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Mapping The Limits Of Skepticism In Law And Morals

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MAPPING THE LIMITS OF SKEPTICISM IN LAW AND MORALS

By Eric Blumenson**

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Abstract

This article identifies the theoretical and practical limits of postmodern skepticism about objective, transcultural standards in law and morals.

Stanley Fish tells us that moral issues are intelligible only "within the precincts of the...paradigms or communities that give them their local and changeable shape." This is one formulation of antifoundationalism, which rejects the idea of a transcultural moral reality that binds all people. Antifoundationalists see value judgments as contingent cultural products that cannot be objectively true.

But can we do anything with this thesis in practice? Postmodern pragmatists like Richard Rorty and Joan Williams believe that we can; they say we would benefit by understanding our moral principles as no more than cultural preferences. This Article takes issue with that approach and provides a series of pragmatic counter-arguments in favor of objectivist moral and legal discourse. By investigating the relationship between the anti-foundationalist claim and the universal human rights claim, this Article demonstrates that (a) the thesis that our moral commitments are produced through a contingent historical process can never tell us what commitments we should have; (b) to formulate such commitments, we require an objectivist language of evaluation, one which is not confined to diagnosing the play of cultural and psychological forces but which stands apart from them; and (c) in law and morals this objectivist discourse expresses the distinctions we experience as morally sensitive beings, including the difference between the fair and illegitimate uses of power. A truly pragmatic view would recognize that objective moral claims are not a way we stake out a metaphysical position, but the way we inhabit and describe a nuanced normative world.

These are pragmatic arguments which show that anti-foundationalist theory is so divorced from the human experience of agency and choice that we cannot utilize it in practice. In the final section, the Article offers some affirmative reasons to believe that the universal human rights claim states a transcultural moral truth.

INTRODUCTION

> *Suppose that Socrates was wrong, that we have* <u>*not*</u> *once seen the Truth, and so will not, intuitively, recognize it when we see it again. This means that when the secret police come, when the torturers violate the innocent, there is nothing to be said to them of the form, 'There is something within you which you are betraying. Though you embody the practices of a totalitarian society which will endure forever, there is something beyond those practices which condemns you.'*
>
> Richard Rorty[1]

> *Saying that the Aztecs were wrong [to practice human sacrifice] simply means we do not want to change in the ways required to make their practices understandable.*
>
> Joan Williams[2]

In an early, influential essay, Duncan Kennedy argued that "there is never a 'correct legal solution' that is other than the correct ethical and political solution to that legal problem."[3] This was an attractive claim, at least to those lawyers who rejected the Langdellian faith that legal concepts are tied to nature and logic in a way that can produce uncontroversial right answers to legal questions. It reflected

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[1] RICHARD RORTY, CONSEQUENCES OF PRAGMATISM xlii (1982).

[2] Joan Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WISC. L. REV 131, 137.

[3] Duncan Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, 40, 47 (D. Kairys, ed., 1982). Kennedy's formulation reiterates the claim made almost fifty years earlier by the legal realist Felix S. Cohen in *Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809, 838-49.

the efforts of many critical legal scholars, and of the legal realists before them, to dismantle the formalist dichotomy separating decisions based on legal reasoning (pictured as an autonomous, determinate form of conceptual thinking) from outcome-driven decisions (pictured as decisions based on individual prejudice or sentiment).[4] Where formalists saw the rule of law, these scholars saw a rules fetish -- a sort of institutionalized Milgram experiment directing judges to ignore the consequences of their rulings.[5]

There are various of ways to pursue this antiformalist program.[6] For legal academics, the most direct is to *do* what Kennedy suggested -- expose the real political and ethical stakes underlying legal controversies. An example is the abundant critical scholarship on particular legal doctrines, which is less concerned with the doctrine's theoretical soundness than with how operates in practice, or

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[4] Morton Horwitz describes the nature of such formalism during its golden age at the end of the 19th Century in his book THE TRANSFORMATION OF AMERICAN LAW: 1870-1960 170 (1992). For one statement of the legal realist's argument, see Jerome Frank, *Are Judges Human? Part Two: As Through A Class Darkly,* 80 U. PA. L. REV. 233, 241-42 (1931) (arguing against the claim that strict legal rules constrain judicial bias). For examples of the critical legal approach, see David Kairys, *Legal Reasoning,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note --- at 11 - 17 (demonstrating through Supreme Court free speech decisions that the doctrine of stare decisis plays an ideological rather than constraining role); Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685, 1766 (1976) (arguing that the formalist distinction between broad equitable decisionmaking standards and rigid legal rules masks a conflict between substantive values).

[5] *See* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 73-88 (1974) (presenting selected transcripts of an experiment in which most subjects were willing to inflict excruciating pain on another if ordered to do so by a scientist with apparent authority). For one study drawing a convincing parallel between the Milgram experiment and the de-humanizing, distancing effect of formal legal rules in the death penalty context, see Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REVIEW 305, 391-95.

[6] I do not mean to imply that anti-formalism has been the only focus of the wide-ranging scholarship Kennedy and other critical legal theorists have produced. But if there are any unifying themes in this body of work, one of them is surely the effort to expose the ways that our fixation with the formal equality of individual rights-holders has blinded us to institutional, economic and cultural background conditions that prevent the realization of actual equality.

whose interests it serves, or whose vision it reflects.[7] Such efforts can reveal suffering and injustice that go unnoticed because of their formal legitimacy.

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[7] Critical, pragmatist and other scholars have enlisted a wide variety of methodogies in this effort, including for example: (1) Empirical studies of how laws operate in practice, *e.g.* David Kairys, *Freedom of Speech,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 3 at 140; Karl E. Klare, *Critical Theory and Labor Relations Law,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 3 at 65-88; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1432 (1991) (arguing that selective prosecutions of drug-addicted mothers have a disproportionate impact on poor women of color); David Rudovsky, *The Criminal Justice System and the Role of the Police,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 3 at 242. (2) Doctrinal analyses exposing purportedly universal legal principles as the partial perspective of a race, class or gender, *e.g.,* Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STANFORD L. REV. 1 (1988) (arguing that tort elements reflect employer ideology); Mary Joe Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AMERICAN L. REV. 1065, 1138 (1985) (concluding that an individual's attitudes about gender shape what he or she believes to be acceptable pedagogy); Karl E. Klare, *The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941,* 62 MINNESOTA L. REV. 265 (1978); Joseph W. Singer, *The Reliance Interest in Property*, 40 Stanford L. Rev. 611 (1988) (alternative interpretation of property law to protect workers confronting plant closings); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, Part II (David Kairys, ed., 1982) (an excellent, early compilation of critical scholarship regarding a variety of doctrinal areas. (3) Personal narratives that bring previously excluded voices into law, *e.g.* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991); Kathryn Abrams, *Hearing the Call of Stories,* 79 CAL. L. REV. 971 (1991) (discussing examples of narrative legal scholarship); Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989); Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation,* 90 MICH. L. REV. 1 (1991) (using narratives to argue for law reforms which reflect the reality of battered women's lives rather than cultural stereotypes); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.,* 38 BUFF. L. REV. 1, 5 (1990) (providing a narrative of a woman who had been "subordinated by race, gender and class"). (4) Cultural criticism linking prevailing types of legal consciousness to social alienation or oppression, *e.g.* Peter Gabel, *The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life*, 52 GEO. WASH. L. REV. 263 (1984); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563 (1984); Peter Gabel, *Reification in Legal Reasoning*, 3 RESEARCH IN LAW AND SOCIOLOGY 25, 26 (1980) (asserting that legal reasoning "substitutes an harmonious abstract world for the concrete alienation that characterizes...lived experience"); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (exposing assumptions that underlie and limit feminist legal reforms); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1, 9 (1984) (arguing that abandoning the myth of a rational foundation for legal reasoning liberates us to embrace moral and political commitments).

There are also less fruitful paths. This Article attempts to elucidate the drawbacks of one of them: the production of postmodern legal theory, a cottage industry that has consumed the best efforts of a number of progressive legal scholars. Postmodern theory seems a useful antidote to formalist ideology because it denies the possibility of neutral and objective answers in *any* domain, and thus necessarily in the legal one. But because of its generality, this approach inherently eschews specific ethical and political claims and operates on a much more abstract level. Consequently, it risks producing a scholarship as conceptual, arid, and removed from experience as the formalism which is its target. And so it has.

What do these theorists assert? There are many, sometimes conflicting claims, but as a first approximation we can say they present a contemporary version of what Nietzsche called perspectivism (to adopt his term[8] from among many[9]). On this view, all judgments are contingent cultural products that cannot

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[8] Whether my rendition above is what *Nietzsche* meant by his use of the term "perspectivism" is a subject of recent controversy. *See* Brian Leiter, *Perspectivism in Nietzsche's Genealogy of Morals*, in NIETZSCHE, GENEALOGY, MORALITY: ESSAYS ON NIETZSCHE'S GENEOLOGY OF MORALS 334-357 (R. Schact, ed. 1994) (disputing the conventional view by arguing that Nietzsche's perspectivism implies merely that we each view an objective reality from a different angle and can make progress in comprehending it.)

[9] Self-described relativists, historicists, postmodernists, anti-foundationalists and anti-essentialists would likely subscribe to the view that all truth is local and perspectival, while perhaps emphasizing different bases for or consequences of this idea. *Anti-foundationalism* conveys the idea that there are no self-justifying rationalist or empiricist foundations for our beliefs; they can be justified only by reference to our other beliefs, and hence "truth" describes a quality of coherence, not correspondence to an external referent. A similar perspectivist view (although with a more ontological emphasis) is *anti-essentialism,* which denies that the world is composed of self-announcing, determinate essences that can be described without reference to one's point of view; rather, we create our world by continual acts of interpretation that deconstruct and reconstruct reality in different ways. Gender roles, for example, are not preordained by nature, but are a way that particular human beings have chosen to understand the sexes. The perpectivist strain known as *anti-humanism* has special relevance to the human rights claim I discuss *infra* because it rejects the humanist claim -- that all human beings have a value and dignity -- as universal in theory but exclusionary in practice, and blind to the contingencies of power and culture in constructing the self. See MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (1973). *Postmodernism* offers similar claims, except
(Continued on next page)

be "objectively true." We each necessarily see through particular lenses shaped by our cultural and personal histories, so that our beliefs are always situated and partial, and no one can properly claim to have privileged, unmediated access to the "real" description of the world or to "natural" standards of rationality. The claim that one *has* achieved this impartial view from Nowhere is really an exercise of power.[10] Gary Peller writes:

> According to the new critical approaches, there is no objective reference point, separate from culture and politics, available to distinguish truth from ideology, fact from opinion, or representation from interpretation... These new critical approaches deny the central Enlightenment notion... that there is a difference between rational, objective representation and interested, biased interpretation...

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when clothed as a "condition" of our times. *See, e.g.,* Peter Schank, *Understanding Postmodern Thought,* 65 S. CAL. L. REV. 2505, 2509 (1992) (postmodernism "conceives of knowledge as always mediated by our social, cultural, linguistic, and historical circumstances...[truth] must always be a social construction..."); JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION -- A REPORT ON KNOWLEDGE xxiv (1984) ("I define postmodernism as incredulity towards metanarratives."). Whatever the emphasis, the starting point for each theory is the denial of an external referent -- a single reality against which beliefs or values can be judged.

[10] *See, e.g.,* Martha Minow, *The Supreme Court, 1986 Term -- Forward: Justice Engendered*, 101 HARV. L. REV. 10, 75-76 (1987). Some theorists make this point by re-describing so-called universal truths as "truth effects" that result when a positioned and partial viewpoint has enough social power to mask its partiality. This emphasis moves the perspectivist thesis into an explicitly political dimension explored most famously by Michel Foucault, who saw knowledge not as a product of the "truth", but as a system of "power-knowledge" whose functions include the production and maintenance of social discipline. Because we as subjects are constituted by the institutional and cultural forces of our place and time, our beliefs and choices do not spring from a rational weighing of truth claims or intrinsic value, but are rather the "truth effects" produced by fluid and ever changing systems of power. *See, e.g.,* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 194 (1979), and *id.* at 27-28 ("[I]t is not the activity of the subject of knowledge that produces a corpus of knowledge, useful or resistant to power, but power-knowledge, the processes and struggles that traverse it and of which it is made up, that determines the forms and possible domains of knowledge.")

> [T]he most successful form of social power is one that presents itself not as power, but as reason, truth, and objectivity. [But there is no] place that is outside politics and independent of social struggle...."[11]

This account seems to reiterate Kennedy's suggestion, to a point. It tells us we will find no correct legal solution independent of politics -- no *pre*-interpretive legal texts to be faithful to, no intelligible essences underlying legal concepts like "property" and "contract" for the law to track, no external referent of any kind that could underwrite objective answers to legal questions. We construct our concepts rather than discover them. [12] The perspectivist account suggests that adjudication is neither neutral nor objective, and is better understood as a political contest that ends with an exercise of power in someone's favor.

Perspectivist theory challenges the separation of law and politics in this way, but it *also* leaves the third term in Kennedy's formulation -- "the correct *ethical* solution"[13] -- in a jurisprudential limbo. For although ethics differs from formalist legal reasoning in that it does not aspire to value-neutrality, it *does* presuppose that objectively correct answers exist and that there is an impartial position from which to distinguish legitimate from illegitimate uses of power. If we describe *Bowers v. Hardwick,*[14] the so-called anti-sodomy case, not merely as an inevitably partial decision reflecting the homophobic perspective of particular judges, but as *unjust*,

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[11] Gary Peller, *Reason and the Mob: The Politics of Representation,* in TIKKUN: AN ANTHOLOGY 163, 164, 165, 172 (Michael Lerner, ed. 1987). *See also* Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152 (1985) (criticizing legal realism on the ground that it replaced the formalist model of objectivity with an objectivity of its own and thus denied the social construction of meaning).

[12] Mark Tushnet, *An Essay on Rights*, 62 Texas L. Rev 1363, 1402 (1984). The legal realists had previously debunked the reification of such concepts as "transcendental nonsense". Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

[13] *See supra* text accompanying note 3.

[14] 478 U.S. 186, 190 (1986) (constitution does not confer "a fundamental right upon homosexuals to engage in sodomy").

we do so from the conviction that there are correct ethical answers across persons. But the perspectivist critique deconstructs the ethical claim no less than the Langdellian one, and reduces ethics to a heavily mystified form of politics.

Applied to ethics, perspectivism challenges the idea that ideals like justice and equality *refer* to anything at all, except as particular cultures come to define them. The problem is not just that people have divergent ideals (such as individualism and communitarianism), but that they construct different descriptions of the world (is the fetus a person?): One can only make moral judgments with a picture of the world in mind, and what looks like discrimination in one picture will look natural and just in a different one. A slaveholder's picture might combine the conviction that all human beings have inalienable rights with the belief that slaves are not human beings. To put this another way, the perspectivist can argue that the most rudimentary requirement of justice -- to "treat like cases alike" -- is formal and empty, because there are no natural essenses to cases but only theory-laden, culture-bound interpretations attached to them. "The world [does not split] itself up, on its own initiative, into sentence-shaped chunks called 'facts'"[15]; worlds are made, not found, and in some of them "treating like cases alike" means assigning roles according to caste, or treating abortion as murder, or limiting the vote to the propertied class.

The problem with yoking this postmodern view to the antiformalist cause is that it blinds us to the difference in kind between transcendental legal nonsense like "the nature of a corporation," which can be usefully deconstructed, and meaningful transcendental ethical ideals like equality and universal human rights,

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[15] RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 5 (1989). *See also* Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152, 1176 (1985); Mark Kelman, *Trashing,* 36 STAN. L. REV. 293, 303 (1984) (both asserting that reality is socially constructed rather than consisting of ready-made, natural categories).

which cannot.[16] And as the quotations that preface this article show, committed perspectivists are indeed willing to hold these moral claims equally hostage to perspectivist theory. Richard Rorty, a pragmatist philosopher who has greatly influenced legal theory, believes that his theoretical commitment to antifoundationalism means he cannot claim that a totalitarian society betrays any moral principle that transcends its practices.[17] Joan Williams, a legal pragmatist, suggests that we can "benefit...from *redefining* our moral certainties as cultural rather than as reflective of eternal truth".[18] She views her opposition to human sacrifice as a cultural epiphenomenon with no transcultural validity.[19] According to these theorists and many others who advocate a postmodern legal and ethical practice, we should stop thinking we can be impartial and own up to the fact that the moral standards we apply are simply *our* standards: *There can be no objective standards of justice because each culture constructs its own.*[20]

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[16] See infra notes --- and accompanying text. If the antiformalist objects to adjudication so concerned with conceptual manipulation that it is oblivious to the social stakes involved, he should also recognize that the objectivist language of extracultural ideals is often the way we express what *is* at stake. Indeed, a case could be made for the proposition that the *only* way to identify objectionable legal formalism is by its unjust result.

[17] *See supra* note 1.

[18] Joan Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WISC L. REV. 131, 134 (emphasis added). This is the practical implication of the "new epistemology" Prof. Williams favors: "Traditional epistemology, with its belief in the existence of trancendent, objective truth, has been replaced in the twentieth century by a 'new epistemology', which rejects a belief in objective truth and the claims of certainty that traditionally follow." Joan Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 NYU L. REV. 429, 430-31 (1987).

[19] Williams, *supra* note 2, at 137. Williams' point is about the Aztec practice of human sacrifice. She says that the Aztecs did not violate some eternal moral truth, because there are none -- so we should understand our condemnation as simply a statement about who *we* are.

[20] For citations to some of the legal scholars who advocate this view, see *infra* fn. --- [cross-ref to fn. dropped from Part I text: "revolving around culture and contingency."] Perspectivist theory (by whatever label) is a greater or lesser component of several contemporary jurisprudential movements, including legal pragmatism, critical legal studies, and postmodern legal theory. But some feminists and critical race theorists are more ambivalent. See, e.g., Robin West, *Adjudication*

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This perspectivist thesis now permeates academia, and is "as dominant in legal theory as any paradigm was in the past" according to one observer.[21] But there is much wrong with it, not least a non-sequitur that conflates morality and history. We *do* all see from somewhere, encumbered by our particular histories and interests; but that does not mean that we should give up seeking a wider, more impartial view, or that the effort is futile. What *is* futile, I believe, is a theory that leaves no room for this basic moral aspiration.

This article is an effort to explain as precisely as possible why perspectivism is such a black hole for legal theory and legal scholars. It offers a map of the circular trails and blind alleys that plague the theoreticians who enter this maze, hoping to find some kind of liberation or political promise within. What they actually find, I argue, is the unnuanced formalism they thought they left behind. The ethical stakes in legal cases remain obscure, this time because the perspectivist approach supplants moral considerations with (anti-)metaphysical ones.

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is Not Interpretation: Some Reservations About the Law-As-Literature Movement, 54 Tenn. L. Rev. 203, 246-53 (1987) (exposing the "conservative vision" embraced by subjective interpretivists such as Stanley Fish); Deborah Rhode, *Feminist Critical Theories,* 42 STAN. L. REV. 617 (1990) (arguing that postmodernism creates political and theoretical difficulties for feminists by limiting their aspirations to authority); Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) (seeking a third way which recognizes contingency and objectivity); Jennifer Wicke, *Postmodern Identity and the Legal Subject*, 62 U. Colo. L. Rev. 455 (1991); Veronica Gentilli, *A Double Challenge for Critical Race Scholars: The Moral Context,* 65 S. CAL. L. REV. 2361, 2362 (1992) ("Critical race scholars have a double challenge: On the one hand, they must dispel the myth of objectivity that underlies our current understanding of the law and its moral foundation, while on the other, they must prove that it is possible to obtain a true and objective conception of justice."). Compare Charles Lawrence, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL L. REV. 2231, 2252 (1992).

[21] Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2507 (1992); *see also id.* at 2512-13. Schanck calls the postmodern paradigm hegemonic and notes that few have challenged its epistemological claims. *Id.* at 2507.

