects of classical pragmatism. For example, the social activism and democratic thought of Jane Addams is all but absent in contemporary legal scholarship. I suggest that a complete understanding of classical pragmatism, taking into account the contributions of Peirce, James, Dewey, Holmes, and Addams as a community of thinkers, will provide a more robust pragmatic framework for current legal work. Such a framework will bear a living connection to classical pragmatism, yet will constantly refine itself in connection to the needs of our contemporary judicial system.

Pragmatism has contained elements of legal philosophy since its inception. Classical pragmatists often used legal examples in their philosophical writings. For example, in his essay "The Will to Believe" (1896), William James writes:

> Wherever the option between losing truth and gaining it is not momentous, we can throw the chance of *gaining truth* away, and at any rate save ourselves from any chance of *believing falsehood*, by not making up our minds at all till objective

evidence has come. In scientific questions, this is almost always the case; and even in human affairs in general, the need of acting is seldom so urgent that a false belief to act on is better than no belief at all. Law courts, indeed, have to decide on the best evidence attainable for the moment, because a judge's duty is to make law as well as to ascertain it, and (as a learned judge once said to me) few cases are worth spending much time over: the great thing is to have them decided on *any* acceptable principle, and got out of the way. But in our dealings with objective nature we obviously are recorders, not makers of the truth; and decisions for the mere sake of deciding promptly and getting on to the next business would be wholly out of place. ("Will to Believe" 17)

After setting up the difference between urgent, practical decision-making (which requires decisions made without all the evidence) and objective, scientific decision-making (which has the luxury of waiting until all evidence is supplied), James explodes the binary and shows that, in the end, all decision-making is done with incomplete evidence, and thus, all "truth" is made by the decision-maker—or else there is no truth at all, merely eternal skepticism. James's application of truth-making—as opposed to truth-finding—to legal theory strongly echoes the work of his friend Supreme Court Justice Oliver Wendell Holmes, Jr. Holmes and James were members of philosophical discussion groups in Boston in which pragmatic thought developed. In a similar vein to James, Holmes writes that "the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is an illusion and repose is not the destiny of man. … You can give any conclusion logical form" ("Path of the Law" 998). For Holmes, any conclusion of law can be logically justified. We cannot count on logic for certainty in the law any more than we can count on the good nature of a jury. Rather than focusing on the logical method, we should turn our eye to the conclusions, not the

reasoning, and see if the conclusions are useful: "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious" (Holmes "Path of the Law" 999). Taken together, the legal writings of James, Holmes, and Dewey emphasize the importance of conclusions in American jurisprudence over logical method based in *a priori* legal concepts.

One of the best-known recent scholars to claim the pragmatic mantle is Judge Richard A. Posner. He writes in *Law, Pragmatism, and Democracy* (2004), regarding his recent legal scholarship, "I have been arguing that pragmatism is the best description of the American judicial ethos and also the best guide to the improvement of judicial performance—and thus the best normative as well as positive theory of the judicial role" (1). With these words, Posner makes two suggestions. First, he observes that the judicial work we do in America is best understood as pragmatic. Second, he asserts that pragmatism can help us do our judicial work better. These claims, made by such a powerful voice in the field of legal scholarship, seem to bode well for the future of pragmatism as a legal method. But what exactly does Posner mean by "pragmatism"? I suggest that he ignores or undermines crucial ideas from classical pragmatists such as Jane Addams and John Dewey in order to support his various claims. Although he argues that pragmatism should be brought into judicial practice, this argument is founded on a

15

definitional split, between what he calls "philosophical" and "everyday" pragmatism. He

writes that his work "defends everyday rather than philosophical pragmatism" (4). This

splitting reveals that his position is fundamentally anti-theory, except in very limited

circumstances. He also claims that pragmatism has "no political valence," that

progressivism does not inhere in pragmatic philosophy: that pragmatism has a form, but

no content (44).

Posner admits, and I agree, that "Pragmatism, notwithstanding William James's

effort at definition, is a devil to define" (24). Despite these words, Posner spends the

introductory section of this text providing what he claims are the basic tenets of what he

calls "philosophical pragmatism." He contrasts the philosophical version of pragmatism

with "everyday pragmatism," which he explains in detail later. Posner's description of

philosophical pragmatism appears to be a fairly accurate portrayal of the basic tenets of

classical pragmatism. According to Posner, the "fundamental thesis of philosophical

pragmatism" is Darwinian in nature, that is, "human beings are merely clever animals"

(4). Posner explains this thesis as a mending of the mind/body split: "Body is not a drag

on mind, as Plato thought. … Body and mind coevolved" (4). It is this mending of the

mind/body split that provides the groundwork for Dewey's revolutionary hypothesis that

human learning is as much about physical doing as it is about thinking. One of Dewey's

principles of education is the "continuity of experience." He writes:

> At bottom, this principle rests upon the fact of habit, when *habit* is interpreted
> biologically. The basic characteristic of habit is that every experience enacted
> and undergone modifies the one who acts and undergoes, while this modification

affects, whether we wish it or not, the quality of subsequent experiences. For it is a somewhat different person who enters into them. (<u>Experience & Education</u> 35)

Thus, one's physical acts, one's habits, are capable of modifying one's entire physical and mental being. Dewey based his system of education on an understanding of human learning that considered the mind and the body inextricable from one another. Posner next states, accurately, that for philosophical pragmatism, knowledge is both "local" and "perspectival," shaped by historical and cultural conditions (5). Pragmatists place emphasis on consequences rather than metaphysical, *a priori* "truths." Pragmatists believe in *true* and *false*, although, Posner writes (quoting James) they would be more likely to say "true enough" (6).

Oddly, after all of this explanation, Posner discards "philosophical pragmatism" as generally useless for the law. Law and government "should largely be cut loose from philosophy" (Posner 4). "What I am calling orthodox pragmatism," he writes, "has little to contribute to law at the operational level. It has become part of technical philosophy, in which few judges or practicing lawyers take any interest" (41). For Posner, philosophical pragmatism divides into two groups, "orthodox" or academic pragmatism and "recusant" (literally, *unorthodox*) pragmatism (35). He asserts that recusant pragmatists, such as John Dewey and Richard Rorty, "don't think that the epistemological and ethical questions that have largely defined the classical tradition and that many pragmatists have tried to answer are worth asking. … The questions are merely distractions from the business of helping us to understand and improve the world" (39).

17

For Posner, philosophical pragmatism, whether orthodox or recusant, is too theoretical to be helpful in judicial practice: "Even recusant pragmatism has at most an atmospheric effect on thinking about law" (42).

Instead, Posner focuses his attention on what he calls "everyday pragmatism," for this is where the real legal value of pragmatism lies. Everyday pragmatism

> is the mindset denoted by the popular usage of the word 'pragmatic,' meaning practical and business-like, 'no-nonsense,' disdainful of abstract theory and intellectual pretension, contemptuous of moralizers and utopian dreamers. It long has been and remains the untheorized cultural outlook of most Americans. (50)

Posner asserts that everyday pragmatism, rather than the philosophical type, should be used to guide adjudication and government. Yet this binary between philosophical and everyday pragmatism is a false one, because all pragmatism is everyday. In fact, Posner's words sound like a fairly accurate description of classical pragmatic philosophy, of the work of James and Dewey—with one exception. Is Posner correct in his characterization of the "cultural outlook of most Americans" in that we, as a society, are contemptuous of "utopian dreamers"? We seem to have great patience for idealistic talk: for abstract notions of equality and liberty, for *I have a dream*. Contemporary pragmatist Richard Rorty writes, in a review of Posner's text, "Posner is so suspicious of romance and idealism … that he has trouble conceding that either has played a role in our political history," implying, of course, that both have played major roles indeed (101).

Pragmatism recognizes the philosophy located in the everyday, in the pedestrian, literally, in the streets. In 1917 Dewey warned that philosophy was growing too

academic, and that it should become more involved with everyday pursuits or it would risk growing irrelevant. He writes: "Philosophy when taught inevitably magnifies the history of past thought, and leads professional philosophers to approach their subject-matter through its formulation in received systems. … Direct preoccupation with contemporary difficulties is left to literature and politics" ("Recovery of Philosophy" 220). Dewey writes to his fellow philosophers that they should not ignore the needs of "serious-minded men not engaged in the professional business of philosophy." These men want to know "what modifications and abandonments of intellectual inheritance are required by the newer industrial, political, and scientific movements. They want to know what these newer movements mean when translated into general ideas" ("Recovery of Philosophy" 220). If philosophy fails to heed the call of ordinary folks, "it is likely to get more and more sidetracked from the main currents of contemporary life" ("Recovery of Philosophy" 220). Despite these writings of classical pragmatists which emphasize the importance of everyday experience, Posner insists on the importance of severing the everyday from classical pragmatic philosophy. Posner writes that everyday pragmatism is "rooted in the usages and attitudes of a brash, fast-moving, competitive, forward-looking, commercial, materialistic, philistine society, with its emphasis on working hard and getting ahead" (50). Yet Dewey made a similar call in 1917, when he insisted that philosophy must be able to speak to the questions posed by industry and science.

Posner's disagreement with philosophical pragmatism stems from his own position as fundamentally anti-theory. When he describes everyday pragmatism as the

"untheorized cultural outlook of most Americans," he disregards the theorization of this outlook, of the American ethos generally, that has been the project of many classical pragmatists. For example, in her narrative writings on her experiences working with the poor and working classes in the city of Chicago, Jane Addams develops a flexible theoretical framework that helps her readers understand the relationships between the individual experiences she recounts and the larger project of social democracy as a whole. In other words, a peek into the work of Addams reveals that pragmatism, whether of the everyday or philosophical type, has indeed been theorized. Furthermore, Posner continues this process of theorization with his own text.

Despite pragmatism's and Posner's own use of theory, Posner rejects theory as an important component of everyday pragmatism. Instead, he writes, "Its core is merely a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans. … Among the conceptualisms rejected are moral, legal, and political theory when offered to guide legal and other official decisionmaking" (3). Posner omits the fact that classical pragmatism advocates the interrelatedness of theory and practice, sometimes called the theory-practice circle. In this conception, theory—conjecture, speculation—and practice—experience, empirical study—have equal and reciprocal value. The pragmatists of the nineteenth century did not reject theory; they simply brought experience into a position of equal value. Posner's separation of the philosophical from the everyday divides theory from practice.

According to Posner, theory is useful only to guide empirical study: "It would be more constructive to focus on the practical consequences of such things [e.g. adjudication, democracy, policies], with theorization used only to illuminate the consequences—which is where economic theory and empirical methods of economics come in" (3). Theory is thus only valuable as a way to make investigation less cumbersome, that is, to shorten the pathways that experiment must travel to find its answers: "Pure trial and error operates too slowly to be a feasible research strategy, and this is where theorizing comes in. The theories pick out the most promising paths for experimental inquiry. But this means that theorizing is the beginning of inquiry, not its end" (32). What Posner misunderstands is that from its inception, pragmatism sought to unite theory with experience, because each is just as important as the other in guiding us to knowledge. Theory and practice are resting posts on the path to pragmatic truth. Contemporary pragmatists Roskelly and Ronald explain the classical pragmatic relationship between theory and practice in lucid terms:

> Because it is concerned with consequence, use, and human action, the heart of pragmatism rests in experience, testable conclusions, and verifiable data. It is therefore scientific, or technical, in its approach to the possibility of knowledge and truth. The strong emphasis on experience as opposed to a priori assumptions led to an interactive, symbiotic relationship between theory and practice and, just as important, an altered vision of the role of the observer, who participated in making meaning through experience and observation. ("Untested Feasibility" 618)

The symbiosis of theory and practice does not allow for a discarding of theory altogether. The classical pragmatists worked against the Western tradition of metaphysical

21

philosophy grounded in *a priori* assumptions when they insisted on the importance of experience. But Posner has allowed the pendulum to swing too far the other way, removing all theoretical insight from pragmatism; removing, as he would say, all philosophy. In their review of Posner's book, legal scholars Sullivan and Solove write:

> At the heart of Posner's pragmatism is a particular understanding of the relationship between theory and practice. For Posner, theory has little to offer practice, and he has engaged in an ongoing quest to attack academic theorists. … According to Posner, academics are insulated from the 'real' world and tend to become easily infatuated with empty abstractions such as justice, fairness, and equality. (697)

Posner may not like theory and those who engage in theoretical thought. However, complete understanding and application of the tenets of pragmatism requires respect for and use of both theory and experience. For, it is only through theory and reflection that we are able to learn from our experiences and make use of new experiential knowledge. Peirce calls this moment of learning the "irritation of doubt"; Jane Addams calls it "perplexity." Dewey calls change that occurs upon the irritation or perplexity "readjustment." Wherever one turns in classical pragmatism, the process of reflection upon one's experiences, of theorizing from what one has lived, is central to the pragmatic method.

Posner's discarding of the theory-practice circle unfortunately allows him to be blinded to the political ramifications inherent in pragmatism. His opinion about the relationship between pragmatism and politics is fairly straightforward: "[T]he suggestion that the pragmatic outlook favors social democracy or legal liberalism is unconvincing.

Pragmatism has no political valence" (44). Posner argues that the fact that so many

pragmatic philosophers are social liberals or progressives is merely accidental:

"Philosophical pragmatists tend … to believe that somehow their philosophy really can

clear the decks for liberal social policies, though this is largely an accident of the fact that

John Dewey was a prominent liberal" (12). Indeed, Posner goes to great lengths to draw

connections between pragmatism and National Socialism to make his point that no ethical

or moral content attaches to pragmatism, noting "the powerful vein of hard-hearted

pragmatic thinking in German jurisprudence during the Weimar and Hitler eras" (44). In

the end, for Posner, pragmatism "has no moral compass" (55). Pragmatism has only a

structural relationship to the law; "as for law's content," Posner writes, "pragmatism is

and was silent" (44). Rorty agrees with Posner on this point, writing, "Posner, a

philosophy buff who cheerfully calls himself a 'moral relativist,' is happy to endorse

Dewey's anti-foundationlist and contextualist views about knowledge, rationality, and

morality. But he thinks, rightly, that 'pragmatism has no political valence,' and that

Dewey's social hopes have nothing in particular to do with these views." (100). The

binary separation of structure from content that Posner employs to make this argument is

misleading and harmful to our understanding of not only the law, but of everything. The

originary content/form division is the mind/body split, one that dates to Plato, if not

before. Here, Posner's pragmatism slips back into metaphysics.

Cornel West, a contemporary pragmatic philosopher overlooked by Posner in his

text, makes broad claims about not only the political relevancy but also the moral

relevancy of American pragmatism in his book on pragmatic philosophy, *The American*

Evasion of Philosophy (1989). He writes:

> The distinctive appeal of American pragmatism in our postmodern moment is its unashamedly moral emphasis and its unequivocally ameliorative impulse. In this world-weary period of pervasive cynicisms, nihilisms, terrorisms and possible extermination, there is a longing for norms and values that can make a difference, a yearning for principled resistance and struggle that can change our desperate plight. (<u>Evasion of Philosophy</u> 4)

West claims pragmatism supports a "moral emphasis" and an "ameliorative impulse."

He believes that pragmatism is the social philosophy that can "change our desperate

plight" in our nihilistic world by providing "values that can make a difference."

Throughout his writings and his political work, West applies his pragmatic philosophy to

concrete social problems, arguing for a moral and ethical social progress. Roskelly and

Ronald write,

> The central proposition of North American pragmatism in the nineteenth and twentieth centuries is an insistence on precisely this relationship between belief and action, knowing and its consequences. West describes the pragmatists' provocative agenda as a "deep intellectual vocation" that "impels the major American pragmatists to be organic intellectuals; that is, participants in the life of the mind who revel in ideas and relate ideas to action." ("Untested Feasibility" 616) (citing West <u>Evasion of Philosophy</u> 6)

The organic relationship between theory and practice gives pragmatism its content.

Philosophers cannot to bury their heads in the sand; they must take the perspectives of all

people into consideration in order to reach a more accurate point of knowledge. These

tenets are part of the structure and content of pragmatism, which are, like experience and

belief, inextricable.

Contemporary legal philosopher Stanley Fish agrees with Posner regarding

pragmatism's philosophical void, writing:

> If pragmatism points out that its rivals cannot deliver what they promise—once-and-for-all answers to always relevant questions—pragmatism should itself know enough not to promise anything, or even to recommend anything. If pragmatism is true, it has nothing to say to us; no politics follow from it or is blocked by it; no morality attaches to it or is enjoined by it. (<u>Trouble with Principle</u> 295)

For Fish, there are no lofty ideals without culture, language, and society to give them

meaning—highly contingent and disputed meaning. Without principles, according to

Fish, we are left with rhetoric—principles of argumentation first compiled in an

organized fashion by Aristotle and added to ever since, tools we can use as needed (à la

the Sophists) to win the arguments we find most valuable. Of course, how we determine

which arguments are most valuable is the big question. Although there are no universal,

a priori truths, Fish suggests that one's smaller "interpretive communities" help one make

meaning of the world. These communities provide definitions for politically powerful

words such as "equality," "justice," "good," and "evil" (Fish <u>Trouble with Principle</u> 295).

Because, according to Fish, pragmatism explodes the notion of universal principles in

much the same way as his own analysis, pragmatism must yield any sense of ethics, any

content.

Fish writes that even though one may not believe in ultimate truths, but rather in inquiry, as a pragmatist does—even though one may revise one's knowledge through experience—these are simply beliefs. They remain isolated from one's actual behavior. A person still can act like a jerk, metaphysically speaking. Fish writes:

> [Y]our philosophical views are independent of your views (and therefore of your practices in any realm of life other than the very special and rarified realm of doing philosophy. If you believe that your convictions have their source not in ultimate truths or foundations but in contingent traditions of inquiry and are therefore revisable, that belief, in and of itself, will not render you disposed to revise your convictions or turn you into a person who enters into situations provisionally and with epistemic modesty. (Trouble with Principle 300)

Thus, for Fish, because one's philosophical views are stuck in the part of you that is philosophical, they have no bearing on how you act in the world. He writes, "You can give all the standard answers to all the pragmatist questions and still be an authoritarian in the classroom, a decided conservative in cultural matters, or inclined to the absolutes of theology" (Trouble with Principle 300). But in this Fish expounds a very unpragmatic philosophy, for the essence of pragmatism is bringing the everyday into philosophy and philosophy into the everyday. Pragmatism has at least one, very important principle, that even Fish agrees on: the theory-practice circle. Fish calls it having one's "convictions" rooted in "contingent traditions of inquiry" (Trouble with Principle 300). The results are the same: if one is a pragmatist, and practices philosophical pragmatism, then one's philosophy cannot be partitioned off from the rest of one's life, or from one's behavior, from how one treats other people. By definition, these things are interconnected. There

is no "doing philosophy" in pragmatism that is separate from everything else that one does. One's philosophy is integral to one's experience, and vice-versa.

Fundamental to classical pragmatism is the recognition that each person has a unique perspective on the world. This tenet began as a scientific principle, when pragmatism insisted on subjectivity of the observer in scientific practice, a revolution in scientific method at the time. In this manner, pragmatism presumed there would be human error. To compensate for error, a scientist can gather a high number of observations, or perspectives, and take an average thereof in order to gain an accurate measurement. (Menand 177).   In social terms, in a democracy, gathering the most perspectives from the most diverse number of people allows for the closest approximation of social "truth." Posner is helpful when he recognizes the perspective inherent in the judicial process, writing, "Pragmatism applied to law at most takes away from judges the claim to be engaged in a neutral scientific activity of matching facts to law rather than in a basically political activity of formulating and applying public policy called law" (46). Here Posner denaturalizes—de-*neutral*-izes—the work that judges do. He writes, though, that this is the "most" that pragmatism can do for law. He fails to take the next step, and suggest how pragmatism can help the law act in a more ethical, democratic manner toward its citizens. In her writings, Jane Addams insists on gathering the perspectives of the downtrodden when powerful people come to help. She writes, for example, regarding educating "special" children: "In discussing the problem of the special child it is, of course, necessary to consider it from the point of view of the child

who is somewhat mentally deficient, and of the child who is what we now call incorrigible and delinquent" ("Special Child" 224). Addams's choice of phrase, "of course," highlights the fact that most educators and policy makers at the time of this speech in 1908, and even through today, do not consider the points of view of children with special needs important to policy decisions regarding the education of these children. Addams's work constantly highlights the importance of taking account of perspective for gaining a correct understanding of the world.

Susan Haack, a contemporary scholar of pragmatism, has written much about the debates within pragmatic thought today. She suggests an approach for dealing with the question of pragmatist "authenticity":

> It is easy to get hung up on the question of which variants qualify as authentic pragmatism; but probably it is better—potentially more fruitful, and appropriately forward-looking—to ask, rather, what we can borrow from the riches of classical pragmatism, and what we can salvage from the intellectual shipwreck of the new. (34)

In a similar mode to that suggested by Haack, I suggest that contemporary legal pragmatism consider the fullness of classical pragmatism, especially the work of Jane Addams which has thus far been neglected, in shaping the ways that pragmatism can help judicial practice for the future.

d. Chapters Overview

The general focus of this project is the reconstruction of classical pragmatism as a useful way to solve legal problems. In order to illustrate the validity of classical pragmatic thought, I study the issues that have arisen during the long-standing debate surrounding race-conscious college admissions. Included in this study are readings of the recent Supreme Court decisions *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003), cases which recently reconsidered, reshaped, and upheld affirmative action in higher education.

Chapter One, "Peirce, Formal Equality, and the Philosophies of Affirmative Action" introduces founding pragmatic concepts and applies them to some of the fundamental issues of the debate over race-conscious college admissions policies. Using pragmatism, I question the notion of "formal equality," the value of elite colleges and universities to our democracy, and whether supposedly objective standards of consideration are preferable or indeed even possible. Chapter Two, "James, Mead, Individualism, and the Myth of Color-Blindness," examines the anti-affirmative action movement's call for individualism and color-blindness.

In Chapter Three, "Addams, Holmes, and Contemporary Affirmative Action Jurisprudence," I provide a pragmatic reading of recent Supreme Court cases dealing with race-conscious university admissions in a framework crafted from the jurisprudence of Justice Holmes and the social activism of Jane Addams. In this chapter, I show that although the Supreme Court upheld affirmative action admissions policies in *Grutter v.*

Bollinger (2003), it did so in terms that reveal a loyalty to elitist values, not a commitment to democratic representation in higher education—despite the Court's talk of "diversity." Chapter Four, "Dewey, Pragmatic Pedagogy, and Meaningful Diversity," combines readings of pragmatism and the affirmative action cases and looks for various ways that the call for "diversity" in *Grutter* might be made meaningful through pedagogical practices. Using the pragmatic educational methods of John Dewey, this chapter provides readings of contemporary pragmatists and pedagogical theorists, mapping ways that educators can make the promise of diversity provided to us by continued race-conscious college admissions a meaningful reality.

Pragmatism suggests that the more perspectives we gather, the closer we can come to a valuable, viable truth. The law as it stands in practice deliberately excludes a majority of voices from consideration. Like the courtroom, a classroom is a focal point of authority; too often the voices of those who are perceived as outsiders are excluded from places of learning. The most valuable contribution that pragmatism can make to both legal theory and pedagogy is the insistence that legal and educational insiders ensure that all perspectives be given voice. *Grutter* promises "diversity," but it is up to each of us to see the promise through.

CHAPTER II

PEIRCE, FORMAL EQUALITY,

AND THE PHILOSOPHIES OF AFFIRMATIVE ACTION

When discussion of affirmative action is couched in terms of legal "facts" or
political "truths," the underlying philosophical presumptions of the debate are lost in the
shuffle. Although I support affirmative action, many contemporary liberal defenders of
race-conscious college admissions and hiring programs have bought into the same
philosophies as those that zealously criticize these same programs. For example, both
critics and liberal supports of affirmative action agree that students admitted into college
must "merit" such admissions, in that their college admission test scores and grade point
averages must meet some pre-set standards of merit. Both sides presume the infallibility
and objectivity of these standards of merit. The U.S. Supreme Court, in its recent opinion
upholding affirmative action, *Grutter v. Bollinger* (2003), held that affirmative action
"permits consideration of race as a 'plus' factor in any given case while still ensuring that
each candidate 'competes with all other qualified applicants,'" (Grutter 335). In other
words, all applicants must be "qualified" as some baseline measure, before race can be
considered a "plus." Here, the Court which upheld affirmative action does so using the
same terms of argument employed by their opponents—those of merit, qualifications, and
standards. The result is that supporters of affirmative action are forced to walk the

minefield of "objectivity" and "merit." They have no way to account for human fallibility, history, or experience.

