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# Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory

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After Rorty's sustained critique of "professional philosophy" and his attack on the very idea of philosophy . . . he left us in an ambiguous situation about what useful role (if any) the philosopher might still play in the ongoing "conversation of mankind." He suggested that we think of the philosopher (or her successor) as a "kibitzer," a self-consciously amateurish cultural critic.

Richard Bernstein<sup>1</sup>

What I am calling "pragmatism" might also be called "left-wing Kuhnianism." It has been also rather endearingly called . . . the "new fuzziness," because it is an attempt to blur just those distinctions between the objective and the subjective and between fact and value which the criterial conception of rationality has developed. We fuzzies would like to substitute the idea of "unforced agreement" for that of "objectivity." We should like to put all of culture on an epistemological level—or, to put it another way, we would like to get rid of the idea of an "epistemological level" . . . . On our view, "truth" is a univocal term. It applies equally to the judgments of lawyers, anthropologists, physicists, philologists, and literary critics. There is no point in assigning degrees of "objectivity" or "hardness" to such disciplines. For the presence of unforced agreement in all of them gives us everything in the way of "objective truth" which one could possibly want: namely, intersubjective agreement.

Richard Rorty<sup>2</sup>

If we see knowing not as having an essence, to be described by scientists and philosophers, but rather as a right, by current

1. Richard Bernstein, *One Step Forward, Two Steps Backward*, 15 POLITICAL THEORY 538, 541 (1987).

2. Richard Rorty, *Sciences as Solidarity*, in THE RHETORIC OF THE HUMAN SCIENCES 38, 41-42 (1987).

standards to believe, then we are well on the way to seeing *conversation* as the ultimate context within which knowledge is to be understood. Our focus shifts from the relation between human beings and the objects of their inquiry to the relation between alternative standards of justification, and from there to the actual changes in those standards which make up intellectual history.

Richard Rorty<sup>3</sup>

It is the ability to participate in this conversation, and not the ability to reason cogently, to make discoveries about the world, or to contrive a better world, which distinguishes the human being from the animal . . . . Indeed, it seems not improbable that it was the engagement in this conversation (where talk is without a conclusion) that gave us our present appearance, man being descended from a race of apes who sat in talk so long and so late that they wore out their tails.

Michael Oakeshott<sup>4</sup>

## I. INTRODUCTION

Legal theory is currently in a state of crisis.<sup>5</sup> No longer is reason heralded as the undisputed foundation of legal culture. From diverse quarters comes a call to abandon the dogma of legal reasoning and to replace it with a radically different form of inquiry.<sup>6</sup> This new form of inquiry—which I shall call “conversationalism”—is reputed to be vastly superior to reason

3. RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 389-94 (1979).

4. Michael Oakeshott, *The Voice of Poetry in the Conversation of Mankind*, in *RATIONALISM IN POLITICS* 197, 199 (1962).

5. The crisis in legal theory reflects the crisis in academic philosophy. Metaphysics and epistemology, the principal philosophical disciplines, appear to have led to a cultural dead-end. In abandoning metaphysics and epistemology, post-philosophical “philosophers” have taken the conversational turn and have become kibitzers, fuzzies, or apes without tails—anti-foundationalist, anti-essentialist conversationalists. The crisis now in legal theory is whether legal theorists should abandon legal metaphysics and legal epistemology and take the conversational turn. Should legal theorists, like their post-philosophical counterparts, become kibitzers, fuzzies, or apes without tails?

For an account of the conceptual framework in which this crisis operates, see generally Robert J. Lipkin, *Beyond Skepticism, Foundationalism, and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 *CORNELL L. REV.* 811 (1990).

6. This novel approach echoes Rorty’s admonition to abandon epistemology. Rorty, *supra* note 2. In abandoning legal epistemology, traditional notions of objectivity, determinacy, and neutrality have come under heavy fire. See, e.g., Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1 (1984). For Singer’s current views on Rorty’s politics, see Joseph W. Singer, *Should Lawyers Care about Philosophy*, 1989 *DUKE L.J.* 1752 (1989) (Book Review).

because it does not rely on the quixotic attempt to formulate a neutral perspective from which to evaluate competing legal theories. Conversationalism is also attractive because there seems to be something especially humane in exhorting people to try to settle their differences by sitting down and talking to one another. This Article attempts to discover whether conversationalism is a desirable alternative to traditional legal methods. The Article concludes that only one form of conversationalism, namely, wide reflective equilibrium, exists as a viable alternative to legal reasoning.

Part One of this Article critically examines and rejects five different types of conversationalist theories. Part Two describes and defends wide reflective equilibrium as the most illuminating model of conversationalism available. It is then argued that even wide reflective equilibrium is restricted by an unavoidable form of skepticism, compelling us to abandon the hope of devising a completely normative theory of law and ethics. Finally, Part Three explores the relationship between conversationalism and compromise, concluding that without a positive theory of compromise, anti-foundationalist theories, including conversationalism, are unable to provide a rapprochement between competing systems of values. Without the possibility of compromise, legal and moral controversies will be settled only through advocacy or coercion. No purely rational means will be possible.

## II. THE CONVERSATIONALIST TURN

### A. *Conversationalism and Post-Modernity*

The turn to conversationalism is a problem of post-modernity. Post-modernity challenges reason's privileged place in human society.<sup>7</sup> It rejects the Enlightenment as "a failed rationalist project which has run its course but which continues to encumber contemporary thought with illusions of a rational route to knowledge, a faith in science and in progress."<sup>8</sup> Post-modern inquiry denies the possibility of rationally justifying a conviction in a permanent, real, and morally desirable world order. The journey to post-modern society has been a tortuous one, requiring a transition from the authority and stability of

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7. Post-modernity involves a commitment to "anti-foundationalism, immanence, historicity, and epistemic struggle." Frank Michelman & Margaret J. Radin, *Pragmatist and Post-Structuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1024 n.30 (1991).

8. Alan Hunt, *Law Confronts Postmodernism*, 35 MCGILL L.J. 507, 515 (1990).

traditional, feudal society to the modern adulation of the individual during the Enlightenment. The move from traditional to modern society involved a shift away from theological or secular authority. In its place came the glorification of individual reason.<sup>9</sup> No longer did external, contingent authorities dictate what was true, right, or real. Instead, the rational individual became the final arbiter of these questions. Reason appeared to provide what contingent authorities only promised, but could never deliver—a permanent foundation for validating one's beliefs and values.

When reason could not make good on its promise, the exhilaration associated with reason's empire waned. Soon skepticism, relativism, and nihilism became permanent features of intellectual history. Neither reason, nor human life, would ever be the same. Without the security of reason's empire, we are left afloat in Neurath's boat in a sea of swirling, treacherous cynicism and despair.<sup>10</sup> Coping with this contingency has prompted mainstream legal theorists to resort to the notions of reasonableness or judgment in order to satisfy both anti-foundationalist and anti-skeptical concerns.<sup>11</sup> By contrast, other theorists have turned to a pragmatic voice with which to continue the conversation of humankind.

Conversationalism arises as a serious form of human inquiry when we abandon reason as the foundation for knowledge and value. Conversationalists take dissensus seriously, arguing that intellectual history is replete with failed attempts at achieving agreement. According to this position, the fact that the very best of the hearts and minds of civilization have failed

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9. Reason promised to ground everything, including itself. See Marcelo Dascal, *Reflections on the 'Crisis of Modernity'*, in *THE INSTITUTION OF PHILOSOPHY: A DISCIPLINE IN CRISIS?* 217, 225 (1989).

10. Neurath compared conceptual change to rebuilding a boat plank by plank while it is still afloat. WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* 3-4 (1960). Neurath's image, as described by Quine, has become a rallying symbol for anti-foundationalism. But what does it mean? Surely you can rebuild a ship from scratch if you get to dry dock. In these circumstances, the dock functions as a neutral vantage point from which the boat can be rebuilt. Of course, there exists no final dry dock—no absolutely neutral vantage point—from which to reconstruct our conceptual scheme. The metaphor of a dry dock might, however, be instructive. We can use one part of our conceptual scheme as a relatively neutral vantage point from which to reconstruct other parts of the same conceptual scheme.

11. Theorists endorsing these methods recommend a middle path between foundationalism and skepticism. Elsewhere I have called these theorists new foundationalists or middle-grounders, challenging them to provide a coherent procedure for deriving right answers to controversial legal and moral questions. See generally Lipkin, *supra* note 5.

to achieve agreement over controversial issues is powerful evidence that resolution is unlikely. According to the conversationalist, the historical fact of dissensus, in conjunction with a revised conception of value and the nature of the self, present a compelling argument for epistemic and ethical pluralism.<sup>12</sup> Conversationalism emerges when pluralism captures the imagination of an age.

### *B. Neutral Conversationalism in Liberal Theory*

Although theories of conversationalism repudiate foundationalism, they do not all denigrate reason entirely.<sup>13</sup> Theories of constrained conversationalism present a model for settling legal and moral controversies which describes the argumentative moves permissible in legal and moral reasoning. Constrained conversationalism incorporates a formal procedure for setting aside controversial substantive values. Instead, it concentrates on articulating a neutral discourse for settling controversies. Conversationalism presumes that unless we can devise a neutral discourse for ascertaining what is right, we must despair of ever reaching agreement across persons.<sup>14</sup>

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12. One explanation of dissensus in law and ethics is that conceptually or metaphysically there exists more than one correct way of life. Of course, there might be only one correct way of life, but we may not know it. Before we can evaluate the force of a dissensus argument, therefore, we must distinguish between conceptual or metaphysical determinacy and epistemic determinacy. Metaphysical determinacy claims that one way of life is superior to all others. Epistemic determinacy says that we can prove that one way of life is superior to all others. Metaphysical determinacy is compatible with epistemic indeterminacy. In short, one way of life may be superior to all others but we may be unable to prove it.

In my estimation, the distinction between conceptual determinacy and epistemic determinacy is pragmatically pointless, since conceptual determinacy absent epistemic determinacy leaves us in precisely the same situation as conceptual indeterminacy. Without the possibility of proof, conceptual determinacy fails to provide us with the means for resolving practical dilemmas. Consequently, practical dilemmas are irresolvable if epistemic indeterminacy is true, irrespective of whether conceptual indeterminacy is true. I argue this point in greater detail in Robert J. Lipkin, *Indeterminacy, Justification, and Truth in Constitutional Theory*, 60 *FORDHAM L. REV.* (forthcoming 1992).

13. Steven Burton integrates some elements of the metaphor of conversation with traditional features of legal reasoning. STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 204-14 (1985).

14. The forerunner of neutral conversationalism is to be found in the meta-ethical movement of analytic moral philosophy, especially in the work of R.M. Hare. See, e.g. R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD AND POINT* (1981); R.M. HARE, *ESSAYS ON THE MORAL CONCEPTS* 98 (1972); R.M. HARE, *FREEDOM AND REASON* (1963); R.M. HARE, *THE LANGUAGE OF MORALS* (1962). Hare contends that by using moral language an individual practical reasoner commits herself to certain determinate argumentative moves. If she judges that flag burners should be incarcerated, for instance,

Neutral conversationalism in politics<sup>15</sup> and law faces this problem. If no substantive values are morally required or demonstrable, appealing to one's values in settling controversies begs the question against one's adversary. For example, if I contend that segregation is wrong because all people are created equal, I beg the question against the segregationist who does not share my views on equality. Theories of constrained conversationalism squarely face the following question: What kind of agreement is possible among people who do not share the same substantive values?<sup>16</sup>

Bruce Ackerman confronts this question directly.<sup>17</sup> Acker-

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she must universalize this judgment and be prepared to be treated in a similar manner should she find herself in relatively similar circumstances. In Hare's view, the logic of moral language assists us in deciding how to treat our enemies. But Hare's theory is too thin to achieve significant results. Almost any judgment suitably described can be universalized. See Don Locke, *The Trivializability of Universalizability*, 77 PHIL. REV. 25 *passim* (1968); see also JOHN RAWLS, A THEORY OF JUSTICE 251 (1971). Moreover, Hare's theory has been criticized for inadequately explaining the role desires play in practical reasoning. See Robert J. Lipkin, *Universalizability and Prescriptivity in Practical Reasoning*, 15 S.J. PHIL. 67 (1977). David Gauthier also has argued that Hare's theory fails to distinguish between moral obligations and moral permissions. David P. Gauthier, *Hare's Debtors* 77 MIND 400 (1968). But see Robert J. Lipkin, *Hare's Theory of Rational Assent*, 28 PHIL. STUD. (Ir.) 238 (1979) (arguing that Gauthier fails to properly identify Hare's theory of rational assent). For a recent evaluation of Hare's theory with Hare's reply, see generally HARE AND CRITICS: ESSAYS ON MORAL THINKING (David Seanor & N. Fotion eds., 1988).

15. Generality and neutrality have captured the imagination of some constitutional theorists. These theorists have taken up the gauntlet of formulating quasi-formal principles that in turn generate substantive constitutional decisions. See generally ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). According to theorists of this type, a constitutional decision must be supported by general and neutral constitutional principles. The greatest obstacle to this approach is that of formulating a conception of such principles that will settle legal controversies.

16. Underlying this issue is the problem of coherent communication and argument between individuals committed to different moral perspectives. See ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 348-403 (1988).

17. Bruce Ackerman, *Why Dialogue?* 86 J. PHIL. 5, 9 (1989) [hereinafter Ackerman, *Why Dialogue?*]; see also BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980) [hereinafter ACKERMAN, SOCIAL JUSTICE]. I concentrate on *Why Dialogue?* rather than SOCIAL JUSTICE because Ackerman insists in *Why Dialogue?* that liberalism "calls upon us to reflect upon the pragmatic imperative to talk to strangers as well as soul-mates; and to consider whether, despite the strangers' strangeness, we might still have something reasonable to say to one another about our efforts to coexist on this puzzling planet." Ackerman, *Why Dialogue?* *supra*, at 22. Whether we have something reasonable to say to strangers should depend upon the content of what we have to say, not upon the constraints on saying it.

*Why Dialogue?* is essentially a prolegomenon to a treatise on liberal justice. Its avowed purpose is to show why questions concerning the relationship between "conversational space" and political theory are questions worth asking. Respectfully, I submit that



man describes contemporary society as consisting of disparate primary groups competing for the same scarce resources.<sup>18</sup> According to Ackerman, these circumstances give rise to "the problem of liberal politics: How are the different groups to resolve their problem of mutual coexistence in a reasonable way?"<sup>19</sup> Ackerman calls the answer to this question "the *supreme pragmatic imperative: If you and I disagree about the moral truth, the only way we stand half a chance of solving our problems in coexistence in a way both of us find reasonable is by talking to one another about them.*"<sup>20</sup> Ackerman promises that talking to one's enemy through constrained dialogue itself has important substantive implications for resolving conflicts.<sup>21</sup>

Ordinarily, conversationalism counsels the individual to say just what it is that is troubling about her enemies' perspective. Indeed, conversationalism usually permits the participants to say anything they choose. Curiously, in Ackerman's view, dialogue in a liberal society is depicted as centering around conversational constraint over what you *cannot* say. He notes:

When you and I learn that we disagree about one or another dimension of the moral truth, we should not search for some common value that will trump this disagreement; nor should we try to translate it into some putatively neutral framework; nor should we seek to transcend it by talking about how some unearthly creature might resolve it. We should simply say *nothing at all* about this disagreement and put the moral ideals that divide us off the conversational agenda of the liberal state.<sup>22</sup>

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Ackerman's project in showing how dialogue and conversation themselves enable us to formulate a plausible liberal theory of justice is itself a dead end. Everything worth saying about dialogue and conversation can be said about reasoning or justification, and what can be said only about dialogue and conversation might not be worth saying.

18. Both Ackerman's neutral conversationalism and Hare's universal prescriptivism are designed to preclude special pleading. This similarity should not obscure important differences between these theories. See Albert Weale, Book Review, 65 MINN L. REV. 685, 689-92 (1981).

19. Ackerman, *Why Dialogue?*, *supra* note 17, at 9.

20. *Id.* at 10 (emphasis added).

21. I use the term "enemy" in the following manner. Your enemy is a person having an ethical conceptual scheme that is at least partially incommensurate with yours. If your ethical conceptual scheme regards abortion, flag burning, obscenity, and affirmative action for minorities and women permissible, your enemy is the person who finds these activities impermissible. An enemy, moreover, is someone who is no longer inclined to take her opponent's view seriously.

22. Ackerman, *Why Dialogue?*, *supra* note 17, at 16.

Though counter-intuitive,<sup>23</sup> Ackerman's proposal is intriguing. Usually, conversationalism requires each party to state clearly what exactly she values most and why. It is no wonder then that in these circumstances enemies will find Ackerman's proposal to be frustrating and counter-productive, "for it will prevent each of us from justifying our political actions by appealing to many of the things we hold to be among the deepest and most revealing truths known to humanity."<sup>24</sup> No one then will embrace conversational restraint for its own sake. Rather, "our mutual act of conversational restraint allows all of us to win a priceless advantage: none of us will be obliged to say something in liberal conversation that seems *affirmatively false*."<sup>25</sup> Let us explore how this priceless advantage is won.

If I am a religious conservative desiring prayer in school, I say something that is affirmatively false (from my perspective) only if I say that school prayer is bad, not if I refrain from making any claim whatsoever about its moral desirability. Not talking about prayer is neutral—neither endorsing nor denying the desirability of prayer.<sup>26</sup> In Ackerman's view, this neutrality respects the equal citizenship of both the advocate and opponent of prayer in the schools. But, if I truly value school prayer, I will surely desire to express this in my public life, especially in public institutions like schools. Consequently, remaining silent on the issue of school prayer compromises my integrity. Can public discourse require such a compromise and simultaneously claim to value the citizens who make these compromises? Ackerman has not shown that it can.

Neutral conversationalism requires the individual to keep her nonpublic identity to herself.<sup>27</sup> The only other option leads to a Hobbesian state of war of all against all. Furthermore, by "constrain[ing] the conversation in this way, we may instead use

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23. Ackerman does not appear to be impressed with the charge of counter-intuitiveness. See generally ACKERMAN, *SOCIAL JUSTICE*, *supra* note 17, at 349-55. But see Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship* 30 UCLA L. REV. 1103, 1201 (1983).

24. Ackerman, *Why Dialogue?*, *supra* note 17, at 16-17.

25. *Id.*

26. Ackerman's theory reflects the traditional liberal conviction that public discourse should be neutral and not reflect any particular substantive way of life. Instead, public discourse should express only constitutional values. See *id.* at 19-22. According to the First Amendment, for example, public discourse cannot include government-sanctioned religion.

27. John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. PUB. AFF. 223, 241 (1985).

dialogue for pragmatically productive purposes: to identify normative premises all political participants find reasonable (or, at least, not unreasonable)."<sup>28</sup>

Ackerman is surely right in seeking reasonable premises that enemies can embrace. This is a specifically pragmatic task, implying that moral and political truths may be understood in terms of consensus. True judgments are those judgments about which neutral conversationalists agree. Understood in this fashion, Ackerman must concede that moral and political truth is severely limited. Finding reasonable premises enables us to rationalize those moral and political truths that almost no one doubts, such as the belief that murder, theft, and fraud are wrong. But these reasonable premises will not help resolve the pressing controversial issues separating members of a liberal society, such as abortion, affirmative action, flag desecration, pornography, poverty, and so forth. Consequently, conversational constraint applied to controversial questions provides little benefit, pragmatic or otherwise.

