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# Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory

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# BEYOND SKEPTICISM, FOUNDATIONALISM AND THE NEW FUZZINESS: THE ROLE OF WIDE REFLECTIVE EQUILIBRIUM IN LEGAL THEORY

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This piece is dedicated to the cherished memory of Libby Lipkin, my mother, whose life was a testimony to a reasoned, prudent and courageous optimism, and to Herb Lipkin, my father, who lovingly nursed her through a long, devastating and unrelenting illness.

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## INTRODUCTION

The skeptic is the perennial whipping boy of mainstream legal theorists.[1] These theorists delight in labelling the skeptic's credo self-refuting, inconsistent, incoherent or unintelligible.[2] Curiously, however, something important in the skeptical attitude survives their criticism. This Article specifies what this "something" is.[3] Summarily stated, the skeptic is in touch with the scope and limit of reason and justification. He understands just how much we can legitimately claim to know, and what we must acknowledge is beyond

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[1] By "mainstream theorists," I mean theorists who attempt to show the rationality of law, for example: THEODORE M. BENDITT, LAW AS RULE AND PRINCIPLE (1978); RONALD DWORKIN, LAW'S EMPIRE (1986); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); H.L.A. HART, THE CONCEPT OF LAW (1961); DAVID LYONS, ETHICS AND THE RULE OF LAW (1984); and Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1980). Mainstream theorists are distinguished from theorists advocating reductionist doctrines, such as law and economics, or the radical revision or abandonment of law, including certain strains of Critical Legal Studies and feminist theory.

[2] Typically, mainstream theorists contend that skepticism is radically mistaken. For example, Finnis argues that certain values are objectively and universally good: "It is obvious that a man who is well informed, etc. simply *is* better off (all things being equal) than a man who is . . . ignorant, that the state of the one is better than the state of the other . . . universally, and *whether I like it or not*." *See e.g.*, J. FINNIS, *supra* note 1, at 70-75. The problem with Finnis's argument is that it depends upon a controversial notion of self-evidence that reductionists and revisionists specifically reject. More importantly, Finnis' argument is plausible only when stated at a level of generality that trivializes it.

[3] I carefully distinguish between legal skepticism and other similar challenges to mainstream thought, for example, nihilism and cynicism. Skepticism challenges the meaning or justification of law as a valid form of practical reasoning, while nihilism concludes, perhaps after exposure to skeptical doubt, that human existence generally and legal culture in particular are meaningless. In contrast, the cynic believes that morality represents a legitimate ideal which human nature is too depraved to realize. Nothing in my view prevents a skeptic from seeking to overcome his skepticism. *See* Myles F. Burnyeat, *Can the Skeptic Live His Skepticism?*, in THE SKEPTICAL TRADITION 117, 140 (Myles F. Burnyeat ed. 1983).

our understanding.[4]

This Article describes a modified form of skepticism. Modified skepticism concerns the scope and limit of rational argument. Surprisingly, this novel brand of skepticism explains why there is agreement on so many important legal and moral issues. Modified skepticism further explains why the great controversial issues of the day defy rational solution. Modified skepticism depicts three salient problems with contemporary legal discourse: the problem of scope, the ranking problem and the problem of ultimate values.[5] These skeptical problems together with three distinct conceptions of moral personality preclude uniquely correct answers to the great moral and political dilemmas presently confronting legal theory and contemporary American society.

The problem of scope maintains that agreement on the abstract meaning of a given value does not tell us how this value should be applied to concrete situations. Unless we can determine the scope of an abstract value, agreement on concrete applications will be illusory, and hence, modified skepticism is warranted. Accordingly, two people might agree on the truth of a particular legal or ethical claim, but disagree on what that claim implies. In such cases, both parties are non-skeptical regarding the abstract formulation of the claim, yet they disagree irreconcilably over its concrete implications.

Generalizing from cases of this sort, unless we have a method for resolving the problem of scope, many urgent legal and moral questions will have only a skeptical solution. For example, we might agree that American citizens have the right to be treated equally, yet fail to agree whether this implies affirmative action, social security, a guaranteed income, a high or low inheritance tax, or whether equality is only formal equality. When people have very different political perspectives, they will inevitably disagree about the scope of equality, despite agreement on the value of equality abstractly formulated. Their differences will be irreconcilable, suggesting that

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4 The current legal landscape looks like this: Foundationalism is dead. So is radical skepticism. No one seriously contends that we can know the truth of legal propositions with certainty. *But see* J. FINNIS, *supra* note 1. Similarly, no one seriously believes that we know nothing at all. Mainstream theorists pick up the slack here, arguing that there is no reason in principle why controversial legal and moral questions cannot be resolved. Their argument involves a subtle, imperceptible move from this unremarkable declaration to what must be a startling conclusion, namely, that at present there exists a methodology capable of resolving these controversies. The legal skeptic provides the appropriate counterpoise to the mainstream theorists' contentions. The skeptic appreciates the limits of theoretical and practical knowledge, and therefore must be taken seriously. *See* LAURENCE BONJOUR, THE STRUCTURE OF EMPIRICAL KNOWLEDGE 180-81 (1985).

5 The problems of scope, ranking and ultimate values may not exhaustively define modified skepticism. However, in this Article I am interested only in these forms of the doctrine.

agreement on values abstractly formulated is virtually irrelevant to solving most legal and moral controversies. In order to avoid skepticism, we must formulate bridge principles that normatively tie abstract values to concrete applications. Since no one has yet persuasively formulated such principles, the problem of scope is a powerful skeptical problem.

The ranking problem is a familiar problem in legal and ethical theory.[6] Essentially, this problem maintains that disagreement in law and ethics occurs because two individuals accept the same fundamental principles or values, but disagree as to their relative importance. For example, we might believe both that lying is wrong and that protecting innocent life is right. What then should be done when a murderer demands to know the location of an innocent person whom he intends to kill? If protecting innocent life is ranked higher than truthfulness, our choice is easy. If, however, truthfulness is ranked higher than protecting innocent life, we must tell the murderer the victim's whereabouts.[7] The problem here is whether there are meta-principles available for settling this matter. It is not enough to argue, as do some contemporary legal scholars,[8] that there exists an informal procedure, namely judgment, which eschews meta-principles yet nevertheless solves the ranking problem. This response is pointless unless we can accurately describe these ranking principles and show how they achieve agreement across persons.

The problem of ultimate values maintains that unless there is a procedure for settling conflicts involving ultimate values, reasoning ultimately runs out before reaching agreement. Similarly, if ulti-

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6 Intuitionism in ethical theory relies upon intuition to determine and then rank competing moral values. Intuition is an intellectual faculty by which we directly apprehend the truth of a proposition. *See* HENRI BERGSON, AN INTRODUCTION TO METAPHYSICS 24, 60 (1955); EDMUND HUSSERL, PHENOMENOLOGY AND THE CRISIS OF PHILOSOPHY 115 (1965). *But see* Moritz Schlick, *Is There Intuitive Knowledge?*, in 1 PHILOSOPHICAL PAPERS 141 (1979). Classical ethical intuitionists need this faculty in order to solve the ranking problem. WILLIAM DAVID ROSS, THE FOUNDATIONS OF ETHICS (1939) (stating the intuitionist antipathy towards moral theories); WILLIAM DAVID ROSS, THE RIGHT AND THE GOOD (1930). Some intuitionists hold that true moral statements are self-evident and represent non-natural moral facts. *See, e.g.*, C.D. BROAD, FIVE TYPES OF ETHICAL THEORY (1930); GEORGE EDWARD MOORE, PRINCIPIA ETHICA (1903); HENRY SIDGWICK, THE METHODS OF ETHICS (1907); *cf.* J. FINNIS, *supra* note 1. Most contemporary intuitionists are justifiably skeptical of such a mysterious intellectual faculty.

7 Of course, one might reply that no one could seriously argue that telling the truth is more important than saving an innocent life. But can one prove this? Kant, perhaps the greatest Western ethicist, contended that we are morally obligated to tell the truth even to a murderer intent on taking an innocent life. IMMANUEL KANT, *On a Supposed Right to Tell Lies from Benevolent Motives*, in KANT'S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS 361-65 (Thomas Kingsmill Abbott trans. 5th ed. 1898).

8 *See infra* notes 74-112 and accompanying text.

mate values are grounded in a particular conception of moral personality, and if skepticism is to be defeated, then there must be a method for showing that one and only one moral personality is rationally defensible. If not, the difference in ultimate moral values is inevitable.[9] The existence of several plausible, though incompatible, conceptions of moral personality explains why there is systematic disagreement over controversial legal and moral issues, issues over which "reasonable people can differ." Reasonable people can differ over these issues because they can differ over what sort of moral person to be.[10] Since there are several equally plausible conceptions of the person, ultimate values will differ, and as a result it will be impossible to provide uniquely correct answers to controversial legal and moral questions.[11]

Part One of this Article first describes the varieties of skepticism; then it concludes by describing modified skepticism in greater detail. Part Two examines certain arguments against legal skepticism. Part Three examines a very influential attempt to abandon the framework within which skepticism operates. Finally, this Article describes the methodology available if one takes skepticism seriously, and explains why skepticism will remain a permanent element in practical reasoning.

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9 If ultimate values depend on moral personality, then one's ultimate values are correct only if one, and only one, conception of moral personality is correct. If, on the other hand, more than one type of moral personality is possible, then one's ultimate values depend upon the type of person one is or chooses to be. For example, if traditionalist and reformist represent two incommensurable personality types, then the traditionalist and reformist will have different ultimate values, and hence will give different "correct" answers to legal and moral problems. *See infra* notes 260-85 and accompanying text. According to this view, since moral personality is the ultimate ground of all legal and moral reasoning, there are no independent reasons for choosing one personality type over another.

10 Two important qualifications must be made. First, since modified skepticism insists that there exists intractable disagreement over only certain kinds of contemporary controversies, it follows that there is much about which we do agree. Second, modified skepticism does not permit just any conceivable conception of moral personality. *See infra* notes 260-85 and accompanying text. Rather, it describes three general types of moral personality that generate intrinsically different world views. Modified skepticism explains why we never seem to settle the perennial controversies in legal and moral discourse. We do not settle them because they reflect incommensurable political perspectives. Consequently, modified skepticism locates the limits of political justification in one's conception of what kind of person to be.

11 Rather than talk of correct and incorrect legal conclusions, we might instead simply speak of the reasons for or against various perspectives, and develop criteria for more or less convincing reasons. *See* MICHAEL OAKESHOTT, ON HUMAN CONDUCT 135 (1975).

## I
## FOUNDATIONALISM AND SKEPTICISM

At some point in an individual's development, he begins to critically inspect his beliefs and values to determine whether they are reliable. Ordinarily, sense-experience, memory, the testimony of other qualified witnesses, inferential reasoning, and practical reasoning are methods of deriving reliable beliefs and values.[12] This is primarily an individualistic pursuit;[13] each person is capable of engaging in the process of reasoning. During the pre-modern era, reason did not control a person's beliefs and values. Instead, beliefs and values were given the imprimatur of the Church or of some other authoritative source. The individualistic methodology had not yet been instituted as a cultural given, as something any individual, regardless of social status, could use. With the advent of the modern era, individualism flourished, but not without cost. No longer could we be absolutely certain that what we believed and valued was true or real. Skepticism raised its terrifying presence and has been with us ever since.[14]

### A. The Problem of Skepticism

Since Descartes,[15] the modern world[16] has been obsessed with skepticism.[17] Once the status or authority of the speaker no longer

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12 One argument for skepticism concerning values is that obligations and evaluations are not objective properties of the world. If obligations and evaluations were objective, "then they would be entities or qualities or relations of a very strange sort, utterly different from anything else in the universe." J. L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 38 (1977). How would we ever know whether such strange properties exist? We could know this only "by some special faculty of moral perception or intuition, utterly different from our ordinary ways of knowing everything else." *Id. But see* E. J. BOND, REASON AND VALUE 86 (1983) (arguing against the contention that for a value to be objective we must "assign it to a special realm of being" or that we need a special faculty to perceive it).

13 The process is also social because it deploys inter-subjective concepts and principles of inference. No private rules of reasoning are permissible. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G. Anscombe trans. 1953).

14 Mainstream theorists must face the fact that "[d]espite rejection, obloquy, and rebuttal over the centuries, scepticism has managed time and again to rise, Phoenix-like, from the ashes." NICHOLAS RESCHER, SCEPTICISM 6 (1980). What explains this phenomenon, if not the fact that "scepticism embodies a grain of truth—and perhaps many of them?" *Id.*

15 RENÉ DESCARTES, *Meditations on First Philosophy*, in THE PHILOSOPHICAL WORKS OF DESCARTES (Elizabeth S. Haldane and G.R.T. Ross trans. 1911) [hereinafter WORKS]; RENÉ DESCARTES, *Discourse on the Method of Rightly Conducting the Reason*, in WORKS, *supra*.

16 The modern world or the term modernity refers *inter alia* to the "process of secularization and rationalization giving rise to new modes of thought such as rationalism, liberalism and positivism. DOUGLAS KELLNER, CRITICAL THEORY, MARXISM AND MODERNITY 3-4 (1989).

17 Skepticism has deeper roots in Western philosophy. Much of Plato's epistemology is an attempt to defeat skepticism. Contemporary skepticism usually is portrayed as

determined a statement's credibility, philosophers began to search for an unalterable foundation upon which to ground our system of beliefs and values.[18] To demonstrate the credibility of beliefs and values, philosophers thought it necessary to discover immutable principles, principles not subject to doubt or revision. Traditionally, the conviction that our system of beliefs and values must be grounded for the beliefs and values to represent knowledge is known as "foundationalism."[19] According to foundationalism, only statements that are intrinsically credible can serve as a foundation for knowledge.[20] From a skeptical perspective, of course, no statement is intrinsically credible, and therefore foundationalism is impossible.[21] Foundationalism, in its many guises, always involves an attempt to defeat skepticism. One proves that skepticism is wrong

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defeatist or nihilist. By contrast, ancient skepticism, or Pyrrhonism, combines the skeptical attitude of suspending judgment and belief with the quest for tranquility. Burnyeat, *supra* note 3, at 120.

18 The conception of a ground or foundation for our system of beliefs is a metaphor. *See* CALVIN O. SCHRAG, COMMUNICATION PRAXIS AND THE SPACE OF SUBJECTIVITY 94-96 (1989). This is not to denigrate it. Metaphors, however, must be evaluated in terms of how well they do the intended job.

19 Two of the most important types of foundationalist theories are rationalism and empiricism. Descartes' rationalism is a foundational theory because it purports to discover a non-empirical methodology for determining absolute truth. Locke's empiricism is foundationalist in that it appeals to a class of non-inferentially true, empirical statements upon which to rest everything else. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Alexander Campbell Fraser ed. 1959). For interesting discussions of foundationalism, see RODERICK CHISHOLM, PERCEIVING: A PHILOSOPHICAL STUDY (1957); RICHARD FOLEY, THE THEORY OF EPISTEMIC RATIONALITY 68 (1987) (defending a subjectivist foundationalism); CLARENCE IRVING LEWIS, AN ANALYSIS OF KNOWLEDGE AND VALUATION (1946); James Cornman, *Foundational versus Nonfoundational Theories of Empirical Justification* in ESSAYS ON KNOWLEDGE AND JUSTIFICATION 317 (George S. Pappas and Marshall Swain eds. 1978) (arguing for an "explanatory-coherence" foundation theory of empirical justification) [hereinafter KNOWLEDGE AND JUSTIFICATION]; Nelson Goodman, *Sense and Certainty*, 61 PHIL. REV. 160 (1952); Mark Pastin, *Modest Foundationalism and Self-Warrant* in KNOWLEDGE AND JUSTIFICATION, *supra* at 279, 280 (stating that "the most important disagreement among epistemologists is the disagreement between foundationalists and nonfoundationalists."); Wilfrid Sellars, *Empiricism and Philosophy of Mind*, in SCIENCE, PERCEPTION AND REALITY (1963); Moritz Schlick, *On the Foundation of Knowledge*, in 2 PHILOSOPHICAL PAPERS 370 (1979) (describing an empiricist theory of knowledge).

20 Two types of intrinsically credible statements are associated with foundationalism. A statement is intrinsically credible if it is either self-evident or experientially self-confirming. A foundation for knowledge includes, therefore, either a self-evident statement or an experientially self-confirming statement from which all other claims to knowledge and value may be derived.

21 In this discussion I do not always distinguish between skepticisim concerning "knowledge," "truth," "justification," or "reasoning." In my view, formulating reliable principles of *reasoning* would be a significant victory over skepticism, even if it could not defeat skepticism concerning "knowledge," "truth," or "justification." Unfortunately, I believe such principles exist only within a political perspective, not as a procedure for evaluating competing political perspectives. Consequently, selecting a political perspective is not the result of practical reasoning.

by showing how foundational certainty dispels skeptical doubt. Understood in this fashion, foundationalism and skepticism are two sides of the same coin. A person adopts foundationalism when he believes that there exist unrevisable principles upon which to rest everything truly believed and valued. Certainty and necessity often are associated with foundational statements.[22] According to a traditional conception of the relationship between foundationalism and skepticism, a person is skeptical when he believes that doubt is inevitable, and that nothing can ever be known with certainty.[23]

Simplified, the dynamics of modern Western philosophy can be characterized as the alternating rise and fall of foundationalism and skepticism.[24] Individual philosophers, as well as entire philosophical movements, tend to embrace an original philosophical methodology that promises to resolve traditional philosophical problems. After employing this methodology in an attempt to resolve these problems, a maverick philosopher then challenges these solutions with an ingenious skeptical argument. The maverick's skepticism usually is followed by a damaging counter-argument, or a brilliant and unique foundational argument. The ultimate goal of this process is to devise a methodology, once and for all, that achieves agreement on how to solve philosophical problems, if not agreement on the substantive solutions themselves.[25] In other words, this process seeks to normalize philosophical investigations.[26]

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22 Statements known with certainty may, but need not, be necessarily true. PETER KLEIN, CERTAINTY: A REFUTATION OF SKEPTICISM 201 (1981) (arguing that "[c]ontingent propositions *can* be absolutely certain on the basis of confirming evidence which does not entail them.").

23 *See* Peter Unger, *A Defense of Skepticism*, in KNOWLEDGE AND JUSTIFICATION, *supra* note 19, at 317 (arguing that knowledge requires certainty and that we rarely know anything with certainty); *see also* PETER UNGER, IGNORANCE: A CASE FOR SKEPTICISM (1975); Goodman, *supra* note 19. *But see* James A. Cargile, *A Reply to "A Defense of Skepticism"* in KNOWLEDGE AND JUSTIFICATION, *supra* note 19, at 337.

24 Many contemporary philosophers, suspicious of foundationalist solutions to philosophical problems, and instinctively non-skeptical, question whether philosophy is at an end. *See* AFTER PHILOSOPHY: END OR TRANSFORMATION? (Kenneth Barynes, James Bohman, and Thomas McCarthy eds. 1987) [hereinafter AFTER PHILOSOPHY]. Richard Rorty believes that philosophy, as a metaphysical and epistemological discipline, should be abandoned for more pragmatic pursuits. Richard Rorty, *Pragmatism and Philosophy*, in AFTER PHILOSOPHY, *supra*, at 26.

25 Why should *agreement* be the paradigm for a successful methodology? Why does agreement give epistemic authority to what is believed? Indeed, even if people always agreed upon everything, or agreed upon everything in suitably described ideal circumstances, why should this agreement matter? The point here is that even if agreement is universal, we still need to explain it. *See* BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 132 (1985).

26 Normal philosophical activity involves a generally accepted paradigm for settling philosophical disputes. *Cf.* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970) (arguing that normal science involves agreement on what counts as a solution to a scientific question). Logical positivism, ordinary language philosophy and phenome-

Although philosophy is the supreme foundational discipline, other disciplines emulate its quest for foundations by seeking first principles, certainty, necessity, objectivity, and so forth. A foundational discipline seeks a unique, autonomous methodology,[27] philosophically grounded, for resolving its problems. If philosophy cannot sustain its commitment to foundationalism, then other foundational disciplines cannot either. Accordingly, the more foundational a discipline purports to be, the greater the need for imaginative efforts to supply a non-foundational procedure to guide its operations, should it turn out that foundationalism is illusory. According to traditional legal theory, Anglo-American law is a foundational discipline[28] relying heavily on formal, allegedly objective and impartial procedures for resolving legal disputes. The question naturally arises: what picture of law is available once we jettison the quest for legal foundationalism?

## B. Skepticism and Nihilism

We should note an important preliminary distinction between skepticism and nihilism. A skeptic doubts both the truth of an assertion *and* its negation. A nihilist, on the other hand, believes the de-

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nology are failed attempts to normalize philosophical inquiry. According to the traditional conception, philosophy is "a discipline that unites the argumentative rigor made possible by an appeal to commonly shared criteria with the ability to decide issues of ultimate significance for our lives. The traditional image of philosophy is of a discipline that will (any day now) produce noncontroversial results concerning matters of ultimate concern." Richard Rorty, *Pragmatism Without Method*, in SIDNEY HOOK: PHILOSOPHER OF DEMOCRACY AND HUMANISM 259, 271 (Paul Kurtz ed. 1983) [hereinafter Rorty, *Pragmatism Without Method*].

