

# BOOK REVIEW

## Should Lawyers Care About Philosophy?

*Joseph William Singer\**

*A review of*

CONTINGENCY, IRONY, AND SOLIDARITY, by Richard Rorty  
(Cambridge University Press, 1989).

*and*

INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST  
THOUGHT, by Elizabeth V. Spelman (Beacon Press, 1988).

I was so *sure*, and that, I think, was what blinded me.<sup>1</sup>

—Agatha Christie

### I. INTRODUCTION

Philosophy and justice have always had a rocky relationship. Socrates, remember, was put to death for teaching young people to question received wisdom on matters of public importance.<sup>2</sup> Yet his pupil Plato dared to maintain that philosophers possessed ways of thinking that could help answer our most puzzling questions about the nature of both truth and justice. This is our paradox: Sometimes our culture holds philosophy to be essential to define and support just social institutions, and sometimes philosophy appears either to undermine those institutions or to be irrelevant to them.

Philosophers and legal theorists recently have been embroiled in a new debate about the relationships between philosophy and justice. This debate encompasses two issues. The first is the contest between objectivism and pragmatism. Objectivists believe that there are right answers to our most fundamental questions about truth and justice, and that we can

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1. AGATHA CHRISTIE, *MISS MARPLE: THE COMPLETE SHORT STORIES* 155 (1985).

2. For what I.F. Stone calls the "Athenian side of the story," see I.F. STONE, *THE TRIAL OF SOCRATES* (1988).

discover the answers to these questions by thinking in the right way. We discover these answers either by "drawing up truths from within or receiving atomistic sensations from without."<sup>3</sup> Pragmatists, on the other hand, emphasize that truth is not something we discover that is either external to us or intuitively self-evident. Rather, truth is a human creation—what is true depends partly on our purposes and partly on how we, individually and as a society, choose to describe the world. What is true is not simply given, there for us to discover; it is, at least partly, made by people, and therefore, changeable.<sup>4</sup>

The second issue in this debate is whether paying attention to philosophic methodology is necessary to understand and establish social justice, or irrelevant to it. On one side are those who argue for the "end of ideology," suggesting that we should get on with the business of discussing what we mean by "social justice" and how to achieve it, rather than fussing about irrelevant questions of metaphysics. On the other side are those who argue that the way we formulate any inquiry about social justice will have crucial effects on the answers we generate, and that methodological questions are therefore of paramount importance.

These two issues are often linked in the following way: On one side are those who claim that we are all pragmatists now, and that we should therefore stop quibbling about methodology and get on with the business of promoting social justice by imagining better ways to implement our democratic ideals. On the other side are those who claim that whether or not we are all pragmatists, methodology continues to matter greatly. It matters partly because those of us who had hoped to escape discredited objectivist ideas may be recreating them unconsciously in a new form. But more importantly, methodology matters because if we are not careful about the way we structure inquiry, then—whatever our intentions—we may recreate the illegitimate power structures we were trying to identify and undermine.

This debate engages what Elizabeth V. Spelman has called the "antiredeposition" problem. Spelman notes that detergents that work well prevent "the dirt taken out of concentrated spots from being redeposited more generally over the whole load."<sup>5</sup> We pragmatist critics of objectivism should be on guard against our tendency unconsciously to recreate

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3. ISRAEL SCHEFFLER, *FOUR PRAGMATISTS: A CRITICAL INTRODUCTION TO PEIRCE, JAMES, MEAD, AND DEWEY* 20 (1974).

4. JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY* 96, 114-16 (1948) (emphasizing the "place of active and planning thought within the very processes of experience" and hence the connection between human purposes and knowledge).

5. ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 5 (1988).

objectivist assumptions in new forms by inventing ever new ways of implying that answers to our questions can be "found" in some external source. By using the language of "finding answers," and similar "finding" metaphors, we "redeposit" responsibility for social life in some source other than human actors. We should guard against this because one goal of pragmatism is to recognize and accept responsibility for the judgments we make about what is important in human experience and about what it means.<sup>6</sup> Similarly, we theorists of social justice should be on guard against our own tendency to use modes of analysis that support the illegitimate forms of privilege we were hoping to abolish. Doing this is hard work: Those of us who are privileged in various ways may reinforce our own privileges either by ignoring them or by focusing on them. If we ignore them, we may adopt unconscious assumptions that place ourselves and our concerns at the center of attention; if we focus on them, we make ourselves and "our sins the most interesting and most pressing thing to talk about: so we are still center stage."<sup>7</sup>

The debate between objectivists and pragmatists has benefitted from the highly valuable contributions of Richard Rorty. He has led the recent revival of interest in pragmatism. His dissection and radical critique of traditional conceptions of philosophy has been enormously creative and helpful. Rorty has done us a great service by helping to clarify and free us from adherence to outworn vocabularies, questions, and lines of inquiry. He also has suggested what it might be like to live in a world where people did not require metaphysical foundations for their deepest beliefs. At the same time, in my view, Rorty has helped to fashion an unintentionally (according to him) conservative conception of the role of philosophic inquiry in constructing social justice. Although Rorty has helped to revive pragmatism, he also has marginalized the enterprise of philosophy, thereby depriving pragmatism of any critical bite. Whatever his intentions, the effect of his rhetoric is to reinforce existing structures of domination.

The conservative flavor of Rorty's version of pragmatism is important because, in many ways, it is similar to versions of practical reasoning that have become popular among some legal theorists.<sup>8</sup> These theorists

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6. J. DEWEY, *supra* note 4, at 163 (focusing on concrete situations of moral conflict locates responsibility in the decisionmaker by requiring the exercise of intelligent judgment); *see also* DAVID MAMET, *WRITING IN RESTAURANTS* 130-34 (1986) (understanding truth as context-dependent places responsibility in the artist to create meaning).

7. E.V. SPELMAN, *supra* note 5, at 5.

8. For examples of scholarship in this mode, see William Eskridge, Jr. and Philip Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *STAN. L. REV.* 321 (1990); Daniel Farber, *Brilliance Revisited*, 72 *MINN. L. REV.* 367 (1987); Daniel Farber & Philip Frickey, *Practical Reason and the First Amendment*, 34 *UCLA L. REV.* 1615 (1987); Anthony Kronman, *Practical Wisdom*

join pragmatists in asserting that many of our old questions are outworn, and that we should stop fumbling around with them and address ourselves to what really matters. But the way these theorists characterize the questions that confront us will make it harder to adopt a critical stance toward current social practices. This is so despite the fact that many of these theorists are interested in social change.<sup>9</sup>

The poverty of Rorty's version of pragmatic thought can best be understood by comparing his vision of the relation between philosophy and justice with an alternative vision. For this purpose, I take the work of Elizabeth V. Spelman to be exemplary. In contrast to Rorty, Spelman provides a model of inquiry that takes the challenge of pragmatism seriously. She uses a variety of philosophical techniques to explore and expose the ways in which our categories of thought and modes of analysis channel our attention in particular directions, thereby making certain issues and questions salient while suppressing others. In so doing, our paradigms of thought render the experiences of some people central and those of others peripheral. By taking our attention away from the experiences, concerns, and lived reality of marginalized or disempowered people, our habits of thinking reinforce oppression.

The way we conceptualize both social relationships and moral inquiry affects legal analysis. To the extent those conceptions conceal the workings of power, the legal system helps perpetuate social injustice. Through her careful exploration of those conceptions, Spelman challenges our habits of thinking that reinforce the illegitimate power relations we had hoped to challenge. She shows how philosophical analysis can help expose oppression—and that is why lawyers should care about philosophy.

## II. SOLID-ARITY

I do not think that there are any plain moral facts out there in the world, nor any truths independent of language, nor any neutral ground on which to stand and argue that either torture or kindness are preferable to the other.<sup>10</sup>

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and *Professional Character*, in *PHILOSOPHY AND LAW* (J. Coleman & E. Paul eds. 1987); Anthony Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 *YALE L.J.* 1567 (1985); Richard Posner, *The Jurisprudence of Skepticism*, 86 *MICH. L. REV.* 827 (1988); Vincent Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 *U. COLO. L. REV.* 45 (1985). For critiques of practical reasoning, see Jay Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 *MICH. L. REV.* 724 (1988); Allan Hutchinson, *The Three 'R's': Reading/Rorty/Radically*, 103 *HARV. L. REV.* 555 (1989).

9. See, e.g., John Stick, *Can Nihilism Be Pragmatic?*, 100 *HARV. L. REV.* 33 (1986) (arguing that scholars should stop focusing on questions of methodology and, instead, address questions of social change and social justice directly).

10. RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 173 (1989).

The view I am offering says that there is such a thing as moral progress, and that this progress is indeed in the direction of greater human solidarity . . . . [That solidarity is] the ability to see more and more traditional differences (of tribe, religion, race, customs, and the like) as unimportant when compared with similarities with respect to pain and humiliation—the ability to think of people wildly different from ourselves as included in the range of “us.”<sup>11</sup>

—Richard Rorty

### A. *Contingency and Commitment*

In Richard Rorty's most recent book, *Contingency, Irony, and Solidarity*, he clarifies his position on the relation between philosophy and justice. Rorty firmly champions the cause of the pragmatists against the objectivists. He argues that the greatest contribution of pragmatism is the recognition of contingency. Rorty explains that the problem with the objectivist philosophic tradition from Plato to Kant is that philosophers defined the goal of inquiry as identifying secure foundations for knowledge that would be independent of place and time. The preeminent method of identifying objective bases for belief was a form of essentialism, that is, discovering the inherent nature of human beings, truth, and justice by reflecting on their essence. The goal of philosophy was to ensure that the mind was an accurate mirror of reality, so that the essential nature of things could be correctly described.<sup>12</sup>

In contrast, Rorty argues against this representational theory of truth. Truth is not outside human beings, waiting to be discovered; nor is it found in self-evident intuitions. Either of these formulations assumes an inherent structure to the world that only needs to be found—whether outside us or within us—and then elaborated. Rather, according to Rorty, truth is active, social, contingent, and changing. We are not passive observers, but active participants, in the creation of truth.<sup>13</sup> Since many different, incompatible theories can describe or explain the world, the truth is not fixed and final, but entails a choice among competing possible descriptions. Truth is constructed by people for their own purposes; it is therefore necessarily contingent—relative to historical and social context. Although the world is external to human beings, descriptions of the world are not. “To say that truth is not out there is simply to say that where there are no sentences there is no truth, that sentences are

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11. *Id.* at 192.

12. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979) (arguing against correspondence or representational theories of truth).

13. R. RORTY, *supra* note 10, at 3.

elements of human languages, and that human languages are human creations."<sup>14</sup>

This pragmatic attitude toward truth asks us to accept the fact that there can be no final answers to our most important questions. Truth and justice are both partly a matter of experimentation, of finding out what works and trying out different forms of life. The process of discerning the truth is not passive: We do not sit back and observe the world from a distance. Truth and justice are partly matters of choice—they require us to take responsibility for the world we create. This means that there can be no neutral, non-contingent bases for our most fundamental facts or values. We are implicated in what we value, as we are implicated in what we believe.

What does this view of philosophy mean for the possibility of establishing social justice? Rorty argues that philosophy has a negative role to play but not an affirmative one. The negative or edifying role of pragmatism is to free us from the sense that we can find answers to questions of social justice by deducing the essential nature of humanity and the conditions of its fulfillment from self-evident premises. Rather, the pragmatist advises us to elaborate and implement the contingent values of democratic institutions embedded in our culture. According to Rorty, these are not philosophical questions, but rather political ones.<sup>15</sup> This point is purely negative: It eliminates one way to think about the meaning of justice, telling us what philosophy cannot do for us in the public world of law and justice. The pragmatist, in Rorty's view, hopes to eliminate both the utility of, and the need for, uncontested, context-independent foundations for justice.

But what role can philosophy play in helping us affirmatively to think about justice and to establish it in the world—to elaborate the democratic values embedded in our culture? Rorty explains that philosophy may help us to redescribe our values once we have been prompted to change them for other reasons. "[P]hilosophy is one of the techniques for reweaving our vocabulary of moral deliberation in order to accommodate new beliefs."<sup>16</sup> But philosophy appears to have no positive role to help us in attaining new beliefs, or even in clarifying the beliefs we already have.

Rorty further argues that the recognition of contingency has significant affirmative consequences only for private reflection and fulfillment, that is, for the pursuit of self-creation and autonomy. Contingency, ac-

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14. *Id.* at 5.

15. *Id.* at 68.

16. *Id.* at 196.

ording to his view, has no implications for public values designed to create a better social world, other than the negative role of freeing us from the sense that we both need and can find timeless foundations for our values, or proof that they are the right values.<sup>17</sup> But this is not quite right: Rorty sometimes implies that focusing on contingency would have disturbing implications, rather than no implications, for the task of establishing social justice and democratic institutions.

The central point of *Contingency, Irony, and Solidarity* is to establish a public/private distinction.<sup>18</sup> In the private sphere of individual pursuit of self-fulfillment, Rorty claims our goal should be autonomy, self-creation, playful deconstruction.<sup>19</sup> The recognition of contingency is our greatest tool to attain these ends; this is so because it is a crucial element in freeing us from social structures that prevent us from creating our own world. And, according to Rorty, autonomy requires the ability to create something entirely new; he believes that this is what gives an individual life its meaning. His model for the attainment of autonomy is the ironic stance; in the private sphere, Rorty suggests we seek distance from inherited vocabularies—that we be skeptical and questioning of established ways of being, modes of life, types of expression—all so that we can become free and self-creating. Freedom is defined as escaping both the burdens of the past and present social controls. We can do this in our individual lives, Rorty claims, by viewing those controls with detachment, with a sense of irony. This sense of irony helps us to recognize the contingency of the social and imaginative world in which we find ourselves, and thus to free ourselves from it. This, in turn, allows us to imbue our lives with meaning by making something of ourselves, rather than playing out a script written in advance by others.<sup>20</sup>

In the public sphere of law and justice, on the other hand, Rorty suggests that our two goals should be to prevent cruelty and to extend our capacity to identify with people different from ourselves. These goals are summarized in the notion of solidarity.<sup>21</sup> Our tools to promote solidarity with our fellow human beings are social experimentation and novels. Novels—detailed poetic descriptions of other people's lives—help us to empathize with other people who seem strange to us and with whom we cannot immediately identify.<sup>22</sup> Social experimentation tells us what works and what does not work in the way of promoting well-being

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17. *Id.* at 83 (explaining that the recognition of contingency is irrelevant to politics except to free us from a sense of inevitability).

18. *Id.* at xiv-xvi, 141-43.

19. *Id.* at 39-40.

20. *Id.* at 73-95.

21. *Id.* at 189-98.

22. *Id.* at 94.

and freedom. In the public sphere, obsession with contingency and an ironic stance are unhelpful and possibly dangerous; they wrongly counsel distance, indifference, and playfulness when what we need in this area of life are empathy with others, attention to suffering, and a passion to make things work—in other words, commitment. And commitment, Rorty concludes, is incompatible with irony.<sup>23</sup>

Yet commitment is not incompatible, Rorty claims, with a recognition of contingency. The recognition of contingency is recognition that the values of one's culture are simply the values of one's culture, rather than the earthly embodiments of timeless truths. Rorty hopes both to separate and link the public and private aspects of life by acknowledging both contingency and commitment. He argues that "the citizens of my liberal utopia would be people who had a sense of the contingency of their language of moral deliberation, and thus of their consciences, and thus of their community."<sup>24</sup> At the same time, they would have a sense of solidarity with their fellows; they would be the kind of "people who combined commitment with a sense of the contingency of their own commitment."<sup>25</sup>

Although Rorty comes down firmly on the side of the pragmatists, he stands with those who claim that philosophic reflection is irrelevant to politics. I want to agree with Rorty on the pragmatic stance, but to disagree about his position on the relation between philosophy and justice and, hence, with his specific vision of pragmatism. Rorty's argument for pragmatism is powerful, but he steps back from the implications of his own insights. By splitting pragmatism into a public and a private component, he has disarmed it, creating a form of public discourse that not only betrays the insights of pragmatism, but also stands in the way of establishing social justice. In separating philosophy from the public sphere, Rorty separates himself from his hero, John Dewey. Dewey, unlike Rorty, saw the problems of philosophy as inseparable from the problems of collective life.<sup>26</sup> In contrast, Rorty offers us little but platitudes about democratic institutions. By separating philosophy from justice, Rorty's vision reinforces existing power relations that illegitimately oppress and exclude large segments of the population.<sup>27</sup>

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23. *Id.* at 190.

24. *Id.* at 61.

25. *Id.*

26. J. DEWEY, *supra* note 4, at 26, 124 (arguing that philosophers should devote themselves to clearing up the causes of social evils and developing clear ideas of better social possibilities and how to achieve them).

27. See CORNEL WEST, *THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM* 71-111 (1989) (arguing that Dewey wanted philosophers to engage with social problems).

