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Critical Legal Theory and The Politics of Pragmatism

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> Those who think that all paradigms must be left behind, so that we can emerge in the light of an anarchistic post-modernity critique of Reason .... With this total critique of Reason, one bids farewell not only to Descartes but to his virtues as that egalitarianism of scientific thought which renounces any privileged up by instrumental reason assumes totalitarian traits itself. However, there is a moment of truth to this, and it can only be to the good that there is today a heightened sensibility to the Dialectic of Enlightenment, and thus to the fact that even a limited enlightenment must enlighten itself.
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> — Jurgen Habermas

I. *Introduction*

In this century mainstream legal scholarship in the United States has been subjected to various "crises of confidence" over the nature of the adjudication process. One of the key features of more traditional legal scholarship has been a belief in legal texts such as the constitution, statutes and precedents which are said to possess discrete and objective meaning capable of being discovered by objective detached observers. This belief in the authority of the text has been most clearly expressed in American constitutional law scholarship which has been dominated until recently by the quest to reveal the public moral values that are said to inhere in the body of the constitutional document itself. With the insights of the Legal Realists into the subjective preferences of legal actors, the foundations of this belief were severely shaken.[1] Much of the last fifty years has been spent trying to shore up the belief in the objective meaning of social norms derived from legal texts.

In an effort to rebuild the crumbling edifice of adjudication, many legal theorists have sought to appropriate the lessons of other scholarly disciplines. Initially social sciences such as sociology and psychology and more recently economics have been subject to instrumental examination in the hope of breathing new life into a nearly moribund formalism. As in many contemporary disciplines, in the 1980's the focus of efforts towards a theoretical resuscitation in law, has switched to the study of the centrality of the problem of language and meaning. In an attempt to

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1. See E. Mensch, "The History of Mainstream Legal Thought, 1920 to Present", in D. Kairys, ed. *The Politics of Law* (1982).

understand the nature and meaning of social norms which may be derived from legal texts, legal theorists have turned toward the interpretation of the activity of judges and thus to the questioning of the relationships between judges and the texts which they interpret.

Recent law review articles make frequent reference to Anglo-American philosophers such as Richard Rorty and John Searle, to continental thinkers such as Jacques Derrida, Hans Georg Gadamer or Jurgen Habermas, and to literary theorists such as Stanley Fish or E. D. Hirsch.[2] Within the above group of thinkers, there is nothing approaching a consensus on questions or meaning and language. It should thus come as no surprise that the "turn to interpretation" in legal theory has also incorporated many of the current philosophical debates along with the appropriation of the methodology of deconstruction, hermeneutics, or "critical theory". Rather than revealing the presence of shared objective social values in legal material the resulting debate on legal interpretation has raised the spectre of nihilism in which there is a sense that our shared standards of reason for evaluating competing interpretations are dissolving and that without such rational standards many of our democratic ideals will be undermined.[3]

In this debate over objectivity in interpretation, the key question centres on the claims to rationality that are attached to certain critical standards of judgment. With this question, the debate on interpretation in law begins to converge with the extensive debate on the nature of rationality that is taking place in contemporary philosophy. Using the recent work of Richard Bernstein[4] as an analytic framework, in the first section of this paper, I will suggest that the characterization of contemporary philosophical debate as one between the adherents of objectivism and relativism may be equally applicable to recent debates between liberal legal thinkers such as Ronald Dworkin and Owen Fiss and the radical members of the Conference on Critical Legal Studies (CLS). The second section of the paper will focus on the attempt to go beyond dichotomous thinking to avoid the problems associated with objectivism and relativism in the more recent critical legal theory of Joseph Singer.[5] While agreeing with the general aims of Singer's theory

2. S. Levinson, "Dworkin, Kennedy and Ely: Decoding the Legal Past" (1984), 51 Partisan Rev. 248.

3. O. Fiss, "Objectivity and Interpretation" (1982), 34 Stan. L. Rev. 739, at 740-1.

4. See especially R. Bernstein, *Beyond Objectivism and Relativism* (1983).

5. J. Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984), 94 Yales L.J.1. Singer's article represents one of the best examples of legal scholarship to have emerged from the second generation of CLS writers. Not only does it very effectively clarify the nature of the CLS critique but it also elaborates on the CLS project by developing a self-consciously critical framework which takes into account many of the major theoretical developments in contemporary philosophy and social theory.

I will suggest that his disavowal of any rational standards for evaluating competing positions undermines the normative basis of his own project for developing a more pragmatic legal theory. In the final sections of the paper I will briefly outline an alternative conception of pragmatism which may be used to establish a more stable framework for critical legal thought.

II. *Beyond Objectivism and Relativism in Philosophy and Law*

One of the most insightful examinations of the current state of affairs in philosophy is found in the recent work of Richard J. Bernstein. Bernstein's work is particularly suited to this task because of his knowledge of both Anglo-American and continental philosophy. He locates the key problematic in contemporary philosophy in the opposition between objectivism and relativism. Defined very broadly by Bernstein, objectivism refers to "the basic conviction that there is or must be some permanent, ahistorical matrix or framework to which we can ultimately appeal in determining the nature of rationality, knowledge, truth, reality, goodness or rightness."[6] Objectivism includes, various forms of foundationalism which seek to establish objectivity and the validation of norms at the price of ahistoricism and the possibility of an unreflective dogmatism. At the other pole stands relativism, which defines itself against objectivism in maintaining the impossibility of the discovery of any ahistorical matrix. By concentrating on the historical and preconceptual dimensions of human thought, relativism denies that there can be something properly labelled "*the* standard of rationality while insisting that there must be a plurality of standards of rationality which remain "radically incommensurable."[7] With this lack of emphasis on the justification of either epistemological or ethical norms comes a perceived danger of a nihilism in which "anything is permitted."

Bernstein presents the dichotomy between objectivism and relativism as a helpful way of making sense of recent philosophical conflicts. A prevalent concern which Bernstein terms the "Cartesian Anxiety", helps us to conceptualize this opposition. Bernstein presents Descartes' philosophy as representative of the search for a foundation or fixed point that provides security against change. For Descartes, the alternative to such a fixed point is the chaos where nothing is fixed. According to Bernstein, Descartes' position suggests the inevitability of the grand Either/Or which had dominated recent philosophical debate. "*Either* there is some ultimate support for our being, a fixed foundation for our

6. Bernstein, *supra*, note 4 at 8.
7. Bernstein, *supra*, note 4 at 8.

knowledge, *or* we can not escape the forces of darkness that envelop us with madness, with intellectual and moral chaos."[8]

Bernstein refuses to take sides in this conflict. Indeed he suggests that the dichotomy is "misleading and distortive" and must be overcome.[9] He insists that we are not reduced to this grand Either/Or but rather can still find a way to make political and moral commitments without either searching for new foundations for knowledge or resorting to a form of relativism based on values which are entirely contextual or contingent. Drawing on resources from various discourses, Bernstein elaborates on an intellectual project aimed at illuminating a pragmatic concept of rationality which provides a normative basis for evaluating or justifying the legitimacy of specific traditions or modes of thought. Bernstein's insistence on the communitarian character of all systems of rationality allows him to consider the legitimacy of the constraints imposed by a given tradition. Despite this concern for the legitimacy or justifications of specific traditions, Bernstein does not fall back into the trap of objectivism. Against those theorists who appeal to traditions (Gadamer) or to given social practices (Rorty) as sources of moral judgments, he maintains that it is important to emphasize "the role of domination in distorting the process of intersubjective standards of judgment within any given community of inquirers".[10] Accordingly, in his project it is impossible to separate the recognition of the immanent character of the rationality within a community from a critique of the power relations in that community. Philosophy and politics remain intimately connected within a radical and pragmatic concept of rationality.

