

Widener University Delaware Law School

From the Selected Works of Robert Justin Lipkin

1990

Liberalism, Radicalism and Utopian Ideals

Robert Justin Lipkin



Available at: https://works.bepress.com/robert_lipkin/24/

LIBERALISM, RADICALISM AND UTOPIAN IDEALS

ROBERT JUSTIN LIPKIN*

INTRODUCTION

Contemporary legal scholarship is replete with critical discussions of liberal political theory. An especially interesting and engaging attempt to defend liberalism can be found in Steven Shiffrin's novel theory "eclectic liberalism."¹ My primary interest in this essay is to evaluate Shiffrin's objections to the role of theory and utopian ideals in political theory.² Shiffrin's version of liberalism is designed as an alternative to ethical liberalism and democratic radicalism. If Shiffrin is right, eclectic liberalism provides a foundation for constitutional theory and scholarship. In this article, I argue that Shiffrin fails in this attempt, but that his failure is both illuminating and instructive. One walks away from Shiffrin's argument with a deeper appreciation of the relationship between social reality and human nature, on the one hand, and political and moral theory, on the other. Both ethical liberals and democratic radicals alike will benefit from the power and depth of Shiffrin's analysis.

I. THE BASIS OF ECLECTIC LIBERALISM

A. *Classical Liberalism as the Common Enemy*

Classical liberalism is the common enemy of ethical liberalism and democratic socialism. Classical liberal theories contend that the proper role of government is to realize particular conceptions of human nature and of the good and just society. Although the term "classical liberalism" refers to a diverse tradition,³ most classical

* Professor of Law, Widener University School of Law

1. Shiffrin, *Liberalism, Radicalism and Legal Scholarship*, 30 UCLA L. Rev. 1103 (1983).

2. Throughout this essay I talk of theories, methodologies, systems and principles. My use of these terms does not entail any particular epistemic commitment. Indeed, my use of these terms is compatible with skeptical and anti-theoretical positions concerning human rationality. See Robert Lipkin, *Beyond Foundationalism, Skepticism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 Cornell L. Rev. (forthcoming) (1990).

3. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (6th ed. London 1790), THOMAS HOBBES, *THE LEVIATHAN* (M. Oakeshott, ed. 1962), J.S. Mill, *ON LIBERTY* (C. Shofields ed. 1956), JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT* (C.B. Macpherson ed. 1980) J. J. ROUSSEAU, *THE GENERAL WILL* and IMMANUEL KANT, *PROLEGOMENA TO A METAPHYSICS OF MORALS*.

liberal theories conceive of the individual as morally complete and independent of other members of society or of the state of nature. If the individual is morally complete and independent, she cannot be obligated to engage in social or cooperative behavior unless she chooses to do so. The problem then arises, how can the state legitimately coerce individuals to accept its laws; that is, how can the state require the individual to accept the burdens of social life?

Classical liberals answer this question in different ways. Hobbesian liberalism, for instance, regards the individual as a rational egoist; hence, justifying civil society requires demonstrating how state coercion is in the interest of rational egoists. Similarly, Lockean liberalism emphasizes governmental protection of the individual's rights of freedom and property. According to this conception, only the least restrictive government is morally permissible.⁴ The government may require an individual to accept the burdens of social life only if she actually or counterfactually consents to do so. An individual's primary motivational factors, according to classical liberalism, are pleasure, self-interest or freedom.⁵ Each individual competes with others for society's benefits, while remaining morally independent of one another. Self-satisfaction, wealth-maximization or individual freedom are the goals of classical liberal societies. Conceptually, community plays only a small role in such a society, leaving individuals free to form private, disparate communities should they choose to do so.

B. The Rejection of Classical Liberalism: Ethical Liberalism and Democratic Socialism

Ethical liberalism denies that it is government's job to realize any particular conception of human nature or to create one conception of the good society over others. Instead, government must be neutral regarding the good life. The role of government is to devise morally neutral rules permitting each individual to pursue his own conception of the good life without interfering with others. These rules find their source in reason, and imply a rational structure for determining the appropriate distribution of benefits and burdens, and the allocation of rights. Typically, ethical liberals contend that there is one rational principle, for example, justice—though the precise meaning of this principle differs with the brand of liberalism⁶—that constitutes the organizing

4. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1975). The notion of the least restrictive or minimal state is not limited to Lockean liberalism. Rather, according to some views, Hobbes' liberalism also endorses a minimal state.

5. Classical liberalism has hedonistic and non-hedonistic traditions as well as egoistic and non-egoistic traditions.

6. Shiffrin follows a practice of using liberalism as standing for any political philosophy that is not a radical or democratic socialistic political

(Continued)

principle of society. Hence, social reality can be explained by reducing a multiplicity of values—love, ambition, wealth, need and so forth to one fundamental explanatory scheme such as fairness, merit, or equality.

Democratic socialists, on the other hand, regard social structures as distortions of human nature which is basically compassionate and sincere. In this view, social organization is bad because it turns people into selfish, grasping ingrates intent upon domination over one another. Without this corrupting influence, human passion would be sufficient to fulfill the individual and dispose her towards selfless interactions with other human beings.

While ethical liberals glorify reason at the expense of desire, democratic radicals transform desire into romantic concepts of individuals fulfilling their true nature in idyllic contexts where fraternity and social harmony abound. Democratic radicals contend that human nature is malleable and that we can create ideal societies devoid of evil and misery if we truly have the will to do so.

In Shiffrin's view, though unacceptable as they stand, ethical liberalism and democratic radicalism provide the basis for eclectic liberalism. Eclectic liberalism incorporates the virtues of ethical liberalism and democratic radicalism while avoiding the defects of both. In characterizing this doctrine Shiffrin writes:

Eclectic liberalism is a theory premised on the complexities of social reality, human nature, and moral and political values. It does more than provide a middle ground connecting the rationalism of the ethical liberal and the romanticism of the democratic radical. It offers an alternative solidly based on the moral ideals that have made both these traditions attractive [R]ecognition of the complexity of social reality and human nature dictates the rejection of the rationalistic tendency of liberalism to reduce reality to single principles and the romantic tendency of radicalism to imagine an evolving human nature free of selfishness and evil.⁷

In short, Shiffrin opposes reductionism and perfectionism. Reductionism is a dead end, in Shiffrin's view, because social reality and human nature are complex and diverse; and we are lucky that they are. Shiffrin's reason for opposing perfectionism is less clear. Perhaps, he believes that human beings cannot be perfected, that is, morally improved and refined, resulting in the

philosophy. Shiffrin, *supra* note 1. See also Alexander, (distinguishing between libertarian-liberals such as Epstein and Nozick and left-liberals like Dworkin and Rawls). Essentially, this removes conservatives from social reality. It's not at all clear that this conceptual ploy is helpful.