## B. *Defects in Rorty's Vision of Pragmatism*

1. *A Faulty View of Politics.* The first problem with Rorty's argument is that his view of politics is oversimplified. He imagines that there is either an obvious meaning to "democratic institutions" such as a free press, free universities, and an independent judiciary,<sup>28</sup> or that there is a general consensus about what these institutions are and how to implement them. His description of the meaning of democracy and social justice is remarkably terse, and he seems to believe it needs no elaboration. Yet, as Richard Bernstein has argued, once we get down to the political task of implementing justice, of specifying what those institutions are and how they should work, all kinds of disagreements arise, both about how to conceptualize justice and how to implement it.<sup>29</sup> Moreover, these disagreements are not merely technical questions about the best way to implement shared ends; rather, they implicate the ends themselves. Indeed, the very distinction between means and ends is contentious; one person's means is another person's end.

Rorty emphasizes the recognition of contingency solely for the purpose of arguing that we do not need uncontested, culture-independent, grounds for accepting whichever values we accept. This is what he means when he says that politics is political, not metaphysical. Yet Rorty's recognition of contingency is incomplete: He believes that a society's values are relative to place and time, but he fails to note that a society, particularly a pluralistic one like ours, may exhibit within itself conflicting norms. He is a pragmatist as to the foundations, but not the content, of public values. When he speaks about social experimentation,<sup>30</sup> he seems to mean experimentation with means rather than ends, as if we agreed on the meaning of freedom and the only question was the best way to implement it. He recognizes contingency in the sense that values are relative to different cultures; but he does not seem to recognize that it is also contingent what a particular culture's values are, or that there may be significant disagreements about those values and how to implement them.

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28. *Id.* at 84.

29. Richard Bernstein, *One Step Forward, Two Steps Backward: Richard Rorty on Liberal Democracy and Philosophy*, 15 *POL. THEORY* 538, 556-60 (1987); see also ROBERTO MANGABEIRA UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK—A CRITICAL INTRODUCTION TO POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987) [hereinafter R. UNGER, *SOCIAL THEORY*] (arguing against the idea that there are a fixed number of social systems with inherent structures); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986) [hereinafter R. UNGER, *CRITICAL LEGAL STUDIES*] (same).

30. Richard Rorty, *Thugs and Theorists: A Reply to Bernstein*, 15 *POL. THEORY* 564, 565 (1987).

Rorty sought to “de-divinize” philosophy, but he has concluded by divinizing politics.<sup>31</sup> He has objectified politics and justice by failing to recognize that there are vast disagreements in our society about the meaning of democracy and about the just social context in which individuals are to live. He also fails to recognize that there are large disagreements about which decisions are legitimately matters of individual choice within a given social context. Rorty has redeposited objective, context-independent, neutral grounds for social practices in a reified notion of society. He assumes greater coherence and uniformity to “our” culture than he should. These oversimplifications have important consequences: They take our attention away from consideration both of who is benefited and harmed by different political and social structures and who has had the power to shape those structures.

If we follow Rorty’s example and presume consensus on the meaning of “democracy” and “free institutions,” where will we find the meaning of these abstract concepts? Where else but in the institutions that currently exist? Rorty’s implicit message is that “our” political institutions pretty much define liberal democracy. His assumption that there is consensus in “our” society on the meaning of democracy, therefore, has the effect of supporting the status quo.

2. *A Faulty Public/Private Distinction.* Rorty oversimplifies and misrepresents politics in a second way. He presumes that it is both easy and necessary to distinguish between the private sphere, where individuals engage in self-regarding conduct, and the public sphere, where the government uses its legitimate power to regulate harmful other-regarding conduct. The source of this political theory is John Stuart Mill. Mill is another of Rorty’s heroes, and Rorty comments that no one has ever improved upon Mill’s description of our political choices.<sup>32</sup> According to Rorty, “J.S. Mill’s suggestion that governments devote themselves to optimizing the balance between leaving people’s private lives alone and preventing suffering seems to me pretty much the last word.”<sup>33</sup>

Rorty has divided pragmatism into a public element and a private element. The public element concerns other-regarding conduct within the legitimate regulatory sphere of government; Rorty advises using novels and a free press to increase “our” sensitivity to the suffering of others and using social and political experimentation to find out what public institutions and policies work well to decrease that suffering. The private element concerns self-regarding conduct in which individuals

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31. R. RORTY, *supra* note 10, at 40.

32. *Id.* at 63.

33. *Id.*

seek to free themselves from social constraints to engage in self-creation and autonomy through ironic distance from inherited vocabularies and visions. This public/private division assumes that it is possible to divide life into realms where individual actions and decisions have no effects on others, or at least, no effects that legitimately should concern others. It also assumes that it is easy to make this distinction; Rorty does not elaborate on the distinction, instead assuming that "we" will know what he is talking about.

Yet the self-regarding/other-regarding distinction is one of the most elastic distinctions in our legal and political system.<sup>34</sup> In fact, virtually any action defined by some person as "self-regarding" may be defined by someone else as "other-regarding" if we take into account all the possible effects on others of allowing those "private" actions to take place. Consider mandatory seat belt laws. Many people think these statutes constitute illegitimate government intrusion on individual freedom. Drivers, they contend, should be free to determine the level of risk they are willing to assume; government should not be forcing people to "strap themselves in" for their own good. The very notion conjures up images of forced confinement. On the other hand, the failure to wear a seat belt may have drastic consequences, not only to those who fail to protect themselves, but also to a host of others. A person killed or injured because of her failure to wear a seat belt imposes costs on her family and friends, her employer, society in general, and, incidentally, on that sacred group known as "taxpayers." This seemingly private, self-regarding decision is anything but self-regarding. This means that the distinction between self-regarding and other-regarding acts is not one that can be made mechanically; it requires the theorist to adopt a conception of justice to distinguish those decisions that should be left to individuals, despite their effects on others, from those that legitimately can be regulated to protect social interests.

3. *A Faulty View of Criticism.* Rorty's identification of democracy and freedom with "our" political institutions has profoundly conservative implications. Rorty's acceptance of the existing political structure (including, it appears, the legal system), and his failure to exercise any critical faculties toward "democratic political institutions"<sup>35</sup> whatsoever is a consequence of his epistemology. For example, Rorty

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34. See Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (exploring the history of the self-regarding/other-regarding distinction in analytical jurisprudence); see also Judith Shklar, *Giving Injustice Its Due*, 98 YALE L.J. 1135, 1142-45 (1989) (explaining the meaning of "passive injustice," a form of injustice derived from the failure to prevent injustice).

35. R. RORTY, *supra* note 10, at 84.

states, "A liberal society is one which is content to call 'true' whatever the upshot of [free and open] encounters turns out to be."<sup>36</sup> "Free and open encounters" are the kind that emerge from societies like ours that have "liberal institutions" of the kind he has described.<sup>37</sup> The negative connotation of this view of truth is that there are no non-contingent foundations for "our" culture's values. This is a good point and well worth making. But the positive connotation identifies truth with whatever beliefs become dominant in our society. Whether or not he intended to do so, Rorty has identified reason with the status quo. This is because his description of politics leaves no room for subcommunities or for disagreements within the dominant culture about social justice.

We could agree with Rorty on the contingency or cultural and historical relativity of values, without accepting his characterization of the best way to conceptualize those values. In other words, we could accept the idea that knowledge is the result of a social context without defining truth as coextensive with the prevailing values in a society. We could do this by thinking about truth and justice as essentially contested concepts.<sup>38</sup> We could build conflict and a questioning attitude into our reasoning process itself. This requires a sense of distance from one's own preconceptions, a questioning, skeptical attitude toward inherited values and institutions, and a willingness to learn from others with different perspectives.

Yet Rorty contends that irony is inherently threatening to liberal political values, unless it is privatized.<sup>39</sup> He explains:

But even if I am right in thinking that a liberal culture whose public rhetoric is nominalist and historicist is both possible and desirable, I cannot go on to claim that there could or ought to be a culture whose public rhetoric is *ironist*. I cannot imagine a culture which socialized its youth in such a way as to make them continually dubious about their own process of socialization. Irony seems inherently a private matter.<sup>40</sup>

This is an odd statement. Contrary to Rorty, it is not true that commitment is necessarily incompatible with irony.<sup>41</sup> Moreover, I see every

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36. *Id.* at 52, 67.

37. *Id.* at 68.

38. See WILLIAM CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* (2d ed. 1983) (quoting Gallie, *Essentially Contested Concepts*, in 56 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* (1955-56), reprinted in *THE IMPORTANCE OF LANGUAGE* 121 (Max Black 1962 ed.).

39. R. RORTY, *supra* note 10, at 190.

40. *Id.* at 87.

