Pragmatic critique as advocacy (against torture)

Nick Cheesman, for IAS critique group, 1 May 2017

In her 2015 presidential address to the Law and Society Association, Carroll Seron (2016: 12, 13) called for a turn away from critique and for her audience "to take the role of pragmatic policy seriously" so as "to get back in the game of advocacy and policy" and address the manifold crises confronting democratic government in our time. Law-and-society scholars, we might infer, are now being urged to set aside serious work for political and social change via movements whose goals inevitably outrun their actual achievements (see Munger and Seron 1984: 284), to instead aim at rather more modest policy proposals in the hope of convincing skeptics that their sometimes rather ambivalent, interdisciplinary scholarship is not entirely irrelevant.

In opposition to this call, I want to argue that scholars of law and society in particular, and students of law and politics in general, should take the role of pragmatic *critique* seriously. In doing so, I hope to advocate for a mode of inquiry that draws in part on traditions in the law-and-society literature so as to push back against the "pull of the policy audience" (Sarat and Silbey 1988), not out of nostalgia but in order to give meaning to the language and practice of advocacy. I also want to insist that to defy the policy audience's calls for a certain type of practicality, which are usually just calls for conformity, is not at all to be impractical. To the contrary, it is to take a stand for a different kind of practicality, one that recognizes and is grounded in meanings of pragmatism and critique that Seron elided in her lecture.

What is pragmatic critique? Obviously, in its pragmatism it signals an empirical stance (Van Fraassen 2002). But it differs from its ostensibly pragmatic other insofar as it comprises an "empiricist attitude" (James 1975: 31) of relating to the world not through a search for practical prescriptions but instead one that is in keeping with certain methodological and epistemological commitments to examine and understand things on their own terms. As such, pragmatic critique might be said to recommend a research strategy of working not "in critical distance but in critical proximity" (Weizman and Manfredi 2013: 172) with our subject matter. This is not to say that pragmatic policy work might not also sometimes aim for proximity; just that in doing so its goal is to get better data with which to solve solutions to problems that its exponents already presume to know. Pragmatic critique, by contrast, would appear to seek proximity because it is committed to empirical inquiry motivated by an "irritation of doubt" (Peirce 1877) about what we presume to know—both about our problems and their ostensible solutions.

Pragmatic critique might be said to have a foot in each of two critical traditions: the one, critical theory, concerned with emancipatory possibilities; the other, genealogy, concerned with putting distance, along with pragmatism, between normative theory and empirical inquiry (see Fassin 2017; Hansen 2016). Whereas pragmatic policy diminishes theory and privileges certain methods in the interest of communicating on findings from data to policy audiences, pragmatic critique retains a special concern for the part that theory plays as "a sense-making enterprise of that which often makes no sense" (Brown 2005: 81), without which it would not be possible to think and act critically at all. It is not just that it is concerned with the "rich specificity and

contingency" (Koopman 2015: 582) of human action. It is an inherently critical process (Quéré and Terzi 2014: 104), aimed at problematizing and denaturalizing the criteria by which certain practices are validated and accepted while others are not, so as to have us think about how we might act to make things otherwise.

What are the implications of advocating for pragmatic critique in political and legal inquiry? I propose to respond to this question with reference to the subject of my current research project: torture. If the proposition that torture is a practice in need of pragmatic critique sounds redundant, since moral philosophers already have classed torture as a special kind of wrong, and since a "legal archetype" (Waldron 2005) already exists to prohibit it in international law, then that is exactly the point. Precisely because we tend to research torture from established normative positions, we also tend not to have any surprising discoveries about it. That is why, rather than starting with an anti-torture norm and, in the case of international law, proceeding to questions of policy and adjudication, pragmatic critique works in the opposite direction, moving from close empirical inquiry, haphazardly and uncertainly, sideways and indirectly, towards normative considerations. In so doing, it does not set out to repudiate normatively grounded inquiry per se, but rather, to cast plain light on the empirical dimensions of the practice so that we might see them better for what they are, before asking how we might act upon them, and why.

Although it seeks to obtain insights into torture by adopting an empirical rather than normative stance, pragmatic critique should not be mistaken as having anything to do with that strand of legal pragmatism that claims to articulate the circumstances under

which practical-minded exemplary men of action might legitimately approve torture in response to exigencies, for two primary reasons. First, as already discussed, pragmatic critique does not address itself deliberately to policymakers or adjudicators. They and their institutions for administrative and legal order are not its audience, but rather, its subject matter. Secondly, the pragmatic in pragmatic critique differs from how it is discussed in the work of legal pragmatism on torture. Whereas a pragmatic critique of torture necessarily involves close and protracted study of the actual practice, the work of self-identifying legal pragmatists on this topic, at least, tends to rely on suppositions about torture that are based on untenable assumptions, aimed at fueling indeterminable disputes over imaginary scenarios of a sort from which critical pragmatic inquiry aims to break free via inquiry into actual cases.

What does it mean to talk generally of pragmatic critique as a form of advocacy? Although its empirical orientation naturally lends it to advocacy, pragmatic critique clearly entails a different kind of advocacy from that which is tethered to specific policy outcomes. Because pragmatic critique is ampliative rather than prescriptive, concerned with increasing our stock of knowledge, rather than stockpiling it for policy purposes; and, with working towards plausibility rather than necessity in its explanations, it does not lend itself to the kind of advocacy that is concerned with obtaining certainty upon which to design interventions so as to affect policy outcomes, but with a more capacious, pedagogically informed advocacy for transformative projects whose goals inevitably outrun their actual achievements.

So far as advocacy against torture specifically is concerned, while pragmatic critique might be rendered intelligible to policymakers, it cannot be re-presented in that audience's preferred idiom of precision and determinacy because in both its critical and pragmatic parts it embraces rather than seeks to eliminate the uncertainty that is a feature of all inquiry into human action—not least of all, inquiry into the practice of torture; a practice that defies facile attempts at articulation and explanation. But if in declining to speak the language of determinacy, pragmatic critique turns its back on the policy-oriented mandate that Seron now recommends, then in so doing it might regain and celebrate an enduring commitment to more fundamental legal and political transformation through action informed by an awareness of and learning from experience: not in response to policy imperatives but out of doubt about the character and consequences of those imperatives. To my mind, this is most certainly a mandate for public advocacy, and for pragmatic and active engagement with vital matters of politics and law—one that I am committed to pursuing in my own research on torture, and would be interested to think through and spell out more deliberately in a chapter for our proposed collective volume.

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