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# Liberalism, Radicalism, and Legal Scholarship

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# ARTICLE

## LIBERALISM, RADICALISM, AND LEGAL SCHOLARSHIP

Steven Shiffrin\*†

### INTRODUCTION

In the eighteenth century, Kant answered the utilitarians.<sup>1</sup> In the nineteenth century, without embracing utilitarianism,<sup>2</sup> Hegel

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\* Professor of Law, UCLA. This project started out as a broad piece entitled "Away From a General Theory of the First Amendment." It has taken on unbounded proportions and might as well be called "Away From A General Theory of Everything." During the several years I have worked on it, more than thirty friends and colleagues have read one version or another and have given me helpful comments. Listing them all would look silly, but I am grateful to each of them, especially to those who responded in such detail. I would especially like to thank Dru Cornell, who served early in the project as a research assistant and thereafter offered counsel, particularly lending her expertise on continental philosophy. Finally, I appreciate the comments suggested to me by several groups at UCLA (Critical Legal Studies, Law and Philosophy, the Ad Hoc Eclectics), at USC (in the Law and Social Sciences Workshop), and in the halls while visiting at Boston University.

† Editors' note: The following notes, insofar as the citations for books and periodicals are concerned, depart from rules 15 and 16 of A UNIFORM SYSTEM OF CITATION (13th ed.). Such departures are confined to the subsequent citation of works previously cited. This has been done in the interest of clarity.

1. See, e.g., I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (L. Beck trans. 1959). See also *infra* note 15. By utilitarianism, I mean a particular form of consequentialism (i.e., the theory that the moral value of actions lies in their consequences), one that values actions exclusively by their tendency to increase or maximize people's pleasure or happiness. See, e.g., J. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST 79-80 (1973). Although we ordinarily associate utilitarianism with the nineteenth century (owing to the work of J. Bentham, J.S. Mill, and others), it was well developed in the philosophical literature before then. For the claims that utilitarianism was England's "most characteristic, if not most important contribution to the development of ethical theory" and that its "true founder" was seventeenth-century Bishop Richard Cumberland, see E. ALBEE, A HISTORY OF ENGLISH UTILITARIANISM 1, 14 (1901).

2. See, e.g., G. HEGEL, PHILOSOPHY OF RIGHT §§ 119-28, at 81-86 (T.M. Knox trans. 1942). See generally C. TAYLOR, HEGEL 3-50 (1975).

answered Kant,<sup>3</sup> and Marx answered Hegel.<sup>4</sup> The world has not recovered.

America, however, rushed on, moving easily between Benthamite utilitarianism and Lockean conceptions of natural law, not oblivious to the great continental dispute but not moved either.<sup>5</sup> And if America was not moved, American legal scholarship was hardly touched. Twentieth century American legal scholarship has been dominated by utilitarians—by pragmatists, social engineers, and instrumentalists.<sup>6</sup> These scholars have been allied with an always-present group of (mainly constitutional) theorists who emphasize the need to mix a bit of natural law into the utilitarian calculus.<sup>7</sup> Even legal philosophers in the post-World War II era, although often critical of the utilitarian mode,<sup>8</sup> have been generally uninterested in the schematic approaches of continental philosophy,<sup>9</sup> occupying themselves instead with “piecemeal

3. See, e.g., G. HEGEL, *supra* note 2, at 89-90; G. HEGEL, THE PHENOMENOLOGY OF MIND 446-53 (J.B. Baillie trans. 1910) [hereinafter cited as G. HEGEL, THE PHENOMENOLOGY OF MIND]. See generally J. HYPPOLITE, GENESIS AND STRUCTURE OF HEGEL'S *Phenomenology of Spirit* (S. Cherniak & J. Heckman trans. 1974).

4. K. MARX, *Critique of the Hegelian Dialectic and Philosophy as a Whole*, in THE ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844, at 190-93 (M. Milligan trans. 1964).

5. See, e.g., L. HARTZ, THE LIBERAL TRADITION IN AMERICA 10 (1955). [L]aw has flourished on the corpse of philosophy in America, for the settlement of the ultimate moral question is the end of speculation upon it. Pragmatism, interestingly enough America's great contribution to the philosophic tradition, does not alter this, since it feeds itself on the Lockean settlement. It is only when you take your ethics for granted that all problems emerge as problems of technique.

*Id.*

6. See Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66, 82 (1972) [hereinafter cited as Tribe, *Policy Science*].

7. See generally M. COHEN, AMERICAN THOUGHT: A CRITICAL SKETCH 135-80 (1954).

8. See B. BARRY, THE LIBERAL THEORY OF JUSTICE 7 (1973) (contending that utilitarianism among philosophers is “an almost dead stalking-horse”). For a more recent attempt to show that the horse can run another race, see generally D. REGAN, UTILITARIANISM AND CO-OPERATION (1980).

9. The tendency of legal philosophers to stay within the universe of discourse suggested by utilitarian analysis is illustrated by two collections of essays edited by Robert S. Summers. MORE ESSAYS IN LEGAL PHILOSOPHY (R. Summers ed. 1971); ESSAYS IN LEGAL PHILOSOPHY (R. Summers ed. 1968). Summers referred to a revival of interest in Bentham and a “developing faith in the role of reason in social ordering [that] appeared in some quarters [in this century] which was quite unlike anything since Bentham.” Summers, *Legal Philosophy Today—An Introduction*, in ESSAYS IN LEGAL PHILOSOPHY, *supra*, at 19 [hereinafter cited as Summers, *Legal Philosophy Today*]. The point is not that legal philosophers were Benthamites; rather, the issues believed central to legal philosophy developed in a philosophical tradition heavily influenced by utilitarian thought. Thus, H.L.A. Hart in his John Dewey Memorial Lecture in 1978 remarked, “I do not think a satisfactory foundation for a theory of rights will be found as long as the search is conducted in the shadow of utilitarianism . . . .” Hart, *Between Utility and Rights*, in THE IDEA OF FREEDOM: ESSAYS IN HONOUR OF ISAIAH BERLIN 98 (A. Ryan ed. 1979). Cf. R. SENNETT, AUTHORITY 84-121

justificatory analysis"<sup>10</sup> and with "patient enumeration of legal concepts and legal language."<sup>11</sup>

At least, so it was. In 1971 a Harvard philosopher produced a neo-Kantian general theory of justice in response to the utilitarians,<sup>12</sup> and in 1975 a Harvard law professor steeped in Hegel and Marx answered.<sup>13</sup> For a decade, we have witnessed an explosion

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(1980) (rebellion against a particular framework of authority often determines and confines one's categories of thought, emotion, and action).

10. Summers, *Legal Philosophy Today*, *supra* note 9, at 20.

11. Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953, 958 (1957). This quotation from Hart was a proposal for what should be done in legal philosophy. He, of course, has been highly influential. See Pannam, *Professor Hart and Analytical Jurisprudence*, 16 J. LEGAL EDUC. 379 (1964).

12. See, e.g., J. RAWLS, *A THEORY OF JUSTICE* (1971). Some might wince at the idea of Rawls' work being considered as legal scholarship. See Posner, *Lawyers as Philosophers: Ackerman and Others*, 1981 AM. B. FOUND. RESEARCH J. 231.

[A] law school is a proper place, and law professors proper people, to do political philosophy, provided that the dean and the university administration take a tolerant view, as I think they should, of law school research not related directly to the things in which lawyers and judges are professionally interested.

*Id.* (emphasis added). Constitutional law and philosophy merge when anyone writes about the criteria for evaluating constitutions. It is puzzling that anyone would think that writings which discuss freedom, justice, equality, property, community, or the relationship among them are not "directly related to the things in which lawyers and judges are professionally interested." For a more perceptive and generous view of legal research, see Graetz & Whitebread, *Monrad Paulsen and the Idea of a University Law School*, 67 VA. L. REV. 445 (1981).

13. R. UNGER, *KNOWLEDGE AND POLITICS* (1975) [hereinafter cited as R. UNGER, *KNOWLEDGE AND POLITICS*]; R. UNGER, *LAW IN MODERN SOCIETY* (1976) [hereinafter cited as R. UNGER, *LAW IN MODERN SOCIETY*]; Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983) [hereinafter cited as Unger, *Critical Legal Studies*]. The text of this article was completed before the appearance of Unger's 1983 article. Many of the notes show how it connects to his more extensive works. For the most part, Unger's views have been elaborated. In a few important areas, they apparently have changed in ways that I believe underscore the appeal of eclectic liberalism. For helpful background relevant to an appreciation of Unger's 1983 article, see P. RICOEUR, *HERMENEUTICS AND THE HUMAN SCIENCES* 63-100, 222-46 (1981). For stimulating criticism of Unger's *KNOWLEDGE AND POLITICS*, see Kronman, *Book Review*, 61 MINN. L. REV. 167 (1976) and Leff, *Book Review*, 29 STAN. L. REV. 879 (1977). Among other things, both Kronman and Leff made quite perceptive comments about the foundations of Unger's concept of human nature to which I also subscribe. See *infra* text accompanying notes 336-38. Kronman has a general criticism to make, however, that I think is unfair and deserves special comment. Kronman argues that Unger lacks originality, that his views are all there to be found in Hegel "and for the most part explicitly so." Kronman, *supra*, at 182. See *also id.* at 183, 195.

At one level of abstraction, Kronman is right, but at the same level of abstraction Gramsci, Horkheimer, Marcuse, Adorno, Gadamer, and similar scholars are all derivative. Analysis at the same level of abstraction would say that nothing in political or moral theory is original, that it is all there to be found in Plato "and for the most part explicitly so."

There is a tendency for those who write outside the radical tradition to lump all

of law and philosophy in American law journals.<sup>14</sup>

In the thousands of pages produced, two models or visions of the world are of central interest in this article. The first is ethical liberalism or neo-Kantian<sup>15</sup> liberalism. Many of the themes in

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radical thinkers together, and radicals tend to do the same to liberals and conservatives who write in styles of discourse outside their own tradition. Indeed, Kronman rightly criticizes Unger for doing just that. Kronman, *supra*, at 183.

To put it another way, Unger is steeped in Hegel and Marx, but is no more a Hegelian or a Marxist (*see infra* note 21) than Laurence Tribe is a Burkeian (*see infra* note 42). Unger's book, *KNOWLEDGE AND POLITICS*, powerfully raises issues legal scholarship has slighted; it has provoked a great deal of fruitful scholarship. Arthur Leff well described Unger's contribution:

[F]ew people, if any (and those mostly living in absurd places like Frankfurt and Budapest), have seen or described as creatively and accurately all the necessary interconnections among human misperceptions of themselves, their societies and their universe, especially the devastating 'antimomies' of modern human thought—those basic positions about reality that are simultaneously necessary and contradictory.

Leff, *supra*, at 880.

14. An unpublished bibliography of writing in Critical Legal Studies lists more than one hundred and twenty articles, almost all of which were produced in the seventies (on file at *UCLA Law Review*). For a partial bibliography of the many publications on Rawls' work, see *READING RAWLS* 348-50 (N. Daniels ed. 1975).

15. There are many senses in which the scholars mentioned in the text accompanying this note are not Kantian. For example, they generally do not subscribe to Kant's easy toleration of the massive inequality of wealth. Kant, *On the Common Saying: "This may be True in Theory, but It does not Apply in Practice,"* in *KANT'S POLITICAL WRITINGS* 75 (Reiss ed. 1970) [hereinafter cited as Kant, *Theory and Practice*]. "This uniform equality of human beings as subjects of a state is, however, perfectly consistent with the utmost inequality of the mass in the degree of its possessions . . . . Nevertheless, they are all equal as subjects *before the law* . . . ." *Id.* (emphasis in original). *But cf.* I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 134 (J. Ladd trans. 1965) [hereinafter cited as I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*] (permitting state funds for the poor, the disabled, and the sick). These scholars presumably do not share his stern views of punishment (*id.* at 98-108, 131-32) or his absolutist views about the moral duty to obey the law (*id.* at 86-87; Kant, *Theory and Practice, supra*, at 81). Like Kant, however, they do reject utilitarianism, exalt rights, and emphasize the concepts of respect and dignity. They are all rationalists, believing that many of the most important political issues of our time can be solved by attention to and deduction from basic principles. And they are all individualists who resist the social conception of human beings that I shall attribute to the radicals.

Kant is usually regarded as a horrible writer, but he has written an accessible summary of his political thought. *See* Kant, *Theory and Practice, supra*, and Kant, *Idea for a Universal History With Cosmopolitan Intent*, in *THE PHILOSOPHY OF KANT* 116-31 (C. Friedrich ed. 1949) [hereinafter cited as Kant, *Universal History*]. The latter essay (or his *CRITIQUE OF JUDGMENT*) is indispensable for understanding his moral thought, and the failure to attend to the principles there embraced has caused some scholars to misinterpret Kant's most important moral writings. *See infra* note 75.

The standard works on Kant's moral and political writings include: L. BECK, *A COMMENTARY ON KANT'S CRITIQUE OF PRACTICAL REASON* (1960); M. GREGOR, *LAWS OF FREEDOM* (1963) (on part two of *THE METAPHYSICS OF MORALS*; part one is *THE METAPHYSICAL ELEMENTS OF JUSTICE, supra*); H. PATON, *THE CATEGORICAL*

this model can be found in the writings of John Rawls,<sup>16</sup> Ronald Dworkin,<sup>17</sup> Bruce Ackerman,<sup>18</sup> and, in many respects, David Richards<sup>19</sup> and Charles Fried.<sup>20</sup> What is distinctive about this model is the effort to defend liberalism by deriving liberal conclusions about social justice from rather sparse premises about human nature, premises which purport to remain neutral about the nature of the good in life. To be sure, all political theories are neutral about some plans of life. Ethical liberalism, however, invokes neutrality (or variants of it) as a principle from which large and powerful political conclusions are to be drawn.

Lurking behind this neutrality is a conception of what human beings ought to be like and how they ought to think. My criticism is that this underlying conception of human nature will not support general conclusions about individual rights, about property, or about education. Indeed, I will suggest that the entire enterprise of drawing general political conclusions from sparse premises, rooted as it is in a rationalistic desire to transcend human differences, obscures the diversity of human beings, denigrates our

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IMPERATIVE (1948) (ON THE FOUNDATIONS OF THE METAPHYSICS OF MORALS, *supra* note 1).

A particularly helpful guide for the legal scholar has been written by Bruce Aune. B. AUNE, *KANT'S THEORY OF MORALS* (1979). See also William Galston's lucid and penetrating discussion of Kant's theory of history. W. GALSTON, *KANT AND THE PROBLEM OF HISTORY* (1975).

From the perspective of most legal scholars, the difficulty with much of the philosophical commentary on Kant's moral and political philosophy is the commentary's preoccupation with the relationship between Kant's moral theory and his epistemology as detailed in the *CRITIQUE OF PURE REASON*. That commentary is a gold mine for those interested in the debate over free will and responsibility but contains only a handful of gold nuggets for those interested in the relationships among freedom, equality, property, community, and the like. This is true even of Kant scholars whose moral and political writings are otherwise loaded with insights of importance for legal scholars. Compare R. WOLFF, *THE AUTONOMY OF REASON* (1973) [hereinafter cited as R. WOLFF, *THE AUTONOMY OF REASON*] (helpful discussion of Kant but without much focus on legal or political theory) with R. WOLFF, *THE POVERTY OF LIBERALISM* (1968) [hereinafter cited as R. WOLFF, *THE POVERTY OF LIBERALISM*] (attack on Mill's *On Liberty* with much of interest to legal scholars).

16. See *infra* note 56.

17. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) [hereinafter cited as R. DWORKIN, *TAKING RIGHTS SERIOUSLY*] (the edition so cited includes *Appendix: A Reply to Critics*); Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* (S. Hampshire ed. 1978) [hereinafter cited as Dworkin, *Liberalism*].

18. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

19. See, e.g., D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977) [hereinafter cited as D. RICHARDS, *MORAL CRITICISM*]; D. RICHARDS, *A THEORY OF REASONS FOR ACTION* (1971) [hereinafter cited as D. RICHARDS, *A THEORY OF REASONS*]; Richards, *Human Rights and Moral Ideals: An Essay on the Moral Theory of Liberalism*, 5 *SOC. THEORY AND PRAC.* 461, 484-85 (1980) [hereinafter cited as Richards, *Human Rights*].

20. See, e.g., C. FRIED, *RIGHT AND WRONG* (1978) [hereinafter cited as C. FRIED, *RIGHT AND WRONG*]; C. FRIED, *AN ANATOMY OF VALUES* (1970) [hereinafter cited as C. FRIED, *AN ANATOMY OF VALUES*].

passionate side, and, in the final analysis, ignores much of what is important about human nature.

The second model to be criticized in this article is democratic or neo-Hegelian<sup>21</sup> or neo-Marxist<sup>22</sup> radicalism. Many of its ideas appear in the writings of Critical Legal Studies scholars<sup>23</sup> such as Roberto Unger,<sup>24</sup> Duncan Kennedy,<sup>25</sup> Paul Brest,<sup>26</sup> Mark

21. Many radicals hold complicated conceptions of how their views relate to Hegel and Marx. See the correspondence attached to Professor Kronman's useful yet acerbic review of Unger's *KNOWLEDGE AND POLITICS*. Kronman, *supra* note 13, at 167, 200-01, 203-04 (1976). The problem, of course, is typical of those involving characterization. Unger's critique of liberalism is reminiscent of Hegel in its methodology, its organization, and its substantive concerns. His approach to resolving the alleged antinomies of liberalism, however, rests on ontological and theological premises at war with the heart of the Hegelian system. The most fundamental difference is that Unger believes in a transcendent God, while for Hegel it is crucial that no such God exists. Hegel's understanding of rationality and being requires that the infinite exists only in the necessary order of the finite. Among other things, Hegel's resolution of the "unhappy consciousness" problem depends upon a non-transcendent God. See generally C. TAYLOR, *supra* note 2, and Drucilla Cornell's forthcoming exposition and critique of the complicated relationship between Hegel and Unger.

I do not propose to trace in any detail the ways in which these scholars' ideas are related to the thought of Hegel or Marx, let alone the relationship between Hegel and Marx. For a persuasive study of the problems involved in characterizing thinkers as "Hegelian" or "Marxist", see Riley, *Introduction to the Reading of Alexander Kojève*, 9 *POL. THEORY* 5 (1981). See also L. KOLAKOWSKI, *TOWARD A MARXIST HUMANISM* 173-87 (1968).

22. A valuable short study of Marx is I. BERLIN, *KARL MARX: HIS LIFE AND ENVIRONMENT* (4th ed. 1978) (lucid but general discussion of the relationship between Hegel and Marx). See also S. AVENIRI, *THE SOCIAL AND POLITICAL THOUGHT OF KARL MARX* (1968) (emphasizing the continuity of Marx's thought with detailed discussion of the Hegel-Marx relationship).

Many of the themes of the Critical Legal Studies scholars quite naturally appear in the work of neo-Marxists in other fields. In particular, see M. HORKHEIMER, *ECLIPSE OF REASON* (1947); H. MARCUSE, *REASON AND REVOLUTION* (1941). A helpful introductory study of the so-called Frankfurt School scholars with emphasis on Adorno, Horkheimer, Marcuse, and Habermas is D. HELD, *INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS* (1980). Outside the Frankfurt School, perhaps the most important contemporary neo-Marxist is C.B. MacPherson. See, e.g., C. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* (1973) [hereinafter cited as C. MACPHERSON, *DEMOCRATIC THEORY*]; C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962) [hereinafter cited as C. MACPHERSON, *POSSESSIVE INDIVIDUALISM*]. See also R. WOLFF, *THE POVERTY OF LIBERALISM*, *supra* note 15, at 3-50 (brilliant discussion of John Stuart Mill). For useful bibliographic guides to neo-Marxist scholarship, see *THE LEFT ACADEMY* (B. Ollman & E. Vernoff ed. 1982); D. McLELLAN, *MARXISM AFTER MARX* (1979).

23. Obviously, a list of the significant Critical Legal Studies scholars would be quite lengthy. Apart from Unger and Kennedy, I have selected a few of the more important Critical Legal Studies' constitutional law scholars because issues pertaining to that area of the law are of special interest in this article.

24. See *supra* note 13.

25. See, e.g., Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 209 (1979) [hereinafter cited as Kennedy, *Blackstone's Commentaries*]; Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976) [hereinafter cited as Kennedy, *Form and Substance*]; Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law*, 41 *MD. L. REV.* 563 (1982).

Tushnet,<sup>27</sup> and, in some respects, C. Edwin Baker.<sup>28</sup> What distinguishes this model and unites these authors are the beliefs that liberalism is excessively individualistic, that it cannot be defended by rationalistic premises, that any purported neutrality is a mask for unjustified domination, and that the better course lies in radical politics (that is, supporting alternative structures that are hoped to be more democratic, less competitive, and less individualistic, while retaining commitments to individuality and humane values).

In describing democratic radicalism, I will take Roberto Unger as representative,<sup>29</sup> though in many respects no single scholar can be representative. Democratic radicals are delightfully iconoclastic. Among them, however, Unger's critique of liberalism seems to be unanimously respected. His views of knowledge, morals, and politics are drawn from the noblest and most democratic currents of the radical tradition: a rich mixture of Hegel's

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26. See, e.g., Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L. J. 1063 (1981) [hereinafter cited as Brest, *Fundamental Rights*]; Brest, *The Substance of Process*, 42 OHIO ST. L. J. 131 (1981).

27. See, e.g., Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979) [hereinafter cited as Tushnet, *Truth, Justice, and the American Way*]; Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L. J. 411 (1981) [hereinafter cited as Tushnet, *The Dilemmas of Liberal Constitutionalism*].

28. See, e.g., Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1982) [hereinafter cited as Baker, *The Process of Change*]; Baker, *Counting Preferences in Collective Choice Situations*, 25 UCLA L. REV. 381 (1978) [hereinafter cited as Baker, *Counting Preferences*]; Baker, *The Ideology of the Economic Analysis of the Law*, 5 PHIL. & PUB. AFF. 3 (1975). Baker perceives himself as a democratic radical, but his emphasis on rationality and individualism sets him apart. See, e.g., Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) [hereinafter cited as Baker, *Scope of the First Amendment Freedom of Speech*]. *The Process of Change* piece, *supra*, is designed to reconcile the opposing strains of his thought.

29. Although C. Edwin Baker has written a sophisticated analysis of the process of change that is generally compatible with Unger's discussion of change (Baker, *The Process of Change*, *supra* note 28), it is not at all clear that Unger's views of change are representative. Many radicals have been circumspect about how, if at all, their view of how society ought to be organized might come about. Indeed some of them are skeptical about the possibilities for change. Brest, *Fundamental Rights*, *supra* note 26, at 1109; Kennedy, *Form and Substance*, *supra* note 25, at 1777-78; Tushnet, *Truth, Justice, and the American Way*, *supra* note 27, at 1309, 1359.



romantic<sup>30</sup> idealism and Marx's humanism<sup>31</sup> set against a background of Catholic<sup>32</sup> theology.

My critique of democratic radicalism will not fault its willingness to depart from the rationalism of ethical liberalism. By departing from rationalism, however, democratic radicals flee to excessive romanticism. Recognizing that political values cannot be legitimized by resort to abstract premises, they turn to democratic utopias where all will be equal and where individuality will be everywhere encouraged. This sunny view, however, cannot be sustained even when qualified, as it usually is, by sober doses of realism.<sup>33</sup>

My critique of ethical liberalism and democratic radicalism suggests a synthesis that captures the best of both traditions, a synthesis that reformulates the assumptions of the political debate and places them in perspective. At a cavalier level, my position is the same as that in most articles and books—I'm right and they're wrong. All of them are wrong: the instrumentalists, the ethical

30. [A]t the heart of Hegel's system one finds the best of romanticism: emphasis on the primacy of passion. . . rejection of Kantian *stasis* in favor of the 'fluidity' of reason and the openness of human forms of life; and appreciation for not only morality but the preconscious foundations of morality in the family, the tribe, and the religious cult. . . . It is a mistake to think that despair, meaninglessness, and cynicism are essential to romanticism. . . . Hegel's view of a swirling human universe in violent motion—with ourselves and our confused, tentative concepts and often ignorant actions caught up in and contributing to the core of it, for God (and Hegel) knows what purpose—that is the romantic vision at its finest.

R. SOLOMON, HISTORY AND HUMAN NATURE 304 (1979). For another appreciative discussion of Hegel's romanticism, see R. RORTY, CONSEQUENCES OF PRAGMATISM 148–50 (1982). In the final analysis, however, Hegel was no part of the revolt against reason in favor of intuition and imagination. It is the latter point Charles Taylor has in mind when he says "Hegel cannot be called a Romantic." C. TAYLOR, *supra* note 2, at 42. Or as Robert Solomon puts it, "Hegel transcends romanticism." R. SOLOMON, *supra*, at 304.

31. See *supra* note 4.

32. Unger would emphasize that this aspect of his thought (among others) distinguishes him from Hegel and Marx, and, of course, it does. See *supra* note 21. At the same time, Unger could not deny that many of his major themes modernize significant aspects of Hegel's and Marx's thoughts.

33. To the extent radicals recognize that the "contradictions" of liberal thought cannot be reconciled and that utopia will never arrive (see *supra* note 29 and *infra* note 414), this recognition deprives them of an "objective" standard of judgment, undercuts their criticism, and promotes alternating attitudes of cynicism and despair. See *infra* text accompanying notes 341–45 and 382–90. Indeed, the device of labeling the conflict between autonomy and community a *contradiction* instead of a tension (see, e.g., Kennedy, *Blackstone's Commentaries*, *supra* note 25) depends for its efficacy on an available means of reconciling the two or on the unpalatable position of abandoning one for the other.

liberals, and the democratic radicals. I intend to present and defend an alternative that I shall call eclectic or neo-Millian<sup>34</sup> liberalism. A danger exists, however, of being misunderstood at the outset. John Stuart Mill is remembered by many as an elitist, a utilitarian who made hyperbolic claims on behalf of liberty. These aspects of Mill's position form no part of eclectic liberalism. Other themes in Mill's work do recur in eclectic liberalism, along with those of Isaiah Berlin,<sup>35</sup> Kent Greenawalt,<sup>36</sup> Amy Gutmann,<sup>37</sup> Vinit Haksar,<sup>38</sup> Kenneth Karst,<sup>39</sup> and Laurence Tribe.<sup>40</sup>

34. I call eclectic liberalism "neo-Millian" because it appropriates insights from many of Mill's writings. Crucial, of course, is the humane spirit Mill represents, but there is also an important methodological attitude. As Graeme Duncan puts it, Mill "consciously chose 'practical eclecticism' as a methodological principle, assuming that there was likely to be some truth in every doctrine, and that the most useful task of the philosopher was to discern that part, and combine it with the true portions of other doctrines." G. DUNCAN, *MARX AND MILL: TWO VIEWS OF SOCIAL CONFLICT AND SOCIAL HARMONY* 209 (1977). See, e.g., J.S. MILL, *ON LIBERTY*, in *THE UTILITARIANS* 474 (Dolphin ed. 1961) [hereinafter cited as J.S. MILL, *ON LIBERTY*]; J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY*, reprinted in II & III *COLLECTED WORKS OF JOHN STUART MILL* (1965) [hereinafter cited as 2 & 3 J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY*]. Particularly strong statements of Mill's commitment to an eclectic methodology recur in his essays on Bentham and Coleridge. See generally J.S. MILL, *ON BENTHAM AND COLERIDGE* (Leavis ed. 1950). But eclectic liberalism departs from Mill in fundamental ways by rejecting utilitarianism as the exclusive basis for moral judgments (see J.S. MILL, *UTILITARIANISM*, in *THE UTILITARIANS*, supra [hereinafter cited as J.S. MILL, *UTILITARIANISM*]) and Mill's elitist conceptions of democracy. See Mill, *Considerations on Representative Government*, in XIX *COLLECTED WORKS OF JOHN STUART MILL* (1977). For an illuminating commentary on Mill's elitism, see generally C. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* (1977) [hereinafter cited as C. MACPHERSON, *LIBERAL DEMOCRACY*].

Eclectic liberalism, as used here, is Millian as filtered through the work of Isaiah Berlin. See, e.g., I. BERLIN, *FOUR ESSAYS ON LIBERTY* (1970) [hereinafter cited as I. BERLIN, *FOUR ESSAYS*]; I. BERLIN, *RUSSIAN THINKERS* (1978) [hereinafter cited as I. BERLIN, *RUSSIAN THINKERS*]; I. BERLIN, *AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS* (1980) [hereinafter cited as I. BERLIN, *AGAINST THE CURRENT*]; I. BERLIN, *CONCEPTS AND CATEGORIES* (1979) [hereinafter cited as I. BERLIN, *CONCEPTS AND CATEGORIES*]. See also T. NAGEL, *MORTAL QUESTIONS* (1979); K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (1950); B. WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* (1972).

35. See supra note 34.

36. See, e.g., Greenawalt, *Silence as a Moral and Constitutional Right*, 23 *WM. & MARY L. REV.* 15 (1981); Greenawalt, *The Enduring Significance of Neutral Principles*, 78 *COLUM. L. REV.* 982 (1978) [hereinafter cited as Greenawalt, *The Enduring Significance of Neutral Principles*].

37. A. GUTMANN, *LIBERAL EQUALITY* (1980).

38. V. HAKSAR, *EQUALITY, LIBERTY AND PERFECTIONISM* (1979).

39. See, e.g., Karst, *Equality and Community: Lessons from the Civil Rights Era*, 56 *NOTRE DAME LAW.* 183 (1980) [hereinafter cited as Karst, *Equality and Community*]; Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 *HARV. L. REV.* 1 (1977) [hereinafter cited as Karst, *Equal Citizenship*]; Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural Law—Due-Process Formula,"* 16 *UCLA L. REV.* 716 (1969); Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 *UCLA L. REV.* 1 (1965).

The model of eclectic liberalism, as presented here, is more concerned with how to defend liberalism than it is with actually defending it. The model, therefore, forms only part of an overall theory, but even that part has important substantive implications. A commitment to an eclectic method of justification rules out some theories altogether and necessarily proceeds from a particular conception of human nature and social reality. The model of eclectic liberalism is founded on the complexity of human nature and of social reality. This foundation is more helpful than those of the other models in thinking about the most basic legal issues, ranging from freedom of speech to judicial review, from distribution of property to structures for building community. In place of excessive rationalism, eclectic liberalism emphasizes the need to build more humane structures in light of the diversity, interests, and needs of particular beings in a particular social context. Instead of romanticizing the possibilities for social reality, eclectic liberalism recognizes the need to accommodate values and reflects on the appropriate structures for making such accommodations. Although this brand of liberalism stresses the need for an eclectic attitude (that is, a willingness to draw from the positive strains of diverse traditions), it is committed to a liberal society, one that rejects skepticism and values tolerance over neutrality. It rejects structures of domination, valuing programs designed to distribute wealth and meaningful work in a more equitable way. It also rejects the model of state as night watchman, recognizing the affirmative responsibilities of government in creating a community committed to humane values without overwhelming human autonomy.

A methodological point should be emphasized. The models I describe are not fantasies; variations on these models have been advanced and defended by influential scholars. But many of the scholars I have mentioned vigorously disagree with each other. Indeed disputes among those with similar world views are frequently the most violent.<sup>41</sup> Many of these scholars would be appalled if readers were led to believe that they held all of the views I attribute to ethical liberals or democratic radicals.

I have tried to indicate most of the important departures in the notes. I also employ the notes, rather than cluttering up the

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40. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) [hereinafter cited as L. TRIBE, AMERICAN CONSTITUTIONAL LAW]; Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973) [hereinafter cited as Tribe, *Technology Assessment*]. See also *supra* note 6.

41. See L. KOLAKOWSKI, *supra* note 21, at 97.

text, to show that it is not unfair to link the scholars I group together.

Apologies aside, the models stand on their own. They are important ways of looking at the world, and they have persisted precisely because they appeal to powerful and persistent intuitions that war inside us all. Eclectic liberalism tries to coordinate these intuitions, but, more importantly, it tries to show why universal answers cannot be given to particular questions. Without denigrating the importance of theory, it stresses the need for appreciating theoretical limits.

I make three claims for eclectic liberalism. First, eclectic liberalism is part of a great philosophical tradition that reaches back through Isaiah Berlin to John Stuart Mill. That claim is advanced in notes. Precious little turns on how closely eclectic liberalism is tied to the ideals of John Stuart Mill. Mill is an inspiration, not a bible. The same applies to Berlin, Greenawalt, Haksar, Gutmann, Karst, and Tribe.

Second, I think that eclectic liberalism is more descriptive of the beliefs of contemporary American liberal politicians than are the other models, but nothing turns on that claim either. Indeed that contention is not much pursued in text or notes.

Third, eclectic liberalism is the best game in town.

It is a small town, however. It has no conservatives. Libertarians arrive intermittently like transients, departing quickly. Utilitarians, conservative or liberal, make only brief appearances. The article begins with a description of two quite different political theories I put under an umbrella labelled "classical liberalism." Classical liberalism is opposed by both ethical liberals and democratic radicals, neither of which can be understood without reference to this, their common enemy. I describe classical liberalism in quite general terms; I do not delve into the qualifications, nuances and new varieties that would have to be considered if classical liberalism were the focus of the critique. It is not, but classical liberals and other theorists will be alternately soothed and outraged by what appears here. They will perhaps find comfort in the attack on the ethical liberals and the democratic radicals, but when the dust clears, the strategy of the essay will be clear. Liberalism exhibits no monolithic character or deep structure.<sup>42</sup> It has many meanings. Even though some can be toppled

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42. Liberalism is a label that has embraced many different theories that have almost nothing to do with each other. Unger is clear that the liberal model he attacks is hypothetical, "both broader and narrower than the one occupied by what we now ordinarily take for liberalism." R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 3. See also *id.* at 8 (acknowledging that no one thinker accepts the liberal theory as he describes it, but arguing that the theory as he presents it is the "deep structure"). Others have been more daring. See, e.g., M. HORKHEIMER, *supra* note

like straw men, announcements of the death of liberalism will always be premature.

### I. THE COMMON ENEMY: CLASSICAL LIBERALISM

The term liberalism would have to be stretched a great deal to account for all the liberal classics.<sup>43</sup> The works of major liberal writers such as Bentham, Locke, Mill, Rousseau, and Kant differ on the most fundamental issues of moral and political theory including: the essence of human nature,<sup>44</sup> the nature of morals<sup>45</sup>

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22, at 20 ("intellectual imperialism of the abstract principle of self-interest" is "the core of the official ideology of liberalism"); Baker, *The Process of Change*, *supra* note 28, at 296 (where Baker states that liberals are relativists) and at 300 (suggesting that liberals are committed to pure procedural justice); Tushnet, *The Dilemmas of Liberal Constitutionalism*, *supra* note 27, at 415 (where Tushnet states that "liberalism sees us all as creatures of unbounded desire who can accept the infliction of harm on everyone else as we pursue our own ends.") But see 3 J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY*, *supra* note 34, at 754:

I confess I am not charmed with the ideal of life held out by those who think that the normal state of human beings is that of struggling to get on; that the trampling, crushing, elbowing, and treading on each other's heels, which form the existing type of social life, are the most desirable lot of human kind, or anything but the disagreeable symptoms of one of the phases of industrial progress.

The most serious difficulty with reductionist descriptions of liberals is that these descriptions obscure issues, but they also tend to perpetuate stereotypes about non-radicals. For an extreme example of the latter, see Tushnet, Book Review, 78 MICH. L. REV. 694 (1980) [hereinafter cited as Tushnet, Book Review]. For a brief retort, see Posner, *supra* note 12, at 1127. Tushnet portrays Professor Tribe as a Burkeian (thus conflating conservatism and Tribe's brand of liberalism) and goes on to call him corrupt, suggesting that his scholarship is directed to seeking public office and that it lacks integrity. It is a surprising claim. After all, this is the same Laurence Tribe who has argued in print (to a chorus of criticism) that a guaranteed annual income is constitutionally required. Tribe, *Unravelling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977). Scholarly integrity, however wrongheaded, surely triumphed there over any ambition. A public relations firm would never have cleared that position or Tribe's position on state action, criminal procedure, and many other topics. If ambition truly reigned over integrity, Tribe could have tried to be a shade more Burkeian.

What then is Tushnet's evidence? The smoking gun is that Tribe has not sought socialist solutions to the cases. Tribe, we are to assume, is too smart *not* to be able to think things through to Tushnet's truth—presto, he must be corrupt.

Tribe, however, in Tushnet's mind, is just one example of a general condition. Constitutional scholars, we are told, generally share his ambition. Tushnet, Book Review, *supra*, at 710. Ah yes, those liberals—they're all alike—corrupt at the core. See also Tushnet, *Deviant Science in Constitutional Language*, 59 TEX. L. REV. 815, 826 n.42 (1981) (regretting the use of overheated language and suggesting that his remarks were not a personal attack but a rhetorical device).

43. For a work illustrating the diversity of views held by writers ordinarily called liberals, see E. BRAMSTED & K. MELHUIH, *WESTERN LIBERALISM* (1978). For a useful attempt to provide a unified perspective on classical liberalism, see generally H. GIRVETZ, *THE EVOLUTION OF LIBERALISM* (1963).

44. Compare, e.g., Bentham's lack of interest in free will (D. LONG, *BENTHAM ON LIBERTY* 23 (1977)) and his emphasis upon man as a seeker of pleasure and avoider of pain (J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS*

and of freedom,<sup>46</sup> the character of rights and their importance,<sup>47</sup> the role of property in moral<sup>48</sup> and political life<sup>49</sup> (even on the question of whether it would be desirable for the state to redistribute wealth),<sup>50</sup> the importance of the conception of community,<sup>51</sup>

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AND LEGISLATION, in *THE UTILITARIANS* 7 (Dolphin ed. 1961)) with Kant's focus upon free will and his emphasis upon man's ability freely to choose duty over pleasure. 1. KANT, *supra* note 1.

45. Compare J. BENTHAM, *supra* note 44 (moral questions reduced to that which will give pleasure, with no distinctions as to kinds of pleasures) with J.S. MILL, *UTILITARIANISM*, *supra* note 34, at 410 (moral questions dependent on what produces happiness, distinguishing between kinds of pleasure) ("better to be a human being dissatisfied than a pig satisfied") and I. KANT, *supra* note 1 (rejecting happiness or pleasure as the basis of morals):

As nature has elsewhere distributed capacities suitable to the functions they are to perform, reason's proper function must be to produce a will good in itself and not one good merely as a means, for to the former reason is absolutely essential. This will must indeed not be the sole and complete good but the highest good and the condition of all others, even of the desire for happiness.

*Id.* at 12. *But cf. infra* note 120.

46. Compare Locke's contention that freedom from absolute, arbitrary power is so necessary that it cannot be waived (J. LOCKE, *TWO TREATISES OF GOVERNMENT* bk. II, ch. IV § 23, at 325 (P. Laslett rev. ed. 1960)) with Rousseau's concept of forced freedom (J.J. ROUSSEAU, *THE SOCIAL CONTRACT* bk. I, ch. VII, at 18 (G. Cole trans. 1950)):

[W]hoever refuses to obey the general will shall be compelled to do so by the whole body [politic]. This means nothing less than that he will be forced to be free; for this is the condition which, by giving each citizen to his country, secures him against all personal dependence.

*Id.*

47. Compare J. BENTHAM, *ANARCHICAL FALLACIES*, in 2 *THE WORKS OF JEREMY BENTHAM* 501 (Bowring ed. 1843) ("*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.") with J.S. MILL, *ON LIBERTY*, *supra* note 34, at 485 (endorsing rights but foregoing any notion of abstract right independent of utility) and J. LOCKE, *supra* note 46 (endorsing natural rights).

48. Compare J. LOCKE, *supra* note 46, bk. II, ch. V § 50, at 344 (apparently endorsing unlimited accumulation of wealth as in accord with reason and natural law) with 3 J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY*, *supra* note 34, at 753–57 (opposing materialism and urging limits on economic growth) and J.J. ROUSSEAU, *supra* note 46, at 50, 93 (opposing materialism).

49. Compare generally J. LOCKE, *supra* note 46 and I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*, *supra* note 15 (role of state to preserve preexisting just acquisitions of property (*but cf. supra* note 15) (allowing state funds for the poor)) with 2 J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY*, *supra* note 34, at 199–201 (role of state to distribute property in a way that maximizes happiness) and *id.* at 203–14 (socialism better than capitalism, but capitalism reformed in a humane way might be better than socialism). In many respects, Locke's and Kant's political theories are similar. The ethical liberals draw upon Kant's moral theory but infer different political implications. See *supra* note 15.

50. Compare Bentham's belief that redistribution endangers security and thus utility (C. MACPHERSON, *LIBERAL DEMOCRACY*, *supra* note 34, at 27–34) with Mill's belief that redistribution is required to achieve justice (2 J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY*, *supra* note 34, at 203–14) which for him was a subcategory of utility (J.S. MILL, *UTILITARIANISM*, *supra* note 34, at 446–70).

51. Compare Hobbes' and Bentham's conception of community as a fiction, the

the meaning of equality,<sup>52</sup> and the scope of the authority of the state to command the allegiance of its citizens.<sup>53</sup>

Indeed liberalism might be finally susceptible of precise definition only by negation, that is, in terms of *its* common conceptual foe: the political theory that characterizes individuals as being naturally suited to accept their place in a hierarchical society where all pay unswerving homage to the king. The common theme of individualism sets liberalism against monarchical conservatism, but if attention be paid to the diversity of liberals, even that common theme may conceal more than it reveals.

The phrase "classical liberalism," as used in this article, refers to only a small part of the liberal tradition, a part rejected by both ethical liberalism and democratic radicalism. For our purposes, "classical liberalism" embraces both of two alternative models of human, moral, and political life. One model, the pleasure model, contains premises largely traceable to Jeremy Bentham; the other, the property rights freedom model, reaches back to John Locke. These models arrive at similar conclusions by quite different routes. My purpose, again, is merely to sketch the perspectives jointly opposed by ethical liberals and democratic radicals, so that we can appreciate the rhetorical context in which their theories emerge.

#### A. *The Pleasure Model*

The pleasure model of classical liberalism is at most points a rough amalgam of the views of Thomas Hobbes and Jeremy Bentham.<sup>54</sup> Simply stated, its thesis is that a human being is a selfish pleasure center by nature, seeking out pleasure and striving to avoid pain.<sup>55</sup> There is nothing wrong with this—it simply is. The

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individual being all (D. GERMINO, *MACHIAVELLI TO MARX* 234 (1972) with Rousseau's conception of community as an organic body (S. WOLIN, *POLITICS AND VISION* 371 (1960) ("Like D.H. Lawrence, Rousseau believed that 'men are free when they belong to a living, organic, believing community,'" quoting D.H. LAWRENCE, *STUDIES IN CLASSIC AMERICAN LITERATURE* 17 (1953) (emphasis in original)).

52. Compare Kant's conception of material inequality but formal equality before the law (*see supra* note 15) with Rousseau's belief in the need for substantive equality (J.J. ROUSSEAU, *supra* note 46, at 32) ("Under bad government this equality is merely ostensible, *i.e.*, an illusion: it serves only to perpetuate the poor man's poverty and the rich man's possessions.").

53. Compare J. LOCKE, *supra* note 46, bk. II, ch. XVIII §§ 199–210, at 446–53 (right of revolution) with I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*, *supra* note 15, at 86 (duty not to revolt).

54. For an excellent and brief discussion of Hobbes, see S. WOLIN, *supra* note 51, at 239–85. *See also* C. MACPHERSON, *POSSESSIVE INDIVIDUALISM*, *supra* note 22, at 9–106. For a brief discussion of Bentham, see C. MACPHERSON, *LIBERAL DEMOCRACY*, *supra* note 34, at 23–43.

55. I ignore any questions concerning the relationship between pleasure and pain, or pleasure and happiness.

human being is an animal, but a smart one equipped with reason that helps further its<sup>56</sup> pleasure-seeking instincts. Whatever enhances pleasure is right for humans, and morals are defined in these terms. Any other conception contradicts human nature.

Given this conception, government is a necessary device. Without government, individuals would seek pleasure unlimited by rules. No property would be secure, nor would life or the pursuit of happiness. Existence would be a constant state of war. A system of rules is needed to assure that persons do not seek their pleasure by inflicting pain upon others. The rules must not favor one group at the expense of another; otherwise the government could not expect the allegiance of its citizens. Thus, each citizen must stand as an equal before the government which acts as night watchman, enforcing neutral rules so that men may pursue their pleasure without inflicting pain upon each other and so that men will be secure in the knowledge that if they obey the rules, the fruits of their pursuit of pleasure will be theirs to enjoy.

In order to secure happiness, men must also be free to trade what belongs to them, and the state should not interfere with their decisions, prudent or not. Even if inequality should result from the trading process, the state must not intervene. The empirical assumptions are that if the law were to intervene, the productivity incentive would be diminished; security would be undermined; happiness would be diminished.<sup>57</sup> The state as night watchman, therefore, protects people's right to private property and their freedom to contract, and stands to arbitrate other aspects of their activities that might interfere with the activities of others. In arbitrating conflicts, the role of government is dictated by human nature—it should strive to maximize pleasure and minimize pain.

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56. The word "it" is jarring in this context for all, not just for those who would have been comfortable with "he", because we want to think of humans as something other than objects in the world. A major theme invoked against the pleasure model is that it reduces man to an object. *See, e.g.,* M. HORKHEIMER, *supra* note 22.

57. Modern utilitarians, of course, can make quite different assumptions and argue for far greater redistribution. Indeed, John Stuart Mill himself did that. *See supra* note 50. *Cf.* A. GUTMANN, *supra* note 37, at 27:

Bentham's objection to redistributive goals therefore was contingent upon the elasticity of the supply of goods, services, and savings compared to income; the relative utility of increased investment and production to that of tax dollars at the margin; and the nature of people's passion or dispassion for work. Thus the utilitarian incentive argument against redistribution depends upon, among other things, the nature of available employment; the extent of the disincentives entailed in state provision of goods, services, or income; and the social need for increased production. Because the nature of each of these factors can vary over time, it is not surprising that classical utilitarianism became—in the hands of the Fabians—a framework for justifying more egalitarian principles of justice than either Bentham or James Mill explicitly sanctioned.



### B. *The Property Rights Freedom Model*

An alternative model of classical liberalism starts from different premises but arrives at similar conclusions. Under this view, roughly derived from John Locke,<sup>58</sup> God created humans as free, equal, and independent beings, granting to none of them (or to no group of them) the right to impinge upon the freedom of any other except as a just infliction of punishment. To deny another's freedom would be to make one person slave to another, and slavery is the antithesis of what the natural law requires. Government becomes necessary because, without the establishment of rules and their enforcement, humans could not be free from the restraint or violence of those who failed to respect the natural law. But government derives the power to impose rules on individuals only if they (in one way or another) have consented to the rule of government. And the exclusive purpose of government is to protect individuals from the arbitrary will of others, that is, to preserve their freedom.

Central to the idea of freedom is the right to private property. Humans, at a minimum, own their own bodies, and God intended that the industrious be able to use their bodies and their minds to give value to the resources of the world and to enjoy the fruits of their labor. The invention of money as a medium of exchange by the mutual consent<sup>59</sup> of the governed allows us to store wealth in a way that can lead to unequal distribution of wealth. Because we own our own bodies, however, we can freely work to lead a full life. Moreover, government would depart from its function if it attempted to redistribute property. Because government's only purpose is to preserve freedom (including the freedom to possess property), to take property from some to give to others would be theft. If people are to help others in need, their actions must be free. To take property, then, circumscribes freedom—it is a form of slavery.

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58. See J. LOCKE, *supra* note 46, at 305–477. A useful summary is contained in D. GERMINO, *supra* note 51, at 117–49. Indispensable commentary is contained in C. MACPHERSON, *POSSESSIVE INDIVIDUALISM*, *supra* note 22, at 194–262 and Laslett, *Introduction to J. LOCKE*, *supra* note 46, at 15–135. Although I think MacPherson's reading of Locke's property views is generally on the mark, there are ambiguities, and Locke can be read for far greater state regulation of property than is ordinarily attributed to him or than is attributed in this model. See Laslett, *supra*, at 114–20. For a bibliography of works on Locke, see J. LOCKE, *supra* note 46, at 545–56. For an attempt to modernize Locke by a prominent non-Lockean scholar, see R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

59. This is a notoriously weak point in Locke's theory. See, e.g., A. GUTMANN, *supra* note 37, at 30–33.

C. *Classical Liberalism Viewed Through a Democratic Radical Lens*

A glimpse of the democratic radical's<sup>60</sup> counterpoint may place the classical liberal models in perspective. The democratic radicals reject the model of man as an egoistic pleasure seeker and the model of government as night watchman or preserver of acquisitive freedom. Human beings, they say, secure their identities as pleasure-seeking animals to the extent that society trains them to be that way, but society need not be so arranged.

The democratic radicals would substitute altruism for egoism on the ground that egoism is unsatisfying and morally bankrupt. They believe that the model of an individual standing alone is hardly an appropriate symbol for all that is human, and persons are not truly free if they are poor or lack power. For the anomie of individualism, democratic radicals would substitute friendship; for the egoism of competition, they would substitute cooperation; instead of the night watchman, they propose community. In short, the democratic radical opposes the idea of a civil society of ego-maximizing individuals striving for greater and greater wealth at the expense of their fellow citizens.<sup>61</sup> Instead they offer the hope of friendship, community, cooperation, love, trust, and sharing. To defend liberalism, the democratic radicals say, is to defend selfishness, widespread inequality, the misery produced by private property and freedom of contract, and the sense of loneliness and anomie that comes from isolation.

## II. ETHICAL OR NEO-KANTIAN LIBERALISM

Ethical or Neo-Kantian liberalism opposes many of the same features of classical liberalism that rankle the democratic radicals. Ethical liberals reject both of the classical liberal models. Justice and equality are their organizing principles, not efficiency in maximizing happiness or a concept of freedom based on rights of private property.

Perhaps the most extravagant claims for ethical liberalism have been advanced by Ronald Dworkin. He not only has made

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60. See generally *supra* notes 13 & 25.

61. In many ways, so did many of the devotees of the pleasure model. For example, Bentham, who is commonly caricatured as the epitome of the selfish individualist, did not believe that people invariably act out of self-seeking motives. He regarded good will (under which he collected benevolence, charity, philanthropy and love) as the motive most certain to coincide with utility. See generally J. BENTHAM, *supra* note 44, at 109-17.

the normative claim that ethical liberalism is the best political theory,<sup>62</sup> but has also made the descriptive claim that ethical liberalism accurately states the philosophy of those recent American politicians who have called themselves liberals:<sup>63</sup> the Hubert Humphreys,<sup>64</sup> the George McGovern,<sup>65</sup> the Jimmy Carters,<sup>66</sup> and the Kennedys.<sup>67</sup>

In this section, I discuss and endorse ethical liberalism's rejection of the classical liberal models, present its distinctive conception of political theory, and evaluate the normative and descriptive claims made for it on its own terms. In section IV, after discussing and analyzing democratic radicalism, I advance criticisms applicable to both approaches, while presenting a different conception of liberalism.

#### A. *The Rejection of the Pleasure Model—Man as Moral Animal*

The pleasure model countenances government's restriction of an individual's pursuit of pleasure or happiness only when that pursuit will reduce overall pleasure or happiness. Moral questions are reduced to questions of efficiency: What will produce the most happiness? Ethical liberals reject this conception.<sup>68</sup> The pursuit of happiness, according to the ethical liberals, is appropriately restricted by political requirements solidly based on moral principles. Happiness, though relevant to the formulation of moral principles, is not dispositive.

The fundamental moral canon is that persons must treat other persons with the respect and dignity inherently owed to human beings even if such treatment would diminish overall happiness. Similarly, human beings must be treated as equals by the government, as Dworkin puts it, "not because there is not right and wrong in political morality, but because that is what is

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62. R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 17, at vii, 259–78.

63. Dworkin, *Liberalism*, *supra* note 17, at 121 ("I do not claim simply that some set of constitutive principles could explain liberal settlements if people held those principles, but that a particular set does help to explain liberal settlements because people actually have held those principles."). *See also id.* at 128 ("I shall not provide arguments in this essay that my theory of liberalism meets the first condition I described—that the theory must provide a political morality that it makes sense to suppose people in our culture hold—though I think it plain that the theory does meet this condition.").

64. *Id.* at 118.

65. *Id.* at 115.

66. *Id.* at 114.

67. *Id.* at 113.

68. *See, e.g.*, B. ACKERMAN, *supra* note 18, at 342; R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 17, at vii; C. FRIED, *RIGHT AND WRONG*, *supra* note 20, at 13; J. RAWLS, *supra* note 12, § 50, at 329; D. RICHARDS, *A THEORY OF REASONS*, *supra* note 19, at 87. The anti-utilitarian thesis is a major theme of the works cited above, and the page citations are merely illustrative.

right.”<sup>69</sup> It is *morally* required that government treat its citizens with equality and respect.

This concept of respect for persons is at the heart of Kantian and neo-Kantian scholarship,<sup>70</sup> and Kant’s elaboration of the point is worth exploring. In one of the most important passages in moral philosophy Kant stated:

“[M]an and, in general every rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. In all his actions, whether they are directed to himself or to other rational beings, he must always be regarded at the same time as an end. . . . [R]ational beings are designated persons because their nature indicates that they are ends in themselves, i.e., things which may not be used merely as a means. Such a being is thus an object of respect and, so far, restricts all [arbitrary] choice.”<sup>71</sup>

69. Dworkin, *Liberalism*, *supra* note 17, at 142.

70. Most ethical liberals explicitly recognize that their thinking has been influenced by Kant. Dworkin, *Philosophy and Politics*, in *MEN OF IDEAS* 259–60 (B. Magee ed. 1978) [hereinafter cited as Dworkin, *Philosophy and Politics*] (“It is absolutely necessary for liberals now . . . to show that the true father of liberalism is not Bentham, who is in fact rather an embarrassment for liberals, but Kant, whose conception of human nature cannot be called impoverished.”) *But cf.* R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 17, at 175–76 (rejecting Kantian duty-based theories in favor of rights-based theories) Dworkin, *Is Wealth a Value?*, 9 *J. LEGAL STUD.* 91, 233 n.14 (1980) (not Kantian to the extent Kant endorses maldistribution of property); C. FRIED, *RIGHT AND WRONG*, *supra* note 20, at 33 n.\* (recognizing despite several later criticisms of aspects of Kant that his thesis is “basically Kantian”); J. RAWLS, *supra* note 12, § 40, at 251 (following Kant’s notion of autonomy and cautioning against emphasizing the place of generality and universality in Kant’s ethics); Richards, *Human Rights*, *supra* note 19, at 465 (“Kant . . . is, I believe, the most profound philosophical theorist of liberalism”).

Ackerman is quite cagey about the relationship of his thoughts to Kant. B. ACKERMAN, *supra* note 18, at 349–78. He maintains that there is more than one path to liberalism and that individuals must decide their own path for themselves. *Id.* He rejects utilitarianism and intuitionism, but he is also unhappy with what he calls deductionism. *Id.* at 356–57. Moreover, he tries to root his defense of neutrality in a conception of undominated dialogue that is reminiscent of what some regard as post-Kantian continental philosophy, particularly that of Habermas. *See* Ackerman, *What is Neutral about Neutrality*, 93 *ETHICS* 372, 375 n.1 (1983); Weale, Book Review, 65 *MINN. L. REV.* 685, 689–92 (1981). For discussions of Habermas’ relationship to Kant, see *HABERMAS: CRITICAL DEBATES* (J. Thoinpson & D. Held eds. 1982). Nonetheless, Ackerman’s emphasis on rationality, respect, and autonomy is distinctly Kantian. *See, e.g.*, B. ACKERMAN, *supra* note 18, at 57, 75, 111, 182, 255, 289, 302, 320, 347, 354. In particular, see *id.* at 367–68. Ackerman’s major qualification of Kantianism appears to be that he is unwilling to swallow rationalism wholesale when its results are particularly outrageous (*but see infra* note 137), and he rejects social contract theories. The former position is shared by J. RAWLS, *supra* note 12, § 4, at 19–20. Ackerman has also suggested in earlier work that he leans toward a qualified Kantianism. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 76, 85, 225 n.19 (1977). Indeed, the approach he takes in the latter work is one Kant could have endorsed with enthusiasm.

71. I. KANT, *supra* note 1, at 46 (brackets around “arbitrary” in original).

The idea that man is not to be treated merely<sup>72</sup> as a means, although not without subtlety, has an easily comprehensible core of meaning. A person is not to be treated as a mere object, as an incidental means to the satisfaction of the desires of others. Men are never to be treated as if they were rocks.<sup>73</sup>

The Kantian prescription, however, goes on to direct that a person is to be regarded as an "end," and that usage has puzzled some scholars.<sup>74</sup> What does it mean to treat a person as an end?

Humans should act, according to Kant, as if they were the end of nature.<sup>75</sup> From this perspective, vegetables should be regarded as means to feed animals and animals in turn to serve

72. The word "merely" has to distinguish the many circumstances in which we treat individuals as means to ends, e.g., purchasing an object from them without any personal interaction. The prohibition against treating people *merely* as a means does not necessarily extend to such actions.

73. The analogy is not perfect, however. Sadists derive pleasure not because their victims are rocks, but rather because they inflict pain on persons.

74. See, e.g., R. WOLFF, *THE AUTONOMY OF REASON*, *supra* note 15, at 175:

Now, in what sense can a moral agent—whether myself or another—be an *end* of my action? Can a person *be* my purpose? No. The question makes no grammatical sense . . . . When I say, for example, that I took my son to the dentist *for his sake*, I mean that I did it in order to further his well-being. My end was his happiness, which I assume is his end too, insofar as he is capable of choosing ends. So I did what I did for the sake of his purpose. It was *his end* which I took as my end, *not him*.

*Id.* (emphasis in original).

75. I. KANT, *CRITIQUE OF JUDGMENT*, in *THE PHILOSOPHY OF KANT* § 83, at 347 (C. Friedrich ed. 1949) (hereinafter cited as I. KANT, *CRITIQUE OF JUDGMENT*):

We have shown in the preceding section that looking to principles of reason there is ample ground—for the reflective, though not of course for the determinative, judgment—to make us consider man as not merely an end of nature, such as all organized beings are, but as the being upon this earth who is the *ultimate end* of nature, and the one in relation to whom all other natural things constitute a system of ends.

See also generally Kant, *Universal History*, *supra* note 15.

The failure to consider or understand Kant's elaboration of the concept of an end in the *CRITIQUE OF JUDGMENT* and in his historical writings has caused some scholars to ignore or deny Kant's teleology. See, e.g., A. MACINTYRE, *AFTER VIRTUE* 52 (1981) (Kant rejects "any teleological view of human nature . . . . [T]o understand this is to understand why [his] project of finding a basis for morality had to fail."). The failure to recognize Kant's belief that man is the end of nature and that practical reason should be guided by an account of nature's purpose has led many to attack Kant's moral theory as being empty and merely formal. See, e.g., R. UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 13, at 85-86; R. WOLFF, *THE AUTONOMY OF REASON*, *supra* note 15, at 176. Kant did not maintain that we could *know* the purpose of nature; rather he thought that our practical reason could be guided by *assumptions* about that purpose. Only in that sense does Kant deny a teleological view of human nature. Compare C. TAYLOR, *supra* note 2, at 77 n.1 with *id.* at 321 n.1. See generally I. KANT, *CRITIQUE OF JUDGMENT*, *supra*. Rawls is quite correct therefore when he states that "[t]o be avoided at all costs is the idea that Kant's doctrine simply provides the general, or formal elements for a utilitarian (or indeed for any other) theory . . . . *The Critique of Judgment, Religion Within the Limits of Reason*, and the political writings cannot be neglected without distorting his doctrine." J. RAWLS,

mankind.<sup>76</sup> What responsibilities, therefore, do we owe each other?

“[T]he natural end which all men have is their own happiness. Humanity might indeed exist if no one contributed anything to the happiness of others, provided he did not intentionally detract from it; but this harmony with humanity as an end in itself is only negative rather than positive if everyone does not also endeavor, so far as he can, to forward the ends of others. For the ends of any person, who is an end in himself, must as far as possible also be my end, if that conception of an end in itself is to have its full effect on me.”<sup>77</sup>

Under Kant's analysis, then, a moral person is not only prohibited from using others as a mere means; moral persons are required to adopt the morally permissible ends of others as their ends also.<sup>78</sup> Each individual's capacity as a moral being arises precisely because he or she can participate as a member in a community of ends.

Although contemporary neo-Kantian legal scholars are by no means committed to Kant's explanation for the conclusion that moral persons must treat each other with dignity and respect as equal persons,<sup>79</sup> they uniformly accept Kant's general moral conclusions and consequently reject the pleasure model. The human being, they assume, is a moral animal who naturally seeks happiness but should do so only to the extent that it is consistent with moral duties. It is wrong to treat another person merely as a means even if it would enhance the happiness of the human

*supra* note 12, §§ 10–13, at 58–77. See also J. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 90–102 (1970); Riley, *supra* note 21, at 32.

76. I. KANT, CRITIQUE OF JUDGMENT, *supra* note 75, at 343.

77. I. KANT, *supra* note 1, at 48–49.

78. It is important to understand that the ends of moral persons that Kant thinks we must promote are at high levels of abstraction. It is not an injunction to help individuals obtain everything they might want, but only to assist them in their more general ends. If the term “ends” were interpreted in a less general way, incoherence would quickly result. We would be encouraged to assist each person in aims that could be conflicting.

79. For provocative discussions of the problem, see C. FRIED, AN ANATOMY OF VALUES, *supra* note 20, at 40–60; D. RICHARDS, A THEORY OF REASONS, *supra* note 19, at 279–92. Dworkin has yet to speak to the question except to suggest that he is opposed to teleological justifications. See Dworkin, *Is There a Right to Pornography?*, 1 OXFORD J. LEGAL STUD., 177, 210–11 (1981) [hereinafter cited as Dworkin, *Is There a Right to Pornography?*]. Rawls' discussion is cryptic. See *infra* note 116. See also Rawls, *Kantian Constructivism in Moral Theory*, LXXVII J. PHIL. 515, 519 (1980) (justifying his conception of justice by “its congruence with our deeper understanding of ourselves . . . and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.”) But see *id.* at 524 (questions of justice may need revision when examined from a broader base). Ackerman discusses the grounding for the neutrality principle (B. ACKERMAN, *supra* note 18, at 327–78) but not the grounding for his notions of autonomy or respect.

race.<sup>80</sup> Moreover, persons have moral duties to advance the morally permissible ends of others. This is a far cry from the model of man as a selfish pleasure-seeker competing with others for greater and greater wealth.<sup>81</sup> Moreover, ethical liberalism's moral perspective carries over into a rejection of the property rights freedom model.

B. *The Rejection of the Property Rights Freedom Model and the Property Aspects of the Pleasure Model—The Social Basis of Property*

Under either of the classical liberal models, the state is required to enforce the system of private property, however unequal the distribution of wealth might be. The pleasure model postulates that the free market rewards talent, punishes indolence, and supplies necessary incentives. Under the property rights freedom model, taking property from some to give to others would undermine the very reason for which government was established. It would constitute legalized theft.

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80. For Kant, this meant that one could not lie or otherwise commit a wrong even to save the world. None of the contemporary ethical liberals would go this far. *But cf.* C. FRIED, *RIGHT AND WRONG*, *supra* note 20, at 31 ("I do not know how to answer the person who asks me whether I would be willing to kill an innocent person to save the whole of humanity from excruciating suffering and death.") That, however, does not make them utilitarians, consequentialists, or devotees of the pleasure principle. We can distinguish between saying that something is right whatever the consequences and stating "the different idea that everything depends on consequences." Williams, *A Critique of Utilitarianism*, in J. SMART & B. WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 93 (1973). For a challenging perspective on whether one person can be killed to save many others, see Taurek, *Should the Numbers Count?*, 6 *PHIL. & PUB. AFF.* 293 (1977).

81. Nonetheless, Kant apparently was willing to tolerate vast inequality. *See supra* note 15. The simultaneous endorsements of formal equality before the law and material inequality have always drawn critical fire from radicals. *See, e.g.*, R. UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 13, at 175, 186-87. Kant's position, however, was qualified in two major ways. First, he argued that there was a universal moral duty to be beneficent, "to be helpful to men in need according to one's means, for the sake of their happiness and without hoping for anything thereby." I. KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE* § 30, at 117 (J. Ellington trans. 1964) [hereinafter cited as I. KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE*]; *see also id.* § 31, at 117-19.

Second, and even more important, Kant clearly affirmed the "right" of the "sovereign" to tax the people in order to support those unable to support themselves. I. KANT, *THE PHILOSOPHY OF LAW* 186 (W. Hastie trans. 1887) [hereinafter cited as I. KANT, *THE PHILOSOPHY OF LAW*]. This right was founded on the "obligation" on the part of persons with property "to contribute of their means for the preservation of their fellow-citizens." *Id.* at 186.

Like the ethical liberals, Kant rejects the property rights freedom model, but with greater tolerance for material inequality than they are typically willing to countenance. *See Kant, Theory and Practice*, *supra* note 15, at 75. ("[E]very member of the commonwealth must be entitled to reach any degree of rank which a subject can earn through his talent, his industry and his good fortune.")

The ethical liberal rejects both of the classical liberal models and favors the redistribution of wealth from rich to poor. The ethical liberal purports to concretize and clarify the intuitions of those politicians who supported the programs of the New Deal, the War on Poverty, and a variety of other redistributive measures. Such politicians have recognized that, contrary to the pleasure model, the incentives of the free market do not help millions who are unable to help themselves. If security and happiness are the goals of the pleasure model, those objectives are said to be met more effectively by providing for redistribution. From the perspective of the ethical liberal, these measures are not legalized theft, but elementary justice.<sup>82</sup> The conceptions of private property held by the classical liberal and the ethical liberal are obviously incompatible.

If those adhering to the property rights freedom model were to sustain the contention that property redistribution constituted legalized theft, an enormous burden of proof would have to be discharged. A charge of theft would require as support a showing that all property belongs to current owners as a matter of natural right. That in turn would require a showing that the property not only initially had been justly acquired (by prior owners), but also that it had been retained and transferred in accordance with just principles.<sup>83</sup> These showings would necessitate an elaboration of a theory of justice that would tolerate massive inequality (with its potential for suffering) throughout the property holding process.<sup>84</sup>

Moreover, any such showing would be complicated by the fact that many prior and present owners have participated in and received benefits from a society whose constitution has long sanctioned redistribution.<sup>85</sup> History has implications not only by way of estoppel, but also for the determination of the reasonable expectations involved in property acquisitions. Those who would now embrace the property rights freedom model need more than an abstract theory of justice; the theory of justice must incorporate the complexities of historical context.

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82. Thus, such measures would be required even if they did not promote greater overall happiness or pleasure. For utilitarians, in contrast, the latter question would be dispositive. *See supra* note 1.

83. *See* R. NOZICK, *supra* note 58, at 150-53.

84. This point would hold even if a program of redistribution were enacted as a form of corrective justice, i.e., to give property to the true natural owners and their successors. Such a program would necessitate formulating the natural law of remedies for conversion (sorting out whether the converter and/or his successors would be entitled to improvements on the property). After the dust cleared, the need to connect inequality with justice would persist.

85. *See, e.g.*, *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 OHIO ST. L.J. 319, 323-24 (1981).



Ethical liberals correctly doubt the ability of classical liberals to produce such a theory of justice or history, and so far as I am aware, no successful attempt has been made.<sup>86</sup>

For ethical liberals, redistribution is required as a matter of justice. Because government must treat persons as equals with respect and dignity, it must guarantee each person a fair share of society's wealth.<sup>87</sup> How is that fair share to be determined? Although writers in the ethical liberal tradition are divided on that

86. Even Nozick has yet to make the attempt. See R. NOZICK, *supra* note 58, at 153.

87. J. RAWLS, *supra* note 12, § 13, at 76-83; *id.* § 43, at 274-84 (endorsing the difference principle providing, in part, that social institutions are to be arranged in a way that affords maximum benefits to the least advantaged). See also D. RICHARDS, MORAL CRITICISM, *supra* note 19, at 46-49, 137 (revised version of the difference principle). Rawls' support for the difference principle is confined to a well ordered society in which everyone accepts the same principles of justice he advocates. J. RAWLS, *supra* note 12, § 1, at 4-5. Where this does not obtain, self respect might be undermined by the inequality allowed by the difference principle. Presumably, Rawls would endorse even more redistribution in a non-ideal society than would be required under the difference principle. Dworkin claims that Rawls believes that the difference principle is favored over material equality because persons would understand that "sacrifice out of envy for another is a form of subordination to him." R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 183.

This may misread Rawls. Rawls argues that envy is ordinarily a vice and that society should be organized in such a way that people would and could be discouraged from cultivating such feelings. That a more equalitarian distribution would involve "sacrifice" and "subordination" is not found in Rawls' writings, and Dworkin provides no citation. There are grounds to believe Rawls would resist this interpretation. Rawls contends that income is a social product and is not individually deserved except in the sense that income is an entitlement if the institutions have made it so when a person has complied with the rules. J. RAWLS, *supra* note 12, § 48, at 313-14. That legal entitlement, however, derives from an analysis of what the institutions ought to provide, and Rawls rejects any notion of moral desert as a basis for the difference principle. *Id.* § 17, at 100-05; *id.* § 48, at 310-15.

Equally important, Rawls thinks the difference principle might be inappropriate where envy is excusable, e.g., when the individual's lesser position may be so great as to "wound his self respect." *Id.* § 81, at 534. Moreover, Rawls distinguishes between resentment (potentially moral reaction to individuals getting inore because of unjust institutions or wrongful conduct) and envy. Dworkin does not discuss this.

As to Dworkin's own position, initially he supported the difference principle, albeit in guarded and cryptic terms. See R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 181, 183; Dworkin, *Liberalism*, *supra* note 17, at 133; Dworkin, *Philosophy and Politics*, *supra* note 70, at 247 (difference principle has "strong appeal to me" if not carried to extremes). More recently, he has rejected the difference principle, suggesting that it is not so fine-tuned as to assure fair shares for various individuals such as the handicapped and that this deficiency stems from a focus on groups rather than individuals. Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 338-45 (1981) [hereinafter cited as Dworkin, *What is Equality?*]. For similar and powerfully articulated criticism of the difference principle, see B. ACKERMAN, *supra* note 18, § 59.2, at 266-72; Michelman, *Constitutional Welfare Rights and A Theory of Justice*, in *READING RAWLS* 319-47 (N. Daniels ed. 1975). *But cf.* C. FRIED, RIGHT AND WRONG, *supra* note 20, at 120-22 (arguing that meeting the needs of the handicapped and the sick might be impossible).

Charles Fried also supports an individual right to a "fair share of the total pool

issue,<sup>88</sup> most reject the idea that property should be distributed as a matter of right to those who produce more because of their special talents.<sup>89</sup> They claim that talents are not the result of any moral attributes of their owners. Indeed John Rawls has gone so far as to assert that the propensity to work hard or produce more is so tied to family upbringing and inherited traits as to cast doubt on any moral claims arising from them.<sup>90</sup> In any event, ethical liberalism holds that society should organize its property institutions in ways that respect basic liberties but assure that substantial income will be guaranteed to each member of society.

The contrast between the philosophy of the classical liberal and the ethical liberal is stark. Redistribution for the classical liberal is prohibited; for the ethical liberal it is required. Classical liberals employing the pleasure model maintain that efficiency is just, and that efficiency opposes redistribution;<sup>91</sup> ethical liberals subordinate considerations of efficiency to their conception of justice. Ethical liberals, like democratic radicals, reject the model of government as night watchman presiding over a society where pleasure-seeking individuals strive for greater and greater wealth. Ethical liberals regard government as an institution charged with the responsibility of assuring distributive justice and distributing to all persons their fair share of society's resources—as a matter of moral right.

### C. *Ethical Liberalism's General Conception of Equality*

The politics of the ethical liberal are not confined to rejecting the models of other ideologies. Ethical liberals also defend their own model, one premised upon a particular interpretation of what

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of benefits resulting from the schemes of cooperation in our common life—that is, my fair share of income and wealth" (*id.* at 131), but leaves open the question of whether a fair share is to be based on the difference principle, equality, or some other measuring stick. *Id.* at 119. He opposes taxation based upon a person's talents or income (*id.* at 143–48), but supports a consumption tax that would have the effect of treating the *products* of the talents that have been exercised as common assets. *Id.* at 147–50. The idea is to allow free choice of occupation with the incidence of taxation based upon the use of scarce resources. For the provocative contention that Fried and Ackerman are libertarians, see Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 UCLA L. REV. 816 (1981) [hereinafter cited as Alexander, *Liberalism as Neutral Dialogue*].

88. See *supra* note 87.

89. See, e.g., Dworkin, *What is Equality?*, *supra* note 87, at 313–14.

90. J. RAWLS, *supra* note 12, § 17, at 104; *id.* § 48, at 312.

91. Again, I do not contend that any utilitarian need take such a position. Indeed, on utilitarian principles the position seems indefensible. See *supra* note 57. It bears repeating that I am using a stipulative definition of classical liberals, that utilitarians, conservative or liberal, make only brief appearances in this work, and that taking consequences into account on most issues is not the same as utilitarianism. See *supra* notes 1 and 80.

it means for government to treat its citizens as equals—that is, with concern and respect.<sup>92</sup>

In order to treat its citizens as equals, “government must be neutral on what might be called the question of the good life.”<sup>93</sup> It must make its decisions so far as possible “independent of any particular conception of the good life or of what gives value to life.”<sup>94</sup> With one exception, this approach distinguishes ethical liberalism from all other political theories. It is thus distinguished

92. Dworkin, *Liberalism*, *supra* note 17, at 126–27. See also Richards, *Moral Theory, the Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL EDUC. 359, 363–64 (1981). Rawls notes that his starting point is not respect, but that his social contract device (the original position) is calculated to reveal what respect should entail and that respect and related concepts are “precisely” the ideas “that call for interpretation.” J. RAWLS, *supra* note 12, § 87, at 586.

Dworkin argues powerfully that the conditions of the original position can only be justified by resort to the prior assumption that individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them. R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 17, at 179–81. He also contends that this reading is consistent with Rawls’ understanding. *Id.* at 181. Citations illustrating Ackerman’s commitment to these Kantian ideals are set out in note 70 *infra*. See also C. FRIED, *RIGHT AND WRONG*, *supra* note 20, at 9, 20, 24, 28–29.

93. Dworkin, *Liberalism*, *supra* note 17, at 127. See also B. ACKERMAN, *supra* note 18, at 11, 57–58, 166 n.10; C. FRIED, *RIGHT AND WRONG*, *supra* note 20, at 146–47 (people have an individual right to determine the nature of the good); Richards, *Human Rights*, *supra* note 19, at 461, 467–68. With respect to Rawls, it is important for later discussion to distinguish two situations. First, after the principles of justice have been established, Rawls holds that government must “avoid any assessment of the relative value of one another’s way of life.” J. RAWLS, *supra* note 12, § 67, at 442; *id.* § 50, at 325–32. I shall later argue that he does not hold to this principle consistently.

Second, in the original position, the decision-makers have no particular conception of the good, but do believe it is important for them to be able to implant a rational plan of life. See generally *id.* § 60–68, at 395–452.

Dworkin has recently qualified his commitment to the neutrality principle. Dworkin, *Is There a Right to Pornography?*, *supra* note 79. For criticism, see *infra* note 105.

As suggested earlier, I am more interested in the model as a way of looking at the world than as an up-to-the-minute and perfectly accurate representation of particular scholars’ views. Certainly if one stressed part three of Rawls’ book, one would recognize that his thinking is more flexible than those aspects the model incorporates. Indeed many of the themes of eclectic liberalism are to be found in part three and in Rawls’ relatively favorable attitudes toward intuitions. See J. RAWLS, *supra* note 12, § 7, at 34–40; *id.* § 9, at 48–53. See also *infra* note 107 (showing that Richards’ thinking is more flexible than that depicted in the model).

94. Dworkin, *Liberalism*, *supra* note 17, at 127. This does not mean, however, that ethical liberals do not have a view of what the good life is or that they would defend neutrality without some resort to a conception of the good. Indeed, Dworkin (see *infra* notes 105 and 116), Rawls (see *infra* notes 116 and 119), Richards (see *infra* notes 107 and 115) and Fried (see Book Review, 96 HARV. L. REV. 960, 967 (1983)) clearly recognize this. If I am right, Fried has more liberal company than he supposes. See *id.* As to the grounding for Ackerman’s conception of neutrality, see *infra* note 245.

for example, from theories as far apart as conservatism and Marxism because they hold that treating persons as equals means treating them as good or wise persons would wish to be treated.<sup>95</sup> They postulate that government cannot treat people as equals without implementing some theory of what human beings ought to be.<sup>96</sup>

The neutrality principle (that is, government must be neutral on the question of the good life), however, does not distinguish ethical liberals from those classical liberals who adhere to the property rights freedom model, those who are often called libertarians.<sup>97</sup> They too believe that government has no business implementing its conception of the good life.<sup>98</sup> If a line were to be drawn, the classical liberals of the property rights freedom variety and the ethical liberals would stand on one side and all<sup>99</sup> remaining theorists on the other.

The issue of governmental regulation of obscene literature should help to exemplify the different positions. The ethical liberal (and those classical liberals adhering to the property rights freedom model) would argue that government should be wholly restrained from imposing sanctions for the possession of obscene literature on the ground that it should not be determining what constitutes the good life.<sup>100</sup> The political conservative might well say that a community must have the power to impose sanctions against immoral behavior and that government's discouragement of possession of obscene literature through the imposition of sanctions interferes with no worthy freedom. Under the conservative approach, it is necessary and desirable for society to decide what fundamental moral values should bind the political community.<sup>101</sup>

95. Dworkin, *Liberalism*, *supra* note 17, at 127-28. Dworkin argued that ethical liberals are distinguishable from all other political theoreticians by their adherence to the neutrality principle. He has since noted an exception. Dworkin, *Philosophy and Politics*, *supra* note 70, at 255. See *infra* text accompanying notes 96-99.

96. Dworkin, *Liberalism*, *supra* note 17, at 127-28.

97. See *supra* text accompanying notes 58-60.

98. See, e.g., R. NOZICK, *supra* note 58, at 33; Dworkin, *Philosophy and Politics*, *supra* note 70, at 255.

99. The question of how those who adhere to the pleasure model might fit into this classification is complicated and will not get us anywhere. But see *supra* note 91.

100. Dworkin, *Liberalism*, *supra* note 17, at 122. For an excellent example of the neo-Kantian approach to this question, see Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974). Ackerman's brief discussion of freedom of speech emphasizes opposition to censorship in circumstances where unwilling listeners can avoid without cost communications they do not like. B. ACKERMAN, *supra* note 18, at 177-80. Although he can easily handle the issue of one's possessing literature others do not like, Ackerman might be forced to abandon neutrality if he is to avoid compensating unwilling listeners who must endure costs to avoid hearing socialist speeches in public parks. See *id.* at 253-54.

101. See generally H. CLOR, *OBSCENITY AND PUBLIC MORALITY* (1968).

Similarly, a humane Marxist might argue that the possession of obscene literature promotes a conception of individuals as objects that is inconsistent with the dignity of persons in a moral community, or that it perpetuates a false consciousness and the community should move to discourage anything that promotes individual selfishness and division.<sup>102</sup>

For the ethical liberal, the neutrality principle (as the translation of government's obligation to treat its citizens with equal concern and respect) is not just a handy device to address the obscenity problem; it is a fundamental principle of political morality and obligation. Government's task is to assure that each of its citizens is guaranteed the rights of an equal. To treat persons as equals requires that they be granted equal rights of conscience, of speech, and of religious exercise, including the right to vote and to be eligible for public office; that they be granted freedom of the person (along with the right to hold personal property, subject to massive redistribution) and freedom from arbitrary arrest and seizure; that equality of opportunity be assured (thus laws against racial discrimination are necessary); and that a fair share of societal resources be guaranteed to all.<sup>103</sup> Government then is more than a night watchman; it is an active participant, not only providing security, but also creating an environment affording opportunities to all and distributing resources fairly.

Through it all, however, government should act with respect for everyone's life plans. To be sure, a life plan is unacceptable if it necessitates taking more than one's fair share of resources or if it requires interfering with others' life plans in ways that violate their basic rights as equals, but the basic principle of ethical liberalism mandates "official neutrality amongst theories of what is valuable in life."<sup>104</sup>

#### D. *Criticism of Ethical Liberalism's Conception of Equality and a Glimpse of Political Liberalism*

Ethical liberalism appears on the surface to capture the deep premises of contemporary liberal politicians. It seems at least to call for the liberal programs endorsing civil liberties, opposing racial discrimination, and seeking economic justice. Yet I shall claim that ethical liberalism is philosophically at war with the

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102. The Marxist here might distinguish, however, between state enforcement by means of physical coercion and community persuasion, opting for the latter while conceding the coercive power of public opinion. Compare J.S. MILL, ON LIBERTY, *supra* note 34. See also Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, 8 INT'L J. SOC. L. 379 (1980).

103. See, e.g., J. RAWLS, *supra* note 12, § 11, at 61 (listing rights implicated by his theory of justice).

104. Dworkin, *Liberalism*, *supra* note 17, at 142.

working premises of most liberal democrats, is fundamentally ill conceived, unworkable, and even incoherent.

The following example (which I later show goes to the heart of the matter) illustrates the difficulties associated with genuinely strict adherence to the neutrality principles. Suppose a city wished to establish a public library. Could an ethical liberal support such a venture? If ethical liberals were to adhere strictly to the neutrality principle, the use of compulsory tax funds to support public libraries would be supportable only if the government were mirroring decisions that would be made if the economic market were operating efficiently under proper competition and with full knowledge<sup>105</sup> or if it were otherwise necessary to assure equality for disadvantaged groups or to assure that equal liberty is

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105. Dworkin, for example, in discussing subsidies for books says, "It might be said that in a socialist economy books are simply valued more, because they are inherently more worthy uses of social resources, quite apart from the popular demand for books. But the liberal theory of equality rules out that appeal to the inherent value of one theory of what is good in life." Dworkin, *Liberalism*, *supra* note 17, at 132. Doing anything other than mirroring the market "would be a direct violation of the liberal theory of what equality requires . . ." *Id.* at 131.

In later writing Dworkin remarked that "we want government . . . to select methods of education, to sponsor culture, and to do much else that looks, on the surface, like endorsing one set of personal values against another and therefore contradicting liberalism." Dworkin, *Philosophy and Politics*, *supra* note 70, at 260. He suggests the possibility that a distinction between enriching imagination and imposing a choice upon imagination might succeed, but recognizes that he has "named a problem, I haven't met it." *Id.* But see Dworkin, *Why Liberals Should Believe in Equality*, N.Y. REV. BKS. Feb. 3, 1983, at 32, 33 (apparently thinking he has "met it," arguing that art subsidies do not assume that the life of an artist is inherently more valuable but provides an environment where citizens may live "more imaginatively" and "take pride.") I argue later that it was a particular problem for Dworkin because he wanted to hold on to a principle that he and liberals really did not accept. Of course, whatever one's approach, the government speech problem is extraordinarily difficult. See generally Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979).

In recent writing, Dworkin shifted his position still again, allowing him (among other things) to support subsidies of the arts. What he has done is to narrow the neutrality principle to a prohibition against government actions that characterize people's lives as "ignoble" or "wrong" (Dworkin, *Is There a Right to Pornography?*, *supra* note 79, at 194). Subsidies of the arts are now acceptable, Dworkin suggests, because supporting literature does not imply that those who do not read it have "bad character" or are "wrong people." See *id.* at 195-96.

Apparently, under Dworkin's new version, liberals can with good conscience suggest preserving parks on the ground that a life with parks is better than one without any, that those who want parks have a better conception of life. He had previously opposed that ground. See Dworkin, *Liberalism*, *supra* note 17, at 141. Liberals were previously restricted to egalitarian grounds. *Id.* at 141-42. Under Dworkin's lights they still are, but equality has been redefined. See generally Dworkin, *What Liberalism Isn't*, N.Y. REV. BKS. January 20, 1983, at 47 [hereinafter cited as Dworkin, *What Liberalism Isn't*] (difference between being neutral about the good life and

maintained.<sup>106</sup> The government could not encourage or promote the reading of books in order to encourage adults to follow a life in which books played an important role.<sup>107</sup> For government to do so would mean that it embraced and pursued a judgment as to what constituted the good life, and the ethical liberal ordinarily will not countenance the government making such a decision. Ethical liberals such as Dworkin have vacillated on this issue,<sup>108</sup> and still others such as Richards have consistently renounced any application of the neutrality principle in this context.<sup>109</sup> John Rawls, however, insists that in many circumstances the state could

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being neutral about the good society, a society that favors happy citizens over miserable ones and imaginative citizens over ones with a conformist approach to leading a life).

Dworkin's new position is welcome because it partially evidences a theme that I shall develop in some detail, namely that the neutrality principle is both too broad and too thin to resolve important political questions. By shifting from the neutrality principle to a right of *moral* independence, Dworkin has greatly altered the constraints he would place on government action. (For probing discussion of why a utilitarian would be led to a right of moral independence, see Dworkin, *Is There A Right to Pornography?*, *supra* note 79, at 199-206.) The shift, of course, makes it all the more important for Dworkin to describe the grounding for this newly described right and his new approach to equality. He may have begun an attempt in *Why Liberals Should Believe in Equality*, *supra*.

106. Rawls states, for example, that

[T]he principles of justice do not permit subsidizing universities and institutes, or opera and the theater, on the grounds that these institutions are intrinsically valuable and that those who engage in them are to be supported even at some significant expense to others who do not receive compensating benefits. Taxation for these purposes can be justified only as promoting directly or indirectly the social conditions that secure the equal liberties and as advancing in an appropriate way the long-term interests of the least advantaged.

J. RAWLS, *supra* note 12, § 50, at 332. See generally *id.* § 43, at 274-84, § 50, at 325-32, and § 67, at 440-46. Although Rawls' surrounding commentary is atypically murky, read in context he apparently is saying that subsidies of the arts may in some cases be necessary to achieve justice, but in other cases could only be provided through voluntary means. See *id.* § 50, at 331-32. In that connection, he supports a separate branch of government (the exchange branch) to organize the funding of these and other public goods without compulsory taxation (for any purpose agreed upon). *Id.* § 43, at 282-84.

Rawls believes that the combination of subsidies authorized through the exchange branch and those for which justice would permit taxation would ultimately provide sufficient support for the arts and sciences. *Id.* § 50, at 331-32.

107. In a thoughtful essay David Richards departs from both Dworkin's early work and Rawls' work by explicitly supporting subsidies of the arts on the ground that a conception of the good life lies beneath the neutrality principle; he believes that conception is advanced by subsidies of the arts. See generally Richards, *Human Rights*, *supra* note 19, at 467-68, 484-85. To my knowledge, Charles Fried does not discuss this issue, and there is no reason to believe he would apply the neutrality principle with rigidity. On the other hand, although Ackerman does not discuss the issue specifically, several passages suggest he would strictly apply the neutrality principle. B. ACKERMAN, *supra* note 18, at 155-60, 182-85.

108. See *supra* note 105.

109. See *supra* note 107.

subsidize the arts and sciences only if the funding were provided by voluntary contributions.<sup>110</sup> Arguing that it is not the function of government to promote a particular conception of the good life, Rawls maintains that state funding through compulsory taxation would violate elementary principles of justice in a well-ordered society.<sup>111</sup>

Right or wrong, that conception hardly describes the political premises of liberal democratic politicians. Anyone familiar with the Hubert Humphreys or George McGovern of the world would doubt that their support of public libraries has been confined to market failure theories or even to arguments based on liberty or equality. Hubert Humphrey and most liberal politicians (reflecting ideas eloquently expressed by John Stuart Mill)<sup>112</sup> have supported libraries and public universities through the years on grounds that it was desirable to promote intellectual pursuits and to invigorate the culture.

Like Mill,<sup>113</sup> liberal politicians have opposed government impositions of sanctions against an individual based upon majority conceptions of what constitutes a good life, but at the same time have supported government encouragement of particular conceptions of the good. According to their theory, government may support subsidies for the arts and for museums; it may support public universities and public libraries. In short, it may support cultural development in an effort to build a better society, not on a market failure theory, but because government does have a conception of the good life.

Whether or not liberal democratic politicians actually have

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110. See *supra* note 106. Rawls does not say "many circumstances," but I think it is a fair reading of his remarks. *Id.* § 50, at 331-32.

Indeed, if there were a way honestly to apply his standard without a conception of the good life, the result would probably be that taxation for *most* such subsidies could not be properly authorized.

111. See generally J. RAWLS, *supra* note 12, § 50.

112. Without subscribing to Mill's extreme claims for utilitarianism, it seems undeniable that liberals in general are moved by many of his ideals for human personality and culture. See generally J.S. MILL, UTILITARIANISM, *supra* note 34; J.S. MILL, ON LIBERTY, *supra* note 34. Mill argued that government support of particular conceptions of the good was desirable. In particular, see 3 J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 34, § 1, at 936-37; *id.* § 8, at 947-50; *id.* § 15, at 968-70. These passages reveal the difficulty of assuming that market failure theories could coexist with the neutrality principle. They also serve as an antidote to the exaggerated stereotype of Mill as an absolute opponent of paternalism. For an appreciative comment on Mill's ideals, see I. BERLIN, FOUR ESSAYS, *supra* note 34, at 173-206.

113. In particular, see 3 J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 34, § 1, at 936-37.



taken such positions, let us assume they have and call their position a part of eclectic liberalism. Some ethical liberals would accuse eclectic liberals of being unfaithful to their basic premises. I shall argue that the opposite is true.

Generally summarized, my critique begins by trying to show that ethical liberalism presupposes several controversial (but I think generally persuasive) notions about the good life; in other words, ethical liberalism is not entirely neutral. Specifically, my claim is that ethical liberalism favors moral lives over amoral or immoral lives, rational life styles over hedonistic life styles, lives granting more concern to some over those granting equal concern to all, and autonomous life styles over non-autonomous life styles. Most ethical liberals would freely concede this and would not count it as criticism<sup>114</sup>; others might resist. More important, I claim that it is necessary to depart from neutrality if any progress is to be made in resolving most important questions of political theory. The underlying conception of the good life in ethical liberalism is not rich enough to decide questions that involve adjudicating between conflicts of rights, deciding what should count as rights, deciding how to structure the property system, and deciding upon government's role in education or other affirmative efforts in the intellectual marketplace. If these criticisms are well taken, we will be forced to decide whether we need a new theory or to reflect upon the limits of theory. What we will not be able to do is to think that much of assistance can flow from a posture of neutrality.

### 1. Ethical Liberalism's Support of the Neutrality Principle in Any Form Presupposes a Conception of the Good Life

Ethical liberalism itself presupposes a conception of the good life.<sup>115</sup> This claim, if supported, however, is not so damaging to ethical liberalism as might first appear. It amounts to saying that government must be officially neutral on the good life question,

114. In particular, see *supra* notes 94, 107; see also *infra* note 116.

115. The general claim that liberalism (and particularly that of Rawls and Dworkin) necessarily presupposes a conception of the good life is developed in greater detail by Haksar (*supra* note 38) and the general themes of this section owe much to him as well. I believe Rawls would argue that the suppositions about the good life discussed here are *assumed* by him and in most cases he explicitly says so. See *infra* notes 116 and 119. Richards, who studied under Rawls (D. RICHARDS, A THEORY OF REASONS, *supra* note 19, at vii), and presumably would today think of himself as at least a cohort, regards it as important for liberals to recognize the presuppositions discussed here. See Richards, *Human Rights*, *supra* note 19. For recent writing criticizing the connection between neutrality and liberalism, see e.g., V. HAKSAR, *supra* note 38; M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Galston, *Defending Liberalism*, 76 AM. POL. SCI. REV. 621 (1982); Raz, *Liberalism, Autonomy, and the Politics of Neutral Concern*, VII MIDWEST STUD. PHIL. 89 (1982).

not because it has no conception of the good life, but because the good life is best advanced through a policy of official neutrality. Such a position itself would compromise neutrality only to that extent. Later I shall argue that even greater qualification of the neutrality principle is appropriate. First, it must be established that the ethical liberal presupposes that some life styles are better than others.

a. *A moral life style is considered preferable to an amoral or an immoral life style.* First, the ethical liberal supposes that a moral life style is better than a selfish, pleasure-seeking life style. To reject the conception of human beings as pleasure centers, to rail against Bentham's utilitarianism for failing to afford proper respect for the dignity of individuals<sup>116</sup> leads necessarily to the conclusion that a moral life style is better than an amoral life style. It would be possible to argue for a regime based on the

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116. A recurring reaction to this contention is that it is not applicable to Rawls. The argument is that Rawls shows that those in the original position who are stipulated to have no particular conception of the good are led to reject both egoism and utilitarianism by reasoning deductively from their situation. On this reading, the original position refutes egoism and utilitarianism; it does not presuppose that egoism or utilitarianism is wrong.

This argument fails, however, and an appreciation of the failure is fundamental, particularly because Rawls would not dispute the analysis. First, the argument neglects the presuppositions of the original position in that it does not attend to Rawls' views as to why people should accept any conclusion derived from it. Throughout his book Rawls recognizes that the original position incorporates and presupposes morality. For example, Rawls explicitly warns that it would be a mistake to think that the original position is ethically neutral. He states that the original position

already includes moral features and must do so, for example, the formal conditions on principles and the veil of ignorance. I have simply divided up the description of the original position so that these elements do not occur in the characterization of the parties, although even here there might be a question as to what counts as a moral element and what does not.

J. RAWLS, *supra* note 12, § 87, at 585. Indeed, Rawls states that he is not trying to show that a committed egoist should be persuaded by his theory (*id.* § 86, at 568); the most he says to the question "why be moral?" seems to echo what Mill says—moral persons will be happier. For those who do not agree, Rawls states: "[T]heir nature is their misfortune." *Id.* § 87, at 576.

By building into the original position the requirement that each person's plan of life is to be respected so far as possible, Rawls also loads the dice against utilitarianism.

The parties regard moral personality and not the capacity for pleasure and pain as the fundamental aspect of the self. They do not know what final aims persons have, and all dominant-end conceptions are rejected. Thus it would not occur to them to acknowledge the principle of utility in its hedonistic form.

*Id.* § 85, at 563.

It is not necessary to trace the complicated relationship between egoism and utilitarianism. It is evident that Rawls' original position presupposes a rejection of both.

Rawls, therefore, departs from neutrality at the stage where the principles of justice are being established. He also departs from neutrality at an equally fundamental

neutrality principle by relying on utilitarian premises,<sup>117</sup> but this is precisely the argument the ethical liberal opposes.<sup>118</sup> To endorse it would require empirical assertions about what leads to happiness, and the ethical liberal claims to argue rather from moral principle. The ethical liberal believes that one who leads a life that treats others as means (even if he or she respects their legal rights) necessarily pursues an inferior life style.

b. *A rational life style is considered preferable to a purely hedonistic life style.* Second, the ethical liberal presupposes that a life style based on rational principles is better than a life style slavishly devoted to serving one's "animal passions."<sup>119</sup> Indeed this is

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stage. That is, after the principles of justice have been established, the state has committed itself to the neutrality principle. *See supra* note 93.

At that point in Rawls' theory, however, the institutions have been organized and premised upon a highly moral conception of what it means to be a person, and utilitarianism has been rejected. *See generally* J. RAWLS, *supra* note 12, §§ 69-87, at 453-587. In particular, see Rawls' remarks on moral education in the well-ordered state. *Id.* § 78, at 513-20. *See also id.* § 41, at 262. "This view shares with perfectionism the feature of setting up an ideal of the person that constrains the pursuit of existing desires. In this respect justice as fairness and perfectionism are both opposed to utilitarianism." *Id.*

It is doubtful that Dworkin has ever denied that morality is a presupposition of the neutrality principle. Dworkin denies that the neutrality principle is grounded in skepticism and also denies that "the liberal says there is no answer to the question how human beings should live . . ." Dworkin, *Philosophy and Politics*, *supra* note 70, at 250-51. Indeed he approvingly interprets Rawls to say that the right of persons to equal respect is "'owed to human beings as moral persons,' and follows from the moral personality that distinguishes humans from animals." R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 17, at 181. For general discussion, see Dworkin, *What Liberalism Isn't*, *supra* note 105.

117. Ackerman, for example, notes that if the "trick" of rule utilitarianism is used, a utilitarian *might* adopt the neutrality principle. Thus, he says, "if the rule utilitarian finds my . . . principles useful, he is welcome to them." B. ACKERMAN, *supra* note 18, at 266. *See also id.* at 316. Having pointed out numerous times in the book that no utilitarian in his or her right mind would be led to such conclusions, Ackerman ultimately argues that if a utilitarian is crazy enough to adopt the neutrality principle, he will look the other way. *Cf. id.* ("It is hardly my intention to build the utilitarian's castle for him.") Ackerman's indictment of utilitarianism finally appears to be a universal one: it "fails to take individualism seriously enough." *Id.* at 342.

On the other hand, what is missing from the analysis of many ethical liberals is an explanation of the grounding for the conclusion that persons should be taken seriously or discussion of the grounding for their endorsement of morality. *But see supra* note 79. Could it be that their ultimate grounding is utilitarian? For Rawls' cryptic answer, see *supra* note 116. If so, personhood theory may be in the nature of a neo-utilitarian "trick." I do not think so, but these questions are not frivolous. *See also infra* note 118.

118. *See* D. RICHARDS, *A THEORY OF REASONS*, *supra* note 19, at 279-92; Dworkin, *Is There a Right to Pornography?*, *supra* note 79, at 210-11.

119. Some might believe that Rawls employs rationality in a different sense, i.e., as he states early in his book, "[R]ationality must be interpreted as far as possible in the narrow sense, standard in economic theory, of taking the most effective means to

part of what the ethical liberal regards as moral. Persons are required to treat not only others, but also themselves, as if they were the ends of nature. This need not mean that persons are barred from the pursuit of happiness;<sup>120</sup> it does mean that a person's pursuit of happiness is qualified by duties that are owed to oneself as an end of nature.

Some ethical liberals are explicit on this point;<sup>121</sup> but, explicit or not, the rational ideal is deeply embedded in the theory. The depth of the theoretical assumption is most apparent when one considers premises that some ethical liberals (and most of the rest of us) take for granted. Ethical liberals expend great energy attacking the idea that individuals' rights may be routinely sacrificed for marginal or greater increases in public welfare; yet ethical liberals presumably regard as a fixed point that the interests of humans take precedence over non-human animals, and the idea of rationality or some variant of it plays a major role.

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given ends." J. RAWLS, *supra* note 12, § 3, at 14. This usage is consistent with reason operating as a servant of the passions.

Nonetheless, built into the original position is a normative conception of human nature that attacks slavish devotion to the passions. The original position is an attempt to duplicate the Kantian ideal where "men exhibit their freedom, their independence from the contingencies of nature and society . . ." *Id.* § 40, at 256. Rawls contends, as do Rousseau and Kant, that "to be governed by appetite alone is slavery, while obedience to a law one prescribes to oneself is freedom." *Id.* § 42, at 264 n.4 (quoting J.J. ROUSSEAU, *supra* note 46, bk. I, ch. viii). For Rawls, this is the point of both the original position and what it means to be a moral person. See J. RAWLS, *supra* note 12, § 40, at 251-57. It is also deeply implicated in the thin conception of the good shared by the parties in the original position. The most obvious element is that self respect is valued and is part of the conception of the good. Self respect is defined to include a "sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out." *Id.* § 67, at 440. See also the discussion of the Aristotelian principle in *id.* § 65, at 424-33. It is hard to think of any persuasive sense in which self respect as a dominant part of a life plan could be equated with a view of human nature that sees reason as the servant of animal passions.

120. A frequent misreading of Kant is that he opposes man's striving for happiness. That was never Kant's position. He merely thought that there was no moral duty to pursue happiness (i.e., people naturally do it anyway) (see I. KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE*, *supra* note 81, at 43) and that requirements of duty serve to limit the avenues available for the pursuit of happiness. But in the final analysis Kant thought the "creator's unique intention is neither human morality in itself nor happiness in itself, but the highest possible good on earth, the union and harmony of them both." Kant, *Theory and Practice*, *supra* note 15, at 65. See also I. KANT, *CRITIQUE OF PRACTICAL REASON* 96-97 (L. Beck trans. 1956) [hereinafter cited as I. KANT, *CRITIQUE OF PRACTICAL REASON*].

Fortunately, no one, so far as I am aware, has accused Rawls, Dworkin, or other anti-utilitarians of being opposed to human happiness. The refusal to regard human happiness as the sole end of human existence is a far cry from exalting human misery. Interestingly, even Mill, who was a utilitarian, argued that "the conscious ability to do without happiness gives the best prospect of realizing such happiness as is attainable." J.S. MILL, *UTILITARIANISM*, *supra* note 34, at 417.

121. See *supra* note 119.

Ethical liberals rightly assume that animals are not entitled to equal concern and respect;<sup>122</sup> that is, animals need not be treated as ends.<sup>123</sup> If animals were entitled to *equal* concern and respect, we would be led to some dramatic conclusions. Property, for example, would need to be distributed in ways that would recognize the claims of sentient creatures such as spiders or mosquitoes. To kill a cockroach would be as serious a moral offense as killing a human being; government's failure to provide for a housefly's full life would violate basic principles of justice.

My point is not to set out a charter of insects' rights, but to probe the ethical reasons for rejecting the rights of animals to equal concern and respect. For Kant, the reason was straightforward and central. Human beings are the ends of nature because they are rational moral beings with free will, beings with the power to pursue the rational and to reject their animal passions when duty calls. Man is more important than an animal, and man's function is to rise above its animal nature. The pursuit of rationality as a life style, treating others and one's self as an end is a superior life style.

Some ethical liberals argue that animals fall outside the system of justice not because they are inferior but because they are different. They cannot participate in dialogue,<sup>124</sup> or they have no sense of justice,<sup>125</sup> or they cannot assume duties and therefore have no rights.<sup>126</sup> But these are unpersuasive evasions. Stipulative definitions of justice or of rights cannot avoid the substantive

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122. Rawls, for example, does not require that animals be included in the system of justice. He assumes that justice is not owed to those who inherently lack the capacity to have a sense of justice. J. RAWLS, *supra* note 12, § 77, at 504-12. He emphasizes the tentative character of his conclusions, opines that cruelty to animals is morally wrong, and recognizes that man's relation to animals and nature is a question of metaphysics beyond his work. *Id.* § 77, at 512. The tentative position, however, is that whatever concern might appropriately be directed toward animals, they are not owed concern or respect equal to human beings. Their interests in many circumstances may be sacrificed to those of humans. *Id.*

123. See, e.g., I. KANT, *CRITIQUE OF PRACTICAL REASON*, *supra* note 120, at 90 ("Everything in creation which [man] wishes and over which he has power can be used merely as a means; only man, and, with him, every rational creature, is an end in itself.").

124. See B. ACKERMAN, *supra* note 18, at 71-72, 102-03.

125. See *supra* note 122.

126. There are many variations on this theme, e.g., animals cannot make claims. For the view that these variations miss the point that many species of animals "exhibit moral virtues even though they clearly lack human intelligence," see Sapontzis, *A Critique of Personhood*, 91 *ETHICS* 607, 614 (1981). Cf. *Corso v. Crawford Dog & Cat Hospital, Inc.*, 97 Misc. 2d 530, 531, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) (A family heirloom "is merely an inanimate object and is not capable of returning love and affection. It does not respond to human stimulation . . . . But a dog—that is something else. To say it is a piece of personal property and no more is a repudiation of our humaneness.").

issue of why animals' interests can be sacrificed to human interests.<sup>127</sup> Why should the inability to participate in dialogue or the like count as a justification for excluding a being from economic or other benefits? In the final analysis, ethical liberals assume in a very deep way that slavish devotion to animal passion leads to an inferior life. Even if humans are not regarded as superior to animals, whatever features of humanity which allow them to treat animals unequally lead to the conclusion that those humans who act like animals pursue an inferior life style.<sup>128</sup>

Indeed, Kant and some of his modern followers such as Ackerman<sup>129</sup> have gone so far as to argue that animals are entitled to *no* moral concern or respect. They have, therefore, been forced to resort to extraordinarily complicated and unconvincing machinations<sup>130</sup> in order to accommodate one of our most basic intuitions, that gratuitous infliction of suffering on animals is morally wrong. Placing full Kantian emphasis on rationality, as Ackerman does, makes it quite a task even to explain why baby torture or the painless killing of the mentally handicapped or the senile is immoral.<sup>131</sup> A theory that ends up regarding the morally obvious as

127. V. HAKSAR, *supra* note 38, at 25.

128. See generally V. HAKSAR, *supra* note 38.

129. See *infra* note 131.

130. Kant, for example, maintains that no duty of any kind is owed to animals. See e.g., I. KANT, THE METAPHYSICAL PRINCIPLES OF VIRTUE, *supra* note 81, at 105. If only the animal were taken into account, *nothing* would prohibit animal torture. Nonetheless, Kant argues that cruelty to animals is immoral because one has a duty to *oneself* not to engage in actions that reduce compassion because that predisposition is "very serviceable to morality in one's relations with other men" and would be "weakened and gradually obliterated" if cruelty to animals were allowed. *Id.* at 106.

131. For Ackerman, the only entities that deserve rights (leaving aside what a polity might otherwise grant) are those capable of engaging in the minimal demands of rational dialogue, i.e., those capable of invoking the neutrality principle. B. ACKERMAN, *supra* note 18, at 70-73. Thus, if an ape could talk and could raise the neutrality principle, the ape would be entitled to treatment equal to other rational beings (*id.* at 80) but not "normal" animals (*id.* at 102-03) infants (*id.* at 127-29) or "human vegetables" (*id.* at 79-80). It is not clear how the theory works while we are asleep; perhaps we are treated then *as if* we could participate in dialogue.

Thus, for Ackerman, explaining why people cannot kill infants or torture animals is a problem. His main answer depends upon an acknowledgement of doubt about the root assumption dictating an inferior status to non-rational beings or objects. Maybe, he thinks, we would be wrong to assign lions, infants, and the Grand Canyon a status akin to mere rocks. This leads to a "principled agnosticism about the 'proper' relationship between the state and the larger universe." *Id.* at 128. See generally *id.* at 100-03. Thus, without any explanation as to the *neutral* principles that distinguish the Grand Canyon from other rocks and other parts of the material universe (perhaps sinog is so aesthetically pleasant that it should be treated as an historic monument), we are quickly led to the obvious conclusion (why didn't we all see it before?) that infants are like the Grand Canyon and that the polity can, if it wishes, prevent us from wanton brutality because of our collective uncertainty about nature. Without this or some other exotic rationale, Ackerman implies, we would have to tolerate infanticide and the like or else abandon liberalism. If liberalism depends

a puzzle to be explained surely misses the bus somewhere;<sup>132</sup> the limited point here, however, is that ethical liberals presuppose that a rational life style is superior.

c. *A life granting more concern to some is considered preferable to a life style that grants equal concern to all.* Despite their proclamations of dedication to equality, most ethical liberals presuppose that a life style granting more concern to some persons is considered preferable to a life style that grants equal concern to all persons. The assumption is manifested most clearly in the nationalistic premises of most ethical liberals.<sup>133</sup> To make the point

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upon arguments as frail and as counterintuitive as these, it should be abandoned. Ackerman, of course, does not purport to clarify our intuitions. Indeed the unwillingness of Ackerman and other ethical liberals to give sufficient deference to intuitions is part of the central failure of their theory. See *infra* note 132 and text accompanying notes 249–69.

As to the problem of our relationship to nature, neutrality again fails. Consider Marcel's perceptive observation: "The more the sense of the ontological tends to disappear, the more unlimited become the claims of the mind which has lost it to a kind of cosmic governance, because it is less and less capable of examining its own credentials to the exercise of such dominion." G. MARCEL, *THE PHILOSOPHY OF EXISTENTIALISM* 31 (1968). As Marcel points out, the question of how man ought to relate to nature requires that ontological questions be confronted. *Id.* We may emerge as skeptics or take a leap of faith, but neutrality is ruled out. Ackerman, of course, recognizes that his principled agnosticism is a compromise with neutrality, but he does not appreciate the size of the compromise and the difficulty of the stopping place problem. For perceptive discussion, see Alexander, *Liberalism as Neutral Dialogue*, *supra* note 87, at 838–44.

132. The main failure is the willingness to respect persistent and widespread intuitions. Our intuition that inflicting suffering on animals is wrong is clearly related to the emotion of empathy. To respect that intuition need not commit one to extreme utilitarianism or to the idea that humans and animals should be treated equally. To fail to respect that and other basic intuitions is a special form of madness not treated as such because it is so widespread in academia. See *infra* text section II D 4.

133. Rawls clearly assumes that the just society is a nation, not a world government. See J. RAWLS, *supra* note 12, § 18, at 108; *id.* § 58, at 378. *But cf. id.* § 58, at 380 (postulating without discussion that the loss of liberty involved in conscription may be justified only if it is demanded for the loss of liberty itself, either of the citizen in the society or for those of persons in other societies as well). Dworkin argues that liberals are in favor of internationalism. Dworkin, *Liberalism*, *supra* note 17, at 113 (supposing, but not insisting in the process, that the liberal position was to favor the Vietnam war!). He does not develop his concept of internationalism. Dworkin's focus on legal theory in particular communities suggests that he would affirm the justice of nations.

Most liberals have conflicting intuitions on this point. They support international institutions and nation-states. Despite their support of the latter, they undoubtedly have difficult problems with the idea of patriotism. See A. MACINTYRE, *supra* note 75, at 236:

Liberals have often—not always—taken a negative or even hostile attitude toward patriotism, partly because their allegiance is to values which they take to be universal and not local and particular, and partly because of a well-justified suspicion that in the modern world patriotism is often a facade behind which chauvinism and imperialism are fostered.

specific, consider the duties owed by the government and citizens of the United States to the citizens of Tanzania or of other foreign nations. Ethical liberals ordinarily assume that citizens of the United States do *not* owe equal concern to Tanzanians.<sup>134</sup> That is, institutional arrangements need not be structured in a way that affords Tanzanians the same economic opportunities and benefits granted to citizens as a matter of right. The point need not be overdrawn. Tanzanians as human beings are entitled to some concern; they cannot be treated as mere means, as if they were stones. They are humans entitled to be treated as ends. There may even be obligations to give foreign aid to relieve human suffering, yet there is no duty to maximize Tanzanian opportunities and resources.

How can this be? How can citizens justify living in one society and agreeing to give preferences to the citizens of that society that are not given others? How can Americans or others justly appropriate land for themselves and exclude others from sharing equally? The same questions that operate to defeat the property rights freedom model also plague the property "rights" of collective groups.<sup>135</sup>

In the main, ethical liberals assume that human beings flourish best by living in societies of less than world dimension. Yet one might have expected ethical liberals to support a world nation and to oppose the diversity of nation states.<sup>136</sup> Is it possible for ethical liberals to reconcile their commitment to nationalism with their commitment to equal concern and respect and to the related idea of neutrality about life plans? Perhaps the argument could be made that the clashes of values, traditions, and cultures in a world-nation would be so enormous as to make government unmanageable. The specific fear might be that equal rights to basic liberties could not be maintained and that institutions must be arranged to assure those liberties. Such an approach, however,

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134. We may be required to *respect* all individuals as persons, but grant more *concern* to some individuals such as our friends. See Dworkin, *Liberalism*, *supra* note 17, at 125.

135. [I]t is not only persons favoring *private* property who need a theory of how property rights legitimately originate. Those believing in collective property, for example those believing that a group of persons living in an area jointly own the territory, or its mineral resources, also must provide a theory of how such property rights arise; they must show why the persons living there have rights to determine what is done with the land and resources there that persons living elsewhere don't have (with regard to the same land and resources).

R. NOZICK, *supra* note 58, at 178.

136. Compare B. BARRY, *THE LIBERAL THEORY OF JUSTICE* 132-33 (1973) ("As far as economic relations are concerned, I can see no reason within Rawls' theory why the representatives of different countries should not, meeting under the conditions specified, agree on some sort of international maximum.").



would need to explain why the liberty of some should take priority over the economic welfare of others in circumstances of widespread economic deprivation.<sup>137</sup> How could that be done without preferring a particular style of life and preferring it to the point that other moral persons are sacrificed in the process? Alternatively, it might be argued that a world nation in which world citizens were treated as equals would not improve the condition of the world's poor. That empirical assumption, however, is dubious; I suspect the reality is that we, the rich, would be worse off and many of the poor of the world would be better off.

One might argue, at this point, that even if it were true that

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137. This is one of the pressure points in Ackerman's discussion of nationalism. Ackerman argues that immigration can be restricted only when it is necessary to protect liberal dialogue (i.e., a process in which all power and property distribution is justified according to the neutrality principle). B. ACKERMAN, *supra* note 18, at 93-95. Ackerman then squarely values liberal dialogue over economic welfare. The preference (as Robert G. McCloskey stated in a related context) "smell[s] of the lamp." McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 46. Ackerman also demands substantial foreign aid for those nations who have "realistic programs" that promise "the ultimate construction of a liberal power structure." B. ACKERMAN, *supra* note 18, at 256 (do we let the others starve because their leaders fail to offer such programs?). If Asian nations were to have such programs and to demand aid, Ackerman thinks, we would be presented with the "purist" nightmare—"with *all* starving in the name of legitimate freedom." *Id.* The dilemma, as Ackerman puts it, is then "freedom without legitimacy or legitimacy without freedom." *Id.* at 257. In this area, Ackerman regrets that his theory has nothing useful to say, or to put it another way—the neutrality principle runs out. *Id.*

But Ackerman abandoned his theory when he chose liberal dialogue over the economic welfare of immigrants. For example, Ackerman imagines an immigrant saying that even if liberal dialogue were to be maintained, perhaps he should be admitted and someone inside the country deported. Liberal dialogue could then be enjoyed by others. Perhaps a lottery could be used to decide who is admitted to the charmed circle. The immigrant's challenge is rebuffed on the ground that the assimilative capacity of a country is determined "only on the assumption that there exists a cadre of natives familiar with the operation of liberal institutions." *Id.* at 94. If some of the natives were removed, even fewer immigrants might be permitted to enter. *Id.* But this will not do. If that analysis were accepted, an immigrant with "liberal" credentials could replace any illiberal citizen. Ackerman's defense of liberalism raises the spectre of loyalty oaths and deportation.

But it does even worse than that. The problem, Ackerman believes, is that we have too many people in the world. *Id.* at 257. Elsewhere he speaks about how to handle a part of the population problem. Persons, he believes, have a right to be born into a world where their resources are at least equal to those of the last generation. If they are born into a world with less resources, they have been treated unjustly. But what do we do if we have consumed too much or miscalculated our productive capacity? We simply distribute "birthrights on an egalitarian basis." *Id.* at 221. Ackerman even provides for birthrights to be sold in his ideal liberal polity. *Id.* For Ackerman, then, the value of intergenerational equality dictates government control of child birth even if the new generation would have abundant resources. Massive interference with personal lives is said to be justified, not as a necessary expedient to prevent human suffering, but to comply with the abstract dictates of an idiosyncratic conception of equality. A better reductio of ethical liberalism is not available.

ethical liberals could not support nationalism without qualifying their commitment to equal concern or respect, it would not necessarily follow that they favor some life styles over others *within nation states*.

I respond to that contention by trying to kill two birds with one stone. The first point (one not directly responsive) is to argue that even if ethical liberals abandoned a commitment to nationalism, they would still prefer life styles which grant more concern to some than to others over life styles that grant equal concern to all. The second point is that this preference is arguably an important part of the preference for nationalism.

As to the first point, consider what it would mean if one adopted a life plan granting equal concern to all. Held as a consistent position, the principle would destroy not only the institution of the family, but also of friendship. As Charles Fried has argued at length, each of us gives some persons more of our time, energy, and resources, not because we consider them inherently more deserving than others, but because they are our friends.<sup>138</sup> The institution of friendship is fundamentally non-egalitarian.<sup>139</sup>

138. See generally C. FRIED, *RIGHT AND WRONG*, *supra* note 20, at 36-69, 167-94. Ackerman echoes Fried by attacking utilitarianism in part on the ground that it devalues friendship. B. ACKERMAN, *supra* note 18, at 344. Rawls also endorses friendship, not only as an evolutionary moral institution leading to a morality of principles (J. RAWLS, *supra* note 12, §§ 71-72, at 467-79) but also as carrying special moral significance within a morality of principles:

[E]ven though moral sentiments are in this sense independent from contingencies, our natural attachments to particular persons and groups still have an appropriate place. . . . [I]f we suppose that, say, a rational feeling of guilt (that is, a feeling of guilt arising from applying the correct moral principles in the light of true or reasonable beliefs) implies a fault on our part, and that a greater feeling of guilt implies a greater fault, then indeed breach of trust and the betrayal of friendships and the like, are especially forbidden. The violation of these ties to particular individuals and groups arouses more intense moral feelings, and this entails that these offenses are worse.

*Id.* § 72, at 475.

Similarly, Rawls regards the family as part of the natural order and condition of human life and defends it as an institution even though it interferes with equality of opportunity. *Id.* § 77, at 511-12. Indeed, the idea of friendship and fraternity is deeply embedded in Rawls' conception of an ideal society. See *id.* § 79, at 520-29. See also D. RICHARDS, *A THEORY OF REASONS*, *supra* note 19, at 170-71, 198-99, 205, 210; D. RICHARDS, *MORAL CRITICISM*, *supra* note 19, at 85-91.

Dworkin has not elaborated his views on this point, but he too recognizes that the principle of equal concern applies to political institutions and not to private actors. Dworkin, *Liberalism*, *supra* note 17, at 125.

Whether it is in the analysis of terms like self-respect, concern, or the like, ethical liberals here build into their basic theory conceptions about what human beings are like or about the nature of human nature. For trenchant commentary showing that Rawls' building of psychological facts into the original position is decidedly non-neutral, see Grey, Book Review, 25 *STAN. L. REV.* 286, 302-08 (1973) (reviewing J. RAWLS, *A THEORY OF JUSTICE* (1971)).

139. See, e.g., P. ABBOTT, *FURIOUS FANCIES: AMERICAN POLITICAL THOUGHT IN*

It would be possible to argue that friendship is immoral, that we should treat everyone equally, but if some people took that as a principle for pursuing a life style and actually lived by it, we would wonder about their humanity.<sup>140</sup>

This leads to the second point. Is there a connection between a commitment to the institution of friendship and family and a commitment to nationalism? One approach might deny the connection by recognizing that any bonds of friendship among citizens in communities of national scope could not possibly be maintained. Nonetheless, there is something attractive about living with people not only linked by proximity in space and time, but also in a community with a shared history, language, customs, and traditions. Just as persons derive identity from their close relationships and their close associations, so participation in a large community serves to assist human beings in forging their identity.<sup>141</sup>

Yet some might respond that these conceptions are foreign to

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THE POST-LIBERAL ERA 191 (1980) ("Fraternity, like its more general formulation—love—is a transitive word. To love is to love someone. To love everyone and to love everyone equally is impossible. The consequence is to love no one.").

Friendship might be justified as an institution within the Kantian framework by claiming that one could will the institution according to the dictates of any of the categorical imperatives. *See generally* I. KANT, *supra* note 1; I. KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE*, *supra* note 81, at 135–40 (endorsing and discussing friendship). If an ethical liberal took this line in justifying friendship, however, personal participation in the institution of friendship might be morally required. *Cf. id.* at 140 ("It is one's duty both to himself and to others to use his moral perfections in social intercourse . . . and not isolate himself") (endorsing social virtues as a duty although not necessarily friendship). For the thesis that Kantian morality cannot appreciate friendship, see generally L. BLUM, *FRIENDSHIP, ALTRUISM AND MORALITY* (1980); B. WILLIAMS, *MORAL LUCK* 1–19 (1981).

If friendship were considered a moral duty by ethical liberals, the neutrality principle would still dictate that politics not require people to be friends (how could it?); yet the institution of friendship thus would be a morally favored life style under the same regime that professed neutrality between and among life styles.

140. Some might argue that this goes too far. It implies a normative denunciation of saints like Francis of Assisi who are thought to have treated all humans with equal concern. One could argue that the person who treats all with equal concern is a saint, not a person leading an inferior life style. Natural duties to family members might be explained not by ties of affection but by principles of reciprocity or restitution. I find this approach unconvincing. First, even saints have friends. Second, an ethical liberal who made this argument would be subject to attacks similar to those Fried and Ackerman have made against utilitarians. That is, they attack utilitarians on the ground that if the exclusive goal of a human being is to bring happiness to humanity, that person cannot be a true friend. *See supra* note 138. Convincing or not, an ethical liberal who made the argument and who abandoned nationalism would not necessarily prefer life styles granting more concern to some than those that grant equal concern to all.

141. For a perceptive discussion of the relationship between friendship and nation-states, see Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 695–702 (1981). *See generally* M. WALZER, *SPHERES OF JUSTICE* 31–63 (1983).

liberals. Liberals embrace diversity and the concept of the melting pot. They are more likely than others to support diversity in language, by supporting bi-lingual education. I suspect, however, that there are limits to tolerance here. Would it be a matter of indifference if thousands of different languages were spoken in the United States? Do liberals want to participate in communities where they accommodate the myriad of world customs? Is convenience the only concern? Even if it were, the basic idea that life plans properly grant more concern to some than to others would underpin the commitment to nationalism.

Of course, to endorse institutions of friendship, the family, and nations (however related to assessments of life plans) in no way suggests that *governments* should afford some of their citizens more concern than others.<sup>142</sup> We require public officials to ignore considerations of friendship in distributing benefits, and the public official who treats non-citizens as equals might flirt with treason.<sup>143</sup>

The point here is limited. Ethical liberals, in one way or another, presuppose that a life plan granting concern to some rather than all is preferable to a life style granting equal concern to all.

d. *An autonomous life style is considered superior to a non-autonomous life style.* Perhaps the most important assumption of the ethical liberal is that an autonomous life style is superior to a non-autonomous life style.<sup>144</sup> The assumption follows from the preferences for a moral and rational life style and qualifies the communitarianism involved in the ethical liberals' commitment to

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142. For a helpful set of essays bearing on the relationship between private and public morality, see generally PUBLIC & PRIVATE MORALITY (S. Hampshire ed. 1978).

143. For the powerful suggestion that states such as California might justifiably give preferences to citizens of Mexico over, for example, citizens of Ohio in some circumstances, see Lopez, *supra* note 141, at 702.

144. For a strong statement of the view that autonomy is central to liberalism, see Richards, *Human Rights*, *supra* note 19, at 465-68. The idea is most conspicuous in works by Rawls and Dworkin in which they insist that persons be able to pursue independently their own plan of life. Ackerman's work contains many passages discussing the value he places on autonomy. See *supra* note 70. Of course, the placement of a high value on autonomy need not mean that paternalistic acts of government are always foreclosed. Rawls, for example, would authorize paternalistic interference with individuals to the extent that a person in the original position would authorize such interference. J. RAWLS, *supra* note 12, § 39, at 248-50. Indeed, Rawls maintains that interference with such choices would not interfere with autonomy. *Id.* § 78, at 515-20. The latter position obscures analysis, I think. To interfere with choices people want to make may on occasion be justifiable interference with autonomy, but it is not helpful to suppose that such actions do not actually interfere with autonomy. Cf. I. BERLIN, *FOUR ESSAYS*, *supra* note 34, at 118-72 (discussing similar moves with the words liberty and freedom). Rawls' attempt to put even more normative content into the word autonomy than is already there, of course, is a familiar one in political philosophy. See *supra* note 46.

nationalism. Once again the preference is attributable to a conception of human nature, and the point might best be understood by examining the life style considered inferior.

Suppose we could make the irrevocable decision to spend all of our days and nights attached to a machine that would give us continuous pleasure.<sup>145</sup> Or suppose we decided that decisionmaking is too difficult and we therefore grant to another the right to make all our personal decisions.<sup>146</sup> Presumably one would not have to be insane to make either of these decisions, and in one form<sup>147</sup> or another many people make decisions that mirror these examples. The ethical liberal presupposes that the surrender of our autonomy to machines or to other human beings contradicts our moral nature. The life style of the Brave New World is renounced by the ethical liberal. Kant argued that human beings are moral creatures precisely because they have the power to choose good and to avoid evil, the power to do their duty because it is their duty, and the will to advance their own legitimate ends and the legitimate ends of others.<sup>148</sup> To renounce one's autonomy, it is thought, is to renounce human nature and reduce oneself to the status of an animal.

## 2. The Connection Between the Ethical Liberal's Preferred Life Style and the Neutrality Principle

It might be argued that the ethical liberal is already tangled in contradiction. Government is required to be agnostic concerning theories of the good life, and yet the ethical liberal claims to know what the good life is. But the point can be sharpened. The ethical liberal believes government must be neutral as to the good life precisely because it is believed that such a posture is necessary for individuals to achieve the good life.

The connection between the autonomy preference and the neutrality principle provides the fundamental link. Government, it is thought, should not intervene to favor one life style over another because individuals ought to make decisions for themselves. To treat individuals with respect is to recognize their right to make moral decisions. Of course, government can prevent them from violating the rights of others, but government cannot otherwise interfere. To do otherwise would be to interfere with man's

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145. For discussion see R. NOZICK, *supra* note 58, at 42-45.

146. For a useful Kantian perspective on the immorality of servility, particularly in relationship to sex roles, see Hill, *Servility and Self-Respect*, 5 *MONIST* 87 (1973).

147. For discussion of the failure to be an independent person in relations with others, see generally *id.* For discussion of the widespread use of television as if it were a drug machine, see J. MANDER, *FOUR ARGUMENTS FOR THE ELIMINATION OF TELEVISION* (1978).

148. See generally I. KANT, *supra* note 1.

moral nature.<sup>149</sup>

Again, the ethical liberals' conception of mankind's moral nature inheres in the theory. The ethical liberal cannot justify the neutrality requirement on the ground that there is no sure basis for choosing between life styles. To take that position would throw us back to the pleasure model, and the ethical liberal rejects utilitarianism.<sup>150</sup> To reject the pleasure model is to endorse a moral life style; to deny animals equal concern and respect is to take a preference for rationality in one form or another; to deny that government must treat all human beings with equal concern is to endorse a particular form of community; to adopt the model of man as moral chooser is to prefer a life style of independence and autonomy.

### 3. The Undesirability and Incoherence of the Neutrality Principle as a Basic Principle of Government

Ethical liberals, then, must defend the neutrality principle as a means of allowing humans to act in accordance with their moral nature; they must argue that it is consistent to hold a moral preference for a particular life style and nonetheless require that government be agnostic about the good life. I shall argue that the very assumptions thought to underpin the neutrality principle support it only in a qualified form, that the maintenance of the neutrality principle is not desirable and in some circumstances is not even possible. I shall develop the argument with respect to government's attitudes about rights, about property, and about education.

a. *The need for a concept of the good in assigning rights and duties.* As discussed earlier,<sup>151</sup> the obscenity example is a classic illustration of the ethical liberal's application of the neutrality principle. Some conservatives favor the imposition of sanctions against the possession of obscenity because the reading of obscene material is immoral; they argue that government has an obligation to promote virtue and preserve a decent society.<sup>152</sup>

The ethical liberal regards the conservative argument as fundamentally unacceptable. It runs counter to the neutrality principle because government would be imposing its own conception of the good upon its citizens. Putting aside what might be acceptable

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149. For a particularly clear discussion of the link between the neutrality and the autonomy principle, see Richards, *Human Rights*, *supra* note 19.

150. The problem is complicated, however. Rejecting utilitarianism at one level of abstraction need not dictate its rejection at another. See *supra* note 117.

151. See *supra* notes 100-02 and accompanying text.

152. See, e.g., H. CLOR, *supra* note 101.

reasons to limit human conduct, government may not prohibit human activity merely because it thinks the activity is immoral or because other citizens do not like it.

i. Publicly offensive acts. This part of the ethical liberal position can be consistently maintained, but only at some considerable cost to our intuitions. Consider legislative attempts to outlaw public sexual acts such as masturbation or bestiality.<sup>153</sup> There is no claim that such acts would cause harm to others<sup>154</sup> (leaving aside animals' rights), at least not as defined in the traditional liberal lexicon.<sup>155</sup> Government attempts to limit such conduct would only arise because most citizens do not think such acts should be performed in public, even if they might be performed in private.

To permit government to outlaw such public conduct would amount to an obvious qualification of the neutrality principle with the attendant stopping place problems. Public dancers and handholders would be tolerated, but public masturbators would not.<sup>156</sup> Distinctions such as these are rooted in common sense, custom, and tradition, not in principle alone. Even devoted liberals such as J.S. Mill<sup>157</sup> and H.L.A. Hart<sup>158</sup> have been willing to accept such distinctions. One suspects they would accept aesthetic zoning laws as well, but those laws also impose a particular conception of the good upon citizens and violate the neutrality

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153. The argument that liberals cannot cope with publicly offensive acts such as these has been made many times before. It is a recurring theme in discussions of John Stuart Mill because he was willing to prohibit public sexual activity as indecent (*see* J.S. MILL, ON LIBERTY, *supra* note 34, at 578) despite his otherwise fervent call for insisting that activity must cause harm to the interests of others (beyond that of causing offense) before it might be prohibited. *See, e.g.*, Honderich, *Mill on Liberty*, 10 INQUIRY 292, 294 (1967); McCloskey, *Mill's Liberalism*, 13 PHIL. Q. 143, 151 (1963); Monro, *Liberty of Expression, Its Grounds and Limits*, 13 INQUIRY 238, 240 (1970). The same argument has been urged against Rawls and Dworkin. V. HAKSAR, *supra* note 38, at 290-91. Publicly offensive acts need not be sexual acts. *See, e.g.*, Feinberg, *Pornography and the Criminal Law*, 40 U. PITT. L. REV. 567, 572 (1979) (consistent with liberalism to outlaw the eating of excrement on a bus even though it might be unwise, uneconomical, or unnecessary). *See infra* note 161 and accompanying text. *See also infra* note 164.

154. Feinberg argues that liberalism would countenance the prohibition of those actions that either cause harm to others or are considered "offensive nuisances." Feinberg, *supra* note 153, at 568. For a set of provocative responses by Frederick Schauer, Kurt Baier, and Tom Gerety, see generally Baier, *Response: The Liberal Approach to Pornography*, 40 U. PITT. L. REV. 619 (1979); Gerety, *Pornography and Violence*, 40 U. PITT. L. REV. 627 (1979); Schauer, *Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605 (1979).

155. *See infra* note 164. The point is that the offense associated with seeing conduct one does not like is not characterized as harm or, alternately, as harm to the interests of others. *But see infra* note 161.

156. *See* V. HAKSAR, *supra* note 38, at 290-91.

157. *See supra* note 153.

158. H.L.A. HART, *LAW, LIBERTY AND MORALITY* 45-48 (1963).

principle.<sup>159</sup>

The ethical liberals have a hard choice to make here. If they hold fast to their principle, they would spark much discussion of hobgoblins and consistency. But should they depart from the neutrality principle, they can no longer insist on equal liberty.<sup>160</sup> Some conceptions of the good would be favored over others, however, even in the absence of cognizable harm to others. Nor is it possible to say that mental distress is the harm because if mental distress constitutes harm, the ethical liberal could not consistently oppose obscenity regulation.<sup>161</sup> Perhaps the best that can be done is to limit the stopping place problem by confining the exception to public acts.<sup>162</sup>

Even if it were possible, albeit not prudent, to pursue the neutrality principle relentlessly<sup>163</sup> with respect to publicly offensive acts, it might not even be conceptually possible to do so in accommodating conflicts between rights. Moreover, some important rights cannot be derived without a conception of the good.

159. See generally Shiffrin, *supra* note 105, at 653-55.

160. See V. HAKSAR, *supra* note 38, at 290-91.

161. See, e.g., Dworkin, *Is There a Right to Pornography?*, *supra* note 79, at 178. Presumably, liberals are sometimes willing to permit sanctions against speech that causes no harm other than mental distress. Consider the tort of intentional infliction of emotional distress. Such a tort is apparently acceptable because it presents minimal risks to legitimate (this loaded term is obviously necessary) self-expression, to the political process, to marketplace values, and the like.

162. See H.L.A. HART, *supra* note 158, at 45-48. But see Baker, *Counting Preferences*, *supra* note 28, at 387-91. As Baker's criticism suggests, the public-private dividing line may be both overinclusive and underinclusive. Even more complicated line drawing may be called for, though perhaps of a different character than suggested by Baker.

Baker argues that public nudity designed to confront the public is protected. Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 28, at 1019 n.153. I doubt that he would distinguish other publicly offensive acts similarly intended. See *id.* If, on the other hand, public nudity or other acts were not intended to communicate, Baker would permit regulation. *Id.* Baker, it should be noted, does not subscribe to the neutrality principle. See generally Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029 (1980). He does, however, share the ethical liberal's preference for reasoning deductively from abstract principles to sweeping conclusions.

163. Rawls' exposition of reflective equilibrium, which pays substantial deference to deeply held intuitions or considered judgments, suggests that he would qualify the neutrality principle when appropriate. See J. RAWLS, *supra* note 12, § 9, at 51; *id.* § 49, at 320; *id.* § 87, at 579-82. But see Dworkin's interpretation of Rawls in R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 17, at 161-68 (stressing that intuitions must cave in to principle). Dworkin argues that public displays of pornographic materials determine the environment for those who object and alters the character of their own sexual experience. He would make the public-private distinction a "compromise recommended by the right of moral independence." Dworkin, *Is There a Right to Pornography?*, *supra* note 79, at 206. The weak point in Dworkin's argument is the failure to explain persuasively how the preference for a sexual environment bereft of public displays becomes a right. For general discussion of right-creation difficulties, see *infra* text accompanying notes 202-21.



ii. Assigning rights and duties—the contrast between Mill and Kant. In approaching this argument, we need to put the ethical liberals' position on the assignment of rights and duties in historical perspective. Ethical liberals are attempting to resolve problems that have escaped solution by the best liberal minds. For all the controversy created by Mill's *On Liberty*, his argument for liberty is sharply confined. The argument is that liberty may be interfered with only when it causes harm to the interests of others; but, however causation and harm to interests are defined,<sup>164</sup> many of the interesting questions of civil liberties are outside the scope of Mill's "simple" principle.

To limit liberty of speech, for example, is harmful, but to permit damage to reputation is also harmful. Mill, of course, had a ready answer as to how such conflicts should be resolved—by resort to the principle of utility. He resolved the speech-reputation dispute in favor of reputation when false statements of fact were at issue and in favor of speech when opinions were causing the harm;<sup>165</sup> he did not face up to the extraordinarily difficult problems raised by the fact-opinion dichotomy.<sup>166</sup>

Mill certainly did not suppose that, by making such decisions, government was neutral about the good in life. The principle in *On Liberty* was that it was useful for government to make such distinctions only when harm was occasioned by their acts and sometimes not even then.

Kant adopted a variant of Mill's confining principle, but for radically different reasons: the kind of reasons that underpin ethical liberalism. Government could not prevent an individual from reading immoral books (or otherwise impose government conceptions of what is good for people), not because intervention would interfere with known happiness, but because intervention would compromise a person's right to make autonomous decisions.<sup>167</sup>

164. The literature on these points is enormous. Crucial to the debate is what the harm principle should cover, and there is substantial debate about what Mill himself intended. Compare, e.g., Rees, *A Re-Reading of Mill on Liberty*, 8 POL. STUD. 113 (1960) with, e.g., Wollheim, *John Stuart Mill and the Limits of State Action*, 40 SOC. RESEARCH 1 (1973). Together with the criticism by Robert Paul Wolff cited *supra* note 34, the most interesting analysis of Mill's principles has been by H.J. McCloskey. See *supra* note 153. See also McCloskey, *Liberty of Expression: Its Grounds and Limits*, 13 INQUIRY 219 (1970); McCloskey, *Mills Liberalism—A Rejoinder to Mr. Ryan*, 16 PHIL. Q. 64 (1966); McCloskey, *A Critique of the Ideals of Liberty*, 74 MIND 483 (1965) [hereinafter cited as MCCLOSKEY, *A Critique of the Ideals of Liberty*].

165. Mill, *Law of Libel and Liberty of the Press*, in JOHN STUART MILL ON POLITICS AND SOCIETY 143–70 (G. Williams ed. 1976).

166. See, e.g., Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962).

167. This is a standard reading of Kant. See, e.g., J. MURPHY, *supra* note 75, at 103. Yet Kant's conception of anti-paternalism is not as broad as is commonly supposed. See *infra* text accompanying notes 170–81.

Yet government had to be able to restrain some human choices, such as the choice to kill someone, and Kant argued that government could outlaw a person's action only if it would interfere with the *freedom* of another.<sup>168</sup> Moreover, Kant thought government had an obligation to protect people's freedom.<sup>169</sup> If Kant defines something to be a part of freedom, an exercise of liberty to interfere with it would be automatically wrong, and government would be required to impose sanctions in order to protect it. For Mill, the key term is harm, not freedom, and Mill would have government intervene to stop interference with the interests of others only if greater happiness would result from permitting the interference than from prohibiting it. Mill clearly allows for greater government flexibility. Is the distinction between freedom and harm itself of pragmatic moment?

Some have interpreted Kant's position, like Mill's, to preclude paternalistic legislation, and this reading is supported by Kant's observation that a paternalistic government is the "greatest conceivable despotism."<sup>170</sup> Jeffrey Murphy, for example, contends that Kant would oppose legislation against private homosexual conduct. "Since the activities are performed in private, they can hardly be called invasions of freedom in any but a Pickwickian sense."<sup>171</sup>

Yet Kant's opposition to paternalistic legislation is soft. It trades on a narrow interpretation of paternalism. Indeed Kant spoke directly in support of laws against homosexual conduct and bestiality:

[Sexual relations are] either natural, by which human beings may reproduce their own kind, or unnatural, which, again, refers either to a person of the same sex or to an animal of another species than man. These transgressions of all Law, as "*crimina carnis contra naturam*," are even "not to be named;" and as wrongs against all Humanity in the Person they cannot be saved, by any limitation or exception whatever, from entire reprobation.<sup>172</sup>

It is not easy to understand how Kant sees a violation of the freedom of others in homosexual conduct and bestiality (recall

168. See, e.g., I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, *supra* note 15, at 35, 43-44.

169. See *id.* at 69, 80-81, 102, 108. As Aune explains, Kant believes that "each person has the right to have his lawful freedom protected by the lawful coercion of a potential violator of his freedom." B. AUNE, *supra* note 15, at 144.

170. Kant, *Theory and Practice*, *supra* note 15, at 74.

171. J. MURPHY, *supra* note 75, at 103.

172. I. KANT, THE PHILOSOPHY OF LAW, *supra* note 81, at 109 n.1. The reason scholars have been misled is that they have relied on the more modern and more readily available translation by Ladd, cited *supra* note 15. Unfortunately, Ladd's translation omits some of the most interesting passages in the work.

that animals, according to Kant, are owed no moral duties). Kant's position may be that to treat yourself as a means deprives others of their right as free beings to maintain moral relationships in a kingdom of ends.<sup>173</sup> Whatever way Kant squares his willingness to accept morals legislation with his idea that government might act only to stop the interference with the freedom of others, he is quite obviously working with a complex notion of freedom. It is a concept that must separate protected liberty of movement from the unprotected and protected choices of action from the unprotected. It must also separate protected uses of property from the unprotected because Kant also regards property as a part of freedom.<sup>174</sup> Although one might suppose that Kant, unlike Mill, could not support libel laws and that the only speech that could be prohibited would be speech that would somehow interfere with freedom, once property is included in freedom, it is an easy step to consider reputation as property. Kant regarded even libel of the dead as an action that takes away a possession that "attaches inseparably to the individual as a [p]erson."<sup>175</sup>

Kant's use of the word "freedom" appears to be a proxy for whatever rights are to inhere in humanity. It is of major importance to have a theory of rights, of freedom, and of property. Without such a theory it would be impossible to adjudicate between competing conceptions of right. Kant's resolution of the problem is to say that what should count as freedom is that which one could will as a universal law of human nature.<sup>176</sup> But that, Kant would admit, requires making judgments about what is good for human beings. For Kant, rule consequentialism is morally required *ab initio*.<sup>177</sup> As one moves from pure to applied ethics, the need to attend to facts about human beings becomes critical; Kant's venture into applied ethics is notoriously loaded with controversial assumptions about human nature.<sup>178</sup>

Neither Kant nor Mill would shrink from deciding what is

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173. See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*, *supra* note 15, at 42.

174. See generally *id.* at 51-72.

175. See I. KANT, *THE PHILOSOPHY OF LAW*, *supra* note 81, at 138.

176. See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*, *supra* note 15, at 43-45. For helpful commentary and criticism, see generally B. AUNE, *supra* note 15, at 131-69; J. MURPHY, *supra* note 75, at 109-49.

177. My claim is not that Kant is a utilitarian or a consequentialist. Rather, after one sifts through Kant's theory about rationality and rational beings, one finds that his moral rules are formulated in terms of their consequences for human beings. Such rules must be formulated and adhered to even if their formulation or application would result in bad consequences for the human race. See J. MURPHY, *supra* note 75, at 106-07. Mill, on the other hand, might have opted for general rules, but only when he thought that general rules would be useful. For commentary on Mill, see Lyons, *Human Rights and the General Welfare*, 6 *PHIL. & PUB. AFF.* 113 (1977).

178. See *infra* notes 257-68 and accompanying text.

good for human beings in some circumstances. Indeed in Mill's philosophy the conception of what is good determines what is right.<sup>179</sup> For Kant, what is right limits what is good, but the assignment of rights necessarily depends upon a theory of what is good for human beings.<sup>180</sup>

Even with the recognition by Mill and Kant that the assignment of rights requires a determination of what is good for human beings, neither produces a theory that can persuasively dictate solutions in particular cases.<sup>181</sup> To their credit, neither claimed to be neutral; neither could work out a persuasive method of assigning rights and duties in hard cases.

iii. Resolving conflicts: the inability of ethical liberals to escape the problems addressed by Mill and Kant. Ethical liberals assure us that it is possible to assign rights and duties without a conception of the good. Rawls would have an imaginary constitutional convention in which the creators of rights have no conception of their view of the good.<sup>182</sup> Dworkin contends that basic liberties can be teased out of the neutrality principle.<sup>183</sup> Yet resolving the speech-reputation conflict, for example, is impossible without preferring one conception of the good to another.<sup>184</sup>

Contemplating the words respect and dignity does not help at

179. Although the liberalism I ultimately defend is neo-Millian, it does not agree with Mill on this issue. See *supra* note 34 and *infra* text accompanying note 419.

180. My ultimate point is that the failure to produce a theory that can dictate solutions in concrete circumstances arises not from a failure of vision or analytic power, but from a reality that is too complicated to admit of such a powerful theory. It is instructive that even Hegel, hardly one ordinarily to stress the limits of theory, recognized that reason itself could not solve these problems.

[T]here is . . . no inherent line of distinction between what is and what is not injurious, even where crime is concerned, or between what is and what is not suspicious, or between what is to be forbidden or subjected to supervision and what is to be exempt from prohibition, from surveillance and suspicion, from inquiry and the demand to render an account of itself. These details are determined by custom, the spirit of the rest of the constitution, contemporary conditions, the crisis of the hour, and so forth.

G. HEGEL, *supra* note 2, § 234, at 146.

181. Aune contends that "[i]t is possible that Kant would disallow every exercise of freedom that Mill would disallow . . ." B. AUNE, *supra* note 15, at 152. This holds, however, only when Mill commits himself to the formulation of general rules. Mill allows for much greater flexibility in the level of abstraction at which rules are formulated. See Lyons, *supra* note 177, at 116.

182. J. RAWLS, *supra* note 12, § 31, at 196-97.

183. Dworkin, *Liberalism*, *supra* note 17, at 121, 127. Dworkin does clearly recognize, however, that rights must be balanced against each other on occasions when they come in conflict. That is, rights may be limited when their exercise would interfere with other rights. *Id.* at 193, 199. In one way or another, each of the scholars I have labeled an ethical liberal would concede the *general* point made in this section.

184. For the same argument by Hart, albeit somewhat differently developed, see generally Hart, *infra* note 188.

all. At least those who contemplate produce different answers.<sup>185</sup> The common law treated defamatory utterances like wild animals. If people were to be treated with respect and dignity, and if their reputation were damaged by false utterances, those who let the words get out had to pay damages no matter how careful they might have been in attempting to be truthful.<sup>186</sup> Justice Black and Justice Douglas were hostile to state libel laws,<sup>187</sup> believing that if people were to be treated with respect and dignity, they had to have a right to speak freely about others: those falsely defamed should exercise their constitutional right to speak back in their defense.

Rawls does not list a right of reputation in his enumeration of basic liberties, though the right to hold property is mentioned.<sup>188</sup> Dworkin, however, is clear on the point. In an extraordinary passage, he concludes with the announcement of a right of reputation—almost as if it came from the burning bush:

Citizens have personal rights to the State's protection as well as personal rights to be free from the State's interference, and it may be necessary for the Government to choose between these two sorts of rights. The law of defamation, for example, limits the personal rights of any man to say what he thinks, because it requires him to have good grounds for what he says. But this law is justified, even for those who think it does invade a personal right, by the fact that it protects *the right of others not to have their reputations ruined by a careless statement*.<sup>189</sup>

The law is, in fact, more complicated. Some plaintiffs can recover without a showing of carelessness;<sup>190</sup> some, only if they

185. For a telling attack on the question-begging often associated with terms like "dignity" and "respect", see McCloskey, *A Critique of the Ideals of Liberty*, *supra* note 164, at 500-02.

186. See, e.g., RESTATEMENT (SECOND) OF TORTS § 580B comment b, at 222-23 (1977); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 196. Of course, there have always been privileged occasions where even negligent defamation may be protected. See, e.g., 1 F. HARPER & F. JONES, *THE LAW OF TORTS* 419-63 (1956); W. PROSSER, *THE LAW OF TORTS* 776-96 (4th ed. 1971).

187. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 293 (1964) (Black & Douglas, JJ., concurring). It is unclear in their opinions whether they were opposed to state libel law entirely or only to the application of state libel law to speech relating to public affairs. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 357 n.6 (1974) (Douglas, J., dissenting).

188. J. RAWLS, *supra* note 12, § 11, at 61. Rawls' listing does not purport to be comprehensive. What is missing, however, is a clear methodology for determining what should constitute rights. See generally Hart, *Rawls on Liberty and Its Priority*, in *READING RAWLS*, *supra* note 14, at 230-52.

189. R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 17, at 193 (emphasis added).

190. Some courts believe that the common law (see *supra* text accompanying note 186) continues to apply in certain cases involving non-media defendants. The Supreme Court has left the issue open. *Hutchinson v. Proxmire*, 493 U.S. 111, 133-34

show careless conduct;<sup>191</sup> others, only if they show more than careless conduct;<sup>192</sup> still others, not at all, even if they show that the defendant knowingly lied.<sup>193</sup> In no case is recovery a matter of constitutional right.<sup>194</sup>

One could imagine a set of circumstances in which the conflict between speech and reputation might be easily resolved. Suppose, for example, that truth really did catch up with a lie—and quickly. In the absence of such a tidy world, however, resolving the speech-reputation conflict requires judgments about the comparative value of those life styles that place a premium on uninhibited self expression, on the receipt of information about others, and on the joy of exchange against those life styles that care more about the security and dignity of reputation, the harm to the feelings of those who are defamed, and other losses. To resolve the speech-reputation dichotomy (and many others), we need to make a specific decision about what kind of people we want to be, about what kind of choices we ought to make. The point is not merely that it is desirable to have a conception of the good in resolving conflicts between rights; rather, it is simply not possible to resolve many such conflicts without a conception of the good.<sup>195</sup> This line of argument, however, does not trade on the obvious but irrelevant fact that any set of government rules will favor some life styles over others, that is, any set of rules will provide disincentives for some conduct that might be important to some life style.

The important claim of the ethical liberals, however, is that decisions about the rules to be adopted must be made for reasons unconnected with any idea of the good other than the fact that people have rational plans they are entitled to pursue. The point is that when rights come into conflict there is often no way to decide one way or another without resorting to some conception of the good.

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n.16 (1979). For discussion of the issue, see generally Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978). See also *id.* at 930 n.112. (citing sources).

191. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (fault showing against media defendants required of those plaintiffs who are not public figures or public officials). But cf. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (dictum to the effect that *Gertz*'s fault requirement might be satisfied by showing bad motives).

192. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (in order to recover, a public official or a public figure must show that the defendant entertained serious doubts about truth of published statement or knew that it was false).

193. See, e.g., *Barr v. Matteo*, 360 U.S. 564 (1959) (affording absolute immunity from libel judgment to certain federal officials with respect to statements made in the course of their duties).

194. *Paul v. Davis*, 424 U.S. 693 (1976) (in the absence of a state-created entitlement, reputation not part of the liberty or property protected by due process of law).

195. For detailed development of this argument with respect to Rawls, see Grey, Book Review, 25 STAN. L. REV. 286, 308-16 (1973); Hart, *supra* note 188.

The response of some ethical liberals to such conflicts is to refer to the words dignity and respect as if they could resolve the dispute.<sup>196</sup> To do so, of course, involves deciding what human nature is and smuggles in a concept of the good.

Alternatively, the ethical liberal might respond that when rights are genuinely in conflict (which might be regarded as a rare event), government should resort to utilitarianism in resolving the conflict. Rather than deciding which life style is right, it decides which resolution of the conflict will advance pleasure or social welfare overall. If this is the response, we would need to know why such an approach would be superior to deciding the conflict by resorting to conceptions about human nature. One would think that a theory based on a moral conception might look to moral conceptions of human nature to decide conflicts in rights. Such a practice would rely upon conceptions of the good, but if this practice were ruled out, we would need to know why such resort should always be *verboten*.

Dworkin, at least, is clear that utilitarianism is permitted when rights are not involved,<sup>197</sup> and he may even be suggesting that utilitarianism is required on those occasions.

But how can anyone wedded to the neutrality principle permit resort to utilitarianism of any stripe? Why is maximizing pleasure better than maximizing truth or beauty?<sup>198</sup> Perhaps the idea is that when rights are not violated, a focus on pleasure is agnostic about life styles because it incorporates individual conceptions of truth and beauty. But this runs into the familiar concerns about how pleasure is to be measured, how interpersonal comparisons are to be made, how consequences are to be projected, which types of averages to aim for, and the like.<sup>199</sup> It is not merely that utilitarian decisionmaking run by neutral principles requires omniscience.<sup>200</sup> It is that the measurement of pleasure inescapably involves normative or at least aesthetic judgments.<sup>201</sup> The neutrality principle is not just unpersuasive and unworkable; it is incoherent.

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196. A related ploy is the device of *ipse dixit*. See *supra* text accompanying note 189.

197. See, e.g., R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 234-38. Rawls adjudicates conflicts by reference to the "common interest." J. RAWLS, *supra* note 12, § 16, at 97. The common interest idea is not a classic utilitarian concept; neither is it apparent, however, how the idea could resolve most conflicts.

198. See B. ACKERMAN, *supra* note 18, at 49.

199. See generally J. SMART & B. WILLIAMS, *supra* note 1, at 140-50.

200. 2 F. HAYEK, LAW, LEGISLATION, AND LIBERTY 20 (1976).

201. John Stuart Mill, of course, consciously departed from neutrality by claiming that some pleasures were better than others. See generally J.S. MILL, UTILITARIANISM, *supra* note 34.

iv. Creating personal rights and the need for a conception of the good. Ethical liberals argue that rights can be compromised only if they conflict with other rights. Resolving those conflicts, I have argued, requires a conception of the good. Here my argument—which in most respects follows Hart<sup>202</sup> and Nickel<sup>203</sup>—is that a conception of the good is necessary to gain any consideration for some of our most important rights.

Dworkin argues that the question of what qualifies as a right needs a firmer foundation than just the psychological facts of human nature.<sup>204</sup> Freedom of political speech, for example, may not be of psychological importance to many. Many people might come to think that free political speech may be less important than providing for a stable economy. If rights are founded upon people's feelings, they will be unstable. But the concept of neutrality would always prohibit the state from interfering with political rights (except where they might conflict with other rights). The state would surely violate neutrality if it routinely censored what people had to say by supposing that the government knew more or knew better. Dworkin argues that the neutrality principle provides a stronger anchor for our most important rights.<sup>205</sup>

As has been discussed, the root idea is that rights flow from the presumption of equality. Because all persons have moral capacity, no one has a natural duty to obey another. From that idea comes the opposition to caste systems and the endorsement of

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202. See generally Hart, *supra* note 188; Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828 (1979). Hart also develops an argument similar to mine as to the conflict between rights (see generally Hart, *supra* note 188). The principal contribution of this general section perhaps has been to elaborate the argument tracing similar problems through Kant and Mill.

203. See generally Nickel, *Dworkin On the Nature and Consequences of Rights*, 11 GA. L. REV. 1115 (1977).

204. R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 17, at 272.

205. The tone of the claim that the neutrality principle generates important rights varies in Dworkin's writings. In his book, Dworkin argues that the neutrality principle affords one way of arriving at rights and that there may be other ways. *Id.* at 272. He does insist, however, that the right to personal moral decisions (e.g., sexual preference) and the liberties described in the Bill of Rights can be derived from his conception of equality. *Id.* at xiii, 292. Similarly, in his essay on liberalism, he contends that his conception of equality is constitutive of liberal theory; that is, it affords a comprehensive explanation of liberal positions. Dworkin, *Liberalism*, *supra* note 17, at 121, 127. In more recent writing, he emphasizes that he defends his approach in "justifying some rights." Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 511 n.99 (1981).

It seems to be a part of Rawls' "main idea" of the theory of justice that basic liberties can be derived from a hypothetical situation of equal liberty in which people have no conception of what a good life for them might be. See J. RAWLS, *supra* note 12, § 3, at 11-17; *id.* § 31, at 195-98. Rawls' book defends a system of justice in an ideal state where everyone is committed to the principles of justice. It is not clear how much his position would be adjusted in a world with differing attitudes. The same can be said of Ackerman's work. See B. ACKERMAN, *supra* note 18, § 53.1, at 232-33.



rights to the free exercise of religion, the freedom of speech, the right of free sexual preference, and the general right to pursue any life style that does not interfere with the rights of others. To deny a right of free speech or the right to engage in private homosexual conduct is wrong not necessarily because these liberties are perceived to be important,<sup>206</sup> but because in the absence of interference with the right of others, such denials impose one group's conception of the good life upon another.

The claim of the ethical liberal is that all the important rights guaranteed by the American Constitution can be derived from equality.<sup>207</sup> That claim is mistaken, however. The ethical liberal's conception of equality cannot generate many of our most important rights and could create some rights that no humane society should want.

First, the ethical liberal could make out the claim only by benefit of a happy accident far removed from our intuitions. Compare two regulations, one directing black persons to the back of the public bus, the other prohibiting homosexual activity. Black people who object presumably do not care which part of the bus they ride on. They may even prefer the back of the bus. What offends is the denial of equality, the fact that they are not treated as equal persons worthy of respect. The homosexuals' real complaint (assuming the regulation is enforceable) has less to do with equality than with liberty. The denial of equality is presumably irksome, but more important is the denial of liberty. Homosexuals would not be much appeased, for example, if sexual relations were equally denied to all.<sup>208</sup>

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206. Richards, in an interesting variation from Rawls' position, makes the liberty to love a civil liberty (deriving it from the good of self-respect) and argues from that premise that homosexual conduct should be protected. D. RICHARDS, *MORAL CRITICISM*, *supra* note 19, at 85-109. He thus would protect homosexual conduct precisely because it is important.

Richards' strategy seems to make his conclusions depend both upon agreement about reading the assumptions into the Constitution and upon the power of the deductive connections. It is a rationalistic philosopher's approach to the Constitution. If, for example, homosexual relations are to be protected, the more persuasive legal strategy might be to argue incrementally from cases such as *Eisenstadt v. Baird*, 45 U.S. 438 (1972). Richards, of course, need not claim that his approach is the most persuasive legal strategy. I will later argue that as a matter of theory the deductive approach is defective. See *infra* text accompanying notes 348-92. That aside, even for those who entirely reject Richards' methodology, the internal reasoning and evidence he has marshalled regarding homosexuality, obscenity, prostitution, and related topics are important contributions to the legal literature. See, e.g., D. RICHARDS, *MORAL CRITICISM*, *supra* note 19; Richards, *supra* note 100; Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979).

207. See *supra* note 205.

208. See generally Hart, *supra* note 202, at 845.

The ethical liberal's equality grounding, however, appears to work precisely because society would not equally deny such liberty to all.<sup>209</sup> The homosexual cares about his or her liberty and may care not one whit about equal liberty.<sup>210</sup> But, under the ethical liberal's scheme the right is secured because of the denial of equality, not because the liberty is important.<sup>211</sup>

Some of our rights, however, cannot be derived from equality. Suppose the government, in order to protect people's right of private property (which Rawls claims is a basic right), decided to search *everyone's* house from top to bottom and *everyone's* person, including body cavities, once a week. As long as the searches were carried out without discrimination, it is hard to see how this procedure would deviate from the neutrality principle.<sup>212</sup> The

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It is in any case surely fantastic to suppose that what, for example, those denied freedom to worship, or homosexuals denied freedom to form sexual relations, have chiefly to complain about is not the restriction of their liberty with all its grave impact on personal life or development and happiness, but that they are not accorded *equal* concern and respect: that others are accorded a concern and respect denied to them. When it is argued that the denial to some of a certain freedom, say to some form of religious worship or to some form of sexual relations, is essentially a denial of equal concern and respect, the word "equal" is playing an empty but misleading role. The vice of the denial of such freedom is not its inequality or unequal impact: if that *were* the vice the prohibition by a tyrant of all forms of religious worship or sexual activity would not increase the scale of the evil as in fact it surely would, and the evil would vanish if all were converted to the banned faith or to the prohibited form of sexual relationship. The evil is the denial of liberty or respect; not *equal* liberty or *equal* respect: and what is deplorable is the ill-treatment of the victims and not the relational matter of the unfairness of their treatment compared with others.

*Id.*

For the suggestion that such actions by a tyrant would be wicked or insane but might not deny rights on the ground that the concept of rights is needed only when substantial utilitarian justifications are given for decisions injuring people, see Dworkin, *Is There A Right to Pornography?*, *supra* note 79, at 211. Dworkin also indicates such actions might be wholly lacking in the concern owed to subjects by leaders and tentatively suggests that the idea of equality might not be necessary to explain the requirement of concern. *Id.*

209. This insight takes its classic expression in *Railway Express Agency v. New York*, 336 U.S. 106 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."). *Id.* at 151-52.

210. *But see supra* note 208.

211. *But see supra* note 206.

212. *See supra* note 208. *See also* Nickel, *supra* note 203, at 1124-29. Dworkin, in responding to Nickel's argument that the neutrality principle cannot yield protections against torture, reaffirms that it might be possible to get rights some other way. *See supra* note 205. But he also speculates that it might be possible to derive such protections from the idea of equality:

[T]he idea of equality is meant to suggest content for the ideas of respect and autonomy: those in power are meant to treat others as they

government would not be preferring one life style over another, unless one argues that government would be preferring the choices of those who do not object to those that do. But that would apply to any police action including glancing at those who walk down the street or requiring that people not drive up Lexington Avenue.<sup>213</sup> The psychological facts are that we are generally not offended if people glance at us on the street; we do mind if they search our persons or our houses. Presumably it could be different in a more dangerous society. The contours of the right of privacy necessarily depend upon psychological facts in a society, value judgments about how much of the richness of life depends upon being left alone and having property that is free from routine inspection. The right of privacy cannot be defined by resort to abstractions.

Ethical liberals, then, cannot secure some of our most important liberties; ironically, however, they provide a foundation for rights even they do not want. Contemporary liberals regularly support a substantial degree of intervention by government in regulating "private" economic decisions. They routinely support maximum hour laws, for example, over objections that such legislation interferes with liberty and freedom of contract. It is often asserted that such liberals cannot consistently support political liberty and deny economic liberty.<sup>214</sup> Dworkin, however, maintains that ethical liberalism can consistently embrace free speech rights while rejecting freedom of contract:

What can be said on the general theory of rights I offer for any

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treat themselves, not in the sense of supplying for them only the same goods and opportunities they take themselves, so that a masochistic tyrant could justly torture everyone along with himself, but in the more fundamental sense of attempting, so far as it is possible, to see the situation of each person defined through the ambitions and values of that person, just as he must see his own situation defined through his own ambitions and values in order to have that grasp of himself as an entity that is necessary to self-consciousness and therefore to self-identity. I cannot now improve on that possibly confusing statement of the sense in which I think that the idea of equality has power beyond the range it is normally thought to have, though of course I must do so if I wish to extend my claims for the fundamental principle . . . I want now only to say that it may not be absurd to find ideas of equality even behind our belief that torture is wrong.

R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 356-57.

Dworkin's proposal, of course, is not absurd, but it makes the idea of equality meaningless. See generally Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). The basic question then becomes this: what entitlements in a particular historical context is it reasonable for people to have? Such inquiry is far afield from any commitment to neutrality about life plans.

213. R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 271.

214. This attack is the standard view of the libertarians. See, e.g., M. ROTHBARD, FOR A NEW LIBERTY 24 (1973) (libertarianism described as the only consistent position).

particular right of property? What can be said, for example, in favor of the right to liberty of contract sustained by the Supreme Court in the famous *Lochner* case, and later regretted, not only by the Court, but by liberals generally? I cannot think of any argument that a political decision to limit such a right, in the way in which minimum wage laws limited it, is likely to . . . offend the right of those whose liberty is curtailed to equal concern and respect. If, as I think, no such argument can be made out, then the alleged right does not exist; in any case there can be no inconsistency in denying that it exists while warmly defending a right to other liberties.<sup>215</sup>

Maybe so; maybe no. In any event, the problem is far more complicated than Dworkin suggests. *Lochner* dealt with a maximum hour law,<sup>216</sup> not a minimum wage law, and the difference is significant. A major argument of the state in defending the law at issue in *Lochner* was that anyone who wanted to work more than ten hours in a bakery had an inadequate conception of the good life; that it was, in fact, a dangerous life.<sup>217</sup> The Court rejected this argument as paternalistic<sup>218</sup> and inadequately supported,<sup>219</sup> yet Dworkin's basic principle has been that any political decision antecedently likely to turn on disrespect for the life style of others<sup>220</sup> is a prime subject for judicial scrutiny.<sup>221</sup>

The argument is not that *Lochner* was rightly decided; the argument is that ethical liberalism makes it a much harder case

215. R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 278.

216. *Lochner v. New York*, 198 U.S. 45, 45-46 (1905).

217. *Id.* at 58-62.

218. *Id.*

219. *Id.*

220. See generally Dworkin, *Liberalism*, *supra* note 17. But cf. *supra* note 105. Of course, if the persons are disrespected because of their skin color, as opposed to their way of living, the legislation would fare no better. See, e.g., Dworkin, *Social Sciences and Constitutional Rights—the Consequences of Uncertainty*, 6 J. L. & EDUC. 3, 10-12 (1977) [hereinafter cited as Dworkin, *Social Sciences*]. Again, the underlying idea is that government must treat each of its citizens with equal concern and respect. *Id.* at 10. Under Dworkin's principles, it is easy to see why governments can be foreclosed from engaging in racial discrimination. It is not easy to see how governments are entitled under Dworkin's principles to prevent private acts of racial discrimination. To prohibit private acts of racial discrimination is to make judgments for people about whom they should associate with, permitting some choices (e.g., religious, political, etc.) and foreclosing others. How can this be done while adhering to neutrality?

221. Asking how much judicial scrutiny and how the scrutiny should take place is, of course, fundamental. One of Dworkin's writings was susceptible to the interpretation that when the political process is known to be infected with prejudice toward a particular group and an outcome disadvantages that group, the judicial response is to dictate automatically an outcome in favor of that group. See Dworkin, *Social Sciences*, *supra* note 220, at 10-12. That view would trigger an enormous restructuring of society. See generally Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977). For Dworkin's more recent views on the issue, see Dworkin, *Is There A Right to Pornography?*, *supra* note 79.

than it was. The neutrality principle, then, cannot generate some important rights, produces some rights we do not need, and cannot adjudicate between the rights it does produce. If liberalism must rely upon the neutrality principle for the assignment of rights and duties, liberalism is excessively rigid.

b. *The Need for a Conception of the Good in Distributing Property.* The neutrality principle serves no better when it comes to the question of how property ought to be distributed. As previously discussed, the ethical liberal regards property as a social resource to be distributed in a just manner. In order to reach that conclusion, the ethical liberal had to reject the property rights freedom model and the concomitant idea that rights of private property precede the state. This did not require the ethical liberal to forgo property rights; it required instead that rights to the distribution of property be derived from the right to equal concern and respect.

Ethical liberals purport to derive such rights independent of any conception that one life style is better than another.<sup>222</sup> The opening premise is that whatever life plans one might have, it is fair to assume that one would prefer more wealth to less wealth.<sup>223</sup> The more property distributed to each individual the greater the flexibility an individual has in deciding how to promote his or her conception of the good. The neutral conception of the good is said to be advanced by giving everyone a fair share of the resources produced. Moreover, an important feature of the scheme is that equality of opportunity be available for all posts and positions in society.

The ethical liberal's conception of the allocation of the means of production is slightly more complicated, but still thought to be guided by a neutral conception of the good. The ethical liberal argues that the choice between private and collective ownership of the means of production is dictated by egalitarian considerations.<sup>224</sup> In some circumstances, an ethical liberal could support a

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222. *But see infra* note 226.

223. For those who would object that some might prefer an ascetic life style, the answer is that they can destroy the property. B. ACKERMAN, *supra* note 18, at 60-61. For the difficulties in destroying property such as animals, *see supra* notes 122-32 and accompanying text.

224. *See, e.g.,* Dworkin, *Liberalism*, *supra* note 17, at 129-33. *But see infra* note 226. Ackerman also opts for a mixed economy as the best choice to combat structures of domination and elitism, which is another way of stating support for equality. B. ACKERMAN, *supra* note 18, § 58, at 261-64. In a clear thinking essay on the relationship between capitalism and socialism, Rawls suggests that either one in a particular historical context might best further the principles of justice. J. RAWLS, *supra* note 12, § 42, at 265-74. *Accord*, D. RICHARDS, *A THEORY OF REASONS*, *supra* note 19, at 126-27.

capitalistic economy on egalitarian principles. That is, instead of having political leaders guess what the preferences of people are and run the risk that some people's preferences would be given greater consideration than others, the ethical liberal might presume that a market economy would best permit individuals to express their voluntary choices.<sup>225</sup> To the extent that unjustifiable inequality of resource allocation is produced in the market by rewarding those with talent or luck (which are not considered morally relevant), the ethical liberal could rely on welfare programs and taxation programs as methods of redistributing wealth. On the other hand, if these methods should prove to be inefficient or inadequate means of redistribution, the ethical liberal might turn to a socialist economy. The claims of a market or socialist economy would depend entirely upon a judgment as to which system best promoted equality.

Despite the claim that this method of property distribution is independent of the conception of the good, it is not.<sup>226</sup> No system can be. We shall consider only two ways in which the neutrality principle is compromised, and both considerations will be of importance in our discussion of the democratic radical.

First, ethical liberals favor those life plans that value wealth over those that value meaningful work.<sup>227</sup> Although equality of opportunity is guaranteed for access to positions, selection for such positions is based on morally arbitrary features such as comparative talent. To some extent, of course, talent must be considered in that minimal capacity for performance must be present. Conceding that, however, a system could find it crucial that maximum opportunities for meaningful work be available to all and that the talented not be given any greater consideration than necessary. A society so dedicated might be less efficient and produce less wealth, but it would reward life plans that place a premium on meaningful work. Choice is inescapable: society must decide

225. This position is elaborated in Dworkin, *Liberalism*, *supra* note 17, at 129-33. Note, however, that a socialist economy could make generous use of the market. The question of who owns productive resources need not dictate how decisions allocating the use of productive resources shall be determined. See J. RAWLS, *supra* note 12, § 42, at 270-74. See generally C. LINDBLOM, *POLITICS AND MARKETS* (1977).

226. Dworkin once insisted that it was. See *supra* note 224. But see Dworkin, *What Liberalism Isn't*, *supra* note 105 (where Dworkin attacks Ackerman for taking a position similar to Dworkin's earlier one). Ackerman's contention is that it can be neutral. See generally B. ACKERMAN, *supra* note 18, at 231-72; *id.* § 5, at 12-15. For Rawls, the argument has always been more restrained. From the original position, we get to the principles of justice. Those principles having been established, the choice of institutions for property distribution turns in part on a conception of what is good for human beings. J. RAWLS, *supra* note 12, § 41, at 258-60.

227. For development of the point see Nielsen, *A Rationale for Egalitarianism*, 48 *SOC. RESEARCH* 260 (1981).

between life plans that value meaningful work and life plans that value greater income, and it is hard to see how choice can be made without a conception of the good.<sup>228</sup>

Second, ethical liberals discriminate against those life plans that value direct and collective participation in making socially important decisions.<sup>229</sup> The focus of the ethical liberal is upon the fairness of the distribution of income, the equal consideration of each individual's preference in making decisions about production, and the fairness of the system in affording equal opportunity to obtain access to offices and positions. This focus obscures the possibility that the process of deciding how property should be distributed may itself be substantively valued. Persons may consider participation in the community's decision as to what goods should be produced and how they should be produced as a fundamentally important part of their life. They may also think that the capitalistic process promotes destructive competition, encourages selfishness, and limits opportunities for interpersonal development.

To decide how the economic structure should be organized, then, is to make important decisions about life style. It might be argued that the neutrality principle is respected if government, in making these decisions, ignores what people value in life styles and makes decisions about how consumer and production goods shall be distributed on an egalitarian basis. But we must first ask why positions or the power to make economic decisions are not themselves property to be equally distributed. Some may object to the use of the word property here, but whatever label is attached to offices and power, ethical liberals cannot avoid the question of how the distribution of offices and power relate to the neutrality principle.

Moreover, the relationship between offices and power itself is complicated. To what extent should the power to make economic decisions attach to offices? Does the right of equal concern and respect require that citizens be entitled to vote directly about economic decisions, for the people who make the decisions, or for the

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228. For a stimulating discussion of societal distribution of work, see M. WALZER, *supra* note 141, at 165-83. This problem is not addressed by Rawls perhaps because he assumes that equality of opportunity will flourish and that if expectations for the worst off increase, they increase across the board. That is, increases in income and wealth are correlated with increases in the bases of self-respect. See generally J. RAWLS, *supra* note 12, § 10-13, at 54-83.

229. See Nagel, *Rawls on Justice*, in READING RAWLS, *supra* note 14, at 9. Rawls recognizes this and presumably would take it into account without claims of neutrality at that point. See *supra* note 226. Ackerman also recognizes the point (B. ACKERMAN, *supra* note 18, § 39, at 171), but nonetheless insists the problem can be solved consistent with neutrality. See *supra* note 226. See generally B. ACKERMAN, *supra* note 18, §§ 53-59, at 231-72.

people who appoint the people who make the decisions? Or should the power to make such decisions reside in the workers who participate in the creation of the product? In short, what is the relationship between the right to vote and economic democracy?

The capitalist answer is that people "vote" by buying products in the market and influencing the decisions of producers. Even in an ethical liberal's world, however, property is not equally distributed and thus the votes are not equally apportioned. What is ultimately being preferred is a life style that values individual over collective choices.

Some ethical liberals may fear that a government making decisions about the scope of offices, the time periods in which they would be occupied, and choices in production would unduly interfere with individual autonomy. That is plainly a legitimate concern. But the ethical liberal's preference for individual over collective choice is only vaguely connected with the view of the individual as a moral person that underpins ethical liberalism. Moral persons are considered autonomous because they have the capacity to make moral choices, and the state is not permitted to impose its conception of the good on them. But extending the right to vote in some fashion to the economic sphere would continue to respect the autonomy of the moral person; it would simply politicize the process for making such decisions.<sup>230</sup> My point is that the pretense of neutrality obscures the real choices made and that justifying the choices made requires something other than resort to abstract principles. To make a decision about the nature of economic democracy requires a decision about whether one life style is better than another: a conception of the good *is* required.

c. *The Need for a Conception of the Good in Education.* As previously discussed, the ethical liberal's major worry about a government that does not rely on a market economy is that it might make decisions promoting its own conception of the good rather than accommodating the preferences of its citizens. The advantages of the market, it is argued, is that the market allocates according to individual preferences and, therefore, does not cause government to depart from neutrality. It would be a serious evil if government were to produce goods that otherwise would not be produced by an effectively functioning market.<sup>231</sup>

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230. It would also, of course, modify traditional conceptions of property rights.

231. This theme appears in Dworkin's early work. *See supra* note 105. The view is shared by Rawls only in his section on perfectionism, which, I believe, is inconsistent with the rest of his work. *See supra* note 106. Richards correctly notes that "no



This argument places major stress on the existing preferences of citizens. Government, however, cannot ignore the process by which those preferences are formed. Even if it generally provides for a free marketplace of ideas, government will play a major role in the formation of values because government itself cannot avoid participation in the marketplace of ideas.

First, it is impossible for an ethical liberal's government to remain agnostic about life styles. A government must defend its public philosophy. If the public philosophy is to be neutral about the good life, it will have to explain why neutrality is desirable.<sup>232</sup> The ethical liberal's rationale for neutrality involves a preference for moral, rational, and autonomous life styles. Government's commitment favoring some life styles over others cannot be kept secret, and government therefore cannot be neutral. At best, it can only try to behave as though it were.

The speech acts of government, however, cannot be confined to occasional explanations, and thus government must play an influential role in value formation. For example, ethical liberals presumably support compulsory education,<sup>233</sup> but the theoretical difficulties are acute. The common way out of these difficulties is to claim that liberalism applies only to adults and that children are not prepared to make mature decisions. Suppose, however, that a parent wishes to raise a child as an illiterate farmer. The state will intervene on the premises that the parent is wrong in raising a child in that particular way and that education is required. Thus, the state substitutes its conception of a desirable life style for that of the parent. By forcing the child to be educated, the state irretrievably changes how the child will view the world. To be sure, as Mill pointed out, it is irresponsible to suppose that a child is a chattel of the parent.<sup>234</sup> Ethical liberalism can intervene

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modern capitalist economy satisfies the assumptions of perfect competition . . . ." D. RICHARDS, A THEORY OF REASONS, *supra* note 19, at 126.

232. Ethical liberals would not permit the public philosophy to be secret. See J. RAWLS, *supra* note 12, § 3, at 16 (emphasizing the need for publicity). See also B. ACKERMAN, *supra* note 18, § 2, at 4-5 (Ackerman's general emphasis on the need to justify power relations through dialogue). For the powerful suggestion that utilitarianism would only have a chance of working if it were not publicized as being right (or alternatively, if it were not believed), see B. WILLIAMS, *supra* note 34, at 106-07).

233. I have explored the issues in this section in more detail elsewhere. See *generally* Shiffrin, *supra* note 105.

234. See J.S. MILL, ON LIBERTY, *supra* note 34, at 585-86. Cf. G. HEGEL, *supra* note 2, § 239, at 148:

In its character as universal family, civil society has the right and the duty of superintending and influencing education, inasmuch as education bears upon the child's capacity to become a member of society. Society's right here is paramount over the arbitrary and contingent preferences of parents . . . . [S]ociety must provide public educational facilities so far as is practicable.

and at the same time remain consistent only if it is understood that liberalism is in fact designed to support independent and autonomous life styles.<sup>235</sup>

Ethical liberals further assume that the state may promote its own conception of social justice. That society<sup>236</sup> may attempt to communicate its conception of its own premises to those who will participate in the exercise of self-government is a sensible supposition. Nonetheless, it seems not at all sensible to suppose that communicating a sense of what constitutes justice and what does not is compatible with a prohibition on society's determining what constitutes the good life.<sup>237</sup> To determine what constitutes justice is to make decisions about the roles that talent, hard work, history, and personhood are to play in a system of property distribution. It is to determine what persons are and to what they are entitled in a society based upon a conception of rights. In short, to address the question of justice is to address basic questions of determinism and free will, rights and morals, and the meaning of personhood.<sup>238</sup>

The moral presuppositions of ethical liberalism unavoidably intrude into the governmental process, and it is obvious that government need not, and in some circumstances could not, be neutral on the question of the good life. Rather, the ethical liberal's government favors a moral, rational and autonomous life. It opposes much government paternalism, not because it lacks a conception of the good life, but because of a belief that in the good life citizens make their own decisions.

If that is an accurate description of the foundations of liberalism, the actions of liberal political leaders become coherent.

*Id. But cf.* C. FRIED, RIGHT AND WRONG, *supra* note 20, at 152-54 (arguing that the right to form one's child's values obtains as an extension of the right to form one's own life plan because a child is an extension of self and that child's ultimate sense of self depends upon parents having such a right).

235. For strong statements by Mill in favor of compulsory education designed to produce a vigorous, talented, and independent population, see 3 J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 34, bk. V, ch. XI, § 6, at 942-44; *id.* §§ 8-9, at 947-53; J.S. MILL, ON LIBERTY, *supra* note 34, at 539-40, 585-90 (compulsory education supported but with more fear of the state than in PRINCIPLES OF POLITICAL ECONOMY).

236. There are major complications, of course, concerning the relationship between society and the state and the fact that neither society nor the state is monolithic.

237. Again, Rawls would not dispute this, but that makes his qualified opposition to subsidies of the arts all the more curious. Compare 3 J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 34, bk. V, ch. XI, § 1, at 936-37 and sections cited in *supra* note 235.

238. Dworkin's comment that further inquiry into his theory will force him to face the problem of personal identity is precisely on target. R. DWORIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 292. For the argument that the idea of equality must give way to the question of what it means to be a person, see Westen, *supra* note 212, at 549-50.

They have supported government measures encouraging adults to develop their talents as well as government attempts to promote a stimulating culture. They have supported the arts, libraries, and public universities. They have therefore allowed government to support the view that poetry is better than pushpin,<sup>239</sup> and are freely using the tax funds of those who disagree. Government support of particular points of view is not inconsistent with a vigorous, individualistic society. As John Stuart Mill has argued, when government gives advice and attempts to persuade, it still leaves people free to pursue their own interests.<sup>240</sup> Indeed it is hard to understand why a person behind a veil of ignorance would want to prevent noncoercive societal attempts to advise and persuade. Presumably, a person living in a well-ordered society would want to know society's conclusions about the fundamental questions affecting its members. What seems crucial is that society not dictate that individuals be forced to accept such conclusions, but permit individuals to decide for themselves.

Yet the ethical liberal appeals to an intuition that there is something unfair about using tax money to support conceptions of the good not shared by *all* the taxpayers.<sup>241</sup> For most of us no such intuition exists; the appeal appears to flirt with anarchy. The argument of the ethical liberal is more subtle, however. It is not that governments violate rights when they decide (even over the objections of many citizens) upon methods to arbitrate the allocation of scarce resources or when they provide goods (again, over many citizens' objections) that the market could not produce for one reason or another.<sup>242</sup> Government departs from equality only when it uses a citizen's fair share of resources in order to advance conceptions of the good held by others. The ethical liberal's appeal, therefore, is egalitarian, not anarchistic.

There is a ring of fairness to the approach. We contradict citizens' conceptions of the good only when it is necessary. The

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239. 2 J. BENTHAM, *THE WORKS OF JEREMY BENTHAM* 253 (J. Bowring ed. 1843) ("Prejudice, apart, the game of pushpin is of equal value with the arts and sciences of music and poetry.")

240. 3 J.S. MILL, *PRINCIPLES OF POLITICAL ECONOMY*, *supra* note 34, bk. V, ch. XI, § 1, at 937.

241. Note, for example, the unanimity requirement in Rawls' discussion of the exchange branch which handles government expenditures not *required* by the principles of justice. ("There is no more justification for using the state apparatus to compel some citizens to pay for unwanted benefits that others desire than there is to force them to reimburse others for their private expenses.") J. RAWLS, *supra* note 12, § 43, at 283. *See also* Dworkin, *Liberalism*, *supra* note 17, at 131-32. *But see supra* note 105.

242. Perhaps Rawls goes even further than that. *See* Rawls, *supra* note 12, § 43, at 274-84.

notion is that fairness is justice. The approach, however, presupposes that it is necessary to be fair to everyone's conception of the good. And that presupposition is the very point in dispute.<sup>243</sup> The question cannot be begged, or avoided by "gerrymandering"<sup>244</sup> the assumption into the original position, or saved for later imaginary conversations.<sup>245</sup> It is a question central to the theory, and it will not go away.

The ultimate concern of the ethical liberals may be that a society permitted to use resources advancing its own conception of the good might overwhelm individual autonomy.<sup>246</sup> This concern would surely rule out a society that thought its sole organizing function was to produce a race of supermen or the like. But it does not explain why a society could not have as one of its many goals the encouragement of particular lifestyles over others while recognizing the need to respect individual autonomy.<sup>247</sup> In short, ethical liberals do not adequately explain why a society might not support poetry over pushpin, even if pushpin may not be outlawed. And our experience certainly does not yield a reasonable fear that government subsidies of the arts threaten to overwhelm individual choice.

In the final analysis, a humane form of liberalism requires respect for persons, but only discriminating respect for the choices persons make. Ethical liberalism's most important substantive

243. For a brief but powerful discussion against Rawls' position, see Nielsen, *The Choice Between Perfectionism and Rawlsian Contractarianism*, 6 INTERPRETATION 132 (1977).

244. *Id.* at 134.

245. Ackerman maintains that if he could have a dialogue with you and probe your values, he could lead you to liberalism, although he concedes that he might not be able to appreciate your point of view and might have to bring in someone else to assist you in thinking your way to liberalism. B. ACKERMAN, *supra* note 18, at 255-61. (Inconveniently he did not list his phone number in the Social Justice book.) His more serious point, however, is that there are many paths to the neutrality principle. *Id.* § 71, at 359-61. Ackerman's discussion of the grounding for neutrality is helpful both because it recognizes the possibility of complex pluralistic modes of justification and also because, by emphasizing the importance of dialogue, he stresses the situational and interpersonal aspects of justification. Even methodological and philosophical sophistication, however, cannot rescue a principle that is incoherent in some applications and unhelpful in others. Moreover, Ackerman's starting points for conversation (skepticism or doubt, autonomy, fear about how power might be otherwise used) seem insufficient to justify neutrality across the board, that is, in every aspect of political life. Nonetheless, his discussion of the factors relevant to adopting neutrality can be useful to most political theorists, for every political theory ultimately contemplates adopting a posture of neutrality about some aspects of life.

246. Of course, the society itself in any culture will unconsciously instill values in such a powerful way that much choice is virtually determined. The question of what counts as a violation of autonomy will necessarily be relative. See generally Shiffrin, Book Review, 96 HARV. L. REV. 1745 (1983).

247. See generally V. HAKSAR, *supra* note 38; Nielsen, *supra* note 243; Shiffrin, *supra* note 105.

weakness is that by conflating equality and respect, it misunderstands both. Tolerance, not neutrality, ought to be a central liberal value.<sup>248</sup>

#### 4. The Underlying Rationalism as the Root Failure

Those who think of themselves as liberals in contemporary America are a remarkably diverse group. Some are skeptics, others are followers of Kant, many are utilitarians. Most liberals have not thought through their philosophical positions and, if they did, would recognize that they draw on an amalgam of philosophical traditions. What is grand and adventurous is that Dworkin would even try to assimilate all of liberalism into a single principle,<sup>249</sup> let alone to presume that such an assimilation could pass as a descriptive manifesto around which liberals could join with happy hands.

Dworkin's claim, of course, is atypical. Other ethical liberals make broad normative claims without making the descriptive claim that their views capture the deep premises of contemporary liberals. But extreme claims often reflect underlying tendencies of a world view. I argue that reductionism is inherent in ethical liberalism. The hope of ethical liberalism is rationalism: the belief that powerful and sweeping moral and political conclusions can be drawn from a few simple principles.<sup>250</sup>

"Those who suffer from this misconception, rarely expressed but often accepted, imagine that if we thought with sufficient clarity and patience, life's problems would surrender their

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248. See Raz, *supra* note 115, at 116. It bears emphasis that a commitment to tolerance is not a commitment to skepticism or to relativism. The slide from tolerance to the incoherence of skepticism or relativism is an easy one to make. See, e.g., M. HORKHEIMER, *supra* note 22, at 19 ("On the one hand tolerance means freedom from the rule of dogmatic authority; on the other, it furthers an attitude of neutrality toward all spiritual content, which is thus surrendered to relativism."). Compare *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting):

[p]ersecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises.

*Id.* Holmes' connection between tolerance and skepticism is not inherent. Indeed, it is rejected by both ethical and eclectic liberals.

249. See *supra* text accompanying notes 63 and 93.

250. In the final analysis, however, all ethical liberals would admit as a matter of theory that some indeterminacy is inevitable. Those admissions are, as Joel Feinberg has remarked, sometimes grudging. J. Feinberg, *Duty and Obligation in the Non-Ideal World*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 257, 303 (1980) (discussing Rawls). For a perceptive criticism of Rawls' rationalism from the perspective of an intuitionist, see *id.* at 252-64.

secrets to us. They dream that the progress of theory will resolve [philosophy's] contradictions, . . . and the drama of history will be played out in the head of the thinker."<sup>251</sup>

The psychological attractions of rationalism are ubiquitous. They did not escape Kant:

[I]f we are told that a more searching or enlarged knowledge of nature derived from observation must eventually bring us into contact with a multiplicity of laws that no human understanding could reduce to a principle, we can reconcile ourselves to the thought. But still we listen more gladly to others who hold out to us the hope that the more intimately we come to know the secrets of nature, or the better we are able to compare nature with other aspects as yet unknown to us, the more simple shall we find nature in its principles.<sup>252</sup>

The attraction is ultimately philosophical, however, and it goes to the heart of the Kantian enterprise. The underlying goals of that enterprise are to find a principle of moral reality that can transcend the different passions and intuitions of human beings and to find some objective principle that can point to what is right or wrong independent of human emotion.<sup>253</sup> Thus, ethical liberals try to reason from the principle of neutrality, or from the original position, or from categorical imperatives.<sup>254</sup>

We have observed that a number of assumptions of what human nature is and what it ought to be are lurking behind the neutrality principle of the ethical liberals. Moreover, the neutrality principle is too empty, and the conception of human nature too thin, to provide a sturdy foundation for adjudicating between rights or different conceptions of how a property system should be arranged or to tell us much about government's educative role or its participation by way of subsidy in the marketplace of ideas.

If ethical liberals were forced to justify their conception of human nature, what means would be available to them? Contemporary ethical liberals are often silent when it comes to justifying their assumptions about human nature. Yet adherence to the enterprise of drawing back from and transcending the varying biases of human experience falls apart at precisely this point.

251. R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 17.

252. I. KANT, CRITIQUE OF JUDGMENT, *supra* note 75, at 280. *Cf.* M. HORKHEIMER, *supra* note 22, at 167 ("The view that philosophical concepts must be pinned down, identified, and used only when they exactly follow the dictates of the logic of identity is a symptom of the quest for certainty, the all-too-human impulse to trim intellectual needs down to pocket size.").

253. *See generally* I. KANT, *supra* note 1.

254. *See supra* note 70 (where the ethical liberal scholars acknowledge their debt to Kant). In particular, see Rawls' interpretation of the original position as Kantian. J. RAWLS, *supra* note 12, § 40, at 251-57.

The principal difficulty with Kant's attempt to justify particular moral conclusions from abstract conceptions of human nature is instructive. According to some, Kant thought that we could reason from form to substance. We could go from the idea of rationality to powerful conclusions about moral conduct in the real world. Thus, Kant thought the idea that "I should never act in such a way that I could not also will that my maxim should be a universal law"<sup>255</sup> would lead somewhere. But as many have been quick to observe, this idea could lead us to the conclusion that sadomasochism was desirable, because, if we were sadomasochists, we could easily will that everyone should be sadomasochists.<sup>256</sup> A normative conception of human nature is needed before one can get from form to substance or from reason to justifiable desire.

The better reading of Kant is that he understood the need for a normative conception.<sup>257</sup> Kant had a normative view of human nature,<sup>258</sup> but his conception was deeply flawed.<sup>259</sup> Consider this remarkable passage from the *Critique of Practical Reason*:

Sensuous contentment . . . which rests on the satisfaction of inclinations, however refined they may be, can never be adequate to that which is conceived under contentment. For inclinations vary; they grow with the indulgence we allow them, and they leave behind a greater void than the one we intended to fill. *They are consequently always burdensome to a rational being, and, though he cannot put them aside, they nevertheless elicit from him the wish to be free of them.*<sup>260</sup>

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255. I. KANT, *supra* note 1, at 18.

256. See, e.g., B. Aune, *supra* note 15, at 50-51, 118-30.

257. *But see infra* note 258. See also *supra* note 75. My remarks should be read as staking out a position here, rather than purporting to *demonstrate* that those who read Kant differently are wrong. The Kant literature is enormous, the texts large and complicated.

258. His claim, however, was that this normative view of human nature came from reason. That is, we cannot know the data we appear to see is the data as it is, if it is. But it is reasonable for us to act *as if* it is and to act *as if* an intellect designed nature with a purpose, and human nature with a purpose. See *supra* note 75. See generally I. KANT, *CRITIQUE OF JUDGMENT*, *supra* note 75.

259. In this respect Kant was a creature of his time, his place, and his religion. In addition, his emphasis on the values of respect, dignity, integrity, his devotion to peace, and the like, which are not here argued to be flawed, also have been linked to his upbringing. See Friedrich, *Introduction* to *THE PHILOSOPHY OF KANT*, *supra* note 75, at xiv.

260. I. KANT, *CRITIQUE OF PRACTICAL REASON* 122 (Beck trans. 1956). See also W. KAUFMANN, *HEGEL* 34-35 (1965) (contrasting a similar expression of Kant's in his *Anthropologie* with Hegel's more favorable and integrated view of the emotions). At other points in his writings, Kant assumed a more favorable attitude toward the emotions (see generally I. KANT, *RELIGION WITHIN THE LIMITS OF REASON ALONE* (1934) [hereinafter cited as I. KANT, *RELIGION WITHIN THE LIMITS OF REASON ALONE*]), and the passage quoted in the text certainly shows Kant at his worst (though not out of context). My point, however, is less that Kant always took this position and more

With this conception of the relationship of reason to desire, it is easy to understand how Kant could understand the purpose of sexual intercourse to be propagation of the race<sup>261</sup> and could caution against "mere brute pleasure"<sup>262</sup> and "animal union."<sup>263</sup> "Even the allowed bodily union (in itself, to be sure, only animal union) of the two sexes in marriage occasions much delicacy in polite circles and requires a veil to be drawn over the subject whenever it happens to be mentioned."<sup>264</sup> For Kant, whether a married couple could "make use of their sexual attributes . . . during pregnancy or when she is sterile. . . ." <sup>265</sup> was a close question. The issue turned on whether one could "allow animal inclinations latitude, at the risk of forsaking the law of reason."<sup>266</sup> So too, it becomes easy to understand why Kant would find that animal torture violated no duties owed to animals. They are not rational beings, and morality applies only to relations between rational beings.<sup>267</sup>

There is a continuity of theme here, and that theme is perverse. Persons are led to despise themselves. The underlying attitude appears to be that it is too bad humans are human. If only passion could be banished from human existence.<sup>268</sup> What is missing throughout Kant's works is a satisfying explanation of why it must follow that because humans are separated from animals by rationality, human life, which consists of the rational and the passionate, must emphasize the rational and exclude, or at best downplay, the passionate.

There may be readers who find Kant's conception of human nature attractive, but even this is not enough. For Kant, it is necessary to believe that his conception of human nature and no other flows from rationality. Few will accept such a position. At

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that Kant did not have a satisfactory view of the relationship between reason and emotion or between theory and practice. To develop that argument would take more detailed textual exposition than is presented here. I do not pretend to have presented anything that would persuade a committed Kantian.

261. I. KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE*, *supra* note 81, § 7, at 87.

262. *Id.* § 7, at 85.

263. *Id.* § 7, at 86.

264. *Id.*

265. *Id.* § 7, at 87.

266. *Id.*

267. *See supra* notes 123 and 130.

268. I do not mean to suggest that Kant consistently took this position. Rather the tendencies of his exaltation of reason are in that direction. For one of Kant's more interesting discussions with backhanded praise for the passions, see I. KANT, *RELIGION WITHIN THE LIMITS OF REASON ALONE*, *supra* note 260, at 58 n.\*. The failure to integrate reason and desire is the key failure of neo-Kantian liberalism. Thus Sheldon Wolin's comment, "[P]sychoanalysis is the science necessitated by the liberal ethos." S. WOLIN, *supra* note 51, at 318.



least they will feel a need to offer analysis. But the analysis must show how reason can get to justifiable desire without reference to desire. That cannot be done.

The major point to be made about ethical liberals is not that they would adopt Kant's extreme anti-hedonist views as their own. They do not. They do, however, join in Kant's attempt to separate reason from desire,<sup>269</sup> in his move to equate rationality with morality, and in his commitment to the enterprise of resolving the great political issues by a model of human beings that transcends their beliefs, their passions, and their character. Yet, if conclusions of substance cannot be drawn from mere form, the mask of neutrality must be removed.

### III. DEMOCRATIC RADICALISM

Ethical liberals and democratic radicals both oppose a common ideology. They reject the conception of a civil society in which pleasure-maximizing individuals attempt to advance their materialistic desires by treating others as means rather than as ends. Both reject egoism; both regard property as a social resource; both regard the possibility of individual self-development as a prerequisite in a well-ordered society. Indeed, both believe that society has an affirmative role to play not only in the distribution of property, but also in the shaping of an environment conducive to the flourishing of human personality. How then does democratic radicalism differ from ethical liberalism?

Let us start with this contrast: for the ethical liberal the end of nature is the individual, for the democratic radical the end of nature is political community. The contrast oversimplifies, but in the right direction. Democratic radicals believe that an individual's personality is subverted to the extent he or she exists in a society bereft of shared values and political community. The model of man as a solitary individual cannot furnish a basis for nourishing moral choice.<sup>270</sup> Neither the relativism of the pleasure model nor the abstract formalism of ethical liberalism (viewing man as autonomous moral chooser) captures his or her potential for ethical and fulfilling social life.

In discussing democratic radicalism, we should focus on the

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269. See, e.g., J. RAWLS, *supra* note 12, § 40, at 251-58. At the same time, it should be stressed that ethical liberals address the relationship between reason and desire in a far more sensitive way than does Kant. Indeed some of their writings provide a genuine attempt at integration. See generally C. FRIED, *AN ANATOMY OF VALUES*, *supra* note 20 (influenced strongly by Rawls); D. RICHARDS, *MORAL CRITICISM*, *supra* note 19.

270. Indeed, solitary confinement is a paradigm of punishment, a fact suggesting that solitary man is a peculiar starting place for any natural rights theory.

work of Roberto Unger, for his work is basic. Though many democratic radicals would balk at Unger's Catholicism and his theories of change,<sup>271</sup> few would challenge his critique of liberalism or his theory of human nature, a theory that harks back to Hegel and the early Marx.<sup>272</sup> The power of his analysis flows from his critique of the liberalism of Bentham and of Kant. Indeed, Unger's critique in many ways proceeds from where our discussion of the ethical liberals left off, because a major theme of Unger's work is that the Kantian dichotomy of reason against desire must be resolved. "The antinomy of reason and desire" he says "lies at the heart of the history of moral ideas in the modern West."<sup>273</sup> If it cannot be resolved, human personality is doomed to war against itself.<sup>274</sup>

Unger clearly understands that substance cannot be derived from form, that reason cannot alone determine which desires are justifiable and which are not. Armed with that understanding, Unger sets out to demonstrate that the search for neutral principles in legislation<sup>275</sup> and adjudication<sup>276</sup> is unavailing. Before he is through, the antinomy of reason and desire has also become the antinomy of theory or ideas and fact or events<sup>277</sup> (how does one know facts without theory and how can one have theories without facts), of rules and values,<sup>278</sup> of autonomy and community.<sup>279</sup> Unger's critique defies summary because every paragraph counts, but the central theme is clear: you cannot get from theory to fact without reference to facts, from reason to desire without reference to desires, or from rules to values without reference to values. The quest for neutrality is doomed in epistemology, in psychology, in morals, and in politics. It fails across the board.

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271. See *supra* note 29.

272. See *supra* notes 13, 21 and 22. Marx is faulted by Unger, however, not only for indeterminacy (R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 15) and suspect method (*id.* at 114-15) but also for failing to bridge the gap between reason and desire. *Id.* at 10, 40-41. For evidence of Unger's unwillingness to associate himself with any vulgar form of materialism, see Unger, *Critical Legal Studies*, *supra* note 13, at 577, 664.

273. R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 49.

274. Cf. *supra* note 269.

275. R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 83-88.

276. *Id.* at 88-100.

277. *Id.* at 31-36.

278. *Id.* at 67-103. See generally Unger, *Critical Legal Studies*, *supra* note 13, at 567-76.

279. Unger does not consistently use this label (antinomy of autonomy and community), but the argument runs throughout his work (see, e.g., R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 145-235, 274, 277-81), and he clearly sees the problem in terms of autonomy and community. *Id.* at 245, 251. See also R. UNGER, LAW IN MODERN SOCIETY, *supra* note 13, at 266 (freedom and community).

Most powerfully, it fails in our own experience. Unger puts it well:

The antinomy of reason and desire is more than a philosopher's conundrum; it is a fate that falls with terrible force upon those whose moral experience the principles of liberal psychology describe. Its mark on everyday life is the unacceptability, indeed the incomprehensibility of the two halves of the self to each other. For reason, when it sets itself up as moral judge, the appetites are blind forces of nature at loose within the self. They must be controlled and if necessary suppressed. For the will, the moral commands of reason are despotic laws that sacrifice life to duty.<sup>280</sup>

The morality of desire turns us into pleasure centers; the morality of reason, by focusing on empty universals, strips us of our individuality. Moreover, persons are separate from nature and from others. They are alone, and this is frightening.<sup>281</sup> The problem is to integrate persons with nature and with each other.<sup>282</sup>

Standing in polar opposition to Kant, Unger argues that love permits us to overcome the sense that natural inclinations such as the drive for sex are tyrannical, imposing limits and demands on our freedom. Sex is not merely a means of procreation; for Unger, it is representative of a person's ability to bridge the gap between reason and desire.

[I]n love, the union of persons, which represents an ideal of the relation between self and others, is consummated through the inclination of sex. *It is not the case in love that the more a man is a natural being, the less he is distinctly human. On the contrary, the gap between mind and natural disposition is bridged.* By satisfying the ideal of his relation with others and thereby becoming more human, he also becomes more completely natural. This naturalization of man without loss to his humanity is confirmed when sexual union produces children, for procreation allows the individual to serve as a link in the evolution of the species.<sup>283</sup>

There are ways in which man finds harmony with nature. By responding to art, by participating in religious worship, and by creative work persons participate in and feel themselves a part of

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280. R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 55.

281. *Id.* at 201.

282. The problems of relating persons to nature and to each other and of relating reason to desire by resort to conceptions of organic unity have fascinated those writers whom Charles Taylor has called expressionists (see C. TAYLOR, *supra* note 2, at 1-50). They include Herder, Goethe, Schiller, and Hegel. See *id.* at 1-50. They also include many of the writers in the Frankfurt School. See D. HELD, *supra* note 22; M. HORKHEIMER, *supra* note 22. For one of Hegel's statements on the problem, see G. HEGEL, THE PHENOMENOLOGY OF MIND, *supra* note 3, at 242-67.

283. See R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 206. For commentary discussing a similar theme in Hegel's early work, see S. LAKOFF, EQUALITY IN POLITICAL PHILOSOPHY 198-211 (1964).

nature. "Instead of terror at strangeness, he experiences . . . the reassuring confirmation of his own being."<sup>284</sup>

Love, art, and religious worship are temporary respites, however, if one does not live in a community.<sup>285</sup> Men must live, believes Unger, in a community where values are shared, where persons are felt to be a part of an organic whole.<sup>286</sup> Moreover, it is not enough that values are shared; they must be values that stand for what persons can be and should be.<sup>287</sup> The myth of neutrality cannot give legitimacy to rules; indeed neutrality is always a mask for the selection of values. Once the mask is removed the ruling values must give expression to an objective human nature if legitimacy is to be claimed.<sup>288</sup>

Unger's major task then is to justify an objective conception of human nature, but his general vision by now should be clear. It is a vision shared by democratic radicals.

The values of sharing, cooperation, harmony, and group cooperation can and should be realized in the political community. The theory is at war with individualism but not with individuality. Self-actualization can only be realized in a cooperative society. To the extent the state is viewed as an external entity, the individual will be both alienated and alone. Therefore, in the mind of the democratic radical, political community is not a romantic ideal, it is a human necessity. The democratic radical transcends the division between the individual and the state by specifying an ideal of persons flourishing in a community—seeing its ends as theirs.

There are major problems with this vision, but it is important to recognize the absence of two problems. First, nothing in the position requires that basic individual liberties be compromised.

284. See R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 207.

285. *Id.* at 216, 220, 231, 234. The community must have special features and specifically must provide for meaningful work. *Id.* at 231, 261.

286. *Id.* at 216, 220, 231, 236-95.

287. *Id.* at 220.

288. *Id.* at 221, 230-35, 239. But the existence of an objective human nature need not imply an ability to recognize that nature with certitude. See *infra* text accompanying notes 330-37. See Unger, *Critical Legal Studies*, *supra* note 13, at 615. One could get the impression from Unger's *Critical Legal Studies* article that he has given up the idea of an objective human nature. He there attacks objectivism (at an entirely different level of abstraction), opposes Aristotelianism (he always did), and does not mention objective human nature. He does, however, seem to regard freedom as objective (*id.* at 662) and recognizes that any concept of freedom presupposes a view of what persons are and should be. The *Critical Legal Studies* piece is simply more programmatic, operating at a lower, but still high, level of abstraction. I concede that Unger may be in the process of abandoning his approach. But the point is to evaluate an approach to legal and political thought that is important in radical thought and has been elegantly expressed by Unger, even if he has the wisdom ultimately to dispense with it.

The hallmark of the political liberal has been preoccupation with defining what should be private and what should be public. Kant and Mill attempted to define those aspects of life with which the state should not interfere. Nothing in the radical concept of political community requires that it reject human rights as shared values. Nothing requires that freedom of religion or speech, for example, should be interfered with by the political community.<sup>289</sup>

Second, democratic radicals are not guilty, as are many conservatives, of urging that we return to ancient "idyllic" societies such as the Greek polis.<sup>290</sup> They can recognize that the privatization of aspects of human life that were once political (such as the separation of church and state) and the entire process of industrialization with the massive social effects that separate modern societies from ancient Athens, together with the large size of modern societies, make it impossible to draw an easy parallel to the Greek polis.<sup>291</sup> Indeed, democratic radicals would staunchly oppose returning to the polis or to societies in the Middle Ages. Those societies depended upon slavery or other structures of domination for their continued existence.<sup>292</sup> In contrast, the goal of democratic radicalism is to establish a true<sup>293</sup> community of equals.

Although I contend that democratic radicalism is utopian, it is more realistic than other important strands of the radical tradition. Marx sometimes appeared to argue that once the proletariat had thrown off its chains, a classless society of eternal bliss would be established—a society free of tension, scarcity, and conflict.<sup>294</sup>

289. R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 274, 280; Unger, *Critical Legal Studies*, *supra* note 13, at 613-14. See generally C. MACPHERSON, DEMOCRATIC THEORY, *supra* note 13. But see MARX, *On the Jewish Question*, in KARL MARX: EARLY WRITINGS 3-40 (T.B. Bottomore ed. 1963).

290. For a devastating attack on those who would advocate such return, see Holmes, *Aristippus In and Out of Athens*, 73 AM. POL. SCI. REV. 113 (1979). See also C. TAYLOR, *supra* note 2, at 395-96 (discussing Hegel's views on why we cannot return to direct democracy). Clearly, however, many of the same factors which bar return to the polis equally bar the move to radical community. For an eloquent plea to return to the basic Aristotelian values, see A. MACINTYRE, *supra* note 75. Note, however, his rather slender basis for hope upon why we will make our transformation back to virtue.

291. For elaboration see Holmes, *supra* note 290.

292. Indeed, as is later discussed, Unger wants to regard history as a spiral of decreasing domination and increasing community. R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 243-53.

293. Perhaps, for Unger, the word "true" should be emphasized. Unger attacks an ungrounded conception of egalitarian community as utopian in that it provides no way to resolve the antinomy of autonomy and community. *Id.* at 251-53. His conception of community, as discussed below, relies on an evolving conception of human nature to resolve the dichotomy. In this process of resolution, the central task is to determine what constitutes domination. *Id.* at 243-44. To put it another way: defining domination amounts to determining when inequalities are unjustifiable. That the term requires definition suggests that some inequalities are acceptable.

294. See, e.g., S. LAKOFF, *supra* note 283, at 195 (1964); Sirianni, *Production and*

The underlying theme was that people are pure at heart; they are corrupted by institutions. Negate the institutions, and all forms of domination and antagonism will disappear. Democratic radicals, however, do not suppose that all conflict and tension will be removed once community is achieved.<sup>295</sup> Rather, the difficult task for communities will be to determine democratically when domination is justified or not by reference to shared values developed in light of an objective conception of human nature.<sup>296</sup> Whether privilege is to be given is to be decided democratically, not out of blind adherence to a meritocracy.<sup>297</sup> Although democratic radicals recognize that the conflicts of society can never be wholly resolved, their basic claim remains: human nature is subverted outside of political community.<sup>298</sup>

### A. *Getting to Political Community: The Theory of History*

The humanity and social understanding of democratic radicals ultimately plague their theory. Once one advances the claim that human personality is subverted outside of shared values in a political community, it becomes important to know how one will get to this political community, at what cost, and in what way.<sup>299</sup> The problem is to produce an account of history explaining how a

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*Power in a Classless Society*, 59 SOCIALIST REV. 33, 53 (1981). Some democratic radicals are explicit about the need for utopian thinking with varying degrees of qualifying realism attached. See Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503, 506 (1981) [hereinafter cited as Kennedy, *Critical Labor Law Theory*] (“[T]he left doesn’t need a counter-theory that ends with rights. We need utopian thinking, but the short-term, practical and creative manner, rather than in the form of rationalist “end-of-history” deductions of the ideal state of mankind.”). For a powerful argument in favor of utopian thought, see L. KOLAKOWSKI, *supra* note 21, at 69–72.

295. R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 232–33, 237, 256, 260, 284–89.

296. *Id.* at 243–48. See also *supra* notes 288 and 293.

297. R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 268.

298. *Id.* at 6, 12, 30, 259–60.

299. UNGER, *Critical Legal Studies*, *supra* note 13, at 583. Consider Thomas Hill’s perceptive analysis:

[U]topian philosophers have often overlooked [this] problem: . . . [I]n order to decide whether we ought to take the necessary steps (instrumentalities) to achieve a new society (ideal) which is better than the current one (social realities), we need to do more than ask, “Is reaching the new society possible?” and “How would it be better?” We must also ask, “What are the costs of trying to reach the new society and the probabilities of success?” and “If we are not completely successful, are a few steps toward the new society better or worse than none?” Not every “social ideal” which we might choose to pursue without considering the latter two questions will appear equally reasonable once these questions have been considered.

Hill, Book Review, 28 UCLA L. REV. 135, 141 (1980).

complex society can possibly be transformed into an ideal community (a community in which two hundred million people share cooperative values). If despair is to be avoided, the democratic radical needs to find a driving force (or forces) that will transform fragmented modern societies into political communities.

Most of the democratic radicals writing in law have addressed vaguely, if at all, the question of how the transformation to community might arise. Some are skeptical.<sup>300</sup> Some invoke Marxist materialism.<sup>301</sup> In any event, theories of history abound outside of legal scholarship, and nominations for the driving force in history have been diverse. For Hegel, it was the dialectical movement of spirit realizing itself in time; for Mill, the persuasive power of reason. For Marx, it was the class struggle. For Kant, the driving force was nature<sup>302</sup> and behind nature, God.<sup>303</sup>

Unger's candidate for the driving force is an interesting amalgam of all of these suggestions, and his extensive discussion of the problem of transition is unique among democratic radicals in law. Notice first what Unger does not select. One possible way to a community of shared values is to suppose that a revolutionary force will overturn the structure of inequality and impose an egalitarian society upon its members whether or not they would otherwise come to select it. This was Lenin's scenario.<sup>304</sup> Unger rejects this approach. He could not rely upon an elite group of revolutionaries because it is crucial for Unger that democratic ends be achieved by democratic means.<sup>305</sup> Moreover, for any radical it is

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300. See *supra* note 29.

301. Tushnet, *Truth, Justice, and the American Way*, *supra* note 27, at 1345-59. Tushnet also is a skeptic. See *supra* note 29. For writers like Tushnet, the differences among democratic radicals could be more important than their similarities. For example, in Unger's work, there is little talk of class struggle or of ideology following from the structures surrounding the means of production or the like.

302. See, e.g., Kant, *Universal History*, *supra* note 15, at 116-31.

303. I. KANT, *CRITIQUE OF PRACTICAL REASON*, *supra* note 120, at 128-36. Yet Kant argued that the existence of God could not be clearly proven. *Id.* at 153. This, he thought, was helpful to human beings because it assisted them in obeying the moral law out of duty rather than fear. *Id.* at 152. Presumably on this basis, scholars such as Robert Hartman have observed that, "For Kant it is not God but nature that has designs for men in history." Hartman, *Editor's Introduction*, in G. HEGEL, *REASON IN HISTORY* xviii (1953) [hereinafter cited as Hartman, *Editor's Introduction*].

304. See generally 2 L. KOLAKOWSKI, *MAIN CURRENTS OF MARXISM* 381-527 (1978).

305. See R. UNGER, *LAW IN MODERN SOCIETY*, *supra* note 13, at 231-32; R. UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 13, at 273-74. (I think it likely that, aside from Baker (see generally *supra* note 29), some democratic radicals might take a different view depending on the historical context. Liberals also could take a different view. See *infra* note 390.) At the same time, Unger, at various points, suggests (in passages that seem to come out of nowhere) that a few powerful thinkers might come along and lead the world to new visions. R. UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 13, at 149. Compare *id.* at 28, 30. Remarkably, he maintains that philosophers cannot be politicians and that politicians cannot be philosophers:

crucial that the driving force be rooted in the society as it is actually constituted. Forming a rational expectation of an ideal society and imposing it on a society that is not prepared for it is insufficient. This is, after all, the radical indictment of the French Revolution.<sup>306</sup> For the driving force to be realistic, it must give a persuasive account of how a pluralistic society can be transformed into a political community of shared values.

Unger's strategy is fascinating. It combines pluralism with political community and selects as a driving force the very theory of humanity that is already built into his system. He first avoids association with determinism by conceding that the direction of history is neither irreversible nor certain.<sup>307</sup> His interpretation is introduced as a serious possibility; no larger claims for it are made. Qualifications aside, what he wants us to believe and to hope for is that:

The deepest root of all historical change is manifest or latent conflict between the view of the ideal and the experience of actuality.

In liberal society, there is a constant and overt struggle between what men are led to expect and what they in fact receive from it.<sup>308</sup>

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Those who mainly act must depend on those who chiefly theorize to help them understand the truth and the good. Those who theorize must rely on those who act to complete and to criticize their theoretical work in the realm of concrete judgment. But all such collaboration is cursed with the risks of misunderstanding and betrayal.

*Id.* at 257. This passage seems strikingly out of place in a work devoted to linking theory and practice and uniting all facets of human activity. Moreover, the accuracy or wisdom of the observation is easy to criticize.

306. See, e.g., Hartmann, *Editor's Introduction*, *supra* note 303, at xiii ("The cruelties of the French Revolution were interpreted by Hegel as logical abstractions run wild: the vagueness and abstractness of Rousseau's General Will superimposed without analysis upon a concrete particular situation"). That indictment is, of course, not confined to radicals. See generally E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (1976).

307. R. UNGER, *LAW IN MODERN SOCIETY*, *supra* note 13, at 213, 237-39; R. UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 13, at 231, 248. For the claim that theories of history are difficult to reconcile with the idea of free will, see I. BERLIN, *FOUR ESSAYS*, *supra* note 34, at ix-xxxix, 41-117. I do not happen to agree with Berlin's contention; the narrow point in the text, however, is that Unger's theory is not subject to that criticism.

308. R. UNGER, *LAW IN MODERN SOCIETY*, *supra* note 13, at 153-54. Cf. Kennedy, *Critical Labor Law Theory*, *supra* note 294, at 504-06 (rights rhetoric should be used by the left as a tool, but needs to be transformed). Similar themes run through radical thought. See, e.g., M. HORKHEIMER, *supra* note 22, at 178 ("Even ruling groups, intent above all upon defending their particular interests, must stress universal motifs in religion, morality, and science. Thus originates the contradiction between the existent and ideology, a contradiction that spans all historical progress."); A. KOJÉVE, *INTRODUCTION TO THE READING OF HEGEL* 54 (1969) ("[G]enerally speaking, the awareness of a *contradiction* is what moves human, historical evolution.") (emphasis in original). See generally H. MARCUSE, *supra* note 22.



In a liberal society, Unger claims:

The social hierarchy is too volatile and uncertain, too open to changes of rank, and too vulnerable to political attack to be accepted as part of the natural order of things. Thus, paradoxically, the weaker the structure of domination becomes, the stronger the felt need to justify and to limit what remains of it.<sup>309</sup>

What Unger envisions is a spiral of decreasing domination and increasing community.<sup>310</sup> His spiral often reverses directions, but it does not return to its starting point—it continues to move upward.<sup>311</sup> Movement along the spiral is propelled by the gap between expectations of perceived entitlements and reality. If formal equality in the liberal state results in substantive inequality, change will be promoted and at an increasingly rapid pace. The argument combines Hegel's idealism and Marx's concern for the dominated. Yet the concern is not confined to the dominated, for the argument underscores the unsatisfactory position of those who dominate, recognizing that they, too, are at present deprived of the rich moral and political life that lies ahead.<sup>312</sup> They, too, cannot reconcile the contradictions of liberal society, and the reality of the spiral is that they must defend the structure of domination for themselves.

An illustration<sup>313</sup> will assist, if we understand that it speaks to only a part of the contradictions Unger finds in liberal society. The French Revolution, however premature its desire to impose an ideal society, set loose the concept of entitlement, and the concept of entitlement once set loose cannot be easily cabined. Once workers, women, blacks, and other victims of discrimination believe it is their *right* to participate as equals in a society, the force

309. R. UNGER, *LAW IN MODERN SOCIETY*, *supra* note 13, at 68. *See also id.* at 173.

310. *See, e.g.*, R. UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 13, at 243–48. The metaphor is not used in his most recent article, but the hope for historical progress in understanding human nature or, in the terms of that article, the nature of freedom, is still present. *See Unger, Critical Legal Studies*, *supra* note 13, at 656–62.

311. R. UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 13, at 239. *Cf.* C. TAYLOR, *supra* note 2, at 69 (“Hegel takes up in his own way a category of thought which we have already seen was already current in the Romantic generation: history as a circle, or rather spiral, in which unity gives way to division, and then is recovered on a higher level.”).

312. R. UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 13, at 157. For commentary on a similar theme in Hegel, see A. KOJÈVE, *supra* note 308, at 19–20, 29, 46, 50.

313. This illustration was suggested to me by Drucilla Cornell. It is consistent with Unger's thought, although Unger does not develop it specifically. It bears analytical similarities to de Tocqueville's analysis of equality and its role in history, and Unger did recognize a debt to de Tocqueville. R. UNGER, *LAW IN MODERN SOCIETY*, *supra* note 13, at 173. Unger also regards the French revolution as a major landmark in leftist politics. R. UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 13, at 252. For other detailed examples, see generally Unger, *Critical Legal Studies*, *supra* note 13.

moving historical change takes direction. The concept of entitlement takes us from the hierarchy of the Middle Ages through the ego-maximizing individualism of industrial society to Unger's organic conception of individuals being fulfilled by participation in cooperative society. But the argument is not confined to participation in mass society. Those who are equal in the voting booth may come to see that the democratic ideal must be applied to families, to factories, to all of daily life. The feminist movement is an important example of how "political" ideals carry over to what liberals would ordinarily describe as private life. Increasing attempts by workers to democratize the workplace might also be taken as evidence that political concepts of equality cannot and will not be confined to narrow compartments of life. The spiral of increasing equality, decreasing domination, and increasing community is already at work.

*B. Not Getting to Political Community: Criticism of the Theory of History*

I confront Unger's historical scenario in two ways. First, I attack its descriptive force and part of its normative appeal. To do that, we must consider his suggestion as if it were proposed as the probable course of history. Second, after arguing that the scenario is descriptively unpersuasive and normatively unappealing, I reintroduce Unger's qualifications and argue that they undermine the larger claims he has set out. If what follows is correct, Unger's dilemma is inescapable: to withdraw the qualifications will be to substitute exaggeration for description; to keep them is to endanger the epistemological underpinnings of his enterprise.

Suppose that the scenario is proposed as the probable direction of history. Where does history lead<sup>314</sup> according to Unger?

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314. Unger might well object to this characterization, and such an objection would have a point. Unger recognizes that persons and groups can only strive to achieve their full nature and can never fully realize it in history. R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 237, 253, 260, 269, 290-95. Nonetheless, the ideal that history is moving toward in Unger's thought is a rather detailed political scheme. By recognizing that our "species nature" can never be fully realized in history and that we are striving for a regulative ideal, Unger avoids most of the sting of Nietzsche's "last man" argument. See F. NIETZSCHE, THUS SPOKE ZARATHUSTRA, in THE PORTABLE NIETZSCHE 128-31 (W. Kaufmann ed. 1968). But Unger also wants to regard history as moving toward a form of community that would be marked not only as a decisive break with, but also an evolution from, the past. See R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 253. I do not interpret Unger's *Critical Legal Studies* article, *supra* note 13, as necessarily breaking with his earlier position. He now emphasizes a more varied approach to relationships and a more dynamic conception of communal arrangements than is outlined in *Knowledge and Politics*. He may be focusing on different periods in history in the two works and that could account for the difference. In *Critical Legal Studies*, *supra* note 13, at 585, he continues to criticize relationships that are partial and provisional. I suspect, however, that

He contemplates a series of cooperative face-to-face associations. Unger earlier argued that individuals are alienated not only if they fail to participate in a political community,<sup>315</sup> but also if they participate in a work force that is independent of the rest of their lives.<sup>316</sup> He proceeds to imagine that associations will be organized around workplaces and that the workplace will become the social community.<sup>317</sup> This is crucial to human personality, he argues, because humans need to relate to each other in all aspects of their lives, and the workplace community must cooperate in providing everyone with meaningful work.<sup>318</sup>

But this view is utopian.<sup>319</sup> Moreover, Unger's utopia requires us to ignore too much of what we know about human beings. It is easy to understand how one could believe that the concept of entitlement would lead us to a more democratically organized society, a society in which the distribution of property is subject to both the notion of equality and the right to vote. It is also plausible to hope that those who achieved equality in the voting booth might come to believe themselves entitled to equality in their homes and factories.

Even if this propensity were conceded (if for only a paragraph) it is hard to understand how the concepts of democratic entitlement and equality are linked with the visions of communities of life organized around the workplace. I refer not only to the practical difficulties associated with the envisioned structure. Must husbands and wives or cohabitants work in the same workplace in order to fully effectuate community?<sup>320</sup> What is questionable here is the psychological judgment that individual fulfillment depends upon relating to others not in a partial way, but by collectively participating together in all aspects of each other's lives. For many, such an arrangement might produce the spiritual warmth and security and the psychological euphoria of collective

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his position is becoming more flexible than that described in the text, and that is good. The disadvantage to flexibility in this context is that without a vision of where society might go, criticism becomes less persuasive. Unger's new argument stresses that society should be more fluid and receptive to changes in structure. In that respect, his argument merges with the vision of C. Edwin Baker. *See supra* note 28. Few on the left would quarrel with such ideals in the abstract, but that still leaves a lot of room for debate.

315. *See supra* note 298.

316. *See* R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 59-62, 173.

317. *Id.* at 262-67.

318. *Id.*

319. This criticism has particular bite because Unger is critical of utopianism and seeks to avoid it. *Id.* at 237.

320. Like Hegel, Unger regards the family as a "source of inspiration," but he also regards it as a "foe to be contained and transformed" though admitting "it cannot be brought to an end." *Id.* at 264.

participation. For others, it could become stifling<sup>321</sup> and boring. Even in a partial sense, relating to others with different life experiences, backgrounds, values, and perceptions is a vital stimulant. It is no accident that liberals place emphasis on the diversity of humanity, while radicals emphasize its communality.

Diversity, however, cannot be wished away, nor can differing conceptions of desert. Americans have found it easy to reconcile the idea of democratic equality with Lockean notions that people deserve the fruits of their labor. Moreover, middle-class Americans have found it easy to characterize the poor as "shiftless and lazy." Marx may have exaggerated the extent to which selfish interests dictate perceptions of justice, but it is hard to believe he would be completely wrong if he were here to say it again.

Unger's difficulty is empirical. Indications that important segments of hierarchy are on the defensive, of course, exist. Yet a strong commitment to meritocracy, to materialism, and to egoistic competition also exists. The concepts of equality and entitlement once unleashed might produce the smashing victory Unger hopes for, but if their ultimate success were advanced as a probability, the device of *ipse dixit* would have to play a major role in the argument.

Even if the empirical difficulty of getting to Unger's society could be surmounted, another difficulty takes its place. The theory assumes that society will remain committed to shared values because they will be there. The reality, one suspects, is that government officials would enforce a new orthodoxy in the name of shared values,<sup>322</sup> and that one form of domination would replace

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321. In this connection, consider Gutmann's provocative comment that:

[i]t is the value of privacy, not freedom, that Marx's theory denies, privacy understood as retreat from public scrutiny and recognition. My understanding of myself as more or other than what people take me to be is not the self-understanding of a socialist woman. In a socialist society, my nature would be totally "publicized."

A. GUTMANN, *supra* note 37, at 116. Cf. P. ABBOTT, *supra* note 139, at 157:

The marking off of a private from a public sphere is hardly "specifically designed as a defense for the protection of anti-social behavior," a case for a philosophy of "each for himself and the devil take the hindmost." On the contrary, it is designed in part to recognize and protect the complexity of human existence. [Orion] White's honest relationships and Robespierre's *âme déchirée* and Reign of Terror are not far apart. Both derive from the attempt to annihilate privacy.

*Id.*

322. Unger's frank recognition of the danger (R. UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 13, at 66-67, 74, 247-48) does not erase it. He is committed to the freedom of individuals to leave and join groups, to freedom of expression, and to the freedom of choosing the character of one's work. *Id.* at 279. The difficulty, of course, is as Unger points out: "not even the doctrine of freedom can dispense with the need

another. John Stuart Mill feared this;<sup>323</sup> it is the liberal's stock objection to communitarian politics.

To put it another way: Unger provides no escape from the problem of evil.<sup>324</sup> Human history demonstrates a capacity to be humane and altruistic, yet it undeniably shows a capacity to be selfish and barbaric even after centuries of upward movement on Unger's metaphorical spiral. If we are to imagine human history as a continuous process of upward movement on the spiral, it is hard to understand how Hitler could have appeared in the twentieth century.<sup>325</sup> Those adept at spatial relations will either imagine an oddly formed spiral or search for another metaphor.

Ideals of generosity and goodness have always been at large. Why are we to believe that those ideas are powerful enough (without divine assistance) to change human behavior so profoundly? Notice that the problem of evil is not the traditional question of how any God worth loving could create a world where pain, suffering, savagery, and inhumanity play such a prominent role. Unger's problem is more complicated.<sup>326</sup> To explain his theism, Unger must first deal with the existence of evil and explain how its

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for prudential judgments that give concrete content to its abstract dictates or specify their meaning and establish their limits." *Id.* at 281.

Charles Taylor, summarizing Hegel, expressed the problem well:

Participation of *all* in a decision is only possible if there is a ground of agreement, or of underlying common purpose. Radical participation cannot create this; it presupposes it. This is the point which Hegel repeatedly makes. The demand for absolute freedom by itself is empty. Hegel stresses one line of possible consequences, that emptiness [leads] to pure destructiveness. But he also mentions another . . . . For in fact some direction has to be given to society, and hence a group can take over and imprint its own purpose on society claiming to represent the general will. They thus "solve" the problem of diversity by force.

C. TAYLOR, *supra* note 2, at 413.

In his more recent work, Unger recommends that the judiciary play a role in enforcing individual rights, but he suggests only a vague ideal upon which to base such rights. Unger, *Critical Legal Studies*, *supra* note 13, at 611-15. Given the indeterminacy of the ideal, however, it is important to know what power the non-judicial part of society has in defining such rights. If its power is transferred to the judiciary, Unger will have abandoned much of the community he sought to create. As the discussion of the ethical liberals shows, the problems of rights in conflict are large, and the dilemma is as difficult for Unger as everyone else.

323. See generally J.S. MILL, ON LIBERTY, *supra* note 34.

324. For development of a related point, see Leff, *supra* note 13, at 885-89.

325. Cf. H. ARENDT, THE ORIGINS OF TOTALITARIANISM ix (1951) ("[W]ithout [totalitarianism] . . . we might never have known the truly radical character of Evil.").

326. For Unger's attempt to confront the problem, see R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 246-48. His perspective is that being and goodness are linked, that risk must be taken, and that no alternative point of view can escape the dilemmas of liberal politics.

existence is compatible with a Supreme Being worth loving. Unger must also explain how it is that evil might possibly disappear—a task incomparably more difficult. Surely any concept of entitlement cannot extend that far; it is hard to conceive of anything that will. In a courageous, but rather inept rhetorical move, Unger concludes with an appeal to God.<sup>327</sup> (How many have persuaded themselves not to read this difficult but rewarding work on the theory that a book concluding with a prayer “Speak, God” cannot be right for them?)

There is the suggestion that Unger ultimately is prepared to accept a variant of Kant’s idea that if a God does exist, and that if nature is ordered, it would be a plausible explanation of history to suppose that God’s plan was that man would move away from evil and toward good.<sup>328</sup>

If, however, God is assumed (via revelation or faith) to exist, it is also plausible to assume that God is interested in each individual and has no imposed conception of how history should develop. Each individual contest between good and evil may be the stuff of significant history for a Supreme Being; the man-created idea of Human History may not be a Divine category.<sup>329</sup> By way of analogy, God may place a premium on diversity, not on political community. If God exists, she may be a liberal and not a radical.

### C. *The Risks Associated With Romantic Conceptions About Human Nature*

After the press of ideas in history and the purported plan of God, what is left? Unger has one last answer. Exploring this answer, I think, unravels the entire theory.

Unger demands not only that communities proceed from shared values, but that those shared values be formed in light of an objective conception of human nature. A community of masters and slaves might share values somewhere in America, but they would share the wrong values. Unger does not endorse a static conception of human nature, one that cannot change over time or be affected by institutions.<sup>330</sup> But how can one say anything meaningful about human nature if it is open-ended and constantly changing? In responding to this concern, Unger analogizes

327. *Id.* at 295.

328. For Kant, see *supra* note 303. Unger does not make this argument explicit, but he does regard God as the ultimate solution to the problem of human nature (see R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 290–95), and refers to “God’s plan for the creation.” *Id.* at 206.

329. For perceptive development of this point, see K. POPPER, *supra* note 34, at 269–76.

330. See, e.g., R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 221, 234.

to our own experience. You are a person, and you have changed over time, yet you are the same person. You learn more about yourself as life goes on; indeed you create a person as life goes on. But there is a sense in which you can say you are the same person even though your interpretation of what that person is changes over time.<sup>331</sup> So it is with human nature. Individuals provide their own interpretation of what it means to be a person, and those interpretations add to our store of knowledge<sup>332</sup> as do history, sociology, and anthropology insofar as they generalize about change over time.<sup>333</sup> History teaches us, Unger thinks, what real human nature is and that human nature is expressed when persons are free of unjustified domination. As the spiral of decreasing domination and increasing community proceeds, we learn more about what it means to be a person.

Powerful attacks, of course, have been made on the very concept of a generalized human nature, at least insofar as it relies on a concept of what is natural. John Stuart Mill, for example, emphasized that if one accepts the concept of nature, one cannot ignore that floods, earthquakes, tragedy, and human suffering are natural.<sup>334</sup> At least, it is hard to understand how one would argue that they are not natural. If one asserts that selfishness and competitiveness are subversive, something independent of the concept of human nature will have to be introduced: after all, selfishness is not unnatural.

Unger is aware of this problem, and his handling of it is insightful, even thrilling, for those who are still capable of being moved by romantic profound writing. It is clear, however, that Unger is walking a thin and frayed tightrope.

First, Unger's awareness: Unger might argue that intuition is a source for his historical vision of human nature unfolding in time. Yet, Unger argues, some intuitions point in a different direction, so something outside of intuition must suffice<sup>335</sup>—perhaps intuitions informed by history or anthropology or rational thought. Yet history, anthropology, or rational thought all contain aspects that also point another way from Unger's historical vision. Something outside those concepts must be introduced.<sup>336</sup>

331. *See id.* at 55-56, 214, 278. *Cf.* C. TAYLOR, *supra* note 2, at 113 ("[T]he 'I' of the subject can be seen as a universal relative to all the particular changing contents of his mind and properties of his character.").

332. R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 195. Variations on this theme have been developed by Herder, Goethe, Schiller, Hegel, and many others. *See generally* C. TAYLOR, *supra* note 2, at 1-50.

333. *See* R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 103.

334. J.S. MILL, *Nature*, in X COLLECTED WORKS OF JOHN STUART MILL, *supra* note 34, at 384-86.

335. R. UNGER, KNOWLEDGE AND POLITICS, *supra* note 13, at 197.

336. *Id.* at 197-98.

Perhaps some integration of these various sources will suffice. But we need a basis for selecting which parts of intuition, history, etc. to choose. If I understand Unger's exit from the circle, it is this: decide on your best view of human nature, exemplify it, push it, and you will participate in the making of human nature. The object is to commit yourself to Unger's concept of human nature as an act of *faith*. History, intuitions, and other sources will interact with that faith, and a creative synthesis will emerge at each point in history.<sup>337</sup>

The tightrope is obvious. Unger has nothing to say to anyone whose intuition or faith is different,<sup>338</sup> and the difference between skepticism and faith is frequently an act of will. Mill might say that Unger has this faith because he thinks it will make us happy. I think Unger's answer has to be that exploring the grounding of faith sends us back to the circle, admitting, however, that there is either no justification for identifying the landing point or a justification too complicated to make discursive.

The unraveling of the theory: Once it is made clear that Unger's meta-theoretical claim about the nature of human nature depends upon faith, the tenuousness of the claim that modern society subverts human nature becomes obvious and the supposition that history will carry us to a better community dissolves. It is one thing to say we live in a terrible world or a world that really ought to be changed. It is quite another to dress up what is commonplace into elaborate claims about the nature of human nature.<sup>339</sup>

Finally, the importance of Unger's conception of human nature to his whole theory deserves emphasis. Unger's alternative to skepticism and relativism is the concept of human nature unfolding in time. Without such an alternative, Unger is mired in the "contradictions"<sup>340</sup> he seeks to avoid. In order to avoid reverting to subjective values, Unger directs organic communities to seek the good of the community.<sup>341</sup> But that approach does not assist when alternative conceptions of community good are presented. Communities are supposed to be guided by evidence of man's nature as developed by other group decisions, particularly insofar as those decisions were free of unjustified domination.<sup>342</sup> Central to the analysis is the assumption that decisions

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337. *See id.* at 198. *See also id.* at 248.

338. *See* Kronman, *supra* note 13, at 199; Leff, *supra* note 13, at 883-86.

339. For similar criticism, see Leff, *supra* note 13, at 883-87. *See also* Kronman, *supra* note 13, at 190-91.

340. *See supra* note 33.

341. R. UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 13, at 270.

342. *Id.* at 269-70.



made free of unjustified domination express the real human nature. The image is reminiscent of Dworkin's Hercules<sup>343</sup> balancing and interpreting the world's interpretations of human nature but constantly adjusting the picture to give emphasis to any new anthropological findings of decreasing domination in particular groups. Even in search of an alternative to skepticism, few would enthusiastically pledge their fate and future to this new anthropologically centered notion of community. But the dilemma of the theory should also be obvious. If Unger is right about human nature, qualifications about the direction of history are inappropriate. If the qualifications are appropriate, the claim that modern society contradicts *human nature* is nearly empty.

Thinking in terms of evolving human nature, however, is dangerous and counterproductive for several reasons.

First, thinking in such terms itself risks subversion of human personality. Unger's indictment charges that contemporary moral, political, and social life is at war with the most fundamental requirements of human personality. Without optimism from some quarter, it is easy to slide into the conclusion that life in modern society is not worth living. A belief that history will rectify the situation flows as a psychological mandate, and inordinate emphasis is placed upon the direction of history. It is difficult for any human being to come to terms with the problem of evil. I suggest it is impossible for a democratic radical to face up to it. Every encounter with evil is a stinging indictment of realistic possibilities for change. The reality of contemporary life reminds us daily that selfishness and domination are not going to go away and makes the picture of an evolving communitarian society implausible. When the excessive optimism of Unger's theory of history is ultimately appreciated by those who have accepted the rest of the analysis, there may be no place for psychological refuge.<sup>344</sup> Some may be tempted to turn to revolutionary alternatives to speed up the process of history, a course condemned by the underlying theory. Others may retreat to existential despair.<sup>345</sup> The

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343. R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 17, at 105-30.

344. *Cf.* C. TAYLOR, *supra* note 2, at 48:

[O]ur conception of spirit and its self-realization must have a place for reason if man is to be the vehicle of cosmic spirit and yet retain his autonomy. This is the central insight which Hegel alone of his generation saw in full clarity and worked out to its full conclusion. Without it, the Romantics either fell into the despair of exile in a God-forsaken world, or recovered unity with nature and God only in the twilight zone of intuition and fantasy.

It may be worthwhile to compare the psychological difficulties involved in relating to the idea of God *vel non* and those difficulties radicals face in confronting organic community.

345. J. SHKLAR, *AFTER UTOPIA: THE DECLINE OF POLITICAL FAITH* 87 (1957)

irony is that a theory allegedly rooted in a strategy for fulfillment of human personality plants the seeds for its own subversion.

Second, acceptance of Unger's theory of history risks undermining respect for human personality. Unger's basic claim is that human nature is not fixed, but constantly evolves toward organic community. The theory flirts with an attitude that life's major purpose is to move the spiral along for some later generation.<sup>346</sup> Moreover, it requires believers to assess the character of human nature by keeping watch on its development. I suggest that any theory asking individuals to assess others in terms of their contribution or relationship to the evolving conception of human nature can too easily slide into an attitude that examines humans as data rather than persons. Judging others' place in the spiral of decreasing domination and increasing community is a process that invites arrogance and that encourages writing off other human beings. If it is an inhospitable world in which individuals view each other as means to satisfy their egoistic desires, it is also not pleasant to imagine a world of Ungerites, each evaluating the other's place in the spiral. There is more than utilitarian wisdom in the biblical injunction, "Judge not, that you may not be judged."<sup>347</sup>

Third, Unger's theory can be used to characterize issues in unfortunate ways. Consider, for example, the issues of group libel and obscenity. Most liberals have no difficulty recognizing the moral evil of obscenity or the corrosive impact of group libel. Yet the liberal resists government regulation, believing that individuals should decide moral questions for themselves, that repression of speech would be ineffective, and that, as much as possible, it is prudent to cabin majority desires to censor. Democratic radicals can approach the issue quite differently. If democratic radicals are convinced that the ongoing march of history is away from repression, they may also find it easy to view group libel and obscenity as repressive. To stamp out either, therefore, would not interfere with freedom but would help to combat repression. The belief that history marches away from evil and towards good encourages confidence in the majority's ability to impose its conceptions of good on the rest of the population.

This objection is not inherent. The democratic radical who believes in Unger's theory of history need not use the state to repress group libel and obscenity; they should recede of their own

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("The typical romantic cycle [is] from extravagant aspiration to utter defeat . . ."). See also *id.* at 110.

346. Cf. J. SHKLAR, *supra* note 345, at 37: "Especially for the later more reflective romantics . . . life was never really here, in the present, but always a distant goal, an aspiration, something unreachable, an object of longing rather than something experienced. For most romantics life was a desire, not a reality."

347. *Matthew* 7:1 (Douay-Rheims Version).

weight as history unfolds. The claim, indeed, is not that any of the detrimental psychological and substantive consequences of Unger's theory are inherent. They are tendencies and risks, and that is all. But they are not risks we need to assume.

These difficulties are not confined to Unger, of course. They are inherent in democratic radicalism. They cannot be solved by searching for another theory of change in history. What we do not need is another driving force or combination of forces. We need a more realistic assessment of human nature and society.

Despite the differences between ethical liberals and democratic radicals, their underlying weakness is the same. The former resorts to excessive rationalism; the latter excessively romanticizes social possibilities and human nature. These positions stem from the same basic urge—to reduce the complexity of social reality to simple and secure foundations. Both extremes erect faulty foundations in an attempt to avoid the unstable but most interesting complexities of life. The desire for security triumphs over the willingness to live with and appreciate ambiguity.

#### IV. ECLECTIC LIBERALISM

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 those traditions attractive. Eclectic liberalism accommodates the moral presuppositions of liberal theories linked with the Kantian tradition and radical theories linked with humanist successors of Hegel and Marx. Yet recognition of the complexity of social reality and of human nature dictates the rejection of the rationalist 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.

In this section I sketch the general perspective of eclectic liberalism, its view of human nature and social reality, and the implications of that perspective for the concept of theory, for political rights and the institutions best calculated to protect those rights, and for equality and community. I then discuss the potential misunderstandings and real objections that might be lodged against eclectic liberalism. Throughout this section I show how eclectic liberalism draws upon, but distinguishes itself from, ethical liberalism and democratic radicalism.

A. *The General Perspective of Human Nature, Social Reality, and Theory*

The starting point of eclectic liberalism is a premise long associated with the liberal tradition. This premise 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 without denying that individuals are social beings whose values, perspectives, and outlooks are conditioned by their family, their relationships, their personal and social environment, and their culture.<sup>348</sup> Eclectic liberalism attempts to avoid atomistic individualism without leaping to an unrealistic conception of community. It affirms that each individual's choices in reconciling the alternative possibilities in relating to others and to nature are a matter of interest.

Of course, eclectic liberalism *is* eclectic. 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.<sup>349</sup>

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348. Cf. C. TAYLOR, *supra* note 2, at 381:

[T]he culture which lives in our society shapes our private experience and constitutes our public experience, which in turn interacts profoundly with the private. So that it is no extravagant proposition to say that we are what we are in virtue of participating in the larger life of our society—or at least, being immersed in it, if our relationship to it is unconscious and passive, as is often the case.

For development of the importance of seeing persons as beings whose identity has been socially formed, see M. SANDEL, *supra* note 115, at 180:

I ask, as I deliberate, not only what I really want but who I really am, and this last question takes me beyond an attention to my desires alone to reflect on my identity itself . . . . While the notion of constitutive attachments may at first seem an obstacle to agency—the self, now encumbered, is no longer strictly prior—some relative fixity of character appears essential to prevent the lapse into arbitrariness which the deontological self is unable to avoid.

See generally H. GADAMER, *REASON IN THE AGE OF SCIENCE* (F. Lawrence trans. 1981).

349. Note, however, that an eclectic position is not the notion that “all extreme positions are distortions of true values [or that] the key to social harmony and a moral life lies in moderation and the golden means.” The eclectic position is “more tough-minded and intellectually bold: it rejects the view that all conflicts of values can be finally resolved by synthesis and that all desirable goals may be reconciled.” Kelly, *Introduction to RUSSIAN THINKERS*, *supra* note 34, at xv (discussing I. Berlin's liberalism, though not using the phrase eclectic).

The theme of eclecticism is dominant in John Stuart Mill's writings. In particular, see Mill's essays on Bentham and Coleridge cited *supra* note 34. The same theme permeates the essays of Isaiah Berlin. See *supra* note 34. For helpful introductions to this aspect of Berlin's work, see Kelly, *Introduction to RUSSIAN THINKERS*, *supra* note 34, at xiii—xxiv; Williams, *Introduction to CONCEPTS AND CATEGORIES*, *supra* note

Eclectic liberalism regards complexity, diversity, and even mystery as a blessing and not a curse. By affirming the diversity of individuals, the complexity of human interaction, and the capacity of individuals to change their activities and their relationships, eclectic liberalism entertains a natural hostility to systems that would attempt to explain human reality by reference to single principles.<sup>350</sup> It doubts, for example, that social science could ever succeed in its hopes to predict and control human behavior;<sup>351</sup> it anticipates that detailed theories of history could never be proven;<sup>352</sup> it fears that utopian social engineering would stifle the creative potential of human personality.<sup>353</sup>

At the same time, while it recognizes and values human diversity, eclectic liberalism does not deny the existence of important human uniformity. Some features of human nature will always be with us. They have been well summarized by British philosopher J.R. Lucas:

Human beings, as we know them, are often selfish, but sometimes unselfish; their judgment is fallible, but sometimes in the course of argument different people come to hold the same view, which is, as far as we can see, reasonable and right; they are infinite in their complexity and aspirations, but finite in their capacities and achievements; they occupy the same public external world, but are each the centre of a private perspective, not necessarily shareable with others; they have values, which are neither necessarily the same for all, nor actually different for each; they can help one another, and need to, but can hurt one another, and often do.<sup>354</sup>

To assert that human behavior is complex does not rule out the existence of important shared similarities; it does suggest caution and attention to the particular as more important than emphasis upon the general abstraction.

Recognition of the complexity of social reality and of human nature, however, is as consistent with barbarism and feudalism as with liberalism. Complexity and diversity alone could not form the basis for liberal theory. Eclectic liberalism is committed to

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34, at xi-xviii. Berlin's views are stated most discursively in works like *FOUR ESSAYS* and *CONCEPTS AND CATEGORIES*, *supra* note 34. But perhaps the most powerful presentation of his view come in his essays on the work of others and, most particularly, in I. BERLIN, *AGAINST THE CURRENT*, *supra* note 34.

350. See, e.g., I. BERLIN, *FOUR ESSAYS*, *supra* note 34, at 41-117; I. BERLIN, *AGAINST THE CURRENT*, *supra* note 34, at 67-79.

351. See *supra* note 350. See also I. BERLIN, *AGAINST THE CURRENT*, *supra* note 34, at 80-110.

352. See *supra* notes 350 and 351. See also I. BERLIN, *CONCEPTS AND CATEGORIES*, *supra* note 34, at 103-42.

353. See generally K. POPPER, *supra* note 34.

354. J. LUCAS, *THE PRINCIPLES OF POLITICS* 1 (1966).

most of the same outcomes endorsed by the ethical liberals. Indeed, it accepts most of the normative presuppositions of the ethical liberals. It accepts the idea that a moral life style is better than a selfish pleasure seeking life style, that a life style slavishly devoted to serving one's animal passions is to be condemned, that a life style granting more concern to some persons is preferable to a life style granting equal concern to all, and that an autonomous life style is superior to a non-autonomous life style. It adopts the standard liberal commitments to civil rights, freedom of speech, due process, equality, and economic redistribution.

Simultaneously, eclectic liberalism attempts to integrate the insights of the democratic radicals. It resists the stark division between reason and desire that lies at the heart of neo-Kantian liberalism; it places emphasis on the social character of human nature without believing that human nature is subverted outside of utopian community.

Eclectic liberalism's appreciation for diversity is accompanied by substantive commitments to liberal values. But notice again that eclectic liberalism rejects the moral geometry of the ethical liberals.<sup>355</sup> Ethical liberalism's conception of morality diverts attention from the richness of human life, tends to replace tolerance with rigidity, falsely assumes that the great questions of political and moral life can be solved if the great thinkers will only think them through, and slights the extent to which individuals and societies must make hard choices in which basic values must be compromised.<sup>356</sup>

How does eclectic liberalism prove its theory of human nature and its conception of social reality? I have contended that ethical liberals have provided no grounding for their non-neutral conceptions of human nature and that democratic radicals have provided no grounding for their theory of history. What then is the grounding for eclectic liberalism?

The question may seem more reasonable than it is; several responses seem appropriate. First, by rejecting rationalism, eclectic liberalism proscribes the possibility of ahistorical deductive "proofs" about human nature and social reality. If theory or philosophy demands that conceptions of human nature be justified by resort to neutral principles commanding the assent of all, so much the worse for theory and philosophy.<sup>357</sup> Those who search for that

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355. "The argument aims to be strictly deductive . . . . We should strive for a kind of moral geometry with all the rigor which this name connotes." J. RAWLS, *supra* note 12, § 20, at 121 (conceding that his own justification "unhappily" falls short of moral geometry but remarking that the ideal should be kept in focus).

356. On the hard choices point, see Berlin's essay on Machiavelli in I. BERLIN, *AGAINST THE CURRENT*, *supra* note 34, at 25-79.

357. Cf. Nielsen, *supra* note 227, at 265.

kind of theory will find themselves waiting for Godot.

Second, by rejecting the possibility of sweeping systems or of unifying monistic explanations of human reality, eclectic liberalism affirms a negative. It is always logically possible that someone will provide the sweeping system or the monistic explanation. Neither ethical liberalism nor democratic radicalism has successfully done that,<sup>358</sup> and eclectic liberalism is supported by the knowledge that those who have tried for centuries have failed. Eclectic liberalism cannot prove a negative, but it stands ready to profit from (while still refuting) new schemes of moral geometry or human utopia.

Third, while denying rationalism and monistic theory eclectic liberalism does not reject rational discourse.<sup>359</sup> Anyone's commitments or lack thereof to civil rights and economic redistribution, for example, are derived from empirical and normative conceptions of how human beings can and do flourish, and are drawn from personal experience, from history, anthropology, philosophy, literature, sociology, biology, etc. Obviously, human beings can, do, and should share experiences and perspectives in debating those beliefs. Eclectic liberalism affirms that debate about most policy issues is informed by evidence and values drawn from a

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I am not sure we can justify such a fundamental ideal as the belief that all humankind have a right to an equality of concern and respect. And I am not confident that we even need to try, for it may well be that there could be nothing more fundamental that we could appeal to to make such a justification. Perhaps here we should say that justification comes to an end and that we just have to make up our minds about what kind of human beings we want to be.

But cf. *infra* note 359 (rational discourse about our conceptions possible). As Nielsen points out, even if we cannot show that rationality requires a conception of human nature, it does not "at all follow that there is anything irrational about that commitment" and at that point Rawls, Nietzsche, Unger, and the like are equally infirm (or equally human). Nielsen, *supra* note 227, at 264.

358. Ethical liberals admit either that their theories are not fully worked out or that they have not yet presented a full theory. See, e.g., *supra* note 355; Dworkin, *supra* note 79, at 210. Indeed, Rawls' and Ackerman's theories apply only to ideal societies.

359. On the general point, see Tribe, *Technology Assessment*, *supra* note 40, at 640. Even if one's first principles cannot be rationally justified, there is no basis for supposing that rational discourse cannot take place about intermediate principles. See generally Feinberg, Book Review, 81 YALE L.J. 1004, 1019-21 (1972). Second, even if at some point a leap susceptible to challenge must take place, fruitful argument about many "first principles" can still take place. For example, on the question "why be moral?" evidence that many might consider relevant can be drawn from a variety of disciplines and perspectives. See A. DONAGAN, *THE THEORY OF MORALITY* (1977) (recurring views of morality persist through human history); I. KANT, *supra* note 1 (non-utilitarian routes to morality both teleological and deontological); J.S. MILL, *UTILITARIANISM*, *supra* note 34 (morality leads to happiness). Admitting that an existential leap must take place at some point does not preclude rational discussion about the character of the place from which the leap is made, nor does it mean that the leap is irrational. See *supra* note 357 and *infra* note 391.

variety of sources and traditions, that most difficult policy questions involve the accommodation of important values, and that outcomes are necessarily informed by the values and traditions that themselves are constantly in flux. To ask eclectic liberalism for its proof is to ask for volumes, not axioms.

Philosophers as philosophers may search for TRUTH and social scientists as social scientists may try to discover LAWS, but human beings as human beings recognize that their personal life decisions are made in light of a host of dynamic variables. Moral, legal, and political decisions are also made in light of a host of dynamic variables. To assume that theory is theory only if it operates at a sweeping level of abstraction is a mistake; the best theory is that which clarifies, exposes, and evaluates our moral intuitions.<sup>360</sup> Eclectic liberalism is not hostile to theory or philosophy. It *is* hostile to particular conceptions of theory and philosophy.

The diversity of human nature has implications for the nature of theory. It also has implications for the character of rights and the strategy for their protection, for human welfare and desert, and for our conception of community. These implications do not flow with deductive rigor, but recognition of the complexity of human nature suggests conclusions different from those usually associated with ethical liberalism or democratic radicalism.

### B. *The Character of Rights and the Strategy for Their Protection*

Recognition both of the complexity of social reality and of human nature plays a strong role in informing our understanding of the character of rights and the institutional structures needed for their support. Eclectic liberalism recognizes a multi-principled basis for rights and their complex interaction with other rights and interests. All rights need not necessarily have multiple bases of support, but given the complexity of social reality, it should not be surprising if most important rights do. The right of freedom of speech, for example, is associated with a multiplicity<sup>361</sup> of more

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360. Cf. H. GADAMER, *supra* note 348, at 17 (theory need not involve "the distance from beings that allows what is to be known in an unbiased fashion and thereby subjects it to anonymous domination. Instead the distance appropriate to *theoria* is that of proximity and affinity.").

361. This assertion is not new. See generally Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RESEARCH J. 645; Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Shiffrin, *supra* note 105; Shiffrin, *supra* note 190. It is not uncontroversial. See, e.g., Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 28; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). It is descriptive of the Supreme Court's first amendment



general moral rights and interests that are valuable, including, but not limited to, individual self-expression, social communion, political participation, the search for truth and for informed choice, social catharsis, the social affirmation of the rights of equality, dignity, and respect, and the freedom from arbitrary, official aggrandizing or excessively intrusive government regulation. Yet the exercise of speech can imperil many important values including security, dignity, fairness, privacy, equality, and the general quality of life.

The need for sensitive accommodation of conflicting values such as these is bound to be a perennial part of the constitutional process. The American scheme for resolving these conflicts is itself complicated, but judicial review is an important institutional mechanism. Courts serve the special anti-majoritarian function of protecting minorities' rights against the excesses of the majority. Legislators elected by the many are poor bets to respect the rights of the few.

The protection of minorities, however, does not exhaust the judicial function in the category of protecting rights. If protection of the powerless were the exclusive issue, claims brought by politically powerful organizations like CBS or the New York Times would be viewed with suspicion. Both the speech and press clauses function not merely to protect minorities, but also to protect important social values. If a legislature (with all its potential for corruption, grandstanding, responsiveness to wealth, interest groups, and the like) is to compromise important social values, it is reasonable to provide structural assurance that such compromises are responsible.

The complexity of social reality suggests the need for considerable flexibility in constitutional adjudication, and the history of the Supreme Court clearly exhibits such flexibility. Surely no single interpretative source or technique has ruled as king in the constitutional process. Language has been properly ignored on occasion,<sup>362</sup> as has precedent,<sup>363</sup> the structure of the constitution,<sup>364</sup> history, intent,<sup>365</sup> and policy.<sup>366</sup> If one surveys the history

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jurisprudence. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Shiffrin, *supra* note 190.

362. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964) (voting rights part of equal protection despite section two of fourteenth amendment and language in fifteenth and nineteenth amendments); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (equal protection applies to the federal government despite the absence of an equal protection clause).

363. See, e.g., Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467.

364. See generally Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).

365. *Gideon v. Wainwright*, 372 U.S. 335 (1963) is an especially clear case of departure from the intent of the Framers as revealed by the historical evidence. For

of constitutional decisionmaking, one sees that constitutional interpretation has involved the complex interplay of a multiplicity of interpretative sources, allowing the judiciary considerable discretion and flexibility. The common law developed in much the same way,<sup>367</sup> and eclectic liberalism adheres to the view that the complexity of social reality would lead to what we have—rights supported by pluralistic foundations and adjudicated in an interpretative context with pluralistic foundations.<sup>368</sup> Eclectic liberalism expects that reality is too complicated to allow law to be interpreted and developed in a less dynamic way.

Both ethical liberals and democratic radicals have tended to be highly critical of the constitutional process as it has developed. So have scores of other commentators.<sup>369</sup> Before discussing the differing attitudes of the ethical liberals and the democratic radicals, I want to consider a few of the difficulties facing the critics.

First, many critics write in highly moralistic tones, inveighing against the Court for abandoning their favored method of constitutional interpretation and claiming that the Court displays a lack of judicial integrity, has become legislative and not judicial, or does not recognize "its place." The Constitution itself, however, does not speak to the question of interpretation.<sup>370</sup> Thus, it is particularly difficult to argue for any particular interpretative approach with the kind of authority that would justify pinning lack-of-integrity labels on those who disagree. Such argumentation is especially unpersuasive when it is put forth in a historical context where a pluralistic interpretative mode has dominated the history of the Court. Such criticism should be recognized for what it is—a policy-oriented view endorsing a particular vision of separation of powers. It should be tested at least in part by asking how human lives would have been affected if it had been the dominant

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powerful development of the points made in this paragraph, see Sandalow, *supra* note 364.

366. The Burger Court clearly does not like the policies of *Mapp v. Ohio*, 367 U.S. 643 (1961), or *Miranda v. Arizona*, 384 U.S. 436 (1966). If the Court were truly a bevy of Platonic guardians, it would dispense with both entirely instead of clipping away at them. Though cynics may argue to the contrary, the Court cannot do whatever it likes.

367. See generally Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Michelman, *Constancy to an Ideal Object*, 56 N.Y.U. L. REV. 406 (1981).

368. For a perceptive discussion of the complex interaction of the sources of constitutional interpretation, see generally Greenawalt, *The Enduring Significance of Neutral Principles*, *supra* note 36; Greenawalt, *supra* note 361.

369. See, e.g., Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (contending that intent and precedent should be the exclusive sources of constitutional interpretation). For powerful criticism of intent-based theories, see Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

370. Michelman, *supra* note 367.

interpretative mode in our history, what its adoption now would do to past precedent, and what its likely impact would be on human beings in the future. The burden of proof for changing interpretative modes would seem to rest on the critics.

Second, much constitutional commentary is devoted to elegant demonstration that no single interpretative source confines constitutional adjudication and that there is much subjectivity in the process.<sup>371</sup> This commentary quickly moves from the sublime to the ridiculous. The most common error is to assume that subjective judgments are arbitrary judgments.<sup>372</sup> The two are not the same. If the judicial process were truly arbitrary, a litigant who lost a case might just as well file it again because the chances of winning the second time around in an arbitrary system would be fifty-fifty.<sup>373</sup> Judges are appointed not to serve as computers, but as people who are members of a national community. The community and the appointees surely hold a mixture of values that conflict in different contexts. Armed with the power to make prudential judgments,<sup>374</sup> judges make subjective decisions. But even in a pluralistic interpretative system, there are limits to discretion. There are decisions that are clearly right and those that are clearly wrong; there are reasons that can be given for judicial decisions and reasons that could not be given. Despite considerable flexibility, judges operate within an interpretative and political context that places serious limits on their power.<sup>375</sup> Subjective decisions are not necessarily arbitrary decisions.

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371. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Brest, *Fundamental Rights*, *supra* note 26; Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 *YALE L.J.* 1037 (1980).

372. Articles such as Brest's demonstrate that the debate over judicial review and its scope are unresolvable. Brest, *Fundamental Rights*, *supra* note 26, at 1063. But that is a far cry from showing the debate to be incoherent, which Brest also claims. *Id.* See *infra* notes 376 and 391.

373. J. LUCAS, *supra* note 354, at 17-19.

374. Cf. H. GADAMER, *supra* note 348, at 127 (the "legal erudition characteristic of the jurist is with good reason called jurisprudence, which means sagacity in legal affairs. The very word itself recalls the heritage of practical philosophy that considered *prudentia* the highest virtue of practical rationality. It is a sign of the loss of an insight into the methodological uniqueness of this legal erudition and its practical determinacy that in the late nineteenth century the expression *legal science* became predominant.").

375. See generally FISS, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982); WALZER, *Philosophy and Democracy*, 9 *POL. THEORY* 379 (1981). Additional, useful comment may be found in A. MACINTYRE, *supra* note 75, at 206:

[A]ll reasoning takes place within the context of some traditional mode of thought, transcending through criticism and invention the limitations of what had hitherto been reasoned in that tradition; this is as true of modern physics as of medieval logic. Moreover when a tradition is in good order it is always partially constituted by an argument about the

Yet subjective decisionmaking invites flexibility. That, in turn, offers no guarantee that rights will be respected and affords the opportunity for arbitrary decisions, thereby threatening equality values. Eclectic liberalism recognizes the existence of such risks, but insists that they are inevitable in any system. Neither ethical liberalism nor democratic radicalism, however, can be so sanguine.

Ethical liberalism's rationalism makes it reluctant either to accept a pluralistic basis for rights or to endorse a theory of judicial review that permits broad judicial discretion. In order to provide a firm foundation for rights, ethical liberals attempt to limit human discretion by formulating general principles and suggesting that they be adhered to apart from their consequences. Ethical liberals have no impartial way of defending their neutrality principle and no way to accommodate conflicting rights without resort to prudential judgments. Eclectic liberalism therefore contends that a theory of rights not rooted in basic intuitions and human specifics cannot be maintained in a real society. A political theory that depends upon the triumph of abstractions over persistent intuitions<sup>376</sup> is utopian.

It can also be pernicious. Dworkin's rationalism, for example, leads him to advocate a sharply restricted form of judicial review in freedom of speech cases.<sup>377</sup> He has argued that the

goods the pursuit of which gives to that tradition its particular point and purpose.

So when an institution—a university, say, or a farm, or a hospital—is the bearer of a tradition of practice or practices, its common life will be partly, but in a centrally important way, constituted by a continuous argument as to what a university is and ought to be or what good farming is or what good medicine is. Traditions, when vital, embody continuities of conflict.

376. See *supra* note 360. I do not mean to suggest that persistent intuitions are invariably right. "Common sense" has supported many evil institutions, including slavery. For a powerful presentation of the point, see M. HORKHEIMER, *supra* note 22, at 25–26. On the other hand, the sagacity of intuition is usually underestimated. For a particularly extreme view, see A. MACINTYRE, *supra* note 75, at 67. If we unconsciously learn language and apply highly sophisticated grammatical principles without being able to articulate them, we also unconsciously engage in highly sophisticated moral and legal reasoning. See J. RAWLS, *supra* note 12, § 9, at 47. See generally Hampshire, *Public and Private Morality*, in PUBLIC AND PRIVATE MORALITY, *supra* note 17. Indeed the Socratic method often relies on precisely that phenomenon. Students and professors often know how they would resolve various hypothetical cases but struggle to decide what principles they are using in making those decisions. Their decision-making is not necessarily irrational, even if they are unable to make their reasoning process explicit. *Id.* at 30–34. See also *infra* note 391.

377. In addition to the restriction mentioned in the text, Dworkin would impose severe restrictions upon the case by case approach of the common law. See R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 87 (condemning "the practice of making decisions that seem right in isolation, but cannot be brought within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right.").

ground for political rights should be restricted to moral principle.<sup>378</sup> He claims that allowing judicial resort to utilitarian arguments of efficiency (e.g., freedom of speech is efficient because the best test of truth is its power to be accepted in the marketplace of ideas) distracts judges from the minimum, but basic, speech protections mandated by the neutrality principle.<sup>379</sup> Why judges could not distinguish between basic minimums (subject only to limited accommodations with the rights of others) and their expansion by utilitarian conditions is not explained. There may be an aesthetic neatness about tying moral considerations to rights enforceable by the courts while leaving efficiency to legislatures, but there is a corresponding reduction in the richness of rights, not to mention the richness of morality.

The utopianism of the democratic radical suggests even less defensible conclusions about rights and the institutions ultimately needed to protect them. If democratic radicalism's theory of human nature were correct, institutional structures would not play a significant role in the protection of rights.<sup>380</sup> People in the community would develop shared values and, in making democratic choices, would respect any worthy rights. The democratic radical identifies aspects of individuality that a community ought to protect and longs for the day when face to face communities will internalize those aspects with such tenacity that institutional safeguards will not be necessary to protect substantively valued rights. This perspective is not confined to judicial review or fundamental rights. The democratic radical yearns for the community where shared values will replace law.<sup>381</sup> Eclectic liberalism

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378. See generally Dworkin, *Is the Press Losing the First Amendment?*, N.Y. REV. BKS., Dec. 4, 1980, at 53. Dworkin's elaboration of the principle-policy distinction in his general jurisprudence is quite complicated, and he has arguably shifted positions in response to critics like Greenawalt (see R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 17, at 307), but, at least as to freedom of speech, he rules out efficiency or marketplace arguments.

379. Dworkin, *supra* note 378, at 52.

380. Indeed the democratic radical's tendency is the substitution of cooperative communitarian choices for formal rules, which necessitates a background of shared values. See generally R. UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 13, at 75, 100-03, 120, 183-84; R. UNGER, *LAW IN MODERN SOCIETY*, *supra* note 13, at 220-23; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 821-27 (1983). This, of course, is a matter of ideal theory. Democratic radicals might favor various institutional structures in the transitional period. And indeed many of the Critical Legal Studies scholars exhibit pessimism about the realistic possibilities of achieving a cooperative community. They might well opt for institutional structures as a permanent second best. Unger's positing of a judicial role to enforce rights in *Critical Legal Studies* (see *supra* notes 13 and 322) does not address the question of where this role fits in the historical process, i.e., whether as a part of the transition to somewhere or as a permanent second best.

381. See *supra* note 380. To the extent that the democratic radical seeks to liquidate law, the underlying premise is that communities of shared values, like families,

maintains that so long as the problem of evil exists and so long as human interests conflict, institutional structures need to be fashioned to protect rights.

Finally, the claim made by democratic radicals that the American legal structure lacks legitimacy is in need of considerable refinement. The argument usually proceeds along the following lines. Objective criteria do not dictate political or judicial decisions, nor could any such criteria be formulated. Political and judicial decisions, therefore, amount to the imposition of power by some over others and cannot be legitimized.<sup>382</sup>

Recall that Roberto Unger attempted to escape from the antinomies created by the problem of subjectivity by postulating an objective human nature revealed by the evolving historical spiral away from domination and toward community.<sup>383</sup> Assuming that our prior critique of that suggestion was correct and that proposals for democratic communities operating with unanimous consent are utopian, the democratic radical has no alternative to offer. What are we then to make of the radical critique? Are decisions produced through the judicial process, for example, elitist and illegitimate—worthy neither of “respect” nor “obedience”?<sup>384</sup>

In assessing this critique, recognition of its scope is important because the critique proves overly broad. If the problem is that decisions produced by a subjective process are unworthy of respect, the claim applies to all decisions whether humane or inhumane. Indeed the argument necessarily implies not only the impossibility of distinguishing the humane from the inhumane, but also the impossibility of justifying a preference for humane decisions over inhumane decisions. By arguing that decisionmaking is not grounded on objective criteria and denying the impossibility of “liberal” theory’s capacity to formulate objective criteria, democratic radicals have produced a critique that cannot be distinguished from that of the complete skeptic. Among law professors, only Arthur Leff was willing to trace his own skepticism to its chilling conclusion: “Napalming babies is bad . . . Sez who?”<sup>385</sup>

Hegel’s answer to skepticism is persuasive, in skepticism

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ordinarily function without formal legal apparatus. For commentary discussing a similar theme in the early Hegel, see S. LAKOFF, *supra* note 283, at 198–211.

382. See generally Kennedy, *Blackstone’s Commentaries*, *supra* note 25. See also *supra* notes 26 and 27. Professor Fiss responds to this argument by pointing to the limits that confine judicial discretion. Fiss, *supra* note 375, at 742–50. For Professor Brest’s response, see Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982). For a somewhat narrower version of the legitimacy argument, one confined to the judicial role, see Tushnet, *supra* note 380, at 806–08.

383. See *supra* text accompanying notes 330–38.

384. See Brest, *supra* note 382, at 765.

385. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249.

"consciousness gets, in truth, to know itself as a consciousness containing contradiction within itself."<sup>386</sup> "It proclaims the nothingness of essential ethical principles, and makes those very truths the sinews of its own conduct."<sup>387</sup> Once skeptics finish announcing the impossibility of making rational choices or of finding truth about anything, they recognize that they themselves must make choices and must proceed upon assumptions of reality. They themselves are embodied, they do confront situations, and they reason about what is best in those situations. Skepticism is a philosophy of talk and not of life. Skeptics are walking contradictions; they have to be.

To be sure, democratic radicals seek to avoid skepticism and nihilism. But the impossible standards they set for social justification easily topple their own proposals. If no human process can avoid subjective decisionmaking, it seems absurd to indict a process as illegitimate merely because it does not avoid subjectivity.<sup>388</sup>

Once the focus on subjectivity is abandoned, the problem of legitimacy becomes more complicated. It seems important, for example, not to confuse the question whether individuals are morally obliged to obey political or legal decisions with the question of whether or not a particular process is legitimate, or the related question of whether a particular decisionmaker such as a judge has acted with integrity. Conceptions of judicial integrity, for example, arise within an interpretative context in which the customs, traditions, and habits of the community set bounds to the process. Some bounds are clear: others are not.<sup>389</sup> Even if judicial decisionmakers act with integrity, questions can be raised about how the decisionmakers have been selected. Claims that important segments of society have been unfairly treated and are underrepresented, for example, might easily be supported.

Even if decisionmakers were fairly selected and acted with integrity, the question of whether individuals would be bound to obey the law would not be fully answered. Regardless of the fairness of the process, the substantive outcomes must be relevant to the choice to regard the decisions produced as legitimate. If rights

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386. G. HEGEL, *THE PHENOMENOLOGY OF MIND*, *supra* note 3, at 250.

387. *Id.* For a more detailed argument, see B. WILLIAMS, *supra* note 34.

388. See also *supra* note 33. Cf. C. TAYLOR, *supra* note 2, at 137:

[W]hat if a given notion of self-certainty not only is unfulfilled but cannot be in the nature of things; if the surrounding reality cannot ratify this notion of ourselves? Then action out of this idea is in a sense contradictory; it frustrates what it is meant to fulfill . . . . We have then a dialectic in which our self-certainty plays the role of yardstick and in which our "truth" is matched against it. If they are in principle non-congruent, then . . . the yardstick must change.

389. See *supra* note 375.

have been denied, the fairness of the process might be beside the point. There is always the possibility, of course, of defining the fairness of the process in part by the outcomes it produces. Finally, decisions not worthy of respect might be decisions that ought to be obeyed, nonetheless, when consideration of the human cost of specific acts of disobedience are taken into account.

By rejecting the radical critique of political and legal decisionmaking, then, eclectic liberalism need not claim that the process is necessarily worthy of respect or obedience in all contexts. The question of legitimacy in this society depends upon who is being asked to respect and obey what laws in the context of what process.<sup>390</sup>

The perspective of eclectic liberalism tends to lead to a different and more persuasive perspective about rights and institutions than that of the ethical liberals or democratic radicals. Eclectic liberalism offers no false guarantees that rights can be safely guarded by absolute principles, nor does it restrict the range of rights by excluding utilitarian considerations. It argues that complex reality necessitates human flexibility. It identifies values of importance and provides structural impediments to their destruction. It regards judges' sagacity, courage, and prudence as more important than their ability to work with slide rules. After all, the common law developed by refining, adjusting, and accommodating principles to a succession of concrete situations. The same pattern has been displayed in constitutional law, and rightly so.<sup>391</sup>

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390. Radicals have no monopoly on the claim that decisions or processes lack legitimacy. Similarly, liberals are not bound to oppose revolution. As Gutmann has observed, "[L]iberal egalitarianism no more than Marxism depends for its validity upon the easy or gradual transition to its preferred end state. Liberals too can justify, and have justified, revolutions, especially in situations where recourse to peaceful means of transition have failed." A. GUTMANN, *supra* note 37, at 156. Moral questions about revolution arise less from the legitimacy of the system opposed than from concern over the human costs involved in the transition and the doubts about plausibility of success, even recognizing that the question of what counts as success is itself difficult. For the opposition by some radicals to violent revolutionary action, see *supra* notes 29 and 305.

391. Cf. T. NAGEL, *supra* note 34, at 135:

[T]he faculty Aristotle described as practical wisdom . . . reveals itself over time in individual decisions rather than in the enunciation of general principles. It will not always yield a solution: there are true practical dilemmas that have no solution, and there are also conflicts so complex that judgment cannot operate confidently . . . .

. . . . [T]he position does not imply that we should abandon the search for more and better reasons and more critical insight in the domain of practical decision. It is just that our capacity to resolve conflicts in particular cases may extend beyond our capacity to enunciate general principles that explain those resolutions. Perhaps we are working with general principles unconsciously, and can discover them by codifying our decisions and particular intuitions.



Eclectic liberalism rejects the hope for rights flourishing in a utopian community without institutional safeguards and the idea that the critique of law is advanced by demonstrating the existence of subjectivity or indeterminacy. The critique of law is best advanced by arguing that in this particular situation, in this historical context, a decision is unwise or unjust. What exists is relevant to what is wise and just, but hardly is dispositive. The process of justification is necessarily pluralistic—we cannot know the abstract without knowing the concrete; we cannot know the concrete without knowing the abstract. The character of rights cannot be forever fixed.<sup>392</sup>

### C. *Equality and Community*

The most basic division between liberals and radicals focuses on community or, more precisely, on the relationship of equality to community. There is some important agreement, however. Eclectic liberals, ethical liberals, and democratic radicals each support the equality notion that persons *qua* persons are entitled not only to political and civil liberties, but also to adequate food, clothing, housing, education, and healthcare. Difficult questions arise about the process by which and the extent to which entitlements may be curtailed when persons violate laws. Even more troubling is the extent to which economic entitlements are dependent upon a person's willingness to work if able to do so.

Putting these problems aside, liberals and radicals indict American society's failure to grant economic entitlements to all. There might be some disagreement as to whether that failure is unconstitutional,<sup>393</sup> but each of these perspectives would endorse the view that America's failure is immoral and unjust.<sup>394</sup> Neither

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*See also* Karst, *Equality and Community*, *supra* note 39; Karst, *Equal Citizenship*, *supra* note 39, at 64–68; Tribe, *Technology Assessment*, *supra* note 40, at 659.

392. That the epistemology of rights rests in pluralistic formulations, that rights must be evaluated within a specific social context, and that rights cannot be absolutely fixed all combine with an opposition to relativism in Laurence Tribe's work. *See, e.g.*, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 40, § 15-2, at 889–93.

393. Many, for example, have argued that the Constitution should be interpreted now or in the near future to guarantee minimum levels of wealth to every citizen. *See, e.g.*, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 40, at 314 n.32 and sections cited therein (suggesting that the idea is emerging that the fifth and fourteenth amendments "create affirmative rights with respect to physical survival and security, health and housing, employment and education"); Karst, *Equal Citizenship*, *supra* note 39, at 61 (noting that his equal citizenship approach will reach results approximating those of Michelman, *The Supreme Court 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969)). My inclination and that of many other liberals would be to conclude that our Constitution does not require such rights in this historical context, but that feature is its most unjust aspect.

394. Here too the roots of eclectic liberalism reach back to John Stuart Mill. *See*

eclectic liberalism, ethical liberalism, nor democratic radicalism supports the status quo. The routes to these conclusions are different, however; the differences in some cases lead to important substantive disagreements. Ethical liberalism provides an incomplete foundation for important rights and provides an artificial method of giving content to the ideals of dignity and respect. Indeed, in its preoccupation with equality and in its desire to separate itself from utilitarianism, ethical liberalism slights the most important unifying theme of modern liberalism—the desire to minimize human suffering.<sup>395</sup>

Eclectic liberalism, on the other hand, endorses the values of human dignity and respect and the general rights of human beings to follow their own plan of life. The desire to prevent human misery, however, has been the primary drive behind the push for housing programs and for guaranteed income or job proposals.<sup>396</sup> Through taxation, eclectic liberals are prepared to take money from hard working people simply because others need it more. Eclectic liberalism does not deny that those who work more ordinarily are entitled to receive more;<sup>397</sup> it merely denies the force of those considerations in competition with the needs of others.<sup>398</sup> Thus the war on poverty was just that: it was not a war for mathematical equality, nor was it a war against the idea of desert. The ideas of reward and praise are deeply embedded in our most elementary institutions.<sup>399</sup> To be sure, they can lead to destructive competition, envy, invasions of privacy, and the like, but to rule

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*supra* note 50 (Mill's support of a guaranteed annual income). Some on the left (*e.g.*, Marxist positivists) might eschew judgments about morality and justice and claim their positions are scientific historical judgments. The starting point in confronting that position is to ask if history should guide us in making policy judgments and why. The same can be said for those social "scientists" who purport to find descriptive power in the idea of efficiency in explaining the direction of the law.

395. One can believe that John Stuart Mill's utilitarianism was too extreme without denying that his concern with welfare should play an important role in normative theory.

396. Franklin Delano Roosevelt's message to Congress in January, 1941 has been re-expressed in countless ways by liberal democrats:

[W]e look forward to a world founded upon four essential freedoms. The first is freedom of speech and expression—everywhere in the world. The second is freedom of every person to worship God in his own way—everywhere in the world. *The third freedom is freedom from want . . . everywhere in the world.* The fourth is freedom from fear . . . anywhere in the world.

BARTLETT'S FAMILIAR QUOTATIONS 750 (15th ed. 1980) (emphasis added).

397. *See, e.g.*, 2 J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 34, at 208.

398. *See id.* at 960–67.

399. *See, e.g.*, I. BERLIN, FOUR ESSAYS, *supra* note 34, at xii–xxviii. The most difficult aspect of the present system is the difficulty of finding any correlation between wealth and desert. *See* J. RAWLS, *supra* note 12, § 45, at 308.

them entirely out of a system of just distribution is to divorce principle from social reality.<sup>400</sup> Eclectic liberalism seeks to minimize suffering while still allowing desert to play a role in a system of distribution. America, however, has tolerated poverty and vast inequality in its midst that cannot be related to any reasonable theory of moral desert.<sup>401</sup> For the eclectic liberal, economic entitlements should be guaranteed, but the tension between equality and desert is one to be constantly monitored, adjusted, and readjusted.

Ethical liberals have taken quite different approaches on the question of desert. Their inclination, of course, is to resolve the contest between equality and desert once and for all by resorting to principle. Perhaps the most extreme approach is taken by Rawls. He argues that hard work is primarily based on character. This, in turn, is primarily based on family background and social circumstances for which one can claim no credit.<sup>402</sup> Because one's background and talents are the result of luck, hard work does not give rise to just claims of desert.<sup>403</sup> Even if the empirical connections assumed by this argument were not so dubious, the theoretical difficulty would remain acute: Rawls cannot assume that autonomy is part of human nature as an anchor for one part of his theory and so nearly reject it in the other. Eclectic liberalism, on the other hand, 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.

The democratic radicals' perspective on desert is tied to their conception of human nature. The reality of human nature unfolds as human beings are freed from domination of others or from relationships based on domination. It is therefore hard to know what role desert would play in a cooperative community. Surely if desert led to destructive competition or reintroduced the possibility of domination, it would not be favored. The democratic radical would strongly argue that one of the worst features of American society is its emphasis on meritocracy and excessive rewards. Whatever role desert might play in radical community, it would surely be quite different from contemporary society. Presumably, in making adjustments, the democratic radical would place more value on equality than would the eclectic liberal.

Democratic radicals would tend to support equality over desert in more sweeping fashion than eclectic liberals but not because the former have a fetish for mathematical equality. For the

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400. See Karst, *Equal Citizenship*, *supra* note 39, at 59-64.

401. See J. RAWLS, *supra* note 12, § 47, at 308.

402. *Id.* § 17, at 102-03.

403. *Id.*

radical, equality and community are indissolubly linked. Indeed, radicals charge that liberal preoccupation with individualism shortchanges the possibility of full individuality flourishing within a cooperative community, and they are right. Eclectic liberalism's conception of human nature denies any possibility of genuine radical community in large societies and is skeptical about the possibility for such community in small ones, save for limited periods of time. To be sure, life in small communities offers the potential for greater solidarity. By living in the United States (especially in large cities) we trade solidarity for welfare (of a type). Similarly, by allowing talent to play more than a minimum role in selection for offices, we choose utility and (qualified) perfectionism over equality; denying this would be insensitive. The choices we must make between fundamental values are tragic.

Having admitted that much, eclectic liberalism need not concede much more. Liberalism does not commend the suffocating commitment of full obedience to community will.<sup>404</sup> In that respect, liberalism is selfish individualism, as it is in other compromises with equality. But skepticism about communal bliss is not endorsement of selfish greed, ruinous competition, or the kind of inequality typically associated with the industrial revolution. Individualism is the antithesis of collectivism; egoism is properly paired against altruism. Individualism can be altruistic and collectivism can promote egoism.<sup>405</sup> Those who fail to separate these concepts overstate the case for radicalism.

Moreover, contemporary liberals have properly worried about the risks to individuality associated with the transition to (and realization of) "community." Indeed, if radicals are wrong, they will produce yet another state that violates equality and denies important freedoms in the name of community.<sup>406</sup>

The most difficult challenge for eclectic liberalism is to fashion creative structures promoting community and solidarity without sacrificing individuality.<sup>407</sup> Ethical liberalism's conception of government is patently insufficient in this regard. For the ethical

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404. Neither, of course, do radicals. Part of the debate is whether the commitment to the community is indeed suffocating and what form commitment might take.

405. See generally K. POPPER, *supra* note 34, at 99-105.

The purported connection between individualism and egoism is not frivolous, however, and it shows up in contexts only slightly less blatant than those displayed by the classical liberals. Consider Judith Shklar's perceptive observation: "The rejection of manners and convention in Bohemia is infinitely less a desire for freedom than a demonstration of contempt for lesser men. The worship of individuality is inseparable from egoism, and from genius-consciousness." J. SHKLAR, *supra* note 345, at 85.

406. Cf. C. LINDBLOM, *supra* note 225 (helpful discussion of the methods of indoctrination in both capitalist and socialist regimes).

407. Radicals have no monopoly on recognizing the value of community. Liberals such as Tribe and Karst have been equally opposed to atomistic individualism. See,

liberal, government is instrumental, valued as a means to allow individuals to pursue their life plans.<sup>408</sup> But if alienation is to be mitigated, political participation itself should be valued as an end.<sup>409</sup> Moreover, genuine political participation is far more widespread than is generally recognized. To participate in the process of deciding how universities are run and businesses are operated is to participate in decisions that many countries rightly call political.<sup>410</sup> Millions of people devote much of their lives to the politics of their schools or their businesses or their unions.<sup>411</sup> The desire to participate is hardly absent from the American scene, and conscious attention to the means by which important decisionmaking can be increased at the local level could enhance the potential for community values without sacrificing individuality.

Government itself has a major role to play in promoting conceptions of the good with respect to education and promotion of cultural pursuits, and that can be done without overwhelming individuality. Once again, eclectic liberalism is not a defense of the status quo. Surely much more ought to be done to increase democratic participation in the institutions that affect people's lives—in workplaces, in education, and even in families. Yet whatever the deficiencies in these aspects, government's impact on perception of the good is an outright scandal. Instead of promoting altruism, government has created structures functioning to promote selfishness and greed. Government has organized the major mass communications medium of society—television—as an outlet for commercial huckstering.<sup>412</sup> Children return home from school and adults from work to witness an avalanche of commercial

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*e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 40, § 15-21, at 987-90; Karst, *Equality and Community*, *supra* note 39.

408. Rawls, however, expends significant effort to show that government according to the principles of justice will instill a sense of community. *See, e.g.*, J. RAWLS, *supra* note 12, § 79, at 520-29.

409. For commentary on Mill's arguments for participatory democracy, see A. GUTMANN, *supra* note 37, at 48-68. *See also id.* at 173-217. In particular, notice that "[p]articipation is not simply of instrumental value in Mill's politics. It may be part of the good life for some citizens . . ." *Id.* at 53.

410. Here too radicals are not alone in emphasizing that the state action doctrine blurs recognition of the fact that state unwillingness to intervene distributes authority in society. That action is itself political. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 40, § 18, at 1147-74; Karst and Van Alstyne, *State Action*, 14 STAN. L. REV. 3 (1961). Moreover, corporate leaders daily make production decisions that affect employment and inflation for which government leaders are ultimately accountable. It is no wonder that business leaders are often called "partners" in government. *See generally* C. LINDBLOM, *supra* note 225, at 161-88.

411. *But cf.* S. WOLIN, *supra* note 51, at 433 ("to contend that individual participation can be satisfied in a political way within the confines of non-political groups is to deprive citizenship of its meaning . . .").

412. For discussion of a variety of alternative structures that could be used to

messages on the public airwaves. The cumulative impact of these messages is not measurable, but if radicals want to charge that American society is devoted to profit and greed, that it trains its children to worship commodities, and that it fails to nurture human relationships, they need not look far beyond America's use of the public airwaves.

#### D. *Potential Misunderstandings and Real Objections*

By rejecting monism, eclectic liberalism seeks to accommodate conflicting values in concrete contexts. It carries to a higher plane of abstraction the wisdom contained in the judicial methodology called balancing—a term that is nothing more than a metaphor for the accommodation of conflicting values. Moreover, eclectic liberalism helps to explain why traditional legal scholarship so often falls into a balancing mode.<sup>413</sup> If human beings are diverse, if social reality is complex, legal scholarship generally must steer the course it has—clarifying intuitions, exposing complexity, showing the impossibility of achieving all goals at once, and advocating accommodation of values tailored to particular circumstances. Legal scholarship, of course, need not be traditional; it is often dull, insensitive, ill-informed, and question-begging. There is room for new approaches and ground for substantial criticism, but general attacks on legal scholarship for accommodating values are no better than the spirit-crushing abstractions that underlie them.<sup>414</sup>

Those attacks will not go away, and eclectic liberalism is a ready target. Indeed, it will be subject to many of the same misconceptions (and regrettably some of the genuine difficulties) that have plagued the methodology of judicial balancing.

The first misconception is that balancing theories are necessarily conservative. That conception may stem from the historical fact that judicial conservatives set their methodology against the liberal absolutism of Hugo Black and William O. Douglas. But

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organize the broadcast medium, see generally R. CASS, *REVOLUTION IN THE WASTELAND* 62-71 (1981); B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION* (1975); Owen, *Structural Approaches to the Problem of Television Network Economic Dominance*, 1979 *DUKE L.J.* 191.

413. See Tushnet, *Truth, Justice, and the American Way*, *supra* note 27, at 1322 (contending that the typical constitutional law article employs a balancing methodology, and providing a provocative analysis as to why).

414. See, e.g., Tushnet, *Truth, Justice, and the American Way*, *supra* note 27 (an excessively pessimistic vision of reality in my view, but there is nothing spirit-crushing about his perceptive analysis of the kind of mind that academic politics too often encourages). See also Tushnet, *Legal Scholarship: Its Causes and Cures*, 90 *YALE L.J.* 1205 (1981).

that view is myopic.<sup>415</sup> It ignores the balancing of William Brennan and Thurgood Marshall and of Kenneth Karst and Laurence Tribe. It ignores the fact that attention to the specific has been urged not only by the conservatism of Burke, but by the radicalism of Marx and the liberalism of Isaiah Berlin.

The second misconception is that balancing theories are utilitarian. That misconception trades on the identification of balancing with Benthamite calculations.<sup>416</sup> Eclectic liberalism, however, does not endorse a pleasure model by recognizing the need to accommodate values. To deny human beings dignity and respect gratuitously is always morally wrong. Yet the content of dignity and respect and the question of what counts as gratuitous often depend upon customs, traditions, and habits. Rights that reasonably flow from the right to respect and from human dignity such as security, freedom, equality, and privacy often conflict, and appropriate accommodations may well depend upon context. Resolving these conflicts is not an exercise in deduction, but an occasion for prudence where rational analysis and empirical investigation may assist intuitions that are themselves more complicated than computer programs.<sup>417</sup> Moreover, the claim that consequences may clarify the shape of rights and sometimes trump them is not utilitarian.<sup>418</sup> For utilitarians, what increases overall welfare is always good; eclectic liberalism recognizes with Rawls that what is right often determines what is good and not always the other way around.<sup>419</sup>

Third, balancing theories need not be skeptical.<sup>420</sup> To assume there is only one right answer in law or politics is one way of avoiding skepticism; it is not the only way, and it is not the way of eclectic liberalism. The skeptic cannot distinguish between right and wrong. Yet the identification of wrong is not the same as determining what is right. Some options are clearly morally wrong, but there may be many alternatives that could be considered right.

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415. For the same observation, see Schauer, *supra* note 361, at 303.

416. Tribe, who recognizes that the accommodation of values via some form of balancing is ordinarily inescapable (L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 40, § 12-2, at 582-83), is deeply opposed to utilitarianism. Tribe, *Policy Science*, *supra* note 6; Tribe, *Technology Assessment*, *supra* note 40. Dworkin also is a staunch opponent of utilitarianism, and favors balancing, albeit limited to the circumstance in which rights come into conflict. See R. DWORIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 17, at 199 ("'Balancing' is appropriate when the Government must choose between competing claims of right . . .").

417. See, e.g., Karst, *Equal Citizenship*, *supra* note 39, at 64-68; Karst, *Equality and Community*, *supra* note 39, at 205-06.

418. See *supra* note 80.

419. J. RAWLS, *supra* note 12, § 68, at 449-52.

420. Ronald Dworkin, for example, opposes skepticism (see *supra* note 69) and favors balancing (see *supra* note 416).

This is not skepticism;<sup>421</sup> it is common sense. In any event, skepticism about most absolutes in no way implies the existence of skepticism about everything.

Fourth, balancing theories are not ad hoc abdications of philosophical integrity. They are not even anti-theoretical. The error of many is to suppose that theory must finally reduce thought to a few simple principles explaining vast portions of reality. Theories, however, may be complicated because the reality or the ideal sought to be explained may itself be complicated.<sup>422</sup> A theory that abstracts too far from the data is deficient. Multi-principled theories are no less principled than their reductionist alternatives. Unger was right when he wrote that:

Theory can define the tensions and suggest the factors that should be taken into account in dealing with them. But only prudence can teach us what to do about them at each moment. And only practice can yield the insights needed to correct the decisions we make.<sup>423</sup>

The important point is that balancing theories need to address tensions and specify how to resolve them so far as possible; therein lies the genuine difficulty. Balancing theories are relatively indeterminate; if adopted as theories of administration they do not limit human discretion as much as more absolutist theories. They run the risk that the purported need for discretion in human administration will mask the abandonment of impartiality, promote inequality, and provide an insecure foundation for human planning.<sup>424</sup>

There are considerations that mitigate these concerns. Balancing theories need not be hostile to rules. The problem is to balance the disadvantages of the over-generality or underinclusiveness of rules against the disadvantages of potentially arbitrary and costly administration.<sup>425</sup> Moreover, as previously discussed,

421. See generally K. POPPER, *supra* note 34, at 369-96.

422. Cf. T. NAGEL, *supra* note 34, at 139:

The lack of a general theory leads too easily to a false dichotomy: either fall back entirely on the unsystematic intuitive judgment of whoever has to make a decision, or else cook up a unified but artificial system . . . which will grind out decisions on any problem presented to it. . . . What is needed instead is a mixed strategy, combining systematic results where these are applicable with less systematic judgment to fill in the gaps.

See generally Kennedy, *Form and Substance*, *supra* note 25; Schauer, *supra* note 361; Shiffrin, *supra* note 105.

423. R. UNGER, *KNOWLEDGE AND POLITICS*, *supra* note 13, at 288.

424. See generally Kennedy, *Form and Substance*, *supra* note 25; Schauer, *supra* note 361.

425. This oversimplifies the matter greatly. For more detailed discussion of the issue, see *supra* note 421.



the capacity of absolutes to confine discretion should not be overestimated.

Yet the comparative indeterminacy of balancing theories either as moral theories or as theories of judicial administration cannot be denied, and the search for more general theories will persist. At least, every new general theory provides a fractional truth. There is a bright way to look at indeterminacy however. Ambiguity has psychological costs, but also psychological comforts. The richness of human experience lies in its variety and in the intractable choices between public and private, work and play, country and family, others and self.<sup>426</sup>

The appeal of the ideal of eclectic liberalism was best put in Isaiah Berlin's commentary on John Stuart Mill:

In his early manhood John Mill went through his first agonizing crisis. He felt lack of purpose, a paralysis of the will and terrible despair. . . . He [had] asked himself a simple question: supposing that the noble Benthamite ideal of universal happiness which he had been taught to believe, and to the best of his ability did believe, were realized, would this, in fact, fulfil all his desires? He admitted to himself, to his horror, that it would not. What, then, was the true end of life? He saw no purpose in existence: everything in his world now seemed dry and bleak. . . . One day, as he was reading a pathetic story in the memoirs on the now almost forgotten French writer Marmontel, he was suddenly moved to tears. This convinced him that he was capable of emotion, and with this his recovery began. . . . He continued to profess that happiness was the sole end of human existence, but his conception of what contributed to it changed into something very different from that of his mentors, for what he came to value most was neither rationality nor contentment, but diversity, versatility, fullness of life—the unaccountable leap of individual genius, the spontaneity and uniqueness of a man, a group, a civilization. . . . [H]e set himself against the worship of order or tidiness, or even peace, if they were bought at the price of obliterating the variety and colour of untamed human beings with unextinguished passions and untrammelled imaginations.<sup>427</sup>

"Mill's ideal," Berlin explains, is "not original. It is an attempt to fuse rationalism and romanticism . . ." <sup>428</sup> So is eclectic liberalism. When Mill argued in the middle of the nineteenth century that society could not interfere with individual behavior

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426. In addition to the works of Berlin cited in note 34 *supra*, this theme is discussed with perception in T. NAGEL, *supra* note 34.

427. I. BERLIN, *FOUR ESSAYS*, note 34, at 175-77. For a related episode in Hegel's life also with an intellectual (albeit quite different) resolution, see A. KOJÈVE, *supra* note 308, at 168.

428. I. BERLIN, *FOUR ESSAYS*, *supra* note 34, at 199.

that did not harm the interests of others,<sup>429</sup> critics responded that the distinction between self-regarding and other-regarding behavior was impossible to make.<sup>430</sup> Whether or not those criticisms were well taken, it seems obvious that human behavior is sufficiently complex and interrelated that intrusive governmental intervention must be contemplated seriously by all but the libertarians.<sup>431</sup> Cities choking in smog and the pollution of water are easy examples of the extent to which the separate actions of millions of individuals, harmful in the aggregate but not in the individual case, necessitate the intervention of the body politic. Liberals need to understand that the complexity of society they used as a means of refuting Marxist determinism also requires them to take the concept of community more seriously than they have.

At the same time, those radicals who have come to recognize that deterministic theories of history are thwarted by society's complexity also need to recognize that states cannot be organized around single principles or utopian ideologies. Perceptive radicals understand this. Michael Walzer has written that radical politics "must not supersede but stand in constant tension within the liberalism of our society."<sup>432</sup> Modern liberals may worry more about the dangers of totalitarian political control, and radicals may place more emphasis on the need to minimize the detrimental impact of selfish individualism. But the distinctions will be matters of degree and not of kind.

In an age in which it is fashionable to recognize the limits of our material resources, perhaps it is not too optimistic to hope it will become fashionable to recognize the limits of our intellectual resources, the complexity of human nature, and the symbiotic necessity of adjusting theory to practice and practice to theory.

## V. POSTSCRIPT

Three last rejoinders need to be considered: one from the cynic or the pragmatist, another from the romantic, and finally, one from the rationalist.

The cynic or the pragmatist might ask why we had to come all this way to be told what we already know—that values have to be accommodated, that absolutes signal the need for suspicion, that reality is complex, that life is sometimes tragic and always

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429. J.S. MILL, ON LIBERTY, *supra* note 34.

430. For a sampling of the debate, see generally LIMITS OF LIBERTY (P. Radcliff ed. 1966).

431. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 40, § 15-2, at 889-90.

432. M. WALZER, RADICAL PRINCIPLES 72 (1980).

difficult. Anti-intellectualism feeds this response, one that is all too common among academics in professional schools. Even on its own terms, however, it is a sorry reaction. It fails to recognize that thinking through the assumptions of one's thought is a prerequisite to genuine understanding, that John Stuart Mill was right when he argued that confrontation with falsehood yields a livelier impression of the truth,<sup>433</sup> and that alternative visions of the world compete within all of us for our attention, or at least within those with whom we daily relate.

Those cynics and pragmatists (who, for example, write off radicals as not worth taking seriously) do not reflect on the probability that had they been born and raised in Moscow, Havana, or Peking, their personal perspectives would be altogether different and just as rigidly held.<sup>434</sup> They pretend to doubt the worth of philosophical reflection; yet they cannot escape the obvious: we are all philosophers.<sup>435</sup>

The romantic might say that the worst defect of eclectic liberalism is that it lacks vision. It runs the psychological risk that nothing will change, that injustice will be tolerated; it gives no energy, no driving force, no romance, no reason to keep going.

That is true. Eclectic liberalism does not supply a romantic vision in a black box with a pink ribbon. It does not supply a ready fuel of change for all seasons. And some of its believers become tired. But theories of change not rooted in actual conditions are doomed. The fuel for change must come from specific, concrete evils.

Whatever the prospects for change, the mono-romantic view of utopia is surely inferior to allowing individuals to form and act upon their own romantic visions. Utopianism is romantic, but it is not the only romantic vision; indeed romance flourishes when single forms are replaced by new ones.

Romance is not inconsistent with security, but it cannot brook uniformity for long. If preserving romance is the issue, the politics of diversity should prevail. The politics of diversity calls upon individuals to provide personal interpretations of what it means to be a human being, and of what human relationships are capable. A society premised upon that conception calls upon its citizens to be artists in their very existence. Romance should not depend upon politics.

The final retort, the rationalist's, is more telling. The rationalist might say that by relying upon persistent intuitions as a

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433. J.S. MILL, ON LIBERTY, *supra* note 34, at 509-20.

434. *See id.* at 479.

435. A. GRAMSCI, THE MODERN PRINCE AND OTHER WRITINGS 58 (1957); A. KOJÈVE, *supra* note 308, at 76.

strong part of the basis of values, eclectic liberalism relies upon a corrupt source. Moral theory by its very nature cannot depend upon what is to determine what is right. Moral theory transcends sociology. Yet intuitions, persistent or not, arise from a psychological and social context, the same context that is subject to critique. Any theory that forms its fixed point from the source to be criticized is inherently flawed.

That objection is too powerful. In responding to that objection it would not even help to abandon intuitions to make guiding principles "consistent." Principles themselves are drawn from the context to be criticized. The objection trades on the inevitable: we are all human beings; there is no wholly objective vantage point somewhere up there in the air.<sup>436</sup> There is no exit from the circle.

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436. See generally H. GADAMER, *supra* note 348; T. NAGEL, *supra* note 34.