41. Günter Frankenberg, *Down By Law: Irony, Seriousness, and Reason*, 83 *Nw. U.L. REV.* 360 (1989). Two examples who come to mind are Arthur Leff and David Kennedy. See, e.g., David Kennedy, *Spring Break*, 63 *TEX. L. REV.* 1377 (1985); David Kennedy, *The Turn to Interpretation*, 58 *S. CAL. L. REV.* 251 (1985); Arthur Leff, *Unspeakable Ethics, Unnatural Law*, 1979 *DUKE L.J.*

reason to be committed to the kind of society that does exactly what Rorty thinks is inconceivable—a society that socializes people into questioning authority of all kinds, not just in their private lives but also in the public world of politics and law. In fact, doubt about established power relations is as fundamental to both modern conservative political thought (“get the government off our backs” and “down with big labor”) and liberal thought (“the government cannot legislate morality” and “down with big business”), as it is to radical political theory (for example, Roberto Unger’s “transformative politics”<sup>42</sup> and “deviationist doctrine”<sup>43</sup> and in Catharine MacKinnon’s critique of gender relations<sup>44</sup>).

Rorty’s argument to keep the recognition of contingency from infecting public values effectively insulates those values from critical evaluation. This construction of the role of philosophy in establishing justice therefore hides from view the ways in which our categories of thought and paradigms of analysis orient our attention toward the concerns and problems of some people and away from the concerns of others. For example, Rorty’s self-regarding/other-regarding distinction oversimplifies politics in a way that has a political effect: It distances those who achieve success from the victims of what they see as “self-regarding” conduct. Think of battered women, and the fact that until very recently spouse abuse was thought of as a private issue to be dealt with by “the family” in the privacy of the home. The point of the feminist recognition that “the personal is political” is that the exclusion of certain issues from political debate and attention, such as the problem of getting adequate child care or otherwise reconciling the demands of work and family, has a differential effect on people, depending on both their gender and their race.<sup>45</sup> Rorty’s failure to understand the problematic character of the self-regarding/other-regarding distinction is disturbing, consequently, since it displays a more general problem: His failure to recognize the existence of conflicts of values and perspectives within society and the differential power among various groups to have their concerns heard and addressed by the community.

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1229; Arthur Leff, *Law and*, 87 YALE L.J. 989 (1978); Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

42. R. UNGER, *SOCIAL THEORY*, *supra* note 29, at 151-69 (developing a conception of politics that opens all social institutions to transformation by collective action).

43. R. UNGER, *CRITICAL LEGAL STUDIES*, *supra* note 29, at 43-90 (developing an expanded conception of legal doctrine that locates the seeds of social change in existing doctrine).

44. CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) (explaining gender hierarchy and power relations).

45. See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1185 (1989); Nancy Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989).

4. *Who Are "We"?* The conservative implications of Rorty's metaphors and his objectification of politics is most obvious in his casual use of "we." He constantly talks about "our" values, "our" institutions, "our" culture.<sup>46</sup> Who are "we"? In an article published several years before *Contingency, Irony, and Solidarity*, Rorty answered a similar criticism by Richard Bernstein<sup>47</sup> by identifying "we" as "we social democrats," meaning those who are undogmatic about the proper balance between government regulation and the free market, who are concerned about the unequal distribution of power and wealth and the divergence between liberal ideals and imperfect realities, and who cherish "liberal institutions" like a free press, an independent judiciary, and free universities.<sup>48</sup>

This answer is not satisfactory. It repeats Rorty's mistaken belief that there is not much to say about the political values that supposedly unite this group; he seems to think that their meaning is self-evident. The assumption that he knows the meaning of democracy (whether liberal or social) ties in with his assumption that the only problems of social justice that we face are either technical problems of how best to implement it or emotive tasks of extending our capacity to relate to different kinds of people unfamiliar to us. This general world view treats the substantive content of justice as given; it is defined by the predominant values of a society. These values are those of the dominant groups in that society. Rorty therefore must assume that the dominant values in our society are good ones and that all oppressed people want is to be let in the door. All we need to do is extend those clear values to people who are marginalized. This construction of the problem excludes the possibility that "we" might learn something from oppressed people or that "we" need to listen to "them." For example, Rorty argues that "[w]e should stay on the lookout for marginalized people—people whom we still instinctively think of as 'they' rather than 'us.' We should try to notice our similarities with them."<sup>49</sup> By stating the challenge this way, Rorty directs his advice—and his attention—to those who are not marginalized; he assumes that his readers do not include anyone who is marginalized. How are such persons to feel on reading such a sentence? The statement attempts to express the idea that disempowered persons should be empowered. Yet the very statement that expresses this idea denies it; the surface statement of "inclusion" is expressed in a way that excludes and marginalizes those it is intended to empower.

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46. See R. RORTY, *supra* note 10, at 59-60.

47. See Bernstein, *supra* note 29, at 547-49.

48. Rorty, *supra* note 30, at 565-67.

49. R. RORTY, *supra* note 10, at 196.

Rorty is right to advise all of us to be on the lookout for people who are oppressed. But his suggestion that "we should try to notice our similarities with them" again reinforces the power of the dominant "us." Suppose it turns out that marginalized people are different from "us"? Does that mean that "they" deserve to be treated differently from "us"? Rorty assumes that the goal is to include oppressed people into "our" world, and that there will no need for "us" to change at all other than to "let them in." This way of stating the problem places "us," meaning members of dominant groups, in the center of the picture, allowing "them" into our world if they are sufficiently similar to us. Suppose it turns out that "our" world view, "our" understanding of democracy or freedom, "our" values, fail to include or account for their different experiences? Have "we" then no obligation to change?

Rorty suggests that although "we" need to learn to empathize with oppressed people, "we" do not need to listen to "them." According to Rorty, there is no "voice of the oppressed" to which "we" need attend.

[V]ictims of cruelty, people who are suffering, do not have much in the way of a language. That is why there is [sic] no such things as the "voice of the oppressed" or the "language of the victims." The language the victims once used is not working anymore, and they are suffering too much to put new words together. So the job of putting their situation into language is going to have to be done for them by somebody else.<sup>50</sup>

This view displays arrogance in presuming to speak for people whose experiences are different from Rorty's. It also fails to recognize that "we" might have to change if we attended to people with experiences different from our own; we might have to give up some of our power.

### C. *A Failed Effort to Separate Philosophy and Justice*

I have argued that in various ways Rorty has identified social justice with the prevailing norms of whatever groups are most powerful in a given society. His epistemology<sup>51</sup> (deriving truth from the values of lib-

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50. *Id.* at 94.

51. Rorty claims that he has no epistemology. See R. RORTY, *supra* note 12 (arguing for a world which does not need epistemological foundations for belief and social practice). This is true in the sense that he seeks to eschew the search for fixed metaphysical foundations for knowledge. But if epistemology means how we know what we know, or how we think about facts and values, Rorty clearly has an epistemology which points to the culture of particular communities as the basis for knowledge. He clearly thinks he knows something, although he has not articulated or explained how he knows what he knows. Perhaps more important, Rorty has a conception about how other people know and what they can know. The absence of metaphysical foundations for belief may remove the need for timeless, context-independent grounds for belief, but it cannot remove the need to have a conception about how we think about thinking and how we judge what we think we know.

eral communities) is linked with a political vision (deriving the meaning of democracy from the predominant institutions in the United States). His attempt to separate philosophy and justice thus fails. Rorty's conception of justice explicitly refers to the values and perspectives of dominant groups. He therefore uses a particular conception of philosophy in the service of particular power relations, while at the same time he claims to be in favor of withdrawing philosophy from the public sphere.

To give one example, Rorty's view of self-fulfillment has a characteristically male flavor. He focuses on autonomy, freedom from social control, and the creation of something new as the keys to creating a meaningful life. This world view sees connections with other people as problematic and individual autonomy and self-assertion as liberating and comforting. It is a peculiarly non-relational and negative conception of freedom: It emphasizes freedom from others. In contrast, feminists have argued that many women understand self-fulfillment as taking place in the context of relationships with others. This world view sees isolation and the inability to connect with others as problematic, whereas the ability to attend to overlapping relationships is a central aspect of personal identity.<sup>52</sup> If this is correct, then Rorty's description of the meaning of freedom and self-fulfillment will be appealing only to some people and not to others. Yet Rorty wants these things for everyone. Either we must listen to the different perspective of others, namely women, who think relationally, rather than individualistically, and imagine a kind of society that would enable people to find self-fulfillment in different ways, or we must engage in a process of consciousness-raising so that we can learn which of the divergent visions of self-fulfillment is the result of false consciousness or adaptation to unjust and restricted circumstances, and then free ourselves from that cramped vision. In either case, we cannot simply rest on our intuitions about the meaning of freedom or democracy. Nor should we presume that a theorist like John Stuart Mill "had the last word." We must attend to the different perspectives and experiences of different people. We also must concern ourselves with the ways in which our categories and modes of thought get in the way of our projects of creating justice and freeing people from oppression.