7. Shiffrin, *supra* note 1, at 1192.

eradication or radical reduction in the amount and degree of evil in the world. Or perhaps, Shiffrin believes that human beings can, but ought not to be, perfected toward this end.⁸

Generally, Shiffrin's argument for or against anything relies heavily on the complexity and diversity of social reality and human nature, which, together with the irreducible multiplicity of political and moral values, precludes the possibility of developing acceptable monistic theories for explaining and justifying the social and political order.⁹ Evaluating Shiffrin's objections to ethical liberalism and democratic socialism requires, therefore, understanding what Shiffrin means by the term "the complexity of social reality."¹⁰

II. THE COMPLEXITY OF SOCIAL REALITY

A. *Ontological and Epistemological Theses*

Describing social reality as complex might mean different things. First, it might be that social reality is mysterious, that it is beyond our ken. Shiffrin's point might be that we are simply unable to understand the reasons for variations in social structures and human values. Such a contention might be based on an *ontological* thesis, namely, that social reality is fragmented, contradictory, and incoherent, that there is *nothing* meaningfully described as *social reality*. Alternatively, describing social reality as complex might indicate that there are many irreducible factors which comprise this reality; hence, reductionism presents a false picture of what there is. Because there are a multiplicity of elementary social factors, any attempt to translate an accurate description of social reality into a lexicon consisting of *one* elementary factor is doomed from the start.

Shiffrin's claim might be based on an *epistemological* thesis, namely, that whereas it is uncontroversial that social reality exists, *we* (any knower) cannot achieve an understanding of its true nature. According to either conception, there is no single explanation of social reality, because there is no explanation of

8. I suppose one reason for the latter conclusion is that attempts at perfection have a tendency to distort character and in the long run render a person morally worse than had he avoided perfectionism. If so, this would be an example of the impossibility, not the undesirability, of human perfection. It is interesting to speculate whether a position granting the possibility but denying the desirability of human perfection is even intelligible.

9. Shiffrin's view is reminiscent of Rorty's liberal ironism. For Rorty we should abandon the quest for philosophical justification, for founding a political theory in anything but ordinary common sensical intuitive judgments concerning the best way to reduce cruelty. RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* (1989). *But see* Lipkin, *supra* note 2.

10. Shiffrin, *supra* note 1, at 1194.

social reality at all. But Shiffrin does not appear to hold the view that social scientific explanation is illusory, though he does believe that no single principle can provide such an explanation.¹¹

Even if Shiffrin is right, that more than one elementary factor exists in any adequate *description* of social reality, it does not follow that it is a condition of any adequate *explanation* that it be pluralistic.¹² There are, for example, many factors—the need for food, shelter, respect, self-expression, community, and so forth—comprising social reality. Hence, an adequate description of social reality must mention each of these factors or their extensional equivalents. It does not follow, however, that all such factors are required in providing an *explanation* of social development and change. Certainly all *important*,¹³ social factors should be included in an adequate description of social reality. This does not entail that any adequate explanation retain the pluralistic dimension of the description. Only if one assumes that every important factor involved in an adequate description of social reality is required for an adequate explanation, is Shiffrin's argument in this instance persuasive. But this assumption is the very point at issue.

In describing social reality,¹⁴ several basic factors may be required to achieve a relatively complete description. However, in providing an explanation of these descriptive facts, that is, in systematizing such a description, at a higher level of abstraction, an adequate explanation may reduce the number of descriptive factors. The fact that social reality is descriptively complex does not preclude this process of systematization. More is needed to defeat explanatory monism. Nothing, in principle, rules out explaining a complex social reality—that is, complex social *facts*—by an monistic explanatory *theory*.¹⁵

11. Shiffrin's view might be that social reality is knowable but not explicable in social scientific terms. If so, he needs to tell us what hangs on calling social theory scientific, before we can determine whether his view is plausible.

12. Though I do not supply one here, the appropriate kind of conceptual framework is needed for distinguishing between different levels of description and explanation. See generally Carl Hempel, *Aspects of Scientific Explanation* (1963)..

13. Reflective commonsense determines which factors are important enough to include in our preliminary description of social reality---what an average intelligent person thinks true of social reality, or would think true were the relevant facts brought to his attention constitute the appropriate pre-theoretical stage of social theorizing. We can become clever later when we attempt scientific explanation

14. Of course, the degree of generality is what determines whether social reality can be described or explained by only one type of factor, or whether a plurality of factors are required. At the most abstract level of generality it is difficult to see how more than one factor is required. But then at that level of generality, it is doubtful that there is anything of interest to be learned. .

15. Eclectic liberalism appears to be pluralistic concerning both explanation and justification. As such, the theory appears to have little respect for the

(Continued)

B. *The Normative Dimension of Social Reality*

More importantly, even if Shiffrin is right that the complexity of social reality precludes simple, descriptive, *and* explanatory accounts of this reality, it does not follow that a *justificatory* or *normative* theory of political development and change need be pluralistic. Descriptive and explanatory accounts of social reality may be pluralistically on one side of the fence, while the correct justificatory or normative account of social reality may be monistic. In other words, the correct normative justification might be Aristotelian, utilitarian, Kantian, or egoistic. Complex social reality itself does not determine the structure of a justificatory account of how social and political change ought to occur.¹⁶ Further, even if no single normative principle accounts for all moral intuitions, some principles may do a better job than others; one such principle may even be the best; if so, this is vital knowledge to possess.

Throughout Shiffrin's discussion, he claims that the existence of a multiplicity of moral values precludes theoretical systematization. This claim should be challenged. Given that there are a multiplicity of moral values, that is, that different people hold sometimes radically different moral values, does this mean that each critical theory must take account of each of these values?

Why should a multiplicity of moral values preclude explanatory or justificatory theoretical systematization? Given a multiplicity of values, there may be *priority* principles for determining how to resolve conflicts between and among conflicting values. Indeed, if no plausible priority principles exist, skepticism concerning ranking values might be the only plausible outcome. To avoid this

meta-theoretical virtue of simplicity. *But see* W. QUINE & J. ULLIAN, *THE WEB OF BELIEF* 45 (1970). On the normative level, eclectic liberalism seems to involve intuitionism both in what counts as a moral belief and what counts as its justification. Moral beliefs derive from persistent intuitions; justification is always in terms of a multiplicity of factors or values. *CF.* W. ROSS, *THE RIGHT AND THE GOOD* (1930) and *THE FOUNDATIONS OF ETHICS* (1939). We can never conclude with certainty that priority principles are impossible. However, the history of western philosophy is replete with failed attempts to describe and defend such principles.

16. For instance, though social reality might be descriptively or even explanatorily complex, it might have a singular justificatory nature. We might agree that desert and merit are part of any complete description or explanation of social reality, yet embrace egalitarian principles as ultimately the best justification of our ethical and political conceptual scheme. Indeed, one need not be a foundationalist to endorse such a justificatory reduction or simplification

outcome we must first explore the possibility of ranking different values across persons.¹⁷

Shiffrin seems to treat theoretical monism and the existence of priority principles as cut from the same stalk. This is surely a mistake. There may be general priority principles that apply to any system of practical reasons. Alternatively, there may be priority principles which are relative to a particular historical period.

Priority principles take on a formal or substantive dimension. A priority principle is formal when it tells us how to determine what to do in cases where competing values which have us abandon action. A formal priority principle is not concerned with the particular values advanced, just how to resolve conflicts between conflicting values. For example, a formal priority principle might tell us to choose that value which permits a larger number of other values to be satisfied. A substantive priority principle, on the other hand, is a principle stating the strength of particular substantive values. Substantive priority principles inform us, for example, that choosing to save a human life rather than property is always the preferred choice of conduct.