The need for finding a methodology for resolving political and moral conflicts arises just at the point where Ackerman's conception of dialogue has nothing more to teach us. It is undoubtedly important to locate shared normative premises in order to achieve agreement on many issues such as murder, theft, fraud, and so on. However, the great controversies of the day will remain unmediated. If conversation is an important pragmatic tool, it needs to illuminate *this* stage of political conflict. It is precisely at this stage, however, that Ackerman's conception precludes conversation.<sup>29</sup>

Ackerman contends that constraining conversation in this manner is only the first step in a liberal project: "[I]t remains for the liberal citizenry to fashion affirmative arguments out of the available public premises—arguments sufficiently incisive to resolve the citizenry's ongoing disputes."<sup>30</sup> What "public premises" can achieve this?<sup>31</sup> What public premises can begin to set-

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28. Ackerman, *Why Dialogue?*, *supra* note 17, at 16.

29. Alan Hyde, *Is Liberalism Possible?*, 57 N.Y.U. L. REV. 1031, 1038 (1982) (Book Review) (stating that "under the constraint of neutrality, the entire apparatus of dialogue might as well drop away").

30. Ackerman, *Why Dialogue?*, *supra* note 17, at 19.

31. This is a general challenge to liberal political and legal theory. Typically, liberal theory either assumes much more de facto consensus than there is, or it assumes that some methodological procedure will help to create the requisite consensus. Neither contention appears very plausible, however, looking at the past twenty-five years of American history

tle the abortion controversy or the problem of affirmative action? Ackerman might reply, for example, that both sides to the abortion controversy agree that the sanctity of life and personal autonomy are fundamental values. But how can he seriously expect this to settle the abortion controversy? Even if both sides to the abortion controversy share these values, each side understands and ranks them differently. What kind of argument can forestall this divergent understanding?

Ackerman rules out one possible solution to the abortion problem, namely, considering the fetus as a bearer of rights. Ackerman insists rightly that an embryo or a fetus cannot participate in neutral dialogue because it cannot utter the liberal mantra "I am at least as good as you are." Consequently, it cannot claim a right to life.<sup>32</sup> How then can Ackerman persuasively distinguish between abortion and infanticide?<sup>33</sup> Infants are no more capable of engaging in neutral dialogue than are fetuses. Further, why is the capacity to engage in neutral dialogue *oneself* a necessary condition for being a bearer of rights?<sup>34</sup> As Dworkin persuasively queries, "If there *is* a rational argument why an infant . . . should have at least some of the rights others have . . . and if this argument passes the test of neutrality, then why is it important whether the infant . . . can in fact make that argument for himself?"<sup>35</sup>

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and political theorizing. To suggest that we await the new Plato, Kant, Hegel, Husserl, Quine, or Nozick, or that the correct procedure for generating consensus will soon be formulated, is to ignore intellectual history. Is there any evidence that *philosophy* can bring about theoretical and substantive consensus on pressing, divisive political and moral controversies? Is there any evidence that any other *discipline* will fare any better?

32. ACKERMAN, *SOCIAL JUSTICE*, *supra* note 17, at 127.

33. Ackerman gives two implausible arguments against infanticide. ACKERMAN, *SOCIAL JUSTICE*, *supra* note 17, at 127-29. First, childless people might want to raise the child and would therefore have rights against the natural parents. Second, only wanton cruelty could explain the natural parents' desire to kill their viable infant. As to the first argument, would the absence of willing adoptive parents even in principle warrant killing the infant? If not, the reason for not killing children cannot be explained by the needs of childless couples. As for the second argument besides wanton cruelty, a natural parent might misguidedly, even if sincerely, wish to kill the child to avoid compelling the child to grow up in an unjust world. In this context, "Ackerman's mechanism for saving . . . babies from inhumane treatment is both *ad hoc* and incapable of being limited. It stands as a constant threat to the Neutrality that is the glue of the liberal state." Larry Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 UCLA L. REV. 816, 839 (1981).

34. Ackerman is surely right that "citizenship [or personhood] is not a biological category." ACKERMAN, *SOCIAL JUSTICE*, *supra* note 17, at 127. It is a *non sequitur*, however, to argue that because citizenship is not a biological category, the capacity for neutral dialogue is the criterion of citizenship. There exist a host of other possible criteria.

35. Ronald Dworkin, *What Liberalism Isn't*, N.Y. REV. BOOKS, Jan. 20, 1983, at 47,

Ackerman's conception of conversationalism as neutral dialogue never explains why conversation is necessary or desirable in the first place.<sup>36</sup> As Walzer states, "It is not at all clear that the give and take of conversation is really crucial to the substance of Ackerman's conclusions."<sup>37</sup> The presence of competing actors advancing opposing political and philosophical positions is an illusion. Ackerman's "conclusions would be no different if he gave up the impersonation and offered us instead a series of deductions . . . ."<sup>38</sup> Of course, this does not detract from the force (or weakness) of Ackerman's argument concerning the nature of justice. If true, however, it shows us that conversationalism plays no significant role in his liberal theory at all.

Ackerman suggests an interesting explanation for the role of conversation in liberal theory: that of deeply uniting citizens. Beyond their substantive disagreements, citizens "are seeking to define themselves through a common process of dialogue."<sup>39</sup> Our reciprocal recognition of this process unites us as citizens. However, this assumption that something valuable follows from such recognition is precisely what we are challenging. Only liberals already committed to Ackerman's project will regard this process as inherently valuable. Why should the "reciprocal recognition" of the common process of defining ourselves through dialogue unite us as citizens, or as anything else? It is not obvious how this process is inherently valuable, nor is it obvious what instrumental benefits are achieved through this sort of dialogue.

Perhaps Ackerman would reply that dialogic competence consists of the capacity to challenge the legitimacy of another's power and the ability to defend one's own share of power through neutral dialogue.<sup>40</sup> Without these capacities, individuals cannot achieve the desirable state of being intelligible to one

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49 n.3 (reviewing BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980)).

36. One obvious benefit of dialogue is that we might learn from one another. ACKERMAN, *SOCIAL JUSTICE*, *supra* note 17, at 275. As anyone in a good academic environment can attest, if learning is a happy experience, we come to rely upon others for edification. This edification in turn promotes a sense of community.

37. Michael Walzer, Book Review, *NEW REPUBLIC* Oct. 5, 1980, at 39-41.

38. *Id.*

39. ACKERMAN, *SOCIAL JUSTICE*, *supra* note 17, at 359.

40. *Id.* at 72.

another.<sup>41</sup> Without intelligibility, we cannot regard one another as "self-interpreting beings" and therefore cannot recognize one another as morally autonomous individuals.

Before evaluating this response, we must consider why Ackerman believes autonomy to be a necessary condition for moral identity or citizenship.<sup>42</sup> Moral identity and citizenship require that an individual have a definite good that can be diminished when she is treated poorly. When an individual has the capacity for flourishing, she has a good that can be protected by herself or by others. Autonomy can, but need not, be an ingredient of this good. Autonomy might be sufficient to establish an individual's right to engage in liberal dialogue, but it hardly appears to be necessary. Indeed, it is question-begging to insist that autonomy is a necessary condition for moral worth generally. Autonomous beings can be described as having a good, but so can animals, and perhaps even plants or ecosystems.<sup>43</sup> Consequently, Ackerman's argument for neutral dialogue is far from persuasive.<sup>44</sup>

Ackerman's conception of neutral dialogue suffers from a general defect: If neutral dialogue is constrained, how do we determine which constraints are appropriate without engaging in dialogue? In short, how do we determine who may participate in the neutral dialogue as well as what argumentative moves are permissible? How do we constrain the choice of constraints? If conversation is designed to settle conflicts,<sup>45</sup> then how do we set-

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41. *Id.*

42. I do not doubt that autonomy is a critically important moral and political value. See generally Robert J. Lipkin, *Free Will, Responsibility and the Promise of Forensic Psychiatry*, 13 INT. J. L. & PSYCH. 331 (1990). But here the issue is not whether autonomy is important. The issue is instead whether the capacity for autonomous choice is a necessary condition for moral identity or political citizenship.

43. See generally, PAUL W. TAYLOR, *RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS* (1986) (arguing that to respect living ecosystems is morally justified).

44. Why should the capacity to participate in practical argument (autonomy) be a necessary condition for having moral worth or for citizenship? Something can have rights either as an agent (actor) or as a patient (something acted upon). Autonomy may be required for agent-centered rights. It does not follow that patient-centered rights—the politically and morally appropriate way to *treat* certain kinds of entities—require autonomy. As long as the entity has a knowable good, and it is possible for a citizen to represent the patient-centered interests of that entity, there is no reason to exclude it from liberal dialogue.

45. Curiously, Ackerman concedes that "while dialogue may transform each *individual's* opinion, it does nothing to assure *collective* consensus. Indeed, it is quite possible that political opinion will be more fractionated after the debate than it was before." ACKERMAN, *SOCIAL JUSTICE*, *supra* note 17, at 275. But then what is so remarkable about conversation?

tle conflicts over the appropriate constraints on conversation? Do we need a meta-conversation to determine what the constraints on the first order conversation should be? But how then do we determine the constraints on this meta-conversation? Without some idea of how to stop this regress, a strong conception of neutral dialogue is doomed from the start.

Ackerman's conception of constrained, neutral dialogue can be contrasted with a conception of conversationalism that permits autonomous individuals to converse with one another in conditions of unbounded choice. While Ackerman's conception of dialogue fails to provide a process for settling legal controversies, a theory of unconstrained conversationalism might succeed where neutrality theory fails. Jürgen Habermas offers such an alternative to neutrality theory.

### C. *Conversationalism and the Consensus Theory of Truth*

Jürgen Habermas offers a theory of unconstrained conversationalism that ties truth to intersubjective agreement. According to Habermas, underlying normal communicative speech is a conception of an ideal speech situation. In an ideal speech situation, individuals freely converse without distorting influences that render mutual agreement impossible. Political truth, for Habermas, consists of those statements totally informed individuals would endorse in circumstances of unconstrained choice.<sup>46</sup> Communicative action presupposes this ideal speech situation in which all rational actors endorse the same opinion.<sup>47</sup> Consider

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46. According to Habermas, in normal communicative action, speaker and hearer share "an underlying consensus." JÜRGEN HABERMAS, *THEORY AND PRACTICE* 17-18 (1973). To form this underlying consensus, speaker and hearer must each reciprocally recognize "at least four claims to validity which speakers announce to each other: the comprehensibility of the utterance, the truth of its propositional component, the correctness and appropriateness of its performatory component, and the authenticity of the speaking subject." *Id.* at 18. Together, these validity conditions represent the structure of communicative action, the goal of which is mutual agreement. When these conditions do not obtain, communication fails. See THOMAS MCCARTHY, *THE CRITICAL THEORY OF JÜRGEN HABERMAS* 288-91 (1978). That is, communication fails when the linguistic utterance does not bring about "an agreement that terminates in the intersubjective communality of mutual comprehension, shared knowledge, reciprocal trust and accord with one another." *Id.* at 290.

47. Habermas's theory of truth echoes Peirce's:

[H]uman opinion universally tends in the long run to a definite form, which is the truth. Let any human being have enough information and exert enough thought upon any question, and the result will be that he will arrive at a certain definite conclusion, which is the same that any other mind will reach under sufficiently favorable circumstances . . . . There is, then, to every question a true answer and

the following:

I may ascribe a predicate to an object if and only if every other person who *could* enter into a dialogue with me *would* ascribe the same predicate to the same object. In order to distinguish true from false statements, I make reference to the judgement of others—in fact to the judgment of all others with whom I could ever hold a dialogue (among whom I counterfactually include all the dialogue partners I could find if my life history were coextensive with the history of mankind). The condition of the truth of statements is the potential agreement of all others.<sup>48</sup>

The closer we come to ideal speech, the more autonomous and rational our conversation becomes.

We name a speaking-situation ideal where the communication is not only not hindered by external, contingent influences, but also not hindered by forces which result from the structure of communication itself. Only then does the peculiarly unforced compulsion of a better argument dominate.<sup>49</sup>

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a final conclusion, to which the opinion of every man is constantly gravitating. He may for a time recede from it, but give him more experience and time for consideration, and he will finally approach it. . . . [T]here is a definite opinion to which the mind of man is . . . tending. On many questions the final agreement is already reached, on all it will be reached if time enough is given . . . . [The] final opinion, then, is independent, not indeed of thought in general, but of all that is arbitrary and individual in thought; [it] is quite independent of how you, or I, or any number of [people] think. Everything, therefore, which will be thought to exist in the final opinion is real, and nothing else. . . . [T]o assert that there are external things which can be known only as exerting a power on our sense, is nothing different from asserting that there is a general *drift* in the history of human thought which will lead it to one general agreement, one catholic consent.

8 CHARLES S. PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE § 8.12 (Arthur W. Burks ed., 1958). Peirce's conception of truth suggests that ideally we should endorse as true those statements that survive criticism. I would add that reflective disagreement in ideal circumstances is *evidence* that the statement is false.

48. Jürgen Habermas, *Wahrheitstheorien*, in WIRKLICHKEIT UND REFLEXION: Festschrift für Walter Schulz 211, 218 (1973), cited in MCCARTHY, *supra* note 46, at 299-303 [hereinafter Habermas, *Wahrheitstheorien*].

It is important to note that "[a] speech situation determined by pure intersubjectivity is an idealization." Jürgen Habermas, *Towards a Theory of Communicative Competence*, 13 INQUIRY 360, 372 (1970) [hereinafter Habermas, *Communicative Competence*].

[C]ommunicative competence does mean the mastery of the means of construction necessary for the establishment of an ideal speech situation. No matter how the intersubjectivity of mutual understanding may be deformed, the *design* of an ideal speech situation is necessarily implied in the structure of potential speech, since all speech, even of intentional deception, is oriented towards the idea of truth. This idea can only be analysed with regard to a consensus achieved in unrestrained and universal discourse.

*Id.*

49. Jürgen Habermas, *Summation and Response*, in CONTINUUM 131 (1970), quoted



Like theoretical discourse, truth as consensus is also the foundation of practical discourse.<sup>50</sup> Practical language depends upon providing the appropriate interpretations of human needs and interests.<sup>51</sup> A particular language must enable people to "make their inner-natures transparent and know what they really want . . . ."<sup>52</sup> The model of an ideal speech situation underlies practical discourse. Potential speech implies a conception of truth and rightness. And "[t]his ideal can only be analyzed with regard to a consensus achieved in [unconstrained] and universal discourse . . . ."<sup>53</sup>

The problem with Habermas's ideal speech situation as a ground for theoretical and practical discourse is that it does not seem either plausible or intelligible to characterize this ideal situation as representing a model for determining truth and rightness.<sup>54</sup> What could possibly count as a situation in which only

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in TRENT SCHORYER, *THE CRITIQUE OF DOMINATION* 161 (1973) [hereinafter Habermas, *Summation and Response*].

Habermas's theory of communicative action is designed to rationally reconstruct practical as well as theoretical discourse. In both discourses, rationality grounds speech. In Habermas's view, "[i]f rightness as well as truth can qualify discursively redeemable validity claims, it follows that right norms must be capable of being grounded in a way similar to true statements." Habermas, *Wahrheitstheorien*, *supra* note 48, at 226-27. This does not mean that theoretical and practical discourse are indistinguishable. Nor does it mean that theoretical discourse admits of truth, while practical discourse does not. Both forms of discourse are rational. Nevertheless, it is important to note that "the grounding of right commands and evaluations differs in the structure of argumentation from the grounding of true statements . . . ." *Id.*

50. Seyla Benhabib suggests that "[t]he ideal speech situation is a 'meta-norm' that applies to theoretical as well as a practical reason. It serves to delineate those aspects of an argumentation process which would lead to a 'rationally motivated' as opposed to a false or apparent consensus." SEYLA BENHABIB, *CRITIQUE, NORM AND UTOPIA: A STUDY IN THE FOUNDATIONS OF CRITICAL THEORY* 284 (1986). For Habermas, "[o]ur first sentence expresses unequivocally the intention of universal and unconstrained consensus." JÜRGEN HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* 314 (1971). This illustrates the ideal of freedom and emancipation implicit in speech. In an emancipated society "communication [will] have developed into the non-authoritarian and universally practiced dialogue from which both our model of reciprocally constituted ego identity and our idea of true consensus are always implicitly derived. To this extent the truth of statements is based on anticipating the realization of the good life." *Id.* Habermas contends that "the dialectical course of history [reveals] the traces of violence that deform repeated attempts at dialogue and recurrently close off the path to unconstrained communication . . . ." *Id.* at 315.

51. Habermas, *Wahrheitstheorien*, *supra* note 48, at 251-52, quoted in McCarthy, *supra* note 46, at 316.

52. *Id.*

53. Habermas, *Communicative Competence*, *supra* note 48, at 372.

54. As a meta-norm for theoretical and practical truth, Benhabib describes four conditions central to the ideal speech situation:

[F]irst each participant must have an equal access to initiate and to continue communication; second each must have an equal chance to make assertions, recom-

"the peculiarly unforced compulsion of a better argument dominate[s]"?<sup>55</sup> Stripped of all worldly influences, Habermas' model of unconstrained conversationalism appears to be vacuous.<sup>56</sup>

Furthermore, must there always be a uniquely better argument, or might not the ideal speech situation function only as a method of eliminating certain arguments? In this event, the ideal speech situation reduces the field of possible arguments, yet some additional procedure must take over in order for an individual to endorse one argument over all others.

In addition, if unfettered communication permits a practical actor to express her innermost nature, what gets expressed? If all distorting influences are shed, what will this ideal of free choice rely upon? Is Habermas implying a noble savage conception underlying distorted communication? If so, he must describe this conception of human nature in greater detail. Or is he relying on a Kantian or existentialist conception of freedom? Neither view seems to capture Habermas's meaning. But then he must explain exactly what underlies free choice. In short, it is completely unclear what is left of the self when all distortions are removed.

Even if we grant that the ideal speech situation is intelligible, how does an individual decide what to believe? How do we distinguish between distorting influences and legitimate historical reasons for adopting a particular value? If ideal speech includes historical reasons for belief, how do we distinguish good and bad historical reasons? If ideal speech precludes historical reasons for belief, the individual is left free, in the worst sense of "free," to create her own reasons for belief. In this case, the individual's reasons are arbitrary. And "freedom" or arbitrariness has no chance of contributing to the resolution of conflict.<sup>57</sup>

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mendations, and explanations, and to challenge justifications. . . . Third, all must have equal chances as actors to express their wishes, feelings, and intentions; and fourth, speakers must *as if* in contexts of actions there is an equal distribution of chances "to order and resist orders, to promise and refuse, to be accountable for one's conduct and to demand accountability in others."

BENHABIB, *supra* note 50 at 285 (quoting Habermas, *Wahrheitstheorien*, *supra* note 48, at 256).

These are precisely the kinds of conditions associated with any adequate conversational theory.

55. Habermas, *Summation and Response*, *supra* note 49, at 161.

56. See DAVID INGRAM, HABERMAS AND THE DIALECTIC OF REASON 169 (1987).

57. This is a far cry from more common notions of conversationalism where people with values, presuppositions, and yes, even prejudices, converse with their opponents or enemies in order to work out a possible solution that is acceptable to all. In this case, some

A further problem with Habermas' conception of ideal speech is that it appears to equate truth with justification. As McCarthy states, "[t]he question, Under what conditions is a statement true? is in the last analysis inseparable from the question, Under what conditions is the assertion of that statement justified?"<sup>58</sup> Equating truth with justification risks rendering both concepts incoherent. Furthermore, if we equate truth with consensus, we have no way to distinguish between different kinds of consensus.<sup>59</sup> There often exists a consensus on some matter that turns out to be erroneous. What is required is some notion distinguishing good and bad consensus. But that is precisely the job of truth; hence, since truth is required to distinguish between good and bad consensus, consensus cannot be used to explain truth.

