# PROPERTY AND COERCION IN FEDERAL INDIAN LAW: THE CONFLICT BETWEEN CRITICAL AND COMPLACENT PRAGMATISM*

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> Pent in under every system of moral rules are innumerable persons whom it weighs upon, and goods which it represses; and these are always rumbling and grumbling in the background, and ready for any issue by which they may get free.
>
> —William James[1]

> [W]e can judge what the law *is* as [a] matter of fact only by telling how it operates, and what are its effects in and upon the human activities that are going on.
>
> —John Dewey[2]

## I. A PRAGMATIC ASSESSMENT OF PRAGMATISM

If we are going to evaluate pragmatism, let us do it pragmatically. This means assessing this philosophic movement—and its contemporary offspring—in terms of its actual consequences for all sorts of people, rather than in terms of its elegance, coherence, logic, or other rhetorical features. I suggest that we test pragmatism's consequences for oppressed peoples—those who are systematically excluded and disempowered. I will take American Indians as my example. First, I will summarize the



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1. WILLIAM JAMES, *The Moral Philosopher and the Moral Life*, in ESSAYS IN PRAGMATISM 65, 81 (Alburey Castell ed. 1959).

2. JOHN DEWEY, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 73, 77 (1941).

promises and dangers of pragmatism as explored by participants in this Symposium.

Pragmatists argue that philosophers and legal theorists miss the point if we spend our time worrying about the internal coherence of systems of abstract principles. They further argue that we misdirect our energy if we seek to establish universal, certain foundations for belief. Rather, pragmatists counsel attention to the actual workings of law in particular settings in social life. Pragmatists suggest we explore the historical and social context in which law operates, instead of formal systems and conceptual neatness. They direct our attention to the messy details of the world around us.

This way of understanding social and legal problems is linked with a normative paradigm: rather than seeking noncontingent bases for our moral and political commitments, pragmatists ask us to choose among different conceptions of law and society by investigating the human consequences of adopting alternative conceptual structures and legal doctrines. Instead of deriving moral or legal rules from a priori premises or metaphysical foundations, pragmatists suggest we make situated judgments based on the values accepted by particular communities. Pragmatists are impatient with rigid rules and frozen concepts; they want results. Frustrated with deductive logic and analytical dissection, they want to know the facts, and, armed with that knowledge, they are ready to accept responsibility for making judgments.

For those interested in combating oppression, this advice poses both opportunities and dangers. The opportunities arise with the potential for opening up what has been taken as given or natural. One route for change pragmatists offer relates to the focus on what "works." Rather than worrying primarily about how a new practice fits with established conceptual structures or rule systems, pragmatists concentrate on satisfying human needs. This focus is congenial to those interested in radical social change; it measures the justice of established legal institutions and reform proposals by what they do, rather than whether they cohere with an already existing ideal vision. This does not mean that ideals do not matter; it means, as Dewey explains, that a "given legal arrangement *is* what it *does*, and what it does lies in the field of modifying and/or maintaining human activities as going concerns."[3] Pragmatists are free to consider a society dysfunctional because it has homeless people scattered

3. *Id.*

throughout its major cities—even if its practices fit abstract models of the "free market."[4]

Because they are interested in results, pragmatists counsel us to attend to the actual workings of the social world. In a modification of traditional pragmatism, Martha Minow and Elizabeth V. Spelman point out that understanding the context within which law operates means looking not only at the particularities of specific situations, but at systematic power relationships in society that form the backdrop against which specific conflicts emerge and that may act as impediments to social change.[5] Similarly, Cornel West argues that pragmatism, if it is to be helpful to oppressed people, must refocus its attention on the "operations of power."[6]

Although pragmatists are impatient with questions of conceptual fit, they do not argue that preexisting social and legal practices are irrelevant or should be ignored.[7] On the contrary, John Dewey emphasizes that one purpose of the legal system is to provide a modicum of regularity and predictability. Conceptual structures and rule systems are parts of the social mechanisms by which the legal system achieves those goals.[8] Moreover, failing to "fit" reform efforts with existing practices and beliefs often ensures that those reform efforts will not succeed.[9] Pragmatists are quite interested in this as another aspect of "what works."

Attending to what works does mean, however, that pragmatists counsel what Thomas Grey calls "freedom from theory-guilt."[10] Karl Llewellyn notes that pragmatic (realist) lawyers care little for deductive logic. They use experience to identify principles that are worthy to serve as major premises.[11] Faced with a bad result that seems to flow from an established principle, they shrug their shoulders and make an exception

4. They will not necessarily consider it this way; nothing in pragmatism, considered only as a concern for consequences, will *lead* one to think homelessness is wrong or worth changing.

5. Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1605 (1990).

6. CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY 208 (1989).

7. For a contrary conception of pragmatism, defining it solely as forward looking, see RONALD DWORKIN, LAW'S EMPIRE 151-75 (1986).

8. Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 26 (1924).

9. *See, e.g.*, Kimberle Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1367 (1988) (arguing that demands for change that do not reflect the institutional logic of the institutions being challenged will probably be ineffective).

10. Thomas Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1569 (1990) (Grey assumes a very narrow and particular notion of "theory.").

11. KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 77-84 (1960).

or distinguish the case. They reformulate the principle to narrow the range of situations in which it applies. As Minow and Spelman explain, this does not mean that pragmatists are uninterested in rules or treating like cases alike; it means that they are interested in specifying through experience what those rules should mean and the contours of lived experience in which those rules are to apply.[12]

In freeing us from "theory-guilt," pragmatists remind us that concepts and rules are human inventions designed to solve human problems. If the concepts get in the way of solving those problems, they can and must be altered so they can work better. By permitting us to concentrate on the human dimension of law, pragmatism frees us from self-created obstacles to human progress and directs our attention to what really matters: doing away with social practices that create unnecessary human misery and promoting practices that nurture human flourishing.

The dangers of pragmatism are evident in the type of thinking that Margaret Jane Radin calls "complacent pragmatism."[13] Because pragmatists understand values as practices and commitments embedded in a social and historical context—rather than based on innate knowledge or established authority—they envision a significant role for "common sense" or what John Rawls calls "considered convictions."[14] The first problem with this is that some pragmatists interpret "freedom from theory-guilt" as an invitation to rely *uncritically* on "common sense." Second, some pragmatists presume that common sense is more "common" than it really is.

Policymakers and philosophers may wrongly translate freedom from theory-guilt into the assumption that frameworks of analysis do not matter. They may feel that all important questions have been resolved or transcended—that we have reached the "end of ideology." They may have a sense of knowing what matters that presumes a general consensus on ends. This perspective suggests that the only real questions are technical ones about the best means to achieve those shared ends.

Professor Radin calls this perspective "complacent pragmatism" because it fails to describe adequately a place from which one can criticize fundamentally one's own culture. It downplays conflicts among both social groups and ideals by presuming that we are all in agreement about ultimate goals and that the only thing we need to do is to listen to

12. Minow & Spelman, *supra* note 5.

13. Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1710 (1990).

14. JOHN RAWLS, A THEORY OF JUSTICE 19 (1971).

people with mature judgment. For this reason, it fails to deal adequately with the problem of power. The assumption that all big questions have been resolved or transcended makes power seem diffuse and easy to overcome. Moreover, as Catharine Wells, Minow, and Spelman remind us, frameworks of analysis do matter.[15]

For example, Richard Rorty has forcefully argued for eliminating epistemology.[16] This is all well and good if we define epistemology as the search for ultimate, noncontingent foundations for knowledge. But it is not acceptable if it means that we have transcended all questions about how we know and how we make mistakes about what we think we know. We cannot escape having an epistemology in this sense. Because he does not see this as a real problem, Rorty appears to fall back on what he sees as the presumably shared values of "our democratic culture." This version of pragmatism is inherently conservative because it equates "democracy" and "freedom" with established institutions. It is also a mechanism for illegitimate hierarchy because it suggests that persons in power have no need to listen to those who are oppressed.[17]

Similarly, Richard Posner suggests that most legal issues concern questions about which "we" have "moderate agreement on ends."[18] For example, he identifies individual autonomy as the preeminent legal and political goal and assumes that the meaning of autonomy is self-evident. The only real question left is how best to foster autonomy; this seems to be a technical, rather than a political, question. Posner's characteristic answer is the "free market."[19] Posner does not elaborate on the meaning of the market, presuming that "we" know what he is talking about. This represents an implied appeal to the market as "we" know it, meaning the idealized image of the free market used in current political discourse.

Both Rorty and Posner therefore assume that a large range of fundamental political questions have been resolved. Rorty focuses on the concepts of cruelty and democracy; Posner focuses on the concepts of autonomy and the market. Neither Rorty nor Posner sees the structure of the market or democracy as fundamentally problematic and contested; neither seems to realize or notice that there are many different ways of

15. Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727 (1990); Minow & Spelman, *supra* note 5.

16. RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

17. RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 94 (1989).

18. Richard Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1668 (1990).

19. *Id.* at 1667; *see also* Posner, *The Regulation of the Market in Adoptions*, 67 B.U.L. REV. 57 (1987) (discussing the efficiency of letting the free market govern adoptions).

structuring both markets and democracies. The failure to recognize the choices that must be made in institutionalizing these general ideals demonstrates that both Rorty and Posner presume a general consensus on the meaning of the underlying social institutions to which they appeal. Further, by failing to consider alternative structural arrangements, they each imply an appeal to common sense. Commonsense notions tend to describe accepted and existing practices. This framework of analysis therefore appears to have a deeply conservative bent.

Yet pragmatism did not begin this way. Both Posner and Rorty caution against uncritical reliance on common sense.[20] Hilary Putnam reminds us that pragmatism, as Dewey conceived it, was not intended to support the status quo. On the contrary, Putnam notes, Dewey was a radical who, time and again, pointed out the social practices that stood in the way of freedom and democracy.[21] Complacent pragmatism is a deviation from the Deweyan initiative. Those of us interested in combatting oppression should guard against the pernicious effects of an unreflective reliance on common sense. Yet we may also find help in pragmatism if we instead seek to generate a revitalized critical form of pragmatism. To understand better the dangers of complacent pragmatism and the opportunities of critical pragmatism, it is useful to consider a recent dispute between the federal government and several American Indian nations regarding land claims and spiritual life. This issue places the question of the social meaning of pragmatism in a context that raises fundamental questions about power relationships, the clash between competing social visions, and strategies for the liberation of oppressed peoples.

