Categorical Community

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The communitarian alternative to atomistic individualism in legal theory reproduces the very error it assails in liberal individualism. Professor Daniel R. Ortiz argues that the poststructuralist critique of the sovereign subject as appropriated by communitarian legal theories has been only half-applied—used as the founding premise for the attack on the "metaphysical individualism" of liberal legal theory but neglected in the elaboration of the communitarian alternative. In asserting that alternative, these theorists envision monolithic and discrete communities as the foundation of social analysis and in so doing counter the anti-foundationalist premises of their theoretical projects. This problem, which Professor Ortiz terms "categorical community," is analyzed in the works of leading scholars of several movements: Duncan Kennedy's treatment of community in Critical Legal Studies, Ronald Dworkin's effort to reconcile communitarianism and liberalism, and Robin West's theory of relational feminism. Further, Professor Ortiz uses the conflict between categorical community and metaphysical individualism as the basis for a new analysis of the sameness/difference debate in feminist legal theory. Professor Ortiz urges a view of social identity that is more complex and attends to the multiplicity, intersectionality, and instability of the individual's relationship to the community.

In the last twenty-five years, much social theory has proceeded from unhappiness with the perceived metaphysical underpinnings of liberalism. Many political and ethical theorists have questioned what they see as the philosophical foundations of individual sovereignty, one of the most deeply rooted and widely accepted tenets of our political culture. Although their specific aims may vary, these theorists share an overall ambition: denying

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the ontological priority of the individual. In plainer terms, they all seek to undermine the notion that the individual is the basic, given unit of political and social analysis.3

The lawyers, of course, have followed—a little behind. Apart from law and economics, which rests on a deep commitment to individual sovereignty, nearly all the major movements in legal theory over the last twenty-five years have tracked these trends in social theory. Critical legal scholars like Roberto Unger4 and Duncan Kennedy,5 critical race theorists like Richard Delgado6 and Patricia Williams,7 and feminist legal theorists like Robin West8 have all in one way or another reacted against the vision of people as sovereign individuals. Indeed, even liberal legal theorists like Ronald Dworkin,9 Stephen Gardbaum,10 and Stephen Holmes11 have severely criticized ontological accounts of liberalism.

Many of the reconstructive projects of these contemporary legal theorists proceed from a contrasting communitarian position.12 Instead of seeing society primarily as a collection of sovereign individuals, they see the community itself as sovereign and individuals as expressions of it. In short, if the received vision of liberalism takes the individual as primary and builds society up from there, these theorists take the community as primary and consider individuals as aspects of its structure.

In making this inversion, these theorists draw not only from longstanding communitarian political traditions but, more importantly, from contemporary postmodernism. Their critique of liberal sovereignty as well as their political

3. This debate, of course, is an old one. Nearly 80 years ago, when opinion was running in the opposite direction, Roscoe Pound referred to the current critics' position, with which he largely agreed, as already "trite." Roscoe Pound, Society and the Individual, in 1920 Proc. Natl. Conf. on Work 103, 104.

4. See generally ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS (1975).

5. See generally Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976) [hereinafter Kennedy, Form and Substance]; Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 Buff. L. Rev. 205 (1979) [hereinafter Kennedy, Blackstone's Commentaries].


9. See also text accompanying notes 71-114 infra. See generally RONALD DWORKIN, LAW'S EMPIRE (1986); Ronald Dworkin, Liberal Community, 77 Cal. L. Rev. 479 (1989).


11. See generally STEPHEN HOLMES, PASSIONS AND CONSTRAINT 16 (1995) (arguing "that liberalism has a robust normative basis, and is not founded . . . on radical moral skepticism").

12. An engaging and instructive discussion of the varieties and implications of community in contemporary political, ethical, and legal theory appears in Gardbaum, supra note 10.
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reconstructions draw partly on the postmodern masters, people like Richard
Rorty, Michel Foucault, and Jean-François Lyotard. Following these
philosophers, contemporary theorists emphasize that all human existence,
and endeavor are necessarily situated, meaning that all aspects of our
lives are shaped by the social contexts and institutions in which we live.
These social matrices, moreover, are not metaphysical; they possess no
transhistorical or transcultural legitimacy. They are, in postmodern lingo,
purely contingent.

