

William & Mary Law Review

Volume 40 (1998-1999)
Issue 3 *Institute of Bill of Rights Symposium:
Reconstructing Liberalism*

Article 2

March 1999

Introduction: Reconstructing Liberalism

Cynthia V. Ward
William & Mary Law School, cvward@wm.edu

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [American Politics Commons](#)

Repository Citation

Cynthia V. Ward, *Introduction: Reconstructing Liberalism*, 40 *Wm. & Mary L. Rev.* 719 (1999),
<https://scholarship.law.wm.edu/wmlr/vol40/iss3/2>

Copyright c 1999 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

INTRODUCTION: RECONSTRUCTING LIBERALISM

CYNTHIA V. WARD*

However bruised by the continuous attacks of its radical critics, "liberal legalism" has so far survived the critical onslaught. But like all battles between powerful opponents the fight has produced casualties on both sides. Liberal theorists have responded to radical attacks by re-examining certain facile assumptions about the priority of individual autonomy, the nature of rationality, and the possibility of state neutrality, and replacing them with a rich and provocative literature that affirmatively defends liberal values and celebrates liberal legal institutions as the best—perhaps the only—way of respecting and encouraging human "difference" while also maximizing freedom and equality.

On the other side, the work of radical critics of liberalism has begun to reflect the idea that liberal values—appropriately modified—are worth examining in a reconstructive light. Without losing sight of the injustices that have been inflicted on vulnerable groups under the liberal American Constitution, at least some radical theorists seem willing to concede that something precious, perhaps even irreplaceable, would be lost were liberal rights and institutions, with their vision of respect for individual dignity and their desire to maximize individual freedom, to be rejected wholesale along with the scourges of racism and sexism that have always shadowed them.

It is tempting to oversimplify. One should take seriously the declared motivations and concerns of one's opponents, and be careful not to discover casually that they have been on one's side all along, although somehow without realizing it. Let me therefore emphasize that I think there are important and irreconcilable differences, at many levels, between liberal visions of the person, of politics, and of the law, and the visions articulated by

* Professor of Law, College of William and Mary.

liberalism's communitarian, critical race, feminist, and post-modern critics. What I find most fascinating in recent legal theory, though, is the increasingly apparent intuition that amid such basic differences there is also a growing area of common ground. Ironically, it may be that the reconstruction of liberal legalism, in some recognizable form, will become the single most dramatic result of radical legal theory.

Of course the whole project of reconstructing liberalism raises as many questions as it does answers. Suppose, for example, that under a redeemed liberalism, individual autonomy—albeit in reconstructed form—becomes the shared human faculty that both unites our strivings for the good and makes them possible. Does it follow that the law should protect the exercise of individual will, creativity, and imagination? If the answer to that is yes, to what extent, and in what forms should such protections be designed? Should liberal law continue to take as its core function the protection of certain fundamental individual rights—such as the freedoms protected under the so-called “right to privacy”? Should law protect these autonomy-enhancing rights at the cost of weakening strong group affiliations, such as those maintained in civil associations that may themselves be grounded in anti-liberal, anti-agentic principles? Or should reconstructed liberals seek other ways (and what might those be?) to recognize agency while also taking notice of the special disadvantages that society has imposed on groups such as racial minorities and white women?

Finally, is the whole effort to revive autonomy misconceived? The protection of autonomy has been envisioned as the reason for limiting legal and political interference in the lives of individuals, but is autonomy, even reconstructed autonomy, an adequate tool to achieve this task? In the realm of the criminal law, for example, does it really make sense—as so many liberals have averred—to organize legal requirements and prohibitions around the protection of individual autonomy, either the autonomy of the criminal or of her potential victims? Or ought liberals to be forced to argue the substantive morality or immorality of particular criminal prohibitions without the protection of an autonomy principle that, in the abstract and from the outset, bans the criminal law from operating in spheres deemed central to indi-

vidual choice? In the end, is liberalism most effectively conceived and defended as a form of politics that gives pride of place to diversity rather than to individual autonomy?

We assembled a distinguished group of philosophers and legal scholars to suggest answers to some of these questions. In the essays and comments that follow, our symposium participants investigate the continuing value of the bedrock liberal principles of privacy, autonomy, toleration, and neutrality, acknowledging the force of various critiques of liberalism while striving to retain, within the rules governing our legal and political institutions, an identifiably liberal respect for individual freedom, dignity, and personhood.