The debate needs to be reframed. Liberal ideology cannot support affirmative action as it stands now, for it is too invested in "formal equality" and the concepts which are its fruit. The work of Charles Sanders Peirce, a pragmatic philosopher who recognized "that in a universe in which events are uncertain and perception is fallible, knowing cannot be a matter of an individual mind 'mirroring' reality. … knowledge must therefore be social"—teaches that concepts such as equality and "objective merit" must be examined closely (Menand 200). Truth becomes a probability and a process, rather than a *telos*. Because perfect truth and knowledge are not possible, the method of study becomes far more important. Through these methods, humans make truths.

The work of C. S. Peirce is best understood in the context of the study of probabilities and statistics that emerged in the late eighteenth and early nineteenth centuries. The "law of errors," the statistical method which produces the bell-shaped curve that most are familiar with today, emerged around 1800 (Menand 177). Menand explains the law with this example from astronomy:

> If a team of astronomers wishes to chart the position of a star, and its members make a series of individual observations of that star, the results they get will almost always vary. The same problem arises when a single astronomer makes multiple observations of the same star. In fact, when we measure anything repeatedly with exactitude, we generally get discrepancies in the results. In the case of astronomy, the discrepancies can have many causes … But these causes are largely undetectable (otherwise we could correct for them). So when we don't know what is producing the discrepancies, how do we know which result is the usable one and which are the errors?

32

The basis of the law of errors in astronomy was the discovery that multiple observations of a star also tend to conform to a bell-shaped curve—as does nay group of measurements of a fixed object. … although the differences in the results are produced by chance (since none of the errors is deliberate), they nevertheless distribute themselves more or less symmetrically around a mean, and this mean can be taken as the likeliest position of the star. The reasoning is that if there is no single hidden variable, no unknown cause responsible for the discrepancies, a measurement is just as likely to be too great as it is to be too small. (179-80)

Scientists discovered that a measurement will grow more accurate—more true—with an increase in the number of observations. Thus, truth-making becomes a process: the process of gathering more and more observations of the same object until "the chances of being wrong become infinitesimal" (182). At that point, "we have arrived, if not at complete certainty, at virtual certainty" (182). Virtual certainty is provisional certainty, provisional truth, a truth that is human-made. In pragmatic philosophy, this is the closest humans can come to truth.

French scientist Pierre-Simon Laplace made the law of errors famous. C. S. Peirce's father and mentor, Benjamin Peirce, was a Harvard professor of mathematics; he studied under Nathaniel Bowditch, the man who translated Laplace's five-volume *Traité de méchanique céleste* (1798-1825), or *Treatise on Celestial Mechanics*, into English. Laplace and his followers in the study of statistics made their field hugely popular because they translated the method of study of astronomy and other scientific phenomena into the study of social phenomena (Menand 184). Because human behavior proved to be statistically predictable, probability theory supported a new type of human determinism (Menand 186). For example, by studying society in a statistical manner, probability

33

theorists shifted blame for society's ills from the individual wrong-doer to society at large (Menand 188). Probability theorists argued "that it is society, and not the individual, that is responsible for vice" (Menand 192). This determinism in turn was used to philosophically support laissez-faire politics and individualism: "nearly all the nineteenth-century champions of statistics were laissez-faire liberals" (Menand 194). Menand explains:

> What statistics seemed to show, in short, was that the market was not … an invitation to anarchy. Markets operate just the way nature does: left to themselves, they can be counted on to produce the optimum outcome over the long run. The individual pursuit of self-interest conduces to aggregate efficiency. Of course, like all appeals to natural laws as a justification for human arrangements, the "discovery" of the laws reflected the arrangements to be justified. (195)

Peirce disagreed theories of economic individualism, determinism, and self-interest, yet he was also a highly trained statistician. This paradox underlies all of his philosophical writings. Menand explains: "He believed that the universe is charged with indeterminacy; like his father, though, he also believed that the universe makes sense, and he devoted his life to devising a cosmology that would show how both of those things— the indeterminacy and the intelligibility—could be the case" (195). The bringing together of these two ways of thinking underlies pragmatic thought generally, and it can be restated this way: a search for a usable truth knowing that all truths change.

 C. S. Peirce was a mathematical prodigy, and statistics and probabilities were his territory (Menand 151). He published scholarly papers in many areas of study, including

logic, semiology, mathematics, astronomy, physics, psychology, and philosophy

(Menand 199). His philosophical work in what came to be known as "pragmatism"

began in the discussion group in Boston that he helped start in January of 1872, called the

Metaphysical Club. William James credits Peirce with coining the new philosophical

term. West explains the "three fundamental claims in Peirce's pragmatism":

> first, that the most reasonable way of arriving at warranted and valid beliefs is by
> means of scientific method; second, that scientific method is a self-correcting
> social and communal process promoted by smoothly functioning habits, i.e.,
> beliefs, upset by uncertain expectations, i.e., doubts, and whose sole end is the
> "settlement of opinion"; and third, that this scientific quest for truth is inextricably
> linked, though in no ways reducible, to the ultimate good of furthering "the
> development of concrete reasonableness," i.e. evolutionary love. (Evasion of
> Philosophy 43)

West has laid out the paradox of Peirce's thought and the solution that Peirce worked

toward. As a scientist, Peirce believed in the scientific method as the process that would

lead humans closest to truth. Yet, rather than supporting turn-of-the-century

individualism, Peirce considered human inquiry a social process, one based in a

community of observers. In order for the scientific process to function properly, the

highest number of scientific observations must be gathered, the most number of

perspectives possible. Thus, the communal aspect of science does not derive necessarily

from a good will towards others, but rather from a belief that the truth process can only

work if people work together. The perspectives are governed by method: only viable

perspectives will gather because the scientific method governs the truth-finding. One of

the necessary components of the communal process is the "self-correcting" disruption of

habit that the presence of other people and new experiences provides. Peirce calls this disruption the "irritation of doubt" ("Ideas Clear" 30). In his philosophical articles, Peirce explains just how irritation upsets habit, and then leads people to new belief—when "we find ourselves decided as to how we should act under such circumstances as those which occasioned our hesitation" ("Ideas Clear" 31). Such irritation is central to the scientific method; it leads scientists and other truth-seekers to set aside prior paradigms in favor of new ways of thinking.

In his writings, Peirce speaks of scientific truth-finding processes in everyday terms; "he demystifies the scientific method into a human affair" (West Evasion of Philosophy 43). Two early articles published by Peirce set forth the fundamental concepts of pragmatism although he does not use the word itself: "The Fixation of Belief" (1877) and "How To Make Our Ideas Clear" (1878). The concepts Peirce develops in these articles are ones that he first worked with in a paper that he first presented to the Metaphysical Club in 1872 (Menand 272). In "The Fixation of Belief," Peirce asserts that a person existing in the world with other people, especially if one lives or works in a diverse community, will encounter those whose differences challenge one's previously-held beliefs. Peirce writes, "Unless we make ourselves hermits, we shall necessarily influences each other's opinions" ("Fixation of Belief" 16). For Peirce, this communal influence is not a bad thing—rather, it leads members of a community or a society closer to truth. He suggests that "a new method of settling opinions must be adopted," and a necessary component of this method is "men, conversing together and regarding matters

36

in different lights" ("Fixation of Belief" 19). However, mere contemplation is not enough for Peirce, rather "a method should be found by which our beliefs may be caused by nothing human, but by some external permanency—by something upon which our thinking has no effect" ("Fixation of Belief" 20-21). Peirce means, of course, science, and the scientific method. He recognizes, though, that the ways the physical world affects each person "are necessarily as various as are individual conditions, yet the method must be such that the ultimate conclusion of every man shall be the same." ("Fixation of Belief" 21). He outlines the method he envisions: "The force of habit will sometimes cause a man to hold on to old beliefs, after he is in a condition to see that they have no sound basis. But reflection upon the state of the case will overcome these habits, and he ought to allow reflection its full weight" ("Fixation of Belief" 24). For Peirce, this is the pragmatic method of truth: habit upholds old beliefs, but they eventually yield to experience—scientific testing—coupled with reflection, if people seek the path of true belief.

Affirmative action challenges many previously held beliefs: about what it means to live in a "free" country, what it means to be "equal," about what it means to be "qualified." If one lifts the layers of popular speech about affirmative action one sees how much Americans take for granted in this debate. One popular argument asserts that university admissions and workplace decisions should be based strictly on merit, not on qualities like race or gender. Underlying this argument is a presumption that there are regular, objective standards of merit that can be identified and used in college admissions

or hiring.   Another presumption asserts that it is just and fair for there to be such a

limited supply of positions in elite universities leading to elite, creative, well-paying jobs

in the future. Because elite positions are in such short supply, the stakes of the

affirmative action debate are high. Members of our society are fighting over how we

give out the few, very valuable positions in our society. The naturalness of the society's

stratification that yields such an imbalance of valuable positions is never questioned.

Instead, opponents of affirmative action insist on adherence to notions of "formal

equality," an unpragmatic frame of argument that ignores all existing social structures, all

history, all context and experience.

a. Pragmatism and Formal Equality.

Stanley Fish, in a recent edition of his weekly online column for the *New York

Times*, analyzes recent developments in affirmative action law using the philosophy of

Immanuel Kant. In the column, "Revisiting Affirmative Action, with Help from Kant"

(2007), Fish writes:

> It is because Kant insists on distinguishing what works (at least in the short run)
> and what is right that he would, I believe, be against affirmative action. He would
> have said, as many opponents of affirmative action do say, that it is wrong to
> respond to past acts of discrimination by discriminating in the present, even if
> your intentions are good. If discrimination—the unequal treatment of inherently
> free and equal citizens—is to be condemned when the motives behind it (to
> preserve power or maintain a way of life) are suspect, it is also to be condemned
> when the motives behind it (to redress an historical injustice or have the student
> body reflect the diversity of America) are benign. Otherwise the calculation of
> happiness (at least by someone's lights) will have taken precedence over the
> upholding of principle. ("Revisiting")

Fish quotes pragmatist William James with the phrase "what works" (Pragmatism 36).
He contrasts Kant's philosophy of high principles—"what is right"—with a pragmatic
way of considering a problem as imbedded in history and culture. The "what is right"
way of thinking ignores context and pays attention only to the "discrimination" yielded
by affirmative action. The "what works" way of thinking insists on paying attention to
context, to history, and to "motives." However, in this passage, Fish has touched on one
aspect of the debate over affirmative action that has proven sticky for proponents of race-
consciousness in college admissions or hiring: too many people perceive affirmative
action to be "the unequal treatment of inherently free and equal citizens." Fish takes it for
granted that this is the definition of discrimination, and that affirmative action is
discrimination—he just does not see anything wrong with discrimination if it is justified.

Fish does not suggest that affirmative action is anything but discrimination or that
discrimination in this context is anything but the unequal treatment of inherently equal
citizens. With these words, Fish nods at a different, highly principled notion—that of
"formal equality." Formal equality is "equality" stripped of context, history, and culture.
It can be defined as treating like individuals alike, their likeness being judged by some
"objective" standard. The *Stanford Encyclopedia of Philosophy* provides this definition:

> When two persons have equal status in at least one normatively relevant respect,
> they must be treated equally with regard to this respect. This is the generally
> accepted formal equality principle that Aristotle formulated in reference to Plato:
> 'treat like cases as like.' … Of course the crucial question is which respects are
> normatively relevant and which are not. ("Equality")

In other words, when considering the usage of formal equality, one must ask, which standards are to be considered the controlling standards? How does one decide which qualities constitute good qualities? The closer one examines formal equality, the more the objective slips into the subjective.

An opposing notion to formal equality is "substantive equality." Using the context of sex discrimination, legal scholars Bartlett and Harris explain that substantive equality

> looks to a rule's results or effects. Formal rule equality often does not produce equal results because of significant differences in the characteristics and circumstances of women and men. Advocates of substantive equality demand that rules take account of these differences to avoid gender-related outcomes that are considered unfair. Determining what differences should be taken into account and in what ways—in short, what is fair—is not always an easy matter. Thus, substantive equality is not one theory, but several theories, reflecting multiple types and sources of difference and a number of alternative or overlapping substantive ideals. (261)

One theory of substantive equality seeks to remedy past discrimination against a disfavored group using remedial measures such as affirmative action (Bartlett and Harris 261). In short, substantive equality defines equality by taking into account historical circumstances and currently cultural contexts. Rather than suggesting that "all men are created equal" as an abstract claim, substantive equality insists that the claim be supported by evidence. This tension between the abstract definition of equality and the definition grounded in experience underlies the affirmative action debate.

C. S. Peirce recognizes humankind's tendency to provide abstract definitions or explanations of everyday occurrences. In describing Leibniz's philosophical work, Peirce writes, "on observing that the method of Descartes labored under the difficulty that we may seem to ourselves to have clear apprehensions of ideas which in truth are very hazy, no better remedy occurred to him [Leibniz] than to require an abstract definition of every important term." ("Ideas Clear" 28). Peirce examines a recent book on mechanics, wondering that

> it is stated that we understand precisely the effect of force, but what force itself is we do not understand! This is simply self-contradiction. The idea which the word force excites in our minds has no other function than to affect our actions, and these actions can have no reference to force otherwise than through its effects. ("Ideas Clear" 41)

For Peirce, our understanding of force is the consequence of our understanding of the effect of force, because force *is* its effect. The drive for an abstract definition is human fancy. Broadly put, Peirce suggests that

> I only desire to point out how impossible it is that we should have an idea in our minds which relates to anything but conceived sensible effects of things. Our idea of anything is our idea of its sensible effects; and if we fancy that we have any other we deceive ourselves, and mistake a mere sensation accompanying the thought for a part of the thought itself. ("Ideas Clear" 36)

Peirce is driving toward a method of thinking and investigating which will guide humankind toward "true belief" ("Ideas Clear" 43). Focusing on abstract terminology and definitions unattached to the physical reality of the thing defined are nearly useless

41

for Peirce's method. He writes, "Nothing new can ever be learned by analyzing definitions" ("Ideas Clear" 28).

Pragmatism requires us to ask whether there can be "equality" devoid of experience and detached from the everyday shuffle. Can equality be "formal"? Can it exist "in principle"? Using the guidelines from Peirce, it would seem that notions of some sort of *a priori* formal equality might be interesting to toss around in philosophical discussion, but since citizens of the United States do not experience equality in a formal way, it is nearly useless to try to define it or use such a notion to shape policy. Rather, in order to come to a true understanding of what equality is now, examination is required. Turning a blind eye to disparate outcomes of jurisprudential rules or legislation because principle dictates such ignorance yields exactly that—ignorance—of contemporary context and of reality. Ignoring the disparate distribution of people of color in higher education or political office or corporate America yields only ignorance. Talk of formal equality is a smokescreen.

Law professor Patricia J. Williams writes, in the context of choosing between two otherwise "equally qualified" job candidates:

> Rarely are two people absolutely equally qualified … so the judgment of equality is usually pretty subjective to begin with … and usually overlooks or fills in a lot of information that may in fact distinguish the candidates significantly (is it the same to be number one in a small class as in a huge class; is the grading done by some absolute standard, or on a strictly enforced bell curve; …). All such differentiations are matters of subjective preference, since all such "equality" is nothing more than assumption, the subjective willingness not to look past a certain point, or to accept the judgments of others (the admissions director of Harvard, the accuracy of the LSAT computer-grader). (Race & Rights 99)

According to Williams, formal equality is a myth because it chooses to ignore important facts, important context clues that affect how one person's numbers appear next to another person's numbers. When opponents of affirmative action say that hiring or college admissions should be based strictly on merit because people in our democracy should be treated equally, pragmatism forces the discussion back to the place where merit is created and asks all of the important questions about context: who decides what merit is, what counts, and why. Williams takes her critique a step further: "Even if we were talking about an assembly line, where the standard [of merit] were some monotonous minimal rather than a rarefied maximum, my critique holds that certain human characteristics are being dishonored as irrelevant—such as creativity, humor, and amiability" (Race & Rights 100). Do we as a society take for granted the qualities that we look for in candidates for jobs or places in university programs, without questioning how these qualities end up shaping professions, end up shaping society itself? Have our definitions of quality lost connection with our experience?

The constant interplay between theory and experience is fundamental to a pragmatic thought. "Experience," for Peirce, is grounded in methodical scientific study. For Addams, it is grounded the lives of the working classes of Chicago that she knew so intimately and wrote about prolifically. For pragmatic legal scholar Brian Z. Tamanaha, building upon the work of John Dewey and William James, theory has an inextricable relationship with what he calls "reality," his word for experience: "Pragmatism builds

truth and knowledge upon this relationship. Meaning, language, truth, and knowledge are

always grounded in and derived from *our meaningfully informed activities in the world*"

(58) (emphasis added). Thus, what we do is just as important as what we know, in fact,

what we do in this sense *becomes* what we know. Furthermore, pragmatic thought calls

the entire notion of objectivity into question because it recognizes the importance of

perspective. Tamanaha writes:

> while the pragmatists recognize that there is no unmediated access to the world,
> and they accept that in a certain sense the world is constituted through our ideas
> and beliefs, that it is carved up and available to us only through the prism of our
> perspective-based interests and concerns, they continue to insist that there is a
> world out there which has its own facticity, albeit one we can never have access to
> in any raw form. (60)

In other words, although pragmatists insist that a reality exists, humans do not have

unadulterated access to it, because perceptions, experiences, and beliefs shape one's

existence in the world. Each person views the world with an individual's eyes. This

should not be mistaken as a call for individualism. On the contrary, for pragmatists,

meaning is made by communities. Tamanaha continues, on the pragmatist "coherence

theory" of knowledge:

> According to the coherence theory, beliefs are true based upon their relationship
> with other beliefs, or, more broadly stated, based upon consistency with the entire
> complex of beliefs. This second element indicates that a key aspect of the inquiry
> is that it takes place within a community of investigators (identified in the
> broadest possible terms, over the long run) which indicates that for the knowledge
> to be accepted it must fit within the prevailing complex of intersubjective
> meaning… (61)

44

The consequence of this pragmatic notion of perspective is that one must question whether there can be anything like formal equality at all.

b. The "Myth of Merit"

The primary popular argument against affirmative action suggests that hiring and college admissions decisions should be based strictly on "merit," rather than on race or gender. Some states have taken this argument and turned it into law, passing ballot referendums outlawing affirmative action in public hiring, contracts, and education. For example, in November of 1996, California's Proposition 209 passed on a state ballot referendum with a 54% of the vote. It amends the state Constitution and reads, in part, "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting" (California). The proposition was initiated by Ward Connerly, at the time a Regent of the University of California. Connerly, a conservative activist, is an outspoken opponent of affirmative action. Since the passage of Proposition 209, he has led similar campaigns in other states, most recently in Michigan.

In January of 2007, the *New York Times* published an article on the "new face" of the University of California at Berkeley, a campus that the author, Timothy Egan, describes as "overwhelmingly Asian" (24). The piece, titled "Little Asia on the Hill," purports to examine the new racial breakdown of Berkeley and the University of

California system in the ten years since the passage of Proposition 209. Ultimately, it appears that Egan wishes to question whether a "pure meritocracy" is more ethical than college admissions based on "racial preferences" (27). He writes:

> If Berkeley is now a pure meritocracy, what does that say about the future of great American universities in the post-affirmative action age? Are we headed toward a day when all elite colleges will look something like Berkeley: relatively wealthy whites (about 60 percent of white freshmen's families make $100,000 or more) and a large Asian plurality and everyone else underrepresented? Is that the inevitable result of color-blind admissions? (27)

Egan wants to know whether it is ethical for state schools—which claim to serve the entire population of a state—to educate only a racially select group. He notes that blacks and Latinos are all but absent from Berkeley's campus, and the campuses of other elite University of California schools.

Egan's phrase "overwhelmingly Asian" has a decidedly doomsday tone. It is also inaccurate. At the time of this article, Berkeley's campus was 41% percent Asian. Thus, although Asians are a plurality, they are not a (overwhelming) majority. This statistic includes people of south Asian descent as well—those from India, for example—yet the students pictured in the photographs and featured in the story are all of east Asian descent. The subheadline of the article reads: "With a mandate that says merit trumps all, Berkeley finds itself looking across the Pacific for its identity. Is this the new face of higher education?" (24). This statement reveals the striking xenophobic tone of the article as a whole. The phrase "finds itself" sets up Berkeley, and the state of California which it represents, as passive victims of some sort of invasion by east Asian students, as

46

though the voters of California did not choose to eradicate affirmative action at the ballot box. Furthermore, the very framing of this statement in the form of a question creates an ominous rhetorical tone (*is this the new face…?*). Finally, Egan writes that Berkeley is "looking across the Pacific." In this he is simply incorrect. Berkeley, a state school, is educating state citizens; the students at Berkeley may be of Asian descent, but they are Californians and Americans—not interlopers from across an ocean.

There is a subtext to this article that is representative of the affirmative action debate on a grander scale. Although it is hard to ignore the xenophobic tone of the article, Egan also makes many presumptions about affirmative action: that we as a society agree on a meaning of "equality"; that there is such a thing as admission based purely on merit ("pure meritocracy"). Egan does present one opposing viewpoint which claims "the idea of pure meritocracy is bunk," because access to excellent high school education is so unevenly distributed along lines of class and race (27).

One popular anti-affirmative action argument claims that some sort of objective standard of merit, not race (or gender or class), should determine whether a person or group receives a desired position. This argument applies across the board: to spots in university classes, government jobs, and government contracts. Stanley Fish outlines the merit argument against affirmative action: "It goes like this: people should get jobs and places in college because they merit them, and neither race nor gender could be a component of merit" (Trouble with Principle 30). Fish explains how merit, although it may appear objective, is actually the articulation of a certain set of preferences: "The

trick here is to define merit narrowly—with test scores or examination results—and then stigmatize any other consideration as unwarranted preference or bad social engineering. But merit is just a word for whatever qualifications are deemed desirable for the performance of a particular task, and there is nothing fixed about those qualifications" (Trouble with Principle 30). Fish denies the possibility of objective standards of merit. Because they are created by people, standards cannot be objective, but rather represent whatever people subjectively want. In the end, "Merit is not one thing but many things, and even when it becomes a disputed thing, the dispute is between different versions of merit and not between merit and something base and indefensible" (Trouble with Principle 30).

Unfortunately, as a society we are so accustomed to thinking in terms of objective merit that it has become habit. Shelby Steele, a conservative scholar on race and a fellow at Stanford's Hoover Institution, is a firm believer in objective standards. In *The Content of our Character* (1990) he makes the classic merit-based argument against affirmative action. He does so, though, under the guise of sympathy for the depressed social position black people. He claims that many black students are accepted into American colleges and universities because of "the lowering of normal standards to increase black representation" (Content of our Character 117). By "normal standards" he seems to refer to standardized test scores and grade point averages, the supposedly objective, standardized, numerical measures of achievement that colleges and universities favor, as a pretense of fairness. The problem, according to Steele, is that "affirmative action …

tries to function like a social program. Rather than ask it to ensure equal opportunity we

have demanded that it create parity between the races. But preferential treatment does

not teach skills, or educate, or instill motivation" (<u>Content of our Character</u> 121). In

other words, Steele believes that black people, as a group, need skills, education, and

motivation, in order to merit positions in universities that are currently handed out under

a system of racial preferences. At the moment, according to Steele, those positions are

undeserved by black people as a group. Affirmative action "only passes out entitlement

by color" (<u>Content of our Character</u> 121).

Steele's argument seems to presume that skills, education, and motivation can be

gained outside of colleges and universities, since Steele acknowledges that black people

will be excluded from universities without affirmative action. This fact is also

acknowledged by the defendant in *Grutter*. The witnesses for the defendant, the

University of Michigan Law School, testified that for the class of 2000, had there not

been a race-conscious admissions policy, underrepresented minorities would have made

up 4% of the class rather than the 14.5% that actually attended that year (Grutter 320).