Whereas Habermas's theory of communicative action may be interpreted as a contemporary foundationalist attempt to ground human conversation in universality and objectivity, Kai Nielsen echoes Habermas's theory while trying to fashion an anti-foundationalist conception of ideal speech. For Nielsen,

[the ideal conditions] must be a situation in which our legitimating beliefs (including, of course, central moral beliefs) are formed and argument for them is sustained in conditions of absolutely free and unlimited discussion and deliberation. All parties to the institutions and practices being set up must be in a position such that they could recognize that they are freely consenting to their establishment under conditions in which the only constraints on their acceptance derive from the force of the better argument or the more careful deliberation.<sup>60</sup>

We should not let ourselves be seduced by the initial attractiveness of this position. What does "conditions of absolutely free and unlimited discussion and deliberation" mean? Does this preclude only external coercion? Internal coercion? What could "absolutely" mean in this context? What does "better argument" or "more careful deliberation" mean? Once we begin to

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common ground is appealed to, or, in the limiting case, a formal procedure is employed for deciding policies that respect each voice in the conversation.

58. MCCARTHY, *supra* note 46, at 303.

59. *Cf. id.* at 304 (discussing Habermas's formulation of "rational consensus [as] the ultimate criterion of truth").

60. See Kai Nielsen, *Searching for an Emancipatory Perspective: Wide Reflective Equilibrium and the Hermeneutical Circle*, in *ANTI-FOUNDATIONALISM & PRACTICAL REASONING: CONVERSATIONS BETWEEN HERMENEUTICS & ANALYSIS* 143, 158 (E. Simpson ed., 1986).

explicate these notions we will necessarily return to the same cognitive or rationalistic structures from which we fled.<sup>61</sup>

More importantly, is Nielsen trying to achieve an Archimedean perspective from which to decide questions of value? According to Nielsen, it is through an ideal model of "undistorted, non-ideological discourse" that we reach "a rational consensus."<sup>62</sup> This ideal model should be contrasted with ordinary discourse. Consider the following:

In our class-divided, ethnically-divided and religiously-oriented cultures . . . we do not get such a consensus; but if we were to get a consensus under the conditions of undistorted discourse . . . , a consensus which would plainly be an unforced consensus and a consensus which is conceivable no matter how unlikely it may be, then in such a circumstance we could have conditions in place for undistorted, non-ideological discourse.<sup>63</sup>

In such circumstances we achieve "a certain kind of objectivity."<sup>64</sup> However, "rational consensus" and "objectivity" are rationalistic terms employed by those who believe we can achieve a neutral point of view, a value-free perspective from which to adjudicate competing values. But such a perspective is illusory. In fact, we can never achieve a value-free vantage point from which to evaluate competing values. There are no ideal, value-free observers. We never engage in undistorted discourse, because in order for discourse to count as expressing a point of view, it must necessarily be distorted. The question is not how to achieve undistorted discourse, but whether there is a discourse that, despite its distortions, will permit actors to communicate, discuss, and dispose of legal and moral conflicts. The notion of an ideal speech situation, however, even if possible, would not have the conceptual resources to permit the resolution of actual conflicts.

The consensus theory of truth together with its model of ideal speech fails to provide a viable model of conversationalism. Its major weakness is its abstractness, its failure to appreciate the concrete, and multifarious contexts in which moral dilem-

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61. This points to a general defect in conversationalist theories, namely, that an appeal to conversationalism tells us nothing until we specify the argument forms that are permitted. However, once we reintroduce the notion of an argument don't we risk returning to epistemic foundationalism?

62. Nielsen, *supra* note 60, at 158.

63. *Id.*

64. *Id.*

mas arise.<sup>65</sup> Can a more thoroughly pragmatic conception of conversationalism, one that gives particularized values a central place in discourse, succeed where consensus theory failed? The following section explores this possibility.

#### D. *Pragmatic Conversationalism*

Richard Rorty's pragmatic conception of conversationalism is a plea to abandon traditional philosophical inquiries into the essence of knowledge, truth, and justification. Rather than being ground in the causal order of the world, these inquiries are part of the normative order or "logical space" of reasons for belief and value.<sup>66</sup> The pursuit of reason promises, but fails to deliver, eternal truths about people and their relationship to the world. Instead, according to Rorty, we should adopt "the Socratic virtues—[the] willingness to talk, to listen to other people, to weigh the consequences of our actions upon other people . . . ."<sup>67</sup> And these "are *simply* moral virtues. They cannot be inculcated nor fortified by theoretical research into essence."<sup>68</sup>

Should conversationalism replace reason as the chief method of resolving disputes?<sup>69</sup> The difference between reason and conversationalism is reason's insistence that there are independent constraints on what we believe and value.<sup>70</sup> For pragmatism, "there are no constraints on inquiry save conversational ones—no wholesale constraints derived from the nature of objects, or of the mind, or of language, but only those retail constraints provided by the remarks of our fellow-inquirers."<sup>71</sup> It is a mistake, according to Rorty,

to hope that objects will constrain us to believe the truth about them, if only they are approached with an unclouded mental eye, or a rigorous method, or a perspicuous language. [The pragmatist] wants us to give up the notion that God, or evolu-

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65. See generally Martha Minow & Elizabeth Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

66. Here Rorty follows Wittgenstein and Kuhn in regarding social practice as the source of reasons.

67. RICHARD RORTY, *Pragmatism, Relativism, and Irrationalism*, in CONSEQUENCES OF PRAGMATISM 160, 172 (1982).

68. *Id.*

69. *Id.*

70. There are at least two distinct senses of the term conversation. The first sense equates conversation with history. STANLEY ROSEN, *THE ANCIENTS AND THE MODERNS: RETHINKING MODERNITY* 178 (1989). The second sense refers to the social or intersubjective character of human inquiry and problem solving. *Id.* at 181.

71. RORTY, *supra* note 67, at 165.

tion, or some other underwriter of our present world-picture, has programmed us as machines for accurate verbal picturing, and that philosophy brings self-knowledge by letting us read our own program. The only sense in which we are constrained to truth is that, as Peirce suggested, we can make no sense of the notion that the view which can survive all objections might be false. But objections—conversational constraints—cannot be anticipated. There is no method for knowing *when* one has reached the truth, or when one is closer to it than before.<sup>72</sup>

Those views that withstand the assault of other conversational voices at any given time are the views that we crown as true. In this picture, truth stands for nothing other than the best view conversation has to offer.<sup>73</sup>

What are “conversational constraints”? Here Rorty resorts to the distinction between normal and abnormal discourse,<sup>74</sup> or perhaps better for our purposes, normal and abnormal conversations.<sup>75</sup> Normal conversations contain settled paradigms or conventions “about what counts as a relevant contribution, what counts as answering a question, what counts as having a good argument for that answer or a good criticism of it.”<sup>76</sup> Abnormal conversation “is what happens when someone joins in the discourse who is ignorant of these conventions or who sets them aside.”<sup>77</sup> Normal conversation produces judgments that all bona fide participants—those considered rational—can accept.<sup>78</sup> In contrast, abnormal conversation “can be anything from nonsense to intellectual revolution, and there is no discipline which describes it, any more than there is a discipline devoted to the study of the unpredictable or ‘creativity.’”<sup>79</sup>

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72. *Id.* at 165-66.

73. Pragmatism does not necessarily offer a reductionist conception of truth. Truth is not defined as “the best view conversation has to offer.” Rather, no definition or theory of truth is offered at all.

74. RORTY, *supra* note 3, at 320.

75. Some might consider abnormal conversation to be an oxymoron. If no conventions govern a situation, one is not conversing, but just shouting or barking. Still, there are degrees of abnormal conversation, as well as degrees of agreement. Moreover, the stark distinction between normal and abnormal conversation overlooks the fact that there are large areas of inquiry in any domain where there are accepted paradigms, but the precise parameters of the paradigm are not completely determinate. In such circumstances, there is a mixture of the coherentism typical of normal conversation with the pragmatism associated with revolutionary conversation.

76. RORTY, *supra* note 3, at 320.

77. *Id.*

78. *Id.*

79. *Id.*

Normal conversation mimics foundationalist epistemology. In normal conversation, one presents and rejects arguments, offers justifications, accepts explanations, and so forth. Deductive and inductive logical principles prevail as well as informal logical rules. You are entitled to criticize your conversational partner if she violates *modus ponens*, if she ignores empirical evidence, or if she presents an *ad hominem* argument.<sup>80</sup> Normal conversation permits you vindicate particular judgments about what to believe and value. What normal conversation will not countenance is an attempt to justify itself.<sup>81</sup>

The question "Is normal conversation justified?" is meaningless if asked as a justification for normal conversation generally. Similarly, such a question is meaningless if asked of a particular form of normal conversation after the results of normal conversation have been validated by normal methods. Asking for such a justification means you have already started out on the wrong foot.<sup>82</sup> Asking for a justification of pragmatically successful paradigms and conventions in a given area reveals nothing more than an inability to wean oneself away from foundationalist proclivities.

One's strategy in asking for a justification might of course be to expose the inadequacy of normal conversation in a particular area. One might intend to turn toward abnormal or revolutionary conversation in order to abandon or replace the conceptual framework in that area. But if not, one cannot raise a normal conversational challenge regarding the desirability of successful normal conversation. Normal conversation is either its own justification or it has no justification at all. Once normal

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80. In different areas of inquiry, normal conversation may have additional rules and standards to which an individual must adhere.

81. Of course, the question "Is normal conversation justified?" is a perfectly sensible question within a particular activity. In this instance, the inquirer is asking whether there is enough agreement to pursue normal inquiry. In astrology, for example, the question may be raised and answered negatively. A true negative response to this question usually means that we should abandon serious conversation within the subject area under consideration. In the absence of sufficient agreement on how to answer astrological questions, attempts at serious—read normal—conversation in astrology should be abandoned. Additionally, such attempts should be abandoned because astrological methods and conclusions conflict with other scientific conversations that have been enormously successful. There are, however, no independent constraints, no *a priori* reasons for abandoning attempts at normal conversation in astrology.

82. There is a striking parallel between the unintelligibility of asking this question and Dworkin's rejection of what he calls external skepticism. See RONALD DWORKIN, *LAW'S EMPIRE* 78-85 (1986).

conversation generates pragmatic benefits, there can be no further question of its legitimacy.

Isn't this conception of normal conversation subject to skeptical challenge? In particular, doesn't it degenerate into relativism, subjectivism, and then solipsism? Steven Winter insists that it does:

The view that nothing constrains meaning inevitably forces social coherence theorists like Rorty to confront the fact that they cannot describe what maintains coherence across the gulf introduced by intersubjective communication. One is forced to confront the possibility that each individual may have her own internally coherent system of meaning. In that event, intersubjective communication can occur only if we can get inside each other's solipsistic coherence system. . . . Because social coherence theory recognizes no constraints save internal consistency, it is forced to move from relativism to subjectivism, and from social coherence to solipsism.<sup>83</sup>

This alleged "slide to solipsism" is surely to be avoided.<sup>84</sup> But does Rorty's view risk this alleged slide? Since Rorty contends that linguistic meaning occurs only in a social context, it is difficult to understand how his view leads to solipsism. A person simply cannot possess a *language* that is meaningful to her alone. Consequently, in Rorty's pragmatism, it is meaningless to suppose "that each individual may have her own internally coherent system of meaning."<sup>85</sup>

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83. Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1127 (1989).

84. In characterizing the argument that incommensurability leads to solipsism, one philosopher of science writes, "even the smallest differences in the sets of sentences embraced by two different speakers would entail systematic differences in the meanings of all the terms they share. It would then be a mystery how they ever understood one another . . . ." PAUL M. CHURCHLAND, *SCIENTIFIC REALISM AND THE PLASTICITY OF MIND* 75 (1979). However, "incommensurability is a matter of degree, and we live with it everyday. In subtle degree it is a background feature of almost all of our non-trivial discourse with one another." *Id.* at 75-76 This only shows that the synonymy "across languages, and the homodoxies . . . across idiolects are very seldom perfect . . . ." *Id.* at 77.

85. *Id.* On pragmatic grounds, a person can not have an internally consistent set of beliefs completely different from everyone else's internally consistent set of beliefs. The pragmatist has a deeply held, and pragmatically useful, belief that there exists a community of other people similar to herself with whom she continually interacts. This community shares her language and beliefs. Indeed, it makes sense to ascribe beliefs to her only insofar as her attitude of endorsing certain sentences are the same as other members of her community. Consequently, we cannot be "stuck in our heads." For Rorty, "[a]t worst, the community of inquirers to which she belongs, the one which shares most of her beliefs, is stuck, for the time being, within its own vocabulary. But bemoaning this is like bemoaning the fact that we are, for the time being, stuck in our own solar system. Human finitude is not



Solipsism can be construed either as a conceptual or as an epistemological thesis. As a conceptual thesis, solipsism maintains that the statement "Julio is in pain" when uttered by me is meaningless since pain statements have meaning only in relation to *my* pain. Epistemological solipsism maintains that third-person pain statements may be meaningful, but I can never know that Julio is in pain because *I* can never have *his* pain. Rorty's pragmatic conception of meaning and of mentalistic language precludes his being a conceptual solipsist. Pain reports are not meaningful because they refer to some ghostly event; their meaning instead derives from their role in the appropriate language-game. This language game should be retained as long as it is useful.<sup>86</sup> Rorty is not an epistemological solipsist because he does not believe that there is any privileged access to pain reports. Consequently, I am not cut off from observing Julio's pain since I can observe Julio *in pain*.

More specifically, Rorty's views avoid the slide to solipsism for two reasons. First, it is not Rorty's position that "nothing constrains"; indeed, according to Rorty's pragmatism, a particular vocabulary is meaningful only if it gets accepted by the appropriate linguistic community—with all the constraints that accompany normal conversation in that community.<sup>87</sup> And second, a particular vocabulary will get accepted by the linguistic community only if it has the pragmatic benefit of helping us to cope with our environment.

What is important, in Rorty's view, is that there are no *formal* or *a priori* constraints—constraints that we can know in advance—constraints that will decisively rule out (or in) only certain answers. Fuzziness, in Rorty's thinking, is not bad thinking, nor is it relativistic or subjectivistic thinking. Instead, it is simply the view that what "constrains" are the particular goals and purposes of individual linguistic communities.

Winter is also confused concerning Rorty's distinction between "normal discourse" and "abnormal discourse." According to Winter, "Rorty . . . offers no account of how the

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an objection to a philosophical view." RICHARD RORTY, *Inquiry as Recontextualization*, in 1 OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS 93, 101-02 (1991) [hereinafter RORTY, 1 PHILOSOPHICAL PAPERS].

86. Indeed, he believes that pain talk may ultimately be abandoned. RORTY, *supra* note 3, at 70-127.

87. Even if Rorty believed that nothing *constrains*, it does not follow that nothing *guides*. Consequently, social coherence and meaning are explained by guiding factors.

consensus defining the coherence conventions of normal discourse is formed.”<sup>88</sup> In explaining the concept of criteria as it is used in normal discourse, Rorty writes:

In such a [post-Philosophical culture], criteria would be seen as the pragmatist sees them—as temporary resting-places constructed for specific utilitarian ends. On the pragmatist account, a criterion (what follows from the axioms, what the needle points to, what the statute says) *is* a criterion because some particular social practice needs to block the road of inquiry, halt the regress of interpretations, in order to get something done. So rigorous argumentation—the practice which is made possible by agreement on criteria, on stopping-places—is no more *generally* desirable than blocking the road of inquiry is generally desirable . . . . If the purposes you are engaged in fulfilling can be specified pretty clearly in advance (e.g., finding out how an enzyme functions, preventing violence in the streets, proving theorems), then you *can* get it. If they are not (as in the search for a just society, the resolution of a moral dilemma, the choice of a symbol of ultimate concern, the quest for a “postmodernist sensibility”), then you probably cannot, and you should not try for it.<sup>89</sup>

Winter contends that this requires what Rorty cannot admit, that “the parties to the discourse are already speaking enough of the same language-game that they can ‘specify pretty clearly in advance’ the purposes they want to fulfill.”<sup>90</sup> But surely Rorty can admit this? Once a new language-game is normalized, the relevant purposes can be specified pretty clearly. What Rorty cannot admit is that there is an interesting, systematic explanation of how normal language-games are created.<sup>91</sup> But then Rorty has no intention of systematically explaining how normal practices are created; indeed, his point is that a new language-game occurs when practitioners sense the futility of an old language-game and begin (abnormally) to construct new vocabularies to ease their concerns.<sup>92</sup> The result of this is either a new

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88. Winter, *supra* note 83, at 1124.

89. RORTY, *Introduction: Pragmatism and Philosophy*, in CONSEQUENCES OF PRAGMATISM, *supra* note 67, at xli-xlii

90. Winter, *supra* note 83, at 1126.

91. Rorty does have a rough and ready explanation of how normal conversation occurs. RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 83 & n.4 (1989).

92. Metaphor plays a central role in creating and altering normal discourse. RORTY, *Non-reduction Physicalism*, in 1 PHILOSOPHICAL PAPERS, *supra* note 85, 113, 124. Human beings have the ability “to utter meaningless sentences—that is, sentences which do not fit into old language-games and serves as occasions for modifying those language-games and creating new ones. This ability is exercised constantly in every act of culture and daily life.

language-game with its own set of purposes, problems, and solutions—an abandonment of the old game without replacement—or a continuation of abnormal discourse with little hope of normalization.<sup>93</sup>

That conversations begin at some point is true but uninteresting unless one believes that there are natural, pre-linguistic starting points for all “valid” conversations. If one concedes that there are no such starting points, that all conversation originates in culture as the product of an already existing conversation, then one will not search for an extra-linguistic reality in which to ground culture. Rorty’s contrast between pragmatism and intuitive realism illustrates this point.

This upshot of the confrontation between the pragmatist and the intuitive realist about the status of intuitions can be described either as a conflict of intuitions about the importance of intuitions, or as a preference for one vocabulary over another. The realist will favor the first description, and the pragmatist, the second. It does not matter which description one uses, as long as it is clear that *the issue is one about whether philosophy should try to find natural starting-points which are distinct from cultural traditions, or whether all philosophy should do is compare and contrast cultural traditions*. This is, once again, the issue of whether philosophy should be Philosophy. The intuitive realist thinks that there is such a thing as Philosophical truth because he thinks that, deep down beneath all the texts, there is something which is not just one more text but that to which various texts are trying to be “adequate.” The pragmatist does not think that there is anything like that. He does not even think that there is anything isolatable as “the purposes which we construct vocabularies and cultures to fulfill” against which to test vocabularies and cultures. But he does think that in the process of playing vocabularies and cultures off against each other, we produce new and better ways of talking and acting—not better by reference to a previously known standard, but just better in the sense that they come to

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In daily life, it appears as wit. In the arts and sciences, it appears, retrospectively, as genius.” *Id.* at 125.

