

CRITICIZING CRITICISM OF CRITICISM: A LESSON IN OBJECTIVITY FROM REVIEWING “IS THE RADICAL CRITIQUE OF MERIT ANTI-SEMITIC?”

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Eight years ago, professors Daniel A. Farber and Suzanna Sherry compiled a collection of articles into a book entitled, *Beyond All Reason*.¹ Although they self-identify as Jewish liberals, Farber and Sherry argue that certain liberals, who they call “radical constructivists,”² undermine the “aspiration to universalism and objectivity that is the fruit of the European Enlightenment.”³ By writing this book they sought to reclaim reason in the law.

“*Is the Radical Critique of Merit Anti-Semitic?*,”⁴ adapted as a chapter in *Beyond All Reason*, was originally a law review article published in the *California Law Review*. The article challenges critical legal theories for adopting the radical critique of merit, merit being measures of group success and achievement. The article argues that if existing standards of merit are not valid, history has taught that the available explanations for Asian American and Jewish success must be anti-Asian and anti-Semitic.

Farber and Sherry argue that because radical constructivists could not possibly wish to endorse anti-Asianism and anti-Semitism, radical constructivism is internally inconsistent and thus, the wrong approach for critiquing merit. Farber and Sherry propose an alternative approach to radical constructivism: pragmatism. Pragmatism accommodates societal and legal change, but defers more to tradition and, according to the authors, does not have anti-Asian and anti-Semitic consequences. However, while Farber and Sherry aspire to objectivity, they fail to adhere to objective principles in making their argument for pragmatism, ultimately leading to the same result they fear under radical constructivism and unwittingly applying another strain of it.

RADICAL CONSTRUCTIVISM AND PRAGMATISM CONTRASTED

Farber and Sherry define the “meritocratic ideal” as the belief that “positions in society should be based on the abilities and achievements of the individual rather than on characteristics such as family background, race, religion, or wealth.”⁵ Furthermore, “[i]n a society that uses merit as a standard for professional success, everyone should have an equal right to compete for desirable occupations.”⁶ But according to Farber and Sherry, the radical constructivist position on merit views “fundamental concepts as socially constructed aspects of systems of power.”⁷ Specifically, “standards of merit are socially constructed to maintain the power of dominant groups,”⁸ and thus, “‘merit’ has no meaning, except as a way for those in power to perpetuate the existing hierarchy.”⁹

Farber and Sherry find this reasoning politically convenient

because it allows radical constructivists to avoid investigating the underlying reasons for inequality by focusing on effects. That is, arguing that “the unequal success rates are per se proof of unjust treatment . . . and sufficient justification for remedial action.”¹⁰

To set up the consequences of radical constructivism, Farber and Sherry first assert that “[b]y almost every measure of success, [Jews and native-born Asian Americans] succeed at far higher rates than white gentile Americans.”¹¹ Farber and Sherry argue that radical constructivism undermines these successes, leading to invariably negative stigmas for these groups. To support their argument, Farber and Sherry provide four historical, prejudicial explanations for the successes of Jews and Asian Americans in America as alternatives to those based on accepting existing standards of merit.

The first explanation purports Asians and Jews succeed as a consequence of a “powerful and pervasive” Asian and Jewish conspiracy (“conspiracy” theory).¹² The second explanation characterizes Asians and Jews as “chameleons who, with no culture of their own, take on the cultural coloration of the society around them” (“cultural imitation” theory).¹³ A third account charges Asians and Jews with infiltrating American culture (“cultural infiltration” theory). According to this account, “Jews succeed because American culture has taken on Jewish characteristics . . . [i]f American culture is really Jewish culture, then Jews are the cause of these deficiencies in our culture and are themselves deficient and unappealing.”¹⁴ The final explanation finds Asian and Jewish success is nothing more than a statistical anomaly (“statistical anomaly” theory). This is “in many ways the most damaging, because it amounts to a denial that Jews exist as a distinct or identifiable group.”¹⁵

These explanations, because they are undesired consequences of radical constructivism, are deemed sufficient to establish a case against this mode of thought: “Having deconstructed merit into pure power, radical constructivists face an implication they will surely find wholly unpalatable – for if merit is merely group power, then Jewish success becomes the fruit of Jewish power. That way lies madness.”¹⁶