Rorty argues that if philosophy requires publicly acceptable criteria for settling disputes, then there is no such thing as philosophy. Rorty insists that "the notion that philosophy is or should become such an application of explicit criteria contradicts the very idea of philosophy." Richard Rorty, *Solidarity or Objectivity?*, in POST-ANALYTIC PHILOSOPHY 8 (John Rajchman & Cornel West eds. 1985) [hereinafter Rorty, *Solidarity or Objectivity?*]. Is Rorty here appealing to some notion of what philosophy *essentially* is? If so, isn't he contradicting his anti-essentialist methodology?

Philosophy, for Rorty, is "what a culture becomes capable of when it ceases to define itself in terms of explicit rules, and becomes sufficiently leisured and civilized to rely on inarticulate know-how, to substitute *phronesis* for codification, and conversation with foreigners for conquest of them." *Id.*

27 An autonomous methodology is one that is distinctive of an independent domain or class of related domains. Many are skeptical that law contains such a methodology. *See* Richard Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 859 (1988) (arguing that "[t]here is no distinctive methodology of legal reasoning"); Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 762 (1987) (stating that the autonomy of law means that law is "properly entrusted to persons trained in law and nothing else."); Pierre Schlag, *Contradiction and Denial* (Book Review), 87 MICH. L. REV. 1216 (1989).

28 To call a discipline foundational implies that it contains or rests upon intrinsically credible statements or statements that are in some other manner either necessarily true or capable of being known with certainty.

nial. An ontological skeptic, for example, refrains from either believing or disbelieving in the existence of some object or entity, such as God; the nihilist believes that the object does not exist.[29] A nihilist believes that nothing is meaningful, including individual aspiration, social ideals, or transcendent values. Nihilism is a markedly pessimistic doctrine that is not only difficult to sustain, but more importantly, is very difficult to truly acquire.[30] Skepticism, on the other hand, can be an exciting, optimistic doctrine. The engaged skeptic continually explores possible resolutions to his skeptical dilemmas. The engaged skeptic might recognize foundational, romantic and spiritual dimensions to his own experience. Accordingly, he might eagerly evaluate alternative theories in an attempt to dispel skeptical doubt. A skeptic might recognize the noble irony in resisting imperfect solutions until his search can be completed on its own terms.[31]

### 1. *Theoretical and Practical Skepticism*

Theoretical knowledge is knowledge of what to *believe* or what *is* the case; practical knowledge is knowledge of what one *ought* to do or what *ought* to be the case.[32] The distinction between theoretical and practical knowledge gives rise to a parallel distinction between theoretical and practical skepticism. Theoretical skepticism contends that our beliefs are unfounded.[33] Practical skepticism similarly insists that our values and intentions to act can never be conclusively justified.[34] Because legal propositions conspicuously concern what to believe and what to do, legal knowledge consists of both theoretical and practical knowledge. Accordingly, legal skepti-

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29 JAMES W. CORNMAN, SKEPTICISM, JUSTIFICATION AND EXPLANATION xi-xii (1980).

30 One may, of course, be an intellectual nihilist and not a practical one. In other words, one might say that life is meaningless, yet nevertheless enjoy one's pursuits. There is nothing necessarily disingenuous about such a person. His nihilism might apply only to big picture attempts to prove that life has meaning. Although nihilism and skepticism are distinct concepts, they often are confused. In this Article, skepticism is primarily an epistemological thesis, while nihilism is a thesis about purpose or meaning, maintaining that "human reason is bankrupt and incapable of resolving any of its own significant questions." DAVID CROSBY, THE SPECTER OF THE ABSURD: SOURCES AND CRITICISM OF MODERN NIHILISM 3 (1988). For a discussion of different types of nihilism, see *id.* at 8-36.

31 After testing various hypotheses, a skeptic might become a nihilist; but this does not establish that skepticism and nihilism are one and the same doctrine.

32 DAVID GAUTHIER, PRACTICAL REASONING 1 (1963).

33 We should distinguish between positive and negative skepticism. Positive skepticism contends that knowledge is impossible, while negative skepticism more cautiously seeks to show on a case by case basis that the cognitivist's argument has failed. OLIVER JOHNSON, SKEPTICISM AND COGNITIVISM 206-12 (1978).

34 Ideally, a person will intend to do what she ought to do. Consequently, the conclusion of a practical argument can be expressed as either "I intend to do X" or "I ought to do X."

cism must challenge both our beliefs and values. However, since law is conceptually tied to action, legal discourse primarily consists of practical reasoning. Consequently, a legal skeptic is primarily a practical skeptic.[35]

### 2. *Subjectivism and Relativism*

A person might be a practical skeptic for several reasons. First, a person might believe that subjectivism provides the best account of truth and goodness. A subjectivist about truth and goodness believes that what an individual means by saying that a statement is true or that a person is good is only that he believes the statement or approves of the person.[36] Subjectivists about truth and goodness deny that these concepts reflect an independently existing reality. Subjectivism in ethics denies moral realism, and therefore denies that there are moral properties or moral facts.

Relativism is another reason for practical skepticism. The relativist holds that goodness and rightness are true and meaningful *only* relative to a particular conceptual or social system.[37] According to the relativist, there are no universally true moral judgments. Moral principles derive from particular social and educational contexts. To change the context is to alter the principles. No moral principle applies to all contexts. Different social systems construct different, sometimes contradictory, moral principles. Only ethnocentrism and arrogance prompts the belief that there is some asocial or ahistorical framework for evaluating competing social systems.

### 3. *Epistemic and Conceptual Skepticism*

Two additional types of skepticism deserving special mention are conceptual and epistemic skepticism.[38] Conceptual skepticism contends that statements of a certain kind are nonsensical, that they have no truth value. For example, a conceptual skeptic might insist

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35 Absolute practical skepticism challenges the legitimacy of any form of practical reasoning. In short, an absolute practical skeptic denies the legitimacy of ethics, prudence, politics, law or custom.

36 A subjectivist, in other words, insists that whenever we speak of truth or goodness, we should add true *for X*, or good *for X*. *See* ROGER TRIGG, REASON AND COMMITMENT 3 (1974).

37 Consequently, unless subjectivism is false, moral reasoning will at some point run out because there is no further objective standard for settling controversies. *See* B. WILLIAMS, *supra* note 25, at 156. Moral diversity cannot itself yield relativism, but moral diversity conjoined with the intractability of settling moral conflicts may. *See* Nicholas L. Sturgeon, *Moral Explanations*, in MORALITY, REASON AND TRUTH: NEW ESSAYS ON THE FOUNDATIONS OF ETHICS 49 (D. Copp and D. Zimmerman eds. 1985); *see also* Gilbert Harman, *Is There a Single True Morality?*, in *id.* at 27.

38 *See* Robert Justin Lipkin, *Conventionalism, Pragmatism and Constitutional Revolutions*, 21 U.C. DAVIS L. REV. 645, 693-94 n.165 (1988).

that it makes no sense to say that other people have minds. The skeptic contends that since pain reports have their paradigmatic meaning in first-person statements ("I am in pain"), it cannot be meaningful to say from my perspective that "Jones is in pain." Consequently, conceptual skepticism about the existence of other minds is warranted, because statements asserting their existence have no truth value.[39] Epistemic skepticism, on the other hand, concedes that statements about other minds are meaningful—that they have a truth value—but insists that we will never know or be justified in asserting that such statements are true. We will never be in a position to discover the truth of such statements, because we can never have Jones's pain.

### 4. *Radical Skepticism*

Any thesis which denies that we can ever be justified in our beliefs and values is a *radically* skeptical doctrine.[40] Radical skepticism usually maintains that knowledge requires justification, and that justification requires *certainty*. Since we can never be certain about anything, the radical skeptic argues, we can never know anything. For radical skeptics, the possibility that a statement can be doubted renders that statement unreliable, and therefore precludes it from being a legitimate claim to knowledge.

There have been myriad attempts to refute radical skepticism.[41] In my view, none of these attempts has succeeded. But I do not

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39 Conceptual skepticism entails epistemic skepticism, since if a statement has no truth value, we cannot know that the statement is true or false.

40 MICHAEL WILLIAMS, GROUNDLESS BELIEF: AN ESSAY ON THE POSSIBILITY OF EPISTEMOLOGY 4 (1977) (defining radical skepticism as the doctrine that we are "never justified in believing anything at all").

41 Typically, such attempts begin by stating the skeptical thesis in a particularly sweeping and startling manner, thus revealing that skepticism is self-refuting or in some other way absurd. In this fashion, skepticism might be defined as denying that we ever know anything at all, in which case we can never know that skepticism itself is true. If, on the other hand, we can know that skepticism is true, there is at least one thing that can be known and therefore skepticism is false.

However, a skeptic might reply that he is non-skeptical only about his skepticism. In short, he knows one general truth about which skepticism is unwarranted, namely, the proposition that one cannot have sufficient reason for believing anything else. This is an important, if not complete, form of skepticism. The problem here is justifying how we can know only one truth. Knowing the truth of one proposition presupposes knowing many other truths. A preferable approach for the skeptic is to acknowledge that even his skeptical attitude might turn out to be false. In other words, a skeptic might be truly skeptical even about his own skepticism. *See* Burnyeat, *supra* note 3, at 140.

An anti-skeptic might use the apparent universality of some convictions to defeat skepticism. For example, he might point out that virtually no one believes that inflicting gratuitous pain on an innocent person is morally correct, hence skepticism concerning such conduct is implausible. Of course, this conclusion is a *non sequitur*. Even if this thesis were universally accepted, we would still be confronted with intractable dilemmas about what pain is, when pain is gratuitous, and who is innocent.

wish to argue that position here. Instead, I wish to point out that there is an excellent reason why radical skepticism has not prevailed as the dominant epistemological or ethical position, though this reason does not *refute* skepticism. Radical skepticism has failed because people are not instinctively skeptical. By nature, human beings are *normative* creatures[42] who seek standards by which to criticize their perceptual, inferential and volitional worlds. Even if convinced that there are no reasons for believing or doing anything, we still must decide how to live our lives;[43] we still must decide how to act. These decisions are generated by information obtained from an individual's inner and outer environments. Inferential procedures still operate to process this information, and our actions, for the most part, still follow our decisions. In this sense, we may agree with Hume that radical skepticism is idle.[44] But it is critically important that we not view this as a refutation of skepticism.[45] The point is simply that a belief in, for example, the material world or in moral distinctions is a natural feature of human consciousness.[46]

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42 Consider Rescher's description of this feature of human beings:

> Man, however, is an ineradicably *rational* animal. In every circumstance and situation he seeks "to know the reason why." Such a creature is geared to satisfy not only its *physical*, but its intellectual hunger as well: to insist upon having some *reason to suppose* the adequacy of its doings and unable to rest content to proceed in blind faith or in a purely experimental spirit.

N. RESCHER, *supra* note 14, at 217 (emphasis in original).

43 Even a decision *not* to decide to live our lives reflectively is a decision about how to live our lives.

44 Hume writes:

> Nature, by an absolute and uncontroulable necessity has determin'd us to judge as well as to breathe and feel; nor can we any more forbear viewing certain objects in a stronger and fuller light, upon an account of their customary connexion with present impressions, than we can hinder ourselves from thinking as long as we are awake, or seeing the surrounding bodies, when we turn our eyes towards them in broad sunshine.

DAVID HUME, A TREATISE OF HUMAN NATURE 183 (L.A. Selby-Bigge ed. 1965).

Given human nature, it is inconceivable to not formulate normative judgments about the world. Even if Descartes' evil demon systematically deceived us, we would still formulate these judgments. This faculty for judging the world is one "which nature has antecedently implanted in the mind, and render'd unavoidable." *Id.* For example, even if you thought that you had an argument establishing that there was no external world, you would still believe that there is, because "[n]ature has not left this to [your] choice, and has doubtless esteem'd it an affair of too great importance to be trusted to our uncertain reasonings and speculations." *Id.* at 187. Should we ever be capable of accepting skepticism "all human life must perish . . . ." DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING (P.H. Nidditch ed. 1978).

45 It is important that we be cautious in how we avoid skepticism. It is a mistake to contend that "the strongest argument against taking radical skepticism seriously is that doing so involves pointless debate." M. WILLIAMS, *supra* note 40, at 272. The futility of attempting to refute skepticism may be grounds for believing skepticism is true; it is not grounds for ignoring it.

46 *Cf.* PETER F. STRAWSON, SKEPTICISM AND NATURALISM: SOME VARIETIES 32-33 (1988):

Despite the practical implausibility of radical skepticism, it is possible to be challenged by a limited or modified skepticism. Modified skepticism does not challenge our claim to knowledge on a global scale. Rather, it systematically challenges certain kinds of knowledge, leaving other kinds intact. For example, skepticism is possible concerning substantive answers to practical questions, as well as the correct procedures for generating these answers. Skepticism also is possible concerning certain controversies that perennially elude resolution. This suggests either that the preferred procedures cannot resolve these controversial and recalcitrant problems, and therefore should be replaced with better procedures, or, if such a replacement is impossible, that these questions do not have uniquely correct answers. In the latter case we are left with a serious form of skepticism that challenges the completeness of our theory of law and morality. Let us explore the possibility of such a modified skepticism.

### C. Modified Skepticism

Modified skepticism is a normative theory explaining why controversial legal and moral questions have no uniquely correct answers.[47] I call this form of skepticism "modified skepticism" because it differs from radical skepticism in acknowledging that agreement is possible in law and ethics. Modified skepticism insists on agreement concerning easy cases.[48] However, modified skepticism despairs of finding uniquely correct answers in hard cases, or even a fool-proof method for distinguishing hard from easy cases.

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> We can no more be reasoned out of our proneness to personal and moral reactive attitudes in general than we can be reasoned out of our belief in the existence of body, [a] general proness to these attitudes and reactions is inextricably bound up with that involvement in personal and social interrelationship which begins with our lives, which develops and complicates itself in a great variety of ways throughout our lives and which is . . . a condition of our humanity. What we have, in [these] inescapable . . . attitudes and feelings, is a natural fact, something deeply rooted in our nature as our existence as social beings.

On one interpretation of Hume's ethics, Hume provides a transcendental argument demonstrating that sympathy is a necessary motivational factor in practical reasoning. Robert Justin Lipkin, *Altruism and Sympathy in Hume's Ethics*, 65 AUSTRALASIAN J. PHIL. 18 (1987).

47 In my view, a normative theory justifies and explains certain features of our moral experience. In particular, a normative theory should justify and explain the systematic disagreement over controversial legal and moral questions about individual rights.

48 But modified skepticism also insists that our present conception of an easy case must change. No case is necessarily, essentially or permanently easy. A case is only relative to the purposes behind it. Modified skepticism insists that there are easy cases whenever the appropriate linguistic community understands these purposes in the same way. When this agreement ends, an easy case is no longer easy.

Modified skepticism explains how agreement is in some instances possible, and why there is systematic disagreement in controversial cases. Modified skepticism is a significant form of skepticism because it shows that we can never have a complete normative theory of law or ethics.[49] Consequently, modified skepticism raises a moral and political challenge; namely, how should society be organized when a complete normative theory[50] of practical life is impossible.[51]

For the modified skeptic, the skeptical problems of scope, ranking and ultimate values are ineradicable. In order to solve the problem of scope, we must first find bridge principles that connect abstract conceptions of equality, for example, with concrete applications such as school integration. Although there are no logical reasons for denying the existence of bridge principles, our conspicuous failure in deriving them suggests that such attempts are quixotic.

When we regard theoretical moral and political values as necessary ingredients of legal or constitutional interpretation, we are faced with the skeptical problem of determining which values are ultimate. If such values are relevant to a judge's decision concerning the implications of "due process," "fairness," or "justice," then his ultimate values will determine his decision. The problem of evaluating differing political values arguably does not arise for purportedly neutral constitutional methodologies, but it plagues most interpretive ones.[52] Unless there is a methodology for settling conflicts regarding which ultimate values are correct, constitutional interpretation regarding controversial questions will not be susceptible to resolution across persons. It does not follow, of course, that just any answer to these questions is acceptable. The most plausible methodology might consistently reject all but one or two possible answers. But if these answers are incompatible, we are bereft of a procedure for rationally resolving the conflict.

The problem of ranking principles is a species of the problem of ultimate values.[53] Unless there are ranking principles to settle conflicts between incompatible legal or ethical principles, we will not be able to generate uniquely correct answers to controversial

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49 "A complete normative theory" of law or ethics is one capable, in principle, of resolving all legal and moral questions. Modified skepticism results when the best normative theory cannot resolve certain controversial questions.

50 A complete normative theory will provide uniquely correct answers to questions like abortion, affirmative action, free speech, capital punishment, the treatment of nonhuman animals and so forth.

51 This challenge forces us to confront the question what sort of legal system is appropriate in a society like ours having many different, sometimes incommensurable, moral communities. *See* MICHAEL PERRY, MORALITY, POLITICS AND LAW 73 (1988).

52 *See infra* notes 74-147 and accompanying text.

53 *See infra* notes 98-104 and accompanying text.

legal and moral questions concerning the relationship between individual rights and social control.

The reason I find these problems significant is because they reveal a certain irreducible skepticism in our legal and moral conceptual scheme. The most important and controversial legal and moral questions appear to resist resolution. Showing that there are easy cases in law and ethics does not ameliorate this difficulty. No one seeks theoretical guidance concerning the speed limit. But we do seek such guidance from legal and moral theory when dealing with abortion, affirmative action, and free speech, to mention just a few. If these questions have only skeptical solutions,[54] we must conclude that legal theory is inefficacious regarding just those critical questions that mean the most to us. This is an important result. For if true, modified skepticism compels us to rethink the role that theory plays in our lives.

Although I do not advocate radical skepticism, I want to examine the structure of attempts to refute it. Recently, such attempts have taken the form of a "new foundationalism." New foundationalism intends to delineate a middle ground between foundationalism and skepticism. If these arguments are unsound, legal theorists should take radical skepticism more seriously. If radical skepticism should be taken seriously, modified skepticism—a weaker form of skepticism—should also be taken seriously.

## II
## NEW FOUNDATIONALISM AND LEGAL SKEPTICISM

### A. The Middle-Grounders' Anti-Skeptical Arguments

Contemporary mainstream theorists contend that the correct framework for legal and ethical discourse includes a middle ground between foundationalism and skepticism. This middle ground permits us to establish the truth of controversial legal and moral questions. I call these theorists "new foundationalists" because they insist that a rationally discoverable procedure for settling legal and moral conflicts exists. New foundationalism is vehemently anti-skeptical. Many new foundationalists contend that legal and moral questions have determinate—sometimes uniquely determinate—answers. New foundationalists contend that one need not seek immutable first principles, principles that may be necessarily true and known with certainty. They attack both traditional foundationalism and skepticism for committing the irredeemable sin of denying this

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54 A "skeptical solution" or "skeptical result" is one that yields two or more incompatible answers.

middle-ground.[55] Let us now examine some interesting new foundationalist arguments against skepticism.

### 1. *Hart's "Middle Path" Between Foundationalism and Skepticism*

The father of contemporary middle-ground approaches is H.L.A. Hart.[56] Hart exhorts the serious student of law and morality to avoid the extremes of foundationalism and skepticism.[57] In place of these stark alternatives, Hart admonishes us to seek a "middle path," a path that reveals the "creative" and "open texture" of judicial reasoning. Hart writes:

> Formalism [a type of foundationalism] and rule-scepticism [a type of skepticism] are the Scylla and Charybdis of juristic theory; they are great exaggerations, salutary where they correct each other, and the truth lies between them. Much . . . needs to be done to characterize in informative detail this middle path, and to show the varied types of reasoning which courts characteristically use in exercising the creative function left to them by the open texture of law in statute or precedent.[58]

The critical feature of Hart's contention is what he omits, namely, just what this middle path is and how the "creative function" of these "varied types of reasoning" reveals that judicial reasoning has a coherent structure. Hart writes:

> The [skeptic] is sometimes a disappointed absolutist; he has found that rules are not all they would be in a formalist's heaven, or in a world where men were like gods and could anticipate all possible combinations of fact, so that open-texture was not a necessary feature of rules. The sceptic's conception of what it is for a rule to exist, may thus be an unattainable ideal, and when he discovers that it is not attained by what are called rules, he expresses his disappointment by the denial that there are, or can be, any rules. Thus the fact that rules, which judges claim bind them in deciding a case, have any open texture, or have exceptions not exhaustively specifiable in advance, and the fact that deviation from the rules will not draw down on the judge a physical sanction are often used to establish the sceptic's case.[59]

Hart's remarks exemplify a particular strategy in dealing with

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55 Just what this middle-ground contains is difficult to say. It is sometimes described as judicial discretion, or judgment or reasonableness; at other times it just denies that there is a mechanical procedure for settling legal and moral issues. The great challenge of new foundationalism is to precisely describe this middle-ground and explain how it yields conclusions that are inter-subjectively acceptable.