As a postmodern kind of guy myself, I largely agree with this picture. I
do, however, have a problem with the particular vision of it that many con-
temporary legal theorists adopt. Unlike the political and ethical theorists
they follow, the contemporary legal theorists pursue postmodernism incom-
pletely and eventually fall prey to exactly the same type of difficulties they
see in "Metaphysical Individualism"—the belief that the individual is the
irreducible unit of social and political analysis, the analog to the atom in
molecular chemistry and to the quark in atomic physics. They too see at-
oms—indivisible, uniform, pure units of meaning and analysis—but at the
level of community rather than the individual. Their vision of community is
what I shall call "categorical." Each group forms a category that does not
intersect, and thus does not disrupt, any other in any serious way, and each
person within a particular category resembles every other in most significant
ways. Communities, in this view, are largely discrete and homogeneous.

That much contemporary legal theory reenacts the types of practices it
criticizes has implications not just for the practice of contemporary legal the-
ory but also for the legal and social regimes it would help implement. By
making a move similar to their opponents', these writers end up mistaking
some of the questions they should ask and thus reach conclusions about how
political and social life should be structured that still need defense to be per-
suasive. In particular, they seriously misrepresent the notion of identity,
which is fast becoming fundamental to contemporary politics. Categorical
community entails a lumbering and coarse vision of what people are about.
Only by disaggregating and refining this vision, which requires jettisoning
categorical community and metaphysical individualism both, can we hope to
describe ourselves adequately and so begin to construct any type of helpful
legal theory.

14. See, e.g., MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY (Robert Hurley trans.,
15. See, e.g., JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION (Geoff Bennington
(1933).
The following article proceeds in four steps. First, I show through discussion of Robert Bork’s *Neutral Principals and Some First Amendment Problems*, his now infamous *Indiana Law Journal* piece, what many contemporary legal theorists are attacking as traditional liberalism and how it metaphysicalizes individualism. Second, by considering two pieces by Duncan Kennedy, *Form and Substance in Private Law Adjudication* and *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, I show how, despite his adoption of postmodern rhetoric, Kennedy eventually succumbs to the same problems he identifies in people like Bork. Third, by looking at two works by Ronald Dworkin, *Liberal Community* and *Law’s Empire*, I argue that, despite entertaining a very sophisticated notion of community in the abstract, Dworkin recapitulates the error he sees in many communitarians when he tries to reinterpret and refound liberal legalism. Fourth, I look at one prominent strand of feminist legal theory, so-called relational legal feminism as exemplified by Robin West, and argue that it, too, commits the same error. I also hope to show in this part that the most central theoretical controversies in legal feminist theory—the sameness/difference and essentialism/antiessentialism debates—are organized around and try to grapple with this very issue of how to envision community. In the second, third, and fourth parts, I indicate what consequences follow and what difficulties arise from pursuing postmodernism incompletely. Finally, I suggest why categorical community has proven so popular as a critical strategy despite its difficulties.

One caution before I start. I have chosen the particular people I discuss because I believe both that they have made a difference in contemporary legal theory and that they typify to some degree the larger movements of which they are a part. Each of the individual movements of contemporary legal theory I discuss, however, is quite broad and encompasses wide variety and conflict. Although few orthodoxies exist, I do believe that the arguments I make here faithfully describe an important current in each stream.

I. THE METAPHYSICS OF LIBERAL LEGALISM

Robert Bork’s *Neutral Principles and Some First Amendment Problems* represents a great example of how not to write your way on to the Supreme Court. In this piece, Bork defends originalist constitutional interpretation

18. Kennedy, *Form and Substance*, supra note 5.
against the Warren Court. As his attack on *Griswold v. Connecticut*, the Warren Court case striking down state prohibitions against the use of contraceptives by married people, reveals, Bork's whole argument rests on assumptions of metaphysical liberalism. I focus on this particular piece because Bork makes his assumptions unmistakably clear and because his example shows how widespread, even among political conservatives, the assumptions of liberal legalism are.