Finding radical constructivism undesirable, Farber and Sherry assess three alternative theories. The ‘arbitrariness’ view argues that, “[b]ecause certain groups were, for whatever reason, non-participants during the creation of the standard, they tend to be excluded by those standards.”¹⁷ However, this view’s lack of normative basis does not allow any judgments against discriminatory policies.¹⁸ The ‘objectivist’ view holds, “completely objective, timeless standards of merit do exist, [but] there can be no

guarantee that we have reached a final understanding of those standards.¹⁹ Farber and Sherry prefer the pragmatist view, which is aligned with the objectivist belief in standards, but “values tradition as the essential foundation for intellectual and social progress.”²⁰

Farber and Sherry adopt a useful and optimistic definition of objectivity, consistent with their moderate politics. Objectivity is “the aspiration to eliminate beliefs based on bias, personal idiosyncrasy, fiat, or careless investigation.”²¹ Because it relies upon aspiration, Farber and Sherry’s objective merit, premised on the meritocratic ideal, allows for evolving standards of merit not entrenched in the status quo and allows for groups to achieve disproportionate success.

Objectivism and pragmatism seem initially consistent with this objective merit allowing for criticism of existing concepts. Objectivism acknowledges that “[a]n objective standard can be distorted by the limited vision of those in power.”²² Pragmatism “neither reifies tradition nor denies the importance of experimentation.”²³ However, even armed with the best intentions in pursuing objective merit, just as groups in power may exercise limited vision within the objectivist framework, Farber and Sherry fall victim to lapses in objectivity leading to unintended consequences. In arguing against radical constructivism and for Asian and Jewish merit, they demonstrate: (1) careless investigation, (2) fiat, and (3) bias or personal idiosyncrasy.

RADICAL CONSTRUCTIVISM AND PRAGMATISM COMPARED CARELESS INVESTIGATION

The disproportionately higher incomes and disproportionate representation of Asian and Jewish Americans in higher education brings Farber and Sherry to the conclusion that “[b]y almost every measure of success, both groups succeed at far higher rates than White Gentile Americans.”²⁴ This conclusion is hasty in three major respects, showing careless investigation on Farber and Sherry’s part.

First, Farber and Sherry arbitrarily compare the single ethnicity of Jewish Americans, to a racial category, Asian Americans, which contains dozens of ethnicities.²⁵ Farber and Sherry use the identifiers “Chinese American,” “Japanese American,” and “Korean American” interchangeably with the general category, “Asian Americans,” and do not mention Vietnamese, Cambodian, Hmong, Indian, or Pakistani Americans, etc. Farber and Sherry consolidate the diverse Asian American community into a singular identity, falsely analogizing the alleged success of Chinese, Japanese, and sometimes Korean Americans as representative of the entire Asian American community.

Focusing on the success of a single ethnically distinct minority to dispel claims of racial discrimination, especially where the ethnic minority is a part of the racial majority in America, is imprecise. In fact, Farber and Sherry argue against themselves by citing statistics that demonstrate that economic success is racially dependent, not racially neutral: Jewish Americans are the most economically successful White ethnic group. Chinese

and Japanese Americans are the most economically successful Asian American ethnic groups. In 1970, Jewish Americans earned 172% of the average American income, but their Asian analogs, the Chinese and Japanese Americans, earned 40% and 60% less, respectively.²⁶ This data tends to reinforce that Whites and Asians are not on par in America.

Second, Farber and Sherry do not consider other fundamental factors that would allow proper analysis of the data. The cited statistics on incomes do not control for the levels of education Chinese, Japanese, and Korean Americans achieve. In fact, the data shows that although Asian Americans in the aggregate have high educational levels, their incomes do not reflect their education, especially compared with incomes of groups with similar education levels.²⁷ Asian immigrants, in particular, do not attain achievement commensurate to their skills and education.

Third, Farber and Sherry make the far-ranging assertion that economic status and representation in higher education accounts for “almost every measure of success.” There are many other vital measures of success by which Asian Americans do not succeed at rates higher than Whites.²⁸ For example, Asian Americans endure stereotypes as the model minority, perpetual foreigners, or passive/submissive peoples.²⁹ Asian Americans are often depicted in mainstream media in stereotypical and arbitrary ways.³⁰ Asian Americans are regular targets of hate crime.³¹ Despite economic success and educational attainment, a glass ceiling bars Asian Americans from obtaining promotions to higher levels of management.³² Asian Americans are also not perceived as needing affirmative action even though they suffer discrimination.³³ At worst, Asian Americans are pitted against other minorities resulting in catastrophic financial and psychological, i.e., Korean American small business owners in the Los Angeles riots, or they are “scapegoated” resulting in a unique deprivation of civil rights, i.e., Japanese American internment. Thus, Farber and Sherry’s claim that Asian Americans succeed at far higher rates than White Americans neglects to consider the diversity of Asian Americans, the disproportionate effort they expend, and other substantial indicia of success. These omissions show careless investigation.