93. Winter also objects to Rorty’s conception of normal discourse on the ground that the indeterminacy of language prevents us from fulfilling our purposes. Winter writes that “‘preventing violence in the streets’ is one of those things that we just do not know how to do . . . .” Winter, *supra* note 83, at 1126. But Winter is surely mistaken. Certainly we know how to prevent violence in the streets. We are just unwilling, one way or the other, to pay the price.

*seem* clearly better than their predecessors.<sup>94</sup>

Rorty hopes that culture represses “[t]he urge to make philosophy into Philosophy . . . to make it the search for some final vocabulary which can somehow be known in advance to be the common core, the truth of all the other vocabularies which might be advanced in its place.”<sup>95</sup> We should repress this urge because “there is nothing deep down inside us except what we have put there ourselves, no criterion that we have not created in the course of creating a practice, no standard of rationality that is not an appeal to such a criterion, no rigorous argumentation that is not obedience to our own conventions.”<sup>96</sup> In short, we are simply left with our contingent selves, “with no links to something Beyond.”<sup>97</sup> Intellectual culture, including physics, literature, philosophy, art, and so forth, is to be evaluated equally by determining whether it “will help us get what we want (or about what we *should* want).”<sup>98</sup>

Rorty’s observation that “there is nothing deep down inside us except what we have put there ourselves” hardly entails that culture or the nature of the self is *exclusively* the result of human choice. Culture and the self are products of multifarious elements, such as biological, anthropological, ethical, and prudential influences. Therefore, there very well may be things that are “deep down inside us” that we did not “put there ourselves.”<sup>99</sup>

Even if everything deep inside us was put there by human choice, it does not follow that it is easily alterable by human choice.<sup>100</sup> One generation’s cultural creation is the next generation’s cultural legacy. Both one’s culture and one’s self are conceived of in terms of this legacy. Understanding the intricate

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94. RORTY, *Introduction: Pragmatism and Philosophy*, in CONSEQUENCES OF PRAGMATISM, *supra* note 67, at xxxvii.

95. *Id.* at xlii.

96. *Id.*

97. *Id.* at xlii-xliii.

98. *Id.* at xliii.

99. Our normal vocabularies shape our beliefs and values. Charles B. Guignon & David R. Hiley, *Biting the Bullet: Rorty on Private and Public Morality*, in READING RORTY 339, 344 (Alan R. Malachowski ed., 1990). Consequently, changing these vocabularies cannot be merely a matter of will. *But see id.*

100. Even if we conceded for the purposes of argument that everything included in our deep structure results from human choice, it hardly follows that particular humans can replace the deep structure merely by choosing to do so. Consequently, determining the deep structure not only tells us who we are, but also tells us just what the stakes are in effecting change.

nature of this legacy is a precondition of creating new intellectual and political possibilities.

Similarly, the notion of human essence is pragmatically useful even after abandoning God and transcendental reality. Formulating a conception of a human essence—even one that is relative to the particular history of the human race—provides a standard for assessing our culture and ourselves.<sup>101</sup> Our biological, anthropological, and cultural history may be contingent—the result of historical accidents—yet still represent the standard by which we can assess various choices in conversation, social organization, and personal morality.<sup>102</sup>

Moreover, the origins of human culture may be contingent, yet it may nevertheless be useful to appeal to connections between various stages of cultural and historical development.<sup>103</sup> For example, one could argue that given the decline of feudal and aristocratic society, capitalism, not communism, was inevitable. Similarly, cultural inevitabilities might arise from biological or natural facts. For instance, given the contingent fact that seventy percent of the earth's surface is water, sailing and shipping might be inevitable. Lastly, while it might be a contingent fact that the human species is capable of sympathy, it might be a noncontingent fact that given this capacity, human language will contain a language of morality through which we can express sympathy.<sup>104</sup>

Human culture might be contingent, yet a complete characterization of it may require deep explanations, explanations that

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101. Rorty's view that intellectual inquiry must occur against the backdrop of cultural norms appears to position culture in the place of God, science, transcendental reality, or the structure of reason. Moreover, he fails to identify how we determine what a particular culture stands for or to distinguish one culture from another. Additionally, he fails to provide a way of distinguishing one cultural period from another. See Bernard Williams, *Auto-da-Fe: Consequences of Pragmatism*, in *READING RORTY*, *supra* note 99, at 26, 27 ("If one says that any human thought is inescapably immersed in the traditions of its period, what counts as 'a period' is an important question; and, in particular, what tradition performs this basic function for us.")

102. Once we abandon philosophical foundationalism, I see nothing wrong with using everything we know about humankind to assess humankind's development. This approach relies on a distinction between deep and surface explanations of cultural and human development, and enables us to use our culture's deep structure, as a standard for social development. See Robert J. Lipkin, *Altruism and Sympathy in Hume's Ethics*, 65 *AUSTRALASIAN J. PHIL.* 18, 24-26 (1987).

103. We might even characterize these connections as necessary, not for metaphysical or epistemological purposes, but simply to suggest that given one set of historical circumstances another set is inescapable from a practical point of view.

104. See Lipkin, *supra* note 102.

reveal inevitabilities in the culture's development. As a consequence, Rorty's framework is too severe. In his view, either human nature and society have an essential core or they are thoroughly contingent. But of course, we need not adopt this framework. A culture might be contingent and, nevertheless, still reveal that certain stages in the culture's development were inescapable.

Furthermore, although we may be contingent creatures, some of our important natural and cultural characteristics might have become settled. This does not mean that they may never be altered, but rather that altering them might constitute an enormous natural or cultural task. Before we embark on such a difficult journey, it may be beneficial to understand pragmatically what our deep structure is. It is natural and innocuous to describe this enterprise as articulating historically essential features of individuals. These features are essential because they are necessary ingredients of the best interpretation of what we are.<sup>105</sup>

Philosophical conversations explore the deep characteristics of a culture.<sup>106</sup> We may coin the unlovely term "foundationalize" and describe philosophical conversations as foundationalizing culture. Conversations that foundationalize culture show what is essential to that culture.<sup>107</sup> Yet what is essential to that culture may not have been necessary or inevitable from the beginning.<sup>108</sup>

Finally, we can accept Rorty's deconstructionist results and still find a place for foundationalism (though not the same place as before Rorty). In other words, foundationalism is an integral part of the very cultural criticism that Rorty endorses. Foundationalism is the attempt to characterize the deep structure of

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105. Once we identify the relevant ingredients, we can then determine whether they have their own structure or unity.

106. Certain kinds of conversations within a culture may be inevitable given the biological and anthropological nature of the culture.

107. Rorty urges us to pay special allegiance to Western culture. To do so, I would say, requires that we foundationalize Western society. This does not necessarily mean that interpreting the deep structure of a culture will escape controversy, or that even a coherent description of this culture will always be found. What it does mean, and what Rorty seems to reject, is that there can be deep systematic and illuminating understanding of contingent cultures.

108. In order to compare and contrast different societies, we must be able to foundationalize their different cultures, that is, we must be able to articulate each culture's deep structure. The fact that culture is contingent does not render this process any less important.

contemporary culture as well as the deep structure of the contemporary nature of the self. No doubt, we can never again embrace essentialism as before, but we still can and should pay considerable attention to our culture's deep structure.<sup>109</sup>

In Rorty's recent work, his conversational turn is supported by a turn to politics. Rorty's liberal irony counsels us to reduce cruelty and humiliation in our public lives. In our private moments, we may choose perfection if that suits our temperament. Furthermore, according to Rorty, it is quixotic to seek an integration of the private and the public, or to look for a general guide in order to tell us how much time to devote to public as opposed to private matters. There is no "comprehensive philosophical outlook [which] would let us hold self-creation and justice, private perfection and human solidarity, in a single vision."<sup>110</sup> Rorty writes:

There is no way in which philosophy, or any other theoretical discipline, will ever let us do that. The closest we will come to joining these two questions is to see the aim of a just and free society as letting its citizens be as privatistic, "irrationalistic," and aestheticist as they please so long as they do it on their own time—causing no harm to others and using no resources needed by those less advantaged.<sup>111</sup>

This unremarkable point of view supports Rorty's contention that "there is no way to bring self-creation together with justice at the level of theory."<sup>112</sup> Why? Because "[t]he vocabulary of self-creation is necessarily private, unshared, unsuited to argument, the vocabulary of justice necessarily public and shared, a medium for argumentative exchange."<sup>113</sup> How does Rorty's anti-essentialism meld with this contention that the language of self-creation is necessarily private and the language of justice is necessarily public?<sup>114</sup> Rorty fails to notice something curious about endorsing the private-public dichotomy, a dichot-

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109. See *supra* note 107.

110. RORTY, *supra* note 91, at xiv.

111. *Id.*

112. *Id.*

113. *Id.*

114. It may be difficult to imagine how the language of justice could be private, although it might be possible to imagine a person believing that the dictates of justice apply to him alone. However, the language of self-creation is necessarily private only in relation to narrowly individualistic conceptions of the self, intimacy, and the community. A rich and illuminating language of self-creation might be thoroughly public and pervasively open to criticism from others. Indeed, the language of romance and utopia appear to be a language of public self-creation.

omy that would be better defended by traditional foundationalism.<sup>115</sup> Rorty's pragmatism should tell him that if the distinction can be drawn at all, it can be drawn only with respect to particular goals and purposes on particular occasions.<sup>116</sup> No general dichotomy between private and public is possible.<sup>117</sup>

Taking pragmatism seriously means giving up general dichotomies such as the private-public split<sup>118</sup> or the contrast between revolution and reform.<sup>119</sup> Similarly a critical pragma-

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115. The public-private split is typically employed as the basis of legitimate coercive governmental power. If we value freedom and privacy, coercive governmental power is legitimate only insofar as it applies to the public domain, or circumstances in which one person harms another. But one person's privacy may be another person's harm, e.g. those who favor abortion see it as a privacy issue, while those opposing it see it as an issue of harming the fetus. Consequently, the public-private split, rather than being the basis of determining legitimate governmental coercive power, may be determined only after one decides the legitimacy issue. See Singer, *supra* note 6, at 40-47.

116. This does not entail that there is no distinction between the two. What it does mean is that there is no systematic way to place perfectionism on the side of the private and justice on the side of the public.

117. Moreover, if we are able to draw this distinction, why would each individual not be capable of lexically ordering the pairs? There may be no general method for deciding this across persons, but each individual may nonetheless decide the issue for herself.

118. Rorty should give up his insistence on the dichotomy between transformation and reform in political theory. See Richard Rorty, *Two Cheers for the Cultural Left*, 89 So. ATLANTIC Q. 227, 229 (1990). Similarly, "[t]he difference between saying 'our society is mainly unreasonable' and saying 'we are betraying our society's traditions' " is less illuminating than Rorty seems willing to admit. *Id.* at 228. It is difficult to understand how we can describe a society as having reasonable traditions that are continually betrayed. If a country's "traditions" are systematically betrayed, then these "traditions" are not the country's traditions; rather, they are charades to which people pay lip service.

119. Is it curious that Rorty insists upon these dualisms, since elsewhere he warns against dualism generally. In inveighing against Hirsch's distinction between "meaning and significance," for example, Rorty writes:

I think he is right in suggesting that philosophy of science and literary theory ought to carry over into each other. But I think that this distinction between 'meaning' and 'significance' is misleading in certain respects. *My holistic strategy, characteristic of pragmatism (and in particular Dewey), is to reinterpret every such dualism as a momentarily convenient blocking-out of regions along a spectrum, rather than as recognition of an ontological, or methodological, or epistemological divide.*

RORTY, *Texts and lumps*, in 1 PHILOSOPHICAL PAPERS, *supra* note 85, at 78, 84 (emphasis added).

Why then should we recognize a moral or political divide? Is it that the private/public distinction or the distinction between revolution and reform is more real than the meaning/significance distinction, or the subjective/objective distinction or the fact/value distinction? Or is it that the private/public distinction and the revolution/reform distinction are methodologically or epistemically required? Surely, Rorty cannot defend his adherence to these distinctions in this way. How then can he defend them? Only by saying that they are more *useful* can Rorty defend them on his own terms? But useful for what? And for whom? Distinctions such as these must be made only "as a momentarily blocking-out of regions along a spectrum, rather than recognition of an ontological, or methodology, or epistemo-



tism implies that once one's goals are formulated, such as the goal of reducing cruelty and humiliation, there is no illuminating dichotomy between incremental and systematic change.<sup>120</sup> The reason for this is that the goal of reducing cruelty and humiliation in contemporary society is likely to entail enhancing empowerment and providing for transformative institutions throughout the culture. The argument here is that taking pragmatism seriously requires taking a more radical stance.<sup>121</sup>

To summarize, Rorty's conclusions about foundationalism and essentialism outstrip the range of his pragmatic arguments. Given Rorty's conceptions of language, contingency, and epistemology, there still exists a role for philosophy in intellectual activities. Philosophy interprets the deep structure of cultures and persons as well as the deep structure of such activities as knowing, valuing, and judging. Thus, Rorty's insistence on abandoning these activities goes too far.

On the other hand, liberal ironism is an anemic and inconsistent political outgrowth of Rorty's pragmatism. A critical pragmatist should challenge such dichotomies as the private and public, or the distinction between revolution and reformation. Pragmatism, properly understood, should be reluctant to follow Rorty in endorsing American institutions as the best available. Indeed, critical pragmatism should resist asking the general, and virtually meaningless, question of which country has the best institutions available. Instead, she would ask *best for whom?* Once this question is taken seriously, the complexity of sweeping, general answers to questions of this type defies the sort of defense of bourgeois values given enthusiastically by Rorty.<sup>122</sup>

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logical divide." *Id.* Neither should they be used as a general principle of political legitimacy.

Finally, and most important, "Rorty's picture of [our] culture as one in which new linguistic forms are continually killing off old ones, seems better suited to a politics of permanent revolution than to liberalism." Tom Sorrell, *The World from its Own Point of View*, in *READING RORTY*, *supra* note 99, at 11, 24.

120. This means that given the goals of reducing cruelty there is no philosophically interesting way to distinguish between liberalism and radicalism.

At a conference on pragmatism Rorty made an intriguing remark that as a result of recent events in Europe no one knows what socialism signifies. Rorty presumably believes that socialism has no meaning because no country is any longer (or ever was?) socialist. But then what happened to the value of *books*? Surely, the classics of socialist thought provide at least the minimal meaning of socialism as a social theory. Why then should the absence of socialist societies affect our understanding of socialism?

121. See Singer, *supra* note 6, at 59-70. See generally Allan C. Hutchinson, *The Three 'Rs': Reading/Rorty/Radically*, 103 HARV. L. REV. 555 (1989) (Book Review).

122. Richard Rorty, *Postmodern Bourgeois Liberalism*, 80 J. PHIL. 583 (1983).

*E. A Critical Legal Studies Approach to Conversationalism*

Like Rorty's anti-foundationalism, the Critical Legal Studies movement calls for a rejection or radical redeployment of traditional conceptions of legal methodology and theory. According to these critics, legal epistemology—the use of reason, justification, truth, objectivity, neutrality, formalism, rationality, and theory—is impoverished and should be abandoned. One strain of this movement advocates replacing legal epistemology with conversation. Consider Joseph William Singer's statement of this point of view.

Legal reasoning . . . consists of conversation. Legal reasoning is not an accurate representation of natural rights or sovereign commands. Traditional legal theorists assume that if legal reasoning is neither accurate representation nor an intersubjective decision procedure, then we are left intolerably free to say anything.<sup>123</sup>

With freedom comes the possibility of transforming overly entrenched concepts and encrusted institutions into more fluid

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Rorty's characterization of his community as European or Western results from not taking Rortyan pragmatism seriously. Pragmatism, properly understood as a liberating strategy, requires understanding oneself, understanding others, and treating other cultures as equally valid experiments in human flourishing.

Rorty's affinity to European culture is even more ironic as soon as one appreciates the reasons that some native Americans give for equating the death of Europe and the West with the survival of the rest of the world. See, e.g., Russell Means, *Fighting Words on the Future of the Earth*, MOTHER JONES, Dec. 1980, at 22.

Pragmatism, properly understood, should be reluctant to follow Rorty in his dualistic use of "our culture" as opposed to "their culture." Rorty wishes to identify this culture with American traditions. But which traditions?

[Rorty] seems to think that he can simply appeal to Americans to be faithful to their own traditions, yet these are many and conflicting. They include *Dred Scott* as well as the Fourteenth Amendment, *Plessy v. Ferguson* as well as *Brown*, aggressive militarism as well as commitments to peaceful coexistence, McCarthyism as well as the First Amendment, willful union-busting courts as well as the Wagner Act, would-be dismantlers of the welfare state as well as its defenders, the New Right with its crusading moral agenda as well as the genial liberal intellectual establishment that Rorty seems to think definitively American.

IAN SHAPIRO, POLITICAL CRITICISM 48-49 (1990).

Similarly, political pragmatism should avoid contrasting "us" with "them." Rorty, at least in one place, enlarges the scope of "us" to include other people and other cultures "by treating them as part of the group among whom unforced agreement is to be sought." RORTY, *Science as Solidarity*, in 1 PHILOSOPHICAL PAPERS, *supra* note 85, at 35, 38.

Most importantly, it is doubtful that the liberal ideals of 'unforced agreement' and 'free and open encounters' are instantiated in American political life." SHAPIRO, *supra*, at 41. Domination and control play a large role in our society. *Id.* Consequently, Rorty's view fails to acknowledge "that one person's consensus is another's hegemony." *Id.*

123. Singer, *supra* note 6, at 51.

and humane ones. But the belief that freedom and transformation are scary should not be denigrated. If "[c]onversations are often free-wheeling, . . . [t]hey can take unexpected and dangerous turns."<sup>124</sup> Does this freedom mean that anything goes? Perhaps not. Perhaps the "rejection of the metaphors of accurate representation and decision procedures does not logically require us to become agnostic about all our moral and political values. To assume that it does unnecessarily and illogically pegs commitment to a privileged form of justification."<sup>125</sup> For Singer, the "[a]doption of the metaphor of conversation does not logically commit us to anything in particular. It does, however, allow us consciously to assume responsibility for what we do."<sup>126</sup>

What about conversations that turn toward racism, slavery, or genocide? Whatever the defects of traditional legal epistemology, one of its virtues seems to be that not every position has standing in a traditional legal dialogue. For example, intuitively pernicious judgments concerning racism, slavery, and genocide are ruled out in advance. In Singer's view, to exclude these positions in advance is impossible, since doing so relies upon an epistemological conception of a priori legitimacy and since notions of a priori legitimacy cannot be defended pragmatically.

Without the conception of a priori legitimacy, conversationalism can rule out certain positions in advance only by introducing the notion of a meta-conversation which informs us of what counts as an acceptable topic of conversation in the first place. But then how do we decide what can be said in this meta-conversation? The only way to block the regress here is for conversationalism to permit any topic to be discussed. That means we must be prepared to discuss slavery, racism, and genocide.<sup>127</sup> We must be prepared to enter into conversation with Hitler, Stalin, Pol Pot, Pinochet, Manson, and Bundy. We must engage in conversation even with those who clearly reject our belief in conversation or who firmly believe that theirs is a morally superior form of conversation.<sup>128</sup>

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124. *Id.*

125. *Id.* at 51-52.

126. *Id.* at 52.

127. If any perspective is a legitimate conversational topic, then it might prevail. That is why permitting racism, slavery, and genocide to be legitimate conversational topics is so troubling.