*Griswold*’s result is “unprincipled,” Bork argues, because every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken [under an originalist theory of interpretation], the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure.

He then goes on to compare the suit in *Griswold* to a suit brought by a utility company and one of its customers to have a pollution ordinance declared unconstitutional. To him, “[t]he cases are identical.” He spins the comparison out:

In *Griswold* a husband and wife assert that they wish to have sexual relations without fear of unwanted children. The law impairs their sexual gratifications. The State can assert, and at one stage in that litigation did assert, that the majority finds the use of contraceptives immoral. Knowledge that it takes place and that the State makes no effort to inhibit it causes the majority anguish, impairs their gratifications.

The electrical company asserts that it wishes to produce electricity at low cost in order to reach a wide market and make profits. Its customer asserts that he wants a lower cost so that prices can be held low. The smoke pollution regulation impairs his and the company’s stockholders’ economic gratifications. The State can assert not only that the majority prefer clean air to lower prices, but also that the absence of the regulation impairs the majority’s physical and aesthetic gratifications.

Structurally, the claims look exactly the same. Without some hierarchy of gratifications, we cannot decide them differently. Accordingly, Bork proposes the same particular disposition as to both:

Unless we can distinguish forms of gratification, the only course for a principled Court is to let the majority have its way. . . . It is clear that the Court cannot make the necessary distinction. There is no principled way to decide that one man’s gratifications are more deserving of respect than another’s or that one form of gratification is more worthy than another. Why is sexual gratification more worthy than moral gratification? Why is sexual gratification nobler

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22. 381 U.S. 479 (1965).
23. But see DWORKIN, *supra* note 9, at 274 & n.19 (claiming this sort of account of liberalism is “defective” descriptively).
25. Id.
26. Id. at 9-10.
than economic gratification? There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ. Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy.

In short, *Griswold* and the bad, old "economic" substantive due process of the *Lochner* Court must stand or fall together—and both should fall.

Note the structure of Bork's argument. Since there is no objective scale on which to order values, since they have no "intrinsic validity," we cannot judge them other than subjectively. Thus, whenever judges displace a majority's choice of values, they are not substituting "better" values but only their own. This, of course, is illegitimate, a belief shared by both sides of the debate in constitutional theory.

The power of Bork's argument comes from popular acceptance of a now philosophically discredited assumption. Ever since the seventeenth century, according to philosopher Richard Bernstein, we have suffered a bad bout of "Cartesian anxiety" over our belief in what he calls the "grand either/or," the conviction that we have to believe either that an objective reality exists beyond us which allows us to adjudicate conflicts of value or that everything is relative and we have no nonsubjective way to settle such conflicts. Bork clearly relies on this conviction when he assumes that once we reject objectivity all we have left is the possibility of judges imposing their own individual values. Since the much heralded "death of God," this argument runs, we have not had the "either," so we must have the "or." Since we cannot rely on objectivity, we must live with the only other alternative, radical subjectivity, and place sovereignty in the only value-giver we have: the individual.

Placing sovereignty in the individual for these reasons metaphysicalizes autonomy because it assumes autonomy as a kind of "natural" fact independent of our culture and history. In this view, the individual necessarily stands prior to all else, including his beliefs and desires. For if the Borkean individual did not enjoy such priority, we could adjudicate conflicts of value according to the source of individuals' beliefs and desires, presumably the

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27. *Id.* at 10.
29. *Richard J. Bernstein, Beyond Objectivism and Relativism* 16 (1983). I do not mean to ratify this account as a completely satisfying description of the West's history of ideas. Many people, especially those believing in the continuing vitality of natural law, would disagree. Bernstein does, however, describe Bork's and others' views of ethics. I invoke Bernstein only because he well describes a common political and ethical position.
30. *Id.* at 18.
cultural environment. But if we could do this, culture would come first and undercut the fundamental independence of the individual.31

Postmodernism and contemporary communitarianism attack liberalism by making a version of this argument. In the postmodern view, there is no simple choice of either objective truth or individual relativism, but rather three choices: these two plus community.32 If we do not believe in objective truth and find relativism repugnant, we can still turn to culture for our grounding. In Bork's terms, we can agree that values have no "objective or intrinsic validity" without accepting his conclusion that judges have nothing but their own individual values to impose on us. Instead, we could say, judges can impose our own cultural values on us. Specific community norms, of course, may not exist to resolve particular questions, and judges may often get these norms wrong when they do exist, but these objections by themselves do not foreclose the third choice in general.