I believe that Rorty's failure to see or focus on issues like this is a direct result of his conception of the relation between philosophy and justice. Rorty's removal of philosophy from the public sphere, and his reliance on the dominant values of a culture to prescribe the meaning of justice and democracy, treats issues of justice as given, as

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52. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M.L. REV. 613 (1986).

unproblematic.<sup>53</sup> Although I agree that we should stop worrying about the metaphysical foundations of justice, this does not mean that we should not be concerned about ways of conceptualizing justice. Nor does it mean that philosophy has nothing to offer us by way of helping us in thinking about the way we think. If we do this, we may begin to unearth the ways in which our modes of analysis get in the way of our own projects.

In the end, Rorty's prescription for philosophy is arid. First, Rorty falls into the very metaphysics he hoped to escape. This is an internal critique: Rorty violates his own criteria for success. He argues correctly that philosophy cannot provide uncontested, metaphysical foundations for thought, and that it cannot provide criteria by which we can judge which of several paradigms of analysis is superior. This recognition of context and the contingency of social practices provides a solid—but shifting—starting place for normative inquiry. But Rorty wrongly concludes from this recognition that philosophy can do nothing to help us to understand the public sphere of politics. His conclusion rests on an unacceptably narrow—one might even say essentialist—conception of the questions philosophers ask and the methodologies they employ.<sup>54</sup> Rorty never considers the possibility that philosophical techniques might be invented or adapted to help clarify the implications of different ways of approaching questions of politics and justice. Nor does he consider that philosophical inquiry might help reveal the ways in which our language, concepts, and discourse may sabotage our own projects by orienting our attention in ways that obscure considerations we take to be important. His attempt to separate philosophy from politics, and to separate the private sphere, where we promote irony and individual autonomy, from the public sphere, where we prevent cruelty, leads Rorty to reify both philosophy and politics. He takes both of these social activities out of “our” hands, thereby stripping us of our ability to remake them.

Remake them we must, however. This brings us to a second, external critique: Rorty's version of the relation between philosophy and jus-

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53. As political theorist William Connolly explains:

Rorty's language tranquilizes and comforts his fellow Americans, first, by celebrating the technocratic values, self-conceptions, and economic arrangements operative in (though not exhaustive of) American institutions and, second, by implying that once these endorsements have been offered there is not much more to be said. Rorty's prose inhibits discursive mobilization of political energies; it closes the conversation before it manages to disturb the sense that all is well with America. . . . Rorty drops out of the conversation just when it should become more intense and demanding.

PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* 566-67 (1988) (citing William Connolly, *Mirror of America*, RARITAN 3 Summer 1983, at 124, 131).

54. See Bernstein, *supra* note 29, at 547.

tice undermines the search for social justice. Rorty's construction of the relation between philosophy and justice is surprisingly unpragmatic. He argues against taking comfort in false foundations for belief; we human beings, he argues, are the creators of our own social world. We make the world in our image, and we are therefore responsible for the image we adopt. Yet Rorty violates this message by substituting objective political facts for discredited philosophical facts. Rather than deferring to the immanent values of "our" culture, our goal should be to become aware of the ways in which our categories of thought and our paradigms of discourse channel our thinking in particular ways. We need to do this to attain the pragmatic goal of understanding the effects of our ways of thinking about the world, and to accept responsibility for the consequences of what we do. More important, we need to understand how our ways of describing the world and conceptualizing the problems of life reinforce the power of dominant groups in society.<sup>55</sup> Rorty champions social justice, yet his approach reinforces some of the very power relations he had hoped to challenge. We need to focus on the ways in which our categories, discourse, and modes of analysis reinforce illegitimate power relationships by embodying the perspectives and concerns of those who are powerful and suppressing members of oppressed groups.<sup>56</sup>

### III. PEBBLES AND DOORS

[O]ur views can function to assert or express domination without explicitly or consciously intending to justify it.<sup>57</sup>

For someone to have privilege is precisely *not* to have to beg for attention to one's case.<sup>58</sup>

—Elizabeth V. Spelman

#### A. *Why Philosophy Is Important for Justice*

In her brilliant book, *Inessential Woman: Problems of Exclusion in Feminist Thought*, Elizabeth V. Spelman analyzes the meaning of gender from a feminist perspective. The problem that forms the center of

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55. Rorty's father, James Rorty, an independent Marxist journalist, thought "Americans would do well to rid themselves of 'the democratic dogma expressed in the phrase 'We, the people.' We have never had in this country any such identity of interest as is implied in that first person plural.'" WILLIAM STOTT, *DOCUMENTARY EXPRESSION AND THIRTIES AMERICA* 239 (1973) (quoting JAMES RORTY, *WHERE LIFE IS BETTER* 169 (1936)).

56. Cornel West also criticizes Rorty for failing to focus on issues of power. West, *supra* note 27, at 207-10. Interestingly, West makes a similar criticism of Dewey, who, West argues, envisioned a homogeneous society characterized by widespread consensus and not racked by oppressive power relationships. *Id.* at 101-02.

57. E.V. SPELMAN, *supra* note 5, at 11.

58. *Id.* at 76.

Spelman's concern is the tendency of many feminist theorists to focus on the experience of white, middle-class women and to ignore or obscure the experience of other women. As an entry into this problem, Spelman re-examines the political thought of Plato and Aristotle, focusing on their treatment of the relations among gender, race, and class. She then engages in a detailed critique of selected feminist theorists, including Nancy Chodorow and Simone de Beauvoir. Spelman concludes that it is inappropriate to conceptualize gender in terms of a binary division between male and female; rather, gender, is complex, variegated, and multiple.

By analyzing the question of the relations among gender, race, and class, Spelman illustrates the importance of methodological questions in analyzing social justice. Her analysis demonstrates how philosophical techniques can be used to uncover mistakes in previous failed efforts to think about justice. Those failures include the ways in which innocuous assumptions both embody and obscure power relationships. Spelman's analysis therefore illustrates both the ways in which pragmatic approaches to social questions may unconsciously recreate objectivist assumptions, and the ways in which our patterns of thought may recreate the very power relationships we meant to challenge. She shows how the way we think reinforces oppression and how critical reflection can uncover and challenge our self-defeating assumptions. In so doing, she convincingly demonstrates why lawyers should care about philosophy.

Spelman argues that "how one starts, in thinking as in acting, has everything to do with where one might go."<sup>59</sup> The way we think about the problems of life constrains what we can see. We inevitably make some issues salient and others obscure; we focus on the experiences of some people and ignore those of others. For this reason, and in contrast to Rorty, Spelman cautions those of us who think about justice to beware of how the assumptions underlying our conceptual paradigms affect our analysis of oppression. She asks us to "wonder to what extent . . . theory implicitly endorses forms of hierarchy it explicitly critiques."<sup>60</sup>

Spelman assumes, without arguing, that philosophical inquiry is context-dependent and relative to social and historical circumstance. Rorty spends half his time trying to persuade us of this point. To some extent, therefore, Spelman starts where Rorty stops. Rorty spends the second half of his argument attempting to convince us that philosophy has nothing to offer us in developing and understanding political values. Unlike Rorty, Spelman believes that one goal of philosophical inquiry is

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59. *Id.* at xi.

60. *Id.* at x.

to increase self-understanding of members of a particular culture about matters of public importance. Her book shows us one way to do this.

John Dewey argued that philosophers should engage with the political and social problems of the day.<sup>61</sup> In contrast to Rorty, Spelman takes Dewey's message to heart, using the tools of philosophy to promote justice. She does this by reflecting on how our ways of thinking promote conditions of oppression by marginalizing the experiences and concerns of those who are most oppressed. For this reason, although Rorty champions pragmatism, Spelman is the better heir to Dewey's legacy.

Spelman argues that the categories and forms of discourse we use, the assumptions with which we approach the world, and the modes of analysis we employ have important consequences in channeling our attention in particular directions. The paradigms we adopt affect what we see and how we interpret it. They determine, to a large extent, who we listen to and what we make of what we hear. They determine what questions we ask and the kinds of answers we seek.