Steele seems to presume that once black students learn skills and gain motivation,

their enrollment will increase in higher education. But how long will this take? In

California, the consequence of ten years without affirmative action in the state university

system, as Egan explains, is that black students are virtually non-existent at Berkeley and

other U.C. schools. According to Egan's article, black students make up the following

percentage of these U.C. freshman classes: Berkeley 4%, Davis 3%, Los Angeles 2%,

Irvine 2%, San Diego 1%. California's state population is 7% black. Yet Steele seems to think that affirmative action is standing in for the basic education that black students need to succeed. So where are the programs in California to teach black students these skills to help them meet the neutral standards that are keeping them out of state universities? Could it be that affirmative action was not the real culprit, but rather an educational system that is not invested in the success of black students? California has had ten years to educate its students of color. Those students that were in second grade when Proposition 209 passed would be going to college. That is plenty of time to learn skills and motivation, but it has not happened, as the numbers at the top schools show.

The anti-affirmative action argument Steele presents suggests that test scores, grade point averages, and other measurements of "objective" merit can reveal whether a student has adequate skills, education, and motivation to succeed in college. But inherent in his words are so many variables that go unquestioned. How are colleges reading the results of standardized tests? How are they valuing grade point averages? Are there other qualities that would predict student performance that are being ignored? As Fish explains, some schools have chosen to redefine what merit means:

> Some medical schools now decline to certify aspiring doctors who have proven themselves technically but lack the skills that enable them to relate to patients. These schools are not abandoning merit but fashioning an alternative conception of it rooted in an alternative notion of what the job requires. (Trouble with Principle 30)

50

The merit argument presumes that there is such a thing as objective merit at all; that there are such things as skills, education, and motivation required for higher education that policy makers can point to and measure. Patricia J. Williams writes that "standards are nothing more than structured preferences" (<u>Race & Rights</u> 103). In the end, they are simply the preferences that come to look normal and cease to be questioned.

In her discussion of affirmative action, political scientist Iris Marion Young explains the "myth of merit" this way:

> A widely held principle of justice in our society is that positions and rewards should be distributed according to individual merit. The merit principle holds that positions should be awarded to the most qualified individuals, that is, to those who have the greatest aptitude and skill for performing the tasks those positions require. (200)

This principle of merit seems so commonsensical as to be beyond question: the best person should get the job. However, as Young points out, "Use of a principle of merit to allocate scarce and desirable positions in a job hierarchy, and in the educational institutions that train people for those jobs, is just only if several conditions are met" (201). The first of these conditions is that "qualifications must be defined in terms of technical skills and competence, independent of and neutral with respect to values and culture" (201). Young defines technical competence as "competence at producing specified results" (201). In other words, only if a group can be certain that the requirements for a job or a college spot are free of cultural norms can it be certain that the decision is actually based on merit.

The problem with using objective standards, according to Young, is that *everything* humans define derives from values and culture. In pragmatist terms, the word for "culture" is "experience." For example, Menand explains that when John Dewey published *Experience and Nature* in 1925, "Dewey used the term 'experience' in that book exactly as [Oliver Wendell] Holmes had used it forty years earlier in the famous opening paragraph of *The Common Law*—as a name for culture" (437). In "How to Make Our Ideas Clear," Peirce provides an example of the function of experience in pragmatist philosophy. He writes, "There is absolutely no difference between a hard thing and a soft thing so long as they are not brought to the test" ("Ideas Clear" 36). He describes a situation in which "a diamond could be crystallized in the midst of a cushion of soft cotton, and should remain there until it was finally burned up" ("Ideas Clear" 36). He asks, rhetorically, "what prevents us from saying that all hard bodies remain perfectly soft until they are touched" ("Ideas Clear" 37). Peirce is pushing towards a conclusion that questions the very existence of *a priori* knowledge without testing in experience: "This leads us to remark that the question of what would occur under circumstances which do not actually arise is not a question of fact, but only of the most perspicuous arrangement of them" ("Ideas Clear" 37). The diamond in the cotton cushion teaches us about the importance of context: how objects derive their meanings by what lies around them. For Peirce, this scientific context could be called experience; in human terms, it can be called culture. We can only learn about the diamond by bringing it into contact with other substances. At the same time, the only knowledge we can have about the

diamond is contextual. We do not have knowledge of the diamond disengaged from comparisons to the hardness or softness of other materials. There is no "objective," decontextualized standard of hardness. An object can only be "as hard as" something else, a measurement that is imbedded in context.

Merit does not exist in a cotton cushion, but rather derives from standards written in a highly contextual environment. Merit does not exist *a priori*. Hiring managers or college admissions counselors can only set standards based on prior systems of measurement; they can only require that new applicants be "as good as" someone else—a highly contextual, subjective standard. The standard by which others are measured is not any eternal standard of the good, it is merely another human circumstance. Thus, it is impossible to design job qualifications or merit standards for a university that are culture- or value-free. According to Young, when this is the case, the resulting standards must be unjust: "If merit criteria do not distinguish between technical skills and normative or cultural attributes there is no way to separate being a 'good' worker of a certain sort from being the sort kind (*sic*) of person—with the right background, way of life, and so on" (201). In the end, Young explains, "The idea of merit criteria that are objective and unbiased with respect to personal attributes is a version of the ideal of impartiality, and is just as impossible." The root of the problem, as Young points out, is that these merit criteria are used to legitimate unjust hierarchies, in jobs and schooling, hierarchies that programs such as affirmative action work to dismantle.

53

Before the United States used a hierarchy of merit, it used a hierarchy of race. White people were considered to be valuable members of American society than black people. This system does not hold any more, at least not in a *de jure* fashion, so we have a new system, the merit system. Except the merit system is not exactly new; it is still highly entangled with the prior racial caste system. When college admissions directors and hiring managers look to their standards, their highly contextualized, culturally-grounded standards, they are enacting standards that are a carryover from the prior system. The model student did not suddenly change when Harvard College was racially desegregated or when women were admitted. One day black students were admitted, yes, but the standards existed prior to their admission. These standards were crafted by white men for white men who bore their own system of values. In this way, the hierarchy of merit has stepped into the shoes of the hierarchy of race. Young explains the relationship between merit and hierarchies in America: "[The merit] principle is central to legitimating a hierarchical division of labor in a liberal democratic society which assumes the equal moral and political worth of all persons. … The unjust hierarchy of caste is to be replaced by a 'natural' hierarchy of intellect and skill" (200). The problem in practice is the unjust hierarchy that the myth of merit supports.

The myth of merit has justified hierarchies in the United States workforce and educational systems for decades. It has yielded, for example, a small minority of elite universities which receive astronomical financial resources and a majority of vocationally-minded schools which receive few resources. This hierarchy is supposedly

justified by the objective standards of students' grades and scores and the performances of professors. Without examining the standards of merit by which we justify our hierarchical system of education (and the workforce it supplies), we merely replicate the hierarchies with each new generation of students and workers. Democracy demands the experiences and voices of all citizens be given equal value in our educational system. If a portion of the population remains unrepresented in our public schools, then their experiences remain unrepresented as well. If a population's cultural history is elided and suppressed, rather than embraced and studied, then their experiences are elided and suppressed.

The problem with Young's critique, as insightful as it may be, is that she fails to provide much of a solution at the end of her deconstruction of the current standard of merit in our society. If what we do now is not fair, what would be a fair way to award spaces in colleges and universities? Young takes her critique a step further, and suggests dismantling the system of elite universities and vocations altogether, as these structures support unjust class hierarchies.

Like truth, merit can be defined provisionally using pragmatism. In order to continue to function, universities will need to continue to make admissions decisions, and they will need standards in order to cull applicants. If pragmatism debunks objective merit, and subjective merit is unworkable by definition, perhaps there can be a third way. Merit can be filled with provisional value—with provisional truth. Pragmatism teaches us that experience, *our meaningfully informed activities in the world*, coupled with

methodical and sound study and openness to perspectives, can lead us on the path to a contingent vision of merit. For example, it is no secret that the most accurate predictor of a student's performance on the Scholastic Aptitude Test (SAT) is the income of the student's parents. "According to the College Board, which administers the SAT, test scores improve with family income" (Gelpi). Yet, Berkeley still relies heavily on test scores in admissions. Egan notes that most white students come from wealthy families; yet he is incorrect that the admissions policy is based purely on merit: experience shows that it favors those who are wealthy. Furthermore, in our society, in which people of color are disproportionately poor, the test favors those who are white. By granting power to a test such as the SAT which displays a bias so obvious that its own administrators announce it to the world, universities do not use experience to supply a useful meaning to "merit."

c. The Elite Pie.

Cornel West, in his popular book *Race Matters* (1993), describes the history of affirmative action this way:

> This historic role of American progressives is to promote redistributive measures that enhance the standard of living and quality of life for the have-nots and have-too-littles. Affirmative action was one such redistributive measure that surfaced in the heat of battle in the 1960s among those fighting for racial equality. (Race Matters 93)

With these words, West identifies the stakes of the affirmative action debate in a way most Americans would recognize: there are some people in U.S. society who possess more wealth and power than others, and those in favor of affirmative action see this unequal distribution of wealth and power as unjust. Thus, affirmative action seeks to redistribute access to education and jobs to align with progressive ideals of justice. Since there are only a very limited amount of highly desired items—positions in elite college classes, valuable jobs, government contracts—such redistribution necessarily takes away from some people in order to give to others. Simply put, the pie of elite jobs, contracts, and college spots is small, everyone wants a piece of this pie, and affirmative action makes powerful people angry because it interferes with the portion they are accustomed to receiving. Of course, the status quo makes other people angry too, but those people are poor, disenfranchised, and underrepresented.

For West, affirmative action is about distribution, about money, about class. He writes, "If I had been old enough to join the fight for racial equality in the courts, the legislatures, and the boardrooms in the 1960s …, I would have favored—as I do now—a class-based affirmative action in principle" (Race Matters 95). West claims that the redistribution accomplished by affirmative action is contrary to traditional capitalist aims: "Every redistributive measure is a compromise with and concession from the caretakers of American prosperity—that is, big business and big government" (Race Matters 94). Thus, for West, there is a conflict between unfettered capitalism, represented by "big business," and affirmative action, a redistributive measure that resembles of anti-

capitalist wealth-sharing. However, West's language of redistribution is misleading.

Affirmative action is not a socialist, nor even progressive, program. It was originally

designed to work within a capitalist system. It aims to create representative social

stratification within racial groups. Affirmative action does not work to break down social

stratification. The way it works now, affirmative action remains a program designed to

maintain hierarchies of poverty and wealth. In this sense, it is not a true "redistributive

measure."

West's arguments in favor of affirmative action, although they claim to be

progressive, are in fact firmly lodged in liberal capitalist principles. His cultural critique

does not include the larger social structures within which affirmative action has been

limited. For example, West writes that he only favors race-based (and gender-based)

affirmative action because he sees such measures as practical, whereas class-based

affirmative action would be too difficult to implement. In some ways, his language is

recognizably pragmatic, for he is looking for a policy that works:

> [I]n the heat of battle in American politics, a redistributive measure in principle
> with no power and pressure behind it means no redistributive measure at all. The
> prevailing discriminatory practices during the sixties, whose targets were working
> people, women, and people of color, were atrocious. Thus, an *enforceable* race-
> based—and later gender-based—affirmative action policy was the best possible
> compromise and concession. (Race Matters 95)

Race-based affirmative action is a system that works, a stand-in for a class-based system

which would be too difficult to enforce, according to West. Choosing an enforceable

system of redistribution—one based on race—even if it isn't perfect, is better than one

that is perfect in theory—one based on class—but unenforceable. For West, race and gender are imperfect stand-ins for class in an affirmative action system. He accepts the stand-ins, because the system is workable. But it is unclear, according to West, why a race-based system is imperfect. West says he prefers a class-based system, but does not specify why, simply saying he favors it "in principle," nor does he explain why it would be difficult to enforce. Yet, at the same time, West writes that the discrimination against people of color and against women has been "atrocious." It would seem that this atrocious discrimination justifies affirmation action based on race and gender. People of color have been and continue to be discriminated against because of their skin color, whether or not they are poor. The internal conflict in West's critique arises because West has bought into the prevailing justification of affirmative action: that it exists to redistribute resources, to divvy up the elite pie, that is, to distribute spots in elite colleges that will then yield spots in elite professions; to distribute elite government contracts and jobs. Affirmative action, as it stands now in public discourse, leaves hierarchical wealth structures unquestioned and undisturbed. The goal of affirmative action is to make these wealth structures representative of the racial makeup of the general population, not to redistribute wealth.

Young provides an insightful critique of affirmative action that questions what she calls the "distributive paradigm" (198). She writes, "While distributive issues are important concerns of social justice, an approach that focuses solely on distribution tends to obscure questions of the justice of social institutions at least as important as

distributions" (198). She cites affirmative action advocate Richard Wasserstrom as a

"representative of those who conceptualize affirmative action as an issue of distributive

justice":

> There is, at present, a maldistribution of power and authority along racial and
> sexual lines that is part of the social structure. … To the degree that the present
> distribution of services and goods is unfair to members of these groups
> [nonwhites and women], the distributional change is justifiable simply because it
> is now a more just distribution. (Wasserstrom)

Young acknowledges that affirmative action does have some success in redistributing

"desirable positions" referred to by Wasserstrom to people of color and women, people

"who otherwise probably would not get them" (199).

Young and Wasserstrom agree that principles of formal equality should be

"violated in order to produce more just patterns in the distributions of positions," that is,

in order to create substantive equality (Young 199). But preferential treatment does not

solve the real problem identified by Young: "the basic structure of group privilege and

oppression in the United States." She elaborates:

> Since these programs [affirmative action programs] require that racially or
> sexually preferred candidates be qualified, and indeed often highly qualified, they
> do nothing directly to increase opportunities for Blacks, Latinos, or women whose
> social environment and lack of resources make getting qualified nearly impossible
> for them. (199)

Young asserts here that affirmative action programs do not help those who need the most

help—those that are most oppressed by poverty, lack of education, and lack of

opportunity. "Qualified" is a subjective standard set by people entrenched in positions of power, and the only way to become qualified is to pass through the gateways that these people guard with standards and qualifications—a catch-22 that reveals the interconnectedness of the problem of the "pure meritocracy" in a world of elite hierarchies.

In order to be effective, the philosophy of affirmative action must be a three-part process. First, it must provide opportunities to people who are denied access to social, political, and financial power: a redistributive measure. As the California experiment has shown, waiting around for change to happen has not worked. Steele may criticize affirmative action for acting as a "social program," but he has not adequately explained why it is not needed, particularly in light of the evidence to the contrary. Secondly, the philosophy of affirmative action must examine standards and qualifications that claim to be objective in light of the cultural context from which they arise. This pragmatic examination of standards will reveal whether they have discriminatory consequences, such as the examination of the SATs that revealed the test's privileging of its wealthy takers. Finally, the philosophy of affirmative action must question hierarchical social institutions and structures that prevent the democratic participation of each individual in U.S. society. The goal of this philosophy and its attendant social labor is not some abstract notion of justice, a Kantian principle lodged in the ether. Rather, it is possible to see, through careful observation, with an open mind, the ways in which in our society racial difference is viewed as deviant from the norm of whiteness. The goal of this

project, then, is for racial difference not to disappear, but rather to no longer be the cause of hurt. Being black should not suggested that one tends to receive a sub-par public education and being Asian should not mean that one tends to be targeted with xenophobia. Justice, too, can be contingent, yet a no less meaningful goal for its contingency.

CHAPTER III

JAMES, MEAD, INDIVIDUALISM,

AND THE MYTH OF COLOR-BLINDNESS

a. James and the Force of the Individual

Cornel West, in his book on pragmatism, describes William James this way:

In short, he is an authentic American intellectual frontiersman, not so much staking land in a wilderness but rather, like Mark Twain's Huckleberry Finn, expanding the moral possibilities of individuals on a raft that floats near land and society yet never really banks for long. In an important sense, experience is a river—a set of actions and reactions connected with ethical purpose. Yet, in contrast to Emerson, James is not a detached contemplative man of the spirit, but rather an attached restless patrician of the street. (Evasion of Philosophy 55)

As West describes, James was interested in the hustle and bustle of humanity; his work

takes Peirce's scientific method and pragmatism and "extends them to our personal and

moral lives" (Evasion of Philosophy 55). As opposed to the model provided by Emerson,

that of an isolated thinker, James's pragmatism took for granted that humans are social

creatures. In this way, James reveals a similarity to Peirce, who believed scientific

discovery was a communal process.

Although there are differences between the work of Peirce and James, the

similarities are far more significant: "Both shun the Cartesian problematic; both turn

away from foundations, certainties, and bases and toward effects, consequences, and

practices; and both view pragmatism as a method for clear thinking, not a new

philosophy" (<u>Evasion of Philosophy</u> 56). As scientists—James was a psychologist—both thinkers "were preoccupied … with method, with how experience is embodied, might be accounted for and used toward the end of understanding" (Roskelly and Ronald <u>Reason to Believe</u> 86). Ultimately, as pragmatists, both Peirce and James "wished to find a way to mediate between experience and belief. … They were also deeply invested in reconciling belief and doubt" (<u>Reason to Believe</u> 86).

Prior to William James, pragmatism was a topic of discussion among a small group of thinkers in Boston. After he spoke on it at the University of California at Berkeley in 1898 and published his book *Pragmatism* in 1907, the term and its attendant ideas lodged themselves in America's popular consciousness. James brought pragmatism out of Peirce's laboratory and into the street. Although Peirce was hardly grateful—Peirce distinguished his own line of thinking by changing the name to "pragmaticism"—James's work bears great force in the larger community of American thought.

Mediating dualities was a special hobby of James: he favored the "juxtaposition of exorbitant polar positions" (West <u>Evasion of Philosophy</u> 57). James enjoyed identifying a middle ground between extremes. For example, his project in *Pragmatism* was to find a third way between what he called "rationalism" and "empiricism." Another such conflict that arises in James's work is between the individual and the community. West critiques an apparent tendency of James to focus on the force of the individual: "James's emphasis on heroism is his way of revising Emerson's notion of power. Like Emerson, he focuses mainly on the energies of individuals. Yet James is even more

anthropocentric than Emerson; man truly is the measure of all things for him" (<u>Evasion of Philosophy</u> 58). West observes that, because of his focus on the strength and accomplishments of individuals, James is not a proponent of social change like his fellow pragmatists such as Dewey and Addams:

> For James, the moral development of human personalities is related to but far from determined by social circumstances. Like Emerson, he is prohibited by his individualism from taking seriously fundamental social change; instead, he opts for a gradualism supported by moral critique. (<u>Evasion of Philosophy</u> 60)

West attributes James's outlook to his social circumstances:

> James's position is symptomatic of his class background, family upbringing, and personal temperament. The crises he encountered were personal and existential, not political or economic. … James was preoccupied with the state of his and others' souls, not the social conditions of their lives. (<u>Evasion of Philosophy</u> 60)

West describes James as a wealthy son detached from the hustle and bustle of social reality, aloof from the streets and from a wealth of diverse experiences that could challenge habit and lead to pragmatic knowledge. In some ways, West's words at this moment contradict his earlier description of James as Huck Finn riding the river of experience. West's problem of interpretation arises perhaps because James's language in his writings is sometimes ambivalent, treading both sides of an argument, when he takes on his role of mediator of binaries.

In his writings on individuals and communities, James straddles the line between favoring the force of the individual and the force of communities. In the end, though, he

insists on the importance of both in the creation of social change. In "Great Men and Their Environment" (1880), James writes:

> Thus social evolution is a resultant of the interaction of two wholly distinct factors,—the individual, deriving his peculiar gifts from the play of physiological and infra-social forces, but bearing all the power of initiative and origination in his hands; and, second, the social environment, with its power of adopting or rejecting both him and his gifts. Both factors are essential to change. The community stagnates without the impulse of the individual. The impulse dies away without the sympathy of the community. ("Great Men" 182)

Although, as West asserts, James lays great store by the power of the individual to create social change, the main emphasis of this passage, and of the essay as a whole, is on "interaction" between two separate yet equally important forces: the individual and the community. The individual and community are as inextricable in James's philosophy as belief is from experience. The social shapes the individual, but the individual in turn shapes society. Thus, the relationship between the individual and community is reciprocal.

b. Mead, the Social Group, and Affirmative Action

Menand writes that George Herbert Mead was "Dewey's best friend at Michigan, whom [Dewey] later brought to Chicago, … a former student of William James's, and one of the founders of social psychology, a field premised on the idea that selfhood is a function of one's relations with others" (304,). This notion of the reciprocity of the self and others in forming what Mead calls "self-consciousness" can help negotiate the

66

current legal arguments between the call for individual consideration which been raised against those who work for civil rights for people of color as a group ("Self and Social Control" 190,). For, in the end, one is always an individual and a member of a group—or groups—at the same time. Does the idea of reciprocity between individual and social group provide any answers for the current debate over race-conscious admissions policies to colleges?

In the debate over affirmative action, the conflict often arises over individual remedies versus remedies for groups or communities of people. Opponents of affirmative action charge that the broad-based remedy of "racial preferences" is "group-think," which is, as Stanley Fish explains, "contrary to the American tradition of regarding persons as individuals" (<u>Trouble with Principle</u> 31). Fish continues:

> The "group perspective" is rejected both as a way of assigning responsibility (it is individuals who discriminate, not society or patterns of history) and as a way of identifying the victimized (it is individuals, not groups, who are harmed). But this insistence on what the *Adarand* decision calls an "individualized showing" of harm does not correspond to the manner in which the harms were inflicted and experienced. Blacks were not historically discriminated against one by one but as a group, by persons who had the entire African-American population, not particular members of it, in mind. And those who experienced discrimination did not do so as the result of being individual targeted (although that of course happened more than occasionally) but as the result of living in a society whose general and impersonal structures worked ceaselessly to their disadvantage. (<u>Trouble with Principle</u> 31)

In other words, to forbid plaintiffs seeking judicial remedies for racism from using evidence of racism against groups makes no sense because the nature of racial discrimination is that it targets individuals because of their group membership. To force

67

a plaintiff to only show acts by individuals against the plaintiff as an individual misunderstands, perhaps deliberately, the very nature of racism.

The U.S. Supreme Court, however, requires just this individual showing. The decision *Adarand v. Pena* (1995), referenced by Fish in the above passage, examined a challenge to a provision of the Small Business Act which states it is "the policy of the United States that … small business concerns owned and controlled by socially and economically disadvantaged individuals, … shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal Agency" ("SBA" 8(d)(1)). Under the SBA, if a business is able to show social and economic disadvantage, then it qualifies for special consideration for government contracts. However, under certain provisions, the SBA allows a presumption of social disadvantage if a business owner is a member of an ethnic group as provided in the statute. Additionally, the showing of economic disadvantage is less rigorous for members of these groups. In *Adarand*, the lower court upheld the SBA provisions, applying a Supreme Court decision, *Metro Broadcasting v. FCC* (1990), which gives greater latitude to "benign" discrimination intended to remedy racism. Justice O'Connor, writing for the slim *Adarand* majority, did not produce much of an opinion regarding the underlying conflict in *Adarand*: she simply vacated the lower court's opinion and sent it back to the lower court for reconsideration. The major change in law occurred because the Supreme Court overturned the holding of *Metro Broadcasting*. In overturning the case, O'Connor observes:

> The three propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race—a *group* classification long recognized as "in most circumstances irrelevant and therefore prohibited,"… should be subjected to detailed judicial inquiry and ensure the *personal* right to equal protection of the laws has not been infringed. (Adarand 227)

Thus, the Supreme Court has eliminated the possibility of benign discrimination in government contracts and hiring, choosing instead to subject all race-conscious programs to the same level of judicial suspicion, no matter what the motives or consequences of the program may be.

Philosophically, the Court is able to treat all race-conscious programs the same way because it deliberately excludes social context from its consideration. Programs designed to remedy discrimination and programs designed to exclude or injure a disfavored group look the same in the eyes of the Court when history and context are erased. Removing context includes removing an individual plaintiff's group membership. However, in reality, a black person comes before the law not as an individual, but rather as a person positioned in the context of structural and governmental discrimination against black people both historically and currently. In this way, all individuals come before the law bearing their group identities with them. This powerful context does not necessarily fully limit our agency as individual persons, however, it is important to observe that history and society can exert pressures on individuals and the legal system

that we as a society are not always aware of. By gaining awareness of these pressures,

individuals and a society can work to change them.

