

Book Review*

Legitimate Differences: Interpretation in the Abortion Controversy and Other Public Debates. By Georgia Warnke. Berkeley & Los Angeles: University of California Press, 1999. 214 pp.

Reviewed by Kathy L. Cerminara**

¶1 Advocating recognition of and respect for others' views, opinions, and cultures does not require a degree in philosophy. Eleanor Roosevelt said, "I feel that unless we learn to live together as individuals and as groups, and to find ways of settling our difficulties without showing fear of each other and resorting to force, we cannot hope to see our democracy successful."¹ In 1992, Los Angeles citizen Rodney King pleaded, in the aftermath of that city's fiery race riots, "We all can get along. We've just got to, just got to."² More recently, after federal agents removed six-year-old alien Elian Gonzalez from his relatives' home in Miami, Jesse Jackson criticized inconsistency in policies applying to Cuban and Haitian immigrants. Jackson, advocating a coalition and calling for peace among the ethnic groups, stated, "You cannot save yourself without saving your neighbors. You need a broad-based demonstration for healing in Miami."³

¶2 It is another matter, however, to advocate such recognition and respect—and to urge further that social thinkers take others' interpretations seriously and learn from them—against a scholarly backdrop of philosophical discourse and literary critique. The advocate takes on an almost unimaginable task when he or she decides to recommend tolerance, understanding, mutual education, and accommodation to people with ingrained, deeply felt beliefs about the matters under discussion. In *Legitimate Differences: Interpretation in the Abortion Controversy and Other Public Debates*, social philosopher Georgia Warnke takes on just such a task with respect to the current debates over abortion, affirmative action, pornography, and surrogate mothering. One hopes that her thoughtful, intelligent reasoning will promote recognition of, appreciation of, and mutual education about legitimate differences of opinion on these topics, as well as similar ones she highlights briefly in the book's conclusion.

¶3 In *Legitimate Differences*, Warnke, a professor of philosophy at the University of California, Riverside, reminds the reader that all Americans proceed

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1. Eleanor Roosevelt, *Keepers of Democracy*, 15 VA. Q. REV. 1 (1939) (discussing oppression, injustice, and the survival of democracy).

2. Richard Serrano, *King Case Aftermath: A City in Crisis*, L.A. TIMES, May 2, 1992, at A2.

3. Jody Benjamin, *Jackson Critical of Refugee Policy: The Rev. Jesse Jackson, in a Miami Visit, Contrasted Cuban and Haitian Immigration Policies and Called for a Change in Rules He Said Had "Inconsistencies"*, SUN SENTINEL (Ft. Lauderdale), May 13, 2000, at 1B.

from the same set of values.⁴ Both pro-choice and pro-life activists, for example, believe in the core principles of life, liberty, and equality. Much the same can be said about believers on both sides of the debates over affirmative action, pornography, and surrogate mothering. Instead of arising from different value systems, then, differences of opinion on these social issues stem from differing interpretations of the same values.⁵ Ultimately, it makes no sense to engage in zero-sum discourse regarding these similar topics. Rather, Warnke advocates “an interpretive discussion of the meaning of our moral and legal principles.”⁶ According to Warnke, political and social discourse should focus on understanding, learning from, and accommodating different legitimate interpretations of common moral and legal values when regulating social issues.⁷

¶14 As she has in previous publications,⁸ Warnke suggests here that ethical-political debate has much to learn from literary interpretation. Revealing a penchant for Jane Austen novels, Warnke begins her book by dissecting *Sense and Sensibility* and approaches its end by discussing *Pride and Prejudice*. In the first instance, Warnke compares actress Emma Thompson’s contemporary interpretation of her character in the film version⁹ with what Austen might originally have meant for that character in her book.¹⁰ In the latter, Warnke uses *Pride and Prejudice* to illustrate a progression from prejudice to knowledge to self-knowledge, while acknowledging that Austen may not have intended her readers to take that meaning from her text.¹¹ Both references serve to illustrate Warnke’s point that “even if we want to understand how an author or her original audience understood a text and even if we are not explicitly concerned with its contemporary relevance, we still understand from out of a particular hermeneutic horizon.”¹² For readers who are not Jane Austen fans, such references may seem overdone and overlong; they do, however, work in illustrating Warnke’s points.

¶15 Warnke thus begins by focusing on literary interpretation to illustrate the idea that various readings each may constitute a legitimate interpretation of a text. She next applies this philosophic-literary-interpretive approach to four real-world examples, devoting one chapter each to surrogate mothering, affirmative action, abortion, and pornography. In each chapter, she dissects the ethical and legal arguments on both sides of the issue and suggests that those with differing views

4. GEORGIA WARNKE, LEGITIMATE DIFFERENCES: INTERPRETATION IN THE ABORTION CONTROVERSY AND OTHER PUBLIC DEBATES 7–8 (1999).

5. *Id.* at 19.

6. *Id.* at 134.

7. *Id.* at 158.

8. *See, e.g.*, Georgia Warnke, *Law, Hermeneutics, and Public Debate*, 9 YALE J.L. & HUMAN. 395 (1997).

9. *SENSE AND SENSIBILITY* (Columbia Pictures 1995).

10. *See* WARNKE, *supra* note 4, at 10–14.

11. *Id.* at 174–75.

12. *Id.* at 12.

should slow down and learn from each other rather than assuming resolution of each issue is an all-or-nothing proposition. She suggests, for example, that both critics and defenders of surrogate mothering arrangements should question their presumptions about autonomy and control and should examine alternative meanings of the concepts of family and mothering.¹³ Those favoring and those opposing affirmative action policies should recognize and appreciate the relationship between equality, neutrality, and integration.¹⁴ Both pro-choice and pro-life activists should learn to accommodate concerns for both autonomy and the sanctity of life.¹⁵ With regard to each of these debates, Warnke cautions that we must remain acutely aware of the tendency of some social conditions to silence legitimate interpretive voices, as noted most explicitly by antipornography theorists and as described in her chapter on pornography.¹⁶

¶16 On many social issues, Warnke advocates sensitivity to a broader spectrum of needs than single-focus advocates address.¹⁷ She in some instances explicitly endorses the Supreme-Court-sanctioned ability of competing groups to resolve their differences on social issues in a variety of ways in the laboratory of the states.¹⁸ With respect to abortion, affirmative action, surrogate mothering, and pornography, she offers explicit proposals for compromise and accommodation, but she is equally concerned simply with opening public debates generally to a range of legitimate voices.¹⁹ Thus, in her conclusion she highlights other issues, such as same-sex marriage, physician-assisted suicide, gun control, euthanasia, and capital punishment, as prime candidates for similar hermeneutic ethical-political exchange.

¶17 Throughout, Warnke neatly anticipates and counters criticisms of her thesis. For example, her critics may suggest that her reasoning, while academically sound, cannot be translated into public policy decision making. Warnke notes, for

13. *Id.* at 54, 135.

14. *Id.* at 80–81, 135.

15. *Id.* at 107, 135.

16. *Id.* at 135.

17. With respect to abortion, for example, she advocates that lawmakers pay more attention to the provision of health care for pregnant women, babies, and children; child-support laws; parental leave policies; the availability and quality of day care; the institution of flex-time arrangements for parents; increased sex education; and adoption reform. *Id.* at 100. Similarly, with respect to surrogate mothering, Warnke advocates that the lawmakers and moral philosophers attempt to understand existing family relationships rather than trying to dictate the validity of relationships in many contexts, including surrogacy, adoption, marriage, and custody disputes. *Id.* at 51, 53.

18. *See* *New State Ice Co. v. Liebmann*, 265 U.S. 262, 311 (1932) (“It is one of those happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). Warnke says, for example, that debating in the fashion she advocates “might lead us . . . to appreciate the possibility of different legitimate compromises and accommodations arrived at in different states and communities with the salutary result that all can learn from the solutions or partial solutions each state and community has found to the understanding of principles we continue to share.” WARNKE, *supra* note 4, at 192. *See also id.* at 53.

19. *See* WARNKE, *supra* note 4, at 192.

example, that Jurgen Habermas might consider the debate she advocates as useful for discovering and identifying problems, or for increasing sensitivity to various viewpoints, but not for establishing public policy.²⁰ In response, Warnke suggests that policymakers should take from her approach, at a minimum: (1) a commitment to ensuring that different voices participate in debate, and (2) “the recommendation that we look less for right answers to our disputes and more for forms of accommodation between different legitimate interpretations.”²¹

¶18 Another, obvious, critique of the hermeneutic approach is the suggestion that it advocates moral relativism.²² Warnke responds to this anticipated critique, however, by explaining that some differing interpretations of legal or moral principles are not legitimate. As proof, she refers to Hans-Georg Gadamer’s hermeneutic circle.²³ This theory holds that understanding is a circular process, in which any literary interpretation must account for and fit with the whole of the literary work, not simply part of it.²⁴ Thus, literary interpretations, at least, are presumptively illegitimate if they do not “admit of a unity between part and whole.”²⁵ Those interpretations fail.

¶19 Translating this literary interpretive concept into public policy debate, Warnke suggests that neither dogmatism nor moral absolutism provide the answer to concerns about moral relativism. Rather, for Warnke, the best defense against moral relativism is a recognition that some interpretations of legal or moral principles will fail as illegitimate because they do not permit open discourse.²⁶ Her recommendations stem from “the recognition that in multicultural and pluralistic societies our understanding of the principles we share warrants confidence rather than conviction.”²⁷ Confidence can lead to openness, to a willingness to incorporate various voices into public discourse, and proponents of each voice should be prepared to understand, learn from, and accommodate legitimate differences. Interpretations that prevent full discourse, such as a pro-slavery or pro-segregation interpretation of the principles of equality and liberty, are simply illegitimate; they fail precisely because they prevent others from voicing their own interpretations

20. *Id.* at 151–52 (citing JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW* 167 (William Rehg trans., 1996)).

21. WARNKE, *supra* note 4, at 158.

22. *See id.* at x (describing her approach as recommending compromise and accommodation “without, I hope, risking an intolerable relativism”). *See also* Warnke, *supra* note 8, at 400 (an earlier discussion of the same ideas).

23. WARNKE, *supra* note 4, at 14–15 (citing HANS-GEORG GADAMER, *TRUTH AND METHOD* 302 (Joel Weinsheimer et al. trans., 2d ed. rev. 1992)).

24. WARNKE, *supra* note 4, at 15.

25. *Id.*

26. *But see* Kent Greenawalt, *Interpretation and Judgment*, 9 *YALE J.L. & HUMAN.* 415, 428–29 (1997) (responding to Warnke’s earlier expression of these ideas by questioning whether this standard, while appropriate for moral judgment and literary interpretation, applies to constitutional and statutory law).

27. WARNKE, *supra* note 4, at 181.

of the meaning of liberty or equality.²⁸ Clearly, not all illegitimate interpretations will be so extreme. As long as discussion remains totally open, however, participants must remain cognizant of the possible distorting effects of money, majorities, and conflict on the resolution of our controversies.²⁹ Warnke seems confident that society can avoid accommodating illegitimate interpretations of legal or moral principles.

¶10 One hopes her confidence is warranted. Her theory and the analysis supporting it leave the reader nodding his or her head and agreeing not just to recognize and respect others' views but also to learn from others and to ensure full, open debate of all legitimate differing views. The challenges remain, however, in deciding which views are legitimate and seeking methods of transforming theory into action.

28. *Id.* at 25–26, 101–102.

29. *Id.* at 193.