## II. COMPLACENT PRAGMATISM AND AMERICAN INDIAN NATIONS

> No illusion is more powerful than that of the inevitability and propriety of one's own beliefs and judgments. The conviction of the necessity of one's convictions survives the most strenuous opposition and extensive contradiction.
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> —Barbara Herrnstein Smith[22]

20. R. RORTY, *supra* note 17, at 74; Posner, *supra* note 18, at 1661.

21. Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1696 (1990). Rorty describes himself as a social democrat and seems not to intend the conservative implications of his version of pragmatism. Rorty, *Thugs and Theorists: A Reply to Bernstein*, 15 POL. THEORY 564 (1987) (arguing for social democracy).

22. BARBARA HERRNSTEIN SMITH, CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY 54 (1988).

In this section I argue that we should assess pragmatism by asking how it will affect the interests of people who are oppressed. American Indians have faced some of the worst treatment our legal system has had to offer. Throughout history the United States has systematically violated its promises made to Indian nations. It has treated Indian land as a commons available for non-Indian settlement. It has seized Indian children and separated them from their families. It has tried to wipe out Indian culture, traditions, and ways of life. It is therefore of considerable interest whether pragmatism has anything to offer American Indians.

What are the consequences of the recent revival of pragmatism for American Indian nations? The answer depends on whether we listen to those pragmatists who suggest that we be complacent or to those who ask us to be critical.

## A. WHEN "DEVASTATING EFFECTS" DO NOT COUNT AS BURDENS

Consider the case of *Lyng v. Northwest Indian Cemetery Protective Association*.[23] The United States Forest Service planned to run a highway through federal lands in the Six Rivers National Forest in California. The road would primarily benefit logging companies operating there. The entire area through which the highway was to run is sacred to many members of the Yurok, Karok, and Tolowa nations who live on the Hoopa Valley Indian Reservation. Those who keep traditional ways of life believe this is the place where the spirits moved when humans came to the Earth.[24] The government conceded that the presence of the highway in the general area would have "devastating effects on traditional Indian religious practices."[25] The legal issue in the case was whether the first amendment guarantee of the free exercise of religion would prevent the government from building a road that would cause an "extremely grave" threat to the Indians' ability to practice their religion.[26]

The Supreme Court, in an opinion by Justice O'Connor, held that even if it were the case, as the Ninth Circuit found, that construction of the road would "virtually destroy the Indians' ability to practice their religion," the Constitution simply did not protect those religious

23. 485 U.S. 439 (1988).
24. *Id.* at 461 (Brennan, J., dissenting).
25. *Id.* at 451.
26. *Id.*

claims.[27] But this was not, as one might have thought, because the compelling nature of the government interests at stake outweighed the burden on religious practice. Rather, it was because in the eyes of the Constitution, *there was no injury that needed to be justified.*

O'Connor explained this result with a complacent pragmatic argument—*pragmatic* because she focused on the consequences of recognizing an injury and *complacent* because she relied uncritically on her common sense to judge those consequences. She noted that the first amendment would be unworkable if it prevented the state from affecting religion in any way. In a pluralistic society with many religions, anything the government does is likely to interfere in some way with someone's religion. Moreover, because religious doctrines conflict, there is no way the government can fully accommodate each of them.[28] The constitutional protection of free exercise of religion must therefore distinguish those aspects of religious practice that may not be infringed by the state from those that may.

In making these distinctions, the courts may focus on either the nature of the harm or the nature of the government's conduct. O'Connor did both. The further question she did not address, however, was the one that has been posed by Mari Matsuda: from whose perspective should the court understand the significance of the harm and the intrusiveness of the conduct?[29]

This question poses a dilemma. On the one hand, the court could adopt a victim perspective and ask whether there are victims who have experienced government action as interfering with their religious practice.[30] That perspective was problematic, from O'Connor's view, because a broad range of government practices will always be "considered essential to the spiritual well-being of some citizens" while "[o]thers will find the very same activities deeply offensive" to their spiritual commitments.[31] Everything the state does may interfere in religious freedom for

27. *Id.* at 451-52.

28. *Id.* at 452.

29. Mari Matsuda, *Pragmatism Modified*, 63 S. CAL. L. REV. 1763, 1764-68 (1990).

30. *See* Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (distinguishing between victim and perpetrator perspectives); Tracey Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It Anyway?*, 25 AM. CRIM. L. REV. 669 (1988) (distinguishing between police and victim perspectives).

31. *Lyng*, 485 U.S. at 452.

some citizen; government simply could not operate if it were prohibited from causing any harm to religious practice as conceived by its citizens.[32]

One way to deal with this problem is to recognize harms experienced by the victims of government action and then require the state to justify committing those harms. The state could do so by explaining that its actions furthered important government ends, such as the preservation of health, welfare, or safety, that could not be achieved in a less intrusive way without impinging on religious practice. This practice would be problematic, in O'Connor's view, because "[w]e would . . . be required to weigh the value of every religious belief and practice that is said to be threatened by any government program."[33] The complexity of this inquiry would be overwhelming; the state could not operate if it had to take all religious views into account whenever it did anything.