If priority principles are available,¹⁸ it does not follow that a multiplicity of moral and political values entails contextualism, though of course, contextualism may be endorsed on independent grounds. One can grant that there are a multiplicity of irreducible values yet still insist that there are principles for ranking these values. If so, providing a systematic account of these priority principles provides a theory of practical choice. Relying on the complexity of social reality as precluding systematization tends to obscure these distinctions.

The point here is that even if social reality is complex in the relevant sense that it precludes simplifying or reductionist theories, we need to describe just which types of theories are precluded and in what ways. Further, we must determine whether a view that the complexity of social reality precludes theories is a vote for the status quo. And if so, how this view explains social and moral change.

17. We can never conclude with certainty that priority principles are impossible. However, the history of western philosophy is replete with failed attempts to describe and defend such principles.

18. Such principles are usually available to systemize a given person's value system. They might not be available for resolving conflicts across persons.

III. SOCIAL PLURALISM AND POLITICAL JUSTIFICATION

Let us assume, for the sake of argument, that social reality is complex. What implications does this concession have for normative political theory? Are all social or moral values equally significant? Is the Nazi's desire to rid the world of Jews and blacks equally important as the desire to feed the hungry? Does the Nazi's desire have any moral value at all? The eclectic liberal's admonition that social reality is complex and diverse seems to suggest either that all social and moral values are equally significant or that all such values have at least *prima facie* value. But this cannot be right. Can it?

Emphasizing the multiplicity of moral values suggests that any desire, need or interest has some *prima facie* legitimacy. Any desire, no matter how odious, has *some* validity. In effect, this means that in constructing a theory, the mere fact that someone desires X, renders X a *prima facie* good. This effectively does away with the common sense wisdom that some things are inherently, or less tendentiously, *always* wrong. Certainly, Shiffrin cannot mean this. But his words suggest otherwise:

[The premise of eclectic liberalism] recognizes the diversity and complexity of human beings and entertains a willingness to appreciate varied approaches in responding to the recurring problems of the human condition. It affirms free will, the ability of individuals to create their own lives and their own interpretation of what it is to be a human being It affirms that each individual's choices in reconciling the alternative possibilities in relating to others and to nature are a matter of interest It affirms that all have something to teach, even if they themselves do not believe it. It assumes there is something of value in the writings and choices of each, even if those values may have been carried to an inappropriate extreme.¹⁹

There are serious problems here. Does Shiffrin's view suggest that there exists an initial parity between the desires of Hitler and Mother Theresa? In short, is there a moral *given* which dignifies any conceivable moral perspective as having a modicum of moral respectability? One need not be draconian to deny this possibility. We can know that certain activities are wrong before we enter into moral dialogue. If not, it is difficult to see how such dialogue can bear fruit.

Shiffrin appears to overlook the fact that often social reality is complex for radically different reasons. Sometimes different legitimate interests conflict; other times, legitimate interests

19. Shiffrin, *supra* note 1, at 1193.

conflict with illegitimate interests. The white male's desire to be admitted to medical school and the disadvantaged black person's interest in affirmative action are both legitimate interests. One cannot say the same thing about a woman's desire for equal opportunity and the chauvinist's desire to keep women in the home. At times social reality is complex because there are competing moral paradigms, that is, alternative conceptions of what it is to be a person and how to live the virtuous and just life. The complexity of social reality has different implications for political theory depending on the reasons for the complexity. It is imperative to know what the reasons for the complexity are before we can agree with the assertions that there are "hard choices in which basic values must be compromised"²⁰ and "[t]he choices we must make between fundamental values are tragic."²¹ Doubtlessly, sometimes we must make such choices. But Shiffrin concludes that such compromises are the norm. And this conclusion is far from obvious.

IV. DIRECT PRAGMATISM AND CRITICAL PRAGMATISM

Shiffrin appears to endorse what might be characterized as a pragmatic turn, to wit:

Look, life is very difficult at best, and social reality is complex and diverse. Social choice involves harmonizing the different values of different people. Abstract theories tend to cause more problems than they solve. Let's recognize the complexity of social reality, the fact that people have different conceptions of the good life, and that no viable solution will be a perfect solution. Let's bring our general knowledge about society and human nature to bear on social and political problems as these problems actually exist in their particular social settings. Keep in mind that we must accommodate a host of competing interests, and earnestly try to fashion viable and stable solutions.

What can be so wrong with such an eminently reasonable point of view?

As I see it, Shiffrin's view is reasonable only when construed as an admonition for us to adopt the proper psychological tenor or the tone of one's remonstrations in trying to settle interpersonal conflicts. As such, no one should try to force a monistic theory of social change down one's opponents' throats without any possibility for compromise. Shiffrin's admonition, construed in this manner, should accompany any theoretical account of social development

20. Shiffrin, *supra* note 1, at 1195.

21. Shiffrin, *supra* note 1, at 1209

and change. When Shiffrin's remarks concern the *application* of a theory to practical situations, they are uncontroversial. On the other hand, when his remarks are interpreted as a reason not to construct theories, they become tendentious. Similarly, the Supreme Court should follow Shiffrin's advice in resolving great constitutional conflicts; but this does not entail a contextualist approach for dealing with practical problems, an approach which eschews theories and priority principles in accommodating competing values.

One final point about Shiffrin's reliance on the complexity of social reality as a basis for eclectic liberalism. The degree of complexity of social reality depends, to a great extent, on the level of abstraction with which one is dealing. The closer we get to concrete circumstances—the level on which we act—the more detailed reality gets. The farther away we travel, the more orderly things may appear. Practical reasoning, however, takes place on both levels simultaneously. Some circumstances require greater abstraction than others. Hence, applying abstract principles to concrete situations is sometimes preferable to deciding the issue from up close. In short, the issue is much more complicated than Shiffrin's view suggests. Sometimes concrete considerations should be dispositive in acting; other times one needs to reach the abstract to achieve the appropriate perspective. Ordinary moral and political decisions often require a synthesis of these two perspectives.

Shiffrin's approach fails to distinguish between two kinds of pragmatism: direct pragmatism and critical pragmatism. Direct pragmatism counsels us to apply a pragmatic, contextualist, balancing approach to each particular social conflict eschewing theories, principles and rules. Critical pragmatism permits the use of these devices telling us to apply the relevant theory, principle or rule in a rationalist, foundationalist manner, without considering whether the conflict is resolvable through a direct application of pragmatism. Critical pragmatism is still pragmatic, however, because it selects the appropriate theory, principle or rule by determining which theory, principle or rule has the best pragmatic consequences. Pragmatic considerations, according to critical pragmatism, determine the selection of a theory, while a conflict is resolved by without a direct appeal to pragmatism. Shiffrin's view, as I understand it,²² insists on direct pragmatism. In my view, direct pragmatism is counter-intuitive and often has pragmatically undesirable consequences.

22. I am characterizing Shiffrin's view as pragmatic. He does not. In fact, he contends that he is not a pragmatist because he does not believe that truth can be understood in terms of utility.

V. THE DIVERSITY OF HUMAN NATURE

Eclectic liberalism views human nature as diverse and insists that each individual should be given the opportunity to fashion his or her own conception of the good life, or what it is to be a person.²³ But surely there must be some constraints on what is permissible! Eclectic liberalism cannot imply that a slave owner's conception of a person permitting or requiring slavery is permissible. Eclectic liberalism must rule this out in advance.²⁴ Must it not? If it does, eclectic liberalism moves closer to democratic radicalism, where an individual's appreciation and expression of different ways to live is protected within the constraints of morally permissible choices. No doubt, eclectic liberalism rules out slavery. Probably, democratic radicalism rules out slavery as well as the private control of resources and the instrumentalities of production. But what principle is behind limiting the scope of permissible choices in this way?²⁵ As soon as Shiffrin concedes that he must articulate such a principle—as certainly he must—it's difficult to see what distinguishes his view from democratic radicalism. Diversity in the conception of the good life—in the possibilities for self-expression—is certainly a legitimate goal of any acceptable political or legal theory. There will, however, always be constraints on such possibilities. With this in mind, diversity can flourish in a radical democratic society just as well as in an eclectic liberal one.²⁶

Emphasizing the diversity in human nature does not preclude there being important values—say, autonomy, equality, fraternity

23. Shiffrin, *supra* note 1, at 1193.

24. The question of whether a particular value can be ruled out in advance is directly relevant to the issue of whether reason is the appropriate methodology in legal theory. If reason is the appropriate methodology, then we have a procedure which can tell us that some value is inherently irrational. If only a replacement to reason is appropriate, such as, dialogue or conversation, then presumably every value is initially as plausible as every other. Bruce Ackerman, *Why Dialogue?* 86 J. Phil. 5 (1989); MICHAEL OAKESHOTT, *Poetry in the Conversation of Mankind* in *RATIONALISM IN POLITICS AND OTHER ESSAYS* 197 (1962).

25. The antitheoretical objection to searching for principles is misguided. Principles of some sort are indispensable. What is not indispensable is a conception of principle which rules out substantive views because they are incapable of being stated as principles. Hare, Dworkin, and Bork are each equally guilty of such a misguided view. RICHARD HARE, *FREEDOM AND REASON* (1963), RONALD DWORKIN, *LAW'S EMPIRE* (1986), ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW* (1990).

26. Perhaps, even better, Shiffrin does not tell us whether capitalism or socialism follows from eclectic liberalism, or whether eclectic liberalism is compatible, in different circumstances, with either economic system. If contemporary America is a paradigm of an eclectic liberal society, where is the diversity. If capitalism requires economic forces be galvanized toward the production of profit-making commodities, conformity is usually the result. Is my individuality enhanced because I buy a Sony VCR, while you buy an RCA?

and community—which are goals anyone should want if he wants anything at all. Shiffrin does not appear to deny this. But then it is difficult to see why such a conception of human nature is unhelpful in determining the nature of one's political theory. Again, the answer seems to be Shiffrin's disenchantment with theories. Individuals make personal decisions based on "a host of dynamic variables;"²⁷ simplifying reductionist theories distort these decisions. Instead, intuition is the key to practical reasoning. No doubt intuition is important in human activities. It is twice as important in theory construction. First, intuition determines what the theory is about, namely, considered or reflective intuitions about the right and the good. Second, intuition plays a role in the choice of theoretical principles as well as in choosing priority principles. But granting this does not discredit the role of theory in political and moral affairs. Remember there are theories and there are theories. You might give "volumes, not axioms"²⁸ and still be articulating a theory with an ordered set of priority principles.²⁹ Shiffrin erroneously believes that a theory must be an axiomatic theory; whereas it is possible and desirable to construct theories which are narratives telling a story that explains social practice in illuminating and insightful ways. This less rigorous conception of theory avoids the defects associated with direct pragmatism.

VI. UTOPIANISM AND MORAL CHANGE

Eclectic liberalism eschews utopianism as a model or procedure for formulating conceptions of social analysis and social change.³⁰ But it is not clear what the charge of utopianism involves. Utopian has at least three possible meanings. First, a program for social change is utopian because it requires people to perform tasks which are empirically impossible. Second, a utopian social scheme may forbid people from having or acting on selfish motives. Third, a society may be utopian if in order to bring about and sustain its conception of the good life, people must change significantly and permanently. Surely, the charge of utopianism, understood in the first two ways, is a valid objection to any proposal for social change. It is pointless to advocate what is empirically impossible. Human perfectibility and improvement need not entail that people have no weaknesses or faults whatsoever. The third conception of utopianism is not guilty of these commitments. Utopianism, understood in the third way, requires resolve, perseverance, and

27. Shiffrin, *supra* note 1, at 1197.

28. Shiffrin, *supra* note 1, at 1197.

29. Perhaps, Shiffrin's problem is an animosity towards formalist, reductionist theories, transforming practical choices into a decision theoretic setting. But surely this is not the only or even the most interesting kind of theory. Is it?

30. Shiffrin, *supra* note 1, at 1201.

luck. But these are no reasons for minimizing the importance of this brand of utopianism in formulating a moral or political theory.

It is myopic and parochial to insist that human nature and the possibilities for social and moral change are fixed once and forever. Let me briefly pursue this point. The eclectic liberal inveighs against utopianism in social theory as do ethical liberals and democratic radicals. On this view, once guilty of utopianism a perspective must be abandoned or revised. No one should in good faith be found courting utopian ideals. If you are found doing so, repent at once.

The charge of utopianism can be lodged by anyone³¹ at any interesting moral or legal theory requiring us to draw closer to a moral ideal.³² Deploying a moral ideal involves encouraging moral change. Sometimes moral change appears to be quixotic. Moreover, if something is utopian it would minimally involve a radical break with what is now considered morally and legally possible.³³ Whenever change involves such a break, it is difficult to see just what the new institution or society will look like.

Surely, no one can seriously maintain that a proposal is discredited as utopian if it involves a sharp break³⁴ with present social reality.³⁵ One needs to show both that it is empirically implausible that people will ever be able to act according to the ideal, or that trying to act according to the ideal will not make them morally better people. Only when both conditions are met is the charge of utopianism damaging.³⁶

31. Even Marx, who denigrated *utopian* socialism, is characterized by one writer as advancing a rational utopia. A. HELLER, *A RADICAL PHILOSOPHY* 141 (1984).

32. One common objection to utopianism is that it is ahistorical. But in one sense of that term all moral revolutions are ahistorical. Ahistoricity becomes a problem only when a utopian proposal is empirically impossible or conflicts with other moral concerns. Cf. T. O'HAGAN, *THE END OF LAW?* 151-57 (1984) (discussing utopias and the difficulties of social change).

33. For a historical discussion of the development of different kinds of utopianisms see generally FRANK MANUEL AND FRITZ MANUEL, *UTOPIAN THOUGHT IN THE WESTERN WORLD* (1979). Historically, it is evident that there has been a utopian propensity. *Id.* at 1-32.

34. There is no doubt that utopian ideals involve a break from current moral perspectives; but this does not imply that utopian ideals are totally discontinuous with contemporary morality. The process of moral evolution is similar to the relationship between Wittgenstein's philosophy and traditional philosophy: "radically different and yet recognizably related." H. PITKIN, *WITTGENSTEIN AND JUSTICE* 325 (1972).

35. There is a very great danger in thinking that the present generation somehow has the wisdom to settle all problems once and forever. B. MOORE, JR. *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY* 509 (1969). Objectivity in developing reasonable proposals for social and legal change often means restricting oneself to a defense of the status quo. *Id.* at 522.