II. THE PLACE OF COMMUNITY IN CRITICAL LEGAL STUDIES:
DUNCAN KENNEDY

A. The Early Theory

Duncan Kennedy's early major articles focus in different ways on the conflict between community and the individual. In Form and Substance in Private Law Adjudication,33 Kennedy describes and explores our fundamental social and political commitments. He sees us as fundamentally torn between two opposed sets of belief, which he calls individualism and altruism. Individualism rests on, among other things, the "arbitrariness of values."34 In this view, "[v]alues are simply there in the psyche as the springs of all action. And since we cannot explain . . . why or how they are there, we cannot expect to converse intelligently about what they ought to be or become."35 There is simply no point to any discussion because we can never criticize any value from any authoritative position. We can only assert other values against it. The only progress conversation can make, in this view, is purely internal. At most we can convince someone who holds a particular value that that value is inconsistent with others that she holds, not that it is inconsistent with any higher authority.

This individualist position corresponds well with Bork's. In both, we cannot say anything about a value other than that a person holds it, and both

31. By "culture" I mean the set of values, beliefs, and practices that support, bind together, and identify a particular community.
32. See RORTY, supra note 13, at 3-69.
33. Kennedy, Form and Substance, supra note 5.
34. Id. at 1769.
35. Id.
views lead to the same broad implications in politics and constitutional theory. As Kennedy puts it, "if the state is only an instrument each party adopts to achieve his individual purposes, it is hard to see how it would ever make sense to set up state processes[, like the Supreme Court,] founded on the notions of changing or developing values."36 Echoing the theory of public choice, Kennedy writes:

The instant the state adopts change or development of values as a purpose, we will suspect that it does so in opposition to certain members whose values other members desire to change. The state then becomes not a means to the ends of all, but an instrument of some in their struggle with others . . . .37

In this view, all gratifications are equal indeed.

Kennedy finds in our legal and political culture another, opposed tradition—altruism—that denies the arbitrariness of values.38 Since in this view our values are collective, "those of man-in-society rather than . . . of individuals,"39 we can fruitfully discuss them—in fact, this is our "highest form of discourse."40 This ability to evaluate values according to other values we collectively hold avoids Bernstein’s "grand either/or." So long as the judge acts "as a person-in-society rather than as an individual"41 in vindicating one value over another, we need not fear Bork’s tyranny. "[T]he dichotomy [of the Constitution’s or the judge’s own individual values] is untenable, and the judge must undertake to practice justice, rather than merely transmit or invent it."42 Far from being a usurpation of political power, the judge’s decision represents a collective act of "group self-determination."43 Although such acts may appear coercive to recalcitrant individuals, to the altruist they represent the achievement of true freedom.44

To Kennedy, the real difficulty here is not that some of us are individualists while others are altruists. The real difficulty is that all of us are both.45 The problem is less a conflict among than a contradiction within us. We each, of course, want consistency, but we do not want to pay its price—giv-

36. Id. at 1770.
37. Id.
38. See id. at 1771.
39. Id. at 1772.
40. Id.
41. Id. at 1773.
42. Id.
43. Id. at 1774.
44. See id. ("The altruist asserts that [the individualist definition of freedom as ‘the absence of restraint on the individual’s choice of ends’ without any ‘moral content’] is destructive of every value that makes freedom a thing to be desired. . . . True, collective self-determination, short of utopia, implies the use of force against the individual. . . . [But the real problem is that the individualist’s freedom] is no more than a rationalization of indifference, or the velvet glove for the hand of domination through rules.").
45. See id. at 1774-75 (discussing how both modern individualists and altruists believe both theories).
ing one side up. As a result, we often find it impossible to act "rationally." We have no metasystem to guide our choice between individualism and altruism generally, let alone in specific circumstances where each option points in a different substantive direction. Also, balancing is out of the question. Since the contradiction makes agreement on any scale of values impossible, we cannot weigh the claims of individualism against the claims of altruism in particular cases. Instead, we must simply abandon ourselves to one commitment or the other as and when the pressure of contradiction overcomes us. We simply "shift[...]