Shelby Steele, a vocal opponent of affirmative action, attacks race-conscious

programs by attacking group consciousness in favor of the "individual." Group-based

solutions such as affirmative action, for Steele, not only do not work, but are in the end

hurtful because they deny a person's ability to be an individual. In his book *The Content*

of Our Character (1990), Steele claims that the benefits of affirmative action programs

for the poorest and most oppressed members of society are shaky at best: "Racial

representation is not the same as racial development, yet affirmative action fosters a

confusion of these very different needs. Representation can be manufactured;

development is always hard-earned" (Content of our Character 116). Here, Steele

accurately describes affirmative action's current goal of gaining racial representation

within America's existing class structure. But he also quite flippantly denies the

possibility that opportunities provided by race-conscious programs provide just the

development he seeks. Furthermore, rather than providing alternatives or modifications

to race-conscious programs, Steele attributes a multitude of negative ramifications to

affirmative action and suggests scrapping it. For example, according to Steele,

affirmative action creates "demoralization" and "enlargement of self-doubt" in its

beneficiaries (Content of our Character 116). It also "undermines their ability to

perform" (Content of our Character 117-18). Astonishingly, Steele does not hold racist

employers responsible for preferential promotions and hiring of white employees.

70

Instead, Steele justifies racism and the racial glass ceiling in the workplace by blaming affirmative action: "Affirmative action makes a glass ceiling virtually necessary as a protection against the corruptions of preferential treatment" (Content of our Character 120-21). His words beg the question: what was the explanation for the glass ceiling that existed before there was affirmative action?

In his book, Steele does not provide much support for these tenuous arguments against affirmative action. Stanley Fish easily debunks the suggestion that affirmative action lowers self-esteem of its beneficiaries. The argument

> has little statistical support and is dubious psychology. Some beneficiaries of affirmative action will question their achievements; others will be quite secure in them; and many more will manage to have low self-esteem no matter what their history. Affirmative action is a weak predictor of low self-esteem, and even if there were a strong correlation, you might prefer the low self-esteem that comes along with wondering if your success is really earned to the low self-esteem that comes with never having been in a position to succeed in the first place. (Trouble with Principle 32-33)

For black students arriving on campuses of predominantly white universities, the challenges to self-esteem are plenty. Low self-esteem can arise from the history and tradition of exclusion of black students and other students of color from the culture and community of the university. Low self-esteem might also arise from white students accusing black students of gaining admission merely because of affirmative action, whether or not such accusations are true. Low self-esteem can arise because black students and other students of color are often treated as outsiders on white campuses, whether or not they attend college in a jurisdiction that permits affirmative action.

71

In an article for *Harper's Magazine*, "The Age of White Guilt and the Disappearance of the Black Individual" (2002), Steele provides a more complex explanation for the arguments he puts forward in his book. Steele focuses on a conflict between individual and group identities, describing what he calls the "protest-group identity" that black people have embraced since the civil-rights era ("Age of White Guilt" 35). The foundation of Steele's argument suggests that by focusing on their victim status as a group, black people are locked in a self-imposed cycle of underachievement. Black individuals, specifically intellectuals, who may otherwise achieve true greatness are unable to do so because of loyalty to their oppressed racial group. Such intellectuals may have the "moral glamour" of being related to "an oppressed group's liberation struggle" ("Age of White Guilt" 37). But "one ceases to be a mere individual with a mere point of view and becomes, in effect, the embodiment of a moral imperative" ("Age of White Guilt" 37). However, Steele explains, "This is rarely done consciously, as a Faustian bargain in which the intellectual knowingly sells his individual soul to the group. Rather the group identity is already a protest-focused identity, and the intellectual simply goes along with it" ("Age of White Guilt" 37). What is worse, according to Steele, due to this protest-focused identity that black people have adopted, the group "mistrusts individualism because free individuals might jeopardize the group's effort to activate this liability"—that is, "white liability" for racism in America ("Age of White Guilt" 35).

Steele uses many powerful words in these passages, words that reveal the key to his argument. What exactly does he mean by "individual" and "individualism," and in

particular, by "*free* individuals"? Is it true, as he claims, that "There are, in fact, no races that need help; only individuals, citizens" ("Age of White Guilt" 42)? Is there such a thing as a "self-made individual" ("Age of White Guilt" 42)? Steele's fundamental view on individuality underlies his argument and should be studied closely, for it is a common argument for those who are opposed to affirmative action.

At the beginning of the article, Steele tells the story of his coming-to-consciousness as a child:

> One day back in the late fifties, when I was ten or eleven years old, there was a moment when I experienced myself as an individual—as a separate consciousness—for the first time. …
> I was struck by a thought that seemed beyond me. I have tried for years to remember it, but all my effort only pushes it further away. I do remember that it came to me with the completeness of an aphorism, as if the subconscious had already done the labor of crafting it into a fine phrase. What scared me a little at the time was its implication of a separate self with independent thoughts—a distinct self that might distill experience into all sorts of ideas for which I would then be responsible. That feeling of responsibility was my first real experience of myself as an individual. ("Age of White Guilt" 33)

Two elements of this passage are particularly striking, especially in light of the article as a whole. First, Steele's coming-to-consciousness is spurred not by an external experience, a collision with the world outside of himself, but rather by a "thought" that springs forth unbidden from his own mind. In many ways, Steele's moment is a restatement of Cartesian *cogito*: by thinking, the child Steele realized he was a being. Secondly, Steele unpacks the experience in terms of individual responsibility, nicely

73

setting up the rest of the article which is an indictment of the black community for its shirking of responsibility for its faults.

What is most interesting about this narrative from the perspective of pragmatism is that the spur of internal thought, apparently welling from an individual self and not from interaction with any outside forces, creates the young Steele's coming-to-consciousness. Classical pragmatists, for whom the study of human psychology was a wellspring for philosophical ideas, recognized the social nature of human identity formation. For example, in "The Social Self" (1913), George Herbert Mead studies the creation in every person of a "subject" consciousness and an "object" consciousness. Mead calls these two consciousnesses the "I" and the "me": "the self can not appear in consciousness as an 'I,' that it is always an object, i.e., a 'me'" ("Social Self" 374). These two consciousnesses interact: "If the 'I' speaks, the 'me' hears" ("Social Self" 375). Fundamental to the creation of these two separate consciousnesses, what we today might call the creation of self-consciousness, is the creation of a social self. The "me," the object-self, is also the self that other people see and act upon, it is "the object of the social conduct of others" ("Social Self" 375). On the other hand, "The 'I' of introspection is the self which enters into social relations with other selves" ("Social Self" 375). Mead writes:

> [I]t is only as the individual finds himself acting with reference to himself as he acts towards others, that he becomes a subject to himself rather than an object, and only as he is affected by his own social conduct in the manner in which he is affected by that of others, that he becomes an object to his own social conduct. ("Social Self" 375)

74

In other words, in order for self-consciousness to begin, a person must recognize that she herself is a person in the world like all other people in the world; she must step back and consider her self the way she considers others. This process is fundamentally social, as the underlying process of considering oneself is modeled after the consideration of other people. Thus, introspection, for Mead, is a function of humanity's social nature, despite that introspection has to do with a person communicating with and examining one's own being. Mead explains further:

> The self which consciously stands over against other selves thus becomes an object, an other to himself, through the very fact that he hears himself talk, and replies. The mechanism of introspection is therefore given in the social attitude which man necessarily assumes toward himself, and the mechanism of thought, in so far as thought uses symbols which are used in social intercourse, is but an inner conversation. ("Social Self" 377)

Even though introspection involves the self examining itself as an object, the process is, in the end, social, in its function and purpose.

In Steele's coming-to-consciousness narrative, he writes that, as a ten or eleven-year-old, "I experienced myself as an individual—as a separate consciousness—for the first time," equating being an "individual" with possessing self-consciousness ("Age of White Guilt" 33). In his work, Mead describes in particular a child's experience with self-consciousness:

> Thus, the child can think about his conduct as good or bad only as he reacts to his own acts in the remembered words of his parents. Until this process has been

75

developed into the abstract process of thought, self-consciousness remains dramatic, and the self which is a fusion of the remembered actor and this accompanying chorus is somewhat loosely organized and very clearly social. Later, the inner stage changes into the forum and workshop of thought. ("Social Self" 377-78).

In other words, the child that lacks self-consciousness per se can only step outside of itself and view its actions from the perspective of an absent, imagined parent-character. It is the moment of transition from this dramatic stage into the "workshop of thought" that Steele recounts in his narrative. But instead of describing a social experience of identity formation, in his narrative Steele emphasizes the power of an individual, Cartesian thinker: "I was struck by a thought that seemed beyond me. … it came to me with the completeness of an aphorism" ("Age of White Guilt" 33). For Steele, the self-consciousness process is not social, but rather individualistic, both in process and in purpose. Now that he is self-conscious, Steele would be "someone who would have to navigate a separate and unpredictable consciousness through a world I already knew to be often unfair and always tense" ("Age of White Guilt" 33). This navigation would be done as an individual, not a member of a social group.

For Steele and his argument, it is very important that his childhood coming-to-consciousness be rooted in his individual mind of a Cartesian-like thinker, not in his social group. Steele launches from his narrative of self-consciousness into a discussion of the 1950's perspective on African American assimilation and individuality: "The idea of the individual resonated with Negro freedom—a freedom not for the group but for the individuals who made up the group" ("Age of White Guilt" 34). Steele insists that "There

was no embrace of a Negro identity, because that would have weakened the argument for our humanity" ("Age of White Guilt" 34). Steele's nostalgia for the days prior to the advent of identity politics is palpable, but it is not realistic. Identity politics, that is, claiming political and legal rights for a group of people based on similar qualities they share, grew as a strategy to work within America's equal protection system of jurisprudence. Steele's argument is also wrong-headed, because he imagines that identity is formed purely from within an individual or social group. In reality, identity is formed through a combination of forces, arising from within and without an individual or group of individuals. With this language, Steele works to draw a bright line between "individuals" and "group," as though these two things can exist separately, as though "individuals" do not always "make up the group."

Pragmatism emphasizes just the sort of reciprocity between individuals and groups, the self and the social. In "The Genesis of the Self and Social Control" (1925), Mead writes of the comprehensive intersection between individual and group behavior: "In the complex life of the group, the acts of the individuals are completed only through the acts of other individuals" ("Self and Social Control" 186). Although each individual might have a singular role to play, it is only when all of these individual roles are brought together into a group that these roles take on meaning. For Mead, and James and other pragmatists, the group and the individual are reciprocal forces, each equally important to the daily workings of society.

An important component of Steele's coming-to-consciousness narrative is the awakening of his sense of responsibility. Throughout the rest of the article, Steele argues that black people in America have shirked responsibility for the improvement of their race, writing that, after the end of the 1960s Civil Rights Movement,

> We allowed ourselves to see a greater power in America's liability for our oppression than we saw in ourselves. Thus we were faithless with ourselves just when we had given ourselves reason to have such faith [at the end of the Civil Rights Movement]. We couldn't have made a worse mistake. We have not been the same since. ("Age of White Guilt" 35)

Steele's language simplifies a great shift in political feeling from the 1960s through the 1980s through today. Steele seems to claim that the Civil Rights Movement lost steam because black people became "faithless" in themselves. This may be partially true. But it is also certainly true that America's majoritarian sympathies shifted as well. The change observed by Steele is actually a result interaction between a small group—African Americans—and the larger group of which it is a member, that is, society of the United States. Towards the end of the 1960s, majority public perception shifted to a place that believed that the "race problem" was solved. American society was no longer sympathetic to continued change. The judicial branch grew more conservative through appointments of justices unwilling to work beneficial social change through the Constitution. It was the interaction between these concrete social forces and smaller, recorded and unrecorded events in black communities that created the reality Steele observes today, not just one force or the other.

Steele's use of the term "liability" invokes the language of legal action. But Steele does not encourage such legal action as a way to solve perceived problems in the black community in America, for legal action would require looking outside the black community for a source, or cause, of problems that the black community suffers. Steele writes:

> To go after America's liability we had to locate real transformative power outside ourselves. Worse, we had to see our fate as contingent on America's paying off that liability. We have been a contingent people ever since, arguing our weakness and white racism in order to ignite the engine of white liability.

Steele reveals a logical slippage at this point by relying upon a binary to make his point. He suggests that in order to hold America at large accountable for the wrongs done to African Americans as a group, both historically and currently, black people have had to "argue their weakness." But this argument does not hold. Just because one wishes to hold another accountable for a wrong does not mean that one reveals "weakness" in order to make that claim. One can be a victim of rape or mugging, and hold another accountable for the crime, without being "weak."

Steele insists on the power of the individual, contending that any claims that black people may make as a group are dirty identity politics: "The greatest problem in coming from an oppressed group is the power the oppressor has over your group. The second greatest problem is the power your group has over you" ("Age of White Guilt" 36). Steele suggests that black America must turn toward its own resources to solve black people's social and economic problems, rather than implicating the "liability" of America

at large. This is an isolationist rejection of community, of diverse social forces coming together into a living unit. Steele suggests that black people have been focusing on their victimhood in the face of white racism, rather than on their own communities as a source of strength. This may be true in some instances, and community building is an important project for all groups in America. But Steele does not consider that both strategies are possible at the same time: reclaiming what America at large has taken and continues to take through structurally racist programs or nepotism, along with working from within to build community strength. Steele also bemoans the loss of individuality as a result of black identity politics. The particulars of his argument suggest that "blacks fell into a group identity that has absolutely no other purpose than to collect the fruits of white guilt" ("Age of White Guilt" 40). Steele does not suggest that the group identity might work as a procedure to gain needed rights under legal action. For Steele, "to be black in the age of white guilt is to be a victim who is very rarely victimized by racism" ("Age of White Guilt" 40). In other words, for Steele, legal action is no longer necessary since racism is virtually non-existent now. Worst of all, though, for Steele, "the fervor of this symbiosis with white guilt has all but killed off the idea of the individual as a source of strength in black life. All is group and unity" ("Age of White Guilt" 40).

Pragmatism can help Steele better understand the relationship between individuals and communities. His work relies upon two main arguments: first, that black Americans should reject America's aid and solve their problems; and second, that black Americans should reject their group identity as black in favor of individual identities that push race

80

to the periphery. As Mead's work in the area of social psychology shows, there is no

individual identity this is not at the same time a social identity. Steele's arguments are not

only wrongheaded but impossible, for a powerful symbiosis that defines the relationship

between individuals and communities, and small communities within large communities.

William James writes, in "The Will to Believe" (1896):

> A social organism of any sort whatever, large or small, is what it is because each
> member proceeds to his own duty with a trust that the other members will
> simultaneously do theirs. Wherever a desired result is achieved by the co-
> operation of many independent persons, its existence as a fact is a pure
> consequence of the precursive faith in one another of those immediately
> concerned. A government, an army, a commercial system, a ship, a college, an
> athletic team, all exist on this condition, without which not only is nothing
> achieved, but nothing is even attempted. ("Will to Believe" 21)

In other words, although a group is made up of "many independent persons," strong faith

in the community forms a tight bond that enables great achievement. The activities of

individual persons and the community bond are required for success; they are symbiotic.

Applying this idea to Steele's complaint reveals how his suggestions—the

rejection of the larger American community by black communities and the rejection of

black identity by individual black people—strips away a vital component of this

symbiosis of power and change. Rather, by locating black America firmly within

America at large, the transformative power and responsibility to help communities of

black Americans would be placed within everyone's hands, in the hands of black and

white people together, as a larger community. Steele writes, in an ominous tone, that

ever since black people have held America liable righting for racial wrongs, "We have

been a contingent people ever since" ("Age of White Guilt" 35).   With these words he

makes grave error. For, as James's words explain, all people are contingent: no person or

group exists alone, outside of context, culture, and community. From community,

individuals derive power and strength; from individuals, communities derive their power

and creativity.

Mead writes in his essay "A Contrast of Individualist and Social Theories of the

Self" (1927):

> The difference between the social and the individual theories of the development
> of mind, self, and the social process of experience or behavior is analogous to the
> difference between the evolutionary and the contract theories of the state as held
> in the past by both rationalists and empiricists. The latter theory takes individuals
> and their individual experiences—individual minds and selves—as logically prior
> to the social process in which they are involved, and explains the existence of that
> social process in terms of them; whereas the former takes the social process of
> experiences or behavior as logically prior to the individuals and their individual
> experiencing which are involved in it, and explains their existence in terms of that
> social process. ("Theories of the Self" 296)

Here, Mead outlines two ways of thinking about the self in a community. In the

"individual" or "contract" theory he refers to, a self exists as complete prior to its

entrance into social engagements, or "processes." The social theory which Mead

advocates suggests that individuals do not exist before joining a social organization. One

never starts from a point of origin—individuals are always already starting in certain

conditions of social life. There is no master position from which one can speak about the

individual before its place in a social reality.

Pragmatism explodes the binary of individual versus group set up by thinkers such as Steele and helps us see how communities are made up of individuals, and individuals are inescapably, and to their benefit, part of communities. When Steele writes, "One's group identity is always a mask—a mask replete with a politics," he seems to argue that a group identity is less authentic than an individual identity. Steele suggests that group identities oppress while "individualism is freedom" ("Age of White Guilt" 36). With these words he presumes that identity is ever purely individual, without group connections or markers. Yet, as Mead explains, the society we are thrown into marks us, as do the social processes that shape our identities. It is not simply one's personal decision to act as an individual rather than as part of a group.

Steele presumes that it is possible for one to present oneself to the world without a "mask," that one possesses a true face that one can show. Presumably, for Steele, this would be one's "individual" face. For Steele, the problem arises when this individual face is hidden behind the "group" face, a false face. But can an individual ever present a true face to the world, a face without a persona? And even if one did, would each person one encountered see the same face? The world "is carved up and available to us only through the prism of our perspective-based interests and concerns" (Tamanaha 60). Pragmatism suggests that because perspective shows humans the world, even if an individual could put on a true face, each person one encountered would see it differently, from a different, individual perspective. Interactions with other people are a dynamic interplay of shifting personae and shifting perspectives. There is no fixed face under a mask that could make

interactions with the world more genuine. Even if one insists that one is an individual, not a member of a race, of the group called "black people," certain members of American society—both black and white—will never see a black person as anything other than a person marked by a group identity. When Steele writes that a group mask is "replete with a politics," he implies that the mask of an individual would be apolitical ("Age of White Guilt" 36). Steele is searching for a neutral position that does not exist.

Human interdependency is central to much of pragmatic thinking. James's pragmatic precursor Peirce explained that by working and thinking in a community, humans create knowledge. John Dewey, James's pragmatic descendent, puts even greater emphasis on the power of community in shaping human thinking and behavior. Drawing from Dewey's *Democracy and Education* (1916), contemporary pragmatic scholar Charlene Haddock Seigfried writes, "Dewey calls the illusion that one can think and act alone a form of insanity that is responsible for much of the avoidable suffering in the world" ("Dilemma" 33). Thus, for Dewey, working in groups forces humans to consider others. It makes humanity more empathetic, and at the same time, stronger for it. At the bottom of Steele's call for individualism is a desire for strength and agency in a society that has, since its inception, denied power and agency to black people in some of the most brutal and inhumane ways in the history of humanity. But to claim that black people are not part of American society denies them membership in a powerful community. To claim that black people should somehow—as though it were possible—deny their membership in the community of black people, reveals, perhaps a sense of shame in

Steele's own membership in the group. The pragmatic thought of James shows that the greatest social power lies in claiming the strength of individuals along with the strength of community, and recognizing the interrelationship between them.

c. Color-Blindness or Race-Consciousness?

Steele's call for "individualism" can be read as a call for color-blindness: for Steele, people should be seen as individuals, not as members of a racial group, indeed, as not bearing any racial markings at all. Color-blindness is a social and legal approach to racial politics, rather than a practical one, that negates the importance of race. The topic of color-blindness in contemporary popular discussion grows confusing because people are actually talking about two different ideas. Color-blindness can operate on the level of current policy formation; it is "positive" color-blindness. Here, proponents of color-blindness argue that new social policies should be written in a colorblind manner because it is more fair to all racial groups. Under this argument, affirmative action, due to its focus on race, is unfair. The second way of considering color-blindness is more philosophical and "normative": it operates on the level of societal transformation. Because a black person cannot simply choose to be not-black in the eyes of American society, in order for there to be color-blindness, American society must first cease seeing color. Of course, how society reaches this point is also a point of contention.

Positive color-blindness is part of Steele's cure for the black underclass. It is a tenable solution in his eyes because, in Steele's opinion, conditions in the U.S. have

changed significantly since the end of the civil rights movement. In a column for the *Los Angeles Times*, he announces the "death of white supremacy" ("Racism"). Because white supremacy is dead, white racism has lost its teeth. Focus on white racism by black Americans, according to Steele, only serves to mask the real problems faced by black society: "underdevelopment and broken families" ("Racism"). These are problems that can only be fixed by "black effort," not by "white goodwill" ("Racism"). Part of his solution is legally enforced color-blindness in the public sphere: "Today we live in terrible ignorance that will no doubt last until we take race out of every aspect of public life—until we learn, as we did with religion, to separate it from the state" ("Racism"). Steele justifies his call for color-blindness this way: "This does not mean that racist behavior today is somehow benign. It means that today racism swims upstream in an atmosphere of ferocious intolerance. Moreover, today's racism is no longer in concert with an overt and systematic subjugation of blacks. While racism continues to exist, it no longer stunts the lives of blacks" ("Racism"). This enforcement of color-blindness includes the eradication of affirmative action. He considers the movement to end affirmative action as a movement towards "fairness": "Was the recent defeat of affirmative action at the polls in Michigan an example of racism or of an insistence on fairness?" ("Racism").

Steele's use of the word "fairness" to describe the destruction of social policy aimed to ease oppression is merely one example of the rhetorical dismantling of affirmative action. The battle of words has been fought alongside the battles in the courts

and at the polls. In the debate over affirmative action, the argument is often made—by conservatives and many so-called liberals—that we should stop making preferences based on race and instead become a colorblind society, in the interest of fairness and equality. The way to become a (normative) colorblind society, in this line of argument, is to first become a positive colorblind society. One is presumed to directly lead to the other.

In public rhetoric, affirmative action is cast as "unfair" to white people by its detractors. Affirmative action is also attacked by being renamed: the phrase "racial preferences" is often used synonymously with "affirmative action." For example, Egan, in his article on Berkeley, uses the two phrases interchangeably (27). "Racial preferences" is a phrase that seems to bear dirty connotations. For those who do not support affirmative action implicitly, but consider it a necessary evil, "racial preferences" lays those evils on the table: race, and "unequal" treatment. The Michigan Civil Rights Initiative Committee, sponsors of the 2006 "Michigan Civil Rights Initiative" (MCRI), claims that the MCRI is "a proposal to amend the state constitution to ban affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes" (MCRI). "Affirmative action" is a phrase with positive connotations. "Racial preferences" implies unequal treatment, based on race, which sounds downright unconstitutional, even un-American. Critics wisely attacked the rhetorical legitimacy of affirmative action alongside its legal viability, using the phrase

"racial preferences" to carry the negative rhetorical weight. Even Cornel West, a

supporter of affirmative action, considers it a necessary evil, a "concession." He would

prefer instead a class-based system of affirmative action. He writes, "an *enforceable*

race-based—and later gender-based—affirmative action policy was the best possible

compromise and concession" (Race Matters 95).

Critics of affirmative action also use the rhetoric of color-blindness to add

legitimacy to their own movements. Opponents of affirmative action, such as Ward

Connerly, the most vocal sponsor of the MCRI and similar proposals in California

(Proposition 209) and other states, abscond with the language of civil rights and equality

in order to make affirmative action and race-consciousness seem wrong (ACRI). Use of

the phrase "Civil Rights" to name the proposals in California and Michigan which

dismantled affirmative action demonstrates the slick rhetorical maneuvering on the part

of Connerly. Steele can call the dismantling of affirmative action "fairness" because,

from the perspective of conservative American society for whom he is speaking, and

even to many centrists and so-called liberals, affirmative action now appears unfair. It

appears unfair because reality has been changed from one in which race-consciousness

for the purpose of remedying discrimination was a social good to one in which any race-

consciousness—rather than color-blindness—is the equivalence of racism or worse,

"reverse-discrimination" against white people.

Steele insists that white supremacy is dead. He writes that his children "have

never experienced racial discrimination" (Content of our Character 111). For Steele,

Connerly, and others of their opinion, America should stop focusing on race and get rid of racial preferences. America is a melting pot, after all. We are a nation of individuals who can pull themselves up by their bootstraps—and Steele and Connerly point to themselves as examples. In this line of thought, racial group-think is only holding people of color back. Black race-consciousness is simply racism in reverse. This is the mythos that Connerly and Steele are selling. But their theory does not hold when tested against experience.