Another way to deal with this problem is to identify core religious practices or values and require the state to justify its actions whenever those actions impinge on core religious values. This procedure would serve a "gatekeeper" function; it would remove some kinds of harms from scrutiny under the free exercise clause while requiring the state to justify any interference with core religious interests.[34] This solution is problematic because it puts the state in the business of defining what is central to religious belief and practice—exactly what the separation of church and state was supposed to avoid. Moreover, it requires the state explicitly and consciously to choose *which* religions and religious practices to treat as central.

Rather than adopting a victim perspective and focusing on the nature or extent of the harm, perhaps the court could adopt a perpetrator perspective and ask whether the government *conduct* is of a sort that the free exercise clause is intended to regulate. As with a definition of core religious values, this inquiry would serve a "gatekeeper" function;[35] it would distinguish those state actions that raise potential free exercise claims from those that do not. But this solution is just as problematic as the attempt to identify what constitutes a harm to religious freedom, and for the same reason: since different religions may define differently the

32. *Id.*

33. *Id.* at 457.

34. Ira Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

35. Reinier Kraakman, *Gate Keepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J. L. ECON. & ORG. 53 (1986).

types of interests central to spiritual fulfillment, different types of government conduct will be perceived as intrusive by members of different religions. How can the court define intrusive government conduct without privileging one sort of religious practice over another?

Justice O'Connor was excruciatingly sensitive to the problem of having the courts define core religious values. She was also painfully aware of the problems government officials would face if they were forced to shape every government policy in a way that minimized government intrusion on multiple and conflicting religious practices. At the same time, Justice O'Connor was surprisingly insensitive to the ways in which her own formulation of the constitutional standard privileged certain religious views over others.

This pattern of sensitivity and insensitivity reflects Justice O'Connor's complacent pragmatism. On the one hand, she rejected the victim perspective on explicitly *pragmatic* grounds: "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[36] On the other hand, she failed to recognize the nonneutrality of the perpetrator perspective she adopted because she relied on her commonsense intuitions to tell her what is and is not a government interference with religion. Common sense is likely to embody the perspective of majority or dominant groups in society. O'Connor failed to reflect adequately on the conflict between commonsense intuitions about religion and minority religious perspectives. O'Connor's intuitions were not neutral; they embodied a particular vision of religious practice. It was precisely O'Connor's "freedom from theory-guilt" that blinded her to her complicity in an existing power structure and allowed her to justify destroying an entire religion while maintaining that "[n]othing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen."[37]

### B. Techniques of Complacent Pragmatism

#### 1. *Freedom from Theory-Guilt as an Immunizing Strategy*

Freedom from theory-guilt may mean the recognition that we must take responsibility for the judgments we make, rather than pretending that those judgments can be made for us by applying a determinate and comprehensive theory of justice. But it may also mean the failure to

36. *Lyng*, 485 U.S. at 452.

37. *Id.* at 453; *see also* Department of Human Resources v. Smith, 110 S. Ct. 1595, *reh'g denied*, 110 S. Ct. 2605 (1990) (holding that the free exercise clause did not protect the sacramental use of peyote by American Indians).

reflect on and acknowledge the actual value choices implicated in those judgments. The former is an aspect of pragmatism generally, while the latter reflects the unattractive aspects of complacent pragmatism.

Complacent pragmatism uses unreflective common sense to make situated judgments. This version of pragmatism fails to consider social problems from the perspective of different social groups. Rather, it appeals to the values of "our culture" or "our community." This appeal presumes either that there is consensus on fundamental values or that existing concepts and institutional mechanisms are neutral with respect to value choices. The failure to make explicit the value choices involved in legal doctrines and institutions is problematic because it may lead to an unreflective deference to existing arrangements, thereby silently supporting the status quo. By implicitly reflecting the values of dominant groups, this practice may constitute one of Hilary Putnam's "immunizing strategies" by which oppression is rendered invisible.[38]

Justice O'Connor used a variety of techniques of complacent pragmatism in ways that wrongly obscured both value choices and power relationships. These techniques appeal to unstated assumptions about the nature of the interests at stake in a way that renders invisible the actual harms experienced by the victims of government policy. These assumptions are based on commonsense notions of coercion and property rights. Professor Spelman reminds us that we can avoid unconscious adherence to oppressive practices only if we are aware of them. It is therefore important to analyze the particular ways in which privilege lodges in our thought.[39]

### 2. *Making Coercion Invisible by Assuming a Majority Perspective*

Justice O'Connor sought to contain the conflicting demands of the first amendment by making a commonsense argument about the kind of government conduct it regulated. The first amendment provides that "Congress shall make no law . . . *prohibiting* the free exercise [of religion]."[40] According to Justice O'Connor, the operative word in the first amendment was "prohibit." The first question in any free exercise inquiry was therefore whether government "action" placed a burden on

38. Putnam, *supra* note 21, at 1676.

39. E. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 75 (1988); *see also* Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (arguing that it is important to become conscious of underlying assumptions that attribute difference to individuals rather than to contingent social relations).