36. In fact, the charge of utopianism is usually regarded as dispositive; this is a radical mistake. Certainly, fantastic proposals for change should not

(Continued)

Moreover, it is useful to sketch an ideal theory, even if such a theory cannot be implemented full-scale. An ideal theory can then be used for criticizing and improving present institutions in terms of the ideal, even if the ideal will never become actual. Hence, if the ideal theory is utopian in that it is permanently beyond our reach, it is still morally and legally useful in helping us make our institutions the best they can be, given the practical limitations. Living a moral life requires synthesizing the ideal with the actual; to do this we must first know what the ideal is.

Utopian theory helps us formulate the appropriate moral and legal ideals, permitting future generations to develop these ideals further.³⁷ Using the charge of utopianism as a way of fortifying the status quo forces us to cut ourselves off from future generations. Developing moral ideals and utopian visions helps us identify with the dynamic dimension of moral change.³⁸ What we need is a methodology for distinguishing utopian reasoning and theorizing from utopian fantasy.

The following are conditions of adequacy any utopian methodology must satisfy.³⁹ First, the methodology, call it "utopian reasoning or theorizing"⁴⁰ must provide a model or ideal of

be taken seriously. But utopian ideals have a role to play even if it is granted in a given case that it would be impossible to implement the ideal. Often successful movements for social reform have been motivated by a utopian ideal. FINLEY, *UTOPIANISM ANCIENT AND MODERN IN THE CRITICAL SPIRIT* 19 (K. Wolff & B. Moore, Jr. eds. 1968) [hereinafter referred to as *CRITICAL SPIRIT*].

What we need is a theory of utopian ideals which provides formal constraints on utopian reasoning. In this way we can distinguish utopian ideals from utopian fantasy.

37. For an interesting discussion of the importance of utopian theory see Moore, *The Utility of Utopias*, 31 *AMER. SOCIO. REV.* 765 (1966).

38. Has there been moral progress over the course of the centuries? One needs a conceptual framework for assessing such matters before one can even venture a guess. For interesting discussions see Fay, *THE IDEA OF PROGRESS*, 52 *AMER. HIST. REV.* 231 (1947); Ingers, *The Ideal of Progress: A Critical Re-assessment*, 71 *AMER. HIST. REV.* 1 (1965); Rotenstreich, *The Ideal of Historical Progress and Its Assumptions*, 10 *HIST. & THEORY* 197 (1971).

39. On one level, this is a bipartisan claim. Both conservatives and progressives alike may each benefit from utopian reasoning and theorizing. After all, it is Nozick that has most recently resurrected serious discussion about utopian theory. R. NOZICK, *supra* note 4, at 297-334. Further, progressives, who are also marxists, should "break the Marxian taboo on utopian speculation in order to project its emancipatory features." D. KELLNER, *HERBERT MARCUSE AND THE CRISIS OF MARXISM* 322 (1984).

40. "Utopian reasoning" has an affinity with the critical legal studies movement. See Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561 (1983). Utopian reasoning or theorizing includes a variety of critical reasoning. Utopian reasoning involves diagnosing structural problems in the political and legal order as well as critical reasoning about a new political or legal order.

(Continued)

society.⁴¹ Second, the model itself must provide a coherent criticism of existing institutions.⁴² Third, the methodology must show how the critical values deployed by the model are the realization or idealization of central values we now endorse. For example, present notions of autonomy and solidarity may yield an idealized sense of community.⁴³ Fourth, utopian reasoning must assess, even if only

The development of human consciousness seems to abhor any theory that has pretensions to completeness. Though there are important ways in which certain kinds of historical or economic development may some day be relatively complete, human consciousness and its inseparable concern with normative understanding will become complete or finished only with the demise of the species. Hence, a value system can become complete only if human consciousness becomes complete. Remember values evolve along with consciousness itself. For an intriguing account of the story of the development of human consciousness see J. JAYNES, *THE ORIGINS OF CONSCIOUSNESS IN THE BREAKDOWN OF THE BICAMERAL MIND* (1976).

41. See H. SEGAL, *TECHNOLOGICAL UTOPIANISM IN AMERICAN CULTURE* 156-163 (1985).

42. *Id.*

43. In other words, though utopian reasoning involves, on one level of theorizing, a break with conventional moral and political methodology, our current conceptual scheme and present political and legal institutions, on another level, it is continuous with certain key values. See B. GOODWIN, *SOCIAL SCIENCE AND UTOPIA* 6 (1978) (arguing that although in one sense utopia is ahistorical, its [development] must be historically located).

Similarly, we can see utopian reasoning as necessary to bringing about a new moral paradigm. The new paradigm may involve the sort of "networking" advanced by some feminist writers and others. For an example of utopian reasoning in constitutional theory see Karst, *Women's Constitution*, 1985 DUKE L.J. (1985). I do not mean to imply that Karst intends his piece to be characterized as utopian critical reasoning or that he would welcome this characterization. For criticism of Karst's project see Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA L. REV. 543 (1986).

Feminist writers have emphasized the notions of empathy and connectedness as a paradigm for human moral relations. See C. GILLIGAN, *IN A DIFFERENT VOICE* (1982) and N. NODDINGS, *CARING* (1984); See also M. MAYEROFF, *ON CARING* (1972). Connectedness has also been endorsed as a particular way of knowing. M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, *WOMEN'S WAY OF KNOWING* 112-13 (1986) (describing connected knowing as an attempt to convey knowledge to another by having that person share the knower's experience). Connectedness with other people structures an authentic sense of community; it produces a real sense of "we". Gabel, *Founding Father Knows Best: A Response to Tushnet*, 1 TIKKUN 41, 43 (1986) ("A real sense of "we" emerges from the realization of a desire, immanent within each of us as social beings, for mutual recognition and confirmation; it is a feeling-bond that is grounded in the actual connection of those who generate it, and as a result, it has no need of a ground or source outside itself in order to exist.")

Utopian reasoning must also supply a phenomenology of those present values which should survive—though, perhaps, in an altered form—critical attack. Included in this phenomenological description should be an integrated vision or ideal of future social organization. This involves an account of how

(Continued)

in schematically, both the moral and empirical obstacles in the way of deploying the model. Finally, and a corollary of the fourth principle, utopian reasoning must describe bridge principles⁴⁴ for overcoming these obstacles.⁴⁵ Meeting these constraints is

the "old" values of autonomy, equality, community and so forth are to be integrated according to a new moral paradigm resulting in "new" values of autonomy, equality and community. What follows from this is that utopian values if ever instantiated in actual future institutions can be seen to have their source in present law and social reality. For a related point consider Dworkin's remarks:

[U]topian legal politics is . . . law still. Its philosophers offer large programs that can, if they take hold in lawyers' imagination, make its progress more deliberate and reflective. They are chain novelists with epics in mind, imagining the work unfolding through volumes it make take generations to write. In that sense each of their dreams is already latent in present law; each dream might be law's future.

R. Dworkin, *supra* note 24, at 409

44. Bridge principles include descriptions of the means to be used in realizing utopian ideas. Cf. HERMAND, *THE NECESSITY OF UTOPIAN THINKING*, SOUNDINGS 97, 111 (1975).

The notion of a bridge principle is used in the philosophy of science to describe a principle for connecting the theoretical vocabulary of a scientific theory with its experimental vocabulary. In this essay, I use the term to suggest a methodology for describing transition institutions and transition policies for getting from present society to a more ideal one. Bridge principles have a more general use in tying abstract formulations of fundamental values to concrete circumstances. R. Lipkin, *supra* note 2.

It is important to keep in mind that bridge principles may assume a great significance, since it may be a long time before we reach our utopian ideal. Indeed, some may argue that the importance of an utopian ideal is that it serves as an ideal which is unrealizable. In my view, however, a utopian ideal must be achievable for it to be the appropriate sort of utopian ideal.

A contemporary description of a model for a utopian society cannot be complete. If it was, future utopian development of the model description would be impossible; and that is anathema to utopian reasoning. Current conceptions of utopia should not freeze the development of an even more ideal society. One general criticism of current methodologies in ethical and legal thought is that they assume present values to be sacrosanct. If utopian reasoning froze future utopian values, it would be guilty of a critically similar mistake.

Those who use the appellation "utopian" in a pejorative sense must explain precisely what is wrong with specifying as an ideal what presently is unrealizable. The complaint cannot be simply that it is unrealistic to suppose that the perfect can become the real presently. No utopian worth her salt believes that. Moreover, it is not enough to say that we cannot presently deploy a utopian scheme; that is compatible with the contention that we should strive to implement such a scheme in the future.

45. Utopian reasoning can and must take place in a variety of disciplines. And utopian theorists in one discipline must maintain at least a rudimentary understanding of what their colleagues in other disciplines. Utopian reasoning informs us how the various utopian programs form a synoptic vision of a new society. This is already going on today, though perhaps not self-consciously on

(Continued)

necessary for utopian theory to be relevant to our present political troubles. When these constraints are met, moral evolution is possible. In such circumstances moral personality, that is, what it is to be a moral person, changes and develops historically. Consequently, the historical development of moral character might be very well enhanced by utopian reasoning.

VII. CROSS HISTORICAL COMPARISONS OF MORALITY PERSONALITY

This raises the question whether it is morally possible to compare individuals from different historical periods. Does it ever make sense to say that a person living, say, a thousand years ago was a different kind of moral person than we are? Can we say that people today are morally better than those living in ancient times? If so, what methodology do we employ to establish such a claim. I think the answer to these questions is unequivocally yes; while no one has yet devised the appropriate methodology for verifying such a claim.

Consider some examples. Aristotle believed that slavery was a necessary element in a civilized society. Some medieval trials were decided by drowning the defendant, or putting him through some other ordeal. Reviewing history provides evidence that some moral difference between and among people of different epoches is a difference in kind.⁴⁶ This evidence illustrates that that we can see a historical progression in the moral sensitivity of human beings.⁴⁷

To insist that what is generally true of people today, will (necessarily?) be true of people in a millennium is myopic and parochial. If the prudential and moral price is right, people can and will change. Perhaps the change will occur along the lines suggested by radical feminists and democratic radicals. The potential for improvement in human nature or in the conception of a person is possible. However, improvement is usually imperceptible when one is immersed in the concrete. Therefore, an historical perspective is required to understand how this moral potential can blossom. More importantly, the historical possibility

the part of its practitioners. *See generally*, the notion of an economic bill of rights in M. CARNOY AND D. SHEARER, *ECONOMIC DEMOCRACY* (1980).

46. This is not to suggest that the difference between different kinds of moral persons is incommensurable. Indeed, we can discern the common thread between Aristotle and ourselves. My point here is only that we should never identify what is currently conceived of as a good person with the ideal of a good person.

47. Of course, there are notable exceptions to this progression. Moreover, I do not contend that it is inevitable that we will progress morally just that we have in fact.

that people can radically change morally suggests that any methodology sanctifying the present or the status quo is deficient.

Moral change, of course, has implications for constitutional theory and legal scholarship. For if a theory of moral change is possible, the eclectic liberal's exhortation that intuition is the best we can do in the context of social change becomes less persuasive. The correct moral and legal theory may restrict the need for flexibility and discretion in judicial adjudication; it may be specifically designed for that task. Such a theory may jettison some—more peripheral—intuitions, but that is alright. Any interesting and useful theory permits, or perhaps, even requires this. It is one thing to value intuition as a way of determining the subject matter for theory construction or as part of the methodology in constructing one's theory. It is quite another thing to slavishly adhere to each and every intuition as if it were sacrosanct. A defense of the status quo is the only likely result of such a process. Surely, in attempting to articulate a reflective systematic account of moral and legal intuitions, not every intuition survives critical and theoretical scrutiny. The appropriate conception of moral change must include a notion of dynamic theorizing. A moral theory is not a fixed, static entity. Rather, it is a process of scrutinizing intuitions in terms of reflective standards that are intuitively plausible and critically effective.⁴⁸ How else can a person (or a society) develop and evolve morally? If we insist that all intuitions imbibed with one's mother's milk survive scrutiny, we provide no systematic method for moral development and change. Growing up in a traditional society, I may believe that gender-linked roles are perfectly natural and acceptable as a basis for legal institutions. After exposure to the feminist theory, I may jettison the former intuitions and replace it with a non-chauvinist ones. Articulating a systematic account of my moral intuitions—attempting to construct a critical theory of my own moral beliefs—is inextricably related to moral development and change. Any process of evaluating intuitions by comparing them to one another and to principles which explain their structure and rationale is a theoretical process. Let us not recoil from theory; let us just do the theoretical job right.

The eclectic liberal denies the possibility of an ahistorical proof of human nature. But it's not really clear what this denial involves. Surely, a conception of human nature that is not derivative from or applicable to historical conditions is fatuous. However, it is a non sequitur to infer from this truism that our *conceptualization* of human nature as it has developed and changed historically must be exclusively grounded in historical facts.⁴⁹ Our conceptualization of

48. For a more comprehensive discussion of this process see Lipkin, *supra* note 2.

49. Our conceptualization of historical human nature may include a deep explanation of certain traits which seem to be central to our humanity. For
(Continued)

human nature must depend on historical events, but it need not first achieve an unsystematized description of each and every trait ever exhibited by human beings as historical agents, however contradictory such a description might be. Instead, there may be discernible historical trends in the development of human personality, toward or away from domination for example. Such trends might turn out to be describable only in terms of non-trivial necessary truths.⁵⁰ Such truths may suggest that there are important characteristics of human beings—their need for autonomous social interactions with others as persons, say—which define human nature, while simultaneously illustrating how these (essential?) human traits develop and change historically and are complemented by additional traits which combine to form human personality.⁵¹

VIII. THE ISSUE OF LEGITIMACY

For the eclectic liberal, as long as there is evil in the world "and so long as human interests conflict, institutional structures need to be fashioned to protect rights."⁵² There is much to be said for this requirement. But which rights are institutionally protected? Is it the right of free speech? And *whose* right to free speech? Is it the right of the poor, inner city black to speak his or her mind? Is that institutionally protected? Where? On the street corner? When political power depends so much on mass communication, which in turn depends on the ordinary but expensive forms of media, is the ghetto dweller's right to free speech protected?

Whenever rights are protected in any society they are protected at the behest of the powerful. There is a penumbral "cultural authority" behind the law which includes the commands of the powerful, the normative element in the rule of law, and the internalization of these commands by the citizenry. It is this cultural authority and not the laws themselves which provide the protections associated with the legal system. In an egalitarian society it may be possible to have this cultural authority as a protec-

example, sympathy is certainly a trait that everyone or almost everyone has to some degree. We know this historically. Yet, there might be a way of showing that this empirically discoverable property is central to our capacity as practical reasoners. Lipkin, *Altruism and Sympathy in Hume's Ethics*, AUSTRALASIAN J. PHIL. (1987).

50. This reintroduces the notion of *synthetic a priori* into political theory.

51. This should not preclude the possibility that primitive human beings lacked traits which are now regarded as essentially human. Perhaps, some of these traits were acquired only later in historical development. Becoming part of cultural evolution, such traits become essential features of persons.

52. Shiffrin, *supra* note 1, at 1203.

tor of rights without actual statutes and constitutional decrees.⁵³ No doubt this cultural authority can protect rights in a democratic, radical society only when it embodies well-entrenched traditions of reciprocal regard for individual freedom and human worth. But it is a question begging to insist that compliance can come about only when the cultural authority is backed up by law.

Cultural authority is tied to political legitimacy. Legitimacy exists only when the law or the cultural authority behind the law respects each individual equally. Eclectic liberalism maintains a different view. According to Shiffrin, "[t]he question of legitimacy in this society depends upon who is being asked to respect and obey what laws in the context of what process."⁵⁴ This suggests that eclectic liberalism departs from traditional conception of legitimacy which seek a *general* answer to the question what legitimizes the law or the state. According to eclectic liberalism it seems that the law can be legitimate for some and not for others. Consequently, we have the following anomalous result. Suppose the law respects Duncan's rights, but not Roberto's. Does it follow that Duncan cannot disobey the law, in order to assist Roberto in changing the law to respect Roberto's rights? If so, then eclectic liberalism denies the legitimacy of a white civil rights worker illegally sitting at a white lunch counter in order to help blacks achieve their freedom. On the other hand, if eclectic liberalism permits breaking the law solely for the purpose of helping others, then it blurs the distinction between liberalism and radicalism.

Let us bring this issue into sharper relief. If Shiffrin concedes that, in contemporary society, steel workers are not obligated to obey the law, *and* that well-paid autoworkers, for example, may disobey the law in support of the steel workers, he is laying the seed of revolution.⁵⁵ Shiffrin doesn't shrink from this conclusion; rather he insists that liberals can support revolutions. This blurs the distinction between liberalism and radicalism once more. Liberals can, of course, support revolutions, the *kind* of revolutions liberals can support and those supported by radicals are very different kinds of revolutions indeed. Exploitation warranting revolutionary change, on democratic radical grounds, is systemic, affecting every aspect of law and society. Revolution, as a radical concept,

53. The point here is that the law does not usually come down and grab people by the throat and force them not to violate the rights of others. Rather, internalized values do that. Hence, internalized values can do so without law, at least, there is no reason in principle why this could not be so. It is no response to say that this cultural authority does not work in the case of criminals. It is no response because, contrary to popular belief, criminals make up an extremely small percentage of the society. What makes law abiding people obey the law? My answer is the cultural authority existing irrespective of whether there are formal laws or a typical legal system.

54. Shiffrin, *supra* note 1, at 1205.

55. Shiffrin mentioned this in conversation.

refers to economic injustice as well *as every other aspect of political, social and personal life*. Revolution is a process through which human social reality and human nature is defined, refined and improved. The goal of such revolution is not *merely* to achieve freedom from coercive forces, but rather to bring about the conditions in which individuals can achieve authentic⁵⁶ autonomy in creating and recreating their individual identities. Legitimacy, one result of such a revolutionary process, cannot come piecemeal for this or that group.

IX. NEED, DESERT, AND COMMUNITY

The egalitarian element in this revolutionary process is antithetical to the liberal conception of desert. Shiffrin contends that "ideas of reward and praise are deeply embedded in our most elementary institutions."⁵⁷ Why is reward necessarily individualistic and not collective? Further, why is reward necessarily economic reward—not reward of power, recognition, self-satisfaction and so forth. Doesn't a physician have a more intrinsically rewarding job than a sanitation worker? If so, why shouldn't the sanitation worker earn more? Shiffrin does not explain why reward should not work in this way. Additionally, even if reward must be economic, should not the avenues to economic reward be equally and meaningfully open to every member of society? Shouldn't need outweigh desert in many circumstances?

Shiffrin wouldn't disagree. In his view, "[e]clectic liberalism . . . can accept free will, recognize the moral claim of desert and regret the inability to meet that moral claim when superior claims of need are introduced."⁵⁸ However, in a society which institutionalizes desert and economic reward, those reaping the benefits usually have the political power to eviscerate the moral claim of need. Accomplished individuals often have the clout to render the claim of desert preeminent—superior to food, shelter, medical care and so forth. Any realistic appraisal of contemporary society supports this observation. To paraphrase Shiffrin, he (Shiffrin) cannot assume a realistic account of the complexity of social reality for the pluralism part of his conception and so nearly reject it in the context of desert.

Institutionalized, individualistic reward often prevents the development of a comprehensive sense of community. Shiffrin is skeptical about both the likelihood and the desirability of achieving

56. The notion of "authentic" autonomy refers to the process by which an individual critically evaluates culturally implanted desires and values and rejects or internalizes them. See M. TAYLOR, *COMMUNITY, ANARCHY AND LIBERTY* 148 (1982).

57. Shiffrin, *supra* note 1, at 1207.

58. Shiffrin, *supra* note 1, at 1208.

genuine community. Shiffrin believes that "if radicals are wrong, they will produce yet another state that violates equality and denies important freedoms in the name of community."⁵⁹ This indicates apprehension that radical change cannot or will not steer a course toward community but avoid totalitarianism.⁶⁰ This overlooks an important feature of acceptable revolutionary change, namely, the need and desirability of doing it again. Walzer observes that political power or liberation is twice-won: first, liberation from large private actors is won with the help of the state, followed by liberation from the state.⁶¹ However, the truth is probably more complex.

Liberation must be won over and over again. Liberation must first be won from domination by large, independent aristocratic interests; then from the control of powerful burgeoning capitalist enterprises; then from the military-industrial state; then from the welfare-state; then from state capitalism and so on and so on.⁶² Even beyond the state---if there is anything beyond the state---in circumstances in which autonomy, equality, fraternity and community reign as shared goals, some individuals and groups might seek to dominate others. In such a society, however, the *tendency* will be away from domination. When a group tries to dominate other groups its cost will be high and the damage to the victim will be less severe.⁶³ The question should not be: will a society dedicated to the values of autonomy, equality, fraternity and community eradicate all human evil and misery, all domination, all conflict? The answer to this question is resoundingly no. There will always be conflict. The question is what sort of society will make the price of conflict less deadly?⁶⁴ Eclectic liberalism is not likely to do this.

59. Shiffrin, *supra* note 1, at 1209.

60. The problem of totalitarianism is a problem any theory of democratic socialism must confront. Will a democratic socialist society develop a conception of community that stifles individuality? Replying that it will not if the society is genuinely democratic is not a good reply. Even democratic societies can squelch individual flourishing. To avoid this, formal and informal constraints must be built in to the democratic process. One problem with Bork's conception of majoritarianism is that it overlooks the necessity of informal constraints.

61. M. WALZER, *RADICAL PRINCIPLES* 51 (1980).

62. To say nothing of the counter-revolutions occurring on the way.

63. Aggressiveness or competition in a libertarian or social Darwinist society probably will leave the loser dead. In a conservative society, the loser will probably be a servant. In a liberal society, the loser will receive welfare. In a democratic radical society, the loser will be left to struggle another day.

64. In a radical democratic society, conflict will not only be less deadly. There will also be ways for anyone to participate in daily decisions so as to resolve conflict. Equal say in the decisions of the economy and political structure do not extirpate conflict. Rather it makes conflict work for everyone's welfare.

On a related issue, Shiffrin contends that radicalism does not take the problem of misery seriously enough.⁶⁵ Radicals are prepared to sacrifice the misery of actual people living now in the hope that present misery will miraculously lead to a future utopia. Shiffrin is certainly right on this point; such a trade-off is ghastly. However, if relieving misery now, prolongs or exacerbates future misery, eclectic liberalism is just as guilty as is radicalism in inadequately dealing with the problem of misery. Surely, today's misery is vividly upon us. But to afford today's misery greater attention than future misery is to consider the present more real than the future.⁶⁶ If some of tomorrow's misery is just as bad or worse than some of today's misery, neither eclectic liberalism nor democratic radicalism solves the problem of misery.

The acuity of the problem of misery tends to become blunted in a society where everyone can participate meaningfully in major (as well as minor) social, economic and political decisions. Shiffrin, to the contrary, believes that participation is not universally valuable because some people may find it "stifling and boring."⁶⁷ However, participation potentially diminishes the misery in the world by providing a solid basis for communicating the needs and interests of different members of the group and by providing a means for resolving conflicts which cause and exacerbate misery.⁶⁸ Participation tends also to equalize the strength of competing factions. Neither of these tendencies will eradicate misery, but they tend to blunt its sting.⁶⁹

As for those who find participation oppressive, let them abstain. As long as the means of participating are opened permanently to

65. Shiffrin said this is conversation. He does claim that ethical liberals slight this problem. Shiffrin, *supra* note 1, at 1207.

66. Emphasizing the present to the detriment of the future is paradigmatic of imprudence. T. NAGEL, *THE POSSIBILITY OF ALTRUISM* 33-46 (1970). Of course, Shiffrin might reply that present misery is more certain than future misery. This is either tautologically true, that present misery is more certain than the future misery because the present is more certain than the future. Or else, it is false in many cases.

67. Shiffrin, *supra* note 1, at 1185.

68. For those who believe participation in democratic processes is central to the original understanding of the Constitution conceptually, then the original understanding must morally include the abolition of all forms of hierarchy and domination. For full participation is impossible absent this abolition. Consequently, the egalitarian strain in the Warren Court's decisions, rather than improper, is actually the fulfillment of the original understanding of the founding fathers. *But see* R. BORK, *supra* note 24.

69. More precisely, the potential for participation will help to relieve misery, but other remedies are also required. Participation is necessary to create a continuing practical dialogue among the various members of society. Such practical discourse is required for there to be communal judgment. *Cf.* R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS*, 223 (1983).

everyone, the recluse has no grounds for complaint. Of course, participants should always represent, as best they can the interests of non-participants; and no one should be compelled to participate. (Though genuine, non-paternalistic encouragement to participation is not precluded.) Still, non-participants may lose out in not participating; but then that is their choice. It is clearly unfair for those who dislike participating to impose a "benevolent dictator" upon those who enjoy participating just because the nonparticipants dislike participation.

X. CONSTITUTIONAL ADJUDICATION IN THE AGE OF BALANCING

Eclectic liberalism endorses balancing in constitutional adjudication. Indeed, it is difficult to see how it can endorse any other methodology. The problem with balancing is that it tends to obscure why a certain balance was reached, and how the rationale of that decision illuminates other pressing constitutional issues. Balancing, as a comprehensive approach to practical reasoning in general, and constitutional adjudication in particular, fails to wear on its sleeve the values to be weighed, or how one should tally these values. Such balancing may be deployed as camouflage for invidious decisions. Moreover, two individuals can add up the same values, yet reach different conclusions without a clue concerning why. This leaves us with a mystery how to systematically replicate these decisions.

Categorical or definitional balancing, on the other hand, is preferable to *ad hoc* balancing because the type and strength of values is decided in advance. However, should Shiffrin concede that only categorical balancing is acceptable, he leaves the door open to questions of which categories we should prefer. Questions of this sort cry out for a theoretic approach to constitutional values. Consequently, eclectic liberalism must take a second look at theories, principles and methodologies.

CONCLUSION

I want to conclude this essay with some speculative comments. If Shiffrin is right in his criticism of ethical liberalism and democratic radicalism, and if eclectic liberalism is an inadequate substitute, then we are then faced with a conspicuously difficult problem. How do we organize social relations when there is no moral consensus concerning the resolution of the important moral and legal controversies? When society is comprised of disparate and often hostile moral communities, is civic virtue possible? By "civic virtue" I mean both an attitude and a form of language or human communication. The attitude is the disposition to tolerate and respect the answers one's enemy gives to the urgent, controversial questions of the period. The form of communication consists of; 1) a political discourse which defines and

conceptualizes legal questions in terms of an agreed upon paradigm of toleration and respect and 2) precepts and rules of inference which permits enemies⁷⁰ the chance to engage in a continual conversation, a dialogue, which though not always successful in achieving consensus, permits its own self-perpetuation.

This question is a vital question which all serious legal, moral and political theorists must address now. The reason for this urgency is that our society is seriously polarized as it has never been before with the possible exception of the year just prior to the Civil War. Various groups, both on the left and right, have given up the goal of achieving consensus. Instead, they are determined through a variety of means to win governmental support for their side without concern for the interests of the losers. Under these conditions, the possibility of civic virtue is illusory. For civic virtue entails taking your enemies' concerns seriously and through principled compromise attempt to accommodate them. It is only by doing so that we show the appropriate connection among people living in the same society.⁷¹

70. Your enemy is a person with whom you disagree about the significant controversial issues of the day. Your enemy is someone with whom you disagree systematically about the moral good and who one has given up any hope of persuading through reasoned conversation. In other words, one's enemy is a person believed to be so thoroughly corrupt or incapable of coming to see the point of your vision of society. Enemies may agree on many things, but their reasons for agreement will be different. We may all agree that murder, theft, fraud and so forth should be criminalized. But we may disagree as to other important controversial issues, such as abortion, school prayer, flag burning, pornography and so forth. I am only concerned with the relations between enemies, not with the devil. The devil systematically abhors all moral prescriptions, and sees the moral life, the meaning of life, the good life, or one's obligations to others as absurd. My discussion is concerned with bringing enemies together, or in demonstrating why it is that such a community is impossible.

71. Of course, just what counts as the "same" society is a difficult conceptual matter. One central feature of individuals living in the same society is an identification with the chief values in that society. Moreover, it is experiencing and acting in the world through this identification with others that renders individuals members of the same society. In that case, the United States is very far from being the same society.