56 *See* H.L.A. HART, *supra* note 1.

57 Not all middle-grounders believe that we can always find a uniquely correct answer to all controversial legal and moral questions.

58 H.L.A. HART, *supra* note 1, at 144.

59 *Id.* at 135.

skepticism. According to this strategy, the theorist claims that the skeptic demands too much, that in reality the skeptic is asking for a mechanical procedure for resolving legal questions, or that he seeks some Archimedean point external to the legal and moral framework, or that the skeptic cannot distinguish between truth and certainty, or that skeptical doubt regarding one statement requires agreement on many other statements.[60] Once the skeptic's demand is shown to be puerile, the skeptic should be content to approach the bulk of legal and moral questions in a painstaking, deliberative attempt to discover plausible, not self-evident, answers.

However, one need not be guilty of any of the above sins to recognize the skeptical limits of legal and moral reasoning. Instead, one need only show that if law and morals involve creativity, discretion[61] or judgment,[62] these concepts must meet at least two reasonable conditions. First, the type of reasoning should be specifiable in a clear and unequivocal manner. Second, the reasoning should be capable of settling practical conflicts. Failing to meet these conditions leaves us bereft of any reason to characterize legal and moral reasoning as *reasoning*.[63]

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60 According to modified skepticism, one can hold that many claims, factual and normative, are true and justified, yet still be left with a serious form of skepticism. A critic might reply that since modified skepticism accepts some beliefs as justified and true, it can with equal plausibility be described as a non-skeptical doctrine. I do not take this to be an objection to my view. I believe that the only plausible view for contemporary observers is that we know many things, but our knowledge is insufficient for solving most legal and moral controversies.

61 *See* Ronald Dworkin, Taking Rights Seriously 32-33 (1977); H.L.A. HART, *supra* note 1, at 138-44. *But see* Cornelius Murphy, *Dworkin on Judicial Discretion: A Critical Analysis*, 21 U.C. DAVIS L. REV. 767, 784 (1988) (arguing that judicial discretion cannot be explained by an appeal to principle).

62 Contemporary theorists writing about judgment invariably enter all sorts of disclaimers concerning the status of judgment as a legitimate form of practical reasoning. For example, Beiner writes:

> Obviously, it would be impossible to say in advance what *would* be an exemplary act of judgment, for judgment itself involves the capacity for distinguishing what is relevant from what is irrelevant in a given case, and this almost by definition cannot be specified in advance. Judgment is therefore irreducible to algorithm, in the sense of formulation of fully explicit criteria of judgment. What is required is not a 'decision procedure', but an education in hermeneutic insight, taste, and understanding. Consequently the designation of a particular judging subject as exemplary is always a polemical choice, that is, subject to debate and contention (therefore *itself* a matter of judgement) . . . .
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> Political judgment is not something specified in advance by the formulation of criteria; rather it is something 'exemplified'. We know it when we apprehend it in its concrete exemplification, and not before.

RONALD BEINER, POLITICAL JUDGEMENT 163-64 (1983). Is this a description of or a refutation of modified skepticism? A modified skeptic may grant Beiner's point yet argue that judgment does not settle conflicts in controversial cases.

63 For creativity, discretion or judgment to be capable of solving practical conflicts, they must solve this conflict from both the individual and collective perspectives.

I am mindful that Hart's positivism is an important attempt to provide a conception of judicial reasoning that represents a middle path between foundationalism and skepticism. However, it is impossible to ignore that the perennial and irreconcilable disagreement between Hart and other positivists, as well as between Hart and non-positivists, is evidence that controversial substantive and theoretical questions in law and ethics are ultimately irresolvable.[64] One might reply that perennial disagreement shows only that these controversial questions have not been settled, *not* that they *cannot* be. One should instead look to the future or to this or that bright young phenomenon or electrifying jurisprudential movement that any day now will resolve all our controversial questions.[65] If one doesn't buy this reply (and I do not) then one must ask whether the discipline is capable of providing procedures for resolving its most controversial theoretical and substantive questions.

Furthermore, by insisting upon law's open-texture, Hart concedes too much to skepticism. Hart's approach concedes that the problem of scope is an inevitable problem in law and morality that we must learn to live with. For example, what is the scope of the equal protection clause? Should it apply to all social relations? Or, should it apply only to typically judicial activities, such as bringing suit to enforce a contract or to recover land? Most theorists take a middle path in constitutional theory between these extremes. The standard reasons for this middle path refer to the framers' intentions.[66] Putting aside the question of constitutional interpretation, the question arises, how would we settle this issue afresh?[67] Suppose you say equality *before the law* means equality only in judicial

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64 Of course, the failure to resolve theoretical or practical conflicts does not *entail* the impossibility of a solution. But shouldn't this failure give us pause? Are there any circumstances in which the non-skeptic will agree that these conflicts are ineradicable?

65 Such movements include law and economics, critical legal studies, law as interpretation and radical feminism.

66 Understanding the scope of an abstract provision by appealing to the framers' intentions is essentially a conservative approach. *See* Robert Bork, *The Constitution, Original Intent and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986). But how are we to identify the framers' intentions? Whose intentions? Which mental states? How do we discover a collective intention? *See* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1983). Further, what if the framers' intentions suggest they remained silent in order to leave the decision to future generations?

67 Some writers argue that when abstract and concrete intentions conflict, the abstract intention always prevails. R. DWORKIN, *supra* note 1, at 363-65. Consequently, in the case of segregation, a judge should dismiss a framer's concrete intention that segregation and equal protection are compatible, choosing the abstract intention reflected in the fourteenth amendment's equal protection clause and in Brown v. Board of Education, 349 U.S. 294 (1955) instead. However, this is no longer an originalist theory, since originalism is essentially an historicist methodology. It asks what the actual historical actors would choose. To say that the framers of the fourteenth amendment would choose the abstract value of equality as expressed in *Brown*, despite the fact that many of

hearings, and I say it means equality in social and economic relations also. How do we settle this question rationally? The fact that this question has not yet been settled after attempts made by the very best legal scholars and philosophers, is excellent ground for believing that as it is presently conceived it never will be.[68]

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the actual framers believed that the equal protection clause was compatible with segregation, commits the Orwellian sin of rewriting history.

If a particular person believes in equal protection *and* segregated schools, we cannot know as a general rule of constitutional construction which value he would choose should he come to believe that they conflict. Upon being confronted with the conflict, he may choose to give up the general principle of equality. Even more importantly, if an individual believes in equality and segregated schools, it is likely that his conception of equality, that is, what *he* means by equality, sanctions segregation in public education. No doubt we no longer believe this is a remotely plausible conception of equality. But that is irrelevant to a determination of what the particular historical character must believe. The problem of scope forces us to ask: why must equal protection, as a function of the logic of constitutional construction, preclude segregated schools? What constitutional mistake do I commit if I insist that the equal protection clause be restricted to judicial activities such as enforcing a contract? If there is no mistake here, we are bereft of a procedure for reaching consensus on the scope of the provision. This is precisely the conclusion we derive from modified skepticism.

This point can be put another way. At the most extensive level of abstraction, almost everyone agrees that equality is a good thing. However, this agreement has limited value. For once we move to more concrete applications of this abstract concept, consensus becomes impossible. Many important contemporary legal and moral controversies defy consensus in this manner.

One writer suggests the following test for determining which intention will survive when an abstract and concrete intention collide: "Would I, a framer of the Eighth Amendment who is also a proponent of capital punishment . . . have voted for the amendment if I had believed (as I then did not) that capital punishment is cruel and morally indefensible?" David O. Brink, *Legal Theory, Legal Interpretation and Judicial Review*, 17 PHIL. & PUB. AFF. 105, 128 (1988). This counter-factual test helps determine the dominant intention, abstract or concrete, when these conflict. The answer, we are told, is: "Presumably, yes. This shows that my dominant intention in enacting this abstractly worded constitutional provision was the abstract intention to prohibit punishments which are extremely inappropriate morally—whichever punishments these turn out to be—not the particular kinds of punishments which I then believed to be cruel and unusual." *Id.*

Unfortunately, this test is susceptible to the following counter-example. Suppose one endorses a proscription against cruel and morally indefensible punishment. Suppose further that later people come to believe that long prison terms are cruel and morally indefensible. On Brink's view one must accept the conclusion that long prison terms are cruel and morally indefensible. But this conclusion is counter-intuitive. In such circumstances, if one is not opposed to long prison terms, and one cannot convince others that long prison terms are *not* cruel, then one will withdraw one's support for the proscription against cruel and morally indefensible punishment. In this event, one will choose one's concrete conviction that long prison terms are acceptable over the abstract intention proscribing cruel and morally indefensible punishment. Consequently, there is no way to determine in advance which intention prevails when abstract and concrete intentions collide. Of course, if it is tantologously true that any right thinking person be opposed to cruel and morally indefensible punishment, then one will persist in believing that long prison terms are *not* cruel and morally indefensible despite what others come to believe.

68 There are two related problems here. First, there will almost certainly be permanent disagreement over substantive conclusions to practical controversies. In this event,

A corollary to the problem of scope is the *description* problem. Legal rules apply to particular situations, and particular situations can be described differently. A police official may describe my action as stealing a loaf of bread, whereas I may describe it as saving my starving family. There may be no way to determine which description is uniquely correct. We may, of course, combine these descriptions into a super-description stating that I saved my starving family by stealing the bread, but it is not obvious that this super-description is one I must rationally accept. Certainly, I saved my starving family by *taking* bread but this does not compel me to concede that what I did was *stealing*, or even that my action was taking something that did not *belong* to me. The point here is that these key words—"stealing" and "belong"—are based on a set of evaluative and inferential relations that I might reject. Unless there are linguistic or epistemic rules that pick out which descriptions are more central than others, legal rules have force only relative to certain descriptions of situations. Traditional foundationalism has failed because it has not uncovered such rules, and new foundationalism has not yet fared any better.

Modified skepticism points out that though we often agree on generalities, the "open-textured" dimension of legal rules is fatal to generating the sort of agreement we have in other areas of human inquiry. Modified skepticism maintains that bridge principles between general rules or principles and particular fact situations are required for such consensus to occur.[69] At the level of generality, we all believe in the value of human life and the value of personal autonomy. Yet, as a society, we are tragically divided over the issue of abortion. I submit that there are no undiscovered rules or principles that can settle this issue. Instead, we are left with a choice of the sort of person each of us wants to become, and the political perspective that derives from this conception of a person.

### 2. *Perry's Naturalism*

Some new foundationalists, sensitive to the failure of traditional foundationalism, invoke a middle-ground strategy by arguing that

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we must conclude that the preferred methodology failed to achieve its goal of achieving consensus. More damaging, perhaps, is the inevitable disagreement over which methodology should be preferred. Which methodology is rational? The history of our efforts to forge a single conception of rationality has been a collosal failure. A. MACINTYRE, WHOSE JUSTICE? WHOSE RATIONALITY? 3-4 (1988). Nothing in this history suggests that correcting these failures is impossible. But mere possibility does not pay the baker, especially when overwhelming evidence exists suggesting that these failures will be permanent.

69 If bridge principles connecting abstract principles to concrete situations are both necessary and impossible, legal and moral reasoning fail to achieve the sort of consensus we expect of *reasoning*.

moral discourse is not necessarily pointless. Michael Perry illustrates this strategy in arguing that "we don't know how far [moral] discourse can go in resolving *particular* disagreements between *particular* individuals or groups until it is tried."[70] While conceding that "moral discourse is [not] invariably a solvent of moral conflict," Perry insists that "given the alternatives—moral discourse ought to be tried."[71] Perry writes:

> We do not have a priori knowledge . . . that moral discourse cannot resolve particular disagreements between particular individuals or groups; there is always the possibility that it can, at least to *some* extent . . . . There is surely nothing to be gained in underestimating the possibility of productive moral discourse. Even if moral discourse probably can't go very far in resolving a particular conflict, such discourse is almost surely worth attempting, given the alternatives. To say that moral discourse might not be able to go very far in resolving a particular conflict is a far cry from saying that moral discourse is a sham . . . .[72]

There is something seductive about this middle-ground strategy. Legal and moral reasoning no doubt has *some* value. No one except Satan would seriously argue, for instance, that inflicting gratuitous pain is morally permissible. Everyone *can* endorse *some* legal and moral generalities, but what matters most is whether these generalities influence the resolution of particular conflicts. The problem is that legal and moral theories appear to be unnecessary and ineffective. Legal and moral theories are unnecessary because people comprehend legal and moral generalities prior to and independently of adopting a *theory*. They are ineffective because where they are most needed—in formulating bridge principles tying general values to concrete cases—they do not work.

In controversial cases, such as abortion, moral reasoning is needed but ineffective. And when there is a consensus over the acceptability and scope of *general* values, moral reasoning is unnecessary. Consequently, moral reasoning is either necessary but ineffective, or effective but unnecessary.

Modified skepticism entails that, at least in contemporary Western societies, legal and moral reasoning inevitably runs out. Perry is correct in admonishing us to try to resolve moral conflicts before we conclude that they cannot be resolved. But what counts as *trying*? The entire history of Western civilization has been a moral experimental laboratory in which solutions to these conflicts have been tried without obvious success. Moreover, the most compelling and

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70 MICHAEL PERRY, MORALITY, POLITICS AND LAW 52 (1988).

71 *Id.*

72 *Id.* at 52-53.

tragic legal and moral conflicts, such as abortion, affirmative action, and poverty, resist solution. What better *evidence* is there that these problems are not resolvable?

Similarly, Perry is right that moral discourse is preferable to violence and war. Even a modified skeptic can endorse that conclusion. But is war the only viable alternative? Perhaps, instead of writing tomes concerning the legitimacy of legal and moral reasoning, philosophers and legal theorists would do better—according to their own values—if they dropped their pens or word processors and went out into the world to *live* their morality. They could set an example for others in the ghettos and barrios, in the board rooms and school houses. Perhaps the alternative to moral reasoning for those like Perry is to practice law and exemplify their moral values in their practice. It is not obvious that moral *theorizing* is preferable to *this* alternative. Consequently, moral theorizing cannot be vindicated by insisting correctly that theorizing is better than violence or war. The choice between theorizing and war is far from exhaustive. The vindication of moral theorizing must be more direct; it must show how theory can assist us in resolving moral conflicts. If it cannot, then such reasoning *is* seriously defective.

Most importantly, keeping faith with the possibilities of moral discourse—while simultaneously denigrating the seriousness of legal and moral skepticism—prevents us from identifying a critically important feature of contemporary life. While there is much agreement about many legal and moral issues, there remain certain intractable controversies that do not promise to be settled by legal and moral reasoning at all. Any unbiased observer will find it evident that "moral discourse can sometimes diminish dissensus, but it is unrealistic to expect such discourse, even at its patient best, always or even often to overcome dissensus." (I think here of the delegates in the United States and elsewhere, as to what public policy regarding abortion should be)."[73] One troubling conclusion is that legal and moral reasoning fails just when it is most needed.

### 3. *Kress's Defense of Determinacy*

New foundationalists are fond of defending the determinacy of legal and moral discourse. For legal and moral reasoning to be reliable, it must be determinate,[74] or at least not radically indetermi-

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[73] *Id.* at 55. Curiously, Perry's faith in the possibility of moral reasoning does not blind *him* to the problem of modified skepticism.

[74] Moderate indeterminacy is the failure of a legal system to provide definite outcomes concerning certain controversial cases. In other words, moderate indeterminacy holds that most legal conflicts are easy to solve. *See* Kenneth Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 295-336 (1989).

nate.[75] Legal realists[76] and critical legal studies scholars[77] have argued that law is radically indeterminate. Legal reasoning, in their view, generates a host of possible solutions, and therefore is indistinguishable from politics.[78] Kenneth Kress has recently argued that legal reasoning is not radically indeterminate. According to Kress, while it is true that legal reasoning is moderately indeterminate, this does not seriously affect its legitimacy.[79] An examination of both these contentions will prove useful.

Before evaluating these claims directly, it is important to point out a problem with the way Kress sets up the problem. In Kress's view, indeterminacy is a problem because it threatens the legitimacy of judicial decisions. Kress writes that "the consequences for legitimacy are prima facie the main reason why legal scholars do and should care about indeterminacy. Few are interested in indeterminacy purely as a metaphysical or epistemological issue."[80]

Kress is correct in suggesting that a legal system riddled with indeterminacy threatens its own legitimacy. In such a system no one knows whether a judge is exercising power according to the system's precepts or his own whims. However, we must be careful not to place the cart before the horse. Even before the question of legitimacy is raised, it must be determined whether a system of reasoning has the capacity to generate definite outcomes. This is not a question of legitimacy, but rather of a system's *competence*. Generally speaking, the competence of a system of reasoning involves two elements: First, the system must generate definite outcomes.[81] Second, the system must generate the same outcomes in relevantly similar circumstances. In other words, legal reasoning must be consistent, it must "treat like cases alike." A system is not competent if it fails to satisfy both conditions. Hence, a principle or system of reasoning is competent when it generates the same definite outcome in relevantly similar circumstances.[82]

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75 Radical indeterminacy holds that there are no legally easy cases. *See id.* at 287-88.

76 Legal realists embrace a variety of views. Most conspicuously, legal realism is committed to the skeptical thesis that legal doctrine is not what drives the legal machine.

77 *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

78 *See id.*

79 *See* Kress, *supra* note 74, at 283.

80 *Id.* at 285.

81 *See* Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195 (1989).

82 If competence were *mere* logical consistency, almost every legal system would be competent. Almost any legal system yields definite results in some circumstances. Legal competence requires a conception of relevantly similar circumstances. In effect, competence requires the ability to show when situation *A* is relevantly similar to situation *B*, so that the rule in *A* applies with equal force in *B*. What counts as morally relevant is itself a notoriously controversial problem.

There are several possibilities regarding a system's competence to generate definite outcomes.[83] First, a system is *strongly* competent if it consistently generates one and only one outcome. Second, a system is *moderately* competent if it consistently generates the same small range of different, perhaps incompatible, outcomes. Third, a system is *weakly* competent when it consistently denies a small range of answers but generates all others. Fourth, a system is *trivially* competent if it generates every possible outcome. Fifth, a system is *incompetent* if it cannot generate any definite outcome. Skepticism is certainly erroneous if legal principles are competent in the first sense. On the other hand, if legal principles are only moderately competent—or less—then legal theory suffers from a limited or modified form of skepticism. Concerning controversial cases, if principles of legal reasoning systematically generate more than one correct answer, and these correct answers are incompatible or in some other way conflict, then there is reason to be moderately skeptical regarding those principles. Similarly, if legal principles are weakly or trivially competent, then a more virulent form of skepticism is warranted.[84]

The question of competence must be answered prior to an examination of the question of legitimacy. We must know how well or poorly a legal system generates unique answers to controversial questions. We must answer this question even if, contrary to fact, we have no active concern with the system's legitimacy. Suppose we believed that any legal system a person is born into is legitimate. We would still be concerned with the determinacy of the system's rules and principles because we still would be interested in the system's competence. We are primarily concerned with a system's competence because the level of competence determines how we discover what the law is in a given case.

The concern with legitimacy implicates the competence of the legal system, not vice versa. To know whether judicial power is legitimate, we must first decide how competent the system is. Consequently, not only is the question of legitimacy not the primary issue associated with determinacy, we can answer the question of legitimacy only after we determine the system's competence.[85]

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83 For purposes of this discussion, I do not distinguish between a system's competence and the competence of a principle within the system.

84 In my view, we need to be more attentive to different forms of legal and moral skepticism and to the different problems they raise. The problem of skepticism is not whether our legal conceptual scheme is susceptible to skeptical doubt, but rather how much and in what areas does skeptical doubt appear more plausible than non-skeptical claims.

85 The question of competence is a conceptual and epistemological matter, while the question of legitimacy is a moral and political one.

Kress's fixation with legitimacy obscures two real problems with indeterminate rules. First, indeterminate legal rules do not provide adequate guidance for the individual practical reasoner. Second, indeterminate rules inhibit the creation of social consensus. If legal rules are weakly or trivially competent, an individual has less reason to rely on the system for guidance and less reason to believe that he is correctly answering the legal question. Moreover, if the system is only weakly or trivially competent, it will not be able to help achieve collective agreement.[86] Even if principles are moderately competent, it nevertheless remains true that at *some* level of legal argument we must abandon the hope of resolving fundamental conflicts.

Understanding the indeterminacy problem first and foremost as a problem of competence renders many of Kress's remarks irrelevant. For example, Kress argues that "the pervasiveness of easy cases [is] strong support for the thesis that at most there is moderate indeterminacy and [this] shifts the burden of proof to advocates of radical indeterminacy to demonstrate law's radical, and not merely moderate, indeterminacy."[87] It is unclear why the burden should shift in this matter.[88] Moreover, even moderate indeterminacy commits one to modified skepticism, a sufficiently alarming form of skepticism to warrant concern. Even if Kress is correct that indeterminacy is limited, for the most part, to certain controversial appellate cases, skepticism still has a significant inroad. In these cases, Kress must concede that in principle the best legal reasoning yields several possible, potentially incompatible, answers. In such cases, we cannot reach collective agreement. When collective agreement cannot be reached, we have a skeptical result.[89]

Returning to the claim that radical indeterminacy exists, Kress writes:

> The pervasiveness of easy cases undercuts critical scholars' claim of radical indeterminacy. Preoccupation with controversial appellate and Supreme Court cases engenders the illusion of pervasive indeterminacy. Focusing instead on everyday acts governed by law reveals the pervasiveness of determinate and correct legal

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86 This Article contends that agreement on language and reasoning is a necessary condition of rationality. *See* L. WITTGENSTEIN, *supra* note 13, at 88e para. 242.

87 Kress, *supra* note 74, at 295-96.

88 Since the skeptic denies the general legitimacy of reasoning, his argument *a fortiori* challenges the legitimacy of burden shifting and the presumptions in favor of one party or the other. Consequently, talk of burden shifting begs the question. *But see* N. RESCHER, *supra* note 14, at 167-72 (1980) (arguing that the skeptic begs the question against the advocate of these procedural devices).

89 Of course, this skeptical result is pernicious only if it is systemic, that is, only if our best efforts to reach agreement have failed and we have an explanation of why we are unlikely to reach agreement in the future.

outcomes.[90]

However, the existence of easy cases does not undermine the contention of radical indeterminacy.[91] The indeterminacy doctrine need not be understood as asserting that every legal case *in fact* presents difficult controversial alternatives. Rather, the indeterminacy doctrine states that it takes little imagination to conjure up circumstances in which an ordinarily easy case becomes a difficult one. What can be more uncontroversial than the constitutional requirement that the president of the United States be 35 years old? Yet, even here there are several imaginative examples of how this requirement can become contested.[92] If legally uncontroversial cases are uncontroversial simply because certain facts never arise, the conceptual structure on which the easy conclusions are based has not been shown to be determinate. For example, I may accept the principle that I should give ten percent of my salary to my friends. Such a principle is conceptually indeterminate: it does not tell me *how to divide* the bounty. Should I divide it equally? Should I give more to those I have known longer? To those who need it more? To those who merit more? The fact that the principle does not in practice give rise to these issues, because I never have more than one friend at a time, does not show that it is conceptually determinate.[93] Similarly, the fact that we rarely, if ever, have reason to question whether the law requires obeying the speed limit, does not prove that rules concerning the speed limit are necessarily determinate.

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90 Kress, *supra* note 74, at 296.

91 *See* Allen C. Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 U. MIAMI L. REV. 541, 555-56 (1989) (Hutchinson argues that the apparent "consensus on the existence of any particular rule." does not guarantee determinacy.). More strikingly, even when "there is a consensus on the meaning and existence of a particular rule, either there is always another rule that competes for application, or the dispute can be reclassified into another doctrinal field, such as from tort to property or tort to contract." *Id.* at 556 (footnote omitted). As a result, "[i]ndeterminacy infiltrates all levels and dimensions of the law, energizing and debilitating the interpretive process and the search for meaning." *Id.*

92 For examples of this point, see Stanley Fish, *Still Wrong After All These Years*, 6 L. & PHIL. 401, 404 (1987) (arguing generally that the literal meaning of a constitutional provisions is contextual, and therefore is permanent just as long as the same conditions obtain) and Robert Justin Lipkin, *The Anatomy of Constitutional Revolutions*, 69 NEB. L. REV. — (1989) (in press) (describing circumstances where a 34 year old might legitimately serve as president).

93 The *existence* of easy cases does not show that radical indeterminacy is mistaken. An easy case is one that is not seriously challenged, not one that *cannot* be challenged. Only if cases of the latter type exist do we have a knock-down argument against radical indeterminacy. The existence of cases of the former type is a good argument against radical indeterminacy only if there is no better explanation for the consensus. Surely such an explanation in terms of shared goals and purposes always exists. Should legal actors cease sharing the same goals, easy cases will no longer be easy.

Kress's argument is also plagued by an important ambiguity in the concept of indeterminacy.[94] Legal reasoning may be indeterminate in one of two ways. First, an *individual's* use of legal rules and principles may generate more than one answer. In reasoning legally, *I* may never be able to come up with a uniquely right answer. This is the failure of the individual-perspective. However, legal reasoning may also be indeterminate in that its rules and principles depend upon moral or political values, and these values differ across persons. As a result, since people often have different moral and political values, their use of the same rules and principles will generate different answers.[95] This is the failure of the collective-perspective. Either type of failure renders legal rules and principles seriously indeterminate.

Whenever an individual's values are constant and determinate he can succeed in generating determinate outcomes from the perspective of the individual. Whenever the same reasoner is involved, the same factual situation will yield the same conclusion.[96] But in controversial cases, values are seldom the same across persons; hence, rules that are determinate from the individual-perspective will be indeterminate from the collective-perspective. If there is no way of determining which set of values should be appealed to in a given situation, different individuals will generate different results. This indeterminacy across persons is directly relevant to legal culture. Judges often have different values from one another. Therefore, the same fact situation will generate different results across judges. Nothing Kress has said discredits this conclusion.

Kress, like other middle-grounders,[97] insists that both founda-

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94 For legal principles to be determinate there must be agreement on the purposes and goals behind them. Assuming the existence of atypical purposes and goals, *any* legal conflict can become controversial. Further, when these goals and purposes are themselves indeterminate or unstable, legal reasoning is radically indeterminate. This is perfectly compatible with the existence of easy cases.

95 *See* Michael Moore, *Moral Reality*, 1982 WISC. L. REV. 1061, 1152. Moore argues that skeptics make too much of this point. In Moore's view, once we apply general values to concrete situations, a uniquely correct decision may appear. Certainly, a uniquely correct decision *may* appear. But then again it may not, even in many important cases. Further, even if such answers always appeared from the individualistic-perspective, there is little chance that there will be uniquely correct answers across persons. Different people unpack general terms in different ways, and weigh alternatives differently.

96 When an individual's moral and political values are indeterminate, his substantive conclusions, even from the individual-perspective, will be indeterminate also.

97 Kress contends that it is irrational to draw a skeptical result from the failure of formalism. He writes: "It is a myopic view which fails to envision a middle ground between formalism and radical indeterminacy." Kress, *supra* note 74, at 329. The problem with the middle-grounders is that they do not take the problem of scope seriously. If there is a middle ground that provides a rational structure to law, shouldn't we have identified it by now? Without some explanation of this failure, skepticism concerning a middle-ground, far from being irrational, is required by the evidence.

tionalists (or absolutists) and skeptics invoke a defective framework. Indeed, Kress insists that skeptics are disappointed absolutists. There is some plausibility to this claim. But its relevance is illusory. In describing a legal framework as having two poles we are describing a very common, elementary structure of reasoning and justification. To describe foundationalists and skeptics as setting impossible standards is persuasive only after identifying an alternative standard, and this Kress has conspicuously failed to do. How do we identify this middle ground, and why should we follow it?

One central obstacle to denying the skeptical implications of either radical or moderate indeterminacy is the ranking problem. If two or more first-order rules or principles conflict, there must be a meta-rule or principle for ranking first-order principles.[98] We must determine which first-order principle takes precedence given the particular facts of the case. In other words, in cases of conflict we need a meta theory to determine the weight and the effectiveness of one of the competing first-order principles. Kress insists that having a "metatheory is unrealistic and unnecessary."[99] The skeptic agrees that having a meta-theory is unrealistic. But what grounds does Kress have for denying the necessity of a meta-principle? If two principles conflict, a practical reasoner must have some way to rationally choose between them if one is to get either a strongly competent or moderately competent result.[100] Unless there is a reliable method for deciding between conflicting first-order principles, the results from the individual-perspective will be indeterminate. Even if determinate on the individual level, if there are not agreed upon second-order principles or procedures for settling conflicts between individual results, outcomes will be radically indeterminate across persons.[101] It is insufficient to retreat behind the notion of reconstructive techniques, the role of judgment in legal reasoning, or other middle ground approaches.[102] If there is a rational, non-

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98 It is important to keep in mind the distinction between first- and second-order beliefs. First-order beliefs are ordinary beliefs derived from experience and reason. Second-order beliefs are epistemic beliefs *about* beliefs. *See* ROBERT AUDI, BELIEF, JUSTIFICATION AND KNOWLEDGE 136 (1988).

99 Kress, *supra* note 74, at 332.

100 The failures here are failures of both the individual-perspective and the collective-perspective.

101 The familiar notion of there being second-order principles can be understood as follows: First-order principles are principles about the propriety of actions, while second-order principles are principles about rejecting or accepting first-order principles. *See* Michael Williams, *Coherence, Justification, and Truth*, 34 REV. METAPHYSICS 243, 248 (1980). Similarly, within any system of law, there must be second-order principles, principles that determine which first-order principles prevail in cases of conflict.

102 Kress appears to overlook the fact that appealing to the notion of judgment is perfectly compatible with the skeptic's challenge. Indeed, the skeptic would contend that the notion of judgment is an alternative, though unilluminating, way of describing

arbitrary approach to determine which principles have more weight in cases of conflict, then such an approach must be identified.[103] Merely asserting that such an approach is possible is inadequate in answering the skeptic's challenge.[104]

Kress diagnoses the skeptic's problem as an overly rigid insistance that "right answers must flow from legally authorized premises by deductive or similarly watertight inferential techniques to avoid indeterminacy."[105] Skeptics "fail to contemplate less stingy inferential techniques such as argument by analogy and those deployed in coherence theories."[106] In Kress's view, skeptics' arguments are unsuccessful because they set "unrealistic and unattainable standards for the law and then fail[ ] to envision a middle ground between formalism [foundationalism] and radical indeterminacy [skepticism]."[107] Their view is "myopic," and embraces "the same extremist position" as sometimes attributed to strict conventionalists, "who are allegedly committed to the unattainable watertight standard for law and adjudication."[108]

The objection that skeptics insist upon deduction or other "watertight" inferential techniques is a red herring. Anyone hoping

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the skeptical situation. In deciding between conflicting principles, either there are reliable principles from the individualist-perspective as well as across persons, or there are not. If there are, we must state and evaluate them. If there are not, we have a skeptical result.

How does judgment show the rational, non-arbitrary nature of legal reasoning? If judgment cannot provide rational, inter-subjectively acceptable, procedures for settling cases of conflicting principles, then at this ultimate level of reasoning, judgment does nothing to further constrain a judge's choice. This warrants the conclusion that at this ultimate level of judicial reasoning, judges are not constrained by rationality or judgment, and that legal reasoning can justify two incompatible principles of law.

103 Kress argues that "[l]aw is indeterminate where the correct theory of legal reasoning fails to yield a right answer or permits multiple answers to legal questions." Kress, *supra* note 74, at 320. He then contends that there are "accurate theories of legal reasoning" that "yield right answers . . . ." *Id.* However, Kress never identifies a theory that promises a right answer across persons.

104 Kress's article is checkered with remarks such as: "If, however, social policy is legally authoritative, then law is not indeterminate." Kress, *supra* note 74, at 326. It is not clear how this conclusion follows. It follows only if social policy is determinate, that is, only if there is one and only one correct description of social policy. If there is not, appeals to social policy fail to make law determinate. Kress appears to recognize this problem when he writes: "Of course . . adding materials can create conflicts between authoritative materials. Thus, the addition of nonrule standards does not necessarily eliminate indeterminacy." *Id.* (footnote omitted).

Kress then argues that "these arguments for the existence of more radical forms of indeterminacy are therefore more deeply embarrassed by the reasonable predictability of legal outcomes." *Id.* What Kress overlooks is that predictability cannot itself show that legal rules are determinate. Indeed, predictability is equally explainable by appealing to determinate rules or the ideology of legal culture.

105 *Id.* at 329.

106 *Id.*

107 *Id.*

108 *Id.* (footnote omitted).

that law is a rational enterprise has the right to expect some procedure or set of procedures that are likely to resolve controversial cases. When the best procedures inevitably give multiple answers, as they do in the great controversial cases of our time, agreement across persons is thwarted, and therefore a skeptical conclusion concerning these issues is warranted.

Finally, Kress points out that logical systems do not contain mechanical procedures for determining theorems.[109] But the relevance of this point is difficult to grasp, especially when Kress concedes that "given an alleged argument (*i.e.*, proof) in first-order logic, we can mechanically check its correctness."[110] Isn't that the point? In law we have no agreed upon procedure for evaluating a legal argument's soundness in controversial cases beyond the elementary logical and empirical constraints placed on any argument. We have no collectively agreed upon paradigm for *validating* legal arguments. *This* is what the skeptical challenge involves, not principles for *discovering* the truth of legal propositions.

Kress insists that "[l]ike classical mathematics, law may be ontologically determinate, even if there is no explicit meta-theory that 'tells us' precisely what the law is."[111] But even if law is ontologically determinate, what good is this for legal practitioners? And how does it refute epistemic skepticism? Even if it makes conceptual sense to speak of law as ontologically determinate, unless this determinacy makes its presence felt in recognizable legal arguments, then its existence is useless.

Summarizing, at the heart of our notion of rationality is the notion of agreement across persons. To denigrate the expectation of agreement across persons is to vulgarize epistemic justification.[112] New foundationalists would do us a service by describing a middle-ground approach that generates agreement across persons. Failing this, new foundationalists have not dispelled the sobering bite of modified skepticism. Lastly, Kress commends coherence theories as just such a middle-ground approach. Let us then turn to an examination of one of the most impressive coherence theories available, Ronald Dworkin's law as integrity.

## B. Dworkin's Coherentism

### 1. *Right Answers*

Dworkin's legal theory maintains that there are uniquely correct

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109 *Id.* at 332.

110 *Id.*

111 *Id.* (quoting Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 16 (1984)).

112 *See* Lipkin, *supra* note 38.

answers to controversial legal questions.[113] According to Dworkin, a legal proposition is true if it "follows from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[114] A constructive interpretation of a legal practice is an interpretation that shows the point or purpose of that practice "in order to make of it the best possible example" of law that it can be.[115] Formulating a constructive interpretation of a series of privacy cases, for example, requires constructing a principle of privacy that explains the decisions in these cases and shows these decisions in their best light. In other words, a constructive interpretation of a series of cases explains and justifies the decisions in these cases. Consequently, the right answer to a legal quesiton is a decision that best explains and justifies the decisions in a given area of law. Since there almost always is a best constructive interpretation of a legal practice, there almost always are right answers to every legal question.

Dworkin's declaration flies in the face of the common law lawyer's creed that law can rule out certain unacceptable answers but cannot rule *in* one and only one correct answer. In Dworkin's view, despite disagreement, there is one and only one correct answer to legal questions. Disagreement as to the correct answer in Dworkin's view, even disagreement after careful and sophisticated deliberation, does not preclude there being one right answer. After all, truth does not entail proof. A legal proposition might be true despite our failure to prove it true.[116]

The slogan that truth does not entail proof, like many other slogans, is systematically ambiguous. First, it might imply the uncontroversial claim that for a proposition to be true, it is not necessary to *prove* its truth to all challengers. A constraint requiring that the truth of the proposition "The earth is a sphere" must convince members of The Flat Earth Society is too severe. Even when confronting Truth, there will always be disbelievers.

However, Dworkin might also be advancing the curious position that a legal proposition is true even if agreement in a given case is impossible in principle. Since legal truth depends upon interpretation, and interpretation ultimately depends upon the particular

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113 In Dworkin's view the uniquely correct answer thesis follows from the fact that people have legal rights. According to Dworkin "[a] person has a legal right, . . . if he has a right flowing from past political decisions, to win a lawsuit." R. DWORKIN, *supra* note 1, at 152. *But see* George C. Christie, *Dworkin's Empire*, 1987 DUKE L.J. 157, 184 (stating that Dworkin has abandoned the uniquely right answer thesis).

114 R. DWORKIN, *supra* note 1, at 225.

115 *Id.* at 52.

116 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1978).

judge's values,[117] truth is relative to the particular judge's value system. In a pluralistic society, unless there is some acceptable procedure for determining correct values, judicial decisions invariably will be unprovable. Given a diversity of values, inter-subjective agreement among judges will be impossible. Hence, judicial decisions will be unprovable. By accepting this view, uniquely right answers are possible only from the perspective of the individual practical reasoner or judge. For those not sharing the judges' particular values, no uniquely correct answer is possible.[118]

Like Kress, Dworkin fails to distinguish between rules for *discovering* answers to a legal question, and rules *validating* them.[119] The rationality of any discipline depends upon the existence of rules of validation. Failure to construct rules for *discovering* substantive answers to moral or legal questions might be inevitable. But if a discipline has any normative authority at all, it must contain rules for *validating* the results of particular inquiries.

At most, Dworkin's methodology operates from the individualist-perspective: it enables an individual judge to discover which solution follows from his own explanatory and justificatory values. Unfortunately, Dworkin's methodology fails to provide rules for validating the judge's solution. In order for Dworkin's methodology to be capable of validitating the judge's solution, he must show how it can achieve inter-subjective agreement.[120] Dworkin's interpretivism can be used to validate legal decisions only if each judge is required to hold the *same* explanatory and justificatory values, or if there are rules or principles to adjudicate between judicial decisions stemming from different explanatory and justificatory values.[121] If not, Dworkin's procedure assists an individual judge in discovering what he *believes* the correct decision to be, not what the correct decision *is*. In other words, Dworkin's theory tells us which decision is correct relative to certain explanatory *and* justificatory values, not which de-

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117 There are at least two types of values relevant here. First, there are explanatory values, which guide a judge's sense of how well a new rule fits past legal practice. A judge's sense of fit may be narrow or expansive. Second, there are straightforward political and moral values, such as due process, fairness, and justice that influence different judges in different ways.

118 Dworkin's view is interesting only if his methodology can show that there are uniquely right answers across the entire judicial community. However, upon close inspection Dworkin's methodology, at most, yields answers only from the perspective of an individual judge.

119 W.H. NEWTON-SMITH, THE RATIONALITY OF SCIENCE 125 (1981).

120 One central feature of rationality is the possibility and need for inter-subjective agreement. Dworkin's theory appears to jettison the need for such agreement.

121 Without such rules or principles, it is permissible for each judge to generate his own independent decision. By "independent," I mean that each judge's decision is equally valid, not that the correct methodology ignores other judicial opinions. In law, as in any domain, independence in the latter sense is impossible. *See* Fish, *supra* note 92.

cision is correct *tout court*.[122]

The problem with Dworkin's theory is that it renders justification relative to particular epistemic agents. If I interpret the legal materials to yield one answer, and through the same process someone else comes to a contradictory answer, nothing more can be said. This overlooks the fact that I should ordinarily credit the experience and judgment of other epistemic agents as providing evidence for or against my conclusion. On Dworkin's theory, once a judge has interpreted the relevant materials, he is *epistemically* the final authority. In these circumstances, we are left with judicial anarchy, necessarily barred from achieving the inter-subjective agreement so vital to questions of correctness, criticism and rationality. Judicial anarchy—each judge being the final epistemic authority—breeds skepticism concerning the rationality of judicial decisions.

### 2. *Internal and External Skepticism*

Dworkin appears to believe that he can deflate the force of the above objection by introducing a distinction between two kinds of skepticism: internal skepticism and external skepticism.[123] Internal skepticism is skepticism *within* an enterprise, while external skepticism is skepticism *about* the enterprise.[124] Internal skepticism, while relying on an interpretive methodology, challenges all possible interpretations of a particular practice or an entire enterprise.[125] The internal skeptic does not question the interpretive enterprise, but rather challenges particular interpretations of the object of intepretation. This form of skepticism maintains that the correct answer to the question of whether a particular or a general practice has a best interpretation is that it does not. Accordingly, Dworkin favors internal skepticism because it embraces the interpretive methodology. Any skeptical perspective not embracing this methodology should not be taken seriously.[126]

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122 Should Dworkin reply that all true judicial decisions are true relative to some set of explanatory and justificatory values, then his view is committed to judicial relativism. Unless a non-relative, non-subjective procedure exists for choosing the "correct" set of such values, the uniquely right answer thesis seems patently false. It simply is insufficient to insist that interpreters self-consciously regard their interpretive efforts as producing non-relative, non-subjective results. Unless we can identify the relevant methodology for achieving these results, what interpreters self-consciously think is irrelevant to the question of whether interpretation is a rational activity.

123 R. DWORKIN, *supra* note 1, at 78-83.

124 *Id.* at 78.

125 *Id.* at 78-79. In this event, one's skepticism is global. Global internal skepticism about an entire enterprise is due to the lack of unity and coherence in that enterprise.

126 By insisting that only internal skepticism is legitimate, Dworkin arbitrarily precludes the formulation of a brand of skepticism that attacks the interpretive methodology itself. In particular, Dworkin uses this argument against a strain of Critical Legal Studies, forcing them to play his game if they want to be taken seriously. There are no

An external skeptic, on the other hand, does not question particular or general interpretations. Indeed, according to Dworkin's characterization, an external skeptic has his own opinion concerning which interpretations are correct. The external skeptic maintains that his opinion is merely *his* opinion and does not reflect "an objective fact . . . [that is] locked up in the nature of reality, 'out there' in some transcendental metaphysical world where the meanings of plays subsist."[127] While external skepticism challenges the interpretive attitude, the internal skeptic makes use of this attitude to challenge all possible interpretations of some activity. In Dworkin's view, "[e]xternal skepticism is a metaphysical theory, not an interpretive or moral position."[128] Dworkin continues:

> The external skeptic does not challenge any particular moral or interpretive claim. He does not say that it is in any way a mistake to think that *Hamlet* is about delay or that courtesy is a matter of respect or that slavery is wrong. His theory is rather a second-level theory about the philosophical standing or classification of these claims. He insists they are not descriptions that can be proved or tested like physics; he denies that aesthetic or moral values can be part of what he calls (in one of the maddening metaphors that seem crucial to any statement of his view) the "fabric" of the universe. His skepticism is external because disengaged: it claims to leave the actual conduct of interpretation untouched by its conclusions. The external skeptic himself has opinions about *Hamlet* and slavery and can give reasons for preferring these opinions to those he rejects. He only insists that all these opinions are projected upon, not discovered in, "reality".[129]

Thus, Dworkin disputes the distinction between two different levels or categories of ethical discourse.[130] Indeed, Dworkin believes that he has provided an argument against the meaningfulness

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good philosophical reasons for accepting Dworkin's restriction here. *See* Schlag, *supra* note 81, at 1199.

127 R. DWORKIN, *supra* note 1, at 78.

128 *Id.*

129 *Id.* at 79-80.

130 Dworkin's insistence that the statements "Slavery is wrong" and "There is a right answer to the question 'Is slavery wrong?' " are the same type of statement flies in the face of the distinction between normative and meta-ethical statements. Remarkably, Dworkin's attack on external skepticism seems to ignore meta-ethics completely. Traditionally, normative ethics is distinguished from meta-ethics in the following manner. Normative statements are statements that some act or person is right or wrong, good or bad. DAVID V. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS 1-2 (1989). Meta-ethics is an epistemological inquiry analyzing the meaning of such concepts as objectivity, truth, and justification in ethics. *Id.* Meta-ethical claims are second-order claims about the concept of validation in normative ethics, while normative ethical statements are first order claims about what is right or good. *Id.* Meta-ethical inquiries concerning substantive methodologies can lead to external skepticism. Dworkin may be committed to a rejection of moral epistemology. But then he is denying a large chunk of

or relevance of external skepticism for any interpretive enterprise. He contends that "there is no important difference in philosophical category or standing between the statement that slavery is wrong and the statement that there is a right answer to the question" whether slavery is wrong.[131] According to Dworkin, a person

> cannot intelligibly hold the first opinion as a moral opinion without also holding the second. Since external skepticism offers no reason to retract or modify the former, it offers no reason to retract or modify the latter either. They are both statements within rather than about the enterprise of morality. Unlike the global form of internal skepticism, therefore, genuine external skepticism cannot threaten the interpretive project.[132]

It is true that as long as I insist upon the truth of the statement "Slavery is wrong," I must also hold that there is a right answer to the question whether slavery is wrong. But this is an entirely trivial result. As soon as I question whether there are right answers in this area of inquiry, I begin to undermine my belief that slavery is, *pace* Dworkin, *really* wrong. Moreover, the question whether there are right answers depends in part on how well the methods for validating claims square up to more general conceptions of validation. Questions about evidence, truth, and justification are questions that derive their answers from generalizations about how similar areas of human inquiry handle questions of validation. Consequently, the statement that there are right answers in law and ethics is supported by evidentiary statements from within law and ethics as well as statements about how these evidentiary statements compare with more generalized conceptions of validation. These more generalized of validation provide a form of external skepticism that does not succumb to Dworkin's criticism.[133]

Perhaps Dworkin is correct to discredit external skepticism, if this form of skepticism insists that true legal statements must reflect some metaphysical reality. However, it is not obvious that Dworkin is right if external skepticism reflects what might be labeled a scientific primacy view.[134] According to the scientific primacy view, we

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contemporary ethical theory. In that case, he needs a more compelling argument than the one he offers against external skepticism.

131 R. DWORKIN, *supra* note 1, at 82.

132 *Id.*

133 External skepticism is predicated on the conviction that we can usefully *reflect* on *any* interpretive activity and compare it with other reliable methodologies. This process of reflection may conclude that interpretation is valid or it is not. In the latter case, we have a skeptical result.

134 The scientific primacy view seems to be part of one prominent cultural perspective. *See* Posner, *The Jurisprudence of Skepticism*, *supra* note 27. *But see* Steven J. Burton, *Judge Posner's Jurisprudence of Skepticism*, 87 MICH. L. REV. 710 (1988); Jay Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 MICH. L. REV. 724 (1988).

know how to verify scientific claims by seeing how they reflect physical reality.[135] Consequently, if legal and moral claims do not admit the same sort of verification, we should be skeptical about their truth.[136] A scientific primacy view is a form of external skepticism because it asserts that despite the interpretive method being the dominant mode of analysis in law, it is ultimately unverifiable because it cannot be validated by the scientific method. The reason for holding a scientific primacy view is pragmatic. Science has surpassed all other areas of human inquiry in achieving control over the physical world.[137] Law and morality have been dismal failures in

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135 Michael Moore offers a version of the scientific primacy view in his defense of external skepticism. Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 953-54 (1989). According to Moore, "[f]or morality, the external viewpoint is our normal scientific viewpoint, with its normal notions of truth, reality, reference, and justification." *Id.* at 953.

There are several problems with Moore's position. First, it is ambiguous as it stands. If Moore means that science is external to law and morality, and therefore can be used to evaluate the justificatory procedures in the former domains, he must explain why science qualifies as epistemically authoritative over these other areas of human inquiry. Similarly, if he means that scientific methodology is superior to constructive interpretation, he must present an argument to this effect.

136 According to Moore, Dworkin confuses a point of view external to our conceptual scheme entirely with one that is external to a particular domain, for example, law or morality. Consider:

> Dworkin claims autonomy for each interpretive practice by consistently denying that there are any cross-disciplinary, cross-practice notions through which we could raise external (metaphysical) questions. Thus Dworkin tells us that each interpretive practice must be judged internally by its own standards of validity, objectivity, independence from convention, and even truth, meaning and reality. For Dworkin, it is impossible to judge the propositions central to any interpretive practice by the (external) standards of science. Rather, we should . . . ascertain[ ] what counts as a good reason within each such enterprise and judge the objectivity of its practice accordingly.

*Id.* at 953 (footnotes omitted).

However, Moore mistakes the object of Dworkin's concern. Dworkin's distinction between internal and external skepticism is one between two vantage points from which to evaluate beliefs and values; it is not a distinction between particular domains such as morality, science or law. The first vantage point uses the interpretive methodology to answer questions in law, morality and literary criticism. The object of inquiry of the second vantage point is the interpretive methodology itself. Dworkin's argument maintains that either the interpretive methodology is the correct methodology for acquiring knowledge, or it is not. If it is correct, the first level of inquiry is entirely satisfactory, and there is no need or possibility for inquiry from a second, external vantage point. If the interpretive methodology is not correct, then we should seek an alternative. It makes no sense, so Dworkin's argument goes, to hold that the interpretive methodology is correct for the first vantage point, and then to question its validity from the second. Consequently, what Dworkin insists upon is that it makes no sense to be an internal nonskeptic, while at the same time espousing external skepticism.

137 One central basis for the scientific primacy view is its pragmatic success. Science has achieved "the linked goals of predictive accuracy and technical control." Ernan McMullin, *The Shaping of Scientific Rationality*, in CONSTRUCTION AND CONSTRAINT: THE SHAPING OF SCIENTIFIC RATIONALITY 39 (E. McMullin, ed. 1988) [hereinafter CONSTRUCTION AND CONSTRAINT].

comparison.

Some writers contend that the difference between science and ethics is one of degree, not kind.[138] According to this view, legal and ethical theory need not follow a scientific model. Thus, Dworkin need not accept the scientific primacy view. Nevertheless, external skepticism is still viable; it does not depend upon the scientific primacy view. Dworkin fails to realize that an external skeptic might very well believe internal statements in law and ethics, and still in his more reflective moments deny the validity of the internal viewpoint. It is, to be sure, ironic for someone to be an internal believer and an external heretic. Dworkin's argument against the external perspective is correct only if his point is that *in the final analysis* there is something strange about being an external skeptic and an internal non-skeptic.[139] An external skeptic should ultimately disavow a belief in the legitimacy of the internal point of view. But Dworkin wrongly takes this concession to imply that there is no external perspective from which to evaluate the internal point of view.[140]

Essentially, Dworkin's mistake consists of his mischaracterization of external skepticism. Dworkin bristles at such metaphors as the "fabric of the universe" and concepts such as objectivity.[141] An external skeptic, however, need not employ such metaphors; his argument can be very different. An external skeptic could argue that from up close anything can appear true: for example, a straight stick appears bent when placed in water,[142] and vengeance might appear to be justified in the throes of anger.[143] In order to gain

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138 Richard Rorty, *Science as Solidarity*, in THE RHETORIC OF THE HUMAN SCIENCES 38, 41 (John S. Nelson, Allan Megill and Donald N. McCloskey eds. 1987).

139 R. DWORKIN, *supra* note 1, at 79-81.

140 Whether external skepticism requires abandoning the internal point of view depends upon how much irony a person can tolerate. Those with a high irony threshold can be internal non-skeptics throughout much of what they do, while reserving their external skepticism for more reflective moments.

141 R. DWORKIN, *supra* note 1, at 82-83; *see* Ronald Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk of Objectivity Any More*, in THE POLITICS OF INTERPRETATION 287 (W.T. Mitchell ed. 1983).

142 This is the so-called argument from illusion, namely, that perceptual objects often appear differently from the way they really are. *See* ALFRED J. AYER, THE FOUNDATIONS OF EMPIRICAL KNOWLEDGE (1940). *But see* J.L. AUSTIN, SENSE AND SENSIBILIA (1962). More generally, secondary qualities such as sight, smell, and touch often appear differently to different observers, raising the question of whether such qualities are merely subjective or have a more permanent place in the world. *See* COLIN MCGINN, THE SUBJECTIVE VIEW: SECONDARY QUALITIES AND INDEXICAL THOUGHTS (1983).

143 One central feature of the external point of view is that it functions as a perspective for criticism. Robert Justin Lipkin, *Freedom, Responsibility and the Promise of Forensic Psychiatry*, INT'L J.L. & PSYCHIATRY (forthcoming 1990). In my view, the external view complements the internal perspective. By contrast, it is possible that these perspectives are in conflict. One could argue that "[t]he external view . . . comprehends within its scope of observation all the aims and commitments by reference to which internal significance is measured. It presents itself as the *right* way for the individual to look at the

knowledge,[144] anyone must seek a more general vantage point[145] from which to evaluate the claims we derive from up close.[146] This same process, which seems to be required to validate claims from up close, appears to undermine such claims.[147] After we develop a sophisticated set of procedures for resolving questions from up close, and seek a more general point of view from which to evaluate those solutions, skeptical doubts arise that we are unable to dispel.[148] This is the force of skepticism, and Dworkin's arguments fail to discredit it.

One way of understanding Dworkin's approach to the question of foundationalism and skepticism is to turn to a very different type of conception of the nature of philosophical methodology. Richard Rorty has advanced the theory of liberal ironism, a perspective that purports to abandon the framework of foundationalism and skepticism entirely. The stark alternatives of foundationalism and skepticism are pragmatically unrewarding even when we add the alternative of a middle-ground. Consequently, Rorty seeks to abandon the language of foundationalism and skepticism for an alternative language.

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world and his place in it: the big picture." Thomas Nagel, *Subjective and Objective*, in MORTAL QUESTIONS 197 (1979). Accordingly, the external perspective "develops this kind of detachment naturally, to counter the egocentric distortion of a purely internal view, and to correct the parochialism engendered by the contingencies of his overspecific nature and circumstances." *Id.* This tendency is self-perpetuating: "We cannot help wanting to extend it farther and farther, and to bring more and more of life and the world within its range." *Id.* at 210.

144 If "knowledge" is too strong, replace it with "reliable beliefs and values." Even radical skeptics care whether their beliefs and values are reliable or not.

145 *See* Nagel, *supra* note 143, at 196-213. Kenneth Burke calls this vantage point the "comic frame." KENNETH BURKE, ATTITUDES TOWARDS HISTORY 171 (1959). For Burke, "the comic frame should enable people *to be observers of themselves, while acting*." This capacity enables a person to achieve "*maximum consciousness*." *Id.* (emphasis in original).

146 What misleads Dworkin is his *dichotomy* between the internal and external points of view. Instead, there is a spectrum of continuous, increasingly general perspectives.

147 *See* THOMAS NAGEL, THE VIEW FROM NOWHERE (1986).

148 For a particular judgment to be justified, we must appeal to a general perspective. But then to justify the general perspective, we need an even more general perspective.

There are two problems here. First, the disposition to appeal to general perspectives involves an infinite regress. Second, and more importantly, the particular judgment that a straight stick is bent when placed in water is corrected only by appealing to a general perspective enabling us to see that water distorts a stick's appearance. It is this corrective capacity of the general perspective that is then discredited by appealing to an even more general perspective. Corrective devices entail the possibility that the corrective devices themselves need correcting. Hence, the birth of skepticism.

## III
## PRAGMATISM AND LIBERAL IRONISM

### A. Rorty and the Middle-Grounders

Let us note at the outset a salient difference between Rorty's view and the views of the middle-grounders. Middle-grounders reluctantly accept the foundationalism-skepticism framework. In their view, however, this framework is partially defective because it permits only two possibilities: foundationalism and skepticism. Middle-grounders contend that there is a middle-path, a path that doesn't seek some unquestionable starting point and therefore does not risk skeptical despair. Middle-grounders do not reject epistemology, and some do not reject metaphysics. Instead, they exhort us to accept a more reasonable epistemology or metaphysics. Because Rorty rejects epistemology and metaphysics, he rejects the entire foundationalism-skepticism framework. In Rorty's world there is no need for theories of knowledge, truth, justification, objectivity or rationality. In their place, Rorty is content to speak of degrees of unforced collective agreement about the entire host of human problems. For Rorty, the notion of an epistemic constraint is abandoned as pointless. We are left with different ways of characterizing the world, ways that ultimately are judged by how well they make sense of our lives and reduce cruelty.[149]

Like skepticism, Rorty's pragmatism rejects the notion of an absolute perspective from which to evaluate beliefs and values.[150] Unlike skeptics, Rorty denies that the absence of such an Archimedean point matters. What matters is reducing cruelty and humiliation. Seeking philosophical justifications[151] for caring about these things[152] only gets in the way of doing them. Unlike the liberal met-

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149 RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY (1988).

150 *Id.* at 51 (arguing against neutrality and absolute validity).

151 Rorty disavows only *philosophical* justifications, not everyday justifications. Rorty willingly embraces all sorts of commonsensical explanations and justifications of particular policies designed to bring about the mutually irreducible values of personal perfection and social justice. Rorty's approach relies heavily on Wittgenstein's position concerning justification in calculating: "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.*" LUDWIG WITTGENSTEIN, REMARKS ON THE FOUNDATIONS OF MATHEMATICS 98e (G.E.M. Anscombe trans. 1956). More precisely, Rorty does not deprecate ordinary, piece-meal justifications. What he denies is that there are any foundational or final justifications for anything.

152 Understanding the varieties of cruelty helps us avoid being cruel, but "[i]t will not produce a *reason to care* about suffering." R. RORTY, *supra* note 149, at 93. Perhaps it will not produce a reason to care about suffering in a misanthropic or sociopathic individual. But that is a far cry from showing that understanding the varieties of cruelty provides no reason to care for an ordinary inattentive, apathetic or mildly egoistic person.

aphysician,[153] Rorty's liberal ironist needs no reason to care for the suffering of others; he just does.[154] Rather than search for permanent justifications of knowledge and value, we should seek historical realities that give the greatest latitude for simultaneously achieving private perfection and the quest for justice.

Before we can achieve this we must drop from our vocabulary such terms as foundationalism, realism, anti-realism, and so forth. We should cease trying to ground our web of beliefs and values in anything other than pragmatic corrigibility.[155] We should stop longing for a super-discipline to determine the legitimacy of all other forms of theoretical and practical knowledge.[156] All disciplines have equal value, contributing to different aspects of human life.[157]

### B. The Contingency of Knowledge and Value

In Rorty's utopia, a theory of justification is not a prerequisite

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153 The liberal metaphysician seeks a reason not to be cruel, a reason he will never find. R. RORTY, *supra* note 149, at 94.

154 *Id.* at 93.

155 Rorty adopts Quine's metaphor of a seamless web to depict our conceptual system of beliefs and values. *See* W.V. QUINE & J.S. ULLIAN, THE WEB OF BELIEF (1977). Evidence disconfirming what we believe and value should prompt us to reweave recalcitrant sections of the web. Total abandonment or replacement of this web is unthinkable. This presents a troubling ambiguity. In *Contingency, Irony and Solidarity*, Rorty talks of abruptly replacing old vocabularies with new ones. But this way of talking conflicts with Rorty's talk of a seamless web. In this case, we reweave recalcitrant evidence piece by piece into our web of beliefs and values. No total abandonment is involved here. Consequently, Rorty must tell us whether his present view is a completely coherentist view, or whether it countenances revolutionary change.

Rorty might reply that insofar as we use the same web, we have piecemeal, pragmatic change. When our present web becomes pragmatically useless, or when a different language system appears much better, change is more abrupt. In other words, he may rely on his earlier distinction between normal and revolutionary discourse to show that both coherentism and revolution play a role in conceptual change. RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1980).

156 Here Rorty's affinity to Wittgenstein is obvious. In discussing our knowledge of such reports as "I know that that's a tree." Wittgenstein writes: "As soon as I think of an everyday use of the sentence instead of a philosophical one, its meaning becomes clear and ordinary." LUDWIG WITTGENSTEIN, ON CERTAINTY 44e [347] (G.E.M. Anscombe & G.H. von Wright eds. 1969).

157 In short, Rorty counsels that there is no general way of "dealing with general 'philosophical' ideas." Rorty, *Pragmatism Without Method*, *supra* note 26, at 272. Adopting this perspective enables us to think

> of the entire culture, from physics to poetry, as a single continuous, seamless activity in which the divisions were merely institutional and pedagogical. This would prevent us from making a moral issue of where to draw the line between 'truth' and 'comfort.' We would thus fulfill the mission of the syncretic and holistic side of pragmatism—the side that tries to see human beings doing much the same sort or problem solving across the whole spectrum of their activities (*already* doing it—not needing to be urged to start doing it).

R. RORTY, *supra* note 149.

to acquiring beliefs and values. We need no first principles that permanently ground our conceptual scheme. Rather, justification is a contingent process based on revisable principles. Consequently, beliefs and values are contingent and always subject to revision.

Rorty holds that truth is a human contrivance, since it is a function of language and language is a human tool.[158] As such, language should be understood in terms of its effects, what it helps us to do and say, not in terms of how much closer to reality one language is as compared to another.[159] For Rorty, there is no one way the world is. The world is what a vocabulary or language says it is.[160] The ultimate test of whether a particular vocabulary is preferable to an alternative vocabulary is its pragmatic benefits.[161]

Rorty's conception of the contingency of language and truth essentially rids us of "big-picture" philosophizing.[162] No longer should we seek deep explanations of metaphysical and epistemological concepts.[163] Instead, we seek detailed narratives of different aspects of human experience. We will then realize that only new and more interesting characterizations are possible; not truer, more objective or more real, characterizations. The great "isms"—realism, anti-realism, foundationalism and skepticism—are bankrupt and should be abandoned.

### C. Liberal Ironism and Conceptual Change

Central to Rorty's project is his picture of conceptual change.

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158 *Id.*

159 Rorty believes that this view of truth is central to Romanticism. Consider his words:

> [I]f we could ever become reconciled to the idea that most of reality is indifferent to our descriptions of it, and that the human self is created by the use of a vocabulary, then we should at last have assimilated what was true in the Romantic idea that truth is made rather than found. What is true about this claim is just that *languages* are made rather than found, and that truth is a property of linguistic entities, of sentences.

*Id.* (footnote omitted).

160 Rorty is intent on dispelling the Cartesian conception of mind and the correspondence theory of truth, a theory contending that a statement is true if and only if it pictures, mirrors, or corresponds to reality. *See* R. RORTY, *supra* note 155, at 12.

161 R. RORTY, *supra* note 149, at 8.

162 Rorty rejects big-picture dichotomies, such as objectivity and subjectivity, or morality and prudence, because they are pragmatically troublesome. *Id.*

163 Rorty denies the utility of essentialism in epistemology and metaphysics. The concepts of "truth," "man," or "God" have no intrinsic essence. But it is important, according to Rorty, to recognize that denying that there are intrinsic essences does not imply that everything is extrinsic. Instead, it is a recommendation that we no longer talk about the intrinsic or extrinsic nature of things. Rorty's views here are thoroughly pragmatic. In recommending that we stop talking about truth, Rorty is simply saying that a concern for analyzing truth is unprofitable. And "this claim about . . . profitability, in turn, is just the recommendation that we in fact say little about these topics, and see how we get on." *Id.*

Conceptual change does not occur in a neat, coherent fashion. Indeed, one cannot argue against traditional philosophical concepts such as truth, or against "a familiar and time-honored vocabulary" because such arguments "are expected to be phrased in that very vocabulary."[164] The problem is that "[a]ny argument to the effect that our familiar use of a familiar term is incoherent, or empty, or vague, or 'merely metaphorical' is bound to be inconclusive and question-begging. For such use is, after all, the paradigm of coherent, meaningful, literal speech."[165]

Arguments that familiar terms are incoherent "are always parasitic upon, and abbreviations for, claims that a better vocabulary is available."[166] Such argument should instead explicitly call for a new way of characterizing our experience.[167] In fact, "[i]nteresting philosophy is rarely an examination of the pros and cons of a thesis. Usually it is, implicitly or explicitly, a contest between an entrenched vocabulary which has become a nuisance and a half-formed new vocabulary which vaguely promises great things."[168] Interesting philosophy, according to Rorty, is always revolutionary; it is always discontinuous with the framework within which it arises and which it seeks to replace.[169] One important issue arising here is whether the new vocabulary must be justified in part in terms of the old vocabulary, or whether the new vocabulary must be evaluated on its own terms. Because this issue separates at least one strain of critical legal studies from traditional liberal theory, it is germane to the issue of skepticism in legal theory.

Indeed, this is the source of the controversy between John Stick

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164 *Id.*

165 *Id.* at 8-9.

166 *Id.*

167 Moral and cultural progress is brought about, not by argument, but by changing languages. *Id.* Recognizing an outsider "as one of us" is not effected by appealing to a common human nature. Social and moral evolution is not the result of discovering antecedent conditions which warrant the change. Instead, changing language creates novel questions, novel purposes as well as new kinds of people. For example, Rorty writes:

> The German idealists, the French revolutionaries, and the Romantic poets had in common a dim sense that human beings whose language changed so that they no longer spoke of themselves as responsible to nonhuman powers would thereby become a new kind of human beings [sic].

*Id.*

168 *Id.* at 8-9.

169 This suggests that "ordinary" philosophy seeks a framework within which to operate normally. An important question arises here. If normal philosophy is possible, how much agreement on methodology must there be? Further, how much disagreement over substantive results can normal philosophy permit? The more agreement required, and the more disagreement proscribed, the less likely it is that any kind of philosophy, however uninteresting, is ever normal.

and Joseph William Singer.[170] Stick argues that Singer misuses Rorty's pragmatism in his attempt to have us abandon traditional (liberal) legal theory.[171] Stick chastises Singer for suggesting that it is possible to take a fresh look at legal conflicts through a lens different from traditional legal doctrine. In Stick's view, "the whole point of pragmatism and Rorty's argument is that we cannot start over, and we cannot see things fresh. We cannot escape our language, or our standards of rational thought, to judge them."[172] Instead, "[w]hat we can do is judge one discourse by the standard of another, or in other words, use one part of our language to evaluate another part."[173] According to Stick, change, even radical change, is possible. Thus,

> Singer could try to persuade us to accept a different set of moral purposes and rational standards for law. He might have a socialist or anarchist vision of law, and he could try to convince us that his vision is a more attractive way of life judged by some of our own old values.[174]

In Stick's view, however, Singer must win his argument in traditional terms. In short, "[i]f [Singer] wanted to succeed, he would try to show how his vision was a culmination of parts of our own tradition and avoided acknowledged problems in our own theories."[175] Singer's argument for a different vision, according to Stick, must proceed "*on our own terms*."[176] According to Stick, we can never completely replace our old way of seeing things with a new entirely conceptual structure. Conceptual evolution occurs through a piece by piece transformation of the old vocabulary into the new one.[177] Irrespective of whether this captures Rorty's earlier statement of his theory,[178] Rorty no longer appears to hold such a view.[179] His current position is that the appropriate philosophical "method" is thoroughly holistic and pragmatic.[180] Consider his words:

> It says things like "try thinking of that in this way"—or more specifically, "try to ignore the apparently futile traditional questions

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170 John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

171 John Stick, *supra* note 170, at 395.

172 *Id.* at 396.

173 *Id.*

174 *Id.* at 396-97.

175 *Id.* at 397.

176 *Id.* (emphasis in original).

177 *See id.* at 401. Like Neurath's ship, it can be transformed only by replacing one plank at a time.

178 R. RORTY, *supra* note 149.

179 In other words, Rorty's present views are either inconsistent with his earlier positions, or ambiguous as they now stand.

180 R. RORTY, *supra* note 149, at 9.

> by substituting the following new and possibly interesting questions." It does not pretend to have a better candidate for doing the same old things which we did when we spoke in the old way. Rather, it suggests that we might want to stop doing those things and do something else. But it does not argue for this suggestion on the basis of antecedent criteria common to the old and new language games. For just insofar as the new language is really new, there will be no such criteria.[181]

According to Rorty's liberal ironism, language is a tool that permits the creation of a problem that the tool will solve. A poet, he says,

> is typically unable to make clear what it is that he wants to do before developing the language in which he succeeds doing it. His new vocabulary makes possible, for the first time, a formulation of its own purpose. It is a tool for doing something which could not have been envisaged prior to the development of a particular set of descriptions, those which it itself helps to provide.[182]

Consequently, Stick fails to recognize that Rorty's picture of conceptual change possesses abrupt or revolutionary features.[183] A new language replaces an old language only when a new generation is tempted to abandon the old for the new for whatever reasons.[184] There is no hidden rationale involved in the process. No more coherent a process by which the old is rationally transformed into the new is involved.[185]

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181 *Id.*

182 *Id.* at 13.

183 I do not suggest, nor does Rorty, that a new vocabulary is never continuous with the old. It is, of course, possible for conceptual change to occur and to be evaluated in terms of the old vocabulary. No vocabulary ever is totally different from the old vocabulary. To be recognized as a vocabulary the new vocabulary must share common features with the old. Whether a vocabulary is new depends on its goals and capacities. According to Rorty, a new vocabulary succeeds because a new generation is intrigued by its possibilities, not because it answers old questions.

184 Rorty tells anyone who wants to replace an old vocabulary with a new one to redescribe lots and lots of things in new ways, until you have created a pattern of linguistic behavior which will tempt the rising generation to adopt it, thereby causing them to look for appropriate new forms of nonlinguistic behavior, for example, the adoption of new scientific equipment or new social institutions.

R. RORTY, *supra* note 149, at 9.

185 One can grant that language is contingent, yet deny the possibility of a total change of vocabulary. Vocabularies may take on new and partly different uses and still retain the old meaning temporarily. One possible defect with this phenomenon is that the language risks incoherence in its own terms. In other words, at some point in the process of conceptual change, language functions in the old and new ways simultaneously. Similarly, Rorty contends that conceptual change usually involves "a contest between an entrenched vocabulary which has become a nuisance and a half-formed new vocabulary which vaguely promises great things." *Id.*

However, Rorty needs to explain this process in greater detail. Can we retain old terms, but employ them in new ways? Can we retain partial meanings? Rorty's reply

Stick confuses seeing things afresh by replacing one conceptual scheme for another with giving up our old concepts and not replacing them at all. Certainly, the latter is impossible. There is no neutral vantage point from which to evaluate our conceptual scheme, because there is no perspective totally outside all possible conceptual schemes.[186] Yet granting this is not to deny the point that we can abruptly replace conceptual schemes or even parts of conceptual schemes. Similarly, Stick should distinguish between the proposition that we must begin our evaluations within our present conceptual scheme[187] from the very different proposition that we must replace the old scheme with a newly acquired language in a piecemeal fashion.

One important objection to liberal ironism should be disposed of here. Michael Moore argues that Rorty's "interpretive pragmatism"[188] merely adopts the idealist's argument against realism, and does not, as Rorty contends, change the subject. Rorty "tries to show that realism is false using the exact same arguments as the idealist metaphysician. One hardly shows the senselessness of some debate . . . by participating in one well-defined side of it."[189]

Moore appears to be on to something. Rorty's nemesis is the Cartesian concept of the mind and the correspondence theory of truth. According to Rorty, a language is not validated by showing that it represents reality better than alternative languages. Truth is mind-dependent, in Rorty's view, because truth is a function of sentences and sentences are mind-dependent. Truth does not exist independently of people. Isn't this just the standard idealist objection to realism?

Upon closer inspection, it becomes apparent that Moore's criticism is off the mark for two reasons. First, Rorty is not *endorsing* idealist or skeptical arguments against realism. Instead, Rorty is examining certain metaphors, for example, the central philosophical metaphor which contends that knowledge claims "correspond to reality." We define realism, idealism and skepticism by how they ex-

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would probably be to retain as much of the old as possible in the face of the new. *See* Rorty, *supra* note 26, at 266 (discussing Dewey's and Tillich's decision to hang onto old beliefs while reweaving the framework of their conceptual webs).

186 In short, there is no neutral vantage point which is itself a conceptual scheme from which to evaluate competing conceptual schemes to determine which best depicts reality.

187 CHARLES S. PEIRCE, 5 COLLECTED PAPERS § 5.265 at 156 (1935) (arguing that the philosophical enterprise begins with all our actual prejudices).

188 Moore's argument is aimed primarily at Rorty's work, PHILOSOPHY AND THE MIRROR OF NATURE. *See* Moore, *supra* note 135. In fairness to Moore, Rorty's project is much more explicitly stated in *Contingency, Irony and Solidarity*. Even if Moore is mistaken concerning Rorty's present views, he might still be right about Rorty's earlier position.

189 Moore, *supra* note 135, at 903.

plain this metaphor. As such this metaphor defines a particular conceptual framework or language-game. In attacking this metaphor, Rorty is attacking the framework itself. He argues that we get nowhere by playing these language-games, not that one side or the other should win the debate.

Rorty contends that the linguistic or conceptual framework which defines itself in terms of mental representations "corresponding to reality" is the real culprit, not any one of the positions within the framework.[190] For Rorty culpability means pragmatic worthlessness. Rorty is not, as Moore contends, adopting an idealist position.[191] Rorty insists it is perfectly plausible to believe that a real world independent of human consciousness exists. Indeed, it is perfectly reasonable "[t]o say that the world is out there, that it is not our creation" when this is the "common sense [view], that most things in space and time are the effects of causes which do not include human mental states."[192]

Essentially, Moore's mistake is that he insists on interpreting Rorty's "deconstructive" technique as a way of doing normal philosophy.[193] Instead, Rorty's remarks aim at abandoning normal philosophizing by showing its pointlessness.[194] Rorty's method points to dualistic conceptual frameworks, such as mind and body or reality and appearance. To Rorty, these frameworks are contingent and are dominated by certain metaphors. Rorty contends that when we evaluate these metaphors, we will discover their pragmatic worthlessness and consequently abandon them.[195] This is not to adopt a

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190 The realist contends that true beliefs correspond to reality. By contrast, the idealist and the skeptic deny that truth corresponds to an independent reality. Rorty believes that each of these positions is pragmatically pointless.

191 Rorty tells us that "right-thinking" pragmatists "share the idealists' doubts that 'truth is correspondence to reality' (although they hasten to distinguish themselves from the idealists by making 'the ideally coherent set of representations' a future human product rather than a pre-existent reality)." Consequently, Moore incorrectly chastises Rorty for adopting the idealist's view. What is wrong with using idealist arguments against realists and then an independent argument against idealists?

192 R. RORTY, *supra* note 149, at 5. Rorty argues that the idealists' mistake was that they "confused the idea that nothing has . . . [an intrinsic] nature with the idea that space and time are unreal, that human beings cause the spatiotemporal world to exist." *Id.* at 4. Rorty is not an idealist anymore than he is a realist or a skeptic.

193 *See* Richard J. Bernstein, *Philosophy in the Conversation of Mankind*, 33 REV. METAPHYSICS 745, 747 (1980).

194 Moore fails to see that Rorty's goal is to edify by debunking systematic philosophy, be it normal or revolutionary systematic philosophy. For the distinction between normal and revolutionary philosophy, on the one hand, and systematic and edifying philosophy, on the other hand, see R. RORTY, *supra* note 155, at 369.

195 Moore's mistaken conception of Rorty's program is similar to the mistake one writer makes in characterizing Stanley Fish's views on interpretation as subjectivist. *See* T.K. SEUNG, STRUCTURALISM & HERMENEUTICS 189 (1982). Fish would disavow this characterization precisely because he rejects the subjectivist-objectivist distinction.

substantive position within the framework; rather it is an exhortation to spend one's time doing something else.[196]

Moore insists that Rorty incorrectly suggests that the Platonic (realist) position has failed. He writes:

> The realists don't think that Plato (or the rest of us footnotes to Plato) failed. That of course remains to be seen, but the only way to see it is to work through the realist/antirealist arguments about the explanatory role of correspondence truth and the like. Rorty's metainduction from the history of philosophy depends on the antirealist being right on the merits of his metaphysical arguments, for that is the only way of knowing that "Plato" (*i.e.*, metaphysical realism) has failed.[197]

What realists think or do not think is irrelevant to Rorty's point. Rorty's "metainduction" is a straightforward argument: given that the best minds of western civilization have tried and failed to establish agreement within a certain conceptual framework, we have the best possible evidence that agreement *within* that framework is illusory. Moore challenges Rorty "to work through the realist/antirealist arguments." But in *Philosophy and the Mirror of Nature*,[198] Rorty worked through the arguments and concluded that no stronger reason exists to endorse either realism or antirealism. Nor does Rorty endorse skepticism.[199] Rorty rejects the entire framework incorporating the metaphor of seeing or corresponding not merely a part of this framework.[200] Using the different positions within a framework to cancel each other out shows how futile thinking in terms of the framework is. Essentially, this methodology maintains that realism, idealism and skepticism succumb to one another's arguments. No one position survives refutation. Consequently, the framework incorporating the metaphor of seeing and correspondence sows the seeds of its own destruction. To adopt the framework is to reject various parts of it. So, why bother?[201]

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196 Nor does Rorty advocate replacing this framework with a revolutionary systematic framework. Instead, Rorty wishes to abandon both normal *and* revolutionary *systematic* philosophy.

197 Moore, *supra* note 135, at 905.

198 R. RORTY, *supra* note 155, at 172.

199 *See* Bernstein, *supra* note 193, at 761-62 (arguing that Rorty is not a skeptic in any traditional sense).

200 The metaphor of correspondence defines the realism-idealism-skepticism framework. The realist believes in the legitimacy of perceptual statements; he believes that true perceptual reports reflect an external reality. The idealist also believes in the legitimacy of perceptual statements, but he analyzes these statements into ideational or mentalistic components. The skeptic, on the other hand, either denies the meaningfulness of perceptual reports, or grants their meaningfulness but denies that we can ever know when such a report is true.

201 Moore's remarks concerning Rorty's "metainduction" are too facile. How long should we retain a particular conceptual framework? If the realism-idealism-skepticism

Moore recognizes that Rorty's position is not made from within a philosophical debate, but rather is *about* that debate. Moore recognizes that Rorty is suggesting we exchange one set of metaphysical metaphors for an alternative set of non-metaphysical terms, but chastises Rorty for not describing how choices will be made with the new vocabulary. He writes:

> When someone reaches this position we know that we are reaching the end of our conversation with him. Telling us we must choose and that some choices will *seem* better than others, without giving any reasons why we should choose one way or the other or why the "seeming-better" should be taken to *be* better, does not engage us. Such suggestions are empty in the way that noncognitivist and existential ethics are always empty. For what it is worth, here in the realm of the noncognitivist, Rorty's world does not seem better to me. It seems a barren place in which all arguments are made only by pulling oneself out of deep existential nausea, itself possible only by a bad-faith forgetfulness that all arguments are rhetorical substitutes for the bullets one either does not possess or is unwilling to use.[202]

This criticism radically mischaracterizes Rorty's project. The liberal ironist knows that cruelty and humiliation are wrong.[203] Indeed, he will justify particular acts in terms of how they reduce suffering. The difference is that the liberal ironist sees no need to justify his abhorrence of suffering.[204] For the ironist, no such noncircular justification exists. But this is not a skeptical result. The

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controversy persists unresolved for another two thousand years, would it then be time to abandon the framework? What about four thousand years? Ten thousand?

202 Moore, *supra* note 135, at 904 (emphasis in original).

203 The liberal ironist need not deny that he *knows* that cruelty is wrong, so long as he uses the term "know" in an ordinary, common-sensical manner. In that sense, he can argue that his belief that cruelty is wrong is true and justified. What he will not (and cannot) do is argue for one epistemological conception of "justification" over others, or insist on some metaphysical conception of truth.

204 In a liberal ironist's utopia, non-intellectuals "would see themselves as contingent through and through, without feeling any particular doubts about the contingencies they happened to be." R. RORTY, *supra* note 149, at 87. Such individuals would be "commonsensical nonmetaphysicians . . . [who] would feel no more need to answer the questions '*Why* are you a liberal?' and 'Why do you *care* about the humiliation of strangers?' than the average sixteenth-century Christian felt to answer the question 'Why are you a Christian?' " *Id.*

Although intriguing, Rorty's utopia is still troubling. Doesn't the failure to feel a need to question one's religion or politics indicate a perfidious complacency? Doesn't it inhibit changes that should occur? Doesn't the quest for justification drive all important changes? Rorty's answer is no. He writes:

> Such a person would not need a justification for her sense of human solidarity, for she was not raised to play the language game in which one asks and gets justifications for that sort of belief. Her culture is one in which doubts about the public rhetoric of the culture are met not by Socratic requests for definitions and principles, but by Deweyan requests for concrete alternatives and programs. Such a culture could . . . be every bit as

skeptic would conclude that one is not justified in abhorring suffering, while Rorty believes that no justification is required for this abhorence to be the basis of judgment and action.[205]

Still, Rorty's own remarks concerning the application of pragmatism to legal culture lend credence to Moore's objections. Rorty writes:

> I confess that I tremble at the thought of Barthian readings in law schools . . . . I suspect that civilization reposes on a lot of people who take the normal practices of the discipline with full "realistic" seriousness. However, I should like to think that a pragmatist's understanding of knowledge and community would be, in the end, compatible with normal inquiry—the practitioners of such inquiry reserving their irony for after-hours.[206]

Rorty's entire philosophical conception insists that the liberal ironist is one who is prepared to recognize the contingency of his own views. Accordingly, the liberal ironist, in court or in the classroom, might argue or teach a case with "realistic" seriousness, yet simultaneously hold his views only tentatively after-hours. Why should this be troubling?

Liberal ironism, as I understand it, is the attempt to say that anyone remotely familiar with actual historical institutions must recognize the complexity and conflicts that inevitably arise in a reasonable person's views and behavior. Without foundational principles telling us what is right, real and true, a reasonable person must tolerate a great deal of irony in his life. Rorty's position is no more vulnerable here than are other non-foundationalists' positions.[207] Because normal practices satisfy the ideal of settled expectations, they are extremely valuable. But this is not a foundationalist result. Of course, non-foundationalists cannot ground normal practice in certainty or necessity. But if non-foundationalism is correct, nothing else can either.

Rorty is mistaken, however, in implying that legal practitioners must be "realists" regarding normal practice, if being a realist means they must appear to believe in certainty or correspondence with reality. Pragmatic practitioners can operate normally without

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> self-critical and every bit as devoted to human equality as our own familiar, and still metaphysical, liberal culture—if not more so.

R. RORTY, *supra* note 149, at 87.

205 For Rorty, the absence of a justification for abhorring cruelty is virtually irrelevant to particular judgments that we ought not to act cruelly. He does not deny that *within* the language of cruelty and suffering justification has an important role. Liberal ironism simply asserts that it is pointless to seek a justification of this language.

206 Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 401 n.117 (1982).

207 Rorty needs to say more about how a liberal ironist would function during the normal operations of a discipline like law.

engaging in double-think. These practitioners appreciate the ideal of settled expectations, and consequently, their behavior appears to be "realistic." Once the realist metaphors wither and atrophy, the normal behavior of these practitioners will be described as pragmatic.[208]

Not surprisingly, Rorty's liberal ironism is subject to many external objections.[209] I wish to raise an internal objection,[210] instead, fatal to Rorty's project. The central problem with Rorty's argument is that it can be turned against itself. If pragmatic benefit is the *sine qua non* of intellectual discourse, then it can be argued that the foundationalism-skepticism framework provides greater insight into human knowledge and society[211] than does a direct application of pragmatism.[212] In other words, repeatedly entering into the foundationalism-skepticism controversy has important collateral benefits. Participating in this controversy provides us[213] not with foundationalist or skeptical *answers* but rather with piecemeal insights into the scope and limit of theoretical and practical reasoning.[214] Such a framework enables us to resolve a great many questions about how things work and helps us recognize and avoid cruelty to others. It is ironic that the foundationalism-skepticism frameworks functions this way, but Rorty cannot object to this

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208 In short, realist metaphors will be replaced by pragmatic ones. Pragmatic metaphors will continue to value normal practice, though for very different reasons.

209 External objections are objections that challenge the assumptions upon which the position under investigation rests. Internal objections accept these assumptions, if only tentatively, and argue that the position under investigation has failed on its own terms. The primary external objection to Rorty's liberal ironism is that it begs all the important epistemology, metaphysical, and ethical, and political theoretic questions against foundationalism, new and old. Another type of objection is that antifoundationalists need not abdicate the search for reliable principles of reasoning, because there is a middle ground between foundationalism and Rorty's antifoundationalism. For this objection to hold, the middle ground must be described and defended.

210 *See supra* note 209.

211 The foundationalism-skepticism framework provides such insight despite its failure to settle the issue between foundationalists and skeptics. Perhaps its purpose is not to *settle* the issue at all.

212 *See* Kenneth L. Schmitz, *Neither With Nor Without Foundations*, 42 REV. METAPHYSICS 3, 5 (1988) (arguing that abandoning metaphysics "may mortgage the future").

213 At a minimum, it is surely better to have some people engage in this dialogue than to abandon it completely. Carried on in traditional terms, intellectual inquiry is richer and more productive than would be a direct application of pragmatic theory to human problems. In other words, ignoring pragmatic factors in discussing traditional philosophical questions is pragmatically superior to directly appealing to pragmatism.

214 This controversy helps us understand what is at stake between foundationalism and skepticism. More importantly, only by agonizing over these distant stars can liberalist ironism derive its appeal. Even for those who sympathize with Rorty's project, a world of native-born liberal ironists is scary to contemplate. "You mean you never sought non-contingency?" On the other hand, a world of born-again liberal ironists has a much greater appeal.

framework on that ground.[215] After all, the foundationalist-skepticism framework produced the liberal ironist.[216]

This suggests that the rhetoric of rationality, freedom and truth—visionary exemplars in the successful American experiment—is not intrinsically pointless, but instead has a great instrumental value. If this is true, then Rorty must show why the collateral benefits[217] of using the framework are insufficient for its retention.[218] Rorty appears to believe that because one *can* abandon this framework and because the problems that the framework poses cannot be resolved within its context of the framework, the framework should be abandoned. But if this framework was useful in creating modern democratic societies, shouldn't this remarkable feat give us pause? One should conduct a much more thorough examination of the collateral benefits of retaining the framework[219] before throw-

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215 Rorty as much as concedes this point when he writes:

> [A]lthough the idea of a central and universal human component called "reason," a faculty which is the source of our moral obligations, was very useful in creating modern democratic societies, it can now be dispensed with—and *should* be dispensed with, in order to help bring about [a] liberal utopia . . . I have been urging that the democracies are now in a position to throw away some of the ladders used in their own construction.

R. RORTY, *supra* note 149, at 194. However, it is not at all obvious how or when to decide to abandon historically useful metaphors.

216 Indeed, had the foundationalism—skepticism framework never existed, it is difficult to see how liberal ironism would ever have come about. There would have been no need for it.

217 The chief collateral benefit is the capacity to appreciate the significance of liberal ironism as well as other compatible forms of pragmatism. A second benefit is the capacity to design grand holistic systems for understanding the world. Even if such a quest for system building is quixotic, failed systems often produce great insight into human experience. A third benefit is that retaining the framework permits an eclecticism and diversity that otherwise is lost. Surely, even if Rorty is right about western culture, aren't Rorty *and* Nagel better than two Rortys? Finally, liberal ironism abhors essentialism: the view that a person, object or event is immutable. One can grant the liberal ironist's distaste for essentialism, and yet argue that one should adopt essential strategies in order to determine the deep features of various dimensions of human existence. Essentialists will discover deep characteristics of things that liberal ironists will overlook. (A further collateral benefit, however remote, is keeping the tradition alive just in case Rorty is wrong.)

218 Focusing our attention on such concepts as knowledge, truth, justification and rationality might produce more pragmatic benefits than would abandoning these concepts. This leaves some important issues unresolved. How do we evaluate or determine the pragmatic benefits of either retaining or abandoning a conceptual framework? Is there only one type of benefit? Is the benefit just that we achieve various goals and purposes? What sort of goals and purposes are relevant? Are some goals and purposes themselves subject to pragmatic evaluation? Rorty needs to say more about these issues before we can successfully evaluate his brand of pragmatism.

219 Let me distinguish my view from the position that we should not abandon the framework *at this time*, but perhaps some time in the future. My view contends that we should retain the framework indefinitely, because doing so will enable us to reap its collateral benefits continously.

ing it onto the junk heap of intellectual history.[220]

Rorty's pragmatism counsels us to converse with one another about our most pressing conflicts without the illusion of deducing a solution from some essential feature of humanity.[221] Conversation

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220 Pragmatic considerations always permit the possibility that the framework should be retained. Further, even if pragmatism counsels abandoning a particular concept during one historical period, it might be desirable to resurrect during another period. If so, might it be similarly possible for intellectuals someday to resurrect God on pragmatic grounds. *See* Richard Rorty, *Is Natural Science a Natural Kind*, in CONSTRUCTION AND CONSTRAINT at 67 (stating the possibility of reinventing phlogiston theory).

Rorty's contention is purposely softened on the ground that pragmatic evaluations might show the utility of certain metaphysical concepts. Consider his favorable descriptio of Sellars' views on these matters.

> Sellars would not say[ ] that the attempt to think in terms of abstractions like "child of God," or "humanity," or "rational being" has done no good. It has done an enormous amount of good, as have notions like "truth for its own sake" and "art for art's sake." Such notions have kept the way open for political and cultural change by providing a fuzzy but inspiring *focus imaginarius* (e.g. *absolute* truth, *pure* art, humanity *as such*).

R. RORTY, *supra* note 149, at 195.

Rorty distinguishes thinking about these abstractions from subjecting them to conceptual analysis. Only the latter, in Rorty's view, is futile. This distinction is less than pellucid. Is Rorty simply castigating only one form of analytic philosophy? If not, then how do we draw this distinction? What is to think about these abstractions without attempting to analyze or understand what they mean?

Here Rorty falls back to his original position by insisting that in analyzing these notions, for example, "obligation as such," we must recognize that we are not *discovering anything*; we are rather *creating* "a more expansive sense of solidarity than we presently have." *Id.* The thesis that there is a common human nature, according to Rorty, is "open to the pointlessly skeptical question 'Is this *real*?' " And therefore this position risks the conclusion that we need not avoid being cruel. *Id.* at 196.

Interestingly, Rorty exhorts us to "notice our similarites" with individuals external to our group. But isn't this *discovering* something about the nature of *us* and *them*. If obligations derive from similarities between and among individuals or groups, *discovering* these similarities is necessary for determining one's obligations. Doesn't Rorty's position here resemble the metaphysical perspective he so wants to abandon?

221 Rorty denigrates "the assumption of a central self, the assumption that 'reason' is the name for a component present in other human beings, one whose recognition is the explanation of human solidarity." R. RORTY, *supra* note 149, at 194 (footnote omitted). According to Rorty's liberal ironism, there is no "essential component of humanity." Consider:

> Taking this "essential component of humanity" view at face value has tended to make moral philosophers look like sophistical casuists. This is because we figure out what practices to adopt first, and then expect our philosophers to adjust the definition of "human" or "rational" to suit. For example, *we know that we should not kill a fellow human, except in our official capacity as soldier, hangman, abortionist, or the like.* [Emphasis added throughout entire preceding sentence.] So are those whom we *do* kill in those capacities—the armies of the invading tyrant, the serial murderer, the fetus—not human? Well, in a sense, yes and, in a sense, no—but defining the relevant senses is an after-the-fact, largely scholastic exercise. We deliberate about the justice of the war, or the rightness of capital punishment or of abortion, first, and worry later about the "status" of the invader or the murderer or the fetus. When we try to do the opposite, we find that our philosophers offer no sufficient conditions for humanity or rationality less controversial than the original practical questions. It is

replaces the traditional metaphysical and epistemological disciplines Rorty abandons. Conversation is the process of weaving and reweaving one's web of beliefs and values in light of one's experiences and exchanges with other people. Truth is just those assertions in this conversation which we choose to commend at any given time,[222] and is not something for which we can have, or need, a theory.

Rorty's pragmatism has been called "the new fuzziness,"[223] "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."[224] According to Rorty, "[w]e fuzzies like to substitute the idea of 'unforced agreement' for that of 'objectivity,' "[225] because "the presence of unforced agreement . . . gives us everything in the way of 'objective truth' which one could possibly want: namely, inter-subjective agreement."[226] In Rorty's world, pragmatic benefits generate unforced agreement. Therefore, in most cases there will be something to say on both sides.[227] Balancing appears to be the only appropriate methodology here—if we dare call it a *methodology* at all.[228] There are no blacks, no whites—only fuzzy shades of gray.[229] As edifying philosophy, liberal ironism deserves much greater attention than is possible here. My current concern, however, is to grant liberal ironism's general thrust, yet still to ask whether anything more can be said concerning its implications for legal theory.

In other words, can we describe a pragmatic methodology ac-

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> the *details* of those original questions (just what the invaders have done or will do, just who gets excused and why, just who decides to abort and when) that help us decide what to do. The large general principles wait patiently for the outcome, and then the crucial terms which they contain are redefined to accord with that outcome.

R. RORTY, *supra* note 149, at 194 n.6 (emphasis in original). For Rorty, principles and theories appear to be nothing more than the rationalizations of results that we derive intuitively, commonsensically and pragmatically.

222 Putnam, whose pragmatic realism resembles Rorty's only in broad strokes, differs from Rorty regarding truth. For Rorty, a proposition is true if we are presently inclined to assert it. In Putnam's view, there is "a limit-concept of the ideal truth" rendering his pragmatism closer to Peirce's than Rorty's is. HILARY PUTNAM, REASON, TRUTH AND HISTORY 216 (1981).

223 R. RORTY, *supra* note 149, at 41.

224 *Id.*

225 *Id.* at 42.

226 *Id.*

227 Rorty, *Pragmatism Without Method*, *supra* note 26, at 263 (describing the familiar ways of intellectual debate shorn of knock-down arguments).

228 If "methodology" means "a general view about the nature of rational inquiry and a universal method for fixing belief," then for a Rortyan it must be an abhorred term. *Id.* Consequently, our quest will be for a more modest methodology.

229 Understood in this manner, Rorty's view is congenial to those legal theorists who endorse balancing.

ceptable to fuzzies? In Part Four, this Article describes a methodology that both fuzzies and skeptics can embrace.

## IV
## WIDE REFLECTIVE EQUILIBRIUM AND LEGAL AND MORAL THEORIES

In this final Part, I describe a methodology that promises to help us make sense of our practical lives. However, this methodology is not designed to refute skepticism.[230] Instead, it assumes that we can neither refute skepticism nor live a fully skeptical life. We must, therefore, seek a methodology that promises to illuminate law and ethics, not to ground them.[231] We must be prepared for the modified skeptical conclusion that the best methodology leaves us with unanswered controversial questions. This methodology is called "wide reflective equilibrium."[232] Wide reflective equilibrium is both a pragmatic and naturalistic methodology. Wide reflective equilibrium is "pragmatic" because it is anti-formalistic,[233] and it is "naturalistic" because it takes seriously the idea of human flourishing.[234] Wide reflective equilibrium maintains that it is possible to construct principles that explain and justify our legal and ethical conceptual scheme from within. The caveat "from within" implies that any explanation and justification is provisional and should be

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230 Wide reflective equilibrium is valuable even if skepticism is warranted, because it enables a person to order his or her individual set of values, even if agreement across persons is impossible.

231 Of course, it can be argued that nothing can make sense of our practical lives. In this view, rather than trying to conceptualize and theorize about our practical lives, we should instead simply react existentially or intuitively to our environment without the aid of a preconceived plan. This approach, however, must be evaluated, pragmatically and compared with wide reflective equilibrium. My hunch is that such a comparison will favor the latter.

232 Rawls was the first to use the term "reflective equilibrium," JOHN RAWLS, A THEORY OF JUSTICE (1971), though others have expanded on his notion. *E.g.* Kai Nielsen, *In Defense of Wide Reflective Equilibrium*, in ETHICS AND JUSTIFICATION 22 (Douglas Odegard ed. 1988). Many philosophers have adopted a similar approach in ethics as well as other disciplines. *E.g.* ALVIN GOLDMAN, EPISTEMOLOGY AND COGNITION (1986) (arguing for a similar methodology in epistemology).

233 An anti-formalistic method eschews analytic devices which automatically disqualify some positions from consideration. "Automaticity" is the single most pernicious defect in foundationalist reasoning. But it has its virtues too. One might want to argue that we can automatically exclude from consideration such views as slavery, Nazism, racism, and so forth. Further, one could argue that any view that considers these barbarisms on equal conceptual or moral footing with liberal capitalism or democratic socialism is defective. On the other hand, let's take the Nazi seriously as a legitimate participant in dialogue and simply reject his views resoundingly within the context of that dialogue.

234 Wide reflective equilibrium is naturalistic in yet another sense; it can fashion a conception of rights that is independent of traditional natural law conceptions, while at the same time not educible to any system of positive law.

revised when confronted by additional evidence. Wide reflective equilibrium, in conjunction with a certain conception of moral personality, shows why modified skepticism cannot be eliminated. Before describing wide reflective equilibrium in greater detail, let us make some initial observations about theory construction in law and ethics.

## A. Theory Construction In Law and Ethics

### 1. *The Subject Matter of Legal and Moral Theories*

The subject matter of legal and moral theories is the pre-critical and pre-theoretical beliefs and attitudes we acquire concerning right and wrong, good and bad, justice and injustice, fairness and unfairness.[235] These beliefs are held, for the most part, on an intuitive basis; they result from education, experience and socialization and are not arrived at through critical or theoretical inquiry.[236] Such beliefs are called "intuitions."[237] Legal and moral intuitions are part of our conceptual scheme prior to critical evaluation. Usually these intuitions express concerns we have in common with others. For example, the intuition that stealing is wrong expresses our desire not to let others interfere with our ownership or use of property. The intuition that murder is wrong in part expresses our desire for bodily integrity and survival.

### 2. *Considered Intuitions*

There is no guarantee that one's macro set of intuitions is consistent or coherent, or that it represents the best interpretation of what an individual believes. If not, the individual's intuitions are not ready for theoretical systematization. Some of these intuitions may be based on prejudice, faulty reasoning or ignorance; a person might embrace some of these intuitions when he is angry, tired, or crazy. Consequently, any person seeking a theory for his intuitions must prune the macro set by adopting a calm, dispassionate, inquiring attitude, enabling him to decide which intuitions he wants to

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235 Here again are some collateral benefits of retaining the foundationalism-skepticism framework. Focusing on questions of right and wrong helps us develop a richly layered conceptual scheme for answering questions about cruelty and suffering and for the piecemeal insights fuzzies generally seek. Without retaining this framework, it is difficult to see how such a richly layered scheme would develop. Rorty's response is to leave this job to the poets. But why restrict ourselves to one practitioner? Many roads lead to a richly layered conceptual scheme, and the traditional road is one of them.

236 Of course, what is intuitive to one individual may have been theoretical for the generation before him.

237 Nothing significant hangs on whether we characterize these intuitions as beliefs, attitudes or judgments, as long as we recognize that they are pre-theoretical, pre-reflective and pre-critical.

*endorse* or stand behind. These *considered* intuitions are the subject matter of a legal and moral theory.[238]

3. *The Aim of Legal and Moral Theories*

A legal or moral theory is designed to explain and systematize our considered intuitions about values.[239] There are several reasons for constructing a theory in the first place. First, the theory includes a statement of substantive values. Second, a theory includes second-order "bridge" principles which tie abstract values to concrete situations. Third, a theory includes principles for ranking our substantive values. Fourth, a theory helps resolve novel legal or moral problems.[240] Consequently, having a defensible legal or moral view involves constructing a theory[241] that matches our considered intuitions.

4. *The Relationship Between Our Considered Intuitions and Legal and Moral Theories*

The method advocated here proceeds in the following manner. We arrive at some stage in our life when we attempt to collect our considered intuitions to determine whether they implicitly express

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238 Since, like the rest of us, skeptics and fuzzies must act, they will have favored intuitions. Specifically, they will favor those that help them achieve their goals and purposes. One can raise all sorts of skeptical worries here. For example, why should the favored intuitions be those endorsed in a calm frame of mind? Why not choose only those intuitions that you have when in the throes of anger? The only appropriate response here is the fuzzy response that as a matter of historical fact, both collectively and individually, calm reflection works better than anger. Adopting such an attitude satisfies more goals and purposes that people, even skeptics, actually have.

239 *See* WILLIAM LYCAN, JUDGEMENT AND JUSTIFICATION 211 (1988).

240 One important qualification should be mentioned. Whether there is one and only one theory that systematizes our intuitions is tantamount to the question of whether there is one and only one answer to legal or moral questions. It is the hope of many theorists that there is such a theory, at least a theory of those moral and legal intuitions that are a product of Western or American culture. This hope overlooks the fact that our considered intuitions and the theories that explain them reflect different, equally coherent conceptions of moral personality. If that is so, theory construction might help us rule out many possible theories, but a finite number will remain. At this point theory construction and rational argument have reached their limit, and some alternative, perhaps aesthetic commitment, is the only way to choose between theories.

241 One important qualification is warranted about my use of "theory" and reflected terms. In my view, a theory is any set of beliefs that explain how something works. You have theories about ethics, law, baseball, the loyalty of your friends, and how to get to work. You have a theory even if you believe that we should abandon theories. Consequently, though I use the terms "theory," "principle," and "methodology," I do not give these terms any particular epistemic import. Thus my remarks are compatible with recent anti-theoretical positions in ethics. *See, e.g.*, Annette Baier, *Doing Without Moral Theory*, in ANTI-THEORY IN ETHICS AND MORAL CONSERVATIVISM 29 (S. Clarke & E. Simpson eds. 1989) [hereinafter ANTI-THEORY]; *see also* Cheryl Noble, *Normative Ethical Theories*, in ANTI-THEORY, *supra*, at 49. If you do not like the word theory, replace it with something less objectionable.

any general principles, standards or precepts. If so, these general principles represent the rationale or explanation of our intuitions. In considering a principle, we test it against our considered intuitions as well as certain formal or metatheoretical factors.[242] A theory should conform to our considered intuitions, but it should also be elegant.[243] A theory is elegant when it is simple, general, fecund and reenforced or supported by theories in other domains. For example, a legal or moral theory should be consistent with and illuminate psychological theories of learning, especially that aspect of psychological theory that deals with developing or learning a moral sense. Having a defensible moral theory thus requires constructing a theory that is elegant and sufficiently matches our considered intuitions.[244]

5. *Wide Reflective Equilibrium*

In constructing a theory, we must continually compare its strength—how well it explains, ranks and systematizes—with its weaknesses—how many considered intuitions it repudiates.[245] In constructing a theory, we must decide whether we will choose theory or intuition when the two collide. There are three possible approaches to this problem: intuitionism, formalism, and wide reflective equilibrium.

Intuitionism defies theory by insisting that theories are superfluous, morally and conceptually, if not practically.[246] According to intuitionism, whenever there is a clash between theory and intuitions, we should abandon the theory. Formalism, on the other hand, insists that elegant theories entitle us to abandon many, if not all, our considered intuitions.[247] Both approaches are unpersuasive, since intuitionism compels us to take our intuitions too seriously; while formalism does not permit us to take them seriously enough.[248] Wide reflective equilibrium avoids the defects of both while retaining their virtues.[249] According to wide reflective equilib-

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242 *See* W.V.O. QUINE & J. ULLIAN, *supra* note 155; Thomas S. Kuhn, *Objectivity, Value Judgment and Theory Choice*, in THE ESSENTIAL TENSION 320 (1972).

243 *See* W.V. Quine, *Posits and Reality*, in THE WAYS OF PARADOX 24c (1976).

244 A moral theory must also satisfy various meta-ethical constraints, such as being universalizable and not including self-referential terms or token-reflexives.

245 This implies that wide reflective equilibrium is essentially a conservative methodology. But since wide reflective equilibrium does not consider any intuition to be sacrosanct, it is really antithetical to conservativism. Consequently, wide reflective equilibrium can be a progressive methodology.

246 *See supra* note 6.

247 *See* Peter Singer, *Sidgwick and Reflective Equilibrium*, 58 MONIST 490, 516 (1974) (denigrating the role of intuitions in ethical theory).

248 For a more comprehensive discussion of the weaknesses in ethical intuitionism and ethical formalism, see Robert Justin Lipkin, *supra* note 92, at 801 nn. 84 & 95.

249 *See* Fish, *supra* note 92 (critizing both alternatives).

rium, a theory must be elegant and match our more central, considered intuitions. In constructing a theory, it generally is improper to choose, as a matter of methodological principle, the theory over the intuition or vice versa. Sometimes we abandon the theory, other times we abandon the intuition. Our goal is to hold our intuitions and the theory in a "wide reflective equilibrium."[250]

According to wide reflective equilibrium, few if any, of our intuitions are permanently immune from revision;[251] no intuition is so central to our conceptual scheme that it must be retained at all costs.[252] Even well entrenched intuitions can be abandoned, though not all of them at once.[253] Theoretical principles in legal and moral theories must be tested, in part by determining how well they preserve the more central intuitions. Without at least temporarily anchoring a theory in at least some of our more central intuitions, the theory loses its connection with its subject matter, our reflective legal and moral intuitions, and hence fails to make sense of our practical lives.

Wide reflective equilibrium, as I conceive it, involves three distinctive activities. First, it seeks a reflective equilibrium between our considered intuitions and a theory. If wide reflective equilibrium stopped there, it would necessarily be overly intuitionist and conservative.[254] Instead, it also seeks equilibrium between our considered intuitions, the best candidate for a legal and moral theory and other empirical and normative theories.[255] In constructing a legal and moral theory, we want to know whether it coheres with theories concerning the role of law and morality in society, theories about social stratification, class, "and gender theories about ideology,

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250 *See supra* note 232.

251 In this respect, wide reflective equilibrium has an important emancipatory dimension. Deployed in the appropriate manner, wide reflective equilibrium incorporates a critical theory which is designed to emancipate and enlighten. *See* RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY 35 (1981).

252 Both intuitionism and formalism ascribe to an *a priori* or procedural principle automatically deciding the issue in cases where theory and intuition conflict. Wide reflective equilibrium uses no such procedure. J. RAWLS, *supra* note 232, at 48-51. Indeed, wide reflective equilibrium is essentially a pragmatic methodology requiring us to modify either our intuitions or our theory until we achieve equilibrium.

253 A note of caution. It is not obvious how we could ever abandon such intuitions as "Murder is wrong" or "Gratuitous pain is bad." If we cannot, we must adjust our conception of wide reflective equilibrium to account for this.

254 Narrow reflective equilibrium, in contrast, restricts itself to merely eliciting the principles latent in our considered intuitions; it becomes overly intuitionist and overly conservative. If the correct coherence theory restricts itself to considered intuitions, ignoring other areas of human inquiry, it becomes an intuitionist rationalization for the status quo. Wide reflective equilibrium rectifies these defects in narrow reflective equilibrium.

255 Norman Daniels, *Reflective Equilibrium and Archimedean Points*, 10 CAN. J. PHIL. 83, 86 (1980).

human nature and the like."[256] In short, we want to determine how well our considered intuitions fit moral theories and other theories relevant to morality and society. And third, wide reflective equilibrium identifies those troublesome areas of social life that have perennially defied consensus. In other words, it includes a critical theory of society enabling us to revise our considered intuitions toward utopian ideals.

The question arises whether wide reflective equilibrium can achieve agreement across persons. There are four possibilities. Wide reflective equilibrium might generate one and only one theory; second, it might generate two or more incompatible theories. It might generate an indefinite number of theories, or no theories at all.[257] This last possibility commits wide reflective equilibrium to radical skepticism, which we need not consider here.[258] The third possibility flies in the face of what we know about legal and moral life. The principle "De gustabus non est disputandum"[259] does not reflect moral and social reality. The first possibility is a foundationalist result, and thereby precluded if foundationalism is dead. We are then left with the second possibility. Wide reflective equilibrium enables us to rule out most possibilities, but it cannot determine a uniquely right answer. The question arises whether there is an interesting structure to the remaining candidates. Are the solutions generated by wide reflective equilibrium any old solutions or do they reflect something important about moral reality? In my view, wide reflective equilibrium generates three competing political perspectives revealing three incompatible conceptions of moral personality.

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256 Nielsen, *supra* note 232, at 22.

257 Of course, wide reflective equilibrium might yield one and only one solution to certain kinds of questions. For example, despite Mansonism and Bundyism, no one seriously believes that mass killings are justifiable or excusable. But again this agreement tells us nothing about the pressing controversial cases of the day. Hence, wide reflective equilibrium might yield one and only one set of answers for many legal and moral questions, yet be unable to reduce the field when it comes to abortion, affirmative action and so forth. The reason for this lies in the similarities and differences in moral personality types. Whereas no reasonable person seriously argues for Mansonism, people can reasonably disagree over abortion and affirmative action. Consequently, wide reflective equilibrium might reflect one type of moral personality for a whole range of uncontroversial cases, while, at the same time, reflecting different types of moral personality when it comes to the perennially controversial issues.

258 In supporting modified skepticism, I am conceding that radical skepticism is implausible.

259 "There is no disputing matters of taste."

## B. Wide Reflective Equilibrium and The Concept of Moral Personality

### 1. *Human Flourishing and Moral Pluralism*

This Article maintains that there are different, sometimes competitive, types of human flourishing or ideals. Recognizing this moral pluralism, however, does not necessarily mean countenancing radical subjectivism or radical relativism. The moral pluralism described here is committed to a rejection of an "anything goes" attitude concerning that nature of moral personality. Indeed, this Article maintains that there are three different types of moral personality and that each represents a distinctive reaction to personal and social exigencies. Each type of moral personality represents different ideals[260] or ways of flourishing as a person.[261]

On the view presented here there are three general types of moral personality: conservative, liberal and radical. Each type of moral personality is committed to a particular conception of moral and political change.[262] The conservative seeks a traditional society in which change occurs incrementally, if at all, and only in response to a particular concrete problem involving a concrete individual.[263] A liberal seeks a society in which change, sometimes sweeping change, is viewed as a legitimate means to remedy defects in a system that is basically sound.[264] The radical seeks more abrupt or revolutionary change especially when diagnosing a legal system to be

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260 The three ideals I describe are irreducibly basic. And while it is understandable why many people seek a common or neutral ground upon which to compare and rank these ideals, it is not obvious that any neutral ground exists. *See* Samuel Scheffler, *Moral Skepticism and Ideals of the Person*, 62 MONIST 288, 300 (1979). A likely consequence of this irreducibility is that "a residual core of the skeptical position . . . cannot be eliminated." *Id.*

261 Putnam's remarks are instructive here:

> We agree with Aristotle that different ideas of human flourishing are appropriate for individuals with different constitutions, but we go further and believe that even in the ideal world there would be different constitutions, that diversity is part of the ideal. And we see some degree of tragic tension between ideals, that the fulfillment of some ideals always excludes the fulfillment of some others. But to emphasize the point again, belief in a pluralistic ideal is not the same thing as belief that every ideal of human flourishing is as good as every other. We reject ideals of human flourishing as wrong, as infantile, as sick, as one-sided.

H. PUTNAM, *supra* note 222, at 148.

262 There exists a common ground, of course, between these perspectives. John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987). If not, law and ethics would be susceptible to a broader skeptical challenge.

263 *See, e.g.*, EDMUND BURKE, REFLECTIONS ON THE FRENCH REVOLUTION (1798).

264 *See, e.g.*, R. DWORKIN, *supra* note 1; J. RAWLS, *supra* note 232. *But see* M. PERRY, *supra* note 70 (criticizing both Rawls and Dworkin); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (criticizing Rawls); Steven Shiffrin, *Liberalism, Radicalism and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983) (criticizing Dworkin).

morally and politically bankrupt.[265]

These three types of moral personality are endemic to the human spirit. All three conceptions can be found in very different political systems.[266] After employing wide reflective equilibrium, our legal and moral theory will reflect a particular conception of moral personality. At this point rational argument ends. This is why skepticism terrifies mainstream theorists. Although radical skepticism is unpersuasive, modified skepticism explains and justifies the actual moral and political commitments different Americans have; in doing so it reveals the limits of practical reasoning. Modified skepticism insists that after theory construction, three irreducibly correct answers to controversial legal and moral conflicts remain. Consequently, at this level of argument, the road of rationality ends, and further movement cannot be the product of reasoning. Instead, we must make something like an *aesthetic* commitment to particular political perspectives, a commitment based on the individual's sense of order and harmony and what he finds conducive to his own flourishing. It will be useful to describe these different perspectives in greater detail.

### 2. *The Political Conception of Persons*

#### a. *Conservativism*

The conservative holds that traditional values, and procedures for determining values, are subject to only minor reflective revision.[267] Society's values are integrally interwoven, so that tampering with even a minor aspect of this fabric necessarily involves unravelling others.[268] The actual values, and the procedures for determining them, should be retained because they have withstood the test of time.[269] This social fabric structures both political values and

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265 *See, e.g.*, MARK TUSHNET, RED, WHITE AND BLUE (1988); ROBERTO UNGER, KNOWLEDGE AND POLITICS (1980).

266 Each conception of moral personality has a formal and substantive dimension. The formal dimension connects, for example, different types of conservatives in different societies. Formally, conservativism countenances an adherence to established tradition. *See* Michael Oakeshett, *On Being a Conservative*, in RATIONALISM IN POLITICS AND OTHER ESSAYS (1962) (describing what I call the "formal dimension" of conservativism). Substantively, this means different, sometimes incompatible, approaches to political life. An American conservative will endorse capitalism, while a Soviet conservative endorses Marxism. Due to their conception of social change both are conservatives, though substantively their views differ sharply.

267 Conservativism addresses the issue of *reflective* or *deliberative* change. This does not mean that conservativism cannot acknowledge changes caused in other ways.

268 PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1953).

269 One detects in some conservatives a limited form of skepticism about values. Specifically, conservatives believe that there is no basis for values other than historical durability. This form of skepticism, however, is not a necessary feature of conservativism.

personal values. According to the conservative view, there is only one set of political and personal values that applies to everyone. Conservativism sees no interesting distinction between the public and the private.[270] A corollary of this view is that it is always appropriate to judge and criticize the actions of others. Society imposes standards for conduct that everyone should follow. If you choose not to follow these standards, you are rightly subject to censure.

b. *Liberalism*

Liberalism contends a proper understanding of equality requires that government be neutral concerning the good life.[271] It is not the role of government to enforce one conception of human flourishing over others. Of course, this does not preclude assisting those individuals who are disadvantaged or victims of past injustice. Indeed, in order to secure a level playing field, government must intervene into market and other social relations to insure that outcasts be given a fair chance.

Liberalism sees a sharp division between the political and personal dimensions of one's life. Social morality, in the liberal's view, is not as densely woven as conservativism maintains. Injustices in a particular institution may be rectified by making the appropriate changes in that institution alone. According to the liberal perspective, there is a fundamental cleavage between political and personal life. Morality exists to order and regulate society as a whole. Only those actions which significantly affect or harm others may be judged moral or immoral. Self-regarding actions—actions which do not significantly affect others—are not subject to moral evaluation and criticism.[272] One's ultimate self-regarding goals are inter-subjectively incorrigible. An alternative way of putting this is that self-regarding decisions have a first-person authority. Deploying a third-person description of John's ultimate self-regarding goals as morally wrong or irrational is usually false or, even worse, nonsensical.

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270 In my view, conservativism does not embrace the distinction between the public and the private, except possibly in economic matters. Consequently, you find few conservatives endorsing the Supreme Court's privacy decisions. Similarly, contemporary conservatism denigrates the notion that private consensual homosexual relations or private viewing of obscene material deserves constitutional protection.

271 RONALD DWORKIN, LIBERALISM, A MATTER OF PRINCIPLE 181, 190 (1985).

272 Ronald Dworkin casts this distinction as a distinction between ethics and morality. Ronald Dworkin, *Liberal Community*, 77 CALIF. L. REV. 479 n.1 (1989) ("Ethics . . . includes convictions about which kinds of lives are good or bad to lead, and morality includes principles about how a person should treat other people.").

c. *Radicalism*

Like conservativism, the radical perspective espouses the view that one's moral beliefs and values bridge the distinction between the public and the personal, but not in a way that denies the personal. For the radical, personal autonomy is an important area of one's moral life, susceptible to moral evaluation and criticism. Unlike liberals, radicals believe that the dichotomy between self-regarding and other-regarding actions is illusory.[273] According to this perspective, we can and should criticize the actions and values of others even if these actions and values ultimately are of direct concern only to the other person. There is no infallible authority associated with first-person value judgments. Such judgments are not in any important respect incorrigible. The radical concedes though that in most cases the agent is in the best circumstances to make correct judgments about his own values and concerns, since he generally knows more about his life than others. The radical perspective insists upon the importance of establishing reciprocal and nurturing relations with others.[274] Unlike conservativism and liberalism, the radical does not see others as morally independent individuals with whom he is in competition for societal goods.

The radical denies that there is a significant presumption of right associated with societal values. Values are determined by a range of multifarious factors which change as society changes. If social values are to be viable and rational, there must be a permanent procedure for transforming them.[275] Individuals should expect societal structures to be continuously transformed in order to meet the needs of individuals concerned with their own flourishing. Importantly, society should be structured so this transformative activity becomes accessible to everyone.[276]

## C. Modified Skepticism Revisited

In the view presented here, modified skepticism is inevitable in

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273 Singer, *supra* note 170.

274 Sometimes this is stated as a distinction between a male and female perspective, or the distinction between a ladder and a web approach to social interactions. *See* CAROL GILLIGAN, A DIFFERENT VOICE (1982); NEL NODDINGS, CARING, A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1984); *see also* Kenneth Karst, *Woman's Constitution*, 1984 DUKE L. J. 447 (1984).

275 *See* ROBERTO UNGER, POLITICS (1987); Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); *see also* R. UNGER, *supra* note 265.

276 Much more can be said about this triadic structure. First, are the descriptions of each political perspective complete? Second, are the possibilities restricted to only three? Are there any hybrid possibilities combining some parts of each conception? Third, are there other ways to describe political perspectives? These questions as well as others cannot be addressed here. But I believe the triadic structure survives inquiries of this sort.

any society having different moral communities.[277] In such a society, there exists systematic disagreement on important moral and political issues. This systematic disagreement can be characterized in terms of the triadic structure described above. There will be a conservative, liberal and radical answer to them.[278]

Consider the issue of affirmative action as it exists between the conservative, liberal and radical. Conservatives are likely to hold the view that affirmative action is racial discrimination and therefore unacceptable. They argue that affirmative action stigmatizes and therefore is unjust to the beneficiaries, and also discriminates against the victim on moral and constitutional grounds, for example, race or gender. Further, in the conservative's view one does not right one historical wrong by committing another. Consequently, an affirmative action program that makes race or gender an automatic consideration is unacceptable. Conservatives may concede the social and historical necessity of the civil rights revolution, but in their view, affirmative action is counter-revolutionary.

Liberals usually take the view that affirmative action is permissible, and possibly required, because it is necessary to rectify a past wrong. Liberals believe that, as members of a community, individuals must be ready to assume burdens to rectify wrongs perpetrated by the community, despite the fact that the present victim is not the perpetrator and may not have benefited from the wrong.

The radical position on affirmative action usually includes both negative and positive theses.[279] The negative thesis contends that racial injustice cannot be eradicated within the present socio-economic and political structure. Consequently, we must transform society's basic structure. The positive thesis contends that we must redistribute economic benefits and burdens so there will be no need for affirmative action programs.

Modified skepticism denies that an appeal to rationality can re-

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277 Modified skepticism contends that at least regarding concrete values, "[o]ur intellectual and cultural history does not give us a shred of evidence that we can expect a universal consensus of moral values." James Gouinlock, *Philosophy and Moral Values: A Pragmatic Analysis*, in PRAGMATISM 99, 109 (Robert Mulvaney & Phillip Zeltner eds. 1981).

278 Of course, this framework simplifies the current debates in American law and society. It is useful because it describes three distinct types of moral personality. I contend that these three categories describe and explain actual people and movements, though we might quibble over precisely how to characterize each personality type. There are some similarities or common values among these perspectives. All three types oppose murder, torture, larceny, fraud and so forth. However, the similarities do not explain the great controversies of the day, while the differences do.

279 One curious feature of the American political landscape is that, unlike many western nations, we do not possess a significant popular radical movement. Consequently, our political debates rarely mention radical solutions. Anyone valuing an informed populace should decry the radical's absence.

solve this issue. Each perspective is a possible way to organize society. Of course, one can argue that one or both sides are arguing in bad faith. For example, one might say that if the conservative were to vividly imagine himself as the object of historical discrimination he would argue for affirmative action. Indeed, this might be true of some conservatives. But even if this is so, it does not show that this is a conceptual implication of the conservative view. Assuming good faith, the conservative position is one that values non-discrimination in more absolute or formal terms than the liberal does. Moreover, the conservative has a view of society in which it is less plausible to view us as a community in a liberal or radical's sense. Instead, we are a collection of independent individuals. Corrective justice must be personal; it must be tied to individual wrongdoers and individual victims.

I do not endorse this conservative position. But I do not know how to defeat it except by trotting out the same old arguments that do not seem to convince the sincere conservative.[280] If you grant that he is arguing in good faith, and is not committing any logical or empirical blunders, then you have to admit that liberal arguments do not persuade him because he sees life and society differently from the liberal.[281] Of course, this is not true for all issues separating the conservative and liberal.[282] But in most important controversial cases we reach a point where argument is no longer possible. One simply makes an aesthetic commitment to a perspective and tries to live according to it.[283] At this point it is fair to say that we cannot know which of the three moral and political perspectives is true.[284] We must therefore adopt a modified skeptical attitude to-

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280 *See* Singer, *supra* note 170, at 33.

281 I no longer believe that we can begin to explain political differences by simply asserting that one side is right and the other side is wrong, and that the right side at least in principle will prevail over time. This amounts to nothing more than a dogmatic commitment to one's own political perspective, or what's worse, a dogmatic commitment to the efficacy of reason, a commitment that flies in the face of intellectual history.

282 For example, I suspect there is something paradoxical about the view of the "religious right" concerning the government's role in a democratic society. As conservatives, the religious right insists upon self-interest as the appropriate public (economic) reason for action. Yet, as Christians, the religious right endorses loving thy neighbor. How are these two views reconciled? Although there have been attempts to reconcile these positions, I remain unconvinced.

283 It might be that all three perspectives are "right." In other words, each perspective may represent a perfectly legitimate type of human flourishing. Personal disposition, socialization, or aesthetic commitment may explain why some people choose one perspective over the others. Despite this "pluralism," we are still bereft of a procedure for settling terribly important and controversial moral and legal problems.

It should be noted that an aesthetic commitment to a political perspective means that while there may be reasons for such a choice, these reasons do not apply across persons.

284 Should someday everyone share the same conception of moral personality, it will

ward the question of which perspective is appropriate.[285] If these perspectives ground incompatible answers to controversial legal and moral questions, we must then adopt a modified skeptical attitude towards the solution of these controversies.

## CONCLUSION

In this Article, I described a form of skepticism that explains legal and moral controversies. On the level of individual argument, the problems of ultimate values, scope and ranking preclude agreement on a uniquely *right* legal decision in controversial contemporary moral, political and legal controversies. On the political level, modified skepticism and wide reflective equilibrium show that there are three irreducible types of political theory that also militate against the uniquely right answer thesis. Modified skepticism counsels us to recognize the limits of rational justification in legal and moral argument,[286] and to accept the fact that incompatible solutions to many controversial issues is ineradicable.

However, modified skepticism does not embrace inaction, nor does it preclude the possibility of a future resolution of the problem of competing conceptions of moral personality. Modified skepticism eschews dogmatism, fanaticism and bullying, three traits inimical to open dialogue communication and the possibility of rapprochement. Modified skepticism accurately captures a perennial feature of human beings, namely, that we are normative creatures, seeking and embracing values with which to order our lives. It also captures the historical fact that reason has been unable to vindicate one set of values to the exclusion of all others.

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not be the result of reasoning. Instead, the form of reasoning that emerges in these circumstances will itself be the result of a shared conception of moral personality; hence, this form of reasoning will be unable to explain this conception.

285 I do not claim that we must be skeptical from the individual-perspective. Each person can adopt one of the three perspectives, because he need not concern himself with the skeptical problems of value, scope and ranking. Individually, a person can determine which values to adopt. Similarly, he can determine the scope and ranking of these values. *But see* Thomas Nagel, *The Fragmentation of Value*, in T. NAGEL, *supra* note 147, at 128, 134-35. However, from the collective-perspective, modified skepticism is clearly warranted.

286 These general perspectives have survived the challenge of skepticism, and though we cannot get uniquely correct answers, we can get three correct answers to legal and moral problems. Modified skepticism rejects the conclusion that "anything goes." Most moral and political positions are unacceptable if they are not coherent examples of one of the three perspectives. *See* H. PUTNAM, *supra* note 222, at 216.