In many ways, the call for color-blindness is a call to erase significant aspects of a person's identity, those aspects represented by the signifier "race." Race may mean different things to all people in America, but it nonetheless means something to all. It is an aspect, a quality, that shapes who we are and become. The social ethics that are central to the pragmatism of John Dewey and Jane Addams asserts that we are social creatures, products of our cultural settings. Dewey, in his 1888 essay "The Ethics of Democracy," warns against considering people as abstractions, removed from their environments:

> If [the student of society] will beware of such abstractions, he will remember that men cannot be reduced for political purposes, any more than for any other, to bare figure ones, marks to be placed in rows set over against one another. A man when he comes to vote does not put off from him, like a suit of old clothes, his character, his wealth, his social influence, his devotion to political interest, and become a naked unit. ("Ethics of Dem." 189)

In other words, citizens of a democracy cannot shed their history, their culture, or their imbeddedness in their society and community when they make democratic and social

89

decisions. Dewey would consider the call for color-blindness in policy moot and wrongheaded, for it is impossible to extract individuals from their cultural milieu. America may some day become a culture that no longer sees race, but we are not that culture now. It does not make sense to legislate as though we were.

A sleight-of-hand occurs through the popular and political discourse of color-blindness. Black people are told, by people like Steele, that if they would stop focusing on race, then race would stop holding them back. But, as Dewey writes, we are social creatures, defined socially as part of an organism: we are "men only when in intrinsic relations to other men;" we are not "isolated non-social atoms" ("Ethics of Dem." 186). Yet the policy of color-blindness presumes that social influences do not matter, specifically when those influences are attached to race. Race is a social construction that has fluctuated over centuries to serve the interests of those in power, whether those interests were slavery, white supremacy, or laissez-faire capitalism. But race has also come to socially define African-Americans in their communities in the United States as cultures with languages, religions, arts, literatures, and music, all of which a policy of color-blindness must erase in order to work. Race is not just skin color, it is also culture and community knowledge.

Pragmatism shows us that the many broad arguments of the anti-affirmative action movement only hold when extracted from context and history. One argument claims that affirmative action amounts to reverse discrimination and thus should be dismantled. Another claim, one that is more complex, argues that because black race-

consciousness is regressive, no different from white supremacy, all Americans should

aim for a colorblind society. I argue that when returned to their place within culture, as

pragmatism demands, these arguments cannot stand. For in the end, a call for color-

blindness in policy decisions can be seen as a call for the erasure of history and context.

Proponents of affirmative action and the race-consciousness it requires in order to

operate have been charged with "reverse discrimination." Stanley Fish quickly

dispatches this accusation, making a point that is particularly pertinent to a pragmatic

reading of the affirmative action debate. He debunks the charge that affirmative action is

merely reverse discrimination, that "racial classifications are odious and inherently

suspect" (Trouble with Principle 27). According to Fish, opponents of affirmative action

charge that "If race-consciousness is a component of a policy, it is the same as any other

policy rooted in race-consciousness—Ku Klux Klanners the same as admissions officers

at the University of California" (Trouble with Principle 27). In other words, to the anti-

affirmative action movement, race-consciousness with the purpose of alleviating racial

oppression is exactly the same as race-consciousness with the purpose of perpetuating

racism. What causes such blindness to purpose? The trouble, according to Fish, is with

"principle." He writes:

> The objection to this line of reasoning is not that it evacuates history—
> although it surely does that—but that it evacuates morality, by first taking away
> the usual measures by which we label one act abhorrent and another praiseworthy
> and then substituting for these measures a mechanical test like the question "Does
> it display race-consciousness?" […]

91

> This is the trouble with principles determined to be neutral: they operate by sacrificing everything people care about to their own purity. (Fish <u>Trouble with Principle</u> 27-8)

The problem, according to Fish's critique, is first that a universal condemnation of race-consciousness fails to take into account context, specifically, historical context of race in America. But dehistoricizing is a lesser crime in Fish's eyes. Amorality—that we are no longer able to tell the difference between acts done for the good of others and acts done to hurt others—is the greater problem. The charge of reverse discrimination misses the point, perhaps deliberately, that affirmative action can be seen as a morally good act, an ameliorative act with a specific goal: the goal of contingent justice.

Later in *The Trouble with Principle* Fish provides a polemic on pragmatism's failures, such that he can hardly be called a pragmatist. He writes, for example, "If pragmatism points out that its rivals cannot deliver what they promise—once-and-for-all answers to always relevant questions—pragmatism should itself know enough not to promise anything, or even to recommend anything" (<u>Trouble with Principle</u> 295). Yet, Fish's words on morality strongly echo pragmatist sentiments. Pragmatism's idea of the morally good can be stated simply: it is mutable, and it is social. John Dewey and James Haydon Tufts trace a genealogy of morality in their jointly written *Ethics* (c. 1932). Seigfried summarizes Dewey and Tufts's observations on the mutable nature of the good: "Dewey and Tufts emphasize the historically developmental character of morality and say that the nature of the good cannot be determined for all time but must be done over and over again 'in terms of the conditions of concrete situations in which they arise'"

("Introduction" xvii). In pragmatic terms, humanity's conception of the morally good is either revised or reinforced every time it is tested against experience. As Seigfried explains, "Every situation has unique features, and our moral life is dynamic. Unless we are willing to challenge our beliefs and test their adequacy against the actual outcomes acting on them, including their tangible effects on others and on bettering specific, harmful situations, morality will hinder rather than help in solving present social ills" ("Introduction" xvii). In pragmatic terms, a fixed morality is hardly morality at all, because morality cannot hold on to immutable principles in the face of human suffering. Rather, it must shift to accommodate experience, and thereby help alleviate suffering. This is Fish's point when he writes that charges of reverse discrimination evacuate the moral purpose of affirmative action. Only by ignoring experience—knowledge gained through practice—history, and context can all types of racial discrimination be considered, in principle, to have the same pernicious effect on society.

But isn't Steele's argument that the time for affirmative action has come and gone? What about his claim that most black people rarely suffer racism? The foundation for his argument is that white supremacy is "dead." But one need only compare two recent natural disasters and our nation's response to them—Hurricane Katrina and the tornados in Kansas—to see how much more simply humanity our country grants to white people than to black people. Granted, the scale of the disaster in Kansas in the spring of 2007 was barely comparable to that of Katrina and the damage it wreaked on New Orleans and its citizens, but the greater damage should have been cause for greater sympathy.

Instead, the United States government dispatched mercenaries from Blackwater USA and paid them $350 per day to lay down martial law with assault rifles . Rebuilding efforts have been tainted by portrayals of black citizens of Louisiana as animalistic, lazy, dirty, and stupid—the same caricatures that have haunted black Americans since the beginning of America. The white victims of the Kansas tornados did not also suffer from misrepresentation in the media and gross mishandling by the government. Experiences such as these show that white supremacy is not dead.

Not only is morality revisable for pragmatists like Dewey and Addams, it is also fundamentally social, for it is shaped by contact with other people through a diversity of experiences that are deliberately sought. Addams writes, in *Democracy and Social Ethics*, "We realize, too, that social perspective and sanity of judgment come only from contact with social experience; that such contact is the surest corrective of opinions concerning the social order, and concerning efforts, however humble, for its improvement" (Social Ethics 7). Addams recognized that people of different economic backgrounds, national origins, and ethnic groups experience life in America far differently than she did, as an upper-class, white, educated woman. Therefore, she believed it was her duty, and the duty of all members of a democracy, to deliberately seek unfamiliar experiences. For Addams, "we are under a moral obligation in choosing our experiences, since the result of those experiences must ultimately determine our understanding of life" (Social Ethics 8). The challenge is that most people find new experiences, experiences outside of their usual daily practices, uncomfortable. But it is

within this very discomfort, according to Addams, that human understanding can grow. This pragmatic notion of discomfort or irritation arises in the writings of many thinkers. For Peirce, this discomfort is "doubt," which initiates inquiry and leads inquirers closer to knowledge of reality.

Addams writes that in order to understand one another, we must "see the size of one another's burdens" (Social Ethics 7). What happens if humans do not choose diverse experiences, but instead remain within their narrow groups? Addams writes: "We know instinctively that if we grow contemptuous of our fellows, and consciously limit our intercourse to certain kinds of people whom we have previously decided to respect, we not only tremendously circumscribe our range of life, but limit the scope of our ethics" (Social Ethics 8). For, human ethics and morality are not formed prior to engagement with others, but rather through engagement with others. If one's human interactions are limited, one's ethical understanding of the world is limited as well.

The demand for color-blindness in current policy can be understood as an attempt to circumscribe and suppress racial and ethnic differences. Color-blindness is a way for white people to interact with black people without having to engage culturally, without having to recognize difference, without having to recognize the size of a black person's burdens, whatever that person's burdens might be. The pragmatic response to the racial elision of color-blindness is the call for race-consciousness. When race-consciousness governs interactions between racially different individuals, cultural differences cease to be suppressed. Cultural experiences and heritages can be recognized and valued.

Whiteness can be examined as well, as a cultural construction that provides privilege in our society. History, context, and experience become central sources for knowledge about human interaction and social amelioration.

In his landmark article "Race-Consciousness" (1990), critical race theorist Gary Peller defines race-consciousness as "thinking that race should make a difference in social relations." In his article, Peller traces the history of color-blindness and what he calls "the repudiation of race-consciousness" in current political practice (127). He associates color-blindness with the adoption of the strategy of racial integration by the civil rights movement of the 1960s. Peller writes: "My argument, in summary form, is that the boundaries of today's dominant rhetoric about race were set in the late sixties and early seventies, in the context of an intense cultural clash between black nationalists on one side, and integrationists (white and black) on the other" (127). The problem with the contemporary integrationist point of view, according to Peller, is that it sees all race-consciousness as racial prejudice. Peller writes:

> In the integrationist perspective, racism is rooted in consciousness, in the cognitive process that attributes social significance to the arbitrary fact of skin color. The mental side of racism is accordingly represented either as "prejudice," the prejudging of a person according to mythological stereotypes, or as "bias," the process of being influenced by subjective factors. The key image here is of irrationalism: the problem with prejudice is that it obscures the work of reason by clouding perception with beliefs rooted in superstition. (129)

For integrationists, race should make no difference; race, because it is a cultural construct, is an irrational identity characteristic.

96

Peller's work, when coupled with the pragmatic philosophy of Addams, makes

clear the failures of integration when coupled with a policy of positive color-blindness.

From the perspective of Addams's pragmatism, integration itself seems to be an ideal

experiment in gaining the diversity of experience that would guide us to a more ethical

social democracy. But integration cannot work with positive color-blindness as its

bedfellow. Color-blindness ensures that we do not see each other as socially imbedded.

Take school integration, for example: students from diverse backgrounds are put together

in classrooms, but then are systematically told that they are all the same—or they should

be. Students are not encouraged to engage with each others' differences. Furthermore, in

the case of integration in the 1960s and 1970s, as Peller points out, "same" meant "white

bourgeois," a "neutral" standard that was hardly neutral (129).

Legal scholar Rhonda V. Magee Andrews has written on the second type of color-

blindness, normative color-blindness. In true pragmatic fashion, she explodes dualisms

and embraces paradoxes in her search for social amelioration. In her article "The Third

Reconstruction: An Alternative to Race-Consciousness and Colorblindness in Post-

Slavery America" (2003), she writes:

> Drawing on the most compelling insights of colorblind and race conscious
> approaches leads me to a paradoxical approach which simultaneously focuses on
> both the centrality of race and race-mediated oppression in shaping the world we
> know and the paramount importance of our essential commonality as human
> beings. If race and racial bias remain salient in American law and politics, and
> there is no question that they do, we have a duty under the Constitution to take
> aggressive steps to minimize their harmful effects on people's lives. If, however,
> we are ever to reconstruct society as undivided and unbiased along the lines of

race, we must minimize our reliance on the concept of race in ordering our sociopolitical lives. (Andrews 487)

Andrews rejects the contemporary policy of color-blindness, because "traditional proponents of the colorblind perspective … have utterly failed to incorporate what we have learned about the implications of racialization and race-based oppression—its continuing threat to universal human dignity for all, and its ability to coexist with the color-blind approach" (559). Yet she embraces the possibility of a future society in which race is no longer a salient characteristic in social structuring. She is willing to trespass on the both sides of the color-blindness debate in order to imagine dynamic solutions to current problems of racism and racial oppression. She chooses a method that "emphasizes our commonality but takes into consideration the role of race in our lives" (559).

She brings together the strengths of normative color-blindness and race-consciousness in crafting her model. She provides an alternative to race-consciousness and color-blindness, utilizing a new non-dualistic term, "humanity consciousness" (Andrews 489). Although she argues that "race should be rejected as the primary basis for ordering our socio-political thought and action," she also recognizes that racial injustice will persist during this "period of transition" America will find itself in. In response, Andrews writes, "I propose a dual race-and-humanity conscious approach that would permit the use of race to remedy the effects of minority oppression and white privilege for as long as necessary, but would do so in a way that promotes an overall

humanity-conscious approach" (489). She insists upon working through the law,

rejecting a cynical outlook about the American legal system held by some of her

compatriots. She observes that some legal theorists

> conclude that American law will never do more than maintain, by clever devices, the systemic white-over-black privilege that whites have come to expect. Perhaps they are right. Nevertheless, like many critical race theorists, I have refrained from giving up altogether on the principles that provide the only basis for the kind of human communication and negotiation by which real change ultimately can be made. (557)

Andrews has not given up hope in the American legal process, the "principles" she refers

to here.

Although pragmatism sees the law less as principles and more as a set of useful

tools, Andrews's words strongly echo the words of Addams, in which Addams professes

an unstoppable faith in the transformative power of democracy and the processes of the

American political system. Despite the human suffering Addams found around her in

Chicago during her years at Hull-House, she never gave up the belief that "the cure for

the ills of Democracy is more Democracy" (Social Ethics 9). Addams's faith is not in

immutable political concepts, but rather in day-to-day political struggles that, in the end,

create and recreate our democratic process. Similarly, Andrews writes, "Appeals to

abstract principles generally serve better as masks for the socio-political power struggles

which explain legal results," arguing instead that "constitutional law, like all law, must be

viewed as a social product" (557). Because they can imagine possibilities inherent in

interconnected legal and democratic processes, pragmatists like Addams and legal

99

thinkers like Andrews are able to lead us out of political conundrums, down new

pathways.

CHAPTER IV

ADDAMS, HOLMES, AND CONTEMPORARY

AFFIRMATIVE ACTION JURISPRUDENCE

a. Holmes, Pragmatism, and Reading the Law

An original member of the Metaphysical Club, Supreme Court Justice Oliver Wendell Holmes's philosophical conversations and letters with Charles Sanders Peirce, William James, and John Dewey helped shape pragmatic thought in the late nineteenth and early twentieth centuries. Holmes did not call himself a pragmatist; Menand explains that Holmes "associated the term with a desire to smuggle religion back into modern thought under a pseudo-scientific cover" (432). Yet, Holmes's "belief that life is an experiment, and that since we can never be certain we must tolerate dissent, is consistent with everything James, Peirce, and Dewey wrote. What Holmes did not share with those thinkers was their optimism. He did not believe that the experimental spirit will necessarily lead us, ultimately, down the right path" (Menand 432-33). This lack of belief in the transformative possibilities of experience and social democracy separates Holmes from his pragmatist contemporaries such as Addams and Dewey. However, as a legal scholar, Holmes provides insight into the relationship between "experiment," as Menand terms it, and the law. In this chapter I would like to draw on Holmes's ideas about the relationship between "experiment" and the law and combine these ideas with a pragmatic ethic drawn from the work Jane Addams. I will then use this ethical pragmatic

legal theory to examine the theory of affirmative action jurisprudence and the most recent Supreme Court cases treating affirmative action, *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003).

Holmes opens his magisterial text *The Common Law* (1881) with this language: "The life of the law has not been logic: it has been experience" ("Common Law" 1). What does Holmes mean by "experience?" He means, as Menand explains, "culture" (Menand 437). Although in today's usage, the word culture has taken on a variety of meanings, often conflicting, for Holmes, "culture" referred to "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed" ("Common Law" 1). When Holmes writes that the "life of the law" has not been logic, he does not mean to say that the law is illogical. Rather, Holmes is emphasizing the interwoven relationship of the law in human society. Syllogism and other logical tools are empty, useless tools without human culture to act with and through. To help make his point, Holmes draws a line between form and substance of the law: "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past" ("Common Law" 1-2). Thus, for Holmes, substance, or content, of law is driven by what a culture finds useful—what is "convenient." The predictability and stability which

derive from our legal past are embodied in the form and structures of the law, in our legal

processes. The law, for Holmes, is a fusion of past and present, of form and substance—

of theory and experience. He might not have called himself a pragmatist, but he often

thought like one. Like Dewey and James, he rejected *a priori* notions of truth and instead

shaped his judicial decisions around experience.

Even among the early pragmatists, there grew deep philosophical splits. One such

split falls along the development of social democracy, as compared to more traditional

liberal ideas of democracy. In her treatise *Democracy and Social Ethics* (1902), when

Addams declares that "the cure for the ills of Democracy is more democracy" (<u>Social</u>

<u>Ethics</u> 12), Dewey responds with this statement: "The old saying that the cure for the ills

of Democracy is more democracy is not apt if it means that the evils may be remedied by

introducing more machinery of the same kind as that which already exists" (<u>Public &</u>

<u>Problems</u> 144). As Seigfried explains, if "democracy" is understood by its traditional

liberal definition, more democracy will only be "having more of what ails such a political

order" ("Socializing Democracy" 209). Seigfried explains that liberal democracy refers

to "a process by which individuals seek to satisfy their own needs in complete disregard

of those others who are expected to protect their own interests or fall by the wayside"

("Socializing Democracy" 209). In its characterization in the field of political science, a

liberal understanding then of democracy encourages individuals to act in a self-interested

manner; it is opposed to intervention that prevents the individual from pursuing self-

interest. Although popular usage of the term "liberal" associate it with left-leaning social

politics, a distinction can be drawn between liberal, laissez-faire democracy and the social democracy advocated by Dewey and Addams.

The roots of liberal democratic theory are deep, but it has strong support in the industrial and capitalist growth of the late nineteenth century: in, for example, the liberal social theorist Herbert Spencer's reading of evolutionary theory. Spencer believed evolution indicated that "survival of the fittest," a phrase he coined, leads to social progress (Menand 143). Spencer took his premises from Darwin's research but applied them to human social behavior in a positivist manner. Like many in the 19th century, Holmes subscribed to Spencer's social Darwinism and he supported Eugenics for this reason, believing that the most fit of the species were most capable of making contributions for the betterment of society. In the case *Buck v. Bell* (1927), he wrote the opinion approving compulsory sterilization by the state of Virginia. The victims of the sterilization were a mother and daughter, described in the facts in this manner: "Carrie Buck is a feeble minded white woman who was committed to the State Colony above mentioned in due form. She is the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child" (Buck 205). Based on these facts, Holmes found that the interests of the state outweighed the interests of Carrie Buck and her daughter, and granted permission to force them to be sterilized:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough. (Buck 207)

Holmes's words reveal his lack of interest in the sacrifice of individuals for what he perceived to be the greater good of society. In this moment, Holmes's words reveals the strong relationship between utilitarian social theory and "survival of the fittest" social Darwinism. Holmes's opinion in Buck had far-reaching consequences, rendering forced sterilization active policy around the country for decades.

Menand provides useful insight into Holmes's legal theory. Menand writes:

The key to Holmes's civil liberties opinions is the key to all his jurisprudence: it is that he thought only in terms of aggregate social forces; he had no concern for the individual. The spectacle of individuals falling victim to dominant political or economic tendencies, when those tendencies had been instantiated in duly enacted laws, gave him a kind of chilly satisfaction. (65-66).

The key word in this passage is "spectacle." It emphasizes the position of Holmes as spectator, removed from the effects his decisions might have upon individuals in society. Holmes's disregard for the fate of individuals stands in stark contrast to the philosophy of Jane Addams, John Dewey, and other pragmatists, who insist that individuals and their opinions are essential to a valid democracy, because the greater the experience we have to use the truer or more real our conclusions will be (Dewey Public & Problems 177). Addams in particular dedicated her life to helping individuals resist victimization by the political and economic forces which threatened to crush them. She often wrote about the life stories of individuals, and through these narratives derived her theory. In crafting a classical pragmatist framework to read contemporary judicial opinions, Addams's work

provides a necessary antidote to the disregard of the individual prevalent in the legal writings of Holmes.

Holmes's jurisprudence makes it possible for contemporary self-styled pragmatists such as Richard Posner and Richard Rorty to makes claims about the moral emptiness of pragmatism—even though Holmes rejected the pragmatist label. The Law and Economics school of legal analysis, of which Judge Posner is a leader, is strongly rooted in the theoretical work of Holmes. Holmes advocated a working knowledge of statistics and economics by lawyers and legal scholars, rejecting the role played by "history" in legal thought in his day:

> I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. A step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics. … In the present state of political economy, indeed, we come again upon history on a larger scale, but there we are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. ("Path of the Law" 1005)

Although he emphasizes consequences, a pragmatic maxim, Holmes's words can be read to oversimplify this maxim into cost-benefit, means-end analysis. These are the ideas that are linked to contemporary legal pragmatism. It appears that contemporary legal pragmatism has been reduced to utilitarianism.

What Holmes lacked, and what Posner lacks, are two necessary components of pragmatic method: diversity of perspective and empathy. Holmes was willing to reject history and fixed principles in favor of a cost-benefit analysis using contextual data, yet

106

his analysis is strictly rooted in the perspective of a Supreme Court Justice claiming to know what is best for society. Essentially, Holmes claims to act in a neutral manner. Holmes saw nothing wrong with this objectivism, and neither does Posner. This is the problem with Posner's neo-pragmatism; this is why Holmes is not a pragmatist. Pragmatism insists on multiple perspectives, believing that every member of society has a perspective and that every person's perspective is should be heard. The more variety of experience that we bring to bear on an issue of social importance, the more accurately we can act upon that issue, the more "true" our understanding of that issue will be. Holmes's and Posner's objectivism collides with pragmatic perspectivism, which requires that the observer recognize his position as observer, and all of the privileges that inhere in that position. It is doubtful that Holmes recognized his perspective as a perspective at all.

Pragmatism, through its constant questioning of so-called objectivity, allows us to see that all too often the people sacrificed for the greater good are those deemed by the wealthy and powerful to be unimportant. Society ends up sacrificing poor people, ethnic and racial outsiders, women, and other marginalized people, because it assumes their experience does not matter, or because it assumes that they do not know as much as powerful people, or because they do not represent the greatest number of people. For example, although in the *Buck* case Holmes claims to be considering what is best for society, his reasoning ends up erasing the individuality of the persons whose physical integrity is at stake. He protects society at the expense of a family of women. Yet, for Holmes, it is acceptable to sacrifice the rights of Carrie Buck and her young daughter in

order to establish a principle that the greater good would be served by forced sterilization. Holmes's upper-class, powerful, white, male perspective omits consideration of the perspectives of racial, ethnic, gender, and economic outsiders.

This mode of decisionmaking distinguishes Holmes's work from pragmatism, at least theoretically. Pragmatism deliberately searches for the perspectives of outsiders—the non-lawyers, the defendants, the "imbeciles"—as central to its method of truth. This deliberate search for diversity of perspective is essential to the theory of social democracy which drives much of the work of John Dewey and Jane Addams. Dewey writes, "Regarded as an idea, democracy is not an alternative to other principles of associated life. It is the idea of community life itself. It is an ideal in the only intelligible sense of an ideal: namely, the tendency and movement of some thing which exists carried to its final limit, viewed as completed, perfected" (Public & Problems 148). Addams, a social activist, lived her philosophy. She founded and directed a settlement house in one of the poorest slums of Chicago, and her experiences with outsiders such as immigrants, prostitutes, and laborers informed all of her pragmatist beliefs. Because of Addams's focus on the experiences of outsiders, her writings provide an essential and unique balance to the work of Holmes.

b. Jane Addams, Perplexity, and Perspective

According to the ethical pragmatism of Jane Addams, all people have a duty to search for a diversity of experiences. Addams writes, "We are learning that a standard of social ethics is not attained by traveling a sequestered byway, but by mixing on the thronged and common road…" (<u>Social Ethics</u> 7). These experiences ensure that we keep in mind the perspectives of others and prevent us from slipping into solipsism. The duty is heightened for those who have power over the lives of others, people like judges and politicians, or the presidents of corporations who control the lives of their workers. Addams derived and modified her theories through her career at the Hull-House Settlement in Chicago, where she worked with immigrant and working class families to improve living conditions for all. For example, in her essay "Charitable Effort," Addams examines the relationships between wealthy charity visitors and the working class families they visit. As Addams recounts, when charity visitors encountered the real lives of working class families, received doctrines tended to be called into question. Charity visitors were often taught that families which needed charity were lazy. But upon meeting the families, visitors realized the families were instead hard workers exploited by industry and poor labor conditions. Visitors then found themselves perplexed by this conflict between beliefs and experiences. Recognizing that many visitors were unsure how to act, Addams wrote to help guide people through these moments of perplexity.