40. U.S. CONST. amend. I (emphasis added).

religion amounting to a "prohibition."[41] To answer this question, she asked whether the government had *coerced* individuals into *acting* in violation of their religious beliefs.[42] Such individual action contrary to religious belief could be compelled either by imposing criminal or civil sanctions or by withholding otherwise available government benefits. In the absence of such penalties for religiously motivated conduct, Justice O'Connor believed that the government could not be said to have *done* anything that infringed on religious freedom.[43]

What would you have to believe to think that there is no coercion involved in forcibly desecrating sacred lands? You would have to believe (1) that physical places are not central to religious practice; (2) that forcible removal of a person protesting desecration of a sacred place is not *religious* coercion; (3) that alteration by human beings of natural spaces is not an intrusion on religion; (4) that religion is not connected to a place and can be practiced anywhere; (5) that religion is a set of beliefs and rituals and that coercion arises only when the state requires forced avowals of belief or prohibits the practice of ritual.

The concept of coercion, as Justice O'Connor defined it here, embodies the perspective underlying a particular set of monotheistic religious traditions. Those traditions—particularly Jewish and Christian traditions—emphasize the idea of an individual relationship with God developed as part of a religious community. Religious conscience is secure as long as one is free to believe what one wants, to practice the rituals traditional to that faith, and to live one's life in accordance with those religious principles. The greatest dangers to this kind of religious tradition are coerced professions of faith and prohibition of specific religious practices. In the absence of coerced conformity, adherents to such traditions are free to practice their religions wherever they wish. For example, although specific places have deep religious significance to both Jews and Christians, it is generally assumed to be possible to practice these religions anywhere.[44]

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41. *Lyng*, 485 U.S. at 454.

42. *Id.* at 450.

43. Is it plausible to contend, as Justice O'Connor did, that no coercion is involved in running a highway through sacred lands? Hardly. What would happen, for example, if the individuals affected by this project attempted to stop it by lying down in front of the bulldozers? The answer is that they would be removed—forcibly if necessary—by federal authorities.

44. There are strains in both Judaism and Christianity that emphasize connection with the Holy Land. That aspect of these traditions is outside the scope of Justice O'Connor's concern, since nothing the United States can do—other than limit emigration—can affect the spiritual connection with land in the Middle East.

This conception of religion differs from those that involve a spiritual world understood as both multiple and indissolubly linked with particular aspects of nature. These religions are place specific. Most members of American Indian nations who adhere to traditional beliefs understand all aspects of nature as spiritual. To achieve a link with these spirits requires a direct relationship with and access to particular lands. Moreover, since the spirits are embodied in nature itself, the desecration of nature may destroy or abandon those spirits whose fate is linked with what is destroyed.[45] Chief Seattle of the Suquamish nation explained this understanding of the world in 1854:

> The Great Chief in Washington sends word that he wishes to buy our land. The Great Chief also sends us words of friendship and good will. This is kind of him, since we know he has little need for our friendship in return. But we will consider your offer. For we know that if we do not sell, the white man may come with guns and take our land.
>
> How can you buy or sell the sky, the warmth of the land? The idea is strange to us. If we do not own the freshness of the air and the sparkle of the water, how can you buy them?
>
> Every part of the earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing, and humming insect is holy in the memory and experience of my people. The sap which courses through the trees carries the memories of the red man.[46]

That Justice O'Connor did not intend to privilege one religion over another does not mean that she did not do so. She conceived of government interference with religion by reference to specific religious practices. They formed the context within which she conceptualized coercive government conduct. It is not surprising, therefore, that the doctrine she created prevents the most serious types of interference with those religious traditions she had in mind while it ignores the different types of interference that would be most destructive of other traditions.

What *is* hard to understand is how Justice O'Connor could have failed to appreciate the value-laden nature of her conception of religion. After all, she acknowledged that the government actions here would

45. *Lyng*, 485 U.S. at 467 (Brennan, J., dissenting); *see* AKE HULTKRANTZ, NATIVE RELIGIONS OF NORTH AMERICA 9-34 (1987).

46. Alvin Ziontz, *"When the Last Red Man Has Vanished . . .,"* 16 HUM. RTS. 34 (1989) (Ziontz devotes this section to a quotation by Chief Seattle of the Suquamish Tribe.).

have the surprising effect of devastating and perhaps destroying a religion she did not completely understand. The explanation may have something to do with her reliance on commonsense notions of religious life. Perhaps she could not imagine that a religion could be completely destroyed by what seemed to her to be routine governmental activity. Perhaps she simply could not imagine how government could survive if it could not engage in the ordinary business of building a highway. Either way, she dealt with this sticky problem through a technique of complacent pragmatism: assuming she could confidently rely on her intuitions about what sorts of government conduct would constitute coercive interferences with religious practice. In so doing, she put on blinders. But blinders manufactured by the powerful do not make for blind justice; they merely make power easier to exercise.

### 3. *Commonsense Appeals to Property Rights*

In conjunction with her reliance on intuitive notions of religious practice, Justice O'Connor appealed to commonsense notions of property rights to justify the Court's refusal to recognize the injury to the American Indian religion as a cognizable interest under the first amendment. In what seems to be an incantation, she recited over and over that the Indian nations in this case were attempting to "divest the Government of its right to use what is, after all, *its* land."[47]

The italics are Justice O'Connor's, and her emphasis carries with it some poignancy. It suggests significant doubt about the claim being made. After all, if it were the government's land, this would be only because of conquest—not the most admirable way to acquire property rights. Although not acknowledged, the less-than-honorable origins of what Justice O'Connor called the "Government's property rights"[48] permeate the opinion. Her repeated assertion of government ownership appeals to a claim of right that simply would not be persuasive to the Indian nations locked out of their own territory. Either this argument was not directed to them, or it was a barely disguised claim that American Indian conceptions of property would not count and would not be recognized in our constitutional system.

The situation represented a particularly precarious one for the government's property rights precisely because the land in question was public. The obstacles to returning numerous parcels of privately owned land

47. *Lyng*, 485 U.S. at 453; *see also id.* at 454 (referring to the "Government's rights to the use of its own land").

48. *Id.* at 453.

from current non-Indian possessors to Indian nations are legion. But the obstacles to returning publicly owned land are far fewer. After all, throughout its history the federal government, by sale or gift, distributed public lands to private citizens. Fears of such claims were not far from the surface. Justice O'Connor noted that Indian religious beliefs and practices, because they were connected to the land, "could easily require *de facto* beneficial ownership of some rather spacious tracts of public property."[49]

It is striking that Justice O'Connor appeared to believe that the mere identification of the land as the government's property should end speculation about whether the government had the power to build the highway. In fact, the identification of an "owner" does not in any way preclude so-called non-owners from rights in that land.[50] Non-owners acquire rights of access to land possessed by others in a wide range of situations. The commonsense notion of property presumes that "owners" can do what they like with "their" property. But the *actual* rules in force are quite different. These rules recognize both significant limits to the right to use one's property and a diverse set of circumstances in which others may develop *concurrent* legally protected claims to that property.[51]

Even if Justice O'Connor had recognized the possibility that non-owners might have rights of access to property possessed by others, it would still have been necessary to get over the idea that property doctrine posed a neutral answer to the question of whether these federal lands were subject to competing property rights in these Indian nations. A clear answer, even if it were available, would not be neutral; it would have been made without taking American Indian conceptions of property and spiritual life into account. Existing doctrine is unlikely to protect interests it cannot recognize.

For example, Ira Lupu has argued that common law rules about prescriptive easements could have provided a relatively neutral basis for a finding that building the highway in this case would arguably interfere with the existing property rights of Indian nations.[52] In the alternative, Lupu argues, even if no prescriptive easements could be established, the

49. *Id.*

50. *See, e.g.*, Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 637-41 (1988).

51. *Id.* at 663-701.

52. Lupu, *supra* note 34, at 872-77.

grounds for finding such easements were sufficiently strong that the burden on the American Indian religion should have been recognized as a cognizable burden under the free exercise clause.[53]

This argument fails to recognize sufficiently the enormous obstacles to finding property rights in this case under existing principles of property doctrine. Lupu recognizes some of these problems, including the rule that adverse possession cannot be achieved against government property and the difficulty of proving that use is adverse or without permission.[54] He does not recognize others, including the prevailing principle that only individuals, not groups, can obtain prescriptive easements,[55] and the universal rule that negative easements may under no circumstances be obtained by prescription.[56]

The appeal to commonsense notions of common law property rights has a fatal flaw. Both Justice O'Connor and Lupu presume that the common law of property is neutral with respect to religion. But this is, of course, false. The common law has been constructed in a particular social and historical context that explicitly took into account existing religious values and institutions. John Locke's writings explicitly discuss the relation between property and Christianity.[57] At the same time, existing conceptions of property in the common law system were *not* made with American Indian conceptions in mind. More precisely, they were explicitly intended to *exclude* American Indian claims to land and to justify settlement of the New World and dispossession of its inhabitants.[58] For example, in *Tee-Hit-Ton Indians v. United States*,[59] the Supreme Court held that American Indian property is not protected by the Constitution unless the Congress has recognized it by treaty or statute. The reasoning in the opinion explicitly rested on the assumption that American Indian patterns of land use did not count as sufficient to create possessory rights.[60] This was true despite the fact that, because of

53. *Id.* at 975.

54. *Id.* at 973 n.141, 974.

55. *See, e.g.*, Department of Natural Resources v. Mayor and City Council, 274 Md. 1, 332 A.2d 630 (1975) (rejecting the argument that the public could acquire an easement by prescription).

56. *See, e.g.*, Fontainbleau Hotel v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. Dist. Ct. App. 1959) (holding there can be no negative prescriptive easement for light and air).

57. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 29 (Oskar Piest ed. 1952).

58. Robert Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 250-53 (1989).

59. 348 U.S. 272, *reh'g denied*, 348 U.S. 965 (1955).

60. *Id.* at 285-91.

its spiritual meaning, land is arguably *more* important to the identity of traditional American Indians than it is to non-Indians.

Robert Cover explained that "[e]ach group must accommodate in its own normative world the objective reality of the other."[61] Justice O'Connor failed to do this. The appeal to intuitive notions of property rights can in no way be justified as a neutral basis for adjudicating a case. Rather, it embodies and institutionalizes the perspective of the powerful.

## III. BEWILDERMENT AND HESITATION: A PRAGMATIC PRESCRIPTION FOR FEDERAL INDIAN LAW

> [B]ewilderment and hesitation may actually be marks of fine attention.
>
> —Martha Nussbaum[62]

In Tony Hillerman's novel *Talking God*, a group of American Indians challenge the display of American Indian skeletons by museums. After the museums resist returning the skeletons, the public relations director of the Smithsonian finds a parcel on her desk. She opens it up and finds two human skeletons inside. They are accompanied by a letter that reads, "You won't bury the bones of our ancestors because you say the public has the right to expect authenticity in the museum when it comes to look at skeletons. Therefore I am sending you a couple of authentic skeletons of ancestors."[63] The letter concludes with the names of the persons whose skeletons they were. There the director reads the names of her grandparents.

I have argued that pragmatism, understood in its complacent version, poses significant dangers to those who are oppressed. Unreflective reliance on commonsense intuitions ordinarily obscures unjust power relationships. It may do this by deferring to social practice based on customary expectations.[64] Or it may lead to the conclusion that only "experts" have the maturity and knowledge necessary to make complex judgments. Experts, because they have been socialized into a professional practice, are often relatively conservative in their outlook. Moreover, as Hilary Putnam notes, the idea that only experts can answer hard

61. Robert Cover, *The Supreme Court Term, 1982—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 28-29 (1983).

62. Martha Nussbaum, *Perceptive Equilibrium: Literary Theory and Ethical Theory*, 8 LOGOS 55, 69 (1987).

63. TONY HILLERMAN, TALKING GOD 5-6 (1989).

64. CLIFFORD GEERTZ, *Common Sense as a Cultural System*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 73 (1983).

questions is deeply depoliticizing; it takes fundamental issues of justice out of the realm of collective control.[65]

How, then, can pragmatism be made critical rather than complacent? How can it be made useful to oppressed peoples? First, the pragmatic focus on what works validates an insight that oppressed groups have long understood—that liberation may require multiple, and sometimes conflicting, strategies. Pragmatism began as a revolt against formalism. The pragmatists rejected the idea that we could find answers to important questions of social justice by reference to a priori principles. The injunction to see what works means that we should approach the task of confronting social problems with some humility. As Martha Nussbaum argues, bewilderment and hesitation, unlike confidence, may be marks of careful attention.[66] In adopting strategies for change, one must remember that no abstract theory of the relation between law and society can provide a blueprint for reform. Rather, we must attend to the actual working of structures of power in society.

What has worked to improve conditions for American Indian nations? What seems to have had the greatest impact is a complex set of strategies for community empowerment and self-determination.[67] This includes lobbying to block harmful federal legislation that would reduce the ability of Indian nations to control their destiny. It has also included economic development projects and community efforts to combat fetal alcohol syndrome.[68] It has sometimes included litigation intended to assert claims to land and water resources. And, as Hillerman's novel illustrates, it has also included strategies for persuading the powerful by inducing some understanding of what it feels like to be oppressed.[69]

These efforts at self-empowerment have not all been consistent. But, as Radin reminds us, this is because of the contradictory nature of existing structures of oppression. The problem of the "double bind,"[70] or what Minow calls the "dilemma of difference,"[71] permeates all efforts at social transformation. Oppressed groups may suffer both when they are

65. Putnam, *supra* note 21, at 1696.

66. *See* Nussbaum, *supra* note 62.

67. VINE DELORIA & CLIFFORD LYTHE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 232-64 (1984).

68. MICHAEL DORRIS, THE BROKEN CORD (1989).

69. *See supra* text accompanying note 63; Joseph William Singer, *Persuasion*, 87 MICH. L. REV. 2442 (1989).

70. Radin, *supra* note 13, at 1699-1704.

71. Minow, *supra* note 39, at 11-15.

treated the "same" as the "norm" and when they are treated "differently."[72] This means that reform efforts may require multiple and contradictory strategies.

For example, on the one hand, detailed criticism and impassioned denunciation of the oppressive characteristics of the legal system, such as contained in the magnificent scholarship of Robert A. Williams, Jr., in federal Indian law, may both enlighten and persuade.[73] On the other hand, the dry hornbook language of the 1982 revision of Felix Cohen's *Handbook of Federal Indian Law*[74] may have a similarly powerful impact. Rather than denouncing the injustices underlying federal Indian law, the *Handbook* presents the broad outlines of the law in a way that emphasizes the principles that are most helpful to Indian nations as a way to enable professionals working "within the system" to advocate for American Indians without losing sight of the system's injustice.

To some extent, Williams's scholarship and the *Handbook* are addressed to different audiences—Williams to legal scholars and the *Handbook* to practicing attorneys and judges. Different strategies may be appropriate for these different audiences. But even if the works were addressed to the same audience, different approaches may be appropriate on different occasions. Criticism of the internal coherence of the rules in force may help to undermine claims of the necessity and legitimacy of existing arrangements.[75] On the other hand, describing existing principles in a way that emphasizes the long-standing acceptance of principles

72. Radin, *supra* note 13, at 1704; *see also* Minow, *supra* note 39 (discussing the conflict oppressed groups face).

73. Williams, *supra* note 58; *see* R. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1989); Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989); Williams, *Jefferson, the Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165 (1987); Williams, *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's "Learning to Live with the Plenary Power of Congress Over the Indian Nations,"* 30 ARIZ. L. REV. 439 (1988); Williams, *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in* First English Lutheran Church and Nollan, 59 COLO. L. REV. 427 (1988); Williams, *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 82 HARV. J. LEGIS. 355 (1985); Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983); Williams, *The Algebra of Indian Law: The Hard Trail of Americanizing and Decolonizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

74. FELIX COHEN & RENNARD STRICKLAND, HANDBOOK OF FEDERAL INDIAN LAW (1982).

75. *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Freeman, *supra* note 30 (on antidiscrimination law); Mary Joe Frug, *A Symposium of Critical Legal Study: Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985); Robert Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST.

that work to the benefit of oppressed peoples may be essential to getting necessary reforms instituted.[76]

Second, it is often helpful to focus, as Dewey does, on the disjunction between ideals and reality.[77] Assuming some distance between a community's reigning ideals and its embodied institutions suggests a more fluid sense of what those reigning ideals are and what they mean. We cannot flesh out the meaning of democracy or the free market by reference either to common sense or to established versions of those ideals. Rather, we must understand those ideals as contested and open to reinterpretation.[78] We must exercise our imagination and pay attention to the *range* of alternative political and economic structures that plausibly fit those ideal social visions. It will then be possible to criticize existing institutions, rather than simply identify those institutions as congruent with the ideals. In turn, this process may help us see how those ideals are fundamentally flawed and in need of radical revision.

Finally, those who are in positions of power should remember that, as William James remarked, "what we say about reality . . . depends on the perspective into which we throw it."[79] Wells, Radin, Minow, and Spelman remind us that frameworks of analysis do matter.[80] We should therefore hesitate to presume agreement on fundamental questions of value. Rather, we should recognize conflict among social groups and be attentive to multiple perspectives. As Radin notes, "we must realize that another perspective is always possible."[81] Instead of conceptualizing society as one big unit, we should think of society as composed of overlapping communities with differing experiences.[82]

In particular, it is essential for persons in positions of power to consider "the standpoint of people who have themselves been dominated and

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U.L. REV. 196 (1987); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

76. *See, e.g.*, Crenshaw, *supra* note 9, at 1367; Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407 (1988); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 90 Yale L.J. 473 (1981).

77. *See, e.g.*, Putnam, *supra* note 21, at 1681-83.

78. *See, e.g.*, ROBERTO MANGABEIRA UNGER, POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY (1987).

79. WILLIAM JAMES, *Pragmatism*, in PRAGMATISM AND THE MEANING OF TRUTH 118 (1978).

80. Wells, *supra* note 15; Minow & Spelman, *supra* note 5; Radin, *supra* note 13.

81. Radin, *supra* note 13, at 1725.

82. *See, e.g.*, MICHAEL WALZER, OBLIGATION: ESSAYS ON DISOBEDIENCE, WAR AND CITIZENSHIP (1970) (describing the problem of civil disobedience as a conflict of loyalties among overlapping communities).

oppressed."[83] These perspectives are the ones that are most likely to be excluded from dominant discourses. As Radin notes, "What leads some pragmatists into complacency and over-respect for the status quo is partly the failure to ask, 'Who is "we"?' "[84] The failure to attend to the perspective of the oppressed is one of what Hilary Putnam calls "immunizing strategies" by which "the rationales of oppression . . . can be protected from criticism."[85] Minow and Spelman suggest ongoing criticism of "apparently neutral and universal rules" that in fact implement a worldview that serves historically "privileged, white, Christian, able-bodied, heterosexual adult men. . . ."[86]

To combat the conservative nature of commonsense judgments, we must subject those judgments to critical evaluation by focusing on the underlying power structures that form the context within which those judgments are made. When we ask whether a social or legal practice works, we must ask ourselves, "works *for whom*?" Who benefits and who loses from existing political, economic, and legal structures? This requires a focus on social hierarchies, including, among others, those of gender, race, sexual orientation, and class.[87]

Sensitivity to "context" does not guarantee moral success; it is still necessary to choose whose context will be made to matter. Patterns of exclusion are oppressive both in themselves and because they inhibit the ability of all persons to see what is there. If we understand knowledge and value as social creations, it becomes clear that one cannot "know" by oneself.[88] Existing structures of power systematically exclude oppressed peoples from helping to shape the world. At the same time, oppressed peoples have developed a variety of strategies for community empowerment. If pragmatism is to work, it must help the persons and goods rumbling in the background to break free.

83. Radin, *supra* note 13, at 1720.

84. *Id.* at 1711.

85. Putnam, *supra* note 21, at 1676.

86. Minow & Spelman, *supra* note 5, at 1601.

87. *See id.*

88. E. SPELMAN, *supra* note 39, at 178-83; Minow, *Beyond Universality*, 1989 U. CHI. LEG. FORUM 115, 124-28.