Many of the questions which are at issue within contemporary discussions in philosophy recur in recent debates over the role of interpretation in law. Bernstein's characterization of the poles of objectivism and relativism may also be applied in an analysis of the contesting positions on the existence or non-existence of neutral standards of rationality in adjudication.[11] The "objectivist" forces in the current debate over the nature of legal interpretation are most clearly represented by Owen Fiss and Ronald Dworkin who insist on the need to ground

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8. Bernstein, *supra*, note 4 at 18.
9. Bernstein, *supra*, note 4 at 19.
10. Bernstein, *supra*, note 4 at 181-196. In his insistence on the importance of domination, Bernstein draws on the work of Jurgen Habermas.
11. Bernstein's theory has also been used as a framework for analyzing the interpretive debates in legal theory by Dennis Patterson. See D. N. Patterson, "Interpretation in Law: Toward a Reconstruction of the Current Debate" (1984), 29 Vill. L. Rev. 209. Patterson's use of Bernstein's categories is highly schematic and instead of utilizing the latter's radical form of pragmatism, he suggests that the "Cartesian Anxiety" can be overcome through a resort to the later works of Wittgenstein.

legal reasoning on a rational foundation. The relativist camp is represented by more "radical" legal thinkers such as the "irrationalists" among members of the Conference on Critical Legal Studies (CLS), who suggest that rational standards are irrelevant because they view all interpretive battles as questions of power.

In order to exorcise the spectre of the new nihilism which is thought to arise from the thought of the latter legal thinkers, Fiss and Dworkin contend that there must be rational standards with a validity independent of individual moral choice from which we can derive legal rules. Rather than attempt to resolve the danger of nihilism by referring to some ahistorical moral criteria, Fiss and Dworkin appeal to the institutionalization of communitarian standards of shared meaning.

Fiss locates an objective standard for adjudication in the "authority of the legal community".[12] While acknowledging that the true meaning of legal values can only be articulated in an act of interpretation, he maintains that the interpreter is not free to fashion meaning as she may wish but is constrained to accept a highly circumscribed range of interpretations. For Fiss constraint is expressed primarily in the established practices and the authoritative rules of the legal community as the relevant "interpretive community".[13] The authoritative rules of the community by constraining the interpreter thus transform interpretation into an "objective" process and provide the criteria for its evaluation.

Ronald Dworkin's work on adjudication is even more elaborate than that of Fiss. In his earlier works, Dworkin was committed to the proposition that judges must seek and give the "right answer" to legal questions without any element of discretion or choice. According to this position, any coherent theory of adjudication had to include an appeal to a background theory of political morality as a "complex set of principles and policies that justify that scheme of government."[14] Thus political and ethical principles are said to represent a significant aspect of all law, since they stand behind legal rules and provide the basis for their justification.[15] According to Dworkin, certain constellations of these principles guide judges in resolving disputes between competing legal rules and are regarded as binding because they form "part of the soundest theory of law."[16] This view presupposes the existence of some higher order principle that is capable of determining the weight to be assigned not only

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12. *Supra*, note 3 at 744.
13. *Supra*, note 3 at 744.
14. R. Dworkin, (1977) *Taking Rights Seriously* 107.
15. *Id.*, at 67.
16. *Supra*, note 14 at 67.

to competing rules, but also to competing principles.[17] For Dworkin this grounding of adjudication in the "soundest theory of law" prevents the political nature of judging from generating into an ideological struggle between conflicting principles.

With the recent publication of *Law's Empire*,[18] Dworkin attributes an even greater importance to the interpretive process in adjudication. Since law is regarded as an interpretive concept, Dworkin concludes that all attempts to formulate a relevant contemporary jurisprudence must be founded on some conception of the nature of interpretation. For Dworkin the best interpretation of legal practice is provided by his theory of "law as integrity."[19] Integrity, as "consistency in principle"[20] acts as normative ideal which is necessary for the legitimation of both the legal and political system. Law as integrity requires an interpretation which is consistent with the perpetuation of a particular ethical and legal tradition. It thus aims to provide for the best possible interpretation of specific legal practices and of the legal system as a whole.[21] According to Dworkin, only law as integrity can provide an objective standard for interpretation which will allow us to escape the evils of positivism or of the pragmatic nihilism of the Realists and the radical scholars associated with the Conference on Critical Legal Studies.

The most prominent representatives of relativism in the contemporary debate over the nature of legal interpretation are the so-called irrationalists in the Conference on Critical Legal Studies.[22] For the CLS irrationalists there can be neither an objective rational conceptual foundation for legal decisions nor any claim to a shared reason within a given tradition or community: law is little more than politics by another name. Accordingly, legal decisions are simply the judicial expression of the wider ideological struggles of society as a whole and legal questions are resolved through the use of power.

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17. See A. Altman, "Legal Realism, Critical Legal Studies and Dworkin" (1986), 15 Phil & Pub. Aff. 205 at 217.
18. R. Dworkin, *Law's Empire* (1986).
19. *Id.*, at 94.
20. *Id.*, at 161.
21. *Id.*, at 245.
22. The major figure in the CLS irrationalists is Duncan Kennedy whose influence is persuasive among a second generation of CLS scholars. For a discussion of the irrationalist position see D. Kennedy and P. Gabel "Roll over Beethoven" (1984), 36 Stan. L. Rev.1. A more appropriate label for the irrationalists may be based on either modern post-Marxist and post-structuralist social theory and literary criticism. This tendency within CLS also exhibits various degrees of commitment to irrationalism. CLS has readily accepted the label irrationalist as a characterization of their position, and have in some cases adopted it. It is not meant in this paper pejoratively. While the irrationalist group is not the only tendency in CLS, it is the most influential.

The CLS critique addresses itself to the political determination of legal language and texts. Yet the politics of legal reasoning is not in itself regarded as a problem. According to most CLS analysis, it is not politics, but the effort to hide politics which is at issue: "the crime is not ideology, but the silence which hides it."[23]

Critical Legal Studies views legal reasoning as an attempt to reconcile people to the *status quo* by making them believe that when judges make decisions, they do not take sides in the daily struggles of political and social life. In response to the belief in adjudication as an objective and rational way to determine our governing rules and institutions, CLS proposes that legal reasoning is a way of "simultaneously articulating and masking political and moral commitment."[24] The intricate manner in which traditional legal reasoning attempts to hide its politics becomes the main object of the CLS critique.

Under the influence of post-structuralist philosophy and literary theory as well as recent reconceptualizations of pragmatism in American philosophy, the "irrationalists" within CLS have extended their critique of societal power relations to encompass most accepted notions of reason. Rationality, especially as embodied in legal reasoning is presented as being used to provide an assailable moral foundation for existing social relations by "freezing" structures of meaning and closing off the possibility of all further questioning or debate. For the irrationalists, the attempt to establish the validity of certain claims to rationality represents a quest for "objective truth" which is used to obscure the role played by linguistic and political practices in the constitution of social life. This quest, by suggesting that the truth "exists" naturally to be discovered by processes of reason, thus is regarded by CLS as a denial of the world as something that is created rather than given.

The effect of this critique is to deny that in legal interpretation there can be any appeal to objective standards of reason or even to the historicist claim to reason within a given tradition. For the irrationalist, the struggles between competing claims and legal decisions ultimately are based on the triumph of one of those positions. Interpretation seems to become an issue of sheer power.