Similar to Peirce's "irritation of doubt," Addams's notion of "perplexity" is key to understanding the moral dimensions of pragmatism (Peirce "Ideas Clear" 30; Addams

Social Ethics 26). Although perplexity arises from the "absolute crashing of two ethical standards," the root of perplexity, in Addams's view, is democracy itself. "The young charity visitor who goes from a family living upon a most precarious industrial level to her own home in a prosperous part of the city, if she is sensitive at all, is never free from perplexities which our growing democracy forces upon her" (Addams Social Ethics 13, 31). For the charity workers in Addams's stories, perplexity forces a choice. As Seigfried explains, "The perplexity cannot be resolved without developing a new understanding of the situation and calling into question received values" (Seigfried "Introduction" xxiii). Thus, we can either welcome this new understanding, or at minimum allow it space, adjusting our awareness of the world to align with it, or we can refuse to change and suppress the perplexity.

Toward the end of the essay, Addams poses two important questions: "Of what use is all this striving and perplexity? Has the experience any value?" (Social Ethics 31). The answer, for Addams, is undoubtedly *yes*, but only if we apply what we have learned through experience. Too often, according to Addams, "We distrust the human impulse as well as the teachings of our own experience, and in their stead substitute dogmatic rules for conduct" (Social Ethics 32-33). In other words, many times we suppress what we learn and let the rules given to us by others tell us what we should do or believe, even if those rules are contradicted by what we have learned on our own. Our experiences cannot help us if "[w]e forget that the accumulation of knowledge and the holding of convictions must finally result in the application of that knowledge and those convictions

to life itself" (Addams <u>Social Ethics</u> 33). Through the endless cycle of experiences and examination of those experiences, we can revise the received doctrines that do not hold true, and develop new theories to help us move forward into the future. The present can help discern what is useful in the past in order to craft our future.

It is here that the ideas of Addams and Holmes can begin a productive dialogue. Although they disagree on the progressive possibilities of pragmatism, Holmes has much to say on the use of history in the present interpretation of laws, laws that have fundamental power over our future. He writes, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past" ("Path of the Law" 1001). Like Addams, Holmes rejects hanging onto received doctrine when present experience reveals it to be useless or dead wrong. Addams's work adds to Holmes's, in that it insists on a duty to add diversity to our experiences in order to consider the perspectives of others. It is important to note that this duty is not based on an abstract morality or a feeling of beneficence toward those whose perspectives one seeks; rather, it is scientific, pragmatic. Hearkening back to Peirce and the law of errors, one must gather perspectives on the path to truth. Taken together, Holmes and Addams's ideas help formulate a method for examining legal cases, a pragmatic strategy that insists we use the past only when it is useful in terms of present legal problems and that take into account the perspectives and experiences of all people, not just those in power.

c. Pragmatic Ethics and Legal Outsiders

Jane Addams articulates a necessity to embrace the perspectives of all people in order to have a more ethical democracy. A similar necessity arises in the limited realm of the legal system: the perspectives of all people must be welcomed in order to ensure the legal system treats all people fairly. Too often, only the voices of legal insiders are heard—the voices of judges and lawyers, as well as the voices of the wealthy and powerful who can afford superior legal representation. Philosophy and legal scholar Costas Douzinas outlines an ethical duty for contemporary Anglo-American legal practice. Douzinas observes, "Law appears at its most imperialistic at the precise moment when it starts losing its specificity" (Douzinas 202). In other words, when the law ceases to be anchored in the lived experience of the people whose lives it controls, it slips from being a democratic system of justice into tyranny. The pragmatic ethic I put forward here aims to re-anchor the law in the lives of legal outsiders.

Although the legal system currently claims to treat all comers equally, as Douzinas explains, this "equality before the law is only formal; it necessarily ignores the specific history, motive, and need that the litigant brings to the law" (Douzinas 213). Instead of treating a legal outsider as an individual, the law translates her into a faceless, inhuman form that the legal system can grasp. Thus, "legal freedom is . . . the freedom to be what the law has ordained" (Douzinas 213). In *Buck v. Bell*, Carrie Buck ceased to be an individual person, and instead became representative of any woman that any state

112

might desire to forcibly sterilize. Holmes and the rest of the Supreme Court erased her history, her identity, in order to make their judgment. "Legal freedom" can indeed be tyranny. Pragmatism, as defined by and practiced by Addams, demonstrates how the experiences of legal outsiders provide necessary "irritation" and "perplexity" for the law. Legal insiders—lawyers, judges—are the mediators of this perplexity. Insiders can ensure that the law listens to the experiences of outsiders, allows their words to enter into the law, and thereby to change the law. The law has traditionally been a transitive force in that it acts upon something, applying formal, fixed principles upon faceless outsiders that come before it. Through dialogue, lawyers and judges have the opportunity to mediate the reductive, self-centered system of the law in order to preserve the perspectives of legal outsiders.

A companion to perplexity in Addams's work is the work of "investigation." Like perplexity, investigation is a commonplace word that takes on significant meaning in Addams's pragmatic philosophy. Through investigation, Addams brings into consideration the experiences of outsiders. In *Twenty Years at Hull-House*, she writes of the early days of the Hull-House settlement, explaining the centrality of investigation to her work. One characteristic of settlements in general, she writes, is "insisting that each new undertaking should be preceded by carefully ascertained facts" (Hull-House 77). These facts, for Addams, are gathered by "investigation" (Hull-House 77). Investigation is not lone contemplation by a thinker removed from human experience; rather, it is inserting oneself into the lives of others and listening to their points of view. For

example, when Hull-House desired to start a public kitchen, an "investigation of the sweatshops had disclosed the fact, that sewing women during the busy season paid little attention to the feeding of their families" (Addams Hull-House 77). Further, one of the Hull-House residents "made an investigation, at the instance of the United States Department of Agriculture, into the food values of the dietaries of various immigrants, and this was followed by an investigation made by another resident, for the United States Department of Labor, into the foods of the Italian colony" (Addams Hull-House 77-78). Addams uses the word "investigation" three times in a half of a page: it is her mantra, central to her pragmatic vision. Without investigation, one cannot hear the perspectives of others; without these perspectives, for Addams, there can be no democracy.

What the Hull-House workers learned through their investigations surprised them: the neighborhood residents weren't interested in the dietetically sound yet unpalatable food from the kitchen. However, at the same time, Hull-House was beginning to provide social gathering space for neighborhood residents. This gathering space was hugely popular. Addams writes, "The experience of the coffee-house taught us not to hold on to preconceived ideas of what the neighborhood ought to have, but to keep ourselves in readiness to modify and adapt our undertakings as we discovered those things which the neighborhood was ready to accept" (Hull-House 79). Thus, it is not enough to simply conduct investigations and listen to the perspectives of others; one must allow these perspectives to arouse perplexity, and then allow perplexity to modify behavior. The Hull-House workers changed their free kitchen into a coffee-house for public meetings

114

because they were perplexed that underfed workers didn't want their food. After

investigating further and listening to the needs of the neighborhood, they discovered that

what the people would use was a meeting space, and provided that instead.

We can learn important lessons by drawing parallels from the work of Addams.

Does the law listen to the perspectives of those most affected by its rulings? I would

argue, in the realm of affirmative action jurisprudence, the voices of those most affected,

students from underrepresented minorities, are rarely heard. The law fails to seek out

their voices, instead listening to university administrators—defendants in most recent

affirmative action suits—and white plaintiffs supported by our white upper- and middle-

class whose voices have the most power in our society, even though they are no longer a

majority. The true outsiders have gone missing.

d. Perspective and the "Liberal Defense" of Affirmative Action

There are some legal scholars who are working to bring the perspectives of

outsiders into affirmative action jurisprudence. These scholars recognize that the cases

challenging affirmative action such as *Regents of the University of California v. Bakke*

(1978) and the recent University of Michigan cases *Grutter v. Bollinger* (2003) and *Gratz

v. Bollinger* (2003) present the perspective of white students who claim to be wronged by

the "racial discrimination" inherent in affirmative action programs. They suggest, and I

agree, that these white students are insiders in affirmative action litigation, as they share

the perspective of the white supremacist social structures which affirmative action is

meant to remedy. In order to have true, democratic debate about affirmative action, we need to conduct pragmatic investigation and bring the perspectives of all people to bear on these issues. Thus far, the cases before the Supreme Court have utterly failed in this respect.

Before *Grutter* and *Gratz*, colleges and universities justified affirmative action policies in admissions by pointing to Justice Powell's majority opinion in the *Bakke* case. In *Bakke*, a white male who had been denied admission twice to the medical school at the University of California at Davis, sued the University of California for violating the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (Bakke 269-70). The Equal Protection Clause reads, "no state shall … deny any person with its jurisdiction the equal protection of the laws." It was enacted in 1868 as part of the Reconstruction Amendments—the Thirteenth, which abolished slavery; the Fourteenth, which dealt with equal protection, due process, and citizenship; and the Fifteenth, which provided for universal male suffrage. Unfortunately, in the *Civil Rights Cases* (1883), a group of similar cases considered together, the U.S. Supreme Court held that Congress lacked the power to outlaw racial discrimination by private actors. This case set the foundation for decades of Jim Crow segregation throughout the United States. The Civil Rights Act of 1964 was enacted to bring life back into the Equal Protection Clause. Using the Interstate Commerce Clause of the Constitution as a groundwork, in order to bypass the holding of the *Civil Rights Cases*, the Civil Rights Act of 1964 outlawed racial discrimination, and eventually gender discrimination, in

employment, education, public accommodations (owned by private companies), etc. Title VI, which students have used to sue universities in affirmative actions cases, provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (USA).

Plaintiff Allan Bakke complained that the special admissions program at the Davis medical school impermissibly excluded him on the basis of his race. Davis admissions office reserved 16 seats out of a class of 100 for minority students. In his opinion for the majority, Justice Powell asserted that first of all, any racial and ethnic classification is inherently suspect, without regard to whether the group discriminated against is a "discrete and insular minority" (Bakke 290). In other words, it doesn't matter whether the racial classification is made to help a historically disfavored minority; any racial classification will receive special review by the courts. Powell then held that Davis's special admissions program violated the Equal Protection Clause because it used a quota or fixed numerical set-aside on the basis of race. This process was deemed impermissible because it discriminated against white applicants: "In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class" (Bakke 319). However, Powell noted that the University of

117

California and other colleges and universities may use race as one of many factors in admissions in order to achieve the state's interest in a diverse educational environment.

After providing his opinion for the majority, Powell wrote a famous "Appendix" to his opinion (Bakke 321). In the Appendix, Powell addresses the topic of diversity and how universities might achieve it without violating the Constitution. Although this dicta is not controlling, it was quoted often during the quarter century between *Bakke* and *Grutter*. Powell points to the admissions process at Harvard College as a model for achieving racial and ethnic diversity in higher education:

> The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, minority representation in the undergraduate body cannot be ignored by the Committee on Admissions. (Bakke 322-23)

Universities modeled their affirmative action programs using Powell's diversity justification for decades afterwards. These diversity-minded programs remained significantly unchallenged until the *Grutter* and *Gratz* cases in Michigan, heard by the U.S. Supreme Court in 2003. *Bakke* allowed affirmative action to survive, but not the reasons for it changed. The critical race theorists whose work I present here suggest that

what has changed is perspective—the court has shifted its point of view from that of the victims of structural white supremacy to that of those who benefit from it. From the perspective of the victims of white supremacy, affirmative action should remedy past and present racial oppression. When that perspective is shifted to the perspective of those who benefit from white supremacy, the only argument left in favor of affirmative action is the diversity argument, which essentially says that the presence of black students and other students of color will enhance the education of a predominantly white class of students.

Legal scholar William J. Rich has written on the importance of considering perspective in considering affirmative action cases. He explains that in the years since the decision in *Brown v. Board of Education* (1954), the Supreme Court in particular and the federal judiciary as a whole has shifted its perspective. In *Brown*, the courts took into account the experiences of the victims of discrimination, a point of view that Rich calls the "antisubordination principle" (Rich 323). Under the antisubordination principle, the courts find an "affirmative duty to eliminate segregation." From this posture, "The dominant majority violated the Equal Protection Clause when it forced the minority into a position that all perceived as subordinate" (Rich 323). Rich contrasts the antisubordination principle with the posture that has come to dominate affirmative action jurisprudence: the "color-blind principle." As he explains, the difference between these principles "can be understood in terms of the perspectives of the class of victims of discrimination and the class of perpetrators" (Rich 323). When the courts ceased to see

affirmative action from the perspective of the victims, they ceased to see any judicial obligation to remedy domination by our white majority and historically white supremacist institutions. Instead, the judicial imperative has shifted toward color-blindness, a remedy chosen and approved by the white majority.

Legal scholar and critical race theorist Charles R. Lawrence criticizes mainstream liberal theory for denying the perspective of the oppressed in the affirmative action debate. He writes, regarding the use of the notion of equal protection: "Critics of liberal theory, including critical race theorists, have offered another way to think about promoting equality and human dignity, one that reflects the perspective of the subordinated. Consider the constitutional and moral command of equal protection as one requiring the elimination of racism rather than mandating equal treatment as an individual right" (Lawrence "Two Views of the River" 950-51). Like Rich, Lawrence calls this way of thinking about equality "antisubordination" theory. He writes, "Such a substantive approach assumes that ridding society of racial subordination is indispensable and a prerequisite to individual dignity and equality" ("Two Views of the River" 951). For Lawrence, perspective is an important component of antisubordination theory.

Lawrence examines contemporary debates over affirmative actions identifying what he calls the "liberal defense," which is based in the state's interest in maintaining diversity in education, compared with the a defense of affirmative action grounded in antisubordination theory and racial justice ("Two Views of the River" 931, 32). He writes that he is "concerned that liberal supporters of affirmative action have used the

diversity argument to defend affirmative action at elite universities and law schools

without questioning the ways that traditional admissions criteria continue to perpetuate

race and class privilege" ("Two Views of the River" 931). The liberal defense of

affirmative action, the defense that Powell provided in his Appendix to *Bakke*, suggests

that the quality of education at colleges and universities is enhanced by a diverse student

body. There is significant empirical data to support this claim. But the problem is,

according to Lawrence, is the liberal defense of affirmative action maintains existing

structures of oppression:

> The case for diversity is a case for the integration of a privileged class. Because
> the liberal defense of affirmative action accepts the reproduction of elites as the
> primary purpose of selective colleges and universities, it neither questions the
> validity of standard admissions criteria used at these institutions, nor examines the
> ways that these criteria reinforce the effects of societal segregation and racism.
> (Lawrence "Two Views of the River" 941).

In short, the liberal defense is a top-down defense, a defense from the perspective of

elites. It is the defense given by the gatekeepers of top universities and accepted by the

insiders of the legal system. As Lawrence explains, liberals are attracted to the diversity

defense because it is the "argument for racial integration that least threatens their own

privilege" (Lawrence "Two Views of the River" 941). The diversity defense doesn't

require insiders in the academy or the legal system to seek out the perspective of

outsiders.

Lawrence recognizes the problem of perspective inherent in the liberal defense of

affirmative action. In pragmatic fashion, he investigates the judicial system for a

121

different perspective, in order to bring the experiences of outsiders into the narrative of affirmative action. In 1996, California voters passed Proposition 209 which banned affirmative action in all public institutions, including the University of California system. In 1999, a Mexican-American, an African-American, and a Filipina-American filed a class-action suit against the Regents of the University of California and against the University of California at Berkeley. They were all top students in their high schools and all had been denied admission to Berkeley. Lawrence explains that

> The current Berkeley admissions process creates a preference for white folks in two very concrete ways: First, it gives bonus points to high school students who are enrolled in advanced placement courses; and second, it relies in a determinative and exclusionary way on insignificant differences in standardized test scores.
> Advanced placement courses are not available in every California high school. According to the lawyers representing the Rios plaintiffs, "As many as twenty-five percent of California's high schools offer no AP courses whatsoever. Yet some high schools - four percent - offered twenty-one or more AP courses. Thus, where a student attends high school plays a very large part in his or her chances of admission to Berkeley." In fact, over fifty percent of Berkeley students come from only five percent of California's high schools. (Lawrence "Two Views of the River" 943-44)

Lawrence's study of this law suit is significant because it turns the typical affirmative action challenge on its head. He deliberately takes the perspective of students who were the former the beneficiaries of affirmative action and explains why the stripping away of affirmative action violates their equal protection rights. Essentially, the standards of merit that are accepted by the liberal defense are revealed to be discriminatory. Lawrence writes: "The Rios plaintiffs directly dispute the fairness of criteria such as AP

classes and SAT scores and hold the University responsible for perpetuating the discriminatory practices and conditions of the larger society via the use of such criteria. …[t]he suit exposes and demands an end to systemic, institutional racial preferences" (Lawrence "Two Views of the River" 946). The plaintiffs in the Rios class action suit expose our "neutral" college admissions standards for what they are: part of a social structure built upon racial oppression (Rios). Unlike the liberal defense, "The *Rios* suit speaks from the vantage point of the subordinated" (Lawrence "Two Views of the River" 951). We need more investigation such as this in order to bring a full chorus of voices into the debate over affirmative action.

e. *Grutter*, *Gratz*, and Pragmatism

The recent coupled opinions of *Grutter* and *Gratz* come firmly from the perspectives of upper- and middle-class, of white people, and of legal insiders. Although in the end the Supreme Court upholds affirmative action with *Grutter*, it is clear that the Justices find race conscious programs a necessary evil, not something to be embraced. "Diversity" is the primary defense of affirmative action in *Grutter*. The Court does not find race conscious programs necessary for remedying past discrimination. Past discrimination is never considered at all. In fact, it is arguable that any such "backward-looking" arguments have been stripped forever from affirmative action jurisprudence. Ironically, though, O'Connor's opinion in Grutter has been called "pragmatic" both by those who have supported the opinion (as a compliment) and those who strongly disagree

123

with it (as an insult). I suggest here that the opinion is not pragmatic at all, for it is written from the vantage point of white, powerful, legal insiders and fails to take into consideration the perspectives of those who affirmative action is designed to help. Without the perspectives of all people, the *Grutter* opinion ends up being tyrannical, as I will demonstrate.

The Supreme Court considered *Gratz* and *Grutter* together as a pair. In *Gratz*, white applicants to the undergraduate program at the University of Michigan asserted that the admissions program violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. In the undergraduate admissions program, applicants were awarded a certain number of points for certain qualities. If they reached one hundred points, they were generally admitted. Membership in an underrepresented minority group was given a flat point-value of twenty. Plaintiffs alleged that this allotment all but guaranteed admittance those black people, Latinos, and Native Americans, and the Supreme Court agreed, holding that the point system looked too much like a quota for their comfort. The clincher for the Court was that the system failed to provide "individualized consideration" of each applicant (Gratz 269). Justice William Rehnquist writes, for the majority, "Justice Powell's opinion in Bakke emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education" (Gratz 271). He concludes, "The current LSA [Michigan's College of Literature, Science, and the

Arts] policy does not provide such individualized consideration" (Gratz 272). Because race becomes a decisive factor for underrepresented minority applicants, the policy is held unconstitutional.

In contrast to the *Gratz* opinion, *Grutter* upheld affirmative action under certain circumstances. Like the plaintiffs in *Gratz*, the white plaintiffs claimed here the admissions program of the University of Michigan law school violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. However, this time the Court found that the consideration given to race was not decisive, and that each application was considered individually. Justice Sandra Day O'Connor writes for the majority, clarifying the importance of considering each application individually:

> When using race as a 'plus' factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. (Grutter 337)

In applying this standard to the Michigan Law School's admission policy, she writes, "Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment" (Grutter 337). She discusses at length the necessity of a diverse student body in higher education in particular. First, she writes that the Court must give deference to the judgment of the law school, and by argument all

schools, when they state that "diversity will, in fact, yield educational benefits" (Grutter 328). Diversity "promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races" (Grutter 330). O'Connor asserts that business leaders are better prepared if they have come from a diverse educational environment, as are military officers (Grutter 330-31). She concludes that "the Law School's race-conscious admissions program does not unduly harm nonminority applicants" (Grutter 341).

At the end of *Grutter*, the Court's opinion takes a strange turn. These are the words I would like to examine most closely, for they reveal the most about the Court's position on affirmative action in particular and racial equality in general. After pronouncing the holding, O'Connor writes, "We are mindful, however, that '[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race'" (Grutter 341) (citing Palmore v. Sidoti 1984). There are two unstated premises behind this "purpose." First, this purpose is the interpretation that the Court has given to the Fourteenth Amendment, and not one that is necessary or natural. Second, with these words O'Connor presupposes that affirmative action qualifies as "discrimination based on race," a premise that the *Rios* plaintiffs challenge with their lawsuit. These words reveal what is fundamentally wrong with the liberal defense of race conscious admission policies: it presumes that these policies are wrong at their core, that they are discriminatory, a necessary evil. Thus, the liberal defense finds itself on the side of something that it considers wrong, a difficult position to defend. The problem,

126

O'Connor writes, is that affirmative action is a "deviation from the norm of equal treatment of all racial and ethnic groups" (Grutter 342). In order to justify the evil of race discrimination in college admissions, a rhetorical position that O'Connor put herself in with her own arguments, she writes:

> Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. (Grutter 342)

In response to this "principle" of equal protection the Court suggests "sunset provisions," time limits on race-conscious admissions policies. This legislative move is highly unusual for judicial decisions. Then, the Court goes even further and puts a specific time limit on their own opinion: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" (Grutter 343). In other words, although the state's interest in diversity will remain viable indefinitely, the Court believes that in a quarter century diversity will just happen on its own.

But this is the problem with diversity: people do not tend to seek out the company of people unlike themselves, others whose opinions, beliefs, and ways will disrupt preconceived notions of how the world is supposed to be. Diversity provokes doubt and perplexity, and perplexity isn't fun. Addams recognized this; she writes: "We can recall among the selfish people of our acquaintance at least one common characteristic,—the

127

conviction that they are different from other men and women, … Such people refuse to be bound by any relation save the personally luxurious ones of love and admiration, or the identity of political opinion, or religious creed" (<u>Social Ethics</u> 8-9). Addams imposed an affirmative duty on all people to seek out diverse experiences, to investigate, to gather perspectives, to welcome perplexity, because "diversified human experience and resultant sympathy … are the foundations and guarantee of Democracy" (<u>Social Ethics</u> 7). O'Connor and the Court recognized the value of diversity to a viable democracy when they justified diversity as a rationale for race-conscious admissions programs. But they conceded to the enemies of race-conscious programs that affirmative action is a "deviation from the norm," rather than a necessary condition of democratic education and democratic society. The next chapter will explore how a slight shift in thinking and a more dramatic change in pedagogical practices can transform our current system of higher education and attendant admissions processes into one that works.

CHAPTER V

DEWEY, PRAGMATIC PEDAGOGY, AND MEANINGFUL DIVERSITY

Grutter v. Bollinger provides two exhortations to colleges and universities

interested in using race-conscious admissions processes. First, the application process

must provide individual consideration of each applicant, including a "holistic" weighing

of each person's potential contributions to a class of students (Grutter 337). Second, the

only acceptable justification for race-conscious admissions are the benefits of a diverse

educational environment (Grutter 330-31). So, schools that use race-conscious

admissions have a duty to ensure that the learning environments they foster are indeed

diverse. These two concepts—individual consideration and diversity—are also central

concepts for pragmatic educational methods, from John Dewey's work through the

present day. In this section, I will explore the relationship between pragmatism,

pedagogy, and affirmative action, in hopes of finding the answers to some questions that

proceed from the holding of *Grutter*. What does it mean to teach with, through, around,

or—in the case of California or Michigan—without affirmative action? What does it

mean to consider our students as individuals? What does "diversity" mean, and what duty

does it impose on teachers and schools?