In what follows, I explore the relationships among perspectivism, law and morals primarily through the example of universal human rights.[22] The human rights claim reveals the conflicting arguments at their strongest, because it combines the most deeply-held moral convictions with the most metaphysical, least plausible assertion of objectivity, *cross-cultural* objectivity. On the one hand, it *does* appear self-evident that human beings have certain inalienable rights, such as rights against enslavement and torture. On the other hand, it is difficult to

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[22] When I refer to the "human rights claim" in this Article, I shall mean the claim that human beings have *moral* entitlements, regardless of whether they are recognized by international law. Human rights in this sense comprise a minimal subset of rights which some have called inalienable, or part of natural law, or rationally required as part of the social contract. Other rights may derive from particular and contingent political needs -- for example, as a way a polity binds itself for the future, or a way it brackets disagreement.

I choose human rights an an exemplary objectivist moral claim, but of course one might reject the human rights claim without rejecting objectivism. Thus it is important to be mindful of the distinction between (1) the meta-ethical position I shall oppose, which denies there are universal ethical priorities which transcend the particular cultures we construct, and (2) ethical or policy objections to the primacy of rights in our political discourse on the ground that they devalue other important goods. There are now many theorists who press this second position. To cite three prominent examples: Many communitarian theorists deny that a rights-based legal system can serve as an unobtrusive framework for facilitating the individual pursuit of diverse, self-defined goods while remaining neutral among them; they see such systems as a particular choice of goods that may diminish the strong social bonds and traditions human beings need to flourish. *See, e.g.,* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Symposium, *The Civic Republican Tradition*, 97 Yale L. J. 1493 (1988) (collecting essays on civic republican theory). Some critical legal scholars have criticized reliance on formal legal concepts, including rights, because they divert people from possibilities for true social connectedness by delivering a reified, manipulable, and formal substitute. *See, e.g.,* Mark Tushnet, *An Essay on Rights*, 62 TEXAS LAW REVIEW 1363, 1382-84 (1984); Peter Gabel, *Perspectives on Critical Legal Studies: The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life*, 52 GEO. WASH. L. REV. 263 (1984); Peter Gabel and Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563 (1984). A third example is the utilitarian position that the ethical measure of every action is its cumulative benefit to the population as a whole, regardless of its distribution. See JEREMY BENTHAM, DEONTOLOGY TOGETHER WITH A TABLE OF THE SPRINGS OF ACTION AND THE ARTICLE ON UTILITARIANISM 25 (Ammon Goldsworth ed., 1983) ("Act according to the greatest happiness of the greatest number."). We might call these critiques ethical counterclaims because they argue for particular ethical priorities, and as such they are interposed at an entirely different level than the anti-objectivist claim I shall critique.

understand how objective moral standards could exist wholly independent of a culture's particular traditions, against which cultural practices such as caste and clitoridectomy might be judged.[23] It is equally difficult to envision how such a transcultural, ahistorical moral reality might be *accessible* to people whose beliefs and motivations seem formed by their diverse cultural and personal circumstances. Community consensus is insufficient[24], and locating transcultural truth in Platonic

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[23] In Alasdair MacIntyre's words, "Morality which is no particular society's morality is to be found nowhere. There was the-morality-of-fourth-century-Athens, there were the-moralities-of-thirteenth-century-Western-Europe, there are numerous such moralities, but where ever was or is *morality as such?*" ALASDAIR MACINTYRE, AFTER VIRTUE 264, 265-66 (2d ed. 1984).

[24] This distinguishes the human rights issue from many other issues of "objectivity," such as whether the interpretation of legal texts can be objective -- constrained by the text so that some interpretation might properly be declared the "better" one. In this debate, some rule-of-law theorists have resorted to the concept of shared meanings within an "interpretive community" to underwrite the objectivity of legal interpretation. *See, e.g.,* TRIBE AND DORF, ON READING THE CONSTITUTION 87 (1991) (arguing that widely shared values and the internal structure of prior cases provide constraint on interpretation), and earlier work by Stanley Fish propounding the interpretive communities thesis. STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 11, 14 (1980); STANLEY FISH, *Change*, in DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 141 (1989). But obviously the interpretive community claim cannot avail the human rights advocate: Because she believes that there is no necessary connection between the practices of any culture and the requirements of justice, the interpretive community claim will not help her explain where these requirements reside or how anyone can know what they are.

To elaborate on the differences between these two objectivity debates, i.e. (1) whether there can be *shared meanings within* a culture, and (2) whether there are privileged *values across* cultures, they might *seem* to diverge most significantly in two respects. First, *meaning* does not lose its sense if anchored in convention, but some would say that *value* does. We are more likely to believe that everyone in a culture could be mistaken about the value of a caste system than about the meaning of a sentence. The second distinction, which I think is illusory, is that *assuming* a culture or "interpretive community" can be meaningfully identified, it provides a source for privileged *intracultural* answers across persons which is lacking *across cultures*. But that assumption is not very credible, since the idea of an interpretive community is infinitely malleable and the identification of such communities is itself an act of interpretation.

Suppose we ask whether disagreement between two people counts as any evidence at all that they are not members of the same interpretive community -- for example, the disagreement between those who found Damian Williams' assault on the truck driver Reginald Denny during the recent Los Angeles riots reasonable and those who did not. Because an interpretive community is not monolithic but includes debate, see Fish, *supra* this note at 149, we may doubt whether such diversity of beliefs or values can count as evidence of plural communities; but then

(Continued on next page)

Forms, human nature, or human or divine reason may seem unacceptably metaphysical.[25]

In Parts I and II I argue against perspectivists who have said that the transcultural human rights claim is either false or not useful in practice. What, I ask, can the perspectivist possibly mean when she says a universal moral claim is

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what does, and why? Cultures and subcultures can, of course, be cut as thin as you like; in order to trace "right answers" to those prevalent in an interpretive community, we have to fall back on some independent, pre-existing normative theory that identifies such value-creating communities. Therefore one might argue that the grounds for doubting the existence of *transcultural values* also apply to contested *transpersonal* values.

[25] By a *metaphysical claim*, I mean a claim about the ultimate structure of reality. The metaphysical *realist* believes in an objective mind-independent reality composed of pre-interpretive kinds or essenses and therefore of determinate description. As applied to morals, the metaphysical realist claims that there is a knowable moral reality that people and cultures can transgress. Any ethical claim, whether or not transcultural, includes a moral realist premise because it presumes that our actual values and motivations may be the wrong ones -- at variance with the values people should have (as further discussed at fn. [cross ref to prudence fn---]). Thus, J. L. Mackie wrote that any objective value claim entails Platonic Forms or some other "queer metaphysical entity" that both informs us of the good and motivates us to pursue it. J. L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 38, 40 (1977). *See also* Pierre Schlag, *Values,* 6 YALE JOURNAL OF LAW & THE HUMANITIES 219, 225 (1994) ("values are [God's] pantheistic successors in interest. Values are like little divinities. Like God, they serve as grounds or unquestioned origins."). Metaphysics, with its constitutive assumption that there *is* an ultimate reality to be discovered, is a major target of theorists I shall discuss, including Richard Rorty and other neopragmatists and postmodernists. They might prefer the definition supplied by some legal realists years ago, who saw metaphysics as "the effort of a blind man in a dark room to find a black cat that isn't there." MORRIS COHEN AND FELIX COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 665 (1st ed. 1951).

For examples of efforts to ground morality in intuition, rationality and human nature, see respectively G. E. MOORE, PRINCIPIA ETHICA (1st paperback ed., 1959) (arguing that because value is not identical to any natural property, it must be a non-natural quality that can be intuited by a special human faculty); IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON (L. Beck trans. 1949) (1788) (the categorical imperative both reveals and motivates rational beings towards moral requirements); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2, 30-31, 102 (Lafleur ed., Hafner Classics 1948) (providing a naturalist version of utilitarianism which reduces value to a hedonistic calculus of pleasure and pain). For an application of naturalist moral theory to law, *see* MICHAEL PERRY, MORALITY, POLITICS AND LAW 7-54 (1988) and id. at 11 (deriving morality from the requirements of human flourishing). For arguments asserting the importance of moral realism to law generally, *see* Michael Moore, *Metaphysics, Epistemology and Legal Theory,* 60 S. CAL. L. REV. 453 (1987); Michael Moore, *Moral Reality Revisted*, 90 MICH. L. REV. 2424 (1992).

false? And why would she think that depriving ourselves of the language of transcultural human rights could be useful? By charting these logical and practical limits of perspectivism, I hope to demonstrate that this kind of postmodern skepticism can be no objection to the claim that all human beings have certain objective and fundamental moral rights.

In Part III, I examine two perspectivist alternatives -- neopragmatism and cultural relativism -- and show how each misconceives ethics in the impossible attempt to translate anti-metaphysical theory into practice. Neopragmatists and cultural relativists often disagree about particular human rights policies.[26] But their theories each reject the idea that some actions violate an ahistorical, transcultural moral stricture, and I argue that neither theory provides a convincing alternative. Both of my counter-arguments are internal critiques, for they demonstrate that these programs fail by their own standards.

As I describe in Part III(A), cultural relativism's theory of "local" truth cannot be applied without making the kind of objective, transcultural claims that the theory rejects. Thus, there is really no intelligible difference between "cultural relativism" and "cultural absolutism": as practiced, cultural relativism looks just like an objectivist ethical judgment that every culture *should* be the final arbiter of its practices.

The neopragmatist program also fails on its own terms, at least to the degree that it holds out perspectivism as useful in practice. In Part III(B), I suggest that proposals by Rorty, Williams and others to redefine truth instrumentally as "what it is better to believe,"[27] or ethnocentrically as "cultural preferences,"[28] cannot serve

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[26] Unlike cultural relativists, many neopragmatists favor human rights laws, but purport to do so on ethnocentric rather than moral, grounds. *See infra* note --- [---Cross ref to fn dropped from Pt II text saying "explicitly ethnocentric version]

[27] RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 308 (1979)

as an adequate basis for practice. In this discussion, I argue that a pragmatist should favor a more nuanced approach that is capable of expressing the difference between a matter of taste, a breach of etiquette and an extreme injustice; and that objectivist discourse is necessary for that purpose.

We should address the difficult ethical problems presented by diversity directly, rather than bury them in formalistic, antimetaphysical myths. Part IV suggests that we can do this only by crediting our intuitive moral sense that there is a meaningful difference in kind between fairness and self-assertion that can guide us even in cases of cultural conflict. On this view, locating oneself in history and understanding one's positioned perspective *are* very important, but they are important ethically *only* because they are crucial parts of the project of seeking a more just and inclusive view.

FOUR QUESTIONS FOR PERSPECTIVISTS

I. IS THE HUMAN RIGHTS CLAIM FALSE?

The perspectivist believes that moral ideals are empty vessels filled in different ways by different cultures.[29] Let us begin by asking how someone who holds this view should treat the contrary transcultural claims asserted by the human rights advocate. Should she reject the human rights claim, and all other universal moral claims, as *false*?

Universal moral claims pose a problem for perspectivism because they are indispensible yet "metaphysical": They invoke precisely the objective, extra-

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[28] *See* Williams, *supra* note 2, at 134-37.

[29] *See supra* notes ___ - ___.

cultural, external standards perspectivists disdain. This is obvious enough in the case of the human rights claim, which is explicitly transcultural and therefore suggests something *beyond* culture and circumstance to which each society must answer. What may be less apparent is that *all* ethical ideals present the same metaphysical implications. When we speak of equality, for example, we do not mean that the parties *believe* that they are receiving equal treatment; we envision an external measure that can rule out consensual but exploitative relationships. Thus we might say that the practice of female genital mutilation is a denial of equality even though cultures that practice it do not recognize it as such. Similarly, we cannot *define* justice in terms of cultural convention without changing its meaning; we want to be able to say that an entire culture can be pathologically unjust. These terms refer to a Moral Law that is not the moral law of any particular time and place -- as do all moral claims, since they presuppose the existence of values people should care about, whether they do or not.[30] Since ethical concepts posit such external standards, we can purge them of their

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[30] This presupposition also underwrites the idea that we have prudential interests in pursuing some ends rather than others -- an idea that is as much of a philosophical mystery, and as much of a commonplace, as the idea that there are objective moral standards across cultures. For example, most of us believe that someone who refuses a medically necessary shot because he prefers to avoid momentary pain is mistaken to do so; few of us believe that an anorexic is as rational as a vegetarian, however clear the anorexic is about his preferences. We think that caring about our future is not just a taste some people happen to have, like caring about opera. Rather, we presume that there are ends worth valuing, whether or not we recognize them. Philosophically, however, the idea that prudential interests exist apart from an individual's motivations and goals is mysterious because we have no idea where such values could reside or how they might move us, and this raises the same metaphysical controversy that, writ large, human rights does . *See* J. L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 38-40 (1977); Bernard Williams, *Internal and External Reasons*, in MORAL LUCK 101-113 (1981) (arguing against the existence of prudential and other "external" reasons for action); and David Hume, who said it was not "contrary to reason to prefer even my own acknowledged lesser good to my greater." DAVID HUME, A TREATISE ON HUMAN NATURE, Book II, Part III, Sec. III (Oxford, Clarendon Press, 1978).

transcendental connotations only by changing their meaning *-- only by changing the ethical language game into a different one*.[31]

Now is this what perspectivists want us to do? Do they want us to define "justice" in terms of mores, not morals? Do they believe that the universal human rights claim is false, and that clitoridectomy and caste *do* constitute equality in the cultures that accept them? These are fundamental questions if perspectivism is to be relevant to ethical practice, but the answers are strikingly elusive. The problem is that our transcultural ideals constitute both a cultural *practice* and a set of *propositions* (truth claims[32]), and everything depends on which aspect is emphasized.

Focusing on the propositional content, a perspectivist will reject the language of universal human rights and morality as false, and fraught with spurious foundationalist assumptions. If what counts as justice is always culturally defined,

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[31] This is true for both cognitivist and non-cognitivist moral theories. For the non-cognitivist -- someone who denies that moral statements have truth value and holds instead that they express emotions or commands -- this is a point about the *grammar* of morality: Because a distinguishing quality of moral judgment is its universal form, the assertion that a particular statement is only contingently true, or true relative to a subculture or individual, carries with it an implicit assertion that the statement is not a moral one. For the moral cognitivist, universality is also inherent in moral judgments, most famously in Kant's identification of morality with the categorical imperative. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 70 (H. J. Paton trans., 1964) ("I ought never to act except in such a way that I can also will that my maxim should become a universal law." (emphasis omitted)). Kant thought that a moral rule cannot be a hypothetical imperative (if you want A, do B) precisely because the moral rule is not conditional on one's desires or any other contingency. For example, a rational being must "keep a promise" regardless of one's desire, circumstance, culture, or species. For Kant, moral beliefs are a priori, and so non-contingent that they are true of all rational beings, whether or not human. *See id. at 57.*

[32] By proposition, I mean a thought asserted as true. A proposition should be distinguished from a sentence. A sentence may be grammatical but non-sensical (e.g. "colorless green ideas sleep furiously"), or may be one of many different ways to communicate the same thought, or may express an emotion or command without claiming truth value. *See* A. C. GRAYLING, WITTGENSTEIN 15-16 (1988).

any effort to discern *cross-cultural* principles of justice is doomed and deluded.[33] Thus Rorty suggests that we "give up on transcultural validity"[34] and "human rights foundationalism".[35] Many other legal pragmatists and postmodernists take this revisionist path as well, urging that universalist, transcendent language be replaced with a new vocabulary revolving around culture and contingency.[36]

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[33] As Steven Winter writes, "Values are not to be found elsewhere, outside ourselves and our practices; they are profoundly human products." "[T]he problem of values is one of learning to rediscover their locus in our practices and commitments." Steven L. Winter, *Human Values in a Postmodern World*, 6 YALE JOURNAL OF LAW & THE HUMANITIES 233, 235, 248 (1994).

[34] R. Rorty, *Truth and Freedom: A Reply toThomas McCarthy,* 16 CRITICAL INQUIRY 633, 640 (1990). *See also* RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 60 (1989) (arguing that we should regard moral principles as simply a summary of *our* set of practices).

[35] Richard Rorty, *Human Rights, Rationality and Sentimentality*, in ON HUMAN RIGHTS 116 (S. Shute and S. Hurley, eds. 1993).

[36] *See, e.g.*, MARY JOE FRUG, POSTMODERN LEGAL FEMINISM (1992); BARBARA HERNSTEIN SMITH, CONTINGENCIES OF VALUE (1988); Jerry Frug, *Argument as Character,* 40 STAN. L. REV. 869, 871-72 (1988); Gary Peller, *Reason and the Mob: The Politics of Representation,* in TIKKUN: AN ANTHOLOGY 163, 164 (Michael Lerner, ed. 1987) ([T]here is no objective reference point, separate from culture and politics, available to distinguish truth from ideology, fact from opinion, or representation from interpretation."); Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152 (1985); Margaret J. Radin, *The Pragmatist and the Feminist*, in PRAGMATISM IN LAW AND SOCIETY 127, 134 (M. Brint and W. Weaver, eds. 1991) (pragmatism is "a commitment against abstract idealism, transcendence, foundationalism, and atemporal universality"); Joseph Singer, *The Player and the Cards*, 94 YALE L. J. 3 (1984) ("[W]e should abandon the idea [of] a rational method that will tell us once and for all (or even for our generation) what we are supposed to believe and how we are supposed to live."); Gerald B. Wetlaufer, *Rhetoric and its Denial*, 76 VA. L. REV. 1545, 1568-9 (1990) (opposing language that "implicitly denies any contingency upon the cultural or personal circumstances of the author."); Joan Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WISC L. REV. 131, 134 (arguing that we can benefit from "redefining our moral certainties as cultural rather than reflective of eternal truth"). *Cf.* J. M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE LAW JOURNAL 105, 106 (1993) (suggesting that jurisprudence be transformed into a "jurisprudence of the subject" by shifting its focus from a study of the properties of a legal system to "the nature of the legal subject who apprehends the legal system and judges it to have these properties").

Some legal scholars have lodged an argument against normative discourse generally, suggesting among other things that "talk is cheap" and there is too much of it in legal scholarship. *See Symposium: The Critique of Normativity,* 139 PENN. L. REV. 801 (1991) (containing articles propounding this view by Pierre Schlag, Steven Winter and Richard Delgado).

On the other hand, transcultural moral ideals also constitute a discourse, a form of *cultural practice.* For a perspectivist who believes that nothing exists beyond culture by which to critique its practices, this emphasis yields a very different conclusion. On this alternative reading of perspectivist theory, we who have inherited the Enlightenment vocabulary should embrace the objectivist language of human rights, moral obligation and equality as *our own* local practice, unimpeachable as the product of our history.[37] The perspectivist thesis can't hold that such language is *untrue* without invoking a kind of correspondence theory in reverse, by which our language should correspond to the non-metaphysical-way-the-world-really-is.[38] But since the thesis starts with a rejection of the correspondence theory of truth, there remain only "language games" and "forms of life" (in Wittgenstein's terms) which can be neither true nor false.[39] This idea of

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[37] For example, Stanley Fish seems to accept any practice on its own terms. STANLEY FISH, *Anti-Professionalism,* in DOING WHAT COMES NATURALLY 215-246 (1989). As to specifically *legal* practices, *see* STANLEY FISH, *The Law Wishes to Have a Formal Existence,* in THERE'S NO SUCH THING AS FREE SPEECH AND ITS A GOOD THING TOO, 141, 170-79 (1994); Stanley Fish, *Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin,* in PRAGMATISM IN LAW AND SOCIETY, *supra* note ---, at 47, 62 ("Law is centrally *about* such things as conscience, guilt, personal responsibility, fairness, impartiality, and no analysis imported from some other disciplinary context 'proving' that these things do not exist will remove them from the legal culture…"). Thomas McCarthy makes the related point that because our cultural forms of justification involve claims of transcultural validity, Rorty's attempt to defend our cultural practices against philosophical criticism backfires: it becomes a *philosophical* argument *against* our cultural practices. Thomas McCarthy, *Private Irony and Public Decency*, in 16 CRITICAL INQUIRY 355, 361 (1990).

[38] For a discussion of the correspondence theory of truth, see *infra* Part III(A)(1). To put this point another way, Rorty cannot urge that the language of objectivity be eliminated on grounds it lacks a proper foundation, since this is, on his account, true of all language. Such a view would make Rorty a closet foundationalist.

[39] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS para. 136 (G.E.M. Anscombe trans., 2d ed., 1976). *See also id.* para. 124 ("Philosophy may in no way interfere with the actual use of language…It leaves everything as it is.").

language as a practice, in which "the meaning of a word is its *use*"[40], can as easily rehabilitate metaphysical language games as destroy them: If transcendent ideals are useful, there is no reason why any theory concerning their origins in cultural construction should oblige us to purge them from the language.[41] This view reduces perspectivism to a purely formal theory virtually irrelevant to practice.

That either of these radically opposed practices "follows from" perspectivist theory is an early intimation of the formalist troubles inherent in the whole enterprise. For example, some legal scholars have used Rorty's antimetaphysical argument to attack legal discourse as presuming an objectivity which doesn't exist[42] while others have used Rorty to defend such objectivist discourse as our local practice.[43] Or consider Rorty's change of heart on John Rawls' book, *A Theory of*

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[40] *Id.* para. 43 (1953). This idea is first discussed in WITTGENSTEIN, THE BLUE AND BROWN BOOKS 4 (1958) ("if we had to name anything which is the life of the sign, we should have to say that it was its *use*") (emphasis in original).

[41] Lon Fuller's rejection of the correspondence theory of truth led him in this direction:

> "This lack of a physical counterpart for our intellectual processes is the thing that has led us to call our ideas 'false.' But whence comes this notion that our ideas must have physical counterparts in nature? What justifies the assumption we have been making that our minds should be like mirrors, reflecting nature in miniature?"

LON FULLER, LEGAL FICTIONS 103 (1967). Pragmatists like William James took this view, *see* infra note --- and accompanying text, and Fuller cites John Dewey in support of his position. *Id.* at 105 n. 19. See JOHN DEWEY, THE QUEST FOR CERTAINTY 191 (1929) (regarding theories about the atom, "it is now clear that their worth was independent of the existential status imputed to their subject-matter; that indeed this imputation was irrelevant and as far as it went injurious.").

[42] See, e.g., Joseph Singer, *The Player and the Cards*, 94 YALE L. J. 1, 25-39 (1984).

[43] See, e.g., J. Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986). Stick believes that Rorty's point is limited to philosophy, and its claims to be the arbiter of knowledge in all other fields. The subtle corollary of this is that professional vocabularies, such as legal discourse, remain untouched. Rorty provides much evidence in support of Stick's interpretation, but much against, as I note in fn. --- [re agency]. *See also* STANLEY FISH, *The Law Wishes to Have a Formal Existence,* in THERE'S NO SUCH THING AS FREE SPEECH AND ITS A GOOD THING TOO 141 (1994).

Justice[44]: having earlier rejected it as an unacceptable metaphysical attempt to ground moral intuitions on a foundation of rationality, Rorty became persuaded by subsequent writings that Rawls' theory is an appealing, pragmatic elaboration of those cultural practices that are most reasonable *for us*.[45] Perspectivist theory cannot help us navigate this labyrinth.[46]

II. IS MORAL OBJECTIVITY PRAGMATIC?

For some perspectivists, the previous question -- "Is the human rights claim false?" -- is neither helpful nor relevant[47]; we should ask instead whether invoking transcultural standards is fruitful, and whether some alternative discourse constitutes a better practice. In other words, they suggest we evaluate objectivist

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[44] JOHN RAWLS, A THEORY OF JUSTICE (1971).

[45] See RICHARD RORTY, *The Priority of Democracy to Philosophy, in* OBJECTIVITY, RELATIVISM AND TRUTH 175, 185 (1991) ("Rawls's' [subsequent] writings...have helped us realize that we were misinterpreting his book....When read in light of [later] passages, *A Theory of Justice* no longer seems committed to a philosophical account of the human self, but only to a historico-sociological description of the way we live now.").

[46] One suggestion Rorty offers to guide us merely defers the problem. He says that we should "limit the opposition between rational and irrational forms of persuasion to the interior of a language game, rather than...try to apply it to interesting and important shifts in linguistic behavior." RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 47, 48 (1989). With guideposts as uncertain as these, it is easy to see how legal scholars might disagree on Rorty's implications for legal reasoning. How are we to decide whether a particular challenge to traditional discourse is "interior to a language game" and therefore suspect as "irrational", or constitutes a valuable shift in the language game itself? What we need to do, it would seem, has nothing to do with diagnosing the "borders" of the language game and everything to do with evaluating whether the challenge has merit.

[47] *See, e.g.*, RICHARD RORTY, CONSEQUENCES OF PRAGMATISM xiv (1982) (pragmatists do not have "a 'relativistic' or 'subjectivist' theory of Truth or Goodness. They would simply like to change the subject"). I question whether one can disown the problems of relativism in this way, as I discuss *supra* at note . [---cross ref. to fn re Rorty being a relativist at beginning of Part IIIB---].

discourse pragmatically.[48] So I now turn to certain proposals offered by Rorty and some legal pragmatists, with the caveat that these proposals should not be considered representative of the many varieties of pragmatism associated with such different writers as Charles Pierce, William James, John Dewey, Cornel West, Margaret Radin, Richard Posner, and others.[49] On the issue of transcendental language in particular, there is no common pragmatist view. William James wrote that "universal conceptions...may be as real for pragmatism as particular sensations are...If they have any use they have that amount of meaning....On pragmatistic principles, if the hypothesis of God works satisfactorily in the widest sense of the word, it is true."[50] This article addresses proposals by other pragmatists and postmodernists, those who see foundationalist vocabulary as an Enlightenment vestige that has outlived its usefulness.[51]

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[48] *See, e.g.,* Richard Posner, *What has Pragmatism to Offer Law?*, in PRAGMATISM IN LAW AND SOCIETY 29, 31 (M. Brint and W. Weaver, eds. 1991) ("[T]he pragmatist's real interest is not in truth at all, but in belief justified by social need."); RICHARD RORTY, *Solidarity or Objectivity?,* in OBJECTIVITY, RELATIVISM AND TRUTH 33 (1991) ("[T]he traditional Western metaphysico-epistemological way of firming up our habits simply isn't working any more....[The pragmatist proposal] is put forward on practical grounds. It is not put forward as a corollary of a metaphysical claim that the objects in the world contain no intrinsically action-guiding properties, nor of an epistemological claim that we lack a faculty of moral sense, nor of a semantical claim that truth is reducible to justification.")

However, Rorty and others often seem oblivious to the pragmatic value of objectivist discourse, *see infra* note ---, implicitly presuming that objectivist vocabulary is in some sense false because it does not acknowledge its own historicity. Bernard Williams makes this point in criticizing Rorty for opposing objectivist scientific vocabulary despite its pragmatic benefits. BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSPHY 137, 138 (1985).

[49] Although each pragmatist can speak only for herself, Richard Rorty might be called the founder of contemporary neopragmatism. With his 1979 book PHILOSOPHY AND THE MIRROR OF NATURE and subsequent, brilliantly provocative writings, Rorty initiated a wave of interest in both the American pragmatist and the continental philosophic traditions.

[50] WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 131, 143 (1978).

[51] *See supra* notes --- and accompanying text (providing examples of contemporary critics of Enlightenment foundationalism).

Although it is sometimes unclear how far he intends his critique to go,[52] Rorty is clearly a language revisionist: He advocates a postmetaphysical society in which people observe human rights without thinking of them as rights or objective moral truths.[53] Arguing on pragmatic grounds, Rorty says that vocabulary "which revolves around notions of metaphor and self-creation rather than around notions of truth, rationality, and moral obligation, is better suited" to the "preservation and progress of democratic societies."[54] The vocabulary he favors is that of the novel and other narrative forms[55], and recently many legal scholars have indeed demonstrated that thickly descriptive accounts can help us understand law and care about its consequences.[56] But the power of these narrative accounts does *not*

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[52] See fn. --- [re Stick]. As I discuss *infra* note --- [re agency], Rorty's position on everyday language is extremely ambiguous. In this article, I focus on the revisionist claims that I believe predominate in his work.

[53] *See, e.g.,* RICHARD RORTY, OBJECTIVITY, RELATIVISM AND TRUTH 31 (1991) (rejecting the "metaphysical comfort" of thinking that "membership in our biological species carries with it certain 'rights', a notion which does not seem to make sense unless the biological similarities entail the possession of something nonbiological, something which links our species to a nonhuman reality and thus gives the species moral dignity."); *id.* at 34 (asserting that pragmatists want to retain Enlightenment institutions and practices while rejecting their objectivist justifications).

[54] RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 44 (1989).

[55] Rorty argues that such narratives are a form of "*sentimental education*" which, by widening the circle of sympathy and identification with others, is more likely to reduce cruelty than claims about what rationality and morality require. *See* Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in ON HUMAN RIGHTS 111, 119, 122-23, 133-34 (1993); Rorty, *supra* note --- at 94. In his use of this term, Rorty follows Hume, who thought that one's choice of ends was the product of sentiment, not reason. See HUME, *supra* note --- at 415. As Rorty says, "[s]olidarity is not discovered by reflection but created. It is created by increasing our sensitivity to the particular details of the pain and humiliation of other, unfamiliar sorts of people." RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY xvi (1989).

[56] *See, e.g.,* Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989) (exploring reproductive issues through narratives); Marie Ashe, "*Bad Mothers*", "*Good Lawyers*" *and* "*Legal Ethics*", GEORGETOWN L. J. 2533 (1993) (using narratives to examine the ethics of representing abusive parents); DERRICK BELL, AND WE ARE NOT SAVED (1987) (stories elucidating racial justice issues); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL (1992) ("[L]iterary models [are] a more helpful vehicle than legal precedent in [the] continuing quest for new directions in our struggle for racial justice); PATRICIA

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demonstrate that one can or should dispense with the language of "truth, rationality, and moral obligation", as Rorty suggests when he juxtaposes these two vocabularies as substitutes for (rather than complements to) each other. For example, a narrative may best describe the suffering a slave endured while the language of moral obligation may best identify the injustice involved. So one must evaluate the objectivist language Rorty opposes on its own pragmatic merits. To do this I shall ask, first, how do we use objective moral standards? Second, is there any alternative postmetaphysical practice that better serves our needs?

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Why do people invoke objective moral standards, like the claim that slavery violates a universal human right? Would they lose anything important by acknowledging and incorporating their own subjectivity -- saying "*I* or *we* oppose slavery", or something of the sort? Taken literally, the two statements convey entirely different meanings: one statement only refers to ourselves and our preferences, the other claims that there is a moral fact of the matter prior to our preferences. The pragmatic question before us is whether the stronger claim serves us well in practice or is instead superfluous or even counterproductive.

Because people can never actually produce the universal moral yardstick they say would support their moral positions, one might be tempted to dismiss the objectivist claim as bluff, or as merely a way to turn up the volume. The legal realist Alf Ross wrote, "A says: I am against this rule, because it is unjust. What he should say is: This rule is unjust because I oppose it. To invoke justice is the same thing as banging on the table: an emotional expression which turns one's demand

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WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991) (narratives exploring racism).

into an absolute postulate."[57] On this account, talk of "injustice" is a rhetorically disguised demand for capitulation. A different interpretation would recognize objectivist claims as the necessary foundation for a moral dialogue that could not even get started were moral claims held out as merely idiosyncratic preferences (in Ross's terms) or only true-for-us (in the relativist formulation). [58] But here I want to lodge a simpler objection: we cannot recast justice claims as statements of personal preference because each statement conveys a distinct and indispensible meaning. We refer to one rather than the other for good reason. It would, for example, badly misconstrue the moral stakes to speak only of the "competing preferences" of a rapist and his victim, or of a slaveholder and a slave; these are conflicts which demand resolution according to the language of justice, not the marketplace. Or consider whether it is intelligible to worry whether you are acting fairly, whether your "preferences" are justified. Rorty often argues that ethical appeals have no pragmatic value by pointing to the futility of invoking them with

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[57] A. ROSS, ON LAW AND JUSTICE, 274 (1958).

[58] Unlike a statement of naked preference, the objectivist formulation entails the possibility of error, invites scrutiny, and challenges all sides to justify and criticize moral claims with reasons. When Rorty says our primary objective should be "to keep the conversation going rather than to find objective truth", he discounts all those conversations which are sustained only because we *do* posit an objective moral reality worth investigating and describing. RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 377 (1979). Similarly, Rorty wants people to be "generators of new descriptions" and also to abandon the idea that there is something to describe. *Id.* at 378. *See also* RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 169-75 (1982) ("We are not conversing because we have a goal, but because Socratic conversation is an activity which is its *own* end") (emphasis in original).

Rorty's endorsement of conversation turns out to have some stringent limits. In Part IV, fn ---, I inventory the types of moral and legal reasoning that are arguably suspect on the perspectivist account. But perspectivism might be deemed to have even broader implications. Religious, psychoanalytic, Marxist, scientific, and other vocabularies all claim some degree of transcultural and transpersonal objectivity, so they all invoke the puzzle I have already discussed: should a perspectivist reject such claims as "false" or embrace them as her own cultural products? Or are only *some* of them improperly essentialist, and if so, how do we identify them?

the Gestapo,[59] but that does not show they have no reason-giving, action-guiding force for someone who *is* morally motivated.[60]

These examples may seem almost too facile, but they illustrate that perspectivists misdiagnose the role objectivity plays in our discourse when they construe it as a specious way we *support* our pre-existing commitments -- as a "banging on the table," or metaphysical backup for value judgments that can stand on their own.[61] Actually, *the objectivist claim is itself the value judgment*, not support

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[59] *See, e.g.,* RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 53 (1989) (asserting that we should give up the idea that Nazis could have been refuted by driving them "up against an argumentative wall -- forcing them to admit that liberal freedom has a 'moral privilege' which their own values lacked"). Rorty sees reasoning as purely instrumental, which means that there can be no philosophical proofs that morality should matter to us. *See* Richard Rorty, *Human Rights, Rationality and Sentimentality*, in ON HUMAN RIGHTS 111-34 (S. Shute and S. Hurley, eds. 1993). Like many, he seems to believe that unless moral inquiry can answer the question, "why should I be moral?", there is no point to it. And philosophy has been less adept at answering this question than explaining why it cannot -- why reason cannot persuade the unmotivated to be moral. *See* DAVID HUME, A TREATISE ON HUMAN NATURE, Book II, Part III, Sec. III (arguing that reason can serve only as "a slave to the passions" -- it can only *further* our ends, not select them for us); H. SIDGWICK, THE METHODS OF ETHICS 508, 496-509 (Hackett ed. 1981) (Macmillan 7th ed. 1907) (concluding that the choice between pursuing individual self-interest andpursuing moral requirements is a theistic, not rational, one). For ancient and recent treatments of this motivational question, *see* PLATO, THE REPUBLIC, Book II (considering whether "just" and "unjust" men would behave similarly if given the power of invisibility) and CHRISTINE KORSGAARD, THE SOURCES OF NORMATIVITY: THE TANNER LECTURES ON HUMAN VALUES (1992).

[60] One possible conceptualization of this point is to see "justice" as a kind of "secondary quality" -- objectively present and "waiting to be discovered", but perceptible only to those who are morally motivated. This view analogizes justice to the Lockean picture of taste, sound, color and other sensations as secondary qualities which describe a power to produce experiences in those with the proper sensory apparati. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 135 (Peter H. Niddich, ed., 1975) (1689). On this analogy, moral argument might have "reason-giving" or "action-guiding" force, but only for those who already care about the moral legitimacy of their own actions. *See* John MacDowell, *Values and Secondary Qualities,* in MORALITY AND OBJECTIVITY 110-29 (Honderich, ed., 1985) (concluding that values do not exist "independently of our sensibilities"). The perspectivist rejects this theory about justice because on her view, there can be no external referent: moral qualities are constructed by cultures, not independent of them.

[61] *See, e.g.,* S. Winter, *Human Values in a Postmodern World*, 6 YALE JOURNAL OF LAW & THE HUMANITIES 233, 246 (1994) (contending that discarding objective moral standards "leaves us exactly where we are, with all the resources of moral deliberation that constitute us and our

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for it. To follow Rorty and "realise the *relative* validity of [our] convictions and yet stand for them unflinchingly"[62] is not merely to obviate an irrelevant, esoteric philosophical debate about foundations. It is rather to eliminate consideration of whether one's position is justified or simply willful -- or in a cross cultural context, whether intervention against a particular cultural tradition is morally legitimate or a form of cultural imperialism. This is an important issue to someone who wants to act fairly, and it does not disappear when the conflict involves people or cultures with different value systems. For human rights advocates confronting clitoridectomy, patriarchal property laws or other troubling traditions, "relative validity" is not enough; their search for objective foundations is what gives sense

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traditions."). Winter agrees with Hugh Silverman's claim that "[d]econstruction does not deny grounds, reasons, intelligibles, or the like. Rather it *situates* them." *Id.* at 235 n. 10 (emphasis in original) (quoting Hugh J. Silverman, *Between Merleau-Ponty and Postmodernism*, in MAURICE MERLEAU-PONTY, HERMENEUTICS, AND POSTMODERNISM 143 (Thomas W. Busch & Shaun Gallagher eds. 1992)). Winter's view is shared by many antifoundationalists, particularly legal pragmatists who seek to show that moral deliberation remains viable within an antifoundationalist discourse. *See, e.g.* Richard Rorty, *Human Rights, Rationality and Sentimentality*, in ON HUMAN RIGHTS 119 (S. Shute and S. Hurley, eds. 1993) (the difference between moral realism and anti-realism makes no practical difference); Joan Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WISC L. REV. 131, 132 ("Words were tools, even when we thought they were mirrors. The mere admission that they are no more than tools will not cause them suddenly to break."). Even some on the non-perspectivist side, such as Ronald Dworkin, have characterized objectivity as a "fake" issue. RONALD DWORKIN, *On Interpretation and Objectivity,* in A MATTER OF PRINCIPLE 167, 172, 171-174 (1985). For any theorist who wants to steer clear of both nihilism and foundationalism, the temptation is to dispose of the objectivity question as, in Richard Berstein's phrase, a kind of "Cartesian Anxiety":

> Either there is a universal, objective moral law, or the concept of morality is groundless and vacuous...Either there is some support for our being, a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos...We need to exorcise the Cartesian Anxiety and liberate ourselves from its seductive appeal.

R. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM 13, 18, 19 (1983) (emphasis in original).

[62] RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 46 (1989) (quoting Joseph Schumpeter) (emphasis added).

to, and helps avoid, the dangers of an aggressive ethnocentrism on the one hand and an amoral cultural relativism on the other.[63]

Rorty and other perspectivists make this kind of moral judgment unintelligible when they deny that there are any impartial, transcultural standards of justice to turn to in resolving these conflicts. They offer instead a forced embrace of either ethnocentric or deferential relativism; for if we take all moral truths to have only *local* validity, the ethical focus necessarily shifts to the issue of *whose* truth we should privilege in practice, ours or theirs, and we arrive at one of these two crude solutions. Hence Rorty's neopragmatism offers an explicitly ethnocentric version,[64] according to which we need no justification for pressing human rights policies or any other aspect of our own cultural agenda; we just need to stop caring whether they have transcultural validity.[65] The alternative,

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[63] Alasdair MacIntyre sees the meta-ethical and ethical inquiries as inextricably related: "[T]he history of morality and the history of moral philosophy are a single history...[W]hen rival moralities make competing and incompatible claims, there is always an issue at the level of moral philosophy concerning the ability of either to make good a claim to rational superiority over the other." MACINTYRE, AFTER VIRTUE 268 (2nd ed. 1984). This quest for an Archimedean point results from this demand for impartiality across diverse viewpoints. Although MacIntyre sees them as fruitless, formulations such as the Golden Rule, Kant's categorical imperative, Rawls' original position, and Habermas' theory of free and non-hierarchical communicative discourse are attempts to describe a normative framework that can help fulfill this aspiration.

[64] *See, e.g.,* RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 60 (1989) (we should identify morality with *our* practices); RICHARD RORTY, OBJECTIVITY, RELATIVISM AND TRUTH 21, 23, 30 (1991) (identifying pragmatism as ethnocentric); *id.* at 29 ("we pragmatists should grasp the ethnocentric horn of this dilemma. We should say that we must, in practice, privilege our own group, even though there can be no noncircular justification for doing so."); Richard Rorty, *Human Rights, Rationality and Sentimentality*, in ON HUMAN RIGHTS (S. Shute and S. Hurley, eds. 1993), at 117 (arguing that we should make our culture more self-conscious and more powerful); *Id.* at 126 (identifying himself as a Eurocentric intellectual).

Notwithstanding their very different programs, both the ethnocentrist and the deferential cultural relativist share a conception of morality as relative. Although Rorty sometimes rejects the relativist label, saying that pragmatism makes relativism and epistemology "irrelevant", this claim is unconvincing for reasons detailed *supra* in text at fn --- [cross ref to ftnte in part IIIB---].

[65] *See, e.g.,* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 361 (1979) (it is dubious and self deceptive to see norms as grounded in something beyond our local criteria);
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deferential version of cultural relativism also regards the human rights claim as no more than a contingent cultural construct, but says that our local paradigms have no special privilege, and therefore we should *abandon* human rights policies insofar as they threaten the autonomy and different traditions of other cultures. I doubt there is a third way that would not constitute a revival of the aspiration for the sort of objective, impartial solution that perspectivists believe is illusory.[66]

This stark choice of proceduralist dogmas, between asserting one's own cultural norms and deferring to another's, should be entirely unsatisfactory to a pragmatist, and to anyone who wants a language rich enough to give voice to her intuitive moral sensibility.[67] Each dogma amounts to a form of cultural absolutism;

Rorty, *Human Rights, Rationality and Sentimentality*, in ON HUMAN RIGHTS 117 (S. Shute and S. Hurley, eds. 1993) (arguing that we should make our human rights culture more powerful "rather than...demonstrat[e] its superiority to other cultures by an appeal to something transcultural").

[66] *See supra* note --- (listing representative works by revisionist perspectivists). I suspect that many perspectivists attempt to escape this trilemma by continuing to look for legitimate, impartial solutions to cross-cultural conflicts, and treating anti-foundational theory as a purely academic, intellectual pursuit that cannot inform practice.

[67] The literary critic Terry Eagleton argues that ethical deconstruction is not "the most reliable basis for our deliberations over what to do about the boat people...To deconstruct [political struggles] is to be complicit with the political status quo, as with that fashionable brand of neocolonialist theory for which colonialist and colonized would seem mere mirror images of each other in their ambivalences and self-divisions." Terry Eagleton, *Deconstruction and Human Rights*, in FREEDOM AND INTERPRETATION 121, 123-24 (B. Johnson, ed., 1992). *See also* Daniel C. K. Chow, *Trashing Nihilism*, 65 TULANE L. REV. 221, 277-98 (1990) (arguing that the "nihilist branch" of critical legal studies must retreat from its theories in order to adjudicate moral issues); Peter Gabel, On Passionate Reason: Transcending Marxism and Deconstructionism, in TIKKUN: AN ANTHOLOGY 173, 174 (Michael Lerner, ed. 1990) ("[T]he denial, in the name of cultural uniqueness, that there is any way to reunite and illuminate the meaning of these diverse experiences through the development of a more supple and experiential social theory grounded in our common humanity makes it difficult for us to challenge the Allan Blooms and William Bennetts of our society."); Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective,* 14 FEMINIST STUDIES 575, 577, 579 (1988) ("The strong program in the sociology of knowledge joins with the lovely and nasty tools of semiology and deconstruction to insist on the rhetorical nature of truth, including scientific truth....So much for those of us who would still like to talk about *reality* with more confidence than we allow to the Christian right when they discuss the Second Coming....Feminists have to insist on a better
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each provides an unnuanced and unsatisfactory solution to cultural conflict. When Joan Williams says that because there are no "eternal moral truths", her opposition to human sacrifice *means* only that she does "not want to change in the ways required to make [these] practices understandable,"[68] we should question why any metatheory should be allowed to so drastically redefine and flatten the range of our normative discourse: I might give the same reason for choosing not to become an accountant!

We need better tools to make nuanced moral sense of the wide variety of situations that confront us, and we find them in the distinctions that perspectivists enjoin us to abandon -- distinctions between the objective and the subjective, the universal and the local, and the contingent and the unconditional. This is the only vocabulary that permits us to assert the right to life of every individual -- even in an ancient culture that practiced human sacrifice, and even in a modern one where killing one person really can save the lives of several organ transplant candidates. It is the only vocabulary that allows us to describe some choices as merely matters of taste (novels) and others as enjoined by objective moral obligations no matter how widespread or accepted in a culture (slavery).[69] We

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account of the world; it is not enough to show radical historical contingency and modes of construction for everything.") (emphasis in original).

[68] Joan Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WISC L. REV. 131, 137.

[69] International human rights conventions make these same distinctions by recognizing some rights that appropriately claim inescapable, transcultural validity and some that are subject to derogation or counterveiling cultural considerations. For example, the European Court of Human Rights allows a "margin of appreciation" -- consideration of particular local circumstances -- to limit the application of some rights (like detention without trial) but not others (rights against torture). *See* Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights,* 4 HUM. RTS. Q. 474, 475 (1982). International human rights law contains a similar rule, the *jus cogens* doctrine, which establishes a division between human rights that a state can derogate (by maintaining a "persistent objection" to being bound) and other human rights, such as those against slavery, genocide or aggressive war,
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lose, not gain, opportunities for nuanced and contextual evaluation by treating *all* choices as merely matters of idiosyncratic preference[70] or, worse, examples of a welcome "moral versatility."[71]

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which no state can escape. Arts. 53 and 64, Vienna Convention on the Law of Treaties (1969). In the case of human rights, one might say that positive international law has recognized the moral importance of a certain class of rights regardless of their prior legal status.

[70] Some have aruged that we can still make a moral distinction between, for example, choosing vacation reading and choosing to enslave without claiming that the distinction is "objective"; it is simply our commitment. *See* Singer, *supra* note --- at 52. By now, however, it should be clear that if we reformulate our language in this way, such ideas as universal rights, moral obligation and intrinsic values "worth" valuing become so convoluted as to lose their sense. Consider again the contemporary human sacrifice case above, in which a hospital could save the lives of five patients awaiting transplants by killing a sixth, healthy patient and distributing his organs to the others. I want to say that there is a deontological stricture against killing an innocent that cannot be balanced against beneficial consequences to others. But I cannot assert this view through a relativist reformulation of the Sixth Commandment as "absolutely true-for-me," or by replacing the objective moral claim with any other vocabulary of contingent value, because my point is precisely that there are no circumstances in *any* culture which can justify such a practice: it violates an unconditional *human* right. This is a claim that, unlike the utilitarian view, ascribes a non-contingent moral significance to human beings as individuals. If we were to reject this claim as essentialist or as presuming a religious or transcendent truth, we would no longer have a name for this injustice. We would be one step closer to the utilitarian vision -- not because we had accepted the "truth" of utilitarianism, but because we had allowed our ethical descriptions to be dictated by metaphysical positions rather than moral considerations.

[71] *See* S. Winter, *Human Values in a Postmodern World*, 6 YALE JOURNAL OF LAW & THE HUMANITIES 233, 248 (1994). Winter writes, "The relativism of human moral systems can thus be seen as an adaptive mechanism essential to any human (which is to say fallible) normative enterprise. We have no reason to want to bring our moral versatility to a stop, and much reason to carry on with it." *Id.*

My claim that the subjective/objective distinction allows for a more nuanced, contextual understanding of events may be surprising, for both deontological rights and transcultural claims have often been thought to connote a decontextualized, overly abstract judgment. Often people *do* invoke such rights in a formalistic way that has nothing to do with either the moral basis for the right or the real-life consequences at stake. But relativism and other approaches that regard diverse subcultures as impenetrable have no prospect of contextual understanding; they are formal systems that deny any possibility of discerning the salient characteristics of an event through a self-conscious, evaluative engagement with it. And of course, when ethical choices need to be made (Should all South Africans have the right to vote?), embracing all perspectives as examples of a welcome moral versatility is simply changing the subject.

The irony here is that as pragmatists like Rorty and Williams have waged their theoretical battles, they apparently have lost sight of the ways in which extracultural standards *function* in our lives. They view objectivist moral discourse as a way we stake out a metaphysical position, rather than recognizing we use it to inhabit and describe a normative world.[72] This theoretical bewitchment is what allows Rorty to propose that we both "make our human rights culture more powerful"[73] *and* abandon the idea that people have non-contingent moral rights, as if the two had no relation to each other.[74] It is what prompts Williams to offer the equally hopeless proposal that our moral statements be understood as simply descriptions of who *we* are, rather than claims about the moral character of certain acts.[75] These suggestions fail to recognize that people need a vocabulary that can distinguish between existing cultural practices and ideal practices, between *Is* and *Ought,* in order to describe both moral aspirations and moral transgressions. Flattening moral discourse in this way is not only impractical but, for reasons I shall now discuss, impossible.

III. IS THERE A PERSPECTIVIST ALTERNATIVE?

To fully assess the pragmatic merits of objectivist discourse we must also consider whether there is a viable alternative to it. Is there a perspectivist practice

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[72] Such language is a medium by which we "identify ourselves in moral space," to borrow Charles Taylor's felicitous phrase. For an enlightening account of this process, *see* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 25-52 (1989).

[73] *See* Rorty, *supra* note --- at 117.

[74] *See* RICHARD RORTY, OBJECTIVITY, RELATIVISM AND TRUTH 31-32 (1991).

[75] *See* text *supra* note 2.

-- some fully de-divinized, nonmetaphysical way of speaking and acting -- that could sustain the kind of culture Rorty and others advocate? Most postmodern and pragmatist writings provide a mixed message in this regard; they do not constitute *examples* of an alternative practice but are rather theoretical claims *about* practice, mostly written in the vocabulary they seek to abolish.[76] They are, after all, arguments, a medium which presumes that reasons and evidence can have objective weight and are not merely revelations about the people who proffer them.[77] And they are arguments that invoke an extracultural standard to tell us that our culture's Enlightenment discourse has gone wrong.[78]

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[76] *See, e.g.,* MATTHEW KRAMER, LEGAL THEORY, POLITICAL THEORY, AND DECONSTRUCTION 10 (1991) (criticizing Jerry Frug, whom Kramer interprets as urging us "to eschew the subjectvity/objectivity dualism on the precise ground that it is subjective (ie. 'a human creation') rather than objective (ie. 'a reflection of what the world 'is really like').”). More generally, many of these works offer mixed messages when they provide abstract endorsements of contextualism, metanarratives about the death of metanarrative, theories about privileging practice over theory, and so on. The writer who comes closest to being an exception is Pierre Schlag, whose work resolutely proposes nothing. *See, e.g.,* Schlag, *Clerks in the Maze,* 91 MICH. L. REV. 2053 (1993).

[77] This statement requires some elaboration. Metaphysical skeptics like Hume certainly thought that reasons could have weight, but only instrumental ones. See fn. --- (fn dropped from "refuge from metaphysical uncertainties..."---). But the kind of argument Rorty makes seeks to have us change our ends -- from truth-seeking to striving for solidarity with our community -- and although he argues that reason cannot produce solidarity, his work seems to be an example of just that effort. (To get more complicated, it is always possible Rorty may be using a strategy to make me *think* that he is persuading me with arguments rather than manipulating me with rhetoric.)

Joan Williams walks a similar line. As noted earlier, she argues that our "truths" tell us about the speaker, not about the object of inquiry. So Williams takes some care to deny that her perspectivist arguments are objectively true, as when she says, "I am not asserting that the new epistemology is an objective thing that exists in the outside world. Rather, I am offering a new reading of well-known texts to suggest that connections formerly thought unimportant (or nonexistent) are in fact interesting and instructive." Joan Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 430 n. 6 (1987). We might wonder, however, whether such a disclaimer changes things very much; the search for truth *is* a search for "instruction".

[78] As we have seen, Rorty's attempt to defend culture against extracultural standards is simultaneously an extracultural critique of our Enlightenment culture. *See supra* Part I. To speak, as Rorty does, of a vocabulary that has become inimicable to our progress, is to invoke an

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The ultimate question is whether one can actually execute these blueprints, and to explore this issue, I turn now to two such efforts. The first is the moral relativist's attempt to utilize the concept of local truth. The second is the related but more complicated neopragmatist program. Each seeks to replace reliance on objective, transcultural moral standards with a postmetaphysical discourse of contingent value, but as I shall argue, each fails to deliver on this promise. Both cases show that the antifoundationalist trail is a circular one that leads the actor back to the ethical choices and objectivist discourse she had hoped to avoid. Like phlogiston and the ether, these theories leave us with the problems they were initially thought to solve.

A. THREE RELATIVIST DILEMMAS

Moral relativism provides the most straightforward attempt to fashion an alternative practice that steers clear of both nihilism and objective moral standards. The relativist says that statements about justice and other ethical matters can be true, but only locally so.[79] This means that there can be equally

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extracultural standard -- the word "progress" means that cultures can go wrong. *See* RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 44 (1989). For reasons that I offer in Part III(B), I do not believe it is credible to argue that Rorty ues the old objectivist vocabulary merely to dismantle and replace itself -- as a ladder to be thrown away after climbing it, in Wittgenstein's famous analogy. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS Sec. 6.54 (D. Pears and B. McGuinness, trans. 1961) ("[A]nyone who understands me eventually recognizes [my propositions] as nonsensical, when he has used them--as steps--to climb up beyond them....He must transcend these propositions, and then he will see the world aright.").

[79] More precisely, the particular relativist I shall discuss holds this view. My inquiry concerns the case of a *moral cognitivist* who asserts that moral statements are *relatively* true -- that is, someone who contends both that moral statements are propositions that can be true, not merely commands, emotions or expressive utterances; *and* that their truth is contingent on the framework within which one evaluates them. Although beyond the scope of this Article, it is possible for a moral relativist to reject the idea that moral statements have truth value and yet retain some *local* criterion of validity.

justified, alternative standards for what counts as truth (even if the circumstances are identical[80]). To apply the idea of local truth to the recent case of an American vandal sentenced by a Singapore court, the assertions "flogging is never justified" and "flogging can be justified if it will reduce crime" do not conflict for a *cultural* relativist if they can be traced to diverse cultural standards (which themselves need not be further justified). So there can be no single set of correct reasons, values, or truths; they are valid only relative to a "framework", which relativists have variously identified as culture, language, discourse, form of life, epoch, subjective motivations, conceptual scheme, etc.[81]

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[80] This relativist theory is thus *not* merely the claim that because cultural circumstances are different, cultural practices must be different as well. The latter claim is uncontroversial: everyone agrees that a universal principle may require different actions depending on circumstances, and *must* do so if it is not to be arbitrary. This contrast, however, is easier to draw in theory than to discern in practice; it is often difficult to say whether diverse practices result from applying different standards or simply from the application of a single standard to different circumstances. T. M. Scanlon makes this point about his own criterion of justice, which holds that "an action is wrong if it would be disallowed by any set of principles for the general regulation of behavior that no one suitably motivated could reasonably reject." We might consider this contractualist formula a universal moral principle, but we could equally consider it relativistic, for it makes wrongness relative to principles that have a certain standing in the particular society. T. M. Scanlon, *Fear of Relativism* in VIRTUES AND REASONS: PHILIPPA FOOT AND MORAL THEORY 219, 225-26 (Rosalind Hursthouse, Gavin Lawrence and Warren Quinn, eds., 1995). Or consider the idea that an event can only be understood "in context". Is such a view relativistic? Or should we see a plea for context as an appeal to "parametric universalism" as Scanlon calls it, in which valid moral principles require different conduct depending on variable conditions. *Id.* at 225. On this view, one might say that there exists an underlying moral reality that dictates which factors are relevant, but that we cannot reduce these factors to rules and must instead rely on contextualization as an intuitive tool for "getting it right".

[81] *See, e.g.,* Ruth Benedict, *A Defense of Moral Relativism,* in VICE AND VIRTUE IN EVERDAY LIFE 148-56 (Christina Sommers and Fred Sommers, eds., 1989) (defending cultural relativism); NELSON GOODMAN, PROBLEMS AND PROJECTS 95 (1972) (facts are relative to entrenched linguistic practices); Gilbert Harman, *Moral Relativism Defended,* 84 PHILOSOPHICAL REVIEW 3 - 22 (1975) (describing "inner judgments" as relative to the actor's motivations); THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2nd ed., 1970) (describing scientific knowledge as relative to the prevailing conceptual scheme); Benjamin Lee Whorf, *Science and Linguistics,* in LANGUAGE, THOUGHT, AND REALITY 212-13 (J. B. Carroll, ed., 1956 (relativizing experience to the structure of one's language); PETER WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 102 (1958) and *Understanding a Primitive Society* in RATIONALITY 88-
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This theory constitutes a particular normative take on the uncontroversial fact that cultures adhere to diverse values and moralities. Contrast the relativist claim with two other kinds of statements about diversity: (1) *Bare description,* such as an ethnographer's description of the diversity in *what is taken to be* good, right, or rational by members of several cultures. Such a report makes no claim concerning the truth or value of these alternative moralities; it does not tell us whether all, some, or none of these codes is right, and it is therefore equally compatible with moral realism, nihilism and skepticism.[82] The moral relativist is not making this kind of statement because she means to stake out a position *in opposition to* these other theories. She does not simply *report* that a certain tribe regards the cannibalism of cowardly enemies as a perversion of an otherwise virtuous practice, but claims that this moral belief is in some relative sense *true*.[83] (2) *The pluralist claim:* The pluralist has a normative theory about diverse goods, but unlike the relativist, she has no mediating framework to which her judgment should conform and no bar to the conclusion that a particular cultural practice is unconditionally unjust. The pluralist simply says that there are multiple, sometimes mutually

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99 (BRYAN R. WILSON, ED. 1970) (both arguing that rationality and intelligibility are relative to particular "forms of life").

[82] By these terms, I mean the following: moral realism is the view that moral truths exist independently of beliefs, practices, and cultural standards; nihilism is the view that there are no moral truths or objective values; and skepticism is the view that even if there are such truths and values, we cannot know what they are. In contrast to these positions, cognitive moral relativism holds that there are moral truths, but they are relative to local standards which cannot themselves be selected morally.

[83] I should note, however, that some writers identify moral relativism as just such a descriptive claim. *See, e.g.*, Krausz and Meiland, *Introduction to* Geoffrey Harrison, Relativism and Tolerance, in RELATIVISM: COGNITIVE AND MORAL 226 (Krausz and Meiland, eds. 1982) (asserting that the moral relativist can claim that "moral relativism is itself a factual doctrine rather than a moral doctrine and therefore moral relativism does not apply to itself."). Sometimes relativism is divided into a "descriptive" version and a "normative" version. *See, e.g.,* WILLIAM FRANKENA, ETHICS 92 (1963). In any event, if there is any reason to recognize such a "descriptive relativism", it is *not* because the bare fact of diversity implies a position on any ethical issue.

exclusive values.[84] A pluralist might view the Singapore flogging as invoking a conflict between the values of utility (crime prevention), desert (torture is disproportionate punishment), cultural autonomy and so on. Although for the pluralist these values conflict and are not resolvable by any explicit, determinate metric[85], she can still say that these competing goods must be judged ("weighed" or "intuited") from the ethical point of view. The moral relativist has a different, stronger, claim: that a judgment between these values may not be an ethical question at all. For the moral relativist, there is an end point of ethical concern in some cultural or other fact. A relativist would not ask whether a utilitarian culture

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[84] The term "pluralism" connotes different things to different people. The particular features I have in mind in using the term are the following. The pluralist assumes that: (1) there are diverse values and many conflicting yet valid, alternative conceptions of what constitutes a moral or a good life; (2) values are not quantifiable or reducible to a single value, so that often "choices must be made for no better reason than that each value is what it is, and we choose it for what it is, and not because it can be shown on some single scale to be higher than another," ISAIAH BERLIN, *The Originality of Machiavelli, in* AGAINST THE CURRENT 25, 78 (1980); (3) not all ends are ethically acceptable; and (4) it is possible in at least some situations to make such evaluations across diversity. So defined, pluralism rejects the aspiration to a hyper-objective algorithmic rationality which can translate values into numbers and choices into calculations; but these are still objectivist assumptions. Collectively, they mean that to live as a pluralist you would have to be able to discern "reasonable" or "hypothetical" values and justifications -- ones which you could recognize as legitimate for others even though you disagreed with them. For a lucid discussion of hypothetical and actual justification, see J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE LAW JOURNAL 105, 117-21 (1993). On pluralism and incommensurability generally, see ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY (1991); **);** 11 SOCIAL PHILOSOPHY AND POLICY 1-280 (1994) (collecting articles on the subject of cultural pluralism and moral knowledge); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

[85] For some attempts to deny the mutual exclusivity of consequentialist and retributive premises, however, *see* Amartya Sen, *Evaluator Relativity and Consequential Evaluation*, 12 PHILOSOPHY AND PUBLIC AFFAIRS 113, 130 (1983) (claiming that a "broad consequentialist" could view actions per se as having their own value or disvalue, which would then be combined with the value of the resulting state of affairs that is otherwise the sole consideration of a consequentialist); H. L. A. Hart, PUNISHMENT AND RESPONSIBILITY 8-10 (1968) (arguing that a system of punishment is justified by its utility in preventing or reducing crime, but that the distribution of punishments within that system must be governed according to principles of retribution or desert).

is more or less ethical than a deontological one because, for her, the question is meaningless.

But the relativist idea of local truth makes little theoretical or practical sense. The practical problem is that the relativist alternative lacks the resources to provide anything more than the baseless choice of procedural dogmas I described above -- a choice between adopting the ethnocentric practice of asserting one's own cultural mores, and the cultural relativist practice of deferring to whatever mores another culture has produced. The ethical dimension of our lives cannot be addressed in these ways, only ignored. The theoretical problem is that several transcultural judgments necessarily underlie every moral relativist claim, and these judgments make the relativist position no less "metaphysical" than the human rights claim. This section uncovers the three transcultural claims implicit in the cultural relativist version.

1. WHAT CONSTITUTES "COHERENCE"?

The theory that truth is local has appeal because it seems to reconcile (1) our respect for diverse cultures and our sense that one's values derive from one's culture with (2) our constitutive assumptions that there are truths (as opposed to beliefs) and values (as opposed to preferences). The combination of these two seductive insights might be thought to demand a concept of "true-for". But it is impossible to find space for this concept between "belief" and "truth" as conventionally understood, and if the concept is to make sense, one must reject this conventional understanding. More specifically, one must reject the idea of truth as "correspondence", according to which a statement is true insofar as it accurately represents reality, and substitute something else that still counts as more

than mere belief. The only option appears to be a theory of truth based on coherence.

On the coherence theory, "truth" does not describe a relationship between words and the world. Rather, truth is simply justified belief, and justified belief is that which coheres with one's other beliefs. The coherence theory initially seems to allow for local truth -- "local" because truth can be relative to a conceptual scheme, which may differ according to time, place, or culture; and "truth" because of the possibility that beliefs are mistaken (do not "fit" in the right way).[86] But the

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[86] To understand the difference between the correspondence and coherence theories, consider their contrasting descriptions of scientific research. On the correspondence theory, our experiments explore and discover physical reality, and we therefore have a "reality check" against truth claims that allows for scientific advancement. Like blind men attempting to picture an elephant, our descriptions should converge, given enough time and effort. In Bernard Williams' terminology, we make progress as we produce an "absolute conception of the world". The "absolute conception" both pictures the world in a way maximally independent of our differing perspectives of it and explains how we come to acquire those perspectives. BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSPHY 139 (1985). Truth cannot vary because it consists in an accurate depiction of one reality.

The correspondence theory is now challenged even in science, a philosophical victim of, among other things, Heisenberg's uncertainty principle and Thomas Kuhn's famous thesis that principles of scientific investigation are themselves contingent and subject to replacement by a new paradigm which would, of course, discover different truths. THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d enlarged ed. 1970). On the alternative coherence view, we can never have access to an unmediated world, let alone represent it. Therefore truth consists not in a belief's relationship to the world, but in its compatibility with the "web" formed by our other beliefs. "[T]here is no way to get outside our beliefs and our language so as to find some test other than coherence." RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 178 (1979).

This is not to say that debates on scientific objectivity necessarily have probative value for inquiries about objectivity in other disciplines, and Williams specifically limits his absolute conception model to scientific knowledge. But both the correspondence and coherence theories are found in many other domains. For example, the idea of representation through discovery is fundamental to the picture theory of language, intuitionism and realism in ethics, and objectivism in history.

A second caveat is in order as well. Relativists cite the coherence theory in support of their views, but so do some anti-relativists. *See, e.g.,* Ronald Dworkin, Taking Rights Seriously, 159-168 (1977); Ronald Dworkin, *How Law is Like Literature*, in A MATTER OF PRINCIPLE 146-166 at 158-162 (1985); Michael Moore, *Moral Reality Revisited*, 90 Mich. L. Rev. 2424, 2494 (1992) (arguing that coherence provides the test of truth but is not the nature of truth). Donald

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coherence theory raises new problems for the relativist: One can question why, if all truth is relative, the quality of "coherence" is not.[87]

The relativist says, in effect, *All truth is relative except this one;* or in different words, the one transcultural truth is that all truth is local and relative to a particular framework. But the philosopher Hilary Putnam has put this idea in different words that unmask its strong objectivist claim: "justification relative to a discourse is itself quite absolute."[88] Putnam believes that a relativist cannot say this: Because she denies the possibility of any absolute truth, she must also "*deny* the existence of any intelligible notion of *objective* 'fit'."[89] If relativism cannot rely on the objectivity of relative justification, it follows that the relativist cannot distinguish someone's "being right" from "thinking he is right", which is to say she cannot have any concept of truth at all, even local truth.[90] For this reason, Putnam believes there is no philosophical space for relativism.[91]

Davidson has even argued that coherence *yields* correspondence because "most of a person's beliefs must be true." Donald Davidson, *A Coherence Theory of Truth and Knowledge,* in READING RORTY 120-138 at 120, 127-28 (Alan Malachowski, ed. 1990). For Davidson, coherence theory does not entail diverse and incommensurable conceptual schemes, a concept he finds unintelligible. *Donald Davidson, On the Very Idea of a Conceptual Scheme*, in RELATIVISM: COGNITIVE AND MORAL 66, 67 (Krausz and Meiland, eds. 1982).

[87] Plato provided an early version of this argument from self-contradiction. One can ask the relativist whether her claim that "all truth is relative" is merely "true for her" or "objectively true." Adopting the first version leaves her open to someone's counterclaim that "relativism isn't true for me", and also reduces her to defending the fully meaningless, incoherent concept of "relative relativity". (That is, the idea that the "relativity of truth" is itself relative to some condition entails that truth is absolute in the absence of the condition -- ie. that non-relative truth is relative.) On the other hand, if she says that relativism is objectively true, the claim seems to be self-refuting on its face. PLATO, THE PROTAGORAS, in THE WORKS OF PLATO 193 (Jowett trans., I. Edman, ed. 1956).

[88] HILARY PUTNAM, REASON TRUTH AND HISTORY 121 (1981).

[89] *Id.* at 123 (emphasis in original).

[90] *Id.* at 122.

[91] *Id.* at 121-24. *See also Donald Davidson, On the Very Idea of a Conceptual Scheme*, in RELATIVISM: COGNITIVE AND MORAL 66, 67 (Krausz and Meiland, eds. 1982) ("Different points

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Although often mistaken for cousins, the coherence theory deeply undercuts the relativist claim. For example, the idea that there are non-relative standards of coherence seems to support the ultra-objectivist claim that legal interpretation is at some level determinate because there are better and worse ways to put concepts together. Perhaps a cultural relativist would say that an objective standard of coherence does not refute *moral* relativism but provides the conditions for it.[92] The following section demonstrates, however, that the relativist challenge to human rights entails some additional objectivist assumptions which render it a disguised version of moral realism.

2. WHY RELATIVE TO CULTURE?

On the relativist theory, moral truth is relative to something; what I want to ask in this section is, relative to *what*? The so-called *cultural* relativist has one answer: moral truth is relative to the actor's culture. But how does she arrive at that answer? How, for example, does she reject the competing relativist ideas that truth is relative to an *individual's* motivations,[93] or Rorty's theory that truth is relative to the culture of the *evaluator*?[94]

I think that a moral relativist can neither avoid the question "*relative to what?*", nor answer it, and this failure is one reason why a genuine moral relativism is impossible. The relativist cannot avoid the question if, as I have argued above,

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of view make sense, but only if there is a common coordinate system on which to plot them; yet the existence of a common system belies the claim of dramatic incomparability.”).

[92] For example, one might argue that the relativist challenge to a universal right against sexual discrimination is no more impeded by the fact that people share a universal logic than by the fact that they share the powers of speech or sight.

[93] *See in fra* note ---.

[94] *See supra* note ---.

moral relativism amounts to the claim that *there is an end point of ethical concern in some cultural or other fact.* Neither a mere description of diversity nor a causal account of how people acquire their values can establish this claim.[95] Rather, the relativist must specify some class of circumstances -- culture, language, upbringing, or some other touchstone -- that *justifies* values.

But two problems confront any attempt to designate a framework that justifies or creates value. G. E. Moore described the first in his "open question" argument against what he called the "naturalistic fallacy".[96] Moore argued that value cannot be reduced to any natural fact, circumstance or sensation; for example, "good" cannot be reduced to whatever creates sensations of pleasure, because one can always ask whether a hedonistic life is really good.[97] The moral relativist, however, attempts to close Moore's open question by selecting cultural, psychological, linguistic or other *facts* which have a value-creating property, such that the culture's standards (for example) have normative weight while being themselves immune to normative questioning or criticism. And it is this characteristic of moral relativism that is disturbing in a way that a tragic choice of plural, incompatible values is not: by deriving an Ought from a contingent Is (such as the culture one happened to be born into), moral relativism denies us the possibility of a *full* inquiry into what we should value and who we should be.

The second problem with answering the question, "relative to what?", is that the relativist in particular has no basis for doing so. Is moral truth relative to

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[95] *See supra* notes --- and accompanying text.

[96] MOORE, PRINCIPIA ETHICA 10, 21 (1st paperback ed., 1959). The naturalistic fallacy is one version of what Hume described as attempting to derive an Ought from an Is. HUME, TREATISE ON HUMAN NATURE, Book III, Part I, Sec. I. *See also* R. M. Hare, *Universalizability*, 55 PROC. OF THE ARISTOTELIAN SOC'Y 295, 303 (1955) (discussing "Hume's Law").

[97] MOORE, PRINCIPIA ETHICA 81-90 (1st paperback ed., 1959).

culture? Or is moral truth instead relative to an individual's motivations, as in subjective relativism?[98] Consider Ruth Benedict's report that some tribes have regarded the cannibalizing of cherished individuals as a supreme act of tenderness,[99] a view incomprehensible in our own time and place except to a man like Jeffrey Dahmer. A subjective relativist will say that Dahmer may have "no reason" to refrain from eating his captive,[100] while a cultural relativist might have the resources to condemn him. I say *might* because the cultural relativist may need to further define the framework before she can say anything at all. If she is a

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[98] Whether subjective relativism should be considered a genuine form of relativism is complicated for two reasons: (1) as I explicate above, the very choice of a framework -- even an agent relative one -- is hard to square with relativism, and (2) someone might agree that actions in the abstract can be objectively wrong yet still provide a relativistic answer to the question of what a given individual has *reason* to do, based on the constraints of practical reason. On this view, rational action is limited to those choices the agent himself could come to see as supported by reasons. Arguments for this position are varied and complex, and include Gilbert Harman's analysis of "inner judgments" and Bernard Williams' analysis of "internal reasons"; a crude composite version to suit our purposes here might be rooted in the precept that "ought implies can", as follows:

The statement that person P has a reason to do phi is not simply a claim about value; it is a claim about rational action. What distinguishes a rational action statement ("P has a reason to do phi") from a simple value statement ("it would be better if P did phi") is the idea that the reason in some way could (if conditions were right) cause the agent to act in the manner recommended, and help to explain his action afterwards. So to be a "reason for P", the reason statement must be capable of motivating P to act. Whether this leads to relativism depends on whether you believe that there are some reasons, like Kant's categorical imperative, that can persuade all rational agents to, say, never break a promise. If you do not, but agree with Hume that reason is "slave to the passions" and can only facilitate pre-existing motivations, you will conclude that there are no reasons *simpliciter* but only reasons for him, her, you or me. On this view, one has a reason to keep a promise only insofar as it furthers pre-existing motivations to be honest, be respected, etc.

For arguments in this vein, *see* Gilbert Harman, *Moral Relativism Defended*, in 84 PHILOSOPHICAL REVIEW 3-22 (1975); Bernard Williams, *Internal and External Reasons,* in MORAL LUCK 101-113 (1981).

[99] Ruth Benedict, *The Uses of Cannibalism*, in AN ANTHROPOLOGIST AT WORK: WRITINGS OF RUTH BENEDICT 44, 45 (Margaret Mead, ed., 1959).

[100] *See, e.g.,* Gilbert Harman, *Moral Relativism Defended*, in 84 PHILOSOPHICAL REVIEW 3, 6-9 (1975). Harman cites the cannibalism case specifically, but distinguishes this first person "ought" statement from the question of whether certain actions are objectively wrong, about which he remains agnostic. *Id.* at 4-6.

member of Benedict's cannibalistic tribe, for example, she will have to decide whether to evaluate Dahmer according to her own cultural standards or American cultural standards. This is a choice between the ethnocentric and deferential versions of relativism -- what David Lyons calls "agent's-group relativism" and "appraiser's-group relativism".[101]

The choice among all these possible frameworks is, of course, one which cannot itself be relative to any framework. The "agent's-group relativist", for example, believes (absolutely) that rightness consists in conformity to the agent's cultural criteria. In this sense, "cultural relativism", "subjective relativism", and "appraiser's-group relativism" are all oxymorons; moral relativism disappears with the choice of a framework.[102] Moral relativism is thus a kind of mirage that always remains out of reach. Explaining why value resides in culture or any other particular framework invokes a single normative principle and moves toward moral realism; but avoiding a normative theory about what counts as a legitimate framework leaves only a descriptive report of diversity in what people take to be moral truths, and this is not what the moral relativist has in mind when she offers her theory as an alternative to nihilism, realism, and skepticism.

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[101] *See* David Lyons, *Ethical Relativism and the Problem of Incoherence*, in RELATIVISM: COGNITIVE AND MORAL 211 (Krausz and Meiland, eds. 1982). On the "agent's group" version, an act is right only if it accords with the norms of the agent's-group. On the "appraiser's group" version, a moral judgment is valid only if it accords with the norms of the appraiser's-group.

[102] When the relativist selects a particular framework as controlling, she effectively transforms conflicting standards into diverse circumstances that are relevant to a single standard. For example, if the French enjoy cuisine prepared with a delicate use of seasonings, and Indians prefer more robust flavors, the two cultures have different culinary standards. But the problematic issues of "relativism" do not arise because we accept the single norm that people should dine according to their own standards, which then serve as circumstances which result in varied application of this norm. Or consider the ethical theory of instrumentalism, which evaluates reasons for action in terms of the agent's present aims. Although instrumentalism is an agent-relative doctrine, it does not give the relativist what she needs because it privileges one moral norm -- that people should act in ways that further or facilitate their ends -- against all potential alternatives.

3. WHOSE CULTURE?

The kind of relativist who objects to human rights is the deferential ("agent's-group") cultural relativist -- not really a relativist at all at this point, but someone who has made a global judgment that rightness consists in conformity to the agent's cultural criteria. If we accept this objection, we must do so on the objectivist basis that cultures *should* be the final arbiters of their own practices. We need, in short, to become cultural absolutists, but even this is not enough: since cultures are not monolithic, further moral judgments are required. In Pakistan, for example, one finds no single, homogenous "Pakistani culture", but a diverse society that includes feminists currently organizing against certain Sharia laws. To these activists, a law requiring male corroboration of female court testimony violates womens' rights, Koranic principles, or both; but many other Pakistanis support the law. A cultural relativist can have nothing to say about such diversity of views unless she adopts some additional transcultural moral theory.

One way to handle the division of opinion within cultures is to say that whatever emerges constitutes that culture's moral truth: what is, should be. This is a decontextualized global judgment to end all judgment, a judgment in favor of the status quo. Rorty sometimes sounds like this kind of relativist, as when he says that people should reject moral objectivity in favor of solidarity with their community, and that insofar as they do, they will not "ask about the relation between the practices of the chosen community and something outside that community".[103]

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[103] RICHARD RORTY, OBJECTIVITY, RELATIVISM AND TRUTH 21 (1991). Joseph William Singer believes that in recent works Rorty has defined truth as co-extensive "with whatever beliefs become dominant in our society" and has identified "reason with the status quo." Singer, *Should Lawyers Care About Philosophy*, 1989 DUKE L. J. 1752, 1763. This is an accurate reading of the
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The cultural relativist can avoid this status quo theory only by relying on a transcultural theory of what constitutes the appropriate value-creating sub-culture. And when *this* choice is made, moral relativism becomes a detailed objectivist view from nowhere, no less ambitious in scope than the claims of moral realists. Margaret Radin provides one such attempt to combine progressive politics with perspectivist epistemology when she suggests that we identify the oppressed in each culture as the value-creating group:

> How can the pragmatist find a standpoint from which to argue that a system is coherent but bad, if pragmatism defines truth and good as coherence? ... One answer to the problem of bad coherence, which the pragmatist will reject, is to bring back transcendence, natural law, or abstract idealism. Another answer, which the pragmatist can accept, is to take the commitment to embodied perspective very seriously indeed, and especially the commitment to the perspective of those who directly experience domination and oppression.[104]

Despite its perspectivist packaging, Radin's proposal asserts a transcultural moral claim, namely that we can obtain the morally correct answer by deferring to the vision of those who know injustice best. In fact, this understates the extent of Radin's objectivism: one can only defer to the "perspective of the oppressed" by identifying oppression, which Radin implicitly assumes is a natural kind that is identifiable across cultures.

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many essays in which Rorty suggests that an ethnocentric preference for our present practices is a sufficient basis for commitment, *see supra* note ---, but his position on conventionalism is complicated by other comments opposing the search for "objective truths" as a way we "freeze over culture" by deluding ourselves into thinking we have discovered a final, privileged vocabulary. RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 377 (1979). Moreover, Rorty's own example is of someone who finds a great many practices in his own American culture worth changing.

[104] Margaret Jane Radin, *The Pragmatist and the Feminist*, in PRAGMATISM IN LAW AND SOCIETY 127, 136 (M. Brint and W. Weaver, eds. 1991).

The commitment Radin suggests -- to attend to the viewpoint of those who have been excluded and victimized -- is a crucial one, not because it is one more perspective but because it helps us discern the requirements of justice. Arguably, those on the bottom might possess an epistemic privilege resulting from a kind of dual vision: They are able to compare prevailing, legitimating ideologies with the realities of their lives, and thereby reveal injustices which would otherwise remain invisible to others.[105] But enhancing one's moral judgment by listening to excluded voices is quite different from relinquishing it in the manner Radin's somewhat ambiguous proposal suggests. If Radin means that morality just is the worldview of those classes we have identified as oppressed, her proposal is (like status quo cultural relativism) an undesirable form of procedural absolutism: it endorses whatever outcome emerges from these classes, regardless of content. We should think twice before *presuming* that the oppressed speak with one voice,[106] or that domination will never have a corrupting effect on the dominated, for example by leading them to misperceive their interests.[107] Nor should we presume that

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[105] *See, e.g.*, JAMES BALDWIN, THE FIRE NEXT TIME ("The American Negro has the great advantage of having never believed that collection of myths to which white American's cling...."); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C. R. - C. L. L. REV. 323 (1987); Patricia Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights,* 22 HARV. C. R. - C. L. L. REV. 401 (1987).

[106] Some feminists have been especially attentive to the problem of submerging class, racial and other differences in the course of trying to discern a distinctive female experience. *See, e.g.,* K. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 872-77 (1990) (questioning feminist "standpoint epistemology" for obscuring important differences among women); ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 4 (1988) ("[T]he real problem has been how feminist theory has confused the condition of [white middle-class women of Western industrialized countries] with the condition of all."); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (criticizing Catherine MacKinnon as a gender essentialist who ignores the varied perspectives of nonwhite, nonaffluent women).

[107] *See, e.g.,* ROBERTO UNGER, KNOWLEDGE AND POLITICS 243 (1975) ("Because of the fact of domination, moral agreement is often little more than a testimonial to the allocation of power in the group."). The related Marxist idea of false consciousness has played a major role in feminist

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oppressed groups are always innocent of sexism, racism, or other injustices. If Radin has the capacity to identify oppression in order to defer to the moral vision of its victims, she also has the capacity to identify oppressive practices *by* otherwise victimized groups, and "embodying their perspective" in such cases would surely be a moral mistake.

The idea of a value-creating group is a kind of straightjacket for moral judgment, which starts from an important insight and takes it too far. The insight is that moral evaluation is not merely a matter of applying rules, but must be more contextual and holistic. That a person seems rational is a reason to credit an act we might otherwise find inexplicable; that a person seems otherwise oppressed gives us a reason to pay heightened attention to all her views. But this is just evidence, not a proxy for judgment.

B. A PRAGMATIST'S DILEMMA: MAKING PERSPECTIVISM USEFUL

Neo-pragmatists such as Rorty and Williams also propose a perspectivist practice, but they disown the relativist dilemmas I have just described. I do not believe they have succeeded in developing a third way; in fact, they face an additional complication that I shall explore in this section. The complication is that these pragmatists seek to combine two ideas that do not mix well: (1) perspectivist theory and (2) the idea that propositions should "be tested by their

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analyses, *see e.g.* Catherine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence,* 8 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 635, 636 (1983) ("[T]he male perspective is systemic and hegemonic"). To claim that a class misperceives its interests is, of course, to posit a set of objective prudential ends. Thus, the claim that "objectivity" deludes people into thinking that unsavory practices are natural or necessary is not a *truly* perspectivist critique, but rather a realist argument designed to replace false beliefs with true ones.

consequences, by the difference they make -- and if they make none, set aside."[108] The pragmatists' dilemma is that, as I have been arguing, perspectivism is a formal theory that cannot be fashioned into a practice, precisely the kind of theory without consequence that should be "set aside". This threatens to make pragmatism unpragmatic -- self-defeating, or in T. S. Eliot's ironic description, true but "of no *use* to anybody"![109]

I do not mean to deny the significant pragmatist contribution to the anti-formalist project of making legal concepts serve social needs rather than frustrate them. But the *perspectivist* ideology that contemporary pragmatists emphasize is not useful to this project or any other, and this is where Eliot's witticism gets its bite. To see this, let us consider how Rorty and other perspectivists propose to apply their theory to practice.

For Rorty, truth is relative to *our* standards and practices. He is therefore an ethnocentric relativist, his disclaimers notwithstanding[110]. He also believes that we should revise our practices accordingly. On his program, we can continue to

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[108] Richard Posner, *What Has Pragmatism to Offer Law*, in PRAGMATISM IN LAW AND SOCIETY 35 (M. Brint and W. Weaver, eds. (1991)

[109] T.S. Eliot, *Francis Herbert Bradley*, in SELECTED PROSE OF T.S. ELIOT 196, 204 (Frank Kermode, ed. 1975) (emphasis in original).

[110] Although Rorty explicitly embraces ethnocentrism (*see supra* note ---), he balks at the relativist label on ground that he and other pragmatists have no "theory of Truth or Goodness." RICHARD RORTY, CONSEQUENCES OF PRAGMATISM xiv (1982). But anyone who wants to continue using such concepts as "truth" and "value", as Rorty does, can *only* do so according to some theory, and as the quotations in the paragraph above show, Rorty's theory is relativist. If Rorty had no theory of truth but merely wished to make the point that we have no choice but to accept our own cultural criteria, he would accept them wholesale, including our Enlightenment values of rationality and universality. But Rorty's proposals to change our ethical vocabulary are revisionist, and they are revisionist *only* because of their relativist content.

Others have also found Rorty's disclaimer unconvincing. *See* HILARY PUTNAM, REASON, TRUTH AND HISTORY 216 (1981) (characterizing Rorty's view as "self-reflecting relativism"); Brian Leiter, *The Middle Way,* 1 LEGAL THEORY 21, 23 (1995).

describe an assertion as "true" provided we understand that this does not imply an "accurate representation of reality" but merely connotes compliance with our local criteria of justification.[111] Similarly, Rorty would have us redefine "morality" as a summary of our practices, not a justification for them,[112] "irrationality" as deviation from the community,[113] and so on. Does this practice constitute a viable and promising alternative to objectivist discourse? Should we seek to discern truth by reference to a mediating, ethnocentric framework?

One response might be: How can we *not* discern truth through our own cultural framework? But this would misconstrue the question, which is whether we should *identify truth as*, and *aim for*, some kind of cultural correctness. This is the upshot of Rorty's proposal, as he recognizes when he notes that it would make it "impossible to ask the question, 'Is ours a moral society?'"[114]

A better response would be that we have no reason at all to shackle our judgment in this way, nor can we. We are necessarily concerned with the validity of our judgments, not just with their conformity to a cultural framework. Hilary Putnam claims that "it is a presupposition of *thought itself* that some kind of objective 'rightness' exists."[115] And this puts perspectivist theory beyond the reach

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[111] *See* RICHARD RORTY, OBJECTIVITY, RELATIVISM AND TRUTH 22-30 (1991).

[112] RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 58-59 (1989).

[113] RICHARD RORTY, OBJECTIVITY, RELATIVISM AND TRUTH 199 (1991) (declaring that irrationality should be understood as "behavior that leads one to abandon, or be stripped of, membership in [one's] community").

[114] RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 59 (1989). *See also* RICHARD RORTY, OBJECTIVITY, RELATIVISM AND TRUTH 21 (1991) (arguing that if people embrace solidarity with their community, they will not "ask about the relation between practices of the chosen community and something outside that community").

[115] HILARY PUTNAM, REASON, TRUTH AND HISTORY 124 (1981) (emphasis added); *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 290 (1977) ("It may be that the supposition that one side may be right and the other wrong is cemented into our habits of thought at a level so

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of anyone who would act on it. Perspectivist theory tells us that truth is dependent on the identity of idiosyncratic knowers, and this makes the most fundamental distinctions we rely on -- between knowledge and belief, impartiality and bias, and justice and domination -- incomprehensible.[116]

People who suggest we *can* apply perspectivist theory to practice, that we *can* act on it, commit a fallacy Stanley Fish calls "antifoundational theory hope".[117]

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deep that we cannot coherently deny that supposition, no matter how skeptical or hard-headed we wish to be in such matters.").

[116] *See* Robert J. Lipkin, *Can American Constitutional Law Be Postmodern?,* 42 BUFF. L. REV. 317, 323, 326 (1994) (construing postmodern antifoundationalism as denigrating the roles of truth, reason, normativity, and methodology). Donna Haraway has described the corrosive effect of a perspectivism without limits as a kind of "epistemological electro-shock therapy, which far from ushering us into the high stakes table of the game of contesting public truths, lays us out on the table with a self-induced multiple personality disorder." Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective,* 14 FEMINIST STUDIES 575, 578, 583-90 (1988) (arguing for a third way beyond objectivism and relativism). Interestingly, a recent study has pursued this point quite literally, questioning the postmodern vision of multiplicity and fragmentation as "liberating" by exploring the shattered lives of women who actually live that way -- women with multiple personalities. James Glass, SHATTERED SELVES: MULTIPLE PERSONALITY IN A POSTMODERN WORLD (1993).

[117] Fish is a committed perspectivist, but his real passion seems reserved for his claim that perspectivist theory lacks any practical consequence. Fish believes that perspectivist theory is limited in scope to addressing the theoretical issues that comprise its tradition, and therefore has no consequences for any practices other than the practice of theorizing. For Fish, *meta*-ethical positions (such as relativism and realism) are irrelevant to ethical questions, just as literary theories about the nature of interpretation cannot be a resource for the practice of interpretation. *See* Stanley Fish, *Is There a Text in This Class?,* in IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 303, 319 (1980) ("[W]hile relativism is a position one can entertain, it is not a position one can occupy."). *See also infra* notes --- and --- and accompanying text. Fish details his "no consequences" thesis in such essays as *Consequences, Dennis Martinez and the Uses of Theory,* and *Anti-Foundationalism, Theory Hope, and the Teaching of Composition,* all collected in STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989); *Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin, in* PRAGMATISM IN LAW AND SOCIETY, *supra note --- at* 47; and *The Law Wishes to Have a Formal Existence,* in THERE'S NO SUCH THING AS FREE SPEECH AND ITS A GOOD THING TOO 141 (1994).

Although I share Fish's skepticism about the practical benefits of antifoundational theory, I believe he fails to recognize that *foundationalist* theories and practical reasoning are often

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One might also diagnose the problem as a "category mistake" which conflates two alternative views of human action -- the views from "inside" (*doing* it) and "outside" (*observing* it). When perspectivists urge us to treat truth as a "compliment" paid to beliefs we accept,[118] and recognize that there is no difference between objective representation and biased interpretation, [119] they speak as observers, as a sociologist studying cultural behavior might. From this standpoint, it is true that subcultures have highly diverse views of what constitutes the "truth"; one might therefore say that there is no impartial View from Nowhere, no neutral baseline, only alternative social constructions. From the external standpoint, one sees predictable patterns of behavior, not autonomous subjects capable of transcending history through reason. [120] But this view has no "cash value" for the

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necessarily intertwined. As I suggest in this Article, a court dealing with the issue of a Christian Scientist's criminal responsibility for neglecting medical treatment of her child, or a human rights advocate confronting clitoridectomy, has no alternative but to deal with the question of where culture ends and moral imperatives begin, and this is the same issue foundationalism seeks to address. Trying to be impartial in such cross-cultural situations leads one to the metaethical level, see *supra* note --- [[[---footnote quoting MacIntyre, # 68 in galley]]]. Other examples of the entanglement of practice and theory abound in law, such as the link between theories of free will and the recognition of criminal excuses, or the link between theories of textual interpretation and the authority granted to the judiciary.

[118] Richard Rorty, *Solidarity or Objectivity?*, in POST ANALYTIC PHILOSOPHY 7 (J. Rajchman and C. West, eds. 1985).

[119] Gary Peller, *Reason and the Mob: The Politics of Representation,* in TIKKUN: AN ANTHOLOGY 163, 165 (Michael Lerner, ed. 1987). *See also* James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003, 1051-2 (1985) (arguing that reasons are merely tropes which can always be countered by their opposites).

[120] According to Steven Winter, this is a central lesson of postmodernism and its deconstructive method, which attempts to

> decenter the conventional conception of the self as an originary, autonomous agent by stressing its dependence on the conventional systems of signification. The whole point of this gambit is to explode the subject's sense of self as the self-directing author of its practices and expose the subject as but a contingent incident of those ongoing practices.

S. Winter, *Human Values in a Postmodern World*, 6 YALE JOURNAL OF LAW & THE HUMANITIES 233, 241-42 (1994).

agent *making* the decision. For instance, a good-faith juror will see her task as truth-seeking rather than as "playing out her cultural identity," because however sociologically accurate, the latter behavioral conception does not capture decisionmaking from the *agent's* perspective or provide any normative basis for it. [121] (This is why we think it important *both* that juries comprise a cross-section of the community *and* that jurors seek to put aside their biases.) Thus the idea that we cannot overcome our positioned perspective and make legitimate impartial judgments *is theoretical only*: the practices of both judgment and justice are deeply rooted in the belief that we can. Indeed, the very attraction of the perspectivist view lies in the unacknowledged hope that it will prompt us to do what it says we cannot: become aware of our own partiality in order to transcend it. [122]

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[121] Perspectivists should recognize this no less than moral realists because they place so much emphasis on the idea that a "conceptual scheme" -- a background normative understanding -- is a necessary precondition of knowledge and evaluation. Both moral realists and perspectivists usually agree that evaluation requires a background normative theory but differ in characterizing its status. For a moral realist, the important question about a normative theory is whether it is true. For a perspectivist, the background theory may serve as a "conceptual scheme" which generates particular truths or values, but the scheme is itself the contingent product of circumstance and can be neither true nor false. *That each culture has a different normative framework does not mean, however, that a culture can do without one.*

Applying this point to legal doctrine, Roberto Unger has recognized that

> [e]very branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals....Without such a guiding vision, legal reasoning seems condemned to a game of easy analogies. It will always be possible to find, retrospectively, more or less convincing ways to make a set of distinctions, or failures to distinguish, look credible.

ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 8-9 (1986). For Unger, the incompatibility of this coherent world view with doctrinal precedent is one reason legal formalism has failed. *Id.* at 8-11.

[122] Consider whether perspectivists are seeking to accomplish something different than what Thomas Nagel describes as the pursuit of objectivity:

> [W]e can raise our understanding to a new level only if we examine that relation between the world and ourselves which is responsible for our prior understanding, and form a new conception that includes a more detached understanding of ourselves, of the world, and of

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Admittedly there are deep imponderables here, stemming from the fact that both the internal and external viewpoints generate competing explanations for any given decision -- as when advocates explained the recent O. J. Simpson acquittal as a rational application of the reasonable doubt standard and opponents attributed it to the racial composition of the jury.[123] But we need not delve into this well-worn philosophical controversy to be able to say, with certainty, that the external, behavioral standpoint can never wholly substitute for the rational-normative one, or justify discarding ideals like validity, accuracy and impartiality.[124] Each is appropriate to a different task. To see this one need only try to *apply* Rorty's advice to "treat *everything* -- our language, our conscience, our community -- as a product of time and chance [and] *treat chance as worthy of determining our fate*".[125] We cannot reduce decision*making* to behavior in this way.[126]

> the interaction between them. Thus objectivity allows us to transcend our particular viewpoint and develop an expanded consciousness that takes in the world more fully. All this applies to values and attitudes as well as to beliefs and theories.

THOMAS NAGEL, THE VIEW FROM NOWHERE 5 (1986).

[123] *See, e.g.,* Alexander Cockburn, *Beat the Devil, in* THE NATION *491-92* (Oct. 30, 1995) (attributing the acquittal to reasonable doubt); Jacob Weisberg, *The Truth Card,* in NEW YORK 33 (Oct. 16, 1995) (attributing the acquittal to racial composition); Janet Elder, *Simpson Trial Leaves Public Racially Split,* NEW YORK TIMES B9, (Oct. 2, 1995) (reporting poll results showing blacks far more likely to believe Simpson innocent than whites).

[124] As Leszek Kolakowski has written,

> My act of affirming the judgment that 2 + 2 = 4 is causally determined, but it would be absurd to say that the truth of this judgment is causally determined. Otherwise we should be forced to admit that truth arises in the act of its being thought or that Pythagoras' theorem became valid only at the moment when it was uttered by Pythagoras.

LESZEK KOLAKOWSKI, HUSSERL AND THE SEARCH FOR CERTITUDE 19 (U. of Chicago Press Edition, 1987).

[125] RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 22 (1989) (second emphasis added).

[126] Jerry Frug provides a perfect example of this difficulty when he suggests that we view legal argument as an example of rhetoric:

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In short, perspectivist theory cannot be practiced because it rejects the agent's perspective, and one cannot act from any other. No amount of information that we are "really" social constructs can change this; we put the social construction thesis aside the moment we ask whether the construction in progress is the right one. We can hardly avoid asking this sort of question -- some philosophers believe personhood is *defined* by an insistence on asking it[127] -- and to

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> A rhetorical analysis of legal argument involves examining its elements, such as facts, precedents, and principles, not in terms of how they support the argument's conclusion but in terms of how they form attitudes or induce actions in others.

Jerry Frug, *Argument as Character,* 40 STAN. L. REV. 869, 872 (1988). In this excerpt, Frug substitutes the external observer's viewpoint for the actor's viewpoint, because like many perspectivists, he finds the idea of an "autonomous choosing self" theoretically indefensible. But to ask the actor to foresake this role is tantamount to asking her to destroy her own agency. (There is, of course, an analogous problem for the determinist arguing against free will, for no causal account can ever finally dislodge the agent's *experience* of free will.) In Charles Taylor's words, "the attempt to separate out a language of neutral description, which combined with commitments or pro/con attitudes might recapture and make sense of our actual explanations, analyses, or deliberations leads to failure and will always lead to failure". CHARLES TAYLOR, *Explanation and Practical Reason,* in PHILOSOPHICAL ARGUMENTS 39 (1995) (arguing against naturalistic reductionism and for a "phenomenological" focus).

On the subject of the internal and external viewpoints, *see also* J. M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE LAW JOURNAL 105, 110-11 (1993) ("[W]e must ground jurisprudence in a critical perspective....Instead of taking for granted the primacy of the internal viewpoint of participants in the legal system, a critical perspective asks how this internal experience comes about"); Felix Cohen, *The Problems of a Functional Jurisprudence,* 1 Mod. L. Rev. 5, 17 (1937) (distinguishing between predictive and normative answers to the question, what is law?); RONALD DWORKIN, *On Interpretation and Objectivity,* in A MATTER OF PRINCIPLE 167, 171-77 (1985) and LAW'S EMPIRE 78-86 (1986) (both arguing that only the agent's internal viewpoint can elucidate legal interpretation); Thomas McCarthy, *Private Irony and Public Decency*, in 16 CRITICAL INQUIRY 355, 365 (Winter, 1990) (criticizing Rorty for adopting the external standpoint); and IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 118-121 (H. J. Paton, trans., 1964) (describing the alternative standpoints of human beings as free agents and human beings as natural entities subject to causal laws).

[127] Harry Frankfurt makes this claim in his celebrated essay *Freedom of the Will and the Concept of a Person*, 68 JOURNAL OF PHILOSOPHY 5-20 (1971). Frankfurt equates personhood with the presence of what he calls a "second order volition" -- a desire to have a particular desire prevail as his will. He calls those without second order volitions, such as animals, very young children, and certain adults, "wantons". *Id.* at 5. One can easily understand Franfurt's point by imagining the case of the "soma bath", a device which provides complete satiety and as such is instrumentally

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formulate an answer, we require a language of evaluation that is not confined to diagnosing the play of social and psychological forces but that stands apart from them. For this reason, the agent's vocabulary is always a moral realist one that presumes that there are values worth valuing and truths to be discovered.

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But this does not exhaust Rorty's program, and some might say that I have misconstrued it by focusing on its ethnocentric aspect rather than its more pragmatist one. For example, Rorty wants us to reconceptualize truth as, inter alia, "'what we will believe if we keep inquiring by our present lights' *or* 'what it is better for us to believe'..."[128] These are not equivalent criteria, which creates its own problems of practice; but in any event, does not focusing on the second definition rather than the first yield a viable, agent-centered antifoundational practice?

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and hedonistically a complete success. Yet this is not a life worth living; it is not a human life at all because the soma bath eliminates the teleology of living and therefore is wholly incompatible with personhood. By this I mean that people conceive their lives as having qualitative dimensions; they are value-seekers who do not take their identities and motivations for granted but question whether they are the right ones. Thus a person may identify with some desires and consider others compulsions to be overcome through psychiatry, religion, or will. *See also* Charles Taylor, *Responsibility for Self*, in FREE WILL 110, 112 (G. Watson, ed. 1982) (distinguishing between "weak evaluations," in which I evaluate an object according to how well it fulfills my desires, and "strong evaluations," which take place at a non-instrumental, second order level -- essentially, what desires should I have?); THOMAS NAGEL, THE VIEW FROM NOWHERE (1986) (investigating the method of and prospects for attaining a view from no particular perspective).

[128] RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 308 (1979) (emphasis added). Rorty has argued that we unify theory and practice by "thinking of our beliefs as rules for action -- tools for getting what we want --rather than as accurate or inaccurate representations of reality, or as candidates for unconditional validity." R. Rorty, *Truth and Freedom: A Reply toThomas McCarthy*, 16 CRITICAL INQUIRY 633, 641 (1990).

Many perspectivists say that it does. They believe that truth and justice are at least partly matters of choice[129], and find this picture "tremendously liberating" because it frees us from "constraints placed on social life by a relatively unchanging human nature" and other contingencies misperceived as necessary.[130] This is the alternative, optimistic version of the social construction thesis: on this interpretation people are causes rather than effects, creators of their future rather than captives of their past. Therefore, some pragmatists and postmodernists say, we should choose our truths according to their usefulness.

Were we to try to construct our truths, however, we would find that we are moral realists after all, for two reasons. First, we cannot *will* our beliefs, but believe what we think to be true.[131] Second, choosing beliefs according to their "usefulness" is an illusory, impossible form of instrumentalism. Instrumentalism cannot be a goal in itself; we cannot measure usefulness without reference, implicitly or explicitly, to goals that raise prudential or ethical issues, not

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[129] Joseph William Singer, *Should Lawyers Care About Philosophy*, 1989 DUKE L. J. 1752, 1757. *See also* Jerry Frug, *Argument as Character,* 40 STAN. L. REV. 869, 923 (1988)(asserting that people decide by "a process of interpreting and creating oneself and one's society--an aspect of forming one's character"); Joan Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WISC. L. REV 131, 139 (arguing that ethical choices offer an opportunity to find out who we want to be).

[130] Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1402 (1984).

[131] Legal pragmatists and postmodernists sometimes suggest that we can only "take responsibility" for our ethical convictions if we invent them. Joseph W. Singer, *Should Lawyers Care About Philosophy*, 1989 DUKE L. J. 1752, 1757; Mark Tushnet, *An Essay on Rights*, 62 Texas L. Rev. 1363, 1402 (1984). This seems to be a Reaganesque Iran-Contra notion of responsibility, devoid of any idea that one might have made the *wrong* choice. Bernard Williams discusses the theory that ethical convictions must be based on a conscious decision to adopt certain principles, or live in a certain way, in his book ETHICS AND THE LIMITS OF PHILOSOPHY (1985): "This cannot be right because ethical conviction, like any other form of *being convinced*, must have some aspect of passivity to it, must in some sense come to you....[Those favoring the decision model say] we must face the responsibility and take up the burden of making those decisions. This ignores the equally obvious point that if ethics is a matter of decision, and we are uncertain, then we are uncertain what to decide." *Id.* at 169-70 (emphasis omitted).

instrumental ones. To ask whether enunciating a human right against enslavement is *useful,* for example, inevitably invokes the additional question of whether it is in some way *true* that, in the Enlightenment phrase, every human being has certain inalienable rights. Nor can we decide whether Nazi war crimes trials are useful without considering the nonutilitarian issues of retributive justice and the claims of history. These cases illustrate that pragmatic instrumentalism does not obviate objectivist inquiries but is parasitic on them: We still need to ask what consequences we should value. And this leads us back to precisely the "metaphysical" vocabulary Rorty had hoped to avoid, evaluating objectivist claims about human needs, human dignity, deontology, and moral obligation. Rorty can no more obviate these questions than could his utilitarian forebears, who also sought refuge from metaphysical uncertainties in a kind of instrumentalism.[132]

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[132] Rorty traces the definition of truth as "what it is better to believe" to Mill and the utilitarians, *See* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 308 (1979), and the relationship between Rorty's postmodern pragmatist program and the utilitarian one is worth some comment. Both Rorty and the utilitarians invoke instrumentalism because it is action-guiding yet posits no metaphysical claims. Instrumentalism constitutes a hypothetical imperative: If you want x, do y. There are no metaphysical imponderables here, *as long as one's goal is taken as a given*: One is naturally motivated to find the most efficient means to his ends, and what constitutes the best means is a factual question. The utilitarians drew a sharp Humean distinction between this kind of procedural rationality based on pre-existing desires and the much more contestible conception of substantive rationality, which posits independently existing values that can somehow motivate us regardless of our present inclinations. *But see* HILARY PUTNAM, THE MANY FACES OF REALISM 80-85 (1987) (arguing that means-ends rationality poses the same epistemic problem as substantive rationality).

In its classical Benthamite version, utilitarianism sought to avoid privileging any particular values by accepting every individual's desires as equally worthy, and relevant only insofar as they were means of personal gratification. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 102 (Lafleur ed., 1948). Building on instrumental rationality, this theory posited a goal -- "the greatest happiness for the greatest number" -- and thereby tried to convert all further questions of choice into scientific inquiries about utility, uncontaminated by value judgments. Id. at 29-32. But by positing a single hedonistic end, by treating all subjective experience as qualitatively fungible, and by assuming a formal mathematical calculus that allowed for the simple "totaling" of "amounts" of happiness without regard to its distribution, these utilitarians were both making global ethical judgments and, some might say, concealing them by placing them in a black box called "utility".

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Where are we then? We have two opposing positions on the quest for an objective, transcultural morality. To perspectivists, the objective view is a View from Nowhere that no human being can achieve: We all see from *somewhere,* and even if we could see the world innocently, all we would see is diversity, not some pre-interpretive moral or rational order. To Rorty and many others, this means we should abandon the fruitless attempt to "escape from humanity" into the mind of God[133], and look instead to our community and its history as the basis of ethical practice.

But perspectivists overlook the fact that questions of intrinsic, non-contingent value are an irreducible part of our lives, neither dependent upon meta-ethical proof by moral realists nor eradicable by perspectivist refutation. Transcultural questions *are* human questions; not an escape from the world but an effort to live better within it. To recognize this is to see that the exorbitant

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Rorty's particular twist is to finish the anti-metaphysical project that the utilitarians only started. In order to avoid essentialist assumptions about inherent human needs or a natural moral order, he has removed the hedonistic and distributional assumptions of the utilitarians. Instead, his postmetaphysical pragmatist practice combines instrumentalism with *self-creation.* It is on this amalgam that the project derails: Rather than gauge usefulness by a presupposed goal to be served, Rorty would have us assess the goal by its usefulness. It is difficult to imagine any instrumentalist vocabulary for this project -- any instrumentalist vocabulary that can avoid the question, "useful for what?"

[133] RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 308, 377 (1979). *See also* MAURICE MERLEAU-PONTY, *The Philosopher and Sociology,* in SIGNS 98, 109 (R. McCleary trans. 1964) ("As long as I cling to the ideal of an absolute spectator, of knowledge with no point of view, I can see my situation as nothing but a source of error. But if I have once recognized that ...[history] contains everything which can exist for me, then my contact with the social in the finitude of my situation is revealed to me as the point of origin of all truth, including scientific truth.")

demand to "step outside of our humanity" is actually issued by perspectivists who want us somehow to depart the normative world for a different one -- a world of causes, not reasons, where people stop saying things like "I'm against apartheid because it's unjust" and start saying things like "I'm against apartheid because I'm a twentieth-century American."[134]

I doubt that we can manage this escape from normativity, and I have tried to show that perspectivist proposals are so divorced from the human experience of agency and choice that they cannot be practiced. This should be of great concern to its pragmatist proponents, who believe that propositions should be tested by the difference they make -- "and if they make none, set aside."[135] Redefining objective principles as "principles people accept" or as "inventions" fails this test. Legal pragmatists should continue their useful, concrete efforts to challenge the calcification of law and ethics. They just need to beware of a pragmatist pitfall

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[134] Rorty would surely disagree with this characterization, and has explicitly denied that his program banish reasons and moral claims from our conversations or result in loss of agency. *See, e.g.,* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 385-86 and 388-89 (1979); CONTINGENCY, IRONY AND SOLIDARITY 59 (1989); Richard Rorty, *Putnam and the Relativist Menace*, 90 JOURNAL OF PHILOSOPHY 443, 444-5 (1993). My claim, however, is that he makes this discourse unrecognizable and useless by stripping rationality and morality of all normativity. As we have seen, for Rorty whatever justification reasons provide comes not from their content but from their function in a culture's discourse. And "treating chance as worthy of determining our fate" is far from an agent's view of action or evaluation.

Rorty's difficulty is that he straddles two self-defeating and irreconcilable positions: If his perspectivism does not have any practical import, it is a theory without pragmatic "cash value"; but if his perspectivism does demand that everyday vocabulary be revised to eliminate the transcendent, it renders our agent-oriented discourse unusable and is thus unpragmatic in a different way. Consequently, we find both positions often represented and often retracted in Rorty's works. The predominant thread, however, seems to be the revisionist one I have opposed in this article.

[135] *See supra* n. ---

Stanley Fish has identified: the mistake of thinking that "a description of a practice has cash value in a game other than the game of description."[136]

IV. IS IMPARTIALITY AN ILLUSION?

Perspectivists tell us that moral issues are only intelligible "within the precincts of the...paradigms or communities that give them their local and changeable shape." [137] In the preceding sections, I have questioned whether this thesis teaches us anything about the universal human rights claim. As a theoretical matter, it is simply a *nonsequitur* to conclude that the thesis requires us to abandon the idea that every person has certain moral rights. As a practical matter, the thesis that our commitments are produced through an historical process can never tell us what commitments we should have.

Most importantly, recognizing the fact that cultures produce diverse value systems does not obviate the question of how to deal with conflicts between them. For people who see this as an *ethical* question, it is important to reach a resolution that is morally justified and not simply a form of domination or cultural imperialism. I have argued that perspectivist theory cannot help elucidate this

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[136] Stanley Fish, *Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin,* in PRAGMATISM IN LAW AND SOCIETY, 47, 67 (M. Brint and W. Weaver, eds. 1991) (asserting the impossibility of a "pragmatist program"). Fish adds:

> [Y]ou certainly can't go from a pragmatist account, with its emphasis on the ceaseless process of human construction and the endless and unpredictable achieving and reachieving of conversational objectivity, to a brave new world from which the constructions have been happily removed. Indeed, if you take the antifoundationalism of pragmatism seriously...you will see that there is absolutely nothing you can do with it.

Id. at 63.

[137] STANLEY FISH, DOING WHAT COMES NATURALLY 344 (1989).

question because it makes these ethical stakes unintelligible. Someone who rejects the idea of an impartial standpoint as transcendental nonsense can describe the difference between a Jim Crow law and a civil rights law only in terms of whose ox is gored, not in terms of legitimate and illegitimate power, or justice and injustice, because these claims purport to be non-perspectival. For someone who seeks to discover a just resolution across diverse viewpoints, perspectivism can be of no help.

But obviously this argument against perspectivist theory does not establish that any particular human rights claim is true or can be true; and it may seem that by focusing on the individual actor's *experience* of impartial evaluation, I have evaded the perspectivist thesis entirely. For according to perspectivist accounts, this experience is illusory. As Stanley Fish says, everyone experiences her "convictions as universally, not locally, true....[E]ven though the self-reflective clarity of critical self-consciousness cannot be achieved, the experience of having achieved it is inseparable from the experience of conviction."[138] So on this view, if I believe that there is nothing subjective or perspectival about the injustice of the Jim Crow laws, it is only because I am in no position to understand the partiality of my own perspective.

As Fish recognizes, there is hardly anything to do with his thesis *except* ignore it. If human beings have no choice but to believe that there are universal truths, then (1) this thesis can have no effect on our practice, as I have argued; and (2) an awkward question arises as to who *does* recognize that our universal

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[138] STANLEY FISH, DOING WHAT COMES NATURALLY 467 (1989). Fish argues that the difference between "acting impartially" and acting in the name of one's preferences is that they are "different forms of interest-laden behavior -- of behavior that is possible and intelligible only within the context of some interested, non-neutral vision -- and not between interested behavior and something else....[To act impartially is to] act within and as an extension of an interpretive and therefore partial notion of what being impartial means." *Id.* at 439.

truths are "illusions". One is tempted to dismiss Fish's claim as a form of philosophical spin-doctoring -- a phantom theory which leads nowhere.[139] But suppose a perspectivist really presses the point that, whatever our aspirations, we can never discover a truly impartial, transcultural resolution to cultural conflicts because there are none. She says that "justice" is anything a culture chooses to make of it, and it has meant very different things to contemporary Americans, antebellum slaveholders, and the justices who endorsed segregation in *Plessy v. Ferguson.*[140] Does not the human rights advocate have to deal with the perspectivist critique -- not simply by deconstructing it, but by affirmatively showing that her human rights claims are privileged and truly universal?

She does try to show this, but not in a way the perspectivist can accept: She makes a moral argument for her claim. To support a claim that female genital

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[139] Fish presents the most paradoxical and inert version of antifoundationalism, one which constantly threatens to make the whole issue incoherent. Fish's statement above has two implications. *First*, it seems to leave perspectivist theory claiming a kind of inaccessible and objective status for itself. The theory is inacessible because, if people always mistakenly experience their convictions as universally true, it would seem that one can *speak* perspectivist theory but never really believes its claims about one's own convictions. And perspectivist theory claims objectivity because, if we grant the theory is valid in some way, then it is valid for everyone, regardless of their individual or collective contrary views. *Second*, on Fish's rendition we have no choice but to build on our situated perspectives, which happen to presume that there are objective and universal truths. These are all odd features in a theory which suggests that we stop thinking that there can be any such God's eye view.

Fish's anti-foundationalism leads into a Hall of Mirrors that other perspectivists have tried to avoid by showing both that it is possible to recognize the thesis as true and that this knowledge can be liberating. *See, e.g.,* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1402 (1984) (asserting that it is "tremendously liberating" to recognize "that nothing is necessary, that everything is contingent, [and] that I need not resign myself to how things are..."); Kathryn Abrams, *The Unbearable Lightness of Being Stanley Fish,* 47 Stan. L. Rev. 595 (1995) (tracing the normative programs of feminists and others to antifoundationalist insights). My own view is that anti-foundationalist theory, properly understood, has no legitimate consequences for practice (which is not to say that it can't lead people on a wild goose chase) *and* that this is a reason to doubt its intelligibility. *See also supra* note --- (discussing Fish's view that theory has no consequences for practice).

[140] 163 U.S. 537 (1896).

mutilation violates a human right, she might rely on a conception of human nature or a social contract theory, or use analogies and syllogisms, or appeal to intuitions and the implications of settled convictions, or cite higher order principles such as the golden rule, and so on. But apart from the fact that each of these elements is potentially suspect on general perspectivist principles,[141] a perspectivist would say

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[141] To illustrate, here is a partial inventory of stock perspectivist objections to the use of these techniques:

(1) *Re appeals to human nature:* The postmodern view of the self as wholly contingent and socially constructed poses an anti-essentialist challenge to the human rights claim by denying that there is any common quality intrinsic to humanity at all, including "human dignity" warranting protection. *See* RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 189 (1989). (since there is no "core self", there are no actions that are naturally 'inhuman'."). *Compare* J. M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131, 1143 (1994) (arguing that we can use deconstruction to *expand* the category of those deserving just treatment to include animals). According to Tzvetan Todorov, "it is not possible, without inconsistency, to defend human rights with one hand and deconstruct the idea of humanity with the other." T. TODOROV, LITERATURE AND ITS THEORISTS 190 (1987).

(2) *Re higher order principles:* This approach is equally objectionable to the perspectivist, this time because it is too "thin" and abstract. Principles of justice can only be premised on some vision of what constitutes a good life, so we are naive to think that we can "bracket" subjective value preferences and derive a non-controversial, neutral and universal framework of rights. For example, there is no abstract way to choose between free speech and censorship of pornography without reference to some contestable vision of human flourishing. This is the problem with liberal theories of justice, such as Rawls' claim that we can derive principles of justice by imagining ourselves in the "original position", cloaked in a veil of ignorance about our actual life circumstances. JOHN RAWLS, A THEORY OF JUSTICE (1971).

Moreover, to seem neutral, abstract principles must be framed in so general and vague a way that they become wholly indeterminate and empty. They have no integrity; they can serve only as a political battleground. *See, e.g.,* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND ITS A GOOD THING TOO 102, 114 (1994) ("abstract concepts like free speech do not have any 'natural' content but are filled with whatever content and direction one can manage to put into them .... [S]o long as so-called free-speech principles have been fashioned by your enemy...,contest their relevance to the issue at hand; but if you manage to refashion them in line with your purposes, urge them with a vengeance.").

(3) *Re appeals to syllogisms and analogies:* The perspectivist insists that there are no essenses to things, and therefore no natural "likenesses". All analogies are theory-laden cultural constructs and therefore politically controversial. Syllogisms fail for the same reason: Indeterminacy prevents us from knowing whether a given case fits within or outside of the general principle. We should recognize that analogies are constructed and therefore choose them according to our social needs. *See* Unger, *supra* note ---, at 8-9.

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that even the most powerful moral argument begs the question, for the salient issue is whether the power of such arguments arises from their truth or is illusory. But there can be no proof on *either* side of this issue. As Dworkin says, there are "no arguments for the objectivity of moral judgments except moral arguments...[W]e can give no sense to the idea that there is anything else we could do in deciding whether our judgments are 'really' true."[142] Moral objectivity is not a metaphysical "fact" whose existence can be corroborated or refuted by *non-moral* evidence. This means that the choice between moral realism and perspectivism is a matter of faith, or in legal terminology, a matter of which presumption one accepts: We either presume moral argument refers to something real, or we do not. To illustrate this, let us examine an example that perspectivists often cite as evidence supporting their claim: the difficulties in applying the objective "reasonable person" standard to legal cases. The example really shows that we read our presumptions about the fruitfulness of moral argument *into* the reasonable person controversy.

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(4) Re *appeals to social needs:* Our social needs are themselves matters of political choice, for there is no privileged, impartial way to reconcile the diverse claims of various groups within a society -- for example, no "natural" or essential human nature by which some needs could be declared subordinate to others.

Similarly, appeals to intuition may be challenged because they are contingent cultural constructs that seem to be natural and necessary but could be otherwise. *See* Tushnet, *supra* note --- at 1402. On the other hand, the perspectivist also challenges attempts to transcend cultural conventions with "extrahistorical" claims because "the problem of values is one of learning to rediscover their locus in our practices and commitments." S. Winter, *Human Values in a Postmodern World*, 6 YALE JOURNAL OF LAW & THE HUMANITIES 233, 248 (1994).

Many of these rejoinders may be exactly right when applied to a particular moral argument. People often do assert a false stereotype as necessarily true, or speak of contestible social needs as if they were universal. The problem arises when these critiques are marshalled with formalistic abandon because, despite their incompatibility with each other, they are thought to *apply with equal force to* every *moral argument.*

[142] RONALD DWORKIN, *On Interpretation and Objectivity,* in A MATTER OF PRINCIPLE 171, 172 (1985). There is no possible inquiry which could tell us whether moral claims can ever *be*, rather than merely *seem*, impartial and objective, and most of the controversies addressed herein derive from this fact.

Jurors applying the reasonable person standard are less involved in finding facts than in moral reasoning, and they often confront the same issues of legitimacy and cultural imperialism that face the human rights advocate.[143] There is no ready-made reasonable person, but only very particular people, and we wonder which of these should be elevated as the norm and why. Suppose that a parent is charged with involuntary manslaughter based on his criminally negligent failure to seek life-saving medical care for his child.[144] The defendant, however, argues that as a Christian Scientist, he believed that only prayer could save his child, and that this belief is a reasonable one. Massachusetts courts contronted this situation in the recent case of *Commonwealth v. Twitchell*.[145]

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[143] When juries are asked to apply standards rather than rules, their verdicts are more likely to require moral determinations than factual ones. The salient issue may be not whether the defendant struck a blow, but whether she used excessive force to repel a threat; not whether the defendant failed to install a fire door, but whether this omission was criminally negligent; not whether the defendant entered another's land, but whether he was justified in doing so to avert some greater harm under the necessity doctrine.

[144] Criminal negligence is typically described as involving a "gross deviation from the standard of care that a reasonable person would observe in the actor's situation". MODEL PENAL CODE 2.02(2)(d)(1980); 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW Sec. 168 (14th ed. 1979).

[145] 617 NE 2d 609 (Mass. 1993). In *Twitchell*, the parents utilized only spiritual treatment for their child's life-threatening, surgically-correctable bowel abnormality. *Id.* at 612. They defended against the involuntary manslaughter prosecution by citing a state statute that barred child neglect prosecutions against parents who provided spiritual healing according to the tenets of a recognized religious denomination. On appeal, the Massachusetts Supreme Judicial Court found that this statute applied only to child neglect and child support actions and provided no defense to a homicide prosecution. However, the Court reversed the conviction because the trial court improperly excluded evidence that the defendants had reasonably relied on the Massachusetts Attorney General's erroneous interpretation of the statute, which would, if believed, constitute an affirmative defense. Other homicide prosecutions against parents who eschewed medical treatment for religious reasons include Walker v. Superior Court, 763 P. 2d 852 (Cal. 1988) (rejecting spiritual healing defense); State v. Norman, 808 P. 2d 1159 (Wa. Ct. App. 1991) (affirming the first degree manslaughter conviction of a father who, for religious reasons, refused to provide medical treatment to his son); State v. Mckown, 475 NW 2d 63 (Minn. 1991) (reversing on due process grounds the second-degree manslaughter convictions of Christian Science parents who used only spiritual methods in attempting to heal their 11-year-old diabetic son); Lybarger v. People, 807 P.2d 570 (Colo. 1991) (reversing the felony child abuse conviction of

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Our conceptual tools seem inadequate to address such cases, in which a criminal defendant acted in good faith but has a different understanding of the world than his judge or jury. Justice seems to depend on identifying a "reasonable person" who is no one in particular and hence is neutral between these different world views. Yet the choice before a juror may seem limited to either applying a "reasonable Christian Scientist standard" or imposing one's *own* standards; or more bluntly, to deciding which culture will dominate the other. Because most people find such a decision unacceptable, a jury may seek to bracket these differences in order to uncover higher order principles that everyone would accept as impartial norms for adjudicating such cases.[146] But confidence in the results of such

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a minister of the Word of Faith Evangelistic Association on the grounds that jury instructions regarding the availability and burden of proof as to the "treatment by spiritual means" defense were erroneous).

[146] Someone looking for an impartial, principled way to decide this case would probably implicitly adopt something like Rawls' "original position," seeking to bracket her particular values and interests in order to attain a more objective view. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971). To do this when a defendant asserts a cultural defense, a juror might look to such factors as whether and to what degree the practice: may result in physical or emotional harm; is consented to by all affected; constitutes a strong and valued tradition that is integrated with other aspects of the culture; or threatens the social cohesion or norms of other groups. But the prospect that such principles might generate a convincing result is problematic in the example here, where two cultures have a fundamental difference as to whether prayer or medicine is most likely to save a life.

As I have noted in the Introduction, we can often trace moral conflict to a difference in how people describe the world rather than a difference in their ideals. A just result requires not only from an impartial stance, but also an accurate description of the object of inquiry. This means that, as Charles Taylor says, moral judgment must "take intrinsic description seriously". CHARLES TAYLOR, SOURCES OF THE SELF 7 (1989). According to Taylor, we cannot avoid evaluating the validity of descriptive claims, such as the Afrikaners' claim during apartheid that skin color correlates with other factors that make Blacks unqualified to vote. This creates problems for both objectivists and perspectivists. Objectivists confront the argument that moral formulas like the categorical imperative are empty because it is often possible to generate a plausible description that makes discrimination look just. See *supra* note --- and accompanying text. Perspectivists have a different problem. They deny that there is any intrinsic description of the world at all, often arguing that we construct these descriptions and should do so ethically. *See, e.g.,* Singer, *supra* note --- at 1762. But if Taylor is right and ethics must build on intrinsic description -- on a recognition of salient characteristics -- this is an impossible task.

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reasoning would be low in a case like *Twitchell*, which involves a stark choice between fundamentally different beliefs about the world. One might be tempted to conclude that *all* cases are essentially cultural defense cases like this one, and see the act of judging the reasonableness of Lorena Bobbitt's response to her husband,[147] or the police response to Rodney King,[148] as a kind of Roman spectacle in which jurors simply vote thumbs up or thumbs down. The lesson of *Twitchell* could be that impartial adjudication is impossible, and that the "reasonable person" standard simply masks the domination of one group by another.

This lesson is convincing, however, only if one is *already* persuaded that the significance of a moral claim lies in something other than its content -- for example, that a moral claim is merely a cultural artifact. But if we presume instead that moral claims can have more or less weight (and are undecided on *Twitchell*), we will conclude merely that prosecuting Twitchell criminally presents a hard case.[149] We will not take the further step of saying that *Twitchell* shows that no line can be drawn, that there is nothing but ungrounded perspective, or that the

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The question of determinacy of description is central to any inquiry into objectivity, and it is the focus of most discussions on the subject. I address this question *infra*, but previous sections have addressed a different, equally pertinent, issue: whether there is *any* viable alternative to factual and moral inquiries based on the objectivist assumptions that there are intrinsic entities in the world and privileged values which can be discussed.

147 *See* David Margolick, *Witnesses Say Mutilated Man Often Hit His Wife,* N. Y. TIMES, Jan. 12, 1994, at A10 (reporting that Lorena Bobbitt defended cutting off her husband's penis as an "irresistable impulse" arising from years of abuse, including rape that day).

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149 This does not necessarily mean that state intervention to protect the child is also a hard case. The distinction between these two questions points to a critical difference between the human rights issue and the issue of criminal responsibility (and one reason why human rights is a better context for considering the issue of moral objectivity): Criminal responsibility involves the additional issue of blameworthiness. Even if we believe a cultural practice violates a universal moral standard, we may also believe that those raised in that culture are not blameworthy and therefore not properly subject to criminal punishment.

question of whether French Muslims should be allowed to wear the veil in school presents the same issue as whether families should be free to perform clitoridectomies on their children. We would consequently be able to argue, for example, that the criminal law should treat a killing by a threatened battered woman differently from a killing by an enraged motorist trapped in traffic, because our argument would not be based on the idea that every group has its own truth but on the claim that the battered woman has a stronger moral claim than the motorist.[150]

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[150] Applying the "reasonable person" standard always raises this difficult but intelligible ethical question: *Which characteristics of the defendant should be incorporated in the standard and which characteristics are to be judged by the standard?* Or at least, this is the question we must ask in order to avoid a choice between (1) incorporating all of the defendant's characteristics, which would transform the retributive moral judgment into an explanation; and (2) incorporating none of these characteristics and judging the defendant according to standards she might have no ability to meet (for example, judging a blind person's failure to rescue her child by the standards of a sighted person). Focusing on this question reveals that there is no necessary antipathy between objective standards and the invocation of a "reasonable woman" standard. If one must decide which characteristics of the defendant should be incorporated in the standard and which should be judged by it, there seem to be good grounds for holding that sex is in the former class and hotheadedness in the latter. Whether sex should be the characteristic that is singled out for explicit mention in the standard is another question, however. Some have argued that doing so perpetuates stereotypes, implies a false and essentialist view of women, or derogates other characteristics that should be taken into account, such as race, class, upbringing, or other circumstances. On the other hand, equal respect is a universal standard that can only be realized by attending to differences in circumstances, and where history shows that exclusion has been mistaken for neutrality, a reasonable woman standard may be important. *See, e.g.,* State v. Wanrow, 559 P. 2d 549, 558-59 (Wash. 1977); Ellison v. Brady, 924 F.2d 872 (9th Cir., 1991); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1202-15 (1989) (advocating a reasonable woman standard for hostile environment sexual harassment claims); Caroline Forell, *Essentialism, Empathy and the Reasonable Woman,* 1994 Ill. L. Rev. 770 (same).

When legal scholars convened to write the Model Penal Code, they included a clause providing that reasonableness should be assessed "from the viewpoint of a person in the actor's situation," which the commentaries indicate was left "intentionally ambiguous" to provide "flexibility" to jurors. *See* MODEL PENAL CODE Secs. 210.3(1)(b), 210.3 commentary at 63 (1980). The commentaries admit that there can be no legislative solution to whether a "middle range" of defendant characteristics, such as an abnormally fearful temperament, should be attributed to the "reasonable person." *Id.*

Those who *do* take the further step -- those who see indeterminate cases as illustrating the perspectival status of *all* moral claims -- create a great deal of difficulty for themselves. Anyone who wants to see how deep and distressing this morass can be for some perspectivists might read the published papers of a 1989 conference of postmodern and other historians, devoted to the question of how there could be a historical truth about the Holocaust such that some accounts would be a misrepresentation of it.[151] Some of the conference participants were obviously troubled by the divergence of their moral and theoretical commitments, but felt compelled to honor the latter. But were they bound in this way? It is not self-evident that metaphysical skepticism should carry more weight than moral experience,[152] and they might instead have assumed that their sense of the inviolability of human life constitutes one "mode of access" into a world "in which ontological claims are discernible and can be rationally argued about."[153]

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[151] PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE "FINAL SOLUTION" (S. Friedlander, ed., 1992) (collecting commentaries that focus on the opposing positions of Carlo Ginzburg and the postmodern historian Hayden White). *See also* Hayden White, *Historical Emplotment and the Problem of Truth,* in *Id.* at 41 (emphasis added). *See also* HAYDEN WHITE, THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION 75 (1987) ("One must face the fact that when it comes to apprehending the historical record, there are no grounds to be found in the historical record itself for preferring one way of construing its meaning over another.").

[152] Kant's resolution of this conflict was diametrically opposed to the postmodern choice. Giving priority to moral practice rather than metaphysical skepticism, Kant arrived at his "moral proof" of God's existence: he proposed that moral claims can only be intelligible if we postulate a God, and that this is reason enough to do so. IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 227-34 (L. Beck trans. 1949) (1788).

[153] CHARLES TAYLOR, SOURCES OF THE SELF 8 (1989). For an elaboration of the nature of such reasoning, *see also* TAYLOR, *Explanation and Practical Reason,* in PHILOSOPHICAL ARGUMENTS 34-60 (1995).

The perspectivist may read this as the ultimate concession to ethnocentrism. Is not my suggestion that we *presume* the reality of our own moral experience simply a restatement of the ethnocentric view? It is not, because ethnocentrists want us to *shed* this moral sensibility, stop worrying about justifying our convictions to those who do not share them, and press our commitments simply because they are *ours.*[154] Our moral experience tells us something quite different. It tells us, first, that acts and consequences can *merit* respect or condemnation for what they are, which means that we can articulate reasons for our moral views and must entertain the possibility that they are unjustified. Second, our moral experience tells us that our relationships with others do not reduce to a choice between acceding to another's will and imposing our own, but that it is possible to act fairly. We *know* when we are trying to coerce someone rather than persuade him, or use someone rather than respect him.[155] We believe we can generalize this knowledge so as to discern exploitation among others. Why

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[154] *See e.g.,* RICHARD RORTY, OBJECTIVITY, RELATIVISM AND TRUTH 30 (1991) (the ethnocentric pragmatist divides humanity into those to whom she must justify her beliefs and the others); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 361 (1979) ("[O]bjectivity should be seen as conformity to the norms of justification...we find about us [rather than] a way of obtaining access to something which 'grounds' current practices of justification in something else"); Joan Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WISC. L. REV 131, 150 ("[P]ragmatism's recognition of the contingency of our ideals...can help us accept the inevitability of arbitrary lines in the context of our particular form of life."); RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 46 (1989) (quoting Joseph Schumpeter's view that we should "realize the relative validity of [our] convictions...and yet stand for them unflinchingly."); Richard Rorty, *Human Rights, Rationality and Sentimentality*, in ON HUMAN RIGHTS (S. Shute and S. Hurley, eds. 1993), at 117 (arguing that we should make our human rights culture more powerful rather than considering human rights to have transcultural validity).

[155] Peter Strawson draws these distinctions in compelling detail in his essay, *Freedom and Resentment*, in FREE WILL 59 (G. Watson, ed. 1982) (describing the difference between assuming a "treatment attitude" and assuming a "participant attitude" in one's interactions with others). The difference between these attitudes seems to be constant across cultures, and recalls Kant's statement that the good will sparkles "like a jewel in its own right, as something that [has] its full worth in itself." IMMANUEL KANT, FOUNDATION OF THE METAPHYSICS OF MORALS 10 (s. 1, par. 3) (Lewis White Beck, trans. 1959).

should we presume that these Kantian distinctions, which so fundamentally inform our lives, are empty? A sensitivity to the difference between fairness and manipulation is part of the equipment of adult human beings in every culture, and it is implausible to believe that certain conduct -- lying to gain an advantage over another, or killing a person for sport -- could be considered examples of *fairness* by anyone who understood the concept. In this sense, our lived experience ensures that the *meaning* of justice can never be wholly destroyed even by an Orwellian police state, and that contrary to Rorty, people *do* betray "something within them" when they frame the innocent, enslave the powerless, or torture political prisoners.[156]

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[156] *See* text *supra* at fn. 1. Following Philippa Foot, I would say that morality has certain definitional criteria that allow us to conclude that certain acts are "objectively unjust". Philippa Foot, *Morality and Art,* in PHILOSOPHY AS IT IS 12, 14-17 (Ted Honderich and Miles Burnyeat, eds. 1979). Foot regards some moral principles as elective and some as mandatory. *Id.* at 27. The human rights advocate has the luxury of having to defend only the strongest moral claims, without disputing the fact that other moral claims may indeed be "elective," indeterminate, one of a plurality of acceptable values, or the result of idiosyncratic circumstances and expectations that arose in a particular culture.

CONCLUSION

I have explored two perspectivist approaches, each of which challenges the human rights discourse of non-contingent moral obligations and rights. I have endeavored to show that neither cultural relativism nor Rorty's version of neopragmatism offers any convincing reason to abandon our ethical conviction that every human being has certain fundamental moral rights. If we take these theories seriously, we find that each one fails on its own terms, and neither can address our inescapable ethical concerns.

The cultural relativist challenges human rights policies on theoretical grounds, urging us instead to defer to whatever traditions have arisen in diverse cultures. Although the relativist argument for doing so is that there are no transcultural moral truths, I have claimed that cultural relativism is itself based on certain dubious, nonrelative ethical choices, especially including the selection of a value-creating group. The particular weakness of relativism is that it rejects the possibility of nuanced ethical judgments and makes these choices by default, privileging one or another framework which then becomes the source of all value. The kind of relativism asserted against human rights claims, status quo cultural relativism, is a procedural theory which inherently obscures the political divisions and ethical issues within a society. In this way, the relativist flight from "metaphysical" discourse results in a kind of formalism that relieves us of the need to think through the hard problems presented by diversity.

Neopragmatists such as Rorty and Williams present a different perspectivist position. They object not to human rights policies, but to the objectivist moral discourse invoked to develop and justify such policies. I have addressed this position by applying a pragmatic test to the alternative practice they suggest, and have argued that objectivist moral discourse serves our needs in ways that these

perspectivist proposals cannot. When we seek to implement these suggestions, intractable problems arise. We have problems at the outset even understanding whether there is a relationship between Rorty's perspectivist claims and the universalist language we use in legal and ethical discourse. Does perspectivism teach us that people who rely on the ethical and legal language of universal human rights are speaking the "wrong" way? Or are they pursuing their own "local truth", engaging in their own cultural practice which they have no reason to abandon?

However this choice gets resolved, neither path is a particularly compelling one. A perspectivism that has *nothing* to say about the normative language we use leaves human rights discourse untouched, but should be uninteresting to a pragmatist because it makes no difference to practice. The alternative revisionist path *does* make a difference by excising entire discourses as improperly foundationalist or essentialist, including the moral discourse of human rights, but we might wonder whether this version of perspectivism is any more pragmatic than the first. I have described the practical difficulties involved in attempting to *live* according to a theory that denies or obscures the distinctions between justice and convention, reasons and causes, truth and coherence, and impartiality and bias. On pragmatic grounds alone, we should question whether such a post-metaphysical language could provide us with the tools we need to live in and describe a normative world or communicate in meaningful ways with each other. On pragmatic grounds, why would we want to deprive ourselves of the ability to describe torture as a non-contingent *moral* atrocity and a violation of a human right, however well accepted it might be in a culture?

Both of these arguments constitute internal critiques which demarcate the limits of moral skepticism. I have endeavored to show that transcultural moral judgments are part of our humanity, and that therefore we should not object to the human rights claim on the ground that it is such a judgment. Rather than

evaluating human rights claims according to the exorbitant demands of a mythical postmetaphysical practice, we should consider them on their moral merits.[157] There is no way to recognize a human right against slavery without accepting that it is what it claims to be: an inalienable and absolute moral right in any culture. We mistake morality for something else if we think that the existence of countless centuries of slave societies, with their paradigms that made slavery look natural, demonstrate that the moral right is in any way illusory or contingent.

END

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[157] In this Article, I have not attempted to provide any kind of positive account of this deliberative process, but perhaps I have provided a rough guide by identifying certain necessities of ethical practice which are excluded on the perspectivist program. These requirements suggest that the implicit theoretical stance underlying the aspiration for impartiality is a pluralist one, which neither insists that everyone follow our path nor paints a picture of self-enclosed, untranslatable ethical worlds which can only bump into one another. *See supra* note ---. Impartiality entails a pluralist view because it requires that we seek some distance from our particularity, and see that other values can have the same significance to another's life as our values do in ours. Pluralism is a theory which emerges from our practice, from the need for diverse individuals to understand and connect with each other.

In the human rights context, this means a pluralist would believe that cultural autonomy and development have a value which must be weighed in assessing the scope, if any, of human rights legislation. But this would be an ethical judgment, not a blank check for any cultural practice from consumerism to ethnic cleansing. Pluralism rejects the relativist view of cultures as black holes whose morality must remain invisible to those outside them -- "internal affairs", as the Chinese have repeatedly asserted since Tiananmen Square. It asserts that judgments across diversity are not inherently imperlialistic, but are sometimes ethically required and fair.