Investigation into such matters is important, according to Spelman, because the seemingly neutral and innocuous assumptions with which we approach the world may blot from our view facts we ourselves would consider to be important. In this way, we may unconsciously recreate or express forms of hierarchy that we intended to criticize. Self-reflection about such matters may enable us to ferret out the political effects of seemingly neutral premises. We should be on the lookout for ways in which our approaches to problems of illegitimate power relations reinforce those very relations.<sup>62</sup> Good intentions do not immunize against the illegitimate exercise of power. In fact, a great impetus to the exercise of power is the inability to recognize that one is exercising it; when this happens, one need not worry about whether that power is being used wisely. One goal of philosophic inquiry, therefore, is to understand concretely where privilege lodges in our thought.<sup>63</sup>

## B. *How Innocuous Assumptions Reinforce Oppression*

1. *Pebbles: Universality and Particularity.* Spelman argues that many feminist theorists focus on the experience of white, middle-class women, thereby obscuring the experience of other women. This happens in the following way. Feminist theorists have analyzed sexism by at-

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61. J. DEWEY, *supra* note 4, at 26, 124.

62. See, e.g., KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); Martha Minow, *Speaking of Silence* (Book Review), 43 U. MIAMI L. REV. 493, 495 (1988) (reviewing *THE CIVIL RIGHTS SOCIETY*) (arguing that "antidiscrimination laws [may] manifest and recreate some of the harms they were supposed to redress").

63. E.V. SPELMAN, *supra* note 5, at 75.

tempting to isolate it from other forms of oppression, such as race, class, and religious discrimination. In doing so, they have tried to identify what it means to be oppressed "as a woman" rather than by virtue of other traits that one might possess. To do this, feminists have adopted the social science method of isolating gender as a variable to be explained and "controlling for" other variables, like race and class. This method directs the theorist to consider the experiences of women who are not oppressed on account of traits other than gender. It further assumes that we can understand the experiences of people oppressed on several accounts by combining our analyses of the different forms of oppression they face. For example, this methodology assumes that we can understand the situation of black women by combining our analyses of sexism and racism.

Spelman notes that this seemingly innocuous and rational procedure for inquiry has the effect of directing our attention to the experiences of white, middle-class women. What is more disturbing is that it does so "*without mentioning white middle-class women.*"<sup>64</sup> Rather than talking about what all women have in common, feminist theorists have conflated the condition of middle-class, white women with the condition of all women.<sup>65</sup> Yet "the more universal the claim one might hope to make about women—'women have been put on a pedestal' or 'women have been treated like slaves'—the more likely it is to be false."<sup>66</sup> Moreover, universal claims about women that "control for" other forms of oppression are false—not randomly, but in a particular direction. They direct attention to the problems and experiences of women who are privileged in various ways and obscure the problems and experiences of women who face the greatest number of socially-imposed obstacles to a full life.

Spelman locates this problem in the general philosophical problem of universality and particularity. She illustrates this problem by relating the story of Uncle Theo, a character in an Iris Murdoch novel who is overcome by the plethora of pebbles on the beach.<sup>67</sup> Their multiplicity makes the world seem complicated and unmanageable. If each pebble is distinct, and if those distinctions matter, then each pebble demands his attention. These demands cause Uncle Theo "acute discomfort" because it would be impossible to answer them; he cannot pay equal attention to millions of pebbles. His response is to simplify the many-ness of the pebbles by focusing on what they share. "The horror of the many-ness of the pebbles could then be stilled by the awareness that they are all instances

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64. *Id.* at 76.

65. *Id.* at 3.

66. *Id.* at 9.

67. *Id.* at 1.

of a single thing, pebblehood.”<sup>68</sup> This solution seizes one horn of the dilemma of universality and particularity. That dilemma requires us to pay attention to the level of generality at which we speak about the world.

[W]hat is the world really made of? Do we get closer to an answer to this question by noting the manyness of the pebbles, or by reflecting on the fact that though there are many pebbles, there is only one kind of thing, the kind of thing that they all are, namely, a pebble?<sup>69</sup>

This question engages two issues: First, at what level of generality should we speak and, second, how do we generalize? For example, we want to know whether women’s experiences should be investigated separately from men’s experiences, and, if so, how we generalize about “women”—whose experiences count as the prototypical “woman’s experience.”

2. *The Dilemma of Difference.* Feminists have argued that traditional theorists have distorted our understanding of human experience by describing the world from the vantage point of men. Traditional theorists have generated accounts of human life that exclude the distinct experiences of women. These accounts wrongly fail to note the divergent experiences of women and, by describing male experience as human experience, wrongly conflate the experience of men (a subset of people) with all people. (They also conflate the experience of some men with that of all men.) At the same time, Spelman argues that feminists have made a similar mistake. In attempting to explain how “women’s experiences” differ from “men’s experiences,” and therefore deserve attention in their own right, feminists have failed to focus on the divergent experiences of different kinds of women. They have described “women’s experience” not by describing what all women share, but rather by describing the experience of a particular subset of women. In so doing, they have conflated the experience of some women with that of all women.

One response to this complaint might be that it is impossible to focus on everything at once, and that the “special” experiences of women oppressed on several counts can be explained by combining accounts of sexism, racism, and classicism. Otherwise, the argument might go, we are faced with the specter of Uncle Theo’s plethoraphobia; if we focus on the many divergent experiences of women, we will not be able to understand sexism—the power relations between “men” and “women”—at all. If distinctions among different experiences matter, how do we stop the multiplication of distinctions? If we do not, explanation becomes impos-

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68. *Id.*

69. *Id.*

sible; this is because, in some sense, every case is different since every woman's experience is unique.

Spelman explains, however, that this response cannot work. One reason is the "dilemma of difference." Both the "assertion of difference and the denial of difference can operate on behalf of domination."<sup>70</sup> The attribution of difference may justify power by explaining that women are different from men and therefore deserve to be treated differently; this different treatment may explicitly or implicitly grant men power over women. For example, Plato and Aristotle justified explicit male supremacy by explaining that men were generally superior to women, and therefore justly ruled them, because masculine characteristics were superior to feminine characteristics.<sup>71</sup> Similarly, the "separate spheres" ideology, although formally egalitarian by granting members of each sex an appropriate social role based on their supposed relative competencies, implicitly perpetuated male power by confining women's legitimate place to the home.<sup>72</sup>

On the other hand, the failure to note differences also may perpetuate illegitimate power relationships.<sup>73</sup> Providing the same treatment to groups who are differently situated may have the effect of privileging one group over another. For example, requiring both husbands and wives to support themselves after divorce may have the effect of relegating women to a lower standard of living while granting men a higher standard of living. This result occurs because women, on average, earn only two-thirds of the salary earned by men and because women have a greater tendency to withdraw, partly or totally, from the paid wage market during the marriage and therefore may face greater barriers to earning an adequate living when the marriage terminates.<sup>74</sup> Similarly, the failure of feminist theorists to focus on differences among the experiences of different groups of women may recapitulate sexism by failing to note the ways in which the sexism suffered by black women, for instance, differs from the sexism suffered by white women. "The sexism most Black women

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70. *Id.* at 11.

71. Spelman explains that both Plato's and Aristotle's views are more complicated than this. For example, Plato argued that women who possess male characteristics are capable of performing the male task of ruling others. Similarly, Aristotle differentiated between men and women of different social classes, for example, giving women power over male slaves. *See infra* text accompanying notes 74-80.

72. NANCY COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835* (1977); Martha Minow, "Forming Underneath Everything That Grows": *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 846-51.

73. *See* Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (explaining the dilemma of difference).

74. LENORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 204-07 (1985).

have experienced has not typically included being put on a pedestal."<sup>75</sup> Failure to consider the different forms of sexism suffered by different groups of women therefore has the effect of obscuring the operation of sexism in society.

The refusal to consider relevant differences among women's experiences raises the dilemma of difference. Focusing on differences among women may obscure the workings of sexism by making it more difficult to explain; it also may recapitulate illegitimate hierarchies by drawing our attention to the very differences that wrongly have been made to matter. On the other hand, the failure to consider different experiences of different women may recreate the very power relationships the analysis was meant to challenge. It may do this by excluding from consideration the lived reality of subgroups who face forms of oppression not faced by those whose experiences are taken as the norm. A perspective that fails to consider the dilemma of difference may wind up supporting the very power structures it was intended to critique.

3. *The Ampersand Problem: Race & Gender.* Another reason why it is important to focus on the experiences of different groups of women is that focusing on the experience of white, middle-class women as the definition of "women's experience" conveniently removes from theoretical consideration the possibility of white women's sexist treatment of black women, as well as white women's participation in racism, classicism, and other forms of oppression. Women may help to perpetuate sexism by their own acquiescence or participation in ways of life that restrict their own possibilities, restrict their vision, or otherwise limit their power. Moreover, to the extent that black women and white women face different sorts of oppression, white women may help to subordinate black women by exercising forms of power over them that differ from the kinds of power they may exercise over black men. If, for example, women are disproportionately relegated to making decisions about the home, and if black women are more likely than white women to provide domestic services, then white women may help to perpetuate sexism by the ways in which they treat the black women that they employ. A failure to consider the different experiences of black and white women obscures this kind of power.