128. Need a conversationalist tolerate and try to accommodate every topic of conversation? Rorty insists that "[a]ccommodation and toleration must stop short of a willingness to work within any vocabulary that one's interlocutor wishes to use, to take seriously

Although the rejection of legal epistemology does not require us to become agnostic, it should temper our convictions. We should be more tentative, more inquiring, more critical of our own beliefs and values as well as the beliefs and values of others. If pragmatism counsels us to be ready to continuously weave and reweave our beliefs and values, then strident confidence must be abandoned. Moreover, it can be argued that in abandoning legal epistemology, we should seek consensus; perhaps that is the best we can hope for. If enough people plausibly conclude that we should alter our beliefs and values and there are no knockdown arguments for not supporting their conclusions, then perhaps we should alter our beliefs and values. But doesn't this conflict with moral experience? I am intuitively convinced that genocide is wrong. There is nothing that I can imagine that would alter my view. In this instance, it is natural to describe my belief as morally certain in that no conceivable moral argument could persuade me that genocide is right. It is not at all clear that Singer's pragmatism can account for this intuition. Further, suppose I am a committed socialist. Everyone now seems to believe that socialism is a dead-end and that capitalism is the hope of the future. Even though I do not have a knockdown argument against this belief, should I abandon my own convictions and endorse capitalism? Do we not believe that a person should be true to her own convictions, with or without a knockdown argument?

Singer cannot retreat behind the charge that the above argument is still tied to traditional legal epistemology. He cannot retreat in this fashion because, traditional legal epistemology aside, it is perfectly legitimate to wonder what remains after the rejection of traditional theory. Singer has an answer to this question, but one that presents him with additional problems. Singer writes:

When judges decide cases, they should do what we all do when we face a moral decision. We identify a limited set of alternatives; we predict the most likely consequences of following different courses of action; we articulate the values that are important in the context of the decision and the ways in which they conflict with each other; we see what relevant people (judges, scholars) have said about similar issues; we talk with

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any topic that he puts forth for discussion." RORTY, *The Priority of Democracy to Philosophy*, in 1 PHILOSOPHICAL PAPERS, *supra* note 85, at 175, 190.

our friends; . . . we choose what to do.<sup>129</sup>

This might help the individual judge or practical reasoner to determine what she believes and values, but it provides no intersubjective procedure for validating the individual's results. I have argued elsewhere that for legal reasoning to be a legitimate form of reasoning, it should provide ways of generating conclusions from both the individualistic-perspective as well as from the collectivist-perspective.<sup>130</sup> In Singer's world, it might be possible to derive results from the individualistic-perspective.<sup>131</sup> But given that values are not constant across persons, it certainly is not possible to derive results from the collectivist-perspective. Singer's program contextualizes legal reasoning to such a great extent that different judges may, with impunity, decide similar cases differently. Legal reasoning runs out just when it is needed most to resolve important legal and moral controversies.

Summarizing, while I agree with much of Singer's article, I do not see that he has offered anything to replace the traditional legal epistemological notions.<sup>132</sup> Singer contends that "[w]hen judges decide cases, they should do what we all do when we face a moral decision."<sup>133</sup> He describes a common sense mechanism for practical decisions. But what we need is an illuminating model of practical reasoning, or a reason why no such model is possible. If no such model is possible, then why should anyone think that *any* kind of decision process has any validity whatsoever? If that is Singer's point, his view is more than nihilistic, more than anarchistic. It means that we should simply stop talking.

#### F. *A Feminist Approach to Conversationalism*

Feminist theory replaces traditional epistemology with a novel conception of knowledge.<sup>134</sup> Feminism emphasizes the

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129. Singer, *supra* note 6, at 65.

130. Lipkin, *supra* note 5, at 828.

131. On the theoretical level, to derive results on the individualistic-perspective means that the same judge will make the same decision in relevantly similar cases.

132. Singer suggests that we embrace Rorty's notion of edifying discourse. I do not see how this notion can apply to adjudication.

133. Singer, *supra* note 6, at 65.

134. Feminist legal theory is composed of diverse strands. See, e.g., Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1906-37 (1988). Some of these strands endorse reason and other traditional, legal epistemological methods, while others tie the primacy of reason and traditional legal epistemology to male chauvinism. JOSEPHINE DONOVAN, *FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM* 3 (1985).

perspectival, the concrete, and the connectedness in people's views. Contrasted with traditional theory, feminism eschews abstraction, universality, and generality. Typically, traditional legal theory seeks general or abstract principles whose substance is not determined by the particular historical period in which the principles were forged. Rather than impose abstract principles on concrete situations, feminism counsels us to describe in detail the particular features of a given conflict situation and to abandon abstract principles if need be.

Feminist theory has greatly benefited from the work of Carol Gilligan.<sup>135</sup> According to Gilligan, psychological studies concerning morality show that men and women develop different moral senses.<sup>136</sup> Men tend to develop a rights-based morality; women tend to develop a morality centered around responsibility.<sup>137</sup> The morality of rights differs drastically from the morality of responsibility in emphasizing separation rather than connection and "in its consideration of the individual rather than the relationship as primary."<sup>138</sup> Women tend to perceive themselves in terms of how well they create and maintain caring and nurturing relationships, while men tend to see themselves as how well they respect the rights of others.<sup>139</sup>

Gilligan introduces the illuminating metaphors of the ladder of hierarchy and the web of connection to contrast masculine and feminine social perspectives.<sup>140</sup> According to Gilligan, "[t]he images of hierarchy and web . . . convey different ways of structuring relationships and are associated with different views of morality and self."<sup>141</sup> The ladder refers to how morally

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135. See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

136. *Id.* at 19. In making this distinction, one must be cautious not to give a pejorative interpretation to the notion of a "woman's moral sense." See CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 51 (1989) ("When difference means dominance as it does with gender, for women to affirm differences is to affirm the qualities and characteristics of powerlessness.").

137. GILLIGAN, *supra* note 135, at 19.

138. *Id.*

139. *Id.* at 19-21.

140. *Id.* at 62.

141. *Id.*

Karst, in applying Gilligan's insight to constitutional theory, writes:

Men tend to see human interactions as the contractual arrangements of individuals seeking positions in a hierarchy. Women, defining the very idea of self as more continuous with their human environments, tend to see the same interactions as part of ongoing, sharing connections in a network of relationships.

The view from the ladder tends to produce a morality of rights, an abstract

independent, autonomous agents distribute benefits and burdens in society. Individuals compete with one another to reach the highest possible rung of the ladder. According to the hierarchical perspective, further distributions of benefits and burdens may also occur as a result of voluntary choice. Consequently, exchange or contract is the principal means for determining what one owes to others.<sup>142</sup> No one has any obligations or duties to others besides those that are necessary to his status as an independent, autonomous agent, or those obligations that he freely assumes.

Partly as a result of disenchantment with traditional legal epistemology and partly as a result of the recognition of a conspicuously feminine voice of connection and caring,<sup>143</sup> some feminists have adopted the method of dialogue or conversation as the appropriate method for resolving legal conflicts. Feminists, like skeptics and pragmatists, contend that legal epistemology—argument, reasoning, justification, objectivity, formalism, and so forth—depicts an impossible and undesirable conception of conflict resolution. The conception is impossible because it relies on the notion that legal reasoning employs principles that are objective, justified, and true; and no such principles exist. The picture is undesirable because even if such principles existed, they would distort the fundamental complexity of social reality. Rather than appeal to purportedly absolute or universally valid principles that determine how to protect rights, feminist theory urges us to talk about our differences: let us understand a particular conflict in context; let us try to provide a concrete solution based on the assumption that what is important is the relation and connection between the disputants, not which disputant has superior rights.

Feminist theory's concern for caring and conversation is laudable. The problem lies with its incomplete description of a conflict situation. On the one hand, feminist theory has shown us that many of the ways in which men view women are chauvinistic and unfair. But how do we reconcile the feminist's

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hierarchy of rules to govern the competition of highly individuated individuals. To see the world from the web, however, is to see individuals in connection with each other, and to see morality as a question of responsibilities to particular people in particular contexts.

Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 462.

142. Karst, *supra* note 141, at 462.

143. See generally NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION* (1984).

endorsement of caring and conversation with her justifiable interest in condemning chauvinism? In the context of conversation, taking everyone's view seriously, the chauvinist may sincerely convey his sexist attitudes towards women. He might further reveal that though he wishes to exorcize the demonic chauvinism from his thoughts and feelings, he cannot do so. What is the solution to a particular conflict between a chauvinistic man and a liberated woman? To ignore the chauvinist's basic feelings towards women is not to take him seriously. To grant standing to his chauvinistic attitudes and feelings is to be in complicity with evil.<sup>144</sup> How can feminists resolve this dilemma?<sup>145</sup>

This central problem with feminist theory is illustrated dramatically by the contention that women's way of knowing offers a new form of knowing, that of "connected knowing."<sup>146</sup> According to this novel conception,

[c]onnected knowers develop procedures for gaining access to other people's knowledge. At the heart of these procedures is the capacity for empathy. Since knowledge comes from experience, the only way they can hope to understand another person's ideas is to try to share the experience that has led the person to form the idea.<sup>147</sup>

Empathy is certainly an important prerequisite for conversation and compromise. More importantly, one must empathize with one's enemy if one is truly to understand the nature of the conflict. But empathy cannot resolve a conflict; something either more judgmental or more conciliatory is required.

Interestingly, the above passage seems to get empathy wrong. I do not empathize with you if I must "try to share the experience" that led you to think and feel the way you do. If that were required I could rarely empathize with anyone. Can a

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144. One could argue, I suppose, that every perspective has standing, but that some perspectives, for example, chauvinism, will be resoundingly defeated. But will it?

145. Of course, neither ignoring the chauvinist nor endorsing his distorted views of woman exhaust our options. We might exhort, plead, cajole, or remonstrate with him. We might depict the harmful effects his chauvinism has on women and society. While these are legitimate modes of moral persuasion, in my estimation, they are all driven and defined by the concept of moral fault, the recognition of which is a necessary condition of reform.

I do not suggest that the morality of responsibility and connectedness has nothing to say at this point, or that the morality of rights is the only way to deal with male-centered hierarchy and individualism. On the other hand, it is not clear that liberation movements generally can succeed without the force of traditional moral outrage.

146. See, e.g., MARY F. BELENKY ET. AL., *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* 55 (1986).

147. *Id.* at 113.



male empathize with a female's experience in pregnancy and childbirth? I would hope that he can. But he cannot try to share the experience, because he cannot try to do something that is impossible for him to do. Similarly, can nonrape victims, male and female, empathize with a rape victim? Can individuals never victimized by the Nazis empathize with concentration camp survivors? The answer to these questions must be yes, if morality exists at all. Yet it is clear that these brutal, horrific experiences cannot be shared in any meaningful sense.

Connected-knowledge theorists contend that trust is a central feature of "all conversations conducted in the connected mode":<sup>148</sup>

These conversations grow out of connection, and they cement connections. Connected knowers begin with an attitude of trust; they assume the other person has something good to say. This trustfulness builds on the subjectivist notion that because all opinions come from experience and you cannot call anyone's experience wrong, you cannot call the opinion wrong. Connected knowers do not measure other people's words by some impersonal standard. Their purpose is not to judge but to understand.<sup>149</sup>

It is simply unclear to me how we can begin with trust in this manner, or how we can possibly "assume the other person has something good to say." Such an attitude might be possible when the conflict is not fundamental, that is, when the parties share basic legal and moral paradigms. But how can we generate this attitude when the other person is Hitler, Stalin, Amin, Pol Pot, Pinochet, Manson, Bundy, Buono, or Speck? While it might be true that no one's experience can be wrong, a person's experience can be corrupt, depraved, impoverished, and so forth. Moreover, the inclinations and attitudes generated by such experience can be wrong or bad or evil.

Abandoning traditional notions of morality deprives feminist theory of the conceptual apparatus for eloquently describing the evil that men do to women.<sup>150</sup> In other words, how can the feminist critique occur without traditional notions of morality?

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148. *Id.* at 116.

149. *Id.*

150. See generally SIMONE DE BEAUVOIR, *THE SECOND SEX* (1953); SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (1970); KATE MILLETT, *SEXUAL POLITICS* (1970); SHEILA ROWBOTHAM, *WOMEN'S CONSCIOUSNESS, MAN'S WORLD* (1973); *WOMEN'S WORK, MEN'S PROPERTY: THE ORIGINS OF GENDER AND CLASS* (Stephane Coontz & Peta Henderson eds., 1986).

Understanding is certainly an essential feature of moral judgment. But unless we endorse, as a general imperative, Pascal's admonition "tous comprendre, tous pardonner,"<sup>151</sup> judgment must follow understanding if understanding is to have any significance. Comprehensively "listening and suspending one's own judgment" may be required "in order to understand other people in their own terms."<sup>152</sup> Suspending judgment, however, must not be permanent;<sup>153</sup> rather, it must be a preliminary stage in formulating a judgment pro or con. Consequently, feminists must answer this challenge: how can feminism be both persuasively critical of male chauvinism and simultaneously non-judgmental?<sup>154</sup>

### G. *The Benefits of Conversationalism*

Conversationalism produces several kinds of benefits. First, conversationalism is a means of communication.<sup>155</sup> Second, the decision to sit down and talk to one's enemy implies that one is prepared to take one's enemy seriously, that you are willing "to listen (and empathize with) the story the other has to tell," and that you have concern and respect for the "autonomy and dignity of the other person."<sup>156</sup> This in turn implies that one is ready to participate in the search for a just and effective compromise.<sup>157</sup> The willingness to talk to one's enemy tends to soften the respective positions.<sup>158</sup> Third, the phenomenological dimension of conversation, that is, facing, addressing, and listening to one's enemy, experientially reveals that one's enemy is truly human. This understanding counteracts the strong tendency in disputes to objectify one's enemy, to make her an egoist, an ingrate, or a sociopath. Conversation does not necessarily dispel

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151. "Understanding everything is to forgive everything."

152. BELENKY ET AL., *supra* note 146, at 187.

153. Indeed, permanently suspending judgment is arguably immoral. But what about the Christian imperative to abstain from judging?

154. See generally Heather R. Wiskik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64 (1985).

155. Conversationalism communicates pure information as well as conversational demands to accept the norms each party endorses. See Alan Gibbard, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* 172-74 (1990).

156. Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering Division of Employment v. Smith, A Parable of Pagans, Politics, and Majoritarian Rule*, 85 NW. U L. REV. 388, 409-10 (1991).

157. See H. GADAMER, *TRUTH AND METHOD* 386 (1989); see also Sherwin, *supra* note 156, at 409-10.

158. Such softening of one's position requires coming to terms with unconscious, pre-critical, and pre-reflective factors which influence attitude formation.

this tendency, but it may weaken it. Directly confronting one's enemy through conversation blunts the vivid alienation enemies often feel toward one another. Conversationalism aids conflict resolution because observing an enemy's attempt to convince, persuade, and influence the outcome of the conversation tends to increase the possibility of compromise and mediation. Fourth, conversationalism also captures the pragmatic insight that reason cannot settle a dispute once and for all. It is an illusion to believe that there is some novel approach, some methodology or theory that will finally normalize practical inquiry.<sup>159</sup>

Perhaps the most important benefit of conversationalism is its emphasis that disputants must put themselves in the other person's shoes. This reveals the role of imagination in settling disputes. You must not only identify your enemy as a human being, you must also see the particular dynamics of the conflict from her perspective. This enables the practical reasoner to understand the true meaning of the particular conflict.

The above benefits of conversationalism<sup>160</sup> are all instrumental benefits, benefits that enhance the efficacy of other independently identifiable methods of persuasion.<sup>161</sup> What is needed is a conception of the intrinsic benefits of conversation, benefits that provide some novel method of inquiry or conflict resolution. So far, even if conversationalist theories were fault-free (which they are not) each conception is dependent upon traditional conceptions of reasoning and justification. Unless conversationalism provides a plausible account of the intrinsic content of conversa-

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159. Only arrogance allows a theorist to believe that she has cleared up the confusions, pointed out the pseudo-questions, provided the structure of, or formulated the methodological principles that will render controversies in legal theory and practice permanently resolvable. Conversationalism indicates that no matter how much conceit a theorist exhibits, her stupendous discoveries simply qualify her temporarily as a good conversational partner, perhaps even a master conversationalist. But the master someday will be forgotten. Or, if she is lucky, she will be remembered for her interesting wit and charm, despite representing to contemporary master conventionalists an intellectual dead-end.

160. Conversationalism is not without drawbacks. Without a pronounced egalitarian inclusiveness some people or groups are likely to dominate others. See Michelman & Radin, *supra* note 7, at 1040 ("[s]urely, it is overconfidence, unexamined trust, in the extent to which 'we' can talk meaningfully, persuasively, and yet nondominatively to each other.").

161. Conversationalist theorists rarely discuss the dark side of conversation, namely, the conscious and unconscious ways in which conversationalists try to manipulate, distort, or exploit a particular conversation for idiosyncratic purposes. On a more general level, Habermas offers a useful discussion of the process of distorted communication. See Jürgen Habermas, *On Systematically Distorted Communication*, 13 INQUIRY 205 (1970).

tion, these instrumental benefits are unlikely to be sufficient for resolving conflicts.

In what follows, I characterize conversationalism as a form of wide reflective equilibrium. My thesis is that wide reflective equilibrium is a more plausible conception of the intrinsic content of conversationalism than any of the current alternatives. The reason for exploring the relationship between conversationalism and wide reflective equilibrium is that both conceptions reveal remarkable similarities. Conversationalism and wide reflective equilibrium are both thoroughly pragmatic conceptions. Both conceptions eschew legal epistemology. Conversationalism and wide reflective equilibrium are anti-essentialist, anti-foundationalist, and so forth. Thus, it is natural to explore whether conversationalism can be better understood in terms of wide reflective equilibrium.<sup>162</sup>

### III. CONVERSATIONALISM AS WIDE REFLECTIVE EQUILIBRIUM

#### A. *Wide Reflective Equilibrium and Moral Change*

Individuals capable of action—call such individuals “practical actors”—have intuitions, beliefs, and values about how to live. At any given point, a practical actor might reflect on her primary intuitions to see if they have any more weight than merely being hers. Practical actors seek some process for determining which intuitions are reliable. A set of intuitions is reliable when it withstands criticism. Consequently, in determining whether her intuitions are reliable, a practical actor tries to determine whether they have critical defects.

This Article maintains that pragmatic conversationalism is best understood in terms of the process of wide reflective equilibrium.<sup>163</sup> A person converses with oneself as well as other people. The first type of conversation employing wide reflective equilibrium attempts to determine which considered intuitions<sup>164</sup> can

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162. Wide reflective equilibrium and conversationalism may also share the same defect. Neither may be able to provide a completely reliable method for settling theoretical and substantive controversies in law and ethics; indeed, the limitations on both might help to demonstrate why a certain form of skepticism in these affairs is likely to be ineradicable.

163. The process is an attempt to determine “how well the view as a whole meshes with and articulates our more firm considered convictions, at all levels of generality, after due examination, once all adjustments and revisions that seem compelling have been made.” John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 534 (1980).

164. An individual’s considered intuitions are intuitions she continues to endorse under conditions most favorable to such a choice. Such conditions include endorsing intu-

be held in balance with the person's theory of her practical life.<sup>165</sup> A theory of one's practical life is a theory about one's practical intuitions, namely, one's moral, prudential, legal, and political intuitions. A practical theory attempts to crystallize the central theme or themes of one's practical conceptual scheme.<sup>166</sup>

A conversationalist using wide reflective equilibrium may formulate a principle or principles which could replicate, sight unseen, her intuitive practical judgments.<sup>167</sup> To formulate such

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itions in a calm, drug-free frame of mind, one not unduly distorted by aberrant perceptions and feelings, or restricted by a mechanical adherence to rules. See Nielsen, *supra* note 60, at 148. Most favorable conditions depict a psychological attitude or frame of mind conducive to choice. In this frame of mind a person can inspect her intuitions and decide which ones are worthy of her endorsement.