By denying the project of the search for "objective truth", the CLS irrationalists hope to illuminate the infinite plurality of ways of interpreting and living in the world. Critique becomes a process of developing an awareness of the ideological character of the "reified structural determinants" found in legal language and institutions and in

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23. A. Hutchinson, "Cultural Construction or Historical Deconstruction" (Book Review) (1984), 94 Yale L. J. 209 at 234.
24. Singer, *supra*, note 5 at 6.

the process the contingency of all social events is revealed. The irrationalist critic does not see contingency and the absence of a rational founding for action as debilitating. If anything, this situation is accepted as liberating. "By understanding both social and conceptual authoritarianism, this absence provides a momentary opening for other ways of being and other forms of life."[25] Accordingly, both social theory and critical legal theory have meaning only in so far as they reflect and help illuminate daily political struggles.

Just as in the debate in contemporary philosophy, the participants in the debate over legal interpretation appear to be caught in the dilemma posed by Bernstein's "Cartesian Anxiety": "either objectivism or relativism, . . . either neutral standards of rationality or the irrationality of the will to power."[26] Yet this dilemma is by no means inevitable. As will be clear from an analysis of more recent critical legal theory, the rejection of rational foundations does not necessarily lead to political and moral chaos.

III. *Joseph Singer and the Movement Beyond Objectivism and Relativism*

One of the clearest and most sophisticated accounts of an alternative role for legal theory is found in the recent work of Joseph Singer.[27] As a former student of Duncan Kennedy, Singer identifies himself with irrationalist or modernist tendency within CLS. Yet unlike many other representatives of this group, which is becoming increasingly dominant within CLS,[28] he denies neither the importance of a positive program of reconstruction nor the need for defining a continuing role for "legal reason". Singer can maintain this commitment because he wants to define a more circumscribed role for political and legal theory which rejects an appeal either to objective knowledge or to the arbitrary choice of moral and political values. Basing his work on a combination of continental philosophy and American pragmatism as exemplified in the work of Richard Rorty, Singer suggests that it is necessary to give up any foundational conception of theory as a rational method that is capable of telling us what to believe and how we are to live.[29]

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25. J. Boyle, "Modernist Social Theory: Roberto Unger's *Passion*" (Book Review), (1985), 98 Harv. L. Rev. 1066 at 1077.
26. D. Cornell, "Talking Hegel Seriously: Reflections on *Beyond Objectivism and Relativism*" (Book Review), (1985), 7 Cardozo L. Rev. 139 at 142.
27. Singer, *supra,* note 5 and J. Singer, "Radical Moderation: (Book Review), (1985), Amer. B. Found. Res. J. 329.
28. See M. Tushnet, "Critical Legal Studies: Its Origins and Underpinnings" (1987), 36 J. Leg Educ. 508.
29. Singer, *supra,* note 5 at 53.

However, before outlining a framework for his alternative conception of theory, Singer develops a brief critique of existing modes of legal reasoning within liberal legal culture. Following the dominant line of CLS criticism, Singer contends that legal reasoning and liberal theory are neither determinate nor objective.[30] According to his analysis the traditional assumptions with respect to the determinacy and objectivity of legal rules are based on a search for certainty within theory which must now be abandoned. The possibility of determining some rational foundation which would compel a correct institutional or value choice is rejected as a fallacy.

According to Singer's "radical pragmatism", law or legal theory is indeterminate. The meaning of this claim; however, may be expressed in two different ways: Law is "infinitely manipulable"[31] or legal theories can be used "to justify very different sorts of institutions and very different rules."[32] A common factor in these definitions is the existence of an element of choice. Singer suggests that theories or rules are thought to be determinate if they "tell us what to do" while leaving little or no room for choice.[33] Rather than constraining choice, legal theory or rules actually compel it. At the heart of the CLS critique of the indeterminacy of law is a belief that ultimately legal rules are little more than the products of contingent political and moral value choices. The subterfuge to which liberal legal reasoning resorts to obfuscate this element of choice becomes the main object of the recent critique.

According to Singer, both determinacy and indeterminacy are necessary elements in a coherent liberal legal discourse. In his view, an appeal to determinate rules and arguments is crucial for sustaining the ideology of the rule of law because it is necessary for restraining arbitrary judicial power.[34] However, the mechanical rigidity of a completely determinate set of rules also is undesirable because flexible standards are believed to be necessary in order to promote just results in specific situations.[35] Liberal legal theory and legal rules thus have to try to incorporate elements of both determinacy and indeterminacy in a proper mix. Singer concludes that such a mix of rigid rules and flexible standards is impossible to attain since despite all attempts to the contrary, legal rules do not succeed in removing the necessary elements of choice. He also argues that a determinate legal theory or set of rules must meet four

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30. Singer, *supra,* note 5 at 8.
31. Singer, *supra,* note 5 at 10.
32. Singer, *supra,* note 5 at 24.
33. Singer, *supra,* note 5 at 11.
34. Singer, *supra* note 5 at 12.
35. Singer, *supra* note 5 at 13.

criteria: They must be comprehensive, consistent, directive and self revising.[36] Since current law does not succeed in meeting any of these criteria, any claims to determinacy must be dismissed as unrealistic.[37]

While Singer's "deconstruction" of liberal claims with respect to the determinacy of legal rules represents an important elaboration on the CLS critique of "liberal legalism", it is his critique of objectivity in legal thought which is most relevant to his attempt to develop an alternative theoretical basis for critical legal thought. According to Singer, the purpose of objectivism is to establish standards through rational argumentation that are capable of serving as guidelines for our actions and for the establishment of social institutions. Singer, however, contends that this project necessarily must fail because guidance can only come through reflection on experience and through contextualized conversations about political and moral values.

Singer suggests that the project of grounding the legal system on a rational foundation may be based on either substantive or procedural theories of justification. Substantive theories such as positivism and natural law claim that the objectivity of legal rules is based on how accurately they reflect some external source.[38] They share a belief in the possibility of the achievement of rational consensus that will tell us how to make decisions with respect to moral and legal questions.[39] Singer rejects the underlying assumptions of this position because he claims that the effect of the belief in the existence of right rules and of the possibility of their discovery is to substitute the passive preoccupation of rules for active more choice.[40]

A similar concern is reflected in his analysis of procedural theories of justification. Procedural theories locate the objectivity of legal rules in the employment of proper decision procedures rather than in the accurate representation of existing correct rules: "The right method yields the correct rule."[41] Accordingly, a decision procedure, capable of analyzing all relevant factors and of generating results from that analysis is viewed as the primary prerequisite for the justification of law. According to Singer, this procedural objectivity presupposes the prior existence of intersubjective agreement not about particular substantive outcomes

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36. Singer, *supra* note 5 at 14-19.
37. See J. Stick: "Can Nihilism be Pragmatic?" (1986) 100 Harv. L. Rev. 332.
In this excellent article, Stick claims that Singer's criteria for determinacy, submit legal discourse to an "unreasonably rigid notion or rationality. According to Stick, no contemporary liberal legal theory would make such claims with respect to the determinacy of legal rules.
38. Singer, *supra* note 5 at 26.
39. Singer, *supra,* note 5 at 28.
40. Bernstein, *supra,* note 4 at 29.
41. Singer, *supra,* note 5 at 30.

(legal rules and standards), but about the method of reaching outcomes (legal reasoning).[42] Following the line of the CLS critique of legal reasoning, Singer suggests that this notion of social agreement tends to emphasize vague common commitments and value choices while downplaying the existence of competing social values. Accordingly this denial of conflict and a concomitant emphasis on logical technique is regarded as another attempt to avoid the necessity of moral choice.