FIAT

Farber and Sherry endorse an alternative mode of thought called “pragmatism,” espoused by jurists like Richard Posner. Pragmatists believe “current conceptions of objectivity, knowledge, and merit may be flawed, but are necessary starting points in analysis,”³⁴ and they “recognize the importance of logic and clear thinking.”³⁵ Under Farber and Sherry’s pragmatism, the degree of deference to be given to current conceptions of merit is vague and impractical. If current conceptions are necessary starting points in analysis, this does not suggest that a presumption should weigh heavily in favor of keeping them. For example, a starting point can be analogized to a hypothesis in the scientific method. In the face of sufficient evidence to suggest otherwise, a hypothesis, the starting point in analysis, can be

readily rejected as a tentative explanation. Similarly, if current conceptions of merit cease to explain differences in success rates among ethnic groups, they should be discarded, not given continued deference.

Nevertheless Farber and Sherry argue that existing standards should be given the “*benefit of the doubt*.”³⁶ This standard suggests greater deference than starting points in analysis. The article even inflates this standard, eventually stating that existing standards should have a “*rebuttable presumption of validity*.”³⁷ Current merit then: (1) is to be a necessary starting point; (2) is to be given the benefit of the doubt; (3) and finally, is to receive a rebuttable presumption of validity. It is not readily apparent how this multifaceted characterization of pragmatism is expressly distinct from radical constructivism.

In fact, both radical constructivism and pragmatism emerge as subjective viewpoints: radical constructivism exists on the notion that merit is socially constructed by dominant groups to maintain their hegemony; and pragmatism defers to tradition, but recognizes that “current conceptions of objectivity, knowledge, and merit may be flawed.”³⁸ The only difference between the critiques is that Farber and Sherry subjectively judge standards in a context favoring tradition.

So even while Farber and Sherry classify pragmatism as an “alternative”³⁹ to radical constructivism, this brand of pragmatism may just represent another branch of radical constructivism catering just another group, i.e., White European Americans. Farber and Sherry fail to distinguish their definition of pragmatism from radical constructivism, thus evincing fiat and failing the second element of objectivity.

BIAS

As a key premise of their argument, Farber and Sherry claim radical constructivism allows only racist and anti-Semitic explanations for Asian and Jewish success. “These groups have obtained disproportionate shares of important social goods; if they have not earned their shares fairly on the merits, then they must have done so unjustly.”⁴⁰ As summarized above, Farber and Sherry propose four available theories for Asian and Jewish success in America under the radical constructivism critique: conspiracy, cultural imitation, cultural infiltration, and statistical anomaly. These explanations are highly infused with connotations derived from the fear experienced by those in the position of the majority.

By not adequately considering minority viewpoints, Farber and Sherry ignore two universes of explanations that do not have the same anti-Asian and anti-Semitic consequences. That is, (1) explanations blaming the majority, and (2) explanations recognizing Asian and Jewish resourcefulness in overcoming culturally discriminatory barriers erected by the majority. The former suggests neutral characterizations of Asian and Jewish Americans. The latter suggests positive characterizations. Both suggest that negative characterizations of the majority and current critiques of merit are not objective.

Many critical theorists would say that Asians and Jews

succeed as a consequence of a powerful and pervasive *majority* conspiracy to maintain the subordination of minority groups.⁴¹ For example, cultural imitation can be explained in Asian and Jewish-neutral terms if one believes majority culture has subsumed and oppressed Asian and Jewish culture – the marginalization of these cultures results from majority intolerance of difference. Asian and Jewish Americans must assimilate because they otherwise face alienation from mainstream participation.

Cultural infiltration in Asian and Jewish-neutral terms can be explained by cultural overlap in their preferences and practices. The fact that mainstream Americans enjoy aspects of minority culture may be seen as their choice. The better question is who determines what is incorporated into mainstream society, not what gets incorporated.