At this stage of theory construction, a practical actor is not interested in discerning whether her intuitive judgments about how to live have any unity or rationale, or for that matter, whether she will end up with the same intuitions with which she started. At this stage the practical actor merely desires to shed obviously aberrant or otherwise defective intuitions. These considered intuitions represent the preliminary stage of a process by which the actor achieves self-understanding of who she actually is. See generally CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

165. I do not include any contentious epistemic ingredients in the notion of a theory. In my view, the term "theory" designates an informal interpretation of a set of intuitions. A theory can interpret a particular person's intuitions, or the intuitions of a group, or even the intuitions of everyone. A theory should illuminate, explain, or provide the rationale for a particular set of intuitions, if the set has one. My use of theory is compatible with Fish's denial that theories constrain our practical decisions. Stanley Fish, *Dennis Martinez and the Uses of Theory*, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 372 (1989). Fish rightly objects to the notion of a theory as aperspectival and logically efficacious in guiding conduct. However, the richness of "theory" is not exhausted by this conception. In particular, I do not see how his arguments apply to wide reflective equilibrium, which characterizes a very natural process of how we pragmatically, unformalistically, and undogmatically, but critically and reflectively guide our conduct. See generally Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 *STAN. L. REV.* 639 (1990).

166. The core of an actor's practical conceptual scheme is her practical language. A practical language includes the following ingredients: (1) judgments of evaluation, (2) statements persuasively communicating these judgments, and (3) judgments prompting action. Additionally, a practical language incorporates a unified set of judgments derived from wide reflective equilibrium.

167. Human beings are norm-seeking and norm-creating animals. We experience the world with an eye to improving it. It does not follow that change is always good, but change has a normative dimension, in that there must be something to say for the change from the changer's point of view. The predilection for normative change is the characteristic most peculiar to our species.

Normative changes involve decisions to act. These decisions are ultimately based on critical normative and moral standards. See Nielsen, *supra* note 60, at 150. The formulating of normative judgments is something we are compelled to do.

The phenomenological fact that we process information and create standards for evaluating our actions is important not as a justification of morality; sociopaths and criminals also process information and assess their actions. Rather, it illustrates that even if there is

a theory, she must test it against her intuitions. If the theory explains—that is, generates her intuitions sight unseen—it is a plus for the theory. Similarly, if the theory shows what is attractive about her intuitions, what legally and morally can be said in their favor, it is a greater plus for the theory. Explanatory fidelity and justificatory attractiveness are the two central features of wide reflective equilibrium as an interpretive theory of practical conduct.<sup>168</sup> Judgments following from such an interpretive theory are awarded the crown of truth. A practical judgment is true when it follows from a theory the individual holds in wide reflective equilibrium with her considered intuitions.<sup>169</sup>

One compelling feature underlying wide reflective equilibrium is its utility even for skeptics and other rejectionists.<sup>170</sup> Wide reflective equilibrium is useful (inevitable?) even for the skeptic who has no pretension of grounding law and ethics or ascertaining wherein the rationality of law and ethics resides. Adopting wide reflective equilibrium in this spirit permits us to shelve questions of the epistemological and metaphysical status of judgments derived by wide reflective equilibrium. If you want to know what you truly believe and value about a host of issues, you will adopt wide reflective equilibrium.

Wide reflective equilibrium exhibits a tautologically conservative element concerning conversational change in values. A conversationalist's judgments should not be changed unless there is sufficient reason for doing so. Further, refining and perfecting our world view naturally begins with what we are, with what we believe and value. A person's journey through conversation might take her far beyond her original attitudes. Nevertheless, she must begin with her original considered

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persistent systematic doubt about the objectivity or truth of law and ethics, we will still act; therefore, we need to decide how to act. Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256, 282 (1979).

168. I use "interpretive" merely to indicate the nonformal or nonmechanical nature of wide reflective equilibrium. Wide reflective equilibrium is an interpretive theory in Dworkin's sense of "interpretive." Indeed, Dworkin's methodology in formulating "law as integrity" is, in my estimation, a version of wide reflective equilibrium. See DWORKIN, *supra* note 82, at 255-75; Ronald A. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982).

169. We can say that an individual's considered intuitions are held in wide reflective equilibrium with a theory when the judgments following from the theory are less vulnerable to criticism than judgments following from any alternative theory. If truth turns out to be an unilluminating concept, this might be all we can say to vindicate practical judgments.

170. Lipkin, *supra* note 5, at 865.

intuitions.<sup>171</sup>

Wide reflective equilibrium seeks to systematize a person's considered intuitions by constructing principles which express these intuitions as a coherent whole. A person constructs a principle to see how well it fits with her considered intuitions. She also evaluates the principle in terms of how normatively attractive it renders these intuitions. In cases where a principle conflicts with a considered intuition, the individual sometimes retains the intuition and rejects the principle; other times she retains the principle and rejects the intuition. Pragmatic utility drives wide reflective equilibrium. We cannot decide in advance the outcome of a clash between theory and intuition. The goal is to hold one's theory and one's considered intuitions in wide reflective equilibrium. A theory and a set of intuitions are in equilibrium when they yield the same results; they are reflective "since we know to what principles [theories] our judgments conform and the premises of their derivation."<sup>172</sup>

This is a commonsensical, pragmatic process. An actor resorts to this strategy whenever she wants to resolve a conflict between different intuitions or between intuitions and newly constructed principles. Suppose I like traveling and meeting new people. I inspect these preferences and determine that the principle *P1*—one ought to welcome new experiences—underlies them. Suppose someone now offers me a chance to smoke crack cocaine. According to *P1*, I ought to smoke the cocaine because welcoming new experiences follows from the theory of my practical life. But this consequence is counter-intuitive; it conflicts with intuitions I have about health and safety. If those intuitions are sufficiently strong, I may reject *P1* out of hand. However, *P1* might appear plausible despite its counter-intuitive results. In that case, I will modify *P1* by adopting *P2*—one ought to welcome new experiences as long as they are safe. *P2* now explains my original preferences while doing no damage to other intuitions I hold equally as firm. I can now hold the modified new principle *P2*, while retaining both my intuitions about safety and new experiences. Of course, if there was no way to tell in advance when a new experience is safe, and if my intuitions about safety should predominate, I might have to abandon

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171. Once a conversationalist acquires a theory, an intuition cannot remain a considered intuition if it conflicts with her theory. Kai Nielsen, *In Defense of Wide Reflective Equilibrium*, in *ETHICS AND JUSTIFICATION* 19, 34 (Douglas Odegard ed., 1988).

172. RAWLS, *supra* note 14, at 20.

both *P1* and *P2*. Further, if my intuitions about novelty were very deep, I might have to embrace either *P1* or *P2* and abandon my intuitions about safety. Which approach is appropriate cannot be decided in the abstract.<sup>173</sup>

A person can use wide reflective equilibrium from the individualistic-perspective or from the collectivist-perspective. You engage in wide reflective equilibrium from the individualistic-perspective when you try to find out the parameters of *your* ethical conceptual scheme. You use wide reflective equilibrium from the collectivist-perspective when you try to formulate the best interpretation of your society's considered intuitions.<sup>174</sup> Either perspective in principle could generate univocal results, but, given certain assumptions about the constancy of one's values,<sup>175</sup> univocal results are much more likely from the individualistic-perspective.

### *B. Objections to Wide Reflective Equilibrium*

#### 1. Is Wide Reflective Equilibrium Unduly Conservative?

One of the most important objections to wide reflective equilibrium is that it has conservative implications.<sup>176</sup> Because it gives intuitions a central role in conversation, any theory resulting from wide reflective equilibrium will be nothing more than an apologia for the status quo and for well-entrenched political ideology. Similarly, since an actor's set of considered intuitions are nothing more than prejudices,<sup>177</sup> why should these intuitions have authority in conversation?

Kai Nielsen<sup>178</sup> eloquently explains how wide reflective equilibrium can escape the charge of conservatism. Nielsen contends that while we must begin with our familiar moral framework, we must resist the temptation to think that this

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173. For a discussion of conceptions which appear to decide this issue abstractly, see generally Lipkin, *supra* note 5.

174. Indeed, wide reflective equilibrium perhaps could be a critical ingredient in foundationalizing a culture's legal and ethical convictions.

175. An individual's perspective governs his determination of which values to adopt, the scope of these values, as well as how to rank these values. Certain skeptical tendencies, however, afflict the individualist perspective as well as the collective perspective.

176. See ACKERMAN, *SOCIAL JUSTICE*, *supra* note 17, at 349-55; Peter Singer, *Sidgwick and Reflective Equilibrium*, 58 THE MONIST 490, 516 (1974).

177. HARE, *MORAL THINKING*, *supra* note 14, at 12.

178. See Nielsen, *supra* note 60, at 143-145; see also Norman Daniels, *Reflective Equilibrium and Archimedean Points*, 10 CAN. J. PHIL. 83 (1980); Lipkin, *supra* note 5, at 871-77; Robert J. Lipkin, *The Anatomy of Constitutional Revolutions*, 68 NEB. L. REV. 701, 723-27 (1989).



framework is sacrosanct. According to Nielsen, wide reflective equilibrium

must not be mistaken for an implicit defense of conservatism, for the reflective moral agent, starting with a distinctive *Sittlichkeit*, can and will reject certain, indeed perhaps whole blocks, of such institutional norms, refashion some of them, or perhaps forge some new ones. What we cannot do is to coherently reject, or stand aside from, the whole cluster of institutional norms of the life-world in which we come to consciousness and, so to say, start afresh. We cannot avoid starting from the deeply-embedded cultural norms that go with our interlocked set of institutions.<sup>179</sup>

The important point here is that where we start does not determine where we finish. Indeed, it doesn't even determine *that* we finish. Wide reflective equilibrium seeks to establish a coherence between our considered practical intuitions and a set of practical principles as well as with other principles of social interaction.<sup>180</sup> What we seek is a coherence with considered intuitions, moral theory, and everything else that bears significantly on our practical lives.<sup>181</sup>

The charge of conservatism confuses wide reflective equilibrium with narrow reflective equilibrium. Nielsen explains the difference between narrow and wide reflective equilibrium as follows:

WRE [wide reflective equilibrium], unlike partial or narrow equilibrium, is not just the attaining of a fit between the considered judgements and the moral principles we remain committed to on reflection or the principles which are the simplest set of principles from which we could derive most of those considered convictions. Beyond that, WRE remains committed to a fit which also includes the matching of principles which not only satisfy the [conditions of optimal choice] . . . but as well match best with ethical theories, theories which are the most carefully elaborated and rationalized and in turn fit best with what we know about the world and the full range of our considered convictions, including convictions brought to bear in defense of these theories or in defense of background social theories relevant to them and which involve moral convictions,

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179. Nielsen, *supra* note 60, at 145.

180. *Id.* at 146.

181. This pragmatic point contends that when all defeasible factors are unsuccessfully brought to bear on a practical judgment, then there is no reason not to call the judgment true. Of course, this does not entail that truth adds anything significant to this process.

some of which are distinct from and logically independent of the considered convictions with which and from which we started.<sup>182</sup>

Once we identify these elements, namely, considered intuitions, ethical theory, and social theory, “[w]e shuttle back and forth between considered convictions, moral principles, ethical theories, social theories, and other background empirical theories and those considered judgments.”<sup>183</sup> In shuttling back and forth we attempt to make these elements coherent and holistic. This approach has powerful results: it provides a process of mutually testing these different elements to determine which survive reflective, critical scrutiny.

In shuttling we sometimes modify or even abandon a particular considered conviction; at other times we abandon or modify a moral principle or come to adopt some new principles; and sometimes . . . we modify or even abandon a social theory or other background theory or even construct a new one. We move back and forth—rebuilding the ship at sea—modifying and adjusting here and there until we get a coherent and consistent set of beliefs.<sup>184</sup>

No finality exists in this process. Once we have achieved wide reflective equilibrium we can rest, but only temporarily. Achieving wide reflective equilibrium “does not rule out the possibility that at a later time this equilibrium will be upset and that we will then have to seek a new equilibrium.”<sup>185</sup>

Wide reflective equilibrium and the coherence which drives it dissipate the objection that reflective equilibrium is necessarily conservative.<sup>186</sup> In trying to effect a coherence between the relevant elements, we might reject an intuition or principle because it conflicts with social theory. If we achieve an equilibrium after testing our considered intuitions against moral and social theory, there is nothing left according to which we could conceivably criticize the resultant theory except other similar factors which we overlooked or erroneously rejected. Consequently, our con-

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182. Nielsen, *supra* note 60, at 148.

183. *Id.*

184. *Id.*

185. *Id.* at 148-49.

186. Wide reflective equilibrium begins with considered intuitions, but continues with moral and social theory; hence it is *not* only not necessarily conservative, in the appropriate circumstances, it counsels revolution. See DON HERZOG, *WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY* 232 (1985) (arguing that “[r]eform might be better than where we stand, but so might revolution”).

versation or theory cannot be accused of reflecting only ethnocentric concerns. Or to put this another way, the objection is right, but no longer an objection. Our considered intuitions were made to cohere with everything we know about humankind.<sup>187</sup>

## 2. Does Wide Reflective Equilibrium Beg the Question Against Skepticism?

Wide reflective equilibrium can also be charged with begging the question of whether there are any true moral judgments against moral skepticism.<sup>188</sup> According to this objection, wide reflective equilibrium stipulates that our considered moral intuitions have an initial plausibility; and this might mean that moral judgments reflecting these intuitions are true absent some compelling evidence of their falsity. By contrast, moral skepticism denies that any moral judgments are true and therefore rejects the stipulation that our considered intuitions have any plausibility whatsoever. According to skepticism, there can be no set of moral statements which are presumptively true just by virtue of the kind of statements they are. Consequently, wide reflective equilibrium assumes just what skepticism denies.

There are two problems with this objection. First, a skeptic can concede that considered intuitions have an initial credibility, but insist that there is always sufficient reason for ultimately rejecting them. A skeptic of this variety might agree, even insist, that starting off with considered intuitions is perfectly legitimate. Giving the nonskeptic a head start in this way merely permits the nonskeptic to meet the burden of proof. After meeting it, the skeptic might still insist that subjectivism, relativism, nihilism, or some other rejectionist view prevents a conversationalist from converting the initial credibility of considered intuitions into true moral judgments. Thus, wide reflective equilibrium does not boot strap truth into practical matters, and the objection fails.

But more importantly, it is a virtue of this process that the

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187. It is true that "in responding morally and in reasoning morally we cannot escape starting from tradition and from some consensus," but this does not mean that we cannot "go in a reformist or even in a revolutionary or iconoclastic direction . . . ." Nielsen, *supra* note 60, at 145.

188. David Copp, *Considered Judgments and Moral Justification: Conservatism in Moral Theory*, in *MORALITY, REASON AND TRUTH: NEW ESSAYS ON THE FOUNDATIONS OF ETHICS* 141, 147 (D. Copp & D. Zimmerman eds., 1984).

skeptic can use wide reflective equilibrium and save face at the same time. Wide reflective equilibrium, suitably interpreted, is a process anyone can use in attempting to cope with her practical affairs. In other words, foundationalists and skeptics alike, kibitzers, fuzzies, and apes without tails all need to decide what to do and how to live. This conception of wide reflective equilibrium makes it the most plausible candidate for making sense of one's world even if it ultimately fails to provide a window to objective truth. Wide reflective equilibrium is not for those who are unwilling or unable to try to make sense of their world. But then no other process is a better candidate.<sup>189</sup>

3. Is Wide Reflective Equilibrium Defective Because It Assumes a Coherentist Conception of Truth and Justification?

Wide reflective equilibrium can be objected to because it includes a coherentist conception of truth and justification. While I cannot deal comprehensively with this very complex issue here, suffice it to say, for a judgment to be justified, it must follow from the best interpretive theory. Ultimately, our practical conceptual scheme consists of judgments that cohere with one another, that mutually support and refine one another. A practical judgement is a reflection and an extension of those judgments which constitute the core value of our practical conceptual scheme.

Coherentist conceptions of justification are vulnerable to the objection that a perfectly coherent ethical conceptual scheme might be false, since if the scheme's basic principles are false, so will everything else be false. According to this view, justification must ultimately be a process by which practical judgments are true independently of their relationship to other practical judgments. If a particular practical judgement is true, independently of its coherence quotient, then any practical judgment that coheres with this judgement is also true. But what can we make of the notion that practical judgments are true independently of their coherence quotient? Does the objection presuppose that a true practical judgment depicts some practical fact about the world? Does it help our inquiry to posit the existence of such facts?<sup>190</sup> Whether such facts exist or not, it is not obvious that

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189. Other methodological models in ethics include empiricism, ideal observer theory, universal prescriptivism, naturalism, and intuitionism.

190. Practical facts may be understood in both a stronger and weaker way. Some-

we have access to them. Were we to speak from a God's-eye point of view, we might know whether the truth of a practical judgment is merely coherence with other practical judgments or whether truth is at least in part defined by coherence-independent considerations. Ultimately, all we ever really have access to is whether a particular judgment *coheres* well with other practical judgements. Hence, all we should care about is whether we can formulate a conception of coherence which illuminates the notions of justification and truth in practical theory.

I want to suggest that the question of whether moral truth consists of coherence or coherence-independent considerations is pointless. If a particular judgment is one which we cannot imagine giving up, then we can, if we choose, say that its truth is independent of how well it coheres with other judgments. These judgments may have a universal consensus, for example, that murder is wrong. Such universally acceptable judgments fly in the face of the fashionable view that practical theory must yield concrete or particularized results, and that no universal ethic is possible. If universally acceptable judgments exist, then this fashionable view is implausible.

By contrast, there may be many judgments that are linguistically universal. But this is little consolation for those interested in settling practical controversies. Perhaps no one would challenge the statement that murder is wrong; but what counts as murder in various cases is thoroughly controversial. Are abortion, capital punishment, self-defense, euthanasia, and war all instances of justifiable homicide or murder? There is no consensus on these important matters, and hence, even if there is a consensus that murder is wrong, it doesn't resolve perennially intractable moral and political controversies concerning the taking of human life. Even if we cannot imagine abandoning certain statements, what we cannot abandon is a linguistic form

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thing is a practical fact in the stronger sense if it is part of the furniture of the empirical or metaphysical world. A practical judgment is true then because it depicts this fact. This stronger notion of a practical fact suggests that practical facts validate practical judgments. Consequently, in this view, we should attempt to discover practical facts in order to know which practical judgments are true.

A weaker conception of practical fact states that we are entitled to say that a true practical judgment reflects a practical fact, but our methods for determining its truth have nothing to do with discovery; in this instance, the existence of a practical fact is a consequence, not the cause of the truth of a practical judgment. Unfortunately, the stronger sense of practical fact is exciting yet implausible; whereas the weaker sense may be plausible, yet not very interesting.

that has only limited efficacy in settling conflicts.<sup>191</sup> Consequently, noncoherentism in law and ethics might be true, but nothing much is gained by technically defeating coherentism in this manner.