46. See id. at 1775.
47. Id. at 1776.
48. See id. at 1775.
49. KENNEDY, supra note 19.
50. Id. at 34.
51. Id. at 80-81.
52. See id. at 67.
53. Id.
exists in this view but only in the sense of a community performance located in a single human mind or body. No more than that.54

As in many defenses of critical race theory, the center of Kennedy’s argument is his criticism of traditional standards of meritocracy. Following postmodernism, Kennedy notes that there is no position outside of community from which to judge particular communities’ beliefs and practices.55 In other words, we cannot escape our own communities to find an Archimedean point or unsituated perspective from which to judge others. “[T]here is[, accordingly,] no intellectual space outside ideology,”56 which he defines as “a set of contested ideas that provides a ‘partisan’ interpretation (descriptive and normative) of a field of social conflict,”57 from which to adjudicate particular social conflicts. Everything, or at least everything in the least bit interesting, is ideology. From this, Kennedy concludes that the traditional view of meritocracy as neutral is wrong: “There are no metacriteria of merit that determine which among culturally and ideologically specific research traditions or scholarly paradigms is ‘better’ or ‘truer.’ Judgments of merit are inevitably culturally and ideologically contingent because they are inevitably paradigm-dependent.”58

Another, perhaps more familiar, way of making this same statement is to say that all knowledge is a form of power—not just in the sense that knowledge allows people to command themselves and their environment better, but also in the sense that it reflects power, not truth. If knowledge and its production are themselves situated, that is, if they are determined by the particular contingent paradigms of scholarship holding sway at a particular time, then knowledge itself is “merely” an artifact of the particular culture that produces it. In this view, knowledge contains less truth than it does ideology.

I do not want to challenge this view, partly because I agree with some—though not all—of it. Rather, I want to challenge the consequences that Kennedy and some others believe follow. Because “objectivity” and “neutrality” are impossible to attain,59 Kennedy believes we cannot look into and judge between the ideologies of communities in conflict. In other words, since ideologies have no “intrinsic validity,” to use Bork’s term, Kennedy believes we must accept them as we find them. What validates an ideology is simply

54. See id. at 69. Kennedy does discuss a second nontraditional sense of individuality that rests on existentialist and deconstructivist notions of agency. See id. at 70, 79-80. However, “[t]he individual, in this view, is . . . [so] ineffable, unjudgeable, [and] ungraspable with the apparatus of thought,” id. at 70, that I cannot understand—let alone discuss—it.
55. See id. at 53-54.
56. Id. at 53.
57. Id.
58. Id. at 59.
59. Id. at 53.
the fact that a community holds it, not what it contains. In terms of affirmative action, the "culturally and ideologically contingent [character of the] judgments about which candidates are most promising or deserving, and about who should make these very judgments in the future," means that "white males have no more business monopolizing the [distribution of] benefits than they have monopolizing the benefits themselves." The cultural inflection of standards, by itself, disables judgment.

Note the strong resemblance to Bork's argument. Just as Bork argues from the relativism of value to the sovereignty of the individual, Kennedy argues from ideology (basically relativism with a self-conscious political spin) to sovereignty of the community. Both Bork and Kennedy succumb to "Cartesian anxiety" by assuming a single all-encompassing either/or. And since both see the impossibility of objectivity, both grant an actor unquestioned legitimacy in holding value. In short, Kennedy recapitulates Bork's mistake although he privileges community instead of the individual. The result is the same; only the unit of agency is different. As the words "culturally pluralist" in Kennedy's title make clear, Kennedy sees society organized according to the same sort of self-interest and competition that traditional pluralists do, only his is competition among self-interested communities, not individuals. He most clearly reveals his similarity to and difference from Bork when he sums up what he believes the affirmative action debate is all about: "The value at stake is community rather than individual empowerment."  