These questions emphasize the importance of considering affirmative action in the

context of teaching. Too often it seems that the debate swirls into the stratosphere and

forgets that what we are negotiating is the lives of students: who gets to go to school, who

gets to learn, and what and how they learn. Pragmatism insists that inquiry remain firmly planted on the ground; the affirmative action debate must remain grounded in the lives of students and teachers who live the consequences of the political wrangling every day.

a. The Individual in Education

In his introduction to John Dewey's *Democracy and Education*, twentieth-century pragmatic philosopher Sidney Hook emphasizes the importance for Dewey of considering all facets of a person's identity. He writes, "[T]he motivation for Dewey's concern with the social coefficients of 'equal opportunity' flows from his appreciation of the unique value of the individual" (Hook xxii). Dewey focuses much of his educational philosophy on "individual experience," always concerned that we not "judge people *only* by whether they are men or women, black or white, Jew or Gentile, American or foreign and thereby overlook the specificity, the individuality, and the uniqueness of the person" (Hook xxii, xxiii). In his writings on education, Dewey recognizes the grave importance of "breaking down of those barriers of class, race, and national territory which kept men from perceiving the full import of their activity" (Dewey Democracy & Education 93). What would Dewey have thought of the requirement of *Grutter* of holistic consideration of university applications? It appears that Dewey's insistence that we not judge people only by their race or class or nationality or gender aligns with the *Grutter* instructions. However, although their words sound similar, the purpose of Dewey's writings is to instruct on ways to create a more democratic and less exploitative society. The

instructions of the *Grutter* decision on holistic consideration of applications does not come from a liberatory position, but rather from one that seeks to set hurdles in the path of eliminating the oppression of disfavored minority groups.

Grutter is not a decision about disfavored minorities; in fact, disfavored minorities hardly appear in the opinion at all. The plaintiffs in *Grutter*, like those of *Bakke* and *Gratz*, were white students who claimed to be harmed by the admissions policies of public universities. When the Supreme Court held the policies in *Bakke* and *Gratz* to be unconstitutional, they agreed that the rights of the plaintiffs were infringed upon by the policies. In other words, the Court held that white students were unfairly hurt by race-conscious admissions policies. In *Gratz* and *Bakke*, the Court did not address the perspectives of the black, Latino or Native American students who are hurt by racism. Their point of view was omitted from the "facts" section of the opinions. The opposing party in the case was not the group of exploited and oppressed minority students in America who do or may benefit from affirmative action. Instead, the Universities of California (*Bakke*) and Michigan (*Gratz*) stood opposite the white plaintiffs and argued their interests in having diverse student bodies for the sake of improving the education of all of its students. The white plaintiffs called themselves "victims of affirmative action" (CIR). The defendants were large, state institutions, historically all-white, run predominantly by white people. Eight of the nine justices which heard the 2003 cases were white; all of the *Bakke* justices were white. I do not argue that one's race predicts one's position on racial matters—one need only compare

Justice Clarence Thomas's stance with that of Justice Ruth Bader Ginsberg in order to lose that simplistic viewpoint. However, in the *Grutter* case, it is arguable that significant parties to the litigation are missing: students of color whose race hurts their chances of admission to college when affirmative action is stripped away from the admissions process.

In *Grutter*, the perspectives of parties to the litigation were omitted. The pragmatic method of truth tells us that without the perspectives of all parties involved, we cannot approach an accurate consideration of a conflict. When O'Connor writes that each applicant to the Michigan Law School must be considered in a holistic manner, she is contrasting the Law School's policy with the undergraduate policy of *Gratz*, in which being a disfavored minority (black, Latino, or Native American) earned a candidate a certain number of "points," and drastically boosted chances of admission. The Michigan undergraduate policy under examination in *Gratz* admitted "virtually every minimally qualified underrepresented minority applicant" (Gratz 272). It was held to violate the rights of white applicants because "the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity" (Gratz 275). The interests of disfavored minority students were never considered by the *Gratz* or *Grutter* decisions. The directions the Court provides in *Grutter* to provide individual consideration of law student applications is not designed to protect disfavored minorities from exclusion based on their race, but rather to protect white students from being "unfairly" excluded based on their race. When viewed in this

132

light, *Grutter* flips the pragmatic educational philosophy of John Dewey on its head. Dewey's admonishments about consideration of race and gender tell us we must consider people as individuals as well members of groups such as black people or women. Thus, he does not advocate color-blindness, but rather race- and gender-consciousness combined with appreciation of each person's individual qualities. He fears that if we do not give members of disfavored groups individual consideration, then the powerful members of society will reject these people outright simply because they are members of oppressed minority groups. On the contrary, in the *Grutter* decision, the Supreme Court fears that schools will accept—not reject—students simply because they are members of oppressed minorities. Dewey held legitimate fears that American society would mistreat minorities. The *Grutter* Court fears we are treating them too well.

The only conclusion to draw from the *Grutter* decision, especially when viewed in light of Dewey's work, is that our judiciary has slipped too far from the lives of real people. The Court has failed to consider the interests of a significant party to this litigation—the interests of disfavored minority students. And precisely because they are who they are—disfavored minorities—their interests fail to be represented in our nation's highest court. We need lawyers willing to take on the interests of students like the students in the *Rios* case, lawyers willing to think outside of the confines of Justice Powell's dicta in *Bakke*. Perhaps they can consider new ways that our Equal Protection clause can be construed to actively protect each person equitably, rather than allowing it to passively render everyone the same. In his dissenting opinion to the *Grutter* majority

133

opinion, Justice Clarence Thomas writes that "the Equal Protection Clause renders the color of one's skin constitutionally irrelevant" (Grutter 335). Yet, experience-based knowledge shows that, for now at least, race matters greatly to how many people of color confront life in the United States, and the voices of these experiences must be allowed to help shape educational policymaking.

b. Diversity-Reflection-Readjustment

Pragmatism has much to say about the role of diversity in shaping a democratic society. The pragmatic thought of John Dewey addresses our social interactions in general and our educational interactions in particular. Most importantly, as Dewey asserts, our educational system is inextricable from the sort of society we shape. Thus, it is important we keep in mind that "[t]he conception of education as a social process and function has no definite meaning until we define the kind of society we have in mind" (Democracy & Education 103). In his political writings, Dewey established a pragmatist notion of democracy. In *The Public and Its Problems* (1927), Dewey provides "a statement of the nature of the democratic idea in its generic social sense" (Public & Problems 147). He writes of democracy:

> From the standpoint of the individual, it consists in having a responsible share according to capacity in forming and directing the activities of the groups to which one belongs and participating according to need in the values which the groups sustain. From the standpoint of the groups, it demands liberation of the potentialities of members of a group in harmony with the interests and good which are common. Since every individual is a member of many groups, this

134

specification cannot be fulfilled except when different groups interact flexibly and fully in connection with other groups. (<u>Public & Problems</u> 147)

Thus, Dewey recognized that democracy consists of the dynamic interaction of individuals as individuals and as group-members. Too often the debate surrounding affirmative action is reduced to the fight for "individual rights" on one side and "group think" on the other. Dewey illustrates with this mapping of social democracy that, in practice, each member of a democratic society negotiates membership in a number of groups all of the time, and yet does so as an individual with certain individual responsibilities. Individual rights and responsibilities and group rights and responsibilities are not mutually exclusive, but rather mutually reinforcing.

Using this concept of negotiating group responsibilities, Dewey identifies two components of democratic education. The first is the cultivation of common interests between diverse group members. He writes: "In order to have a large number of values in common, all the members of the group must have an equable opportunity to receive and to take from others. There must be a large variety of shared undertakings and experiences" (<u>Democracy & Education</u> 90). The second is the promotion of interaction between different groups, in order to encourage "reorganization and progress through wider relationships (Dewey <u>Democracy & Education</u> 91). These two components— common interests of individuals and interaction between groups—are closely related and dependent on one another for success. Without recognition of common interests, no amount of interaction between diverse peoples will create a democratic community. And

without interaction, there can be no cultivation of common interests, as this must necessarily be done in a communal environment with all parties taking part in the creation of those interests and goals. For if certain groups are left out of the goal-creation process, then the goals and interests are not "common."

Dewey recognizes the radical importance of diversity in education: "Every expansive era in the history of mankind has coincided with the operation of factors which have tended to eliminate distance between peoples and classes previous hemmed off from one another" (Democracy & Education 92). But it is not enough to bring people of different backgrounds into close contact with one another: diverse peoples must also learn from these experiences, reflect upon them, and craft behavior accordingly. Thus, diversity in education must include a reflective component. Students must think about the consequences of working together in a cross-cultural environment toward common goals. Dewey writes that although people have begun to come into closer contact with one another, "It remains for the most part to secure the intellectual and emotional significance of this physical annihilation of space" (Democracy & Education 92). In summary, Dewey's instructions provide an excellent model for democratic, diverse education in a race-conscious environment. He does not suggest that we merely throw people of diverse backgrounds together in classrooms. Rather, educators must create environments in which all students actively learn from one another by creating common goals that students work toward together. During this work process, all students must have something to learn, and all students must have something to teach.

Dewey's watchword for the learning process created through diversity is "readjustment" (Democracy & Education 92):

> The two elements in our criterion both point to democracy. The first [common interests] signifies not only more numerous and more varied points of shared common interest, but greater reliance upon the recognition of mutual interests as a factor in social control. The second [group interactions] means not only freer interaction between social groups … but change in social habit—its continuous readjustment through meeting the new situations produced by varied intercourse. And these two traits are precisely what characterize the democratically constituted society. (Dewey Democracy & Education 92).

Readjustment is central to the pragmatic learning process. Similar to Jane Addams's notion of "perplexity," Dewey recognizes that social interactions coupled with reflection will force us to question previously held beliefs, requiring readjustment of our belief systems and attendant habits and behaviors. Readjustment, in the end, yields new action, which for pragmatism is the consequence and the initiation of thought. This pragmatic formula of diversity-reflection-readjustment is the groundwork for what I call meaningful diversity.

In the *Grutter* decisions, the Court agreed with the University of Michigan's arguments that "educational benefits … flow from a diverse student body" (Grutter 328). The Court notes that this was the only "justification for their use of race in the admissions process" given by the school—not to remedy past discrimination, not to remedy present discrimination (Grutter 328). The University of Michigan took a conservative tactic, hoping to preserve affirmative action by pointing toward Justice Powell's diversity dicta in *Bakke*. However, neither the *Grutter* Court nor the University addresses the question

137

of how to make diversity meaningful in education. Justice Antonin Scalia attacks this gap in his dissenting opinion. He writes that some universities will "talk the talk of multiculturalism and racial diversity but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduate ceremonies" (Grutter 349). I agree with Scalia that universities often admit students from disfavored minorities and then turn their backs once the students hit campus. I would go so far as to say that the majority of schools practice this type of "diversity."

Before I tackle the difference between *Grutter*-diversity and meaningful diversity, I must address a serious defect in Scalia's rhetoric. Scalia writes that even with affirmative action, schools are prone to "tribalism" in the form of minority self-segregation, listing various campus organizations that minority groups often form. First, Scalia's use of the word "tribalism" to refer to minority groups is a woeful error. For centuries black people, Latinos, Native Americans and other people of color have been labeled "native," "savage," and "tribal" by whites. That Scalia has invoked this type of racial domination in this context is despicable. But this kind of defect is typical of Scalia's writing—a brilliant jurist, he is nevertheless prone to slips of the pen that, intentional or no, reveal a disturbing solipsism. For example, in his dissenting opinion in *Romer v. Evans* (1996), a decision which overturned a Colorado state constitutional amendment banning gay people from bringing anti-discrimination law suits, he writes:

138

"The Court has mistaken a Kulturkampf for a fit of spite" (Romer 636). With these

words, Scalia intended to assert that the Court has no business meddling in affairs of

culture, even if it is a "culture war." Scalia's use of the word "Kulturkampf" received

much attention at the time. One legal commentator observes: "why would one choose to

begin an opinion—particularly one dealing with civil rights issues—with a German term,

especially one that incorporates the word "kampf," with its reverberations of Hitler's

Mein Kampf and the persecution and extermination of Jews, gay people, and other

minorities in Nazi Germany?" (Lafferty 185). "Tribalism" and "Kulturkampf" are

deliberately insensitive and insulting words, wrong to use in judicial opinions, because

judicial opinions make law with words. These words only reinforce the power that a

white male justice wields over the lives of disfavored minorities.

Secondly, although Scalia properly observes that colleges and universities often

do sponsor minority-focused student groups, living groups, and student centers, he fails

to recognize that the student and housing groups welcome membership of friends who are

not members of that particular minority (UNC-BLSA). The stated purposes of these

groups often includes the promotion of cross-racial understanding. Other purposes

include addressing "problems unique to Black students" and "to promote diversity within

the [school] community" (UNC-BLSA; Duke-BLSA). Minority-focused student centers

welcome students who are of other races and ethnicities because they exist to educate and

cultivate community. These groups and centers do not have the invidious purpose of

excluding white people: white people often choose not to join or visit simply because

they feel that the interests of these groups do not align with their own interests. Furthermore, there would be no need for student organizations to promote diversity or address the needs of black students if these tasks were accomplished by the university community at large. The organizations exist because too often black students need support and representation in the broader university community, a community that often excludes them, socially, intellectually, and politically, because they are viewed as different. Scalia's observations reverse the causation: minority student groups and centers are not the cause of segregation on campus; they are formed in response to it. But Scalia is correct when he writes that some schools may "talk the talk" of diversity but fail to "walk the walk." This returns to the primary question facing diversity in education: How can teachers make diversity meaningful?

c. Pedagogy for Meaningful Diversity

John Dewey emphasizes that maintaining diversity "is a matter of deliberate effort" (<u>Democracy & Education</u> 93). Our society "must see to it that intellectual opportunities are accessible to all on equable and easy terms" because the health of our democracy depends on it (<u>Democracy & Education</u> 93). This is an affirmative duty, one that does not stop at college admissions, but follows each student and teacher into the classroom. The *Grutter* majority waxed poetic on the benefits of educational diversity both in the university setting and for society at large, but they failed to address how such diversity can be made meaningful in university classrooms. Justice Scalia's warning in

his dissent, though shaded by his insulting language, should be heeded. Universities must be held accountable beyond the admissions process. The "educational benefits of diversity" can only be realized through "deliberate effort."

Law professor Carole Buckner writes about making the "aspirational rhetoric" of *Grutter* into a reality (878). Although Buckner's work deals with law schools in particular, her pedagogical ideas easily translate into undergraduate learning environments as well. A critical idea in Buckner's study is "equitable participation" of all students in classrooms and other university environments. Too often, she asserts, minority students and women gain admission to universities and graduate/professional schools but do not find as many opportunities to participate in the classroom as do their white male peers. The solution to this exclusion from participation lies in the hands of educators. Buckner writes, addressing Justice Scalia's admonitions in *Grutter*: "Implementation of pedagogical strategies conducive to the equitable participation of minority law students can transform the 'talk' of multiculturalism into an experiential reality of robust participation" (878). Buckner suggests that to begin to understand the problems minority students face, educators must conduct an examination—an "investigation" to use Addams's term. She writes, "'The inequities that exist in the larger society are reflected in the classrooms.' To understand this at the micro level, we must 'look to the bottom;' that is, we must examine the actual experiences (the reality) of those who have experienced discrimination" (884-85) (citing Guiterrez & Larson). In

pragmatic fashion, Buckner grounds her knowledge firmly in the experiences of the students she seeks to help.

Buckner's choice of perspective—"looking to the bottom"—echoes that of Charles R. Lawrence when he advocates the perspective of the plaintiffs of the *Rios* lawsuit. Lawrence calls the liberal defense of affirmative action "the view from the top" (Lawrence "Two Views of the River" 932). The *Rios* suit, in which a class of minority plaintiffs sued the University of California for excluding them due to their minority status, embodies "the view from the bottom" (Lawrence "Two Views of the River" 942). The suit provides a voice to show why race-conscious admissions are both just and necessary. The *Rios* suit challenges the presumption of liberal theory which "focuses on guarding the liberty of an autonomous, disconnected human being. … For the liberal legal theorist, racism consists of isolated prejudicial discriminatory practices in an otherwise nondiscriminatory world" (Lawrence "Two Views of the River" 950). The liberal model does not reflect the true experiences of those who experience racism today, usually as "microaggressions" from many actors and in a structural and institutional manner (Davis 1565). The liberal defense of affirmative action affects how diversity is instituted on campus as well. It "justifies diversity as a way to help privileged whites better understand people of color in a nation that may soon have a non-white majority" (Lawrence "Two Views of the River" 950). The way it stands now, "diversity" merely exists to improve the education of white people.

Buckner hopes to dispel this twisted vision of diversity's purpose. Her first investigation confirms that minority students do not achieve in law school as well as non-minority students by the traditional standards of measurement. They have lower grades, higher rates of attrition, and earn fewer judicial clerkships. These arguments have been used by those who seek to eradicate affirmative action, by suggesting that minority students are not prepared for law school. Anti-affirmative action advocates suggest that minority students fail because they are not "qualified." Some criticize the effects of diversity on black students. For example, Justice Thomas writes in his dissenting opinion in *Grutter*, that "heterogeneity actually impairs learning among black students" (Grutter 364). Thomas argues that black students succeed academically at higher rates if they attend historically black colleges (HBCs). In a way, he is acknowledging what Lawrence identified as well: that diversity as it is currently envisioned exists to help white students. Rather than blaming minority students for their poor performance as does Thomas, Buckner examines the work of educators. She welcomes the perplexity that is raised when otherwise "qualified" minority students fail to achieve in school. She writes, "law school instructors agree that students who participate actively in class more readily develop analytical and communication skills. … [C]lass participation affects academic achievement independent of gender, ethnicity, and class. Yet, participation of minority students in law school classes is disproportionately low, and many minority students choose silence" (886-87). What she describes is not meaningful diversity, but diversity in name only.

Buckner advocates, among other strategies, cultivating cooperative learning environments which strongly echo the social learning strategies advocated by John Dewey. In *Experience and Education*, Dewey writes about the importance of allowing students to work in groups in order to develop community skills and what he calls "social control" (Experience & Education 54). Social control of individuals operates "without violation of freedom" because it is the group as a whole which governs. Authority comes from within, rather than from without. Dewey contrasts his progressive school model with traditional schools in which the "school was not a group or community held together by participation in common activities" (Experience & Education 55). In "the new schools," he continues, "the primary source of social control resides in the very nature of the work done as a social enterprise in which all individuals have an opportunity to contribute and to which all feel a responsibility" (Experience & Education 56). However, good cooperative work does not come without preparation on the part of the educator. He writes:

> A genuine community life does not organize itself in an enduring way purely spontaneously. It requires thought and planning ahead. The educator is responsible for a knowledge of individuals and for a knowledge of the subject-matter that will enable activities to be selected which lend themselves to social organization, on organization in which all individuals have an opportunity to contribute something… (Experience & Education 56).

Thus, in order to craft a successful cooperative learning environment, the educator must use all of the knowledge and experience she has about her students and the subject matter in order to ensure that the community will be one which values every individual.

Contemporary pragmatist and pedagogical theorist Hephzibah Roskelly, in her book *Breaking (into) the Circle: Group Work for Change in the English Classroom*, notes that although group work, a common cooperative learning practice, "is resoundingly endorsed" by pedagogy theorists, it is often "unsuccessful in practice" (4). When beginning her work on cooperative learning, Roskelly listened to the voice of perplexity that spoke when study after study showed that students of color, even those from wealthy families, achieved academically at lower rates than white students (7). Roskelly recognizes the power that group work bears for increasing meaningful diversity. She writes,

> [M]any students of color, systematically excluded from the circle of academic responsibility and achievement, begin to choose their own circles, outside the schoolyards. The real hope of group work lies in the possibility it can offer for nurturing more equitable systems within the classroom and the institution—more equal spaces for all the members who are invited to break into the academic circle—that is, all students who enter public schools. (7)

Group work can create vital communities that welcome those who have until now been exclude by our educational system.

Like Dewey, Roskelly recognizes that forming effective groups is not easy. She provides four "maxims" for group work. First, teachers must "make group work organic" (130). If group work is only a sporadic part of the work of the work for a course, then the group work will seem forced and unimportant. Second, Roskelly suggests educators "teach people how to work in a group" (130). Teachers cannot assume that students know how to work in groups. By the time most students have reached college, they have

been taught to compete with other students, not to collaborate. We can encourage

collaboration by providing thoughtful points of discussion for group-members to work on

together. Third, Roskelly suggests that educators "Make membership in a group

permanent" (130). Making groups permanent throughout a semester or a school year

allows group-members to develop confidence in each other and create a safe space for

new types of thinking, thereby developing community. Finally, Roskelly advises: "Make

the group's work real" (130). Students can tell when the work they do does not matter.

If the work does not matter, then the groups will not matter either.

Buckner too advocates group learning in the classroom. She grounds her model

of cooperative learning in studies of minority law students and their preferred learning

styles. Through her investigations, she learned that Native American students, black

students, and Hispanic students all typically "prefer a cooperative style of learning"

(922). She defines cooperative learning as "a pedagogical approach in which a teacher

structures learning so that heterogeneous groups of students work together to achieve a

shared learning goal" (923-24). She warns, "Simply asking students to work together in

groups will not create cooperative learning, and such an approach misses the fundamental

nature and spirit of cooperative learning" (924). Like Roskelly, Buckner provides

specific guidelines for cooperative learning that include assigning specific roles to

students in groups to emphasize group "interdependence" (930). Yet at the same time,

the educator must insure that there is "individual accountability" (931). Buckner allows

that in her experience, "Individual groups evolved their own ways of making sure

146

members prepared for class" (932). "Group processing" is essential; this is the reflective component of cooperative learning, when members "discuss the effectiveness of their groups" (933). "Promotive interaction" provides the opportunity for students to provide feedback to each other on their work; however, as Buckner notes, this type of interaction requires the development of "social skills" (934). Dewey, Roskelly, Buckner, and other pedagogy theorists provide excellent guidance how to implement cooperative learning in the classroom and the benefits it provides for democratic learning. All that is required now are educators willing to step out of traditional modes of pedagogy and walk the walk of meaningful diversity.

d. Paulo Freire and Contemporary Pragmatic Pedagogy

One of the most influential thinkers in pedagogy of the twentieth century is Brazilian pedagogy theorist and activist Paulo Freire (1921-1997). His work is set in the context of illiterate Brazilian peasant laborers seeking freedom and self-actualization through literacy and knowledge during the 1960s (Lownd). Educated in the law and philosophy, Freire soon gained a reputation as a progressive educator, helping educate poor laborers at a time when the right to vote in Brazil was contingent on literacy. Although his writings deal specifically with revolutionary Brazil, his ideas transcend time and geography and have been used by many teachers in the United States to theorize their work. "Liberatory pedagogy" is Freire's model of learning which is "grounded in the desire to pursue the right to be human" (56). A fundamental aspect of Freire's work is

147

praxis: "the action and reflection of men and women upon their world in order to transform it" (79). Freire's concept of praxis along with his privileging of students' lived experience has led to the embrace of his work by contemporary American pragmatists. Pragmatic philosopher Cornel West writes, "Paulo Freire is the exemplary organic intellectual of our time," referring to Antonio Gramsci's term, "… It is safe to say that his classic work, *Pedagogy of the Oppressed*, was a world-historical event for counter-hegemonic theorists and activists in search of new ways of linking social theory to narratives of human freedom" (West "Preface" xiii). Freire's work strongly echoes pragmatism. The pedagogy he advocates can help create meaningful diversity in classrooms the United States.

Roskelly and Ronald, contemporary pragmatists and professors of rhetoric and composition, assert the pragmatic possibilities of the work of Paulo Freire. The authors concentrate on the ways Freire's work focuses on drawing connections between the "world and the word," that is, between social activism and literacy ("Untested Feasibility" 612). In their article "Untested Feasibility: Imagining the Pragmatic Possibility of Paulo Freire," they show "How teachers might re-create, rather than import, Freire into our own North American contexts—and so not lose the power of his ideas" ("Untested Feasibility" 612). "At the same time," they note, "exploring the connections between pragmatic philosophy and liberatory pedagogy also invites a remaking of pragmatism itself as Freirean ideas extend and comment on the earlier approach" ("Untested Feasibility" 613). Across-the-board importation of Freire's theories is not useful, as Roskelly and Ronald

explain. They caution U.S. teachers who would use Freire's ideas in their classrooms.

Rather than importing Freire's work wholesale into the United States, his work must be

"re-invented" for our context ("Untested Feasibility" 612). Re-inventing Freire as a

pragmatist, as Roskelly and Ronald suggest, would plant his theories firmly in American

soil.

Through the course of their article, the authors take three pragmatic tenets in turn

and re-invent Freire through the lens of each. First, Roskelly and Ronald explain that

"Freire and the pragmatists share [a] belief in the centrality of experience" ("Untested

Feasibility" 621). Freire believed that both students and teachers needed to engage with

life experience in order to "see how their words shape their worlds" ("Untested

Feasibility" 621). Second, the authors show how pragmatic mediation—the breaking

down of oppositional binaries and creation of new relationships—is central to Freire's

literacy methods. They write, "Pragmatism offers a method of getting beyond dualism,

recognizing that a third principle, a triadic conception that can put two ideas into

dialogue, can lead thinkers out of traps of ideological narrowness, meaningless debate,

and fatalism" ("Untested Feasibility" 626). Mediation of dualism, in the form of

dialogue, formed the groundwork of Freire's process. For Freire, the authors explain,

"The connections among language, thought, and action are real" ("Untested Feasibility"

626). Third and lastly, Roskelly and Ronald approach the work of Freire through the lens

of pragmatic truth. They write, "as Peirce and James outlined it, pragmatic philosophy

insisted that 'truth' was both a contingent and partial reality … Yet truth remains a real

possibility and a worthwhile goal, a belief that is equally important in pragmatic method and theory" ("Untested Feasibility" 627). The authors relate pragmatic truth to Freire's unwavering sense of hope: "This hope is a belief in the possibility of truth or, put another way, reason to hope for possibility of change" ("Untested Feasibility" 628).

Freire's hopeful and progressive pedagogy can be called upon to negotiate teaching with race-consciousness. Freire's teaching methods, including dialogue, privileging experience, and emphasizing action, are all ways toward meaningful diversity. His liberation-minded political writings can be useful guides as well. Freire observes, for instance, the reaction of the wealthy oppressors in Brazil to the gaining of independence by peasant laborers. His description sounds uncannily similar to the rhetoric of the affirmative action debate in the United States today. He begins by explaining why a new government established by the working class must not be a simple reversal of oppressor positions: "the moment when the new regime hardens into a dominating 'bureaucracy' the humanist dimension of the struggle is lost and it is no longer possible to speak of liberation. Hence our insistence that the authentic solution of the oppressor-oppressed contradiction does not lie in a mere reversal of position" (57). However, even when liberation of laborers is conducted in a democratic fashion, taking into account the perspectives of the former oppressors as well as the perspectives of the laborers,

> the former oppressors do not feel liberated. On the contrary, they genuinely
> consider themselves to be oppressed. Conditioned by the experience of
> oppressing others, any situation other than their former seems to them like

150

oppression. … Any restriction on this way of life, in the name of the rights of the community, appears to the former oppressors as a profound violation of their individual rights … For the oppressors, "human beings" refers only to themselves; other people are "things." (Freire 57)

Freire's observations can be useful in understanding the arguments made by those who seek to dismantle affirmative action, such as white people who claim to be its "victims" and insist on "individual rights" (CIR).

Freire insists that the lives and experiences of students must be central subjects of study (96). However, he sets up a complex pedagogical framework in which this type of study should take place. First, Freire suggests that the teacher's role is not to fill students' minds with knowledge from books, what he calls "the banking method" of teaching. Through the banking method, "The teacher talks about reality as if it were motionless, static, compartmentalized, and predictable. Or else he expounds on a topic completely alien to the existential experience of the students. His task is to 'fill' the students with the contents of his narration—contents which are detached from reality" (72). The banking method is the style preferred by oppressors because the oppressed do not have a say in what they learn and the oppressed cannot question what they learn or its significance. The banking method simply reifies existing power structures: "Education as the exercise of domination stimulates the credulity of students, with the ideological intent (often not perceived by educators) of indoctrinating them to adapt to the world of oppression" (78).

Instead of the banking method, Freire suggests the "problem-posing" method of education: "posing the problems of human beings in relations with their world" because "liberating education consists in acts of cognition, not transferrals of information" (79). In order for problem-posing to work, though, "the vertical pattern characteristic of banking education" must first be broken down (80). In pragmatic fashion, Freire suggests breaking down the teacher/student binary, mediating the binary with the creation of "teacher-student" and "students-teachers" (80). The process through which the binary is resolved is "dialogue." Freire writes: "The teacher is no longer merely the-one-who-teaches, but one who is himself taught in dialogue with the students, who in turn while being taught also teach" (80).

Dialogue is central to Freire's pedagogical theory and praxis. Freire defines dialogue as "the encounter between men, mediated by the world, in order to name the world" (88). For Freire, dialogue is a powerful tool: "If it is in speaking their word that people, by naming the world, transform it, dialogue imposes itself as the way by which they achieve significance as human beings. Dialogue is thus an existential necessity" (88). Through dialogue, teachers and students bring the life experiences of students into the classroom: "It is not our role to speak to the people about our own view of the world, nor to attempt to impose that view on them, but rather to dialogue with the people about their view and ours. We must realize that their view of the world, manifested variously in their action, reflects their *situation* in the world" (96). However, Freire refines the manner in which life experience of students is used as a classroom text: "the object of

investigation is not persons (as if they were anatomical fragments), but rather the thought-language with which men and women refer to reality, the levels at which they perceive that reality" (97). Thus, although the life experiences of students are the object of study, it is important that the students themselves provide the perspective from which these experiences are viewed and analyzed.

This Freirean framework of problem-posing, dismantling hierarchies, dialogue, and privileging student perspective and experience can be re-invented in pragmatic terms to aid in the creation of meaningful diversity in racially and ethnically diverse classrooms in the United States. Law professor Charles R. Lawrence has written on the importance of "the Word" in black American pedagogy and scholarship. Lawrence describes the Word as

> a tradition of teaching, preaching, and healing; an interdisciplinary tradition
> wherein healers are concerned with the soul and preachers with the pedagogy of
> the oppressed; a tradition that eschews hierarchy in the face of the need for all of
> us who seek liberation to be both teachers and students. The Word is an
> articulation and validation of our common experience. It is a vocation of struggle
> against dehumanization, a practice of raising questions about reasons for
> oppression… . ("Word and River" 336)

Lawrence invokes many Freirean themes with his work: raising questions, articulation of experience, eschewing hierarchy, and most directly, the pedagogy of the oppressed. He writes about the Freirean notion of praxis: "Within the Word we find two dimensions, reflection and action, in such radical interaction that if one is sacrificed—even in part— the other immediately suffers. There is no true word that is not at the same time a praxis"

("Word and River" 337). In Lawrence's restatement, the pragmatic possibilities of Freirean pedagogy come to the fore. Dewey asserts often in his writings on education that reflection and experience are inextricable: "Thought or reflection, as we have already seen virtually if not explicitly, is the discernment of the relation between what we try to do and what happens in consequence. No experience having a meaning is possible without some element of thought" (Democracy & Education 151). As Dewey explains, students and teachers must reflect on what we do in order for our actions to have meaning.

Lawrence's pedagogy is Freirean and pragmatic, and as such, contains valuable projects for achieving meaningful diversity in university classrooms. Lawrence espouses the Freirean notion that the role of the teacher and the role of the scholar must be entwined. "In fact," Lawrence writes, "my teaching (in the broadest sense, my dialogue with others) is the chief source of nourishment for my scholarship" ("Word and River" 337). One pedagogical-scholarly method that Lawrence advocates is "embracing subjectivity." He explains that most scholars claim "an unbiased and universal perspective by distancing themselves from the social reality they seek to describe" ("Word and River" 338). However, pragmatism shows us that this scholarly position of neutrality and objectivity is impossible—every position has a perspective, and every perspective must be heard. Lawrence advocates claiming one's perspective as a scholar and educator of color:

> The Word, in stark contrast, embraces position perspective. It recognizes the impossibility of distance and impartiality in the observation of a play in which the observers must also be actors. However, championing subjectivity is more than an acknowledgement of the existence and validity of many different and competing perspectives. Practitioners of the Word must learn to privilege their own perspectives and those of other outsiders, understanding that the dominant legal discourse is premised upon the claim to knowledge of objective truths and the existence of neutral principles. ("Word and River" 338)

Lawrence recognizes that meaningful diversity cannot be achieved so long as the dominant perspective pushes certain people into outsider positions. He advocates the claiming of outsider perspectives, both on the part of students who can use their perspective to "tell one's own story" and on the part of teachers who can use perspective "as an antidote to the mystifying and oppressive properties of the dominant ideology of shared values and neutral principles" ("Word and River" 339-40).

Race-conscious admissions policies present great opportunities to create meaningful diversity in higher education and through education. Keeping in mind the pragmatic strategies embodied in the process of diversity-reflection-readjustment, we can remember that simply putting diverse students together is not enough. Educators must encourage continuous reflection by students upon new relationships, and through this reflection, continuous readjustment of beliefs. I have presented here just a few strategies provided by contemporary pragmatic educators—Freire, Buckner, Roskelly and Ronald, and Lawrence. One day we will realize the goal of race-conscious admissions: all students will have the opportunity to name their world.

CHAPTER VI

CONCLUSION: ON PRAGMATISM AND RACE-CONSCIOUSNESS

As a white woman writing about race and affirmative action, when I discuss my project with other white people, I often see questions unasked on their faces: *Why are you writing about race? What does it have to do with you?* Sometimes they ask the questions aloud. Usually, they are visibly surprised that I defend affirmative action.

The force behind these questions is the fundamental challenge faced by race-consciousness and affirmative action in the United States, and why the call for color-blindness gains so much political traction. Too many white folks cannot figure out why race is an issue that pertains to them and why affirmative action is a fundamental necessity. In U.S. culture, whiteness is a non-race—despite the efforts of academic white studies programs. And since white people get on just fine without a race, then perhaps the feeling is that everyone else should, too. Programs like affirmative action merely force everyone to pay attention to something that white people would rather forget.

Race is the crux of this entire issue, because race is everywhere. White people try to sweep it under the rug in some strange dance of non-race-speak. White people seem to have an agreement among ourselves that we will not mention race when we speak to one another in public. You never know who might be listening. You never know if someone might think you are racist. The problem is, white people seem to be more worried about people thinking they are racist than they are about actually fighting racism.

For example, last month, I was at a doctor's office trying to make an appointment. Two white female clerks sat behind the counter. A year had passed since my last visit and it was time for a check up. The two white women were very polite, but we suffered a moment of confusion. The last doctor I'd seen, Dr. Bayer, had left the practice a few months ago. I needed to switch to a different doctor in the practice.

I said, "I see Dr. Bayer is no longer with your office. I need to find a new doctor here."

One woman replied, "You couldn't have seen Dr. Bayer. He left the practice before your last appointment."

"I'm certain I saw Dr. Bayer. He was wonderful."

The other woman said, "Maybe you saw Dr. Connelly."

"No, I'm certain it was Dr. Bayer."

The first woman said, "Dr. Connelly is tall, thin…"

"No," I said, "I saw Dr. Bayer. The black person."

Both women stared at me in stunned silence. One glanced over my shoulder, perhaps to see if any of the black people in the waiting room heard me say the b-word.

Since when has the very mention of a person's blackness become an insult? Searching for an explanation for the clerks' behavior, I wondered, did they believe Dr. Bayer should be ashamed of being a black person? Did they hope that Dr. Bayer's blackness, an anomaly in this otherwise white doctor's office, would simply disappear if they did not talk about it?

Patricia J. Williams identifies this tendency to talk around race. She writes that "it is imperative to think about this phenomenon of closeting race" (Color-Blind Future 8). Her words describe my experience at the doctor's office:

> [T]he subject [of race] is considered a rude and transgressive one in mixed company, a matter whose observation is sometimes inevitable, but about which, once seen, little should be heard nonetheless. Race thus tends to be treated as though it were an especially delicate category of social infirmity—so-called—like extreme obesity or disfigurement. (Color-Blind Future 8)

My mentioning of Dr. Bayer's blackness horrified and embarrassed the two clerks. They'd spoken in circles to avoid mentioning the race of Dr. Bayer and Dr. Connelly. In this excerpt, though, Williams uses "race" to refer to a race of color, like blackness. Whiteness would not be a social infirmity, in her terms. On the other hand, whiteness, like "average" body weight, disappears into normalcy. There is no need for a white person to mention a whiteness because, in the language of our society, a person is white unless described as something else. But in the reality of our society, one that is swiftly edging toward a majority-of-color, such white solipsism is becoming impractical. "Most" people just are not going to be white any more. What are we going to do then? Scenes like this one will become more and more prevalent.

I am reminded of Rhonda V. Magee Andrews's project of "humanity consciousness," her attempt mediate the binary of race-consciousness and color-blindness (489). Her stated goal is "post-racial human dignity" (489). Put into the terms of my interaction with the clerks at the doctor's office, race will not disappear—how could it?—

but it is possible that it could no longer make a difference—at least not a hurtful difference. The clerks were upset that I mentioned Dr. Bayer's blackness because today blackness often is indeed a "social infirmity": one that hurts a person's chances of getting a job, getting elected to public office, getting a not-guilty verdict, getting out of a speeding ticket, and getting a cab. Blackness currently is a difference that amounts to deviance from the norm of whiteness. By calling Dr. Bayer "black," I invoked this notion of difference and deviance. The clerks wanted to emphasize how much Dr. Bayer is *just like us,* not different and thus not deviant. I struck back with my words, hoping they might see that blackness need not be deviant. But my words were not enough.

As a teacher, I recognize that this scene and others like it represent teaching moments. Race-consciousness and meaningful diversity must be begin in classrooms at all levels of the educational system in the United States, or there will never be meaningful diversity anywhere else. As Paulo Freire emphasizes over and over in his work, dialogue is central to learning. Moments such as these, when people must speak to one another, can be moments of learning, not of fear or aggravation. Teachers can meet Williams's imperative and bring race out of the closet to make it a conscious part of the lives of all people, including the lives of white people.

I am a student and a teacher, not just in the classroom, but everywhere. This notion is central to pragmatic thought. I am always learning, always teaching, always both at the same time.

159

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Back in 2005, I presented a paper about rhetoric and the War on Terror at a large

academic conference. After the presentation, the discussion turned towards issues of

teaching politics. Instructors and professors in the room found this topic especially

pertinent due to our repressive political regime at the time, in which it appeared that any

civil liberty could be stripped away in the name of "terror." Critique of government

policy was stifled. A member of the audience asked me how I thought we could provide

our students with alternatives to the ideas proliferated by mainstream media outlets. She

saw this task as a challenge because, as teachers, we cannot bring our own "agendas" into

the classroom.

"Why not?" I asked her.

She answered, with disbelief, "Because we would get fired."

Setting aside issues of exploitation of non-tenure track instructors and the tough

university job market these days, I forged ahead. I replied by arguing that any speech

challenging an oppressive dominant regime is risky, yet worth the risk. She laughed.

Just as troubling as her fear was this educator's endorsement of the popular, non-

academic, Horowitzian consensus that "agendas" should be eradicated from spaces of

learning: that classrooms must be depoliticized. It seems just as obvious to me that this is

impossible.

I have spoken with other university teachers about the possibility of political change starting in our classrooms. Some seem hopeful. Most seem overworked and uninterested. Some seem afraid of even talking about politics in their classrooms. The issue of classroom politics has become tied to the word *agenda* in recent debates over teachers and classrooms; the word produces a bad taste in the mouth. It needs to be demystified. Merriam-Webster's dictionary provides two definitions: "a list or outline of things to be considered or done" and "an underlying often ideological plan or program" ("Agenda").

The first definition seems simple enough. Most teachers have a lesson plans, either formal or informal, that they use while teaching. The second definition seems more complicated, but it really is not. For everyone involved in education has an agenda: all teachers, all students, all parents of students, all institutions that facilitate learning, and all larger institutions that support these schools. Sometimes, however, these agendas are hidden, or align so closely with the overarching agenda of current mainstream American policy that it all but disappears. If one speaks against current policy, one is being political. If one stands silently, one is also being political by implicitly supporting the status quo. The study of rhetoric includes learning to hear what is unsaid as well as what is shouted.

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The overarching question that encompasses my work presents itself simply: What is education for?

There seem to be no shortage of opinions on this matter. In a recent online column for the *New York Times*, Stanley Fish retackles affirmative action, revealing a shift in his opinion. Although his underlying thought on "principles" has not changed, he does not believe schools should use politics to make a better society. Schools are only here to teach certain subjects, and that's it.

In the column, Fish recognizes that many arguments against affirmative action, especially those expounded by members of the U.S. Supreme Court, are founded on a conflict over "what works … and what is right" ("Revisiting"): principles versus pragmatism. Justices that vote against affirmative action policies take a principles approach. He outlines the parameters of the debate over race-conscious policies: "legislating in response to perceived social needs and legislating with an eye always to first principles—have defined the affirmative action debate from its beginning and continue to do so" ("Revisiting"). A first principles argument would say that any racial prejudice is wrong, even benign prejudice, because prejudice itself has some sort of inherent badness. A pragmatic argument would identify a social need and then work to solve it.

In judging affirmative action, Fish wonders, "Do we ask, will it work? Or do we ask, is it right?" ("Revisiting"). The pragmatic tone of Fish's language is obvious: he quotes William James's text *Pragmatism* with his words *what works*. In answering these

questions, Fish writes: "so-called principled arguments against affirmative action work by evacuating both history and morality—evacuating history by going to a level of abstraction so high that the difference between acts motivated by beneficence and acts motivated by malice disappear, and evacuating morality on the same reasoning" ("Revisiting").

Although Fish appears to be making an argument in favor of affirmative action, similar to the arguments he has made in earlier writings, toward the end of the column he takes a new turn. He presents two arguments against race-conscious admissions policies in higher education. The first has to do with methods of constitutional interpretation. As a professional interpreter of texts, for he is an English professor as well as a professor of law, Fish suggests that the Constitution demands that we follow certain "interpretative principles" ("Revisiting"). "The pragmatic question of whether it [affirmative action] will improve a bad situation" is not the proper question to ask of our Constitution ("Revisiting").

The second argument Fish makes against his former pragmatic argument for affirmative action has to do with the proper roles of colleges and universities:

> institutions of higher education (and their faculty) have only two proper tasks: to introduce students to bodies of material and to equip them with analytical skills. Anything else, in my very strong view, is the job of some other industry or institution, and that includes fashioning character, molding democratic citizens, taking moral or political stands, and performing actions designed to make the world a better place. One reason for supporting affirmative action is that it will make the world a better place, a more democratic place. But from the perspective of my severe notion of what universities should and should not be doing, that is not a good reason. ("Revisiting")

Fish continues: " It follows then that if affirmative action is to be defended, it must be on the basis of a pedagogical goal it directly furthers" ("Revisiting"). For a theorist opposed to first principles, this is a highly principled argument, and it falls apart for just this reason. Fish should know that universities do not exist in a political vacuum. Who decides what "material" and "skills" students should be taught, and who teaches them? These are highly political questions. African American studies and Women's Studies departments came into existence because professors and students recognized the political nature of academic disciplines. Fish yearns for a university devoid of politics, but he will not find one. Pragmatism has shown us that the best thing is a democratic university.

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Differences among students are not the only sources of power imbalances on campus. Teachers wield extraordinary power over their students, so much that sometimes it is hard for teachers to comprehend. Because of the power and influence that inhere in the position of teacher, there are risks to the processes of working toward of race-consciousness and meaningful diversity. Dewey writes that, as students of diverse backgrounds come together, they must work to understand the "intellectual and emotional significance" of their interactions (Democracy & Education 92). Dewey's words reveal that the methods of meaningful diversity involves more than intellectual processing of

164

new experiences, but also an emotional processing. Students are vulnerable, and teachers must remember that.

bell hooks addresses some challenges educators may face when employing pragmatic and Freirean pedagogical methods in American classrooms and presents possible solutions. Many of these problems arise from the inherent hierarchies of power of U.S. classroom structures combined with the emotions that present themselves while using Freirean strategies. For hooks, one of the greatest challenges is the inherent authority that teachers wield over students. She advocates dialogue as a method to break down the power imbalance and allow for free sharing of ideas and perspectives between teachers and students (Teaching Community xv). For hooks, as for Freire, dialogue refers to more than simple conversation. Rather, within hooks's notion of dialogue, ideas and authority are shared and altered by the speakers.

Members of a classroom seeking meaningful diversity must exercise care not to force class-members that are members of marginalized groups to speak for their entire group. This is too much of a burden for any one student to bear. bell hooks terms this role of forced spokesperson the "native informant" (Teaching to Transgress 44). hooks suggests discussing with all class-members the native informant issue as a means to prevent it. Students and teachers together bear responsibility to ensure that all students feel welcome, valued, and heard, but also free to remain silent. As Giroux warns, the "social relations" that a teacher "legitimates," whether consciously or unconsciously, are a powerful consequence of a teacher's work with students (29). Mediating these social

165

relations is necessarily part of a teacher's job, no matter that Fish declines to recognize this responsibility.

hooks addresses other risks that arise when teachers make students' lives a central part of study. She suggests that students should not be forced to write confessional narratives about their lives if they do not want to. Students may feel compelled to confess about their personal lives by teachers who reward such confessions from a position of judgment and power. hooks asserts that it is unfair for teachers to require students to write revealing narratives while the teacher maintains a veil of secrecy about her own life. The solution, according to hooks, is choice. Students should be given the choice to write and talk about their own lives, or not to. Teachers should not be forced to give confessional narrative writing or speaking assignments to their students, as some English departments require. Another solution is for the teacher to share aspects of her own life with her students while asking students about their lives, thereby sharing classroom power. hooks writes, "When education is the practice of freedom, students are not the only ones who are asked to share, to confess" (Teaching to Transgress 21). Giroux asks teachers to question "the identities we offer up to students" (29). For a teacher to share her life experiences requires great trust in her students—but no more than the trust that she asks students to place in her.

When members of a classroom share their personal experiences on the path toward meaningful diversity, teachers can help students negotiate the emotional significance of what they encounter, providing safe ways to speak and opportunities to

166

emotionally reflect on what is learned. Like politics, emotions—of students and

teachers—are always already present in the classroom. They should be welcomed, and

examined, like every other manifestation of experience.

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As I come to the end of this project, I think of how the classroom is like a

courtroom. The *Rios* plaintiffs, these students of color in California who sued for being

excluded from Berkeley after affirmative action was terminated in their state, are legal

outsiders. They are non-white, they are immigrants, they are poor, or they are all three of

these things. Our judicial system was designed by people who did not have these

plaintiffs in mind. The laws were not written with these plaintiffs in mind. Most

members of the judicial system—lawyers, judges—do not look like these plaintiffs. They

are "outside the circle" as Roskelly puts it. The *Rios* plaintiffs are also outside the circle

in a pedagogical sense. These students are marginalized because of their differences:

ethnically, linguistically, economically. Meaningful diversity can help bring them into

the circle of learning, community, and democracy. Being marginalized pedagogically

and marginalized legally and politically are not unrelated. As Justice O'Connor rightly

observes in the *Grutter* opinion,

> Moreover, universities, and in particular, law schools, represent the training
> ground for a large number of our Nation's leaders. Individuals with law degrees
> occupy roughly half the state governorships, more than half the seats in the United

States Senate, and more than a third of the seats in the United States House of Representatives. (<u>Grutter</u> 332) (internal citations omitted)

In other words, there is a direct, causative relationship between attending law school and the likelihood of holding political or judicial office. In this way, the classrooms a student is allowed to enter can help determine the roles that student will be permitted to play in a courtroom.

Most affirmative action lawsuits that cast white students as victims reinscribe structures of educational and judicial power. If a legal complaint fails to ask how a white student with great grades and scores could be considered the "victim" of anything, the circle is kept closed. If the case only hears the voices of white students and powerful university administrators and powerful state officials, the circle is kept closed. Who speaks for the students, the plaintiffs, who have no voice?

I think of the questions that white people ask or don't ask me when I tell them about this project: why write about race and affirmative action? I should answer with more questions: Who can speak? Who is asking the important questions? A Supreme Court Justice or a white graduate student in North Carolina? In some ways, this document is a legal complaint, support by evidence, by affidavits, depositions, interrogatories, and experts. I hope it is complete.

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