#### 4. Does Wide Reflective Equilibrium Fail to Explain the Normative Dimension of Morality?

Joseph Raz argues, in an article that deserves careful reading, that wide reflective equilibrium fails to achieve the several goals it sets for itself.<sup>192</sup> First, it fails to explain the implications of one's moral views. Second, wide reflective equilibrium is incapable of achieving the right sort of agreement and consensus in ethics. Third, wide reflective equilibrium is ineffective as an heuristic device. Fourth, it does not characterize either our moral capacities or our moral sense. According to Raz, all these objections point to the same basic flaw, namely, wide reflective equilibrium "fails in its most fundamental task. It fails to explain that morality is normative and binding."<sup>193</sup>

Raz's objections all rest on the presupposition that moral epistemology is alive and well. The role wide reflective equilibrium plays in this Article is designed to abandon any wholesale reliance on the notions that moral theory is normative or binding. Normative as opposed to what? Descriptive? Explanatory? Motivational? Pragmatic conversationalism prompts us to abandon these categories as failed attempts to make sense of our practical lives. Instead, let us rely on some process that can help us understand what we believe and value, what beliefs and values we hold in common with others, and, most importantly, which beliefs and values are incommensurate with the beliefs and values of others. The notion that morality is normative and binding is an obstacle to understanding our practical lives, unless normative simply refers to what is valuable and binding refers to what is desirable all things considered. This does not deny any phenomenological features of moral experience; it simply rejects the framework giving the dichotomy between the normative and the descriptive a place of special importance.

Similarly, it could be argued that wide reflective equilibrium changes the focus of our inquiry from the normative or

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191. See JEFFREY STOUT, *ETHICS AFTER BABEL* 210-19 (1988).

192. See Joseph Raz, *The Claims of Reflective Equilibrium*, 25 *INQUIRY* 307 (1982).

193. *Id.* at 325.

justificatory nature of law to an explanatory understanding of how law evolves.<sup>194</sup> This argument rests on the familiar supposition that facts are qualitatively different from values and that one cannot derive an *ought* from an *is*.

Wide reflective equilibrium, as a pragmatic process, challenges the notion that there is an important *philosophical* account of the difference between the normative and the explanatory. Consequently, it rejects the contention that wide reflective equilibrium changes the focus of our inquiry. The subject with which this Article deals is whether there is any reliable procedure for individually and collectively arriving at the best legal judgment in a situation of conflict. Of course, "the best legal judgment" is a normative locution that contains explanatory elements. But neither normativity nor explanation plays an interesting philosophical role here.

Wide reflective equilibrium contends that once a particular legal judgment follows from the legal theory we hold in wide reflective equilibrium with all other theories and judgements, then we are entitled to say that we have formulated the best legal judgment in the particular circumstances.<sup>195</sup> Wide reflective equilibrium pragmatically challenges the skeptic to show, by using wide reflective equilibrium, why we should reject the particular judgment in question. What more can we reasonably expect from any other procedure. Wide reflective equilibrium tells us to criticize a particular judgment or the theory from which that judgment follows with any legitimate critical factor. The judgment that survives this criticism—if there is one—is the judgment to embrace.

##### 5. Does Wide Reflective Equilibrium Resurrect Legal Epistemology?

At this juncture, it might be objected that I have resurrected legal epistemology, since coherence and theory construction require consistency and generalization. This objection casts doubt on the distinction between conversationalism as wide reflective equilibrium on the one hand and legal epistemology on the other.

This objection would be plausible if my intention was either

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194. Steven Burton helpfully suggested this to me in correspondence. I am not certain that he would approve of the way I set up this objection.

195. I have no objection to describing this process as deriving a legal judgment from the best normative and explanatory theory of our practical lives.

to establish objectively justified legal truths, or to provide an analysis of legal rationality. My goal is to avoid these epistemic and metaphysical notions. Instead, my strategy is to locate agreement and to understand what separates us when agreement is unlikely. Wide reflective equilibrium describes a familiar process we already use to a greater or lesser degree in making practical decisions. This process also explains our disagreements with others. I do not intend to justify wide reflective equilibrium, nor do I intend to use wide reflective equilibrium as a rational justification for our legal and moral attitudes. Rather, my deployment of wide reflective equilibrium echoes Wittgenstein's remark, "[t]hat the danger here . . . is one of giving a justification of our procedure where there is no such thing as a justification and we ought simply to have said: *that's how we do it*."<sup>196</sup> Wide reflective equilibrium is a pragmatic strategy for isolating our agreement and disagreement with others. It issues a perennial challenge: if there is a better way to understand legal and moral consensus and dissensus, let's see it.

This Article regards wide reflective equilibrium as a pragmatic form of reasoning, a form of reasoning that is careful not to resurrect the more implausible elements in legal epistemology.<sup>197</sup> Still, wide reflective equilibrium is not guaranteed to overcome skepticism or to achieve agreement across persons. Indeed, wide reflective equilibrium may explain why, despite much agreement, certain controversial legal and moral questions defy consensus. Let us now turn to this issue.

### C. *The Problem of Incommensurability and Wide Reflective Equilibrium*

The problem of incommensurability is a problem about meaning and truth.<sup>198</sup> This problem occurs in two contexts.

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196. LUDWIG WITTGENSTEIN, REMARKS ON THE FOUNDATIONS OF MATHEMATICS 98 (G.H. von Wright & R. Rhees eds., G.E.M. Anscombe trans., 1964).

197. Indeed, as interpreted here, wide reflective equilibrium rejects legal epistemology entirely, that is, it denies that any legal judgment or legal theory is a condition of legal rationality. It is true that wide reflective equilibrium challenges alternative conceptions of reasoning to demonstrate how they are superior. It does not, however, insist that such a demonstration is impossible. One salient unexpected virtue of wide reflective equilibrium is that it explains both normal conversation and revolutionary conversation.

198. More generally the problem of commensurability is a problem about having different kinds of experience and living in different worlds. Pointing out that different types of people live in different worlds is a necessary feature of achieving political understanding. I take the notion of living in different worlds metaphorically, though some writers, like Feyerabend, take it literally. Consider:



First, it occurs when two people understand a sentence or a system of sentences in incompatible ways.<sup>199</sup> Second, the problem of incommensurability occurs when there are no agreed upon procedures for arriving at agreement in situations of conflict over belief or values.<sup>200</sup>

The problem of incommensurability involves a weaker and a stronger sense. The stronger sense maintains that one individual's practical theory is incommensurate or untranslatable into another individual's practical theory. The weaker sense maintains that significant parts of one individual's practical theory are incommensurate or untranslatable into the other person's theory.<sup>201</sup> Surely, the stronger sense of incommensurability is false. As Nielsen writes, "[w]e are not caught in radically different conceptual universes, points of view or forms of life between which there are, and can be, no bridges to a rational objective resolution of what sets us apart."<sup>202</sup> Accordingly, for Nielsen the post-modernist rejection of reason is a sham.<sup>203</sup>

However, Nielsen's remarks fail to appreciate the distinction between strong and weak incommensurability. Incommensurability need not insist upon the total untranslatability or

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Not everybody lives in the same world. The events that surround a forest ranger differ from the events that surround a city dweller lost in a wood. They are different events, not just different appearances of the same events. The differences become evident when we move to an alien culture or a distant historical period. The Greek gods were a living presence; "they were there." Today they are nowhere to be found.

Paul Feyerabend, *Knowledge and the Role of Theories*, in *FAREWELL TO REASON* 104 (1987).

199. A stronger statement of the problem of incommensurability states that no one system of beliefs and values is completely translatable or has the same truth value as any other system of beliefs and values. Hence, there will always be at least two incompatible systems of beliefs and values for interacting with the world.

200. Even if wide reflective equilibrium depicts an inevitable process, skepticism has not been defeated. For one thing, unless there is a reliable procedure for achieving agreement using wide reflective equilibrium from the collectivist-perspective, modified skepticism might be inescapable. See Lipkin, *supra* note 5. More importantly, wide reflective equilibrium might require the antecedent existence of values that are a condition of wide reflective equilibrium's successful operation, and consequently cannot be explained by wide reflective equilibrium. In this event, unless a practical actor is logically or morally compelled to embrace certain starting values, wide reflective equilibrium is bound to produce incommensurable theories.

201. For example, if Jones believes that a fetus is a person, she will believe that abortion is homicide. If Smith believes that a fetus is merely a collection of cells, she will not understand how abortion could possibly be homicide. In this case, Jones' and Smith's views on abortion are incommensurate.

202. Nielsen, *supra* note 60, at 160.

203. *Id.*

irreducibility of different moral paradigms. It is still a significant issue should it turn out that different moral problems are only partially incommensurate. If controversial issues are explainable in terms of partially different moral paradigms, then the incommensurability of moral paradigms is a damaging post-modern problem. This is perfectly compatible with total commensurability between two paradigms on questions of murder, theft, fraud, and so forth. If the controversies over on abortion, affirmative action, flag burning, gay rights, church and state, poverty, pornography, and free speech resist resolution, resist a common ground, we are left with an intractable problem. If these paradigms, reflect, even if only partially, different conceptions of value or different conceptions of a good person, then we must conclude that practical reason is severely restricted in practical affairs.<sup>204</sup>

*D. Wide Reflective Equilibrium and the Political Conception of a Person*

Conversationalism driven by wide reflective equilibrium conceivably achieves two goals. First, it permits an individual to formulate her own critically pragmatic conception of practical affairs from the individualistic-perspective. Second, it may, under the appropriate circumstances, permit the individual to formulate her critically pragmatic conception from the perspective of the group or from the collectivist-perspective.

The first goal involves achieving wide reflective equilibrium by considering only the individual's considered intuitions. The second goal compels the individual to include in her initial evidentiary base the considered intuitions of the group. Trouble

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204. One might argue that inevitably any two different ethical schemes have a certain degree of incommensurability. We have not shown, therefore, that two schemes are incommensurate merely by indicating that some portions of one scheme are not translatable into the other scheme. Incommensurability must be more dramatic, more stark. For there to be incommensurability there must be a total failure of translation. But if there were two such untranslatable schemes we could never know it.

To identify a scheme of beliefs and values as such, it is necessary that the scheme be sufficiently like our scheme to enable us to identify it in the first place. *See generally* Donald Davidson, *On The Very Idea of a Conceptual Scheme*, in *POST-ANALYTIC PHILOSOPHY* 129 (John Rajchman & Cornel West eds., 1985). It is not even clear that we could identify something as a scheme of beliefs and values if its central or primary principles were untranslatable into our scheme. Consequently, the only sense that we can give to the incommensurability thesis is that two schemes are partially untranslatable or untranslatable regarding certain critical features. Modified skepticism employs precisely this sense of incommensurability.

begins here. Abstractly, wide reflective equilibrium may very well provide a determinate answer in conversing from the individualistic-perspective.<sup>205</sup> Wide reflective equilibrium may even provide a significant overlap of each individual's practical conception. However, in a pluralistic society, it is improbable in the extreme to believe that this overlap will cover *all*, or even the most important, practical controversies. A univocal practical conception in which each member of the group can hold her considered intuitions in wide reflective equilibrium seems impossible.

Wide reflective equilibrium is unlikely to effect agreement across persons. Differences over controversial moral questions such as abortion, affirmative action, free speech, the relationship between church and state, capital punishment, poverty, among others, are disagreements that very likely will be immune to the reforming tendencies of wide reflective equilibrium. There are important reasons why this is so.

In constructing one's theory, an individual must resolve at least three fundamental problems: (1) the problem of value; (2) the problem of scope; and (3) the priority problem. The problem of value calls for a process for ascertaining what is valuable. The problem of scope asks us how to apply abstract values to concrete circumstances, while the priority problem seeks an answer for ranking competing values. Wide reflective equilibrium *may* effectively answer these question from the individualist-perspective where the considered intuitions are limited to an individual's considered intuitions.<sup>206</sup> However, it is unlikely to provide the appropriate answers from the collectivist-perspective. Only if wide reflective equilibrium could tell us collectively which values to adopt, what level of generality to embrace, and which set of priority principles to formulate could we begin to expect it to resolve moral controversies across persons.

Wide reflective equilibrium may be of paramount importance in systematizing an individual's ethical conceptual scheme. It may, moreover, have significant value in effecting agreement across persons where the parties are members of the same moral community or when they have interests in common. Unfortunately, wide reflective equilibrium appears to have very little

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205. Lipkin, *supra* note 5, at 68-70.

206. There is no guarantee that these problems can be resolved from the individualistic-perspective. See Thomas Nagel, *The Fragmentation of Value*, in MORTAL QUESTIONS 128, 133-34 (1979).

value in effecting agreement across persons when the parties are members of different moral communities or do not share certain important interests. Consequently, wide reflective equilibrium is unlikely to resolve some controversial legal and moral questions.

Of course, there are some who insist that disagreement in ethics results solely from bad faith, ignorance, mental deficiency, or some other defective condition. On this view, there is only one set of correct moral beliefs, and it is only defects of one sort or another that prevent everyone from agreeing on the one true moral code. Adopting such a view reveals either limited moral experience in the diversity of human perspectives or a foundationalist, realist, or transcendentalist view concerning ultimate moral truth. Most theorists today do not, and indeed cannot, take such a view seriously. As Rawls puts it:

[L]ong historical experience suggests, and many plausible reflections confirm, that reasoned and uncoerced agreement is not to be expected [concerning religious, philosophical, moral and political doctrines]. Religious and philosophical views express outlooks toward the world and our life with one another, severally and collectively, as a whole. Our individual and associative points of view, intellectual affinities and affective attachments, are too diverse, especially in a free democratic society, to allow of lasting and reasoned agreement. Many conceptions of the world can plausibly be constructed from different standpoints. Diversity naturally arises from our limited powers and distinct perspectives; it is unrealistic to suppose that all our differences are rooted solely in ignorance and perversity, or else in the rivalries that result from scarcity. [The appropriate view of social organization] takes deep and unresolvable differences on matters of fundamental significance as a permanent condition of human life.<sup>207</sup>

The reason there are “deep and unresolvable differences on matters of fundamental significance . . . [which are] a permanent condition of human life” derives from the fact that there are systematically different ways to flourish as a person. Your self-conception drives the values you ultimately choose and how you rank and apply these values. Since there exists more than one internally consistent, but mutually incompatible, conceptions of a person, there will inevitably be incommensurate systems of values.

This is essentially a pluralist conception insisting that there

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207. Rawls, *supra* note 163, at 542.

is more than one way of flourishing politically, yet these different types of political organization may be mutually incompatible. Because the political conception of a person includes how a person ultimately chooses to live in concert with others, I consider this conception to be the bottom line for evaluating a different form of social organization. In contemporary Western society, this bottom line can be expressed by the trichotomy between conservatism, liberalism, and radicalism. This trichotomy depicts three politically different kinds of people.<sup>208</sup> Such classifications have both a formal and a substantive dimension. In every society, conservatives are those who are disinclined toward change. Liberals take change seriously, but seek selective, piecemeal change, resisting transformation or revolution. Finally, radicals are inclined more readily toward sweeping or global change. Radicals often seek permanent transformative structures. The formal dimension is universal and does not depend on the particular social system. While the substantive dimension is concrete and cannot be characterized without reference to particular societies.

I do not want to argue for this position here.<sup>209</sup> Instead, I want to sketch the relationship between the political conception of a person and wide reflective equilibrium.<sup>210</sup>

Suppose people fall naturally, or after the appropriate socialization, into one of the above categories.<sup>211</sup> Suppose fur-

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208. Despite this trichotomy's failure to depict three completely homogeneous and distinct political conceptions, it nevertheless illuminates the issues of political justification with which we are concerned. See Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 149 (1987).

209. I comment further on this in Lipkin, *supra* note 5.

210. Rawls concedes that there are different political conceptions of the person. Rawls, *supra* note 27, at 241. According to Rawls, the appropriate political conception of the person is a public conception, not including personal goals and values, and tied to "the conception of society as a fair system of cooperation for mutual advantage between free and equal persons." *Id.* It strikes me as question-begging to contend that this is a political conception of a person. Until we know how this abstraction applies to concrete circumstances, it is virtually useless. There are plausible interpretations of Rawls's statement that arguably apply to almost any conceivable society.

I do not see how one's personal goals and values can be excluded from one's political conception of oneself. Indeed, what distinguishes Ronald Reagan from Michael Harrington, or William Buckley from Michael Lerner are vast differences, not only in each person's conception of the good, but more importantly, in what each regards as appropriate political ways of interacting with other members of society.

211. There are, to be sure, different ways in which to characterize the basic perceptions of social reality. For example, some theorists contend that there are five "ways of life:" egalitarianism, fatalism, individualism, hierarchy, and autonomy. MICHAEL THOMPSON ET. AL., *CULTURAL THEORY* (1990). In my view, these different social perspectives

ther that although there is much common ground among these categories—each abhors murder, theft, and fraud, for example—there are areas in each ethical conceptual scheme that simply cannot be translated into the ethical conceptual scheme of the others. For example, in the United States conservatives who choose to criminalize burning the flag or to penalize pornographic art also usually desire the government or some other agency to control the value environment of others;<sup>212</sup> whereas liberals, who may condemn flag burning or pornography, insist that controlling the value environment of others is justified only in the most extreme circumstances. In short, conservatives appear to believe that controlling a person's value environment does not significantly implicate a person's freedom, whereas liberals believe that it must. I do not want to try to adjudicate this issue because I do not know how to do so short of repeating the standard and unpersuasive arguments of each side. Indeed, I do not know that anyone knows how to adjudicate this issue. This suggests that both positions might, if internally consistent and attractive to its adherents on other grounds, represent perfectly rational ways of living.<sup>213</sup>

Consequently, in engaging in conversationalism according to wide reflective equilibrium, we run up against the problem of irreducibly multiple political conceptions of the person. The difference in these conceptions pervades each stage of wide reflective equilibrium and finally results in incommensurable

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are compatible with—and indeed can be assimilated to—the triadic political framework sketched in this Article.

212. A value-environment consists of the ordinary means for learning about new values. What we see, hear, and read determine our value-environment. If you control what I read, view, and listen to, you control my value-environment, and therefore you control my values.

213. Some liberals make the mistake of asserting that there is an inconsistency in saying that you value free speech but not the free symbolic speech of flag burning. Any moderately competent first-year law student can easily distinguish flag burning from other areas of protected free speech. The stronger liberal argument states that once we prohibit flag burning we descend upon a slippery slope that ultimately results in prohibiting free speech in other areas. Notice that this argument needs empirical substantiation, and no one to my mind has done the research. But suppose we had the evidence. Then I believe that the liberals would be right. Suppose on the other hand that the evidence suggested we not fear a slippery slope. Does that invalidate the liberal claim? I think not. At the heart of this dispute is the quasi-aesthetic dimension of assessing how free speech relates to one's conception of human flourishing. A liberal might not be comfortable in a society in which free speech is not given the greatest possible protection; whereas a conservative might be perfectly comfortable in a society that prohibits flag burning. After the slippery slope evidence is in, there is little more to say. What we have is two very different ways of being a person, and of organizing society regarding free expression.

positions, each derived by the same process. If this is our final position, then we must conclude that it is impossible to have a complete normative theory of society, and that some form of skepticism must be accepted as a dictate of reason. That is to say, reason itself might tell us that there exists controversial practical questions that have no single right answer. This is the conclusion of a suitably modified form of skepticism that contends that though moral agreement is possible and actual, it is likely that agreement will never be complete. More importantly, modified skepticism contends that most important controversies will never be (rationally) resolved across persons.