Kennedy's difficulty, just like Bork's, is that he neglects a third choice. It is not, of course, exactly the same third choice that Bork neglects, community pure and simple, because Kennedy does settle on some form of communitarianism. Rather, Kennedy's problem lies in the particular notion of community he adopts. Despite Kennedy's postmodern rhetoric, his notion is crude. To me, Kennedy's conception of community has two difficulties: It is both monolithic and discrete. By monolithic, I mean that Kennedy sees membership in a community as a largely totalizing and uniform experience.

60. Id. at 42.
61. "[W]e should be a culturally pluralist society that deliberately structures institutions so that communities and social classes share wealth and power. . . . At a minimum, cultural pluralism means that we should structure the competition of racial and ethnic communities and social classes in markets and bureaucracies, and in the political system, in such a way that no community . . . is systematically subordinated." Id. at 40-41.
62. Id. at 41.
63. See id. at 34 (seeking "to conceptualize groups in a 'postmodern' way, recognizing their reality in our lives without losing sight of the partial, unstable, contradictory character of group existence"); KENNEDY, supra note 19, at viii (affirming "that groups and identities are contingent and fluid, that each person is likely to be internally contradictory rather than the same all the way through").
The community demands allegiance and commitment from the individual on every level—from the emotional to the moral to the intellectual. If individuality is purely performative, that is, it represents the working out of culture through an agent that culture itself configures, then the community lays claim to all. Kennedy sees each community, moreover, as largely uniform. Although he sees divisions within communities, they “are best understood in class terms [or] other crosscutting divisions that represent the community’s participation in national life (region, gender, religion, and so forth)." They represent differences, in other words, but subsidiary ones that do not disrupt the identity of community itself. Meaningful community does not seem to exist on a more limited, less than all-encompassing level, and it is surprisingly and deeply homogenous.

By discrete, on the other hand, I mean that Kennedy sees communities as largely mutually exclusive. As he puts it, “[t]he crucial idea is that communities are made up of living individuals, but they have an element of transindividual stability and particularity; to be a member is to be situated, and [you] can be situated only in one or two places at a time.” To him, membership in one community necessarily excludes membership in most others.

Together these two characteristics anthropomorphize community. It is as if communities are larger versions of the traditional sovereign individuals of metaphysical liberalism. Each community is so different in nearly every respect from the others that we cannot judge one against another. We must simply respect their differences. It is Bork’s subjectivity on a grander, group scale. In scholarship, it means that as soon as we discover that a standard of judgment is culturally inflected, as they all are, we must back off. Imposing a culturally inflected standard on a different community would represent the wedge of cultural imperialism under the guise of neutrality.

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64. Kennedy’s notion of individuality as cultural production is quite difficult to appreciate at first. See KENNEDY, supra note 19, at 66-73. To my mind, it tracks the notion of “performativity” that Judith Butler has developed in some of her work. As she explains it, “Where there is an ‘I’ who utters or speaks and thereby produces an effect in discourse, there is first a discourse which precedes and enables that ‘I’ and forms in language the constraining trajectory of its will. Thus there is no ‘I’ who stands behind discourse and executes its volition or will through discourse. On the contrary, the ‘I’ only comes into being through being called, named, interpellated, . . . and this discursive constitution takes place prior to the ‘I’ . . . .” JUDITH BUTLER, Critically Queer, in BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX” 223, 225 (1993).

65. This is not to deny that the individual can in turn influence the community. As Kennedy puts the point in two places, “[a]ll the players are functions of the game, as well as vice versa,” KENNEDY, supra note 19, at 52, and “the ‘you’ who pursues preideological purposes is never in a purely instrumental relation to the ideology that consciously or unconsciously provides your framework and conceptual vocabulary. The frame remakes you through and through even as ‘you’ ‘use’ ‘it.’” Id. at 69. I read him here as saying, though, not that the community and the individual enjoy equal priority but that the individual, like any other artifact of and aspect of community, helps construct itself and other parts of the larger community.