Finally, statistical anomaly might be explained by a group having the attributes most appropriate for success in a given cultural moment. Success need not be a result of a particular group being “better” than another, but simply out of being the right group, at the right place, at the right time, in the right context.

Minorities may be able to attain above parity success in a system biased against their interests by expending disproportionate effort and expense.⁴² History contains countless stories of immigrant underdogs defeating the odds, but in the broad context of immigrant success, these stories are rare and do not validate the oppressive regime. With this considered, Asian and Jewish American successes serve as an example of how two groups achieved financial and educational successes *despite* the structural barriers impeding their progress.

Asian and Jewish Americans’ relative success may be attributed to their cultural contributions to mainstream society and their status as cultural “chameleons.” Cultural “chameleons” are less threatening because of their adaptability. Both attributes carry positive connotations and potentially remove dependency on race and ethnicity to explain success. In light of these alternate explanations, current standards may still be in need of revision.

Giving disproportionate weight to limited perspective leads Farber and Sherry to seemingly logical double standards. The potential consequences of radical constructivism upon two specific groups is deemed dispositive for rejecting it altogether. Farber and Sherry also forgo due inquiry into the existing effect of current standards on other groups: they prefer a conception of merit that has specific desired outcomes: no anti-Asianism, no anti-Semitism, notwithstanding whether the current conception of merit is presently anti-Latino or anti-Black. Taking on the majority perspective allows Farber and Sherry to pursue the same line of effects-based reasoning they criticize critical theorists for using.⁴³

LESSONS OF AN ASPIRATIONAL OBJECTIVITY

Farber and Sherry’s objectivity contingent upon aspiration is commendable, but in arguing against radical constructivism, they fail to achieve it. Advocating for current standards without

due examination of relevant perspectives, precise definitions, and thorough investigation hinders the pursuit of objectivity. Farber and Sherry evince bias by ignoring alternative explanations for Asian and Jewish success that are possible under radical constructivism. They evince fiat by proposing a pragmatist model that has multiple interchangeable standards of deference to be afforded to tradition. They evince careless investigation by ignoring considerations that would provide a fuller and more accurate assessment of Asian and Jewish success. Through bias, fiat, and careless investigation, Farber and Sherry are led astray from their ideal of objectivity.

But this is not to say Farber and Sherry should not have spoken. Farber and Sherry express a sincere conviction about the deficiencies of radical constructivism.⁴⁴ If we keep quiet for fear of being wrong or too subjective, it is possible we may never speak and the fruits of public debate may never be enjoyed. Refusing to engage in debate leads to the “twin perils of an unthinking adherence to tradition and an unreflective over eagerness for change”⁴⁵ that Farber and Sherry fear. However, when we go about assessing their argument, we should remain

adherents to the principles required by objectivity. Where tradition is excessively optimistic, criticism is left out in the cold, with no entry into the house of knowledge. Where criticism is excessively pessimistic, tradition is a collection of foolish tales, with no attachment to the tree of history.

CONCLUSION

Farber and Sherry’s article, “*Is the Radical Critique of Merit Anti-Semitic?*” draws an arbitrary line between criticism and objectivity by addressing the distinction between radical constructivism and pragmatism within the context of merit. A society adopting strategies of exclusive arbitrary line-drawing generates barriers to debate that will not provide the freedoms and equal opportunity it might hope to achieve. A better model for objective merit balances criticism and tradition.

If even the best intentions lead to undesired outcomes, a case for opening the debate is made. Bridging the perceived gap between radical constructivism and pragmatism, as opposed to creating it, encourages dialogue to occur and critics to more readily realize an aspirational objectivity.

ENDNOTES

* David Dae Hoon Kim earned his J.D. from Georgetown University Law Center in 2005. He would like to give special thanks to Jerry Kang for his guidance.

¹ DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON* (Oxford University Press 1997) [hereinafter *BEYOND*].

² For the sake of consistency and clarity, I exclusively use Farber and Sherry’s own classifying labels and definitions of the key terms in their argument. The targets of their scrutiny are critical theorists. I will employ the term “radical constructivists” since this is the term Farber and Sherry use in their essay.

³ *BEYOND*, *supra* note 1, at 5.

⁴ Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CALIF. L. REV. 853, 879 (1995).

⁵ *Id.* at 858.

⁶ *Id.*

⁷ *Id.* at 855.

⁸ *Id.* at 856.

⁹ Farber & Sherry, *supra* note 4 at 856.

¹⁰ *Id.*

¹¹ In 1970, Jewish family income was 172% of the average American income. By 1980, native-born Chinese Americans were earning 150% of the non-Hispanic white average, with Japanese and Korean American families close behind. Unemployment rates for East Asian Americans were approximately half that of the general population. Jews and Asian Americans are disproportionately represented in higher education—in 1990, the percentage of Jews with some college education was almost twice that of the general population. Asian Americans also completed college at twice the rate of the general population. *Id.* at 869-70.

¹² *Id.* at 871.

¹³ *Id.* at 874.

¹⁴ Farber & Sherry, *supra* note 4, at 875-76.

¹⁵ *Id.* at 877.

¹⁶ *Id.* at 879.

¹⁷ *Id.* at 880.

¹⁸ Also, under this model, fair process leads to the minority being outvoted, and fair distribution allows reverse discrimination against disproportionately successful minorities. *Id.* at 881.

¹⁹ Farber & Sherry, *supra* note 4, at 882.

²⁰ *Id.* at 883 (quotations omitted).

²¹ *BEYOND*, *supra* note 1, at 27.

²² Farber & Sherry, *Radical Change*, *supra* note 5 at 882.

²³ *Id.* at 883.

²⁴ *Id.* at 869.

²⁵ Even the Census Bureau combines sixteen countries of origin or ethnic groups and more than twenty Pacific Island cultures into one definition of “Asian American.” See Pat K. Chew, *Asian Americans: The “Reticent Minority” and their Paradoxes*, 36 WM. AND MARY L. REV. 1, 26 (1994).

²⁶ Chinese and Japanese Americans earn 132% and 112%, respectively. Farber & Sherry, *supra* note 4, at 869.

²⁷ See Chew, *supra* note 25, at 52-53.

²⁸ Some Jewish Americans believe Jewish Americans are not successful. See, e.g., Beverly Horsburgh, *The Myth of a Model Minority: The Transformation of Knowledge into Power*, 10 UCLA Women’s L.J. 165 (1999) (reviewing DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997)).

²⁹ See, e.g., Chew, *supra* note 25; see generally FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (Basic Books 2002).

³⁰ See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1270-73 (1992).

³¹ See Jerry Kang, *Racial Violence against Asian Americans*, 106 HARV. L. REV. (1993) (noting that stereotypes act as a rational catalyst towards violence against Asian Americans).

³² For example, 23.6 million whites hold bachelor or graduate degrees and, comparably, 26.5 million whites hold managerial or professional positions – a ratio of 1.12. The number of Asian Americans with these degrees (1.3 million) is significantly higher than the number in managerial or professional positions (1 million) – a ratio of 0.77. Thus, one can infer that many Asian Americans are ‘underemployed’ relative to their educational background.” Chew, *supra* note 25, at 53.

³³ See Chew, *supra* note 25 at 75-76 (“[T]here is a trend not to include Asian Americans in affirmative action and diversity enhancement programs.”); William C. Kidder, *Situating Asian Pacific Americans in The Law School Affirmative Action Debate: Empirical Facts About Thernstrom’s Rhetorical Acts*, 7 ASIAN L.J. 29 (2000) (citing that Asian American law school admission rates fell without affirmative action).

³⁴ Farber & Sherry, *supra* note 4, at 856.

³⁵ *Id.*

³⁶ *Id.* at 883.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Farber & Sherry, *supra* note 4, at 883.

⁴¹ See, e.g., Mari Matsuda, *We Will Not Be Used*, 1 ASIAN AM. PAC. ISLANDS L.J. (1993) (highlighting that interest convergence theory purports the majority will only act in a minority’s interest when it is also their interest); see generally Derek Bell, Jr., *Brown v. Board of Education and the Interest – Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

⁴² See Chew, *supra* note 25, at 54-55.

⁴³ “Discrimination is the most promising explanation of differing success rates, but it does not fully satisfy the needs of critical theorists... Finding all the possible answers unsatisfactory, radical constructivists change the question. Instead of asking whether all races are judged by the same standards and have the same opportunities, they argue that the unequal success rates are per se proof of unjust treatment.” Farber & Sherry, *supra* note 4, at 866-67.

⁴⁴ Farber and Sherry synonymously use the terms “radical constructivist” and “critical theorists.”

⁴⁵ Farber & Sherry, *supra* note 4, at 883.