#### IV. CONVERSATIONALISM AND COMPROMISE

##### A. *Modified Skepticism and Compromise*

Modified skepticism explains why there is agreement on so many important practical questions, and why certain controversial questions defy solution. The reason for agreement is that people are capable of perceiving that they have common interests concerning murder, theft, and fraud, for instance.<sup>214</sup> The reason for disagreement is that answers to controversial questions ultimately derive from different political conceptions of the person and there is no non-question begging way to decide between these different conceptions.

Modified skepticism is simultaneously a skeptical conception and a conception based on reason. Concerning reason, modified skepticism shows why we agree on so much.<sup>215</sup> The skeptical feature of modified skepticism explains why certain controversial questions are not susceptible to rational solution.

Why do several competitive political perspectives persist in contemporary American society? Is everyone wrong? Or is it that there is one correct perspective, which is too subtle, too perceptive, too informed, too reasonable for the ordinary person? Why do intractable differences persist between conservatives, liberals, and radicals?

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214. This is not necessarily an egoistic position. The common interests might include altruistic concerns.

215. Nothing in modified skepticism precludes individuals from altering their perspectives. There are many reasons for such shifts. Sometimes individuals learn more about an issue and begin to see how a certain solution is, contrary to appearances, tied to their conception of a person. Other times people begin to value some sort of agreement over principled disagreement. Additionally, disagreement can erupt over issues that were formerly settled.

One possible explanation is that all three perspectives are false. But this explanation seems to suppose that there is some neutral vantage point permitting us to evaluate competing political perspectives, and this supposition is anathema to conversationalist theory.

An alternative explanation is that one of the three perspectives is true and the others false. The problem here is how to prove this. More importantly, once foundationalism and essentialism are abandoned, it must follow that intractable controversy, over a sufficient period of time, engaged in by the best hearts and minds of our culture, is the best *evidence* that no one perspective is correct to the exclusion of the others. I do not say that such controversy *entails* this conclusion, just that it provides the best evidence that more than one political vision can capture different imaginations in a pluralistic society.

Consequently, the only likely explanation is that these competitive perspectives represent coherent ways of being a person, coherent though mutually incompatible. This explanation reflects social reality better than alternative theories.

There remains one salient question concerning wide reflective equilibrium and modified skepticism. Is systemic compromise between the different conceptions of a person possible? And if compromise is possible, how does it operate?

### *B. Kinds of Compromise*

A compromise is some sort of accommodation or adjustment in the interests of competing parties.<sup>216</sup> The term compro-

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216. Conversationalism might be the only acceptable antifoundationalist strategy in democratic societies. Conversationalism, as wide reflective equilibrium, conducted across persons suggests an affinity for compromise. Conversationalism and compromise have a striking similarity. Consider:

The practice of meeting others, taking their concerns seriously, and making binding agreements and compromises rightly represents the persuasive medium of engagement and accomplishment in . . . [democratic] politics. The practice [of conversation and compromise] gives reality to the moral claims that individuals possess a dignity and freedom that warrants their pursuit of their own destinies. [Conversing] and [c]ompromising with other persons acknowledge their status as legitimate participants in the political order and their integrity, which presumes their capacity to assess, promise, and abide by agreements. In many compromises, the interests of others are recognized as worthy of concern, even respect. To the extent that compromises involve mutual gains, they acknowledge all participants as "victors" or gainers in the exercise of politics with a right to those gains.

J. PATRICK DOBEL, COMPROMISE AND POLITICAL ACTION 163 (1990).



mise itself is ambiguous; it might refer to the outcome of a decision process or the decision process itself.<sup>217</sup> The outcome of a compromise must respect the *substantive* and *decision-making* interests of each side equally. Compromises may involve non-moral or moral values.<sup>218</sup> Compromises over nonmoral values often involve resource-allocation problems<sup>219</sup> or fungible interests.<sup>220</sup>

It is, however, difficult to imagine what sort of compromise is possible on many of the important legal and moral controversies confronting us today.<sup>221</sup> Moral conflict is sometimes due to a clash of principles where "there appears to be no common scale into which they can be translated, with the difference then (quantitatively) split,"<sup>222</sup> as for example, when theistic reasons conflict with questions of personal autonomy. In these cases, there appears to be no way to adjudicate the controversy. Sup-

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217. MARTIN BENJAMIN, *SPLITTING THE DIFFERENCE: COMPROMISE AND INTEGRITY IN ETHICS AND POLITICS* 4 (1990).

218. The problem of compromise in moral conflicts drastically differs from the problem of compromise in nonmoral conflicts, though sometimes moral controversies can be recast in terms of nonmoral interests. *Id.* at 15. However, not every interest has "standing." *Id.* at 17. Consider the following statement of the difference between moral and nonmoral compromises.

What is at stake for parties to a moral conflict is higher than when the disagreement is perceived in terms of conflicting nonmoral interests. Our [nonmoral] interests . . . are not so much a part of us—not so integrally related to our identity, personal ideals, or sense of ourselves—as are our basic moral convictions. To compromise fundamental principles is to compromise not simply a contingent or readily interchangeable interest but rather what one regards as an essential aspect of the self. It is to alter one's fundamental convictions and perhaps to weaken or betray one's wholeness or integrity as a particular self—as a person with a determinate identity who stands for some things rather than for others.

*Id.* at 13-14.

If we adopt a suitably pragmatic view, everything is contingent. In changing part of the self, we do not weaken its wholeness or integrity per se. Rather, we exchange one wholeness for another. Moreover, insofar as we replace wholeness with fragmentation, it may be a good thing. Based on this view, wholeness distorts the complexity of social reality and the necessary complexity associated with adequate practical conceptions for dealing with this reality. See Shiffrin, *supra* note 23. But see Robert J. Lipkin, *Liberalism, Radicalism and Utopian Ideals*, 19 CAP. U. L. REV. 1033 (1990); Rodney K. Smith, *Legal Utopia and Myopia: Some Comments Regarding Shiffrin, Lipkin, and Looking Beyond the Mark in Legal Education*, 19 CAP. U.L. REV. 1059 (1990).

219. Theodore M. Benditt, *Compromising Interests and Principles*, in *COMPROMISE IN ETHICS, LAW, AND POLITICS* 26, 30 (J. Roland Pennock & John W. Chapman eds., 1979).

220. GEORGE SIMMEL, *Conflict*, in *CONFLICT AND THE WEB OF GROUP AFFILIATIONS* 115-16 (Kurt H. Wolff trans., 1955).

221. It is not obvious that compromise is even morally appropriate concerning these controversies.

222. BENJAMIN, *supra* note 217, at 15.

pose, for instance, one party states that sex outside of marriage is constrained only by personal choice and the other party says it is always wrong because it is incompatible with divine commandments. How is this conflict to be resolved? What sort of compromise is possible?

Another intractable controversy occurs when two parties share the relevant values but rank them differently. In fact, one way to understand the abortion controversy is as a question of priorities over the *same* values. Both sides share the values of the sanctity of life and the importance of personal choice; however, each ranks these values differently.<sup>223</sup>

### 1. Integrity-Preserving Compromises

Martin Benjamin aptly states the problem of moral compromise: "Are there any circumstances in which parties to a conflict involving rationally irreconcilable ethical commitments may devise a mutually satisfactory compromise without compromising . . . themselves or others?"<sup>224</sup>

In cases where ultimate values are irreconcilable, Benjamin argues that integrity-preserving compromise is possible. When one finds a conflict in the circumstances of compromise, the parties may "do well to investigate the possibility of compromise."<sup>225</sup> According to Benjamin, the circumstances of compromise exist when there is "[f]actual uncertainty, moral complexity, the need to maintain a continuing cooperative relationship, the need for a more or less immediate decision or action, and a scarcity of resources . . . ."<sup>226</sup> In these circumstances, an actor may compromise even a deeply held value and still be a person of integrity. Benjamin writes:

If . . . the overall pattern of life favored by most of us is . . . one that includes a high degree of trying to see matters from others' points of view, an appreciation of factual uncertainty, moral

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223. Sometimes in these circumstances, it only appears that the two parties share the same values. Sometimes ranking two values in a hierarchy differently shows that the parties have incommensurable hierarchies. For example, a scheme that values liberty significantly higher than equality is radically different from a scheme that values equality higher than liberty, despite both schemes valuing liberty *and* equality. This suggests that showing that disputants share the same values does not tell us a great deal. We must inquire further as to how these values are understood, ranked and applied.

224. BENJAMIN, *supra* note 217, at 23.

225. *Id.* at 32.

226. *Id.* Factual uncertainty and moral complexity are reasons for seriously considering the views of one's opponent.

complexity, and limited resources, a presumption against settling matters by rank and force, and so on, it would not be surprising if a compromise . . . were to be more integrity preserving than either of the polar alternatives. To choose to preserve as best as possible the overall pattern of one's life cannot be regarded as betraying one's integrity. Indeed, in such circumstances, a compromise may provide the best means to preserving it. It is one thing simply to compromise [or betray] one's principles; quite another to compromise between them.<sup>227</sup>

Unfortunately, Benjamin's account unjustifiably assumes that there always exists some degree of fragmentation in anyone's moral beliefs. Hence, when two parties find themselves in the circumstances favoring compromise both will be inclined somewhat toward the other's point of view. Benjamin's analysis appears to work only in circumstances where the parties share the same basic ethical conceptual scheme. That is, Benjamin assumes that the parties share many of the same values at least concerning the circumstances of compromise. But how can we compromise when this assumption is unwarranted?

In other words, Benjamin overlooks a distinction between normal and revolutionary conflict, and thus, between normal and revolutionary compromise. In normal conflict, our inquiry is governed by a shared paradigm. Conflicts might appear intractable, but sooner or later the paradigm governs. In revolutionary conflict, we differ over the appropriate paradigm. Abortion, affirmative action, racism, and sexism usually are examples of revolutionary conflict. In cases of revolutionary conflict, Benjamin's circumstances of compromise do not obtain because the parties cannot sufficiently empathize with each other's perspectives.

Benjamin might reply that even in these circumstances compromise is possible. He might contend that in the abortion controversy, for example, each side values life and privacy, but simply ranks these values differently. However, this reply distorts the problem of incommensurability. Two parties have incommensurable views if each has a value that the other eschews. Incommensurability also occurs when both parties share the same values but rank them differently in critical cases. Incommensurability occurs in this second case because ranking values differently means that you have systematically different views on a spate of legal and moral questions. In this event, the

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227. *Id.* at 37.

judgments of one party cannot be translated into the judgments of the other party. The two parties, though sharing similar values, occupy two different universes of practical value and conduct.

## 2. Internal Compromises

Ronald Dworkin's conception of law as integrity is relevant to the problem of compromise.<sup>228</sup> Dworkin argues that we have a justified aversion to checkerboard statutes, that is, internal compromises in schemes of justice.<sup>229</sup> A checkerboard statute "treats a community's public order as a kind of commodity to be distributed in accordance with distributive justice, a cake to be divided fairly by assigning each group a proper slice."<sup>230</sup> Even if this satisfied a political ideal of fairness, we would still reject such a compromise. Dworkin writes:

Most of us . . . would be dismayed by "checkerboard" laws that treat similar accidents or occasions of racial discrimination or abortion differently on arbitrary grounds. . . . [W]e reject a division between parties of opinion when matters of principle are at stake. We follow a different model: that each point of view must be allowed a voice in the process of deliberation but that the collective decision must nevertheless aim to settle on some coherent principle whose influence then extends to the natural limits of its authority. If there must be compromise because people are divided about justice, then the compromise must be external, not internal; it must be a compromise about which scheme of justice to adopt rather than a compromised scheme of justice.<sup>231</sup>

Internal compromises are compromises in principle, not a compromise concerning which principle to accept. Internal compromises suggest a deficiency in integrity, which, according to Dworkin, is a political virtue independent of justice, fairness, and procedural due process.<sup>232</sup>

When choosing a solution to a political conflict a person might choose her conception of justice, her opponent's conception of justice, or an internal compromise, that is, a checkerboard compromise. In Dworkin's view, "[w]e would prefer

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228. DWORKIN, *supra* note 82, at 176-86.

229. *Id.* at 179.

230. *Id.* at 178-79.

231. *Id.* at 179.

232. *Id.* at 177.

either of the alternative solutions [one's own conception of justice or one's opponent's conception of justice] to the checkerboard compromise. . . . [We] would rank the checkerboard solution not intermediate between the other two but third, below both . . . ."<sup>233</sup>

In determining which solution to the abortion controversy is appropriate, pro-abortion, anti-abortion or a checkerboard solution, both pro-abortion and anti-abortion advocates would rank the checkerboard solution third. According to Dworkin, choosing pro- or anti-abortion solutions are the only principled solutions available.<sup>234</sup> Compromise in principle is impossible here. Consider Dworkin's remarks:

Our instincts about internal compromise suggest another political ideal standing beside justice and fairness. Integrity is our Neptune. The most natural explanation of why we oppose checkerboard statutes appeals to that ideal: we say that a state that adopts these internal compromises is acting in an unprincipled way . . . . The state lacks integrity because it must endorse principles to justify part of what it has done that it must reject to justify the rest.<sup>235</sup>

In Dworkin's view, we resist the notion that the state personified may accept internally compromised principles, principles which, for example, permit abortion every other day of the week, because we value principled conduct, conduct which has an internal unity or integrity.

Dworkin is no doubt on to something important. Splitting the difference with a Nazi is unprincipled and morally outrageous. However, Dworkin's view only tells part of the story. In determining whether to compromise with a Nazi, we must first determine what choices are available. If our choice is victory over the Nazis, with some cost in human life, then perhaps we would choose not to compromise. But suppose our choice is either to wage war against the Nazis resulting in the extermination of all Jews or to accept the Nazis killing every other Jew. Is this an acceptable compromise? The reply that *we* might accept this compromise, but no Jew can, is off the mark. The point of this example is that rationality demands that anyone (including Jews) should accept the compromise if the choice is a checkerboard solution or the death of every Jew. The point here is that

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233. *Id.* at 182.

234. *Id.* at 183.

235. *Id.* at 183-84.

when there is no chance of doing better, it is irrational (and immoral) not to endorse a checkerboard solution.<sup>236</sup>

Dworkin seems to think that while individuals might accept checkerboard solutions, the state cannot.<sup>237</sup> But this relies on a tendentious conception of the state. If I believe it morally required to accept a checkerboard solution in order to save half the world's Jews, then I would want the state to accept the same solution if the alternative is total extermination.<sup>238</sup>

I want to suggest that our ethical conceptual scheme is indeterminate on this matter. We do not know how to determine whether these are integrity-preserving compromises, or whether we should be prepared to engage in them. Until we can resolve this issue, we cannot say that we have a rich enough concept of compromise to provide an appropriate analytic model for modified skepticism. Without a robust conception of compromise, we might be left with the permanent incommensurability of our different political perspectives and of the political conceptions of the person upon which these perspectives are based.

## V. CONCLUSION

Conversationalism in legal theory has salutary instrumental consequences. First, sometimes just by talking to one's opponent the irreconcilability of the relevant positions softens. Moreover, empathizing with one's opponent often helps to resolve conflicts. The phenomenology of conversation and compromise help individuals to see possibilities of resolving issues that would have been overlooked had it not been for face-to-face interaction. Finally, conversation tends to reduce alienation and inflexibility. However, these benefits are all instrumental. None singularly or together represents the content of conversationalism. Wide reflective equilibrium provides the content of conversationalism rendering it a viable method for understanding one's beliefs and

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236. *But see id.* at 181.

237. *Id.* at 184.

238. In revolutionary circumstances, it is difficult to understand how an integrity-preserving compromise is possible. My ethical conceptual scheme is defined in terms of the principles that I hold. It is ludicrous to suppose there can be any compromise between murderers, rapists, torturers, and their victims. It might even be implausible to suppose that victims of any sort of crime can compromise with their assailants. Still, in all cases but murder, a type of accommodation might be conceivable. For example, suppose you know with certainty that you will be mugged today. Suppose further that you have a choice of how many blows will be struck. Undoubtedly you will choose fewer blows. But can this be called compromise?

values. Conversationalism embraces modified skepticism and a pluralism which represents an attractive post-modern development.

Modified skepticism is an analytic device attempting to clarify and explain contemporary American society. As such, modified skepticism combines the distinction between normal and revolutionary reasoning with wide reflective equilibrium and a political conception of a person. Modified skepticism insists that justification is holistic and a function of social practices.<sup>239</sup>

What remaining questions must modified skepticism address? First, modified skepticism must explain why one person conceives of herself in a certain way rather than another. To do this modified skepticism must account for the quasi-aesthetic role the imagination plays in ordinary lives. Not giving the imagination its due involves two failures. First, it fails to explain why people adhere to conservative, liberal or radical perspectives despite the evidence against each of these perspectives. Second, it is only by a properly rich conception of our imaginative capacities that we can understand how devising new transformative structures is possible.

Third, modified skepticism is an attitude which aspires to unify skepticism, reason, and romance. One way to achieve this unity is to integrate these three elements in a hard-headed, realistic, utopianism. Modified skepticism is skeptical in taking seriously the failure of Western philosophy to provide rational structures for settling all practical conflicts. It is rationalistic in appreciating the areas in which conflicts can be settled. Finally,

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239. According to this view, "justification is not a matter of a special relation between ideas (or words) and objects, but of conversation, of social practice. Conversational justification . . . is naturally holistic, whereas the notion of justification embedded in the epistemological tradition is reductive and atomistic." RORTY, *supra* note 3, at 170.

Ultimately, conversational justification is hermeneutical. It tells us "that we shall never be able to avoid the "hermeneutic circle"—the fact that we cannot understand the parts of a strange culture, practice, theory, language, or whatever, unless we know something about how the whole thing works, whereas we cannot get a grasp on how the whole works until we have some understanding of its parts." *Id.* at 319. Interpretation plays an important role in this process. Indeed, this conception of "interpretation suggests that coming to understand is more like getting acquainted with a person than like following a demonstration. In both cases we play back and forth between guesses about how to characterize particular statements or other events, and guesses about the point of the whole situation, until gradually we feel at ease with what was hitherto strange." *Id.*

Conversational justification has ramifications for understanding culture. Since "[t]he notion of a culture as a conversation rather than as a structure erected upon foundations fits well with this hermeneutical notion of knowledge, since getting into a conversation with strangers is like acquiring a new virtue or skill by imitating models . . . ." *Id.*

modified skepticism is romantic in acknowledging the value of utopian visions of the self and society as vehicles for unifying presently incompatible political perspectives. I do not insist that these romantic ideals are immanent in history or are in some other way inevitable. Nor do I contend that there is reason for believing any one such vision will necessarily occur,<sup>240</sup> or that if it does occur, it will be an unquestioned good. What I do insist upon, however, is that the romantic faith in the possibility of such a unification is intelligible and desirable, and that a commitment to this ideal in no way denigrates a commitment to the present pluralistic reality. Lastly, modified skepticism provides an account of moral change that accurately reflects social reality, and firmly unites skepticism, reason, and romance as alternating moments in the conversation of humankind.<sup>241</sup>

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240. Instead, perhaps modified skepticism will demonstrate why living with irony ennobles both the self and society.

241. Simplified, these alternating moments exhibit the following structure. Reason reflects the past, it tells us which principles we agree upon and what is reasonable based on that agreement. Skepticism modifies the present, it shows us the limits of what is reasonable. Romance and imagination anticipate the future, creating new possibilities of agreement and change.