66. Id. at 52.
67. Id. at 49 (second emphasis added).
This vision of community seems to me just as crude and simplistic—and therefore just as bad—as the metaphysical version of individualism that it is designed to replace. It simply is not the case that communities are usually mutually exclusive and monolithic in the way Kennedy assumes. Many people are at the same time members of very different communities—political, racial, ethnic, and religious ones, to name just a few—and each community may define only a few aspects of its members’ identities. People can even find themselves members of two conflicting communities at once, as lesbians and gay men within the Catholic church can attest. Communities, in other words, not only can stand separately, as Kennedy seems to assume they always do, but also can overlap, include one another, or command allegiance of completely different dimensions of their members’ personalities. In several parts of his piece, particularly when he acts to foreclose charges of essentialism, Kennedy seems aware of this complexity, but his central argument about cultural pluralism fails to understand it. In the end, anthropomorphism, not postmodern conflict and contradiction, does all the heavy lifting.

Kennedy’s move not only represents a failure of conceptualization but also misdirects his inquiry and may lead him to answer improperly the ultimate questions he asks. For example, if we accept the richer notion of community described above, saying simply that there are two different communities tells you little. On an issue like the value of some forms of critical race scholarship, for example, it will not do to say simply—even if correctly—that meritocratic standards are contingent. Instead we must ask whether the particular communities we are considering actually hold different contingent meritocratic standards and, if they do, which set is more useful for whatever purposes we hope to achieve through scholarship. That meritocratic standards are “ideological” in Kennedy’s sense does not mean that two different communities cannot share them. In fact, as some contemporary philosophers like Donald Davidson have pointed out, the fact that we can even interpret a different community means that we must share with them much in the way of social practices, beliefs, and desires, all or most of which are presumably contingent. If we do share a belief, our membership in different communities makes no difference for any purposes that belief delimits.

To me it seems helpful to refocus some of our debates this way. This is not to say, of course, that this redirection of inquiry will make things easier.

68. See, e.g., id. at 54.

69. This represents quite a change from Kennedy’s early theory in two respects. First, the division between individualism and altruism now operates less within than across persons. Instead of intrapersonal contradiction, Kennedy now finds separate, opposed camps. Some of us are individualists, some of us are altruists, and seldom the twain shall meet. Second, the altruists are clearly right. It is as an unconflicted altruist that Kennedy interprets social practice in his later essays.

It will not. Determining, for example, whether white academics and academics with ties to historically subordinated groups hold the same (admittedly contingent) meritocratic standards and, if they do not, which standards are more useful to the academic enterprise may be very difficult, particularly when there is disagreement about what the academic enterprise itself should be all about. If these questions are harder to answer, however, they are also more pertinent. Although they promise no easy solutions, they will at least move us towards positions in which whatever confidence we have will not be misplaced.

III. LIBERALIZING COMMUNITY: RONALD DWORIN

A. The Critique of Simpleminded Communitarianism

In some of his writings, Ronald Dworkin has tried hard to reconcile liberalism and communitarianism in a way that recovers the best from both. In *Liberal Community,* a contribution to a symposium addressing whether the criminal law should enforce conventional morality, Dworkin recognizes the strong claims communities have over their members. Communities, he admits, do have a communal life, and that life does help determine whether its members' individual lives are good or bad. He disagrees with communitarians primarily over the community's domain and the reach of its claims. As he puts it,

> The [common communitarian description of community] succumbs to anthropomorphism; it supposes that a communal life is the life of an outsize person, that it has the same shape, encounters the same moral and ethical watersheds and dilemmas, and is subject to the same standards of success and failure, as the several lives of the citizens who make it up.

This anthropomorphic conception, in short, holds that the life of the community is totalizing, encompassing all aspects of the individual lives of its members, including their sexual choices. It corresponds to the view implicit in Kennedy's later writings that a community determines all the important aspects of its members' identities.

Dