Robert L. Tsai Comments on Seana Shiffrin, *Democratic Civic Education and Democratic Law*

Professor Shiffrin has given a rich and valuable paper for how we might confront the crisis of civic education in polarized times. I am greatly sympathetic to the project, though I will point out a few differences between us. She rightly laments today's leading version of civic education for being overly fixated on the U.S. Constitution and origin stories. Like Aziz Rana, who warns against constitutional veneration, Shiffrin similarly contends that ancestor worship and text-bound approaches cultivate a "shallow" and "distant" model of citizenship already made too thin because of the model of indirect representation we have inherited—which she labels "the hand-off model." Our leading approach to political engagement, Shiffrin persuasively points out, can lead only to a "haphazard integration" of the citizen and the state (as well as with fellow citizens).

I quibble with whether the typical workplace is a good example given its profit-maximizing imperative and inescapable hierarchies, but Shiffrin is absolutely correct that policies and rules alone can't capture the full range of what a good employee, or a good citizen, must be capable of doing for any collective enterprise to succeed.

As an antidote, she proposes a "deeper exposure" to a "broader body" of substantive law to counteract a sense of hyper-individualism, too much conflict over rights, and an insufficient appreciation of the duties each of us owes to other members of the community. We continue to see, at this very moment in the age of pandemics, the damage wrought in part by the sick civic culture Shiffrin describes.

One possible difficulty with Shiffrin's solution, however, arises the moment one sees that culture is always connected to structure, and that a deeply problematic political system is itself to blame for despair and extremism. If that is so, then it's hard to envision civic culture changing without political structure changing. Putting aside questions of which must change

first, the point is simply that better design choices and altering the dominant forms of politics may do more than reforming education alone.

For instance, direct democracy reforms close the distance between individuals and the state by allowing the people to overrule bad decisions by representatives, thereby counteracting some of the vices of the "hand-off" model" and ensuring that every decision by representatives (including judges) can be subject to reversal through citizen politics. To be fair, such questions may lie beyond the scope of this conference. But I point this out only to note the limits of any project of democratic renewal that rests too heavily on educational reform.

Another difficulty Shiffrin's proposal runs into is that if polarization and demoralization are the problems, it's not clear that more exposure to law and a greater complexity in the treatment of law in middle schools and high schools will really do the trick. The "more-law" solution presumes that lacunae in citizens' knowledge about the law is a primary source of our ailments and that a better understanding of legal ways of thinking can bridge gaps and reverse trends. Yet complex knowledge can easily reinforce existing political hierarchies.

It may turn out that greater knowledge of and facility with legal knowledge does not alter the median civic mindset, but gives more people tools to dig in and reinforce court-centered, individual rights-based visions of community. Although it seems obvious that regular people know too little law and their own country's political past, I am skeptical that more resources devoted to civic legal education will make much of a difference because it rests on a more technocratic diagnosis of our collective condition.

Shiffrin's approach is most persuasive when it focuses on developing a certain democratic mindset. She ends with helpful suggestions about how to inculcate the "moral intelligence" she believes essential to healthier forms of civic participation. Do not use the trolley problem to instruct others, she warns, for it features a lone decisionmaker confronted by a ridiculous situation. Deploying it to teach democratic ethics will merely foster detachment and defeatism.

Here I agree with much of Shiffrin's concerns about the objectives of civic education, especially when she says that the chief aim is not merely to create "obedient" citizens. She prefers the term "compliant," but even that's a little too passive for me. I prefer terminology

such as "active," "creative," "questioning," "reflective," and even "defiant." Broader diffusion of knowledge about legal and communal resources, and understanding of legal infrastructure can help, Shiffrin points out. But to that list I would like to add two more items I believe to be just as important, if not more so: (1) political imagination and (2) templates for democratic action. The first allows us to believe that existing politics, legal arrangements, and democratic conditions can be altered for the better. The second involves identifying actual models from the past that can, with some retooling, be put to use again. Together, civic education becomes less about acquiring minimal know-how and more about empowering those who most lack agency and influence.

Indeed, given what we agree is needed in our citizenry and how far we are falling short, I wonder if Shiffrin has actually set the table for a different kind of civic pedagogy than more law and better hypos: specifically, thick, "historical" approaches to civic instruction, which would employ case studies of how actual groups of people reasoned together imaginatively and productively to overcome great odds in trying to solve their problems. To cut against the tendency to reinforce grand myths or deepen existing skepticism of government, these deep dives must involve not just the founders and not only those already broadly lionized for their achievements, but regular people who did laudable things in their communities during crises for the sake of basic values.

I wonder, too, whether our current moment pushes us toward some philosophical traditions and away from others. Starting with ideal theories of political existence and legal abstractions, as we often do, might not inspire the political faith and skillset so desperately needed for democracy to continue. Instead, it may lay the groundwork for abject disappointment when fellow citizens learn that these ideals are never attainable and have often been subverted from the start. Demanding ideological consistency tends to create lone dissenters who seek personal glory rather than generous, though perhaps critical, engagement with imperfect citizens and the messiness of political life.

For instance, I am experimenting with a pedagogical approach I call "reasoning from injustice," where students do deep dives into particular large-scale democratic breakdowns or opportunities for renewal—such as Reconstruction, the mass expulsion of Chinese migrants

from West Coast cities, the Wilmington insurrection of 1898, and the aftermath of the wartime internment of Japanese Americans—first to immerse ourselves in the structural conditions that give rise to different forms of inequality and indifference, and only then to move to toward what might have been done differently to avoid catastrophe, ameliorate injustice, and deter such breakdowns in the future. When the conversation turns to a dark sense that disaster was inevitable, we press through that energy-sapping moment to try to imagine other worlds, political paths, and approaches.

I have gravitated toward engagement with pragmatism in recent years not only for its capacity to break down sedimented ways of thinking, but also its humanistic focus. I also find it useful to force students to ask themselves not only what they prefer as ideal arrangements and outcomes, but also the institutions and outcomes they might be willing to live with. After all, living with others requires learning how to compromise in ways that meet material needs and satisfy the demands of justice. We are also constantly toggling between harm reduction and fidelity to lasting principles.

Tocqueville famously observed that Americans, above all, are a practical people. That is, we have a tendency that is both "natural and inevitable… to seek the immediate and useful practical results of the sciences." This encompasses democracy as the greatest scientific experiment we have ever undertaken. If our system cannot produce the policies and the better conditions we seek, and people no longer believe democracy works, then there's little that educational tweaks can do to save us. Shiffrin, at least, has pointed the way toward a healthier civic culture. I hope others listen.