If black women do not fit the white model, then the definition of "women's experience," by reference to the experience of white women, treats black women as not really women. In fact, historically, one mode of oppression of black women has been the social differentiation between

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75. E.V. SPELMAN, *supra* note 5, at 14.

sexual relations of blacks and whites. One aspect of racial privilege may have been to deny black women the assertedly positive roles of white women; one way to put down a group of people is to claim that relations between men and women in that group do not fit the ideal model practiced by the dominant group. This social practice may deny to black women the right to be thought of as "women" at all. As Spelman explains,

[W]ithin any single society the definitions and expectations of what it means to be a woman will vary greatly. This is often a bitter truth, as we reflect, for example, on the lot of a white slaveowner's wife "as a woman" and on the condition of a slave woman "as a woman." Sojourner Truth's question, "Ain't I a Woman?" would not have arisen or made sense otherwise.<sup>76</sup>

Spelman emphasizes this point by quoting Barbara Smith: "When you read about Black women being lynched, they aren't thinking of us as females. The horrors that we have experienced have absolutely everything to do with them *not even viewing us as women.*"<sup>77</sup>

4. *The Inadequacy of Additive Analyses.* The problem of the relation between sexism and racism cannot be solved by additive analyses that, for example, attempt to combine accounts of sexism and racism to explain the experiences of black women. Additive procedures raise what Spelman calls the "ampersand problem."<sup>78</sup> They perpetuate racism by a discursive practice that places white women at the center of attention and necessitates the inclusion of black women into the picture after the fact. This paradigm implies that the concerns and experiences of white women are more important or central than those of black women. It also reinforces racism by placing white women at the center of attention.

Consider the social use of the word "woman." If we need to add the adjective "black" to "woman" to draw attention to black women, but we do not need to add the adjective "white" to draw attention to white women, we not only have made the experiences of black women somehow peripheral, but we have defined black women as less clear examples of "women" than are white women.

[A] discussion promising to deal with how "women" fare in the United States military shouldn't end up, logically speaking, being simply about white women; but if the group called "women" is contrasted to the groups called "Blacks" . . . it becomes clear that "women" really has meant "white women" all along. But why wasn't that said explicitly? Both because it didn't need to be—we expect mainstream news-

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76. *Id.* at 14.

77. *Id.* at 37.

78. *Id.* at 114-32.

papers to indicate a woman's race if, and only if, she is not white—and because it needed *not* to be noted, lest the normative status white women have as “women” be eroded. Black women's being Black somehow calls into question their counting as straightforward examples of “women,” but white women's being white does not. As long as “women” are compared to “Blacks,” a decision will have to be made about whether to classify Black women as “Black” or as “women,” but not about whether to classify white women as “white” or as “women.”<sup>79</sup>

One aspect of privilege is not to have to call attention to one's case.<sup>80</sup>

Additive analyses obscure the position of people who fit into more than one category. The phrase “women and blacks” obscures—one might say obliterates—black women. Logically, black women fit into both categories. However, experientially, this way of organizing thought often has the effect of rendering black women invisible. An employer eager to avoid charges of discrimination against “women and blacks” might respond by hiring white women and black men, thereby satisfying both categories. The fact that not a single black woman was considered for employment is excluded from consideration as a significant piece of information. Moreover, if black women experience different kinds of oppression than those faced by either white women or black men, those forms of oppression will not be revealed by analysis that does not take differences between white and black women into account.<sup>81</sup> As Spelman explains, “we surely cannot produce an accurate picture of Latina women's lives simply by combining an account of Anglo women's lives and one of Latino men's lives.”<sup>82</sup>

In another example, Spelman notes that although Simone de Beauvoir paid attention to race, class, and religious discrimination, as well as to gender discrimination, she often compared the plight of women to that of “‘Jews, the Black, the Yellow, the proletariat, slaves, servants, the common people.’”<sup>83</sup> But this comparison “obscures the fact that half of the populations to whom she compares women consist of women.”<sup>84</sup> It therefore takes our attention away from Jewish women, black women, Asian women, working class women, while defining the “women's experience” in a way that excludes them.

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79. *Id.* at 169.

80. *Id.* at 76.

81. See, e.g., Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 10 (1989); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. OF CHI. LEGAL F. 139, 141-50.

82. E.V. SPELMAN, *supra* note 5, at 14.

83. *Id.* at 64.

84. *Id.* at 65.

### E. *Multiple Genders*

1. *Plato and Aristotle.* One road to addressing the relation among race, class, and gender is to conceptualize gender as a multiple, rather than a dual, scheme of social differentiation. In several revealing chapters, Spelman explores the gender analysis of Plato and Aristotle. She concludes that both these philosophers understood gender in conjunction with other factors, particularly social class. For example, although Plato argued that some women were fit to be philosopher-rulers, he also argued that "women" displayed undesirable qualities, such as showing grief at funerals. Spelman reconciles these positions by noting that Plato believed that not all women would be typically feminine; however, he accepted the inferiority of "feminine" qualities, whether exhibited in men or women.<sup>85</sup> He therefore concluded that women were not disqualified, by virtue of their sex, from performing as philosopher-rulers; rather, only certain women were capable of playing this role in society—those that possessed masculine characteristics. Conversely, men who possessed female characteristics were excluded from consideration for the post of ruler.<sup>86</sup> "Plato's argument for the equality of some women to some men was inextricably intertwined with an argument for the superiority of that group of men and women to all other people."<sup>87</sup> Gender and class are intertwined.

Similarly, Aristotle differentiated between men, women, and slaves.<sup>88</sup> What does this categorization do to female slaves? It means that "[w]henver Aristotle speaks of the differences between 'men and women,' he is in fact distinguishing between men and women of a particular social class, the citizen class."<sup>89</sup> It suggests that gender differentiation is important only for people who are not slaves. Female slaves do not merit the appellation of "women"; nor do male slaves merit the appellation of "men." The differentiation between men, women, and slaves makes clear that "one's gender identity is inseparable from one's 'racial' identity: only certain males and females count as 'men' and 'women.'"<sup>90</sup> "One must not only be male but be of a particular 'race' to be masculine."<sup>91</sup> A major defining characteristic of being a slave is the absence of a right to a gender; a major defining characteristic of a citizen is the right to a gender.

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85. *Id.* at 32-33.

86. *Id.* at 32-35.

87. *Id.* at 35.

88. *Id.* at 41-43.

89. *Id.* at 46.

90. *Id.* at 54.

91. *Id.*

These insights into Plato's and Aristotle's conceptions of the relations between gender, race, and class remind us that notions of gender may vary widely among social classes and races. Sexism may work quite differently in different social classes, and the different gender relations within classes of persons may support other forms of oppression. "What makes middle-class women dependent on men of their class is the same as what distinguishes them from working class women."<sup>92</sup> This means that different classes will exhibit different forms of gender relations and different types of oppression of women. If this is true, there are many genders, rather than only two.

2. *Doors: The Contexts of Gender.* Spelman argues that "there is a great variety in what it means to be a woman"<sup>93</sup> and that gender therefore cannot be analytically isolated from consideration of class and race identity. If it could, we could talk about relations between men and women without worrying about whether they were in the same class or race.<sup>94</sup> Yet "[t]he ideology of masculinity in the United States hardly includes the idea that Black men are superior to white women."<sup>95</sup> She reminds us that "if Emmet Till had been white, he wouldn't have been murdered by white men for talking to a white woman, nor would his murderers have been acquitted."<sup>96</sup> Moreover, just as race affects gender, gender affects race: "[W]e can't understand the racism that fueled white men's lynching of Black men without understanding its connection to the sexism that shaped their protective and possessive attitudes toward white women."<sup>97</sup> Gender therefore must be analyzed "in the context of other factors of identity."<sup>98</sup>

Given that gender is multiple and complex, rather than binary, and that it must be understood in the context of other factors like race and class, how should analysis proceed? Spelman explains that we must be aware of the ways in which our categorical schemes affect what we see and how we interpret it. The ways in which we combine gender analysis with other factors will have crucial effects on how we understand social relationships. Spelman imagines an auditorium filled with all kinds of people who are to proceed through various doors differentiating them based on their race, sex, and class. Suppose the first set of doors divides men from women, and the second set divides people based on their race.

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92. *Id.* at 63.

93. *Id.* at 102.

94. *Id.* at 81.

95. *Id.* at 89.

96. *Id.*

97. *Id.* at 106.

98. *Id.* at 102.

This schema suggests that Asian-American women share more in common with African-American women than they do with Asian-American men. On the other hand, suppose the first set of doors divides people by race and the second divides them based on sex. In that case, Asian-American women are assumed to have more in common with Asian-American men than with African-American women.<sup>99</sup> The first schema suggests that it is possible to think about oneself "as a woman" in isolation from other facts about oneself; the second schema suggests that thinking about oneself "as a woman" must take place in the context of other factors about oneself.<sup>100</sup>

Awareness of these complexities can help us to consider the ways in which our categorical schemes reinforce the very forms of oppression that they were invented to combat. Sensitivity to those who are oppressed requires not only that we acquire greater sensitivity toward others, but also that we attempt to empathize with others; we must see things as others see them. People are oppressed in many ways; this means, Rorty to the contrary, that "we" must listen to people who are oppressed in ways that we are not.

But empathy is not enough. Spelman argues that, because people have different experiences, we cannot get at the truth by ourselves. Her philosophical message about epistemology is that we cannot reason alone. We cannot pretend to know everything and we cannot pretend to speak for others. To define "we" as including everyone, we must engage with others, not abstractly, but in fact; we must work with others whose experiences differ from our own in ways that remake the power relationship between us.<sup>101</sup> Those who are privileged must become apprentices to those who are oppressed. We must struggle together to develop a form of intellectual/political practice that remakes the power relationships that structure and impede our knowledge. We come to know in relation to others; knowledge is social. We must therefore remake social relationships so that we are engaged with people who might challenge what we think we know.

#### D. *Moral Complexity and Oppression*

It is of the nature of privilege to find ever deeper places to hide.<sup>102</sup>

—Elizabeth V. Spelman

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99. *Id.* at 146.

100. *Id.*

101. *Id.* at 178-85.

102. *Id.* at 183.

Rorty argues that philosophy cannot provide metaphysical foundations for our conceptions of truth and justice; nor can it provide uncontested criteria for choice among competing possible approaches to thinking about life. These are powerful statements, and I believe they are right. However, Rorty wrongly concludes from these premises that philosophy is irrelevant to public life. Justice is a question of politics, he says, which entails commitment to the democratic values embedded in our culture; truth, in turn, is whatever views emerge from free and open discussion in a democratic society like ours. The only fundamental problem, according to Rorty, is the fact that some people are marginalized and excluded from the mainstream. He argues that "we" need to increase our ability to empathize with these people by learning about "them" through evocative artistic depictions of their lives. Once "we" see "them" as "one of us," we will be moved to include them in "our" world.

This viewpoint assumes that democracy and justice, as embodied in our culture, have a relatively determinate meaning—not a metaphysical essence, just a political coherence. It excludes the possibility that "we" might have to change by our encounters with people who are oppressed. It assumes that our frameworks of analysis are neutral techniques for elaborating the values of "our culture."

Spelman demonstrates that nothing could be further from the truth. Our frameworks of analysis may direct our attention away from those who are oppressed, despite their surface neutrality. Those frameworks and methodologies may express the worldviews and experiences of subgroups of people, but yet purport to express the experiences of everyone. As Martha Minow argues, "We cannot know without standing somewhere, and because we are situated somewhere, we cannot see everything."<sup>103</sup> For this reason, the failure to focus on, and engage with, people who are excluded from both ideological and political power structures reinforces the power of those who dominate.<sup>104</sup>

Radical approaches are not immune from this problem. Roberto Unger's excellent work focuses on increasing both freedom and democracy by bringing our institutional and political structures more within our collective control. These institutions must be transformed to abolish the oppressive structures they embody. He suggests that the right way to

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103. Martha Minow, *Partial Justice: Law and Minorities* 55 (unpublished manuscript).

104. For excellent meditations on this problem, see Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 *YALE L.J.* 1609 (1988) (casting doubt on the advantages to the black community of republicanism espoused by Frank Michelman and Cass Sunstein); Kathleen Sullivan, *Rainbow Republicanism*, 97 *YALE L.J.* 1713 (1988) (arguing for a conception of politics as normative pluralism, which rejects a search for agreement on a single common good).

do this is to imagine those institutions as contexts that can be transformed by collective action. These transformations are to occur in the context of "immunity" rights that protect individuals from vulnerability to specific forms of oppression.<sup>105</sup> Yet the idea of smashing contexts may be more palatable to some people than to others. Patricia Williams<sup>106</sup> and Kimberlé Crenshaw<sup>107</sup> note that the deconstruction of established institutions, such as individualistic legal rights, may be liberating to people who are relatively privileged, yet the same time pose a fundamental threat to oppressed groups who have not yet been fully recognized as persons capable of exercising such rights.

My own work on plant closings has focused on protecting the reliance of workers and communities on longstanding relationships with major local employers; protecting this reliance interest is intended to combat the oppressive use of power by corporations.<sup>108</sup> Yet, by focusing on those who have been fortunate enough to become part of the market, this approach takes our attention away from those who have been excluded from the market. It may make their concerns seem peripheral, less worthy of attention, or even insoluble. If legal protection is based solely on reliance, then those who have had no opportunities to develop relationships on which they can rely, or who have been forcibly deprived of such relationships,<sup>109</sup> have no claim to protection.

Rorty reminds us of the contingent, socially constructed nature of knowledge. Yet he fails to bring this insight fully to bear in his understanding of politics. Rorty brought us to the right floor in the elevator, and then told us not to get off.<sup>110</sup> Spelman shows us how to step out onto the floor and what we might do there. She reminds us to be on the lookout for the ways in which our approaches to thinking about life may unconsciously reinforce the very power relationships we were intending to critique. We can do this partly by using the techniques of analytic philosophy employed by Spelman. Those techniques can be employed to good end if we pay attention to and work with those who, in the words of

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105. R. UNGER, *CRITICAL LEGAL STUDIES*, *supra* note 29, at 13-42; R. UNGER, *SOCIAL THEORY*, *supra* note 29, at 26-35.

106. Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 405-06 (1987).

107. Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

108. *See, e.g.*, Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 750-51 (1988).

109. *See, e.g.*, Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Tradition of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

110. I owe this image to Martha Minow.

Cornelia Spelman, "have been rendered invisible by others' inattention to them."<sup>111</sup>

Does engaging in politics and intellectual inquiry with people of multiple perspectives make political and legal analysis too complex? Spelman addresses this question by asking whether paying attention to the varying experiences of women makes a feminist analysis impossible.<sup>112</sup> She answers, "It's only from a position of privilege that it would seem that the end of focus on white middle-class women has to mean the end of feminism."<sup>113</sup> Gender is obviously an important social category, but it must be understood in the context of other factors; moreover, the experiences of white, middle-class women can no longer be taken as somehow more central aspects of what it means to be a "woman" in our society than those aspects of other women. Nor does the recognition of complexity in both truth and justice make it impossible for us to speak coherently about the world. To believe that it does is to assume that "we all know truths but mine is the true truth, but if what I say turns out *not* to be true, then nothing anyone else says can be true either."<sup>114</sup>

#### IV. MISS MARPLE ON A CERTAIN BLINDNESS IN HUMAN BEINGS<sup>115</sup>

In Agatha Christie's story, *A Christmas Tragedy*, Miss Marple is convinced that a man is going to kill his wife. When she does turn up dead, Miss Marple's attention focuses on proving that the husband is the murderer. Yet her conviction that the husband is the guilty party blinds her to the truth. She eventually discovers that the husband could not have murdered his wife, even though he certainly intended to do so. "I was so *sure*," she says, "and that, I think, was what blinded me."<sup>116</sup> But then the story takes a new twist: It turns out, in the end, that the husband did murder his wife; the original body was not his wife's body. If we had taken Miss Marple's words to heart, the new twist would not surprise us; we would not have been so sure that the new facts were the final word. But still we are surprised. Her experience shows just how difficult it is to learn the lesson that we are often blinded by our own certainty. We think we know, but it turns out that we have a lot to learn.

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111. Cornelia Spelman, *Introduction*, TRIQUARTERLY 75 Spring/Summer 1989, at 5-6.

112. E.V. SPELMAN, *supra* note 5, at 171-72.

113. *Id.* at 172.

114. *Id.* at 184.

115. With apologies to William James. See WILLIAM JAMES, *On a Certain Blindness in Human Beings*, in ON SOME OF LIFE'S IDEALS 3 (1912).

116. A. CHRISTIE, *supra* note 1, at 155.