According to Singer, the achievement of rational consensus is the primary decision procedure through which mainstream legal theory attempts to provide an objective foundation for legal rules.[43] However, he contends that to the extent that it attempts to combine consensus with criteria of rationality, this project must necessarily fail because it is internally contradictory. Since liberal theorists (read Rawls) regard consensus in itself as an insufficient ground for law or politics, reason must be incorporated into their theoretical framework in order to insure that the "right" kind of social agreement is reached. Following Michael Sandel,[44] and referring to social contract theory, Singer maintains that rational consensus can generate neither determinate conclusions nor decision procedures for generating objective results because it becomes impossible to determine the priority of either consensus or rational principle. Since it is impossible to specify "which is the chicken and which is the egg," he suggests that "it is never clear whether one is describing what people actually believe or what they should believe if they thought about it rationally."[45]

Throughout his analysis of mainstream legal thought, Singer repeats the primary reason for his rejection of all attempts to establish an objective basis for legal rules. According to his analysis, such theories represent attempts to deny both the element of choice and our ability to collectively change legal rules and institutions. These specific evaluative criteria also serve to clarify the object of his critique. He suggests that without a "meta theory" or some "existing common ground", theory can not tell us what to do and we are left to make our own choices based on reflections on our own experience. The alternatives are stark: Either we appeal to what is local or experiential or we appeal some fixed/ permanent ahistorical standard which may provide solace from our deepest anxieties. Despite the discussion of the possibility of basing objectivity in decision procedures, Singer's evaluation of the issue of rational agreement suggests that he regards rational standards as

42. Singer, *supra* note 5 at 31.
43. Singer, *supra* note 5 at 35.
44. See M. Sandel, *Liberalism and the Limits of Justice* (1983).
45. Singer, *supra,* note 5 at 38.

originating only from ahistorical criteria of justification. Accordingly all standards or evaluative criteria are tarred with the brush of foundationalism because Singer sees this as the only way to establish correct standards based on reason. This is revealed clearly when Singer refers to existing legal reasoning as the "expression fo an innate antecedently existing decision procedure of rational discourse."[46] By defining the objectivism in such a rigid manner, Singer denies the validity of any process which attempts to validate the truthfulness of our moral and political value choices. All processes of justification are seen as attempts to provide a method that will relieve the anxiety of having to make those choices. He thus rejects this justificatory role for theory and substitutes in its place an expressive concept of theory which openly embraces the contingency of all such choices.

IV. *Edifying Legal Theory*

In place of a systematic theory of justification in legal thought, Singer suggests a Rortian conception of theory as "edification."[47] According to Singer's position, legal theory should edify; it should "help . . . readers, or society as a whole, break free from outworn vocabularies and attitudes, rather than . . . provide 'grounding' for the institutions and customs of the present."[48] This suggests a recognition of the need for a continuing active criticism of the legal system aimed at "broadening the perceived scope of legitimate institutional alternative."[49] According to Singer, such a process would also demonstrate the manner in which judges "rationalize" their discussion by reference to nonexistent "grounds" which are used to hide from themselves the fact that they are exercising power. "The idea of a decision procedure allows judge to believe that when they exercise power they are not really doing so; they are not making choices, but merely applying the law."[50] In this procedure, the belief that "reason" can adjudicate value conflicts which arise in legal disputes thus reduces moral judgment to a matter of logical technique which is believed to compel a particular decision. Singer, however, insists that once edifying theory reveals that legal decisions are the products of choice and not of necessity, it then becomes possible to recognize that a wider range of alternative, political and moral choices are available to us.

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46. Singer, *supra,* note 5 at 51.
47. See R. Rorty, *Philosophy and the Mirror of Nature* (1979) at 368-70 for an explanation of the role of "edification" in philosophy.
48. R. Rorty, *id.* as quoted in J. Singer, *supra* note 7 at 8.
49. Singer, *supra,* note 5 at 58.
50. Singer, *supra,* note 27 at 342.

In the course of this critique, judicial arguments will be shown to reflect the contradictory values that pervade society as a whole and the claim of legal reasoning to embody determinacy, objectivity and neutrality will be discredited. However, as Singer points out this basic incoherence of existing legal rules does not necessarily mean that they are bad. While the critique demonstrates the impossibility of ultimate foundations of thought grounded in either reason or a rational consensus in the community, this does not mean that we are left with no criteria for assessing legal rules and decisions. As Singer suggests, "their goodness or badness depends on political or moral judgement rather than 'reason'."[51]

For Singer the demonstration of the incoherence of legal rules does not mean that we are left with a void or moral chaos as has been suggested by traditional legal theorists. He insists that:

> we are not destined to live in a world in which we must choose between believing in some ultimate permanent foundation for law and morality (rationalism) or believing that all views are as good as all others and it does not matter what we believe or do (nihilism).[52]

Following Bernstein, Singer appears to reject the austere choices imposed by dichotomous thinking and appears to recognise the need to avoid the problems associated with both objectivism and relativism. The rejection of the possibility of rational foundations does not leave us with the stark alternative of moral chaos: even without a foundation we are able to develop "passionate commitments and to make our lives meaningful."[53]

Singer does not consider the internally contradictory character of contemporary legal theory in itself to be a problem. He rejects the claim that theory is capable of resolving conflicts in the real world.[54] Legal theory, according to this position should not be presented as determinative or constitutive of what we should think or value, but rather should be regarded as an expression of our competing values. "Legal theory can not tell us what to value, but it can help us (judges, scholars, citizens) make choices by helping us to articulate what we value."[55]

One of the main characteristics of this theory is Singer's insistence on the need to carefully locate legal rules within their specific cultural and historical contexts. For Singer this means that theory cannot simply be concerned with the form of argumentation and the structure of legal

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51. Singer, *supra* note 5 at 59.
52. Singer, *supra,* note 5 at 59. This would suggest an absolute disjunction between judgment and reason.
53. Singer, *supra,* note 5 at 5.
54. Singer, *supra* note 5 at 60.
55. Singer, *supra,* note 5 at 63.

language. Unlike much of the earlier CLS work, he seems to suggest that it is also important to assess the substantive results of judicial decisions.[56] After his assessment of the role of theory, Singer maintains that since all adjudication involves political and moral decision-making, our evaluative criteria must be based on our own political and moral values which are themselves not products of theory. In other words we must decide whether we can support legal decisions on the basis of our moral and political judgment.[57]

An application of this legal theory is found in Singer's assessment of the career of Mr. Justice Pashman of the New Jersey Supreme Court.[58] In this analysis he emphasizes the importance of clearly distinguishing between judicial activism and judicial passivism.[59] According to Singer, am emphasis on a rational decision procedure is an important means by which the advocates of judicial passivism hide their exercise of political power. He maintains that a consistent passivism is impossible for the exercise of power seems to be inherent in the deciding of legal cases. In any decision, judges are forced to decide in favour of one side or the other on all matters in dispute. There has to be a detailed weighing of all the "interests", values, and utilities involved. "Thus the question is not whether the judge should exercise power or not exercise power, but in whose interests the power should be exercised."[60]

Singer clearly favours judicial activism in part because he believes there is an "open admission" that adjudication is not so much based on objective neutral principles but rather upon the more responsive and pragmatic nature of political and moral values. He praises Mr. Justice Pashman for his selective activism in which the law-making role of judges is readily acknowledged[61]. As conceived by Mr. Justice Pashman, judicial activism becomes an important means by which "our legal system protects the disadvantaged from the powerful."[62] This stance meets with Singer's approval because politically and morally he sees Justice Pashman's commitment to the protection of the powerless as good in itself:

> According to Justice Pashman, the question is not whether judges should make law, but whose interests they should protect. He sought to increase the number and variety of situations in which the legal system would

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56. But see K. J. Vandervelde. "The New Property of the nineteenth-Century: The Development of the modern Concept of Property" (1980), 30 Buff. L. Rev. 325 at 326.
57. See Singer, *supra,* note 51 and accompanying text.
58. J. Singer, "Catcher in the Rye Jurisprudence" (1985), 35 Rutgers L. Rev. 276.
59. *Id.,* at 276.
60. Singer, *supra,* note 58 at 278.
61. Singer, *supra,* note 58 at 281-84.
62. Singer, *supra,* note 58 at 283.

require the community to come to the aid of the weak and disadvantaged in times of crisis. He also believed that the good society would be more egalitarian than the one in which we live. He therefore used his power to redistribute certain social and economic advantages from the priviledged to the powerless. Was this an abuse of his judicial power? The answer depends not on abstract homilies about the judicial role, but with whom we place our sympathies.[63]

V. *The Limits of Edifying Theory*

Singer rejects both the possibility of a shared thinking process that would establish legal reasoning as a single rational procedure and any conception of a rational consensus or agreement as a foundation for legal rules which would allow us to believe in the objectivity of legal reasoning.[64] While rejecting rational consensus, Singer does not suggest that agreement is impossible: it is simply not necessary. Accordingly, "morality is not a matter of truth or logical demonstration. It is a matter of conviction based on experience, emotion and conversation."[65] Questions of morality and law, therefore cannot be proven to be "true" or "right". Thus for Singer, our assessment of the "goodness" or "badness" of specific legal rules ultimately depends upon our political and moral judgments rather than reason.[66] This view suggests an absolute disjunction between judgment and reason. Defined in such a manner, legal reasoning is reduced to a context dependent practical political enterprise which is summed up in the Rortian metaphor of a "conversation."

Legal reasoning, defined as a conversation, reflects the CLS aim of openness and plurality. Protecting a plurality of discourses is regarded as a means of preventing historical closure by insuring that alternative modes of reconceptualizing social relations remain open. The purpose of legal theory as edification therefore is not to find "objective truth", but to keep the conversation going[67] in order to illuminate ways of thought that are systematically repressed in the dominant legal discourse. It is this fear of historical closure which motivates the denial of the possibility of rational ethical consensus by both Singer and other CLS members. In place of shared rational communitarian standards, this critique emphasizes the possibility of an infinite plurality of interpretations.

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63. Singer, *supra,* note 58 at 284.
64. Singer, *supra,* note 5 at 33-39.
65. Singer, *supra,* note 5 at 39.
66. See Singer, *supra,* note 57 and accompanying text.
67. See R. Rorty, *supra,* note 47 at 377. CLS has clearly been influenced by the "deconstructive" side of Rorty's thought. However, they tend to neglect the more conservative implications of his "theoretical" defence of the values and practices of "bourgeois liberalism."

By concluding that the assessment of specific legal rules ultimately depends on political and moral judgment, Singer emphasizes the priority of politics over theory. Accordingly, political choice and action stand on their own without any need for theoretical justification. Theory is regarded as being incapable of providing any such justification, since it cannot specify what our values should be or determine how we shall live. As Singer makes clear from his own evaluation of "edifying" judges such as Justice Pashman[68] and Judge Garrity,[69] the answers to these questions are political. Posing the problems in these terms, Singer reestablishes yet another dichotomy at the heart of contemporary critical jurisprudence: theory v. politics. The attempts to clarify both of these terms in his thought are equally problematic.

With respect to theory, Singer's problems begin with an overly rigid conception of traditional legal theory. Singer regards traditional theory as objectionable because it claims to be able to create or justify legal rules by providing decision procedures capable of resolving all contradictions in an objective and politically neutral manner.[70] The goal of such theory is to generate answers through the determination or creation of norms and values. Such theory, according to Singer, is illegitimate because it attempts to relieve us of the burden of moral choice.[71] He assumes that the purpose of all forms of traditional theory is to generate answers. By portraying traditional legal theory in this manner, he reduces justification to logical deduction from presumably unassailable premises. Few liberal legal or political theorists actually hold such a view of theory.[72] Justification is a much more complex process which is compatible with key features of critical social and legal theory. Singer, however, has a very different concept of critical theory in mind.

As specified by Singer, the role of theory is merely expressive. Accordingly, "legal theory cannot tell us what to value, but it can help us (judges, scholars, citizens) make choices by helping us to articulate what we value."[73] Theory thus serves to articulate our political and moral aspirations rather than attempting to ground specific legal and political practices. Such a concept of theory is generated by critical self-reflection on specific concrete problems of living. Fundamental choices are to be made on the basis of either experience or reflection on social practices. It would be a mistake, however, to assume that Singer is basing his views

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68. See *supra,* notes 58-63 and accompanying text.
69. Singer, *supra* note 5 at 58.
70. Singer, *supra* note 5 at 60.
71. Singer, *supra* note 5 at 60.
72. See, Stick, *supra,* note 37.
73. Singer, *supra,* note 5 at 63.

on a reconceptualization of the liberal ideal of autonomous individuality. Although he emphasizes the active role of the theorist in creating the theory, he also recognizes the communal nature of theory.[74] Here we see that Singer's earlier rejection of the idea of "rational consensus" is only partial for he maintains that there remains a "kernel of truth" in this concept which emphasizes the collective nature of common understanding. Consensus, however, is not something which remains out there waiting to be discovered, it is something which must be created and recreated politically in continuous encounter and discourse with others.[75]

Despite his critical intentions, Singer clearly does not regard his alternative theory as a fundamental departure from the reality of existing theory. He simply recognizes what he believes to be the limits of any kind of theory and then reconceptualizes the role of critical theory to take account of these limitations. According to his analysis, existing theory expresses political and moral commitments which are controversial in themselves rather than meta level principles which are universal in application and grounded in human rationality.[76] What Singer and other CLS critics decry is not the existence of these commitments, but rather the attempt to mask them. The articulation of a political vision itself is embraced as a requisite task of critical legal theory.

While theory as edification continues to inform value choices, Singer contends that this role is definitely subordinate to politics. Despite the importance of politics to his theory, its contours remained somewhat blurred. As envisioned by Singer, politics emphasizes the creation of intersubjective agreement through radical democratic procedures. Although this political goal is valuable in itself, as expressed by Singer, it comes into conflict with two of his theoretical premises: the belief that political values are inevitably controversial; and the belief that social agreement must be created rather than found.

Singer never really elaborates on the nature of radical democracy. Rather he seems to assume that the meaning of the term is self evident. This assumption is problematic for there is more than one sense of what we mean by participatory democracy and as soon as an attempt is made to try to define it, one becomes embroiled in controversy. Singer, who claims that there is no consensus about the competing moral and political values underlying legal theory, seems to think that there is more consensus about conceptions of participatory democracy. He assumes that all critical legal and social thinkers share common institutions about

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74. Singer, *supra,* note 5 at 64.
75. Singer, *supra,* note 5 at 64.
76. Singer, *supra* note 5 at 60.

radical democracy when in reality the historical practices relating to such an ideal are conflicting and incompatible.[77] The tensions and conflicts within the framework of a particular political tradition are largely ignored by Singer. In reality this amounts to an omission of convenience for if these tensions are recognized, the separation of the expressive role of theory from that of the rational evaluation of political practices becomes untenable. The realization that there is no existing consensus based on shared intuitions should bring with it the acknowledgement that some appropriate form of argumentation is necessary for evaluating competing intuitions. The articulation of a political vision cannot be separated from its justification. The necessary justification, however, does not have to be based on an appeal to some ahistorical standard. The central premise of justification thus becomes one of advancing the strongest historical arguments supporting the historical vision that we endorse.

Unfortunately Singer fails to realize that some form of justification is necessary in order to establish the normative authority of his own position. By suggesting "participatory democracy" as a basis for creating consensus, he already assumes that there is an existing consensus on the meaning of participatory democracy. In the very process of trying to provide a minimal framework for "keeping the conversation going", Singer unwittingly blocks the road to inquiry by presenting, as established, a view which depends on competing positions. He thus precludes the possibility for the development of the very political processes of consensus creation that are at the heart of his theory. An appropriate vision of participatory democracy requires a form of theory which not only articulates its vision but provides standards for the evaluation of competing ideals. Singer's concept of theory as edification has yet to allow for the recognition of this more complex process which relies not just on political judgments but on some conception of rational criteria of justification.

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77. While Singer doesn't explicitly associate his position with democratic socialism, that tradition seems to be an obvious political reference point for his thought as it is for most advocates of Critical Legal Studies. However, even if we limit the conceptions of participatory democracy to the range that would be acceptable within democratic socialist thought we are confronted with a number of fundamental conflicts.

In an analysis of Marxist political theory which is particularly instructive, Christopher Pierson suggests that even within Marxism there is little agreement on the nature of the ideal of a socialist democracy. According to Pierson:

> "With the waning of confidence in Marxism, the edifice of socialist theory is now, as much as ever, a tower of Babel of competing ideologies and strategies."
>
> C. Pierson, *Marxist Theory and Democratic Politics* (Berkley: University of California Press, 1986).

VI. *The Politics of Pragmatism*

Although Singer intends to provide a self-conscious analysis of the "nihilist" or "irrationalist" tendency within the CLS Movement, he is careful to suggest that pragmatism may be a more appropriate label for his own brand of critical theory.[78] To the extent that it focuses on the formation of a procedural framework for the promotion of democratic discursive practices, contemporary pragmatism may be seen as a real alternative to the conceptions of political and legal praxis that prevail in the work of the first generation of CLS thinkers.[79] Yet it is important to recognize that neo-pragmatism cannot be regarded as a monolithic unity. Rorty's work is only one variety of contemporary pragmatism. There are others that may be more appropriate for critical legal analysis. With this is mind, it is possible to question the adequacy of Singer's theoretical appropriations.

Singer readily acknowledges that the greatest intellectual influence on his legal thought has been Richard Rorty's recent revival of the American tradition of pragmatism.[80] Rorty's work represents one of the most significant developments in contemporary philosophy. Above all, his metaphor of "philosophy as a conversation" serves as an important reminder of the dangers of legal and social theory falling back into a search for a permanent ahistorical framework to which we can appeal in order to resolve our epistemological dilemmas. Rorty demonstrates the necessity of maintaining a continuous and open questioning of social reality in order to prevent historical closure.

Singer's work also draws attention to another account of pragmatism as exemplified by the work of Richard Bernstein and the German social theorist, Jurgen Habermas. Despite sharing a commitment to practical discourse with Rorty, the Bernsteinian/Habermasian variety of pragmatism is much more concerned with the relationship between theory and politics. Accordingly, it represents a more appropriate model for critical legal theory that focuses more on the politics of law than does the aestheticized Deweyan pragmatism of Rorty.

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78. Singer, *supra* note 5 at 8.

79. See K. Klare, "Law-Making as Praxis" (1979), 40 Telos 115 and D. Kennedy, "The Phenomenology of Adjudication" (1987), 36. J. Leg. Educ. 518. Both Klare and Kennedy derive their concepts of law-making as a form of political reasoning and practice from the concept of praxis as developed in the early works of Karl Marx. This concept emphasizes social transformation as a creative project based on the interaction of a collective subject with the natural world. Despite Marx's recognition of the social aspects of praxis, he fails to account for the communicative or dialogic nature of transformative action. See K. Marx, *The Economic and Philosophic Manuscripts of 1844* (1964).

80. Singer, *supra* note 5 at 7.

81. See especially R. Rorty, *supra,* note 47.

Generally the major advocates of contemporary pragmatism share a commitment to the promotion of intersubjective dialogue and to political institutions which embody democratic values. Despite this shared commitment to democracy, there are important differences in their attitudes to the role of theory in politics and to the adequacy of the institutions of liberal democracy which allow us to make judgments about the utility of pragmatism in critical legal theory.

The main focus of the Rortian project has been relatively narrow. Until recently, Rorty has developed his work within the limited context of debates within academic philosophy and literary criticism. His major concern has been to demonstrate the manner in which philosophy in general and epistemology in particular has blocked the path of social inquiry.[81] The political dimension of Rortian pragmatism has been systematically downplayed. This has resulted in a deliberate diminution of the role of theory in politics.

In his more recent works, Rorty has elaborated on his concept of "philosophy as a conversation" by strengthening the emphasis on intersubjectivity. According to this reformulation, it is necessary to substitute the idea of "unforced agreement" for that of objectivity.[82] In place of the traditional grounding of social consensus or "solidarity" in ahistorical objective standards, Rorty suggests that objectivity may be redefined in terms of solidarity as uncoerced intersubjective agreement. According to Rorty's pragmatism, "the desire for objectivity is not the desire to escape the limitations of one's community, but simply the desire for as much intersubjectivity as possible."[83] Objectivity is thus defined in self-referential terms.

With this acceptance of democratic procedures for the formation of consensus, we get a clearer idea of Rorty's views of the relationship between philosophy or theory and political practice. According to Rorty, philosophy's contribution to politics must be procedural rather than substantive.[84] Such procedural theories are supposed to illuminate specific historical situations and not possess any universal import. More than anything else, Rorty distrusts the implications of all universalist theories. This antipathy for universalism contributes to two different but related conclusions in his theory. It leads him to reject the possibility of developing a social theoretical perspective on modernity and to question the validity of establishing a rational grounding for political action.

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82. R. Rorty, "Science as Solidarity", unpublished paper. 1986 at 4.
83. R. Rorty, "Solidarity or Objectivity?" in J. Rajchman and C. West, eds. *Post-Analytic Philosophy* (1985) at 5.
84. R. Rorty, "Posties" (Book Review) London Rev. of Books Sept. 3, 1987 at 12.

Rorty believes that philosophy should no longer be directed at the construction of grand-scale social theories which attempt to explain the nature of social life or the possibility of social transformation. Following the French post-structuralist philosopher, Jean-Francois Lyotard, he labels such theories as metanarratives which, like Marx's historical materialism, provide criteria for evaluating and legitimating social action within specific cultures which are being examined. Rorty is critical of such metanarratives because he regards them as distractions from the Deweyan project of dealing with the meaning and problems of daily life.[85]

While it is easy to sympathize with Rorty's questioning of the relevance of the abstraction of grand theorizing, his critique of universalism is not limited to social theory. He also rejects the rational justification of political action. He contends that "what we need are philosophers who are willing to let democratic societies sort things out as history goes along, without giving them a 'philosophical framework' of concepts within which to do it."[86] According to this position, it is not deep thinkers such as Bernstein and Habermas who get things accomplished politically, but rather superficial dreamers such as Martin Luther King and Michael Harrington who suggest concrete proposals for improving society. "They supply local hope not universal knowledge."[87] This entails thinking less about theory and more about social practice.

It is in this opposition of that which is local and concrete to that which is universal and abstract that the main assumptions behind Rorty's theory are clarified. Large-scale social theories which attempt to offer general explanations of social phenomena and critical theory which attempts to specify universal principles for guiding social and political action are rejected as being ahistorical and acontextual. At best, according to Rorty, they are irrelevant to social practice; at worst, whatever the intentions of their authors, they act as obstacles to further social inquiry. As an alternative to the ambitions of universalistic theory, Rorty proposes a more limited theory which is to inform social practice only in specific localized contexts by suggesting procedures that are relevant to a very limited time frame. According to Rorty, only such an historically specific pragmatism is capable of informing concrete social goals. This resort to concrete social practice has important implications for Rorty's views on justification.

Although Rorty rejects any appeal to rational criteria for evaluation, he does not discount the need to provide some form of justification for

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85. R. Rorty, "Habermas and Lyotard on Post-Modernity" (1984), 4 Praxis Int'l 32 at 43.
86. Rorty, *supra*, note 84 at 12.
87. Rorty, *supra*, note 84 at 12.

social action. Believing in the relevance of small-scale, localized action to remedy certain of the inequities of contemporary society, he recognizes that there must be some measure of the "appropriateness" of these actions. He locates this measure in existing social practices.

Rorty rightly insists that social vision of any kind must be worked out in practice. However, for those interested in democratic political practice, this amounts to little more than a truism. Without a clarification of the relevance of specific practices, there is a real danger of falling back into a type of positivism which reinforces the *status quo.* Unfortunately Rorty makes little attempt to provide such a clarification and when he ultimately does reveal his commitment to the basic values of liberal democracy, we are forced to question the relevance of his theoretical views to the construction of a contemporary critical analysis of law and legal institutions.

Rorty contends that "philosophy should try to express our political hopes rather than to ground our political practices".[88] Such practices are regarded as resulting from experimental self-reflection.[89] Unfortunately, Rorty seems to assume that we all know what these practices mean and presents them as a given. In so doing, he neglects important questions about how we are to discriminate between better or worse forms of practice; about which social practices need to be discarded and criticized and which ones need to be reconstructed.[90]

Although Rorty's own theory would suggest that these questions are not unimportant, he neglects them and seems to regard any evaluation that attempts to distinguish the better from the worse or the rational from the irrational and is in danger of falling back into a form of foundationalism.

As an alternative to appealing to a fixed permanent ahistorical foundation, Rorty posits an appeal to "something relatively 'local and ethnocentric' — the tradition of a particular community, the consensus of a particular culture."[91] For Rorty such a particular consensus provides a standard for justifying a particular position to ourselves — "to the body of shared belief which determines the reference of the word 'we'."[92] The tradition or consensus to which Rorty appeals is found in the existing

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88. R. Rorty, "Form Logic to Language to Play" (1986), Proceedings and Addresses of the American Philosophical Association at 752-53.
89. *Id.*
90. R. Bernstein, "One Step Forward, Two Steps Backward" (1987), 15. Pol. Theory 538 at 549.
91. R. Rorty, "The Priority of Democracy to Philosophy" in R. Vaughan ed. *The Virginia Statute of Religious Freedom: Two Hundred Years After* (1988) as quoted in R. Bernstein *supra* note 90 at 549.
92. *Id.*

liberal democracies of North America and Western Europe. This support, however qualified it may be, for liberal society distinguishes Rorty's neo-pragmatism from more radical variants that are influenced both by Marxism and continental social thought.

Over the last five years, Rorty has consistently defended what he refers to as "post-modernist bourgeois liberalism."[93] By promoting "post-modernist bourgeois liberalism", Rorty implicitly suggests that it is possible to separate the post-modernist critique of philosophy from the contemporary deconstructionist critique of liberal reformist political thought. In this way, he has been able to support the "extremism" of post-modernist philosophy while maintaining a loyalty to the institutions of liberalism which he believes remain capable of providing the necessary institutional protection for continuing the "conversation of the west."

Rorty presents liberal democracy as a given which does not require any philosophical presuppositions. Accordingly, theory is required to do little more than to articulate the common intuitions, settled habits and shared beliefs of the members of the community who are committed to liberal democracy. Yet with more than one sense of what is meant by liberal democracy, it becomes necessary to establish some criteria for choosing one or another of these competing views.[94] It thus becomes impossible to separate the articulation of a particular liberal democratic vision from its justification in terms of a specific historical context.

In order to answer some of his critics, Rorty has attempted to clarify his political position. He concedes that his use of the label "post-modernist bourgeois liberalism" may have been unfortunate because it is misleading.[95] He maintains that his commitment to liberal democracy is not an absolute one based on rational evaluative criteria such as the suggestion that liberal institutions are a necessary pre-condition for self-creation. Instead Rorty defines his position negatively in reaction to the authoritarian excesses of existing Marxist socialist regimes. In a manner, reminiscent of Cold War liberals from the 1950's, Rorty thus suggests that while flawed, the institutions of liberalism are "humanity's most precious achievement" and must be preserved in order to prevent the realization of an Orwellian future dominated by socialist imperialism.[96] It is in this view of liberal democracy that Rorty also clarifies his position on justification. Accordingly, the chief attributes of liberal democracy are toleration, free inquiry, and the quest for undistorted communication. Justification takes place not by an appeal to rational criteria, but rather

93. See especially R. Rorty, "Post-Modernist Bourgeois Liberalism" (1983), 80 J. of Phil. 583.
94. Bernstein, *supra,* note 90 at 546.
95. R. Rorty, "Thugs and Theorists: A Reply to Bernstein" (1987), 15 Pol. Theory 564 at 564.
96. *Id.* at 565-7.

through a comparison between societies which exhibit the above attributes and those that do not. Political choices are made by "reference to various detailed practical advantages."[97] Rorty continues to resist the idea of theoretical justification. He contends that truth and rationality "consist of descriptions of the familiar procedures of justification used by a given society.[98] With this concession to existing social practices, Rorty's theory is once again deprived of any emancipatory content.

Rorty's theoretical inquiries lead academic philosophy into the world of politics and culture, but his own engagement in this world is strictly confined. His dismissal of the demand for universalization on either a substantive or procedural level and his unwillingness to adopt insights from social theory leave little room for a critique of liberal democracy. From a Rortian perspective, it seems that the best that we can hope for is routine reform. In effect, Rorty hypostatizes the present by immunizing it from all theoretical critique. Philosophy and theory are reduced to private pursuits while politics, to avoid the extremes of totalitarianism, is reduced to routine changes within specific institutional settings.[99]

Richard Rorty's brand of neo-pragmatism is very much dependent on the existing state of liberal democracies for its social vision. To the extent that they combine pragmatism with critical social theory, the theories of Richard Bernstein and Jurgen Habermas are quite different. With the latter theorists, the concern for radical democracy that characterizes pragmatism is combined with the critique of domination that forms an integral element of critical theory. Whether this results in the development of a comprehensive theory of modernity as it does with Habermas or an examination of a revised concept of practical reason as in Bernstein's work, it enables us to look beyond existing democracies to consider an emancipated future.

Unlike Rorty, Bernstein and especially Habermas are more interested in the development of a broader social theoretical perspective that examines the political meaning of social phenomena. Under the influence of Max Weber and an older generation of critical theorists, Habermas has recently developed an explanation of contemporary forms of domination within the framework of a comprehensive theory of rationality.[100] Underlying this broad analysis of contemporary society is a social vision of a just society in which social decisions are formulated through

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97. Rorty, *supra,* note 83 at 11-12.
98. Rorty, *supra, note 83 at 5.*
99. *R. Comay, "Interrupting the Conversation: Notes on Rorty"* (1986), 69 Telos 119 at 127.
100. For the most elaborate development of this theory, see J. Habermas, *Theory of Communicative Action* Vol. 1 (1984), Vol. 2 (1987): and J. Habermas, *The Philosophical Discourse of Modernity* (1987).

democratic rational normative discourse. This social vision puts a strong emphasis on democratic institutions which Habermas regards as central to socialism. Social life is to be regulated through radical democracy and the institutionalization of democratic procedures. This democratic social vision also informs a radical and pragmatic view of justification by providing a procedural standard for rationally evaluating the validity of all social decisions and action.

A brief examination of Bernstein's work will be useful for clarifying this concept of justification.[101] One of the primary concerns of both Bernstein and Habermas is with the status of praxis in the contemporary world. Bernstein believes that it is necessary to redeem a concept of practical reason that is capable of enhancing our understanding of rational standards for informing political praxis.[102] Following Habermas, Bernstein wants to preserve the possibility of critique by establishing such standards to serve as a normative "grounding" for a critical theory of society.

Although Bernstein accepts Rorty's argument that there are no permanent standards, criteria or decision procedures to which we can appeal, he suggests that we are absolved, neither from the responsibility of clarifying the issues involved in important debates nor from the responsibility of distinguishing the worse from the better argument. For Bernstein, this is not a question of arbitrarily choosing one set of values over another, but rather of "trying to give the strongest 'historical reasons' to support one side or the other."[103]

Against Rorty, Bernstein argues that an appeal to an historically situated social and political practice as the source of all epistemological and moral justifications remains incomplete and cannot provide the basis for theory as critique. Critically assessing which social practices are relevant and which should be rejected or modified, "is not a matter of 'mere' rhetoric or 'arbitrary' decision, but requires argumentation."[104] Rorty's appeal to the experimental self-reflection involved in existing social practice is not enough. This is seen as merely another strategy of avoidance to delay the clarification of the "historical" standards and

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101. Although Bernstein's work may be distinguished from that of Habermas by virtue of its author's stronger commitment to American pragmatism, it provides a less obscure and more self-conscious explanation of the assumptions which inform pragmatic social theory. A discussion of the major differences between these two theorists is beyond the scope of this essay. For such a discussion see D. Misgeld, "Modernity, Democracy and Social Engineering" (1988), 7 Praxis Int'l 268.

102. Bernstein, *supra,* note 4 at 190.

103. R. Bernstein, "Philosophy in the Conversation of Mankind" (Book Review) (1980), 33 Rev. of Metaphysics 745 at 770-1.

104. *Id.,* at 774.

criteria that must be utilized in the evaluation of political experimentation.

Bernstein and Habermas substitute a concept of rationality characterized by "argumentation" and "rational persuasion" for the open-endedness of Rortian conversation. They believe that only such a reconstructed practical rationality is capable of providing non-permanent criteria for evaluating competing social and political practices and competing interpretations of the world. The most important feature of this concept of rationality is its emphasis on the importance of a dialogical basis for reaching intersubjective agreement in which all participants in the conversation are oriented to "mutual reciprocal understanding".[105] Within this concept of dialogic or communicative rationality, practical discourse in which all participate serves as a basis for determining the norms and values of a system and for making decisions about its operation. According to this theory of communicative rationality, the consensual generation of social norms becomes the central criterion of their validity.[106] This conception of freely formulated consensus thus not only serves as a basis for justifying specific social action, but is also used to establish a normative "foundation" for a critical theory of society.

The themes of "democratic discursive practices", "symmetrical reciprocity" and "freedom for all" that underly communicative rationality are implicitly critical of existing social conditions. According to Bernstein, "non-distorted, reciprocal communication cannot exist unless we realize and initiate the material social conditions that are required for mutual communication."[107] With Habermas, Bernstein recognizes that our shared ethical life has been corrupted and that our communication has been distorted by prevalent forms of domination. Both are concerned with the need to locate and criticize the power relations that can distort the processes by which standards of judgment are validated within any given "community of inquirers." Such a critique must therefore point to the possibility of social situations beyond existing liberal societies by attempting to specify the preconditions of social transformation.

Bernstein and Habermas are interested in reviving or redeeming a concept of moral practical reason that has been silenced by the alienated

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105. R. Bernstein, "Introduction" in R. Bernstein, ed. *Habermas and Modernity* at 18.

106. S. Benhabib, "Autonomy, Modernity, and Community" unpublish MS. (1987) Seyla Benhabib interprets the project of communicative rationality in light of challenges posed by recent feminist and communtarian theory. My own interpretation of this project has been informed by this "feminization" of Critical Theory by Benhabib and Drucilla Cornell.

107. Bernstein, *supra,* note 105 at 11.

practices of everyday life in contemporary society. They believe that in dialogic or communicative rationality they have found a procedural concept that can serve as a regulative ideal capable of informing or orienting rather than determining action in our practical or political life.[108] Within this conception, the validity of moral norms and the integrity of moral values can only be established through "a process of practical argumentation, which allow its participants full equality in initiating and continuing the debate and suggesting new subject matters for conversation."[109] Accordingly this concept of rationality has important implications for critical legal theory for it provides a rational criterion for assessing competing interpretations which enables us to avoid both the ahistorical limitations of foundationalism and the potential positivism of contextual judgment.

VII. *Conclusion:*

In his attempt to outline an alternative legal theory, Joseph Singer rejects both the idea of a foundationalist grounding for theory and legal reasoning and the possibility of a non-foundationalist justification of political and moral values.[110] While the former position is a crucial step in the reconstruction of a critical legal or social theory, the latter move undermines the very possibility of developing this critical project. Without some evaluative criteria, Singer cannot provide an account for the normative political judgments that he makes throughout his work. As such he cannot provide an answer to the Habermasian question: "Why should domination be resisted?"

Singer suggests that visions of the "good life" or more appropriately of a "better life than at present" are products of a contextualized imagination and social practice. This imaginative reconstruction of social life is also closely related to the faculty of judgement. "Whether some imagined practice will be better or worse than current practice is a question of moral judgment."[111] While imagination and practice are conceived of as social activities, the exercise of such judgment continues to appear as the activities of an individual subject exercising her autonomous will. Such judgment alone, however, is incapable of justifying the normative foundations of Singer's rhetoric. The appeal to political judgment in and of itself does not allow us to distinguish good judgment from political manipulation. In critical theory, discursive

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108. Bernstein, *supra,* note 4 at 162-3.
109. Benhabib, *supra,* note 106 at 12.
110. See Singer, *supra,* notes *64* to *76* and accompanying text.
111. Singer, *supra,* note 5 at 66.

justificatory mechanisms are needed for validating competing social visions.[112] Although political visions may be the products of social imaginations and practices, all such visions are not equally relevant to political emancipation or social transformation, and communicative procedures have to be established which will allow their assessment by the "appropriate" community of inquirers.

In accordance with Singer's own expressed ideal of radical participatory democracy, a normative concept of reason is needed which is capable of guiding political debate and informing our judgments about the preconditions for the realization of a true dialogue between citizens.[113] *Contra* Singer, rational argumentation does not have to be regarded as a device for reifying existing structures and categories. Rather discursive argumentation should be regarded as a critical procedure that provides the conditions for change and the abandonment of established social conventions and practices. Without such democratic practical argumentation, there can be no normative basis for critical legal theory.

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112. D. Cornell, "Beyond Tragedy and Complacency" (1987), 81 Northwest U. L. Rev. 693 at 706.
113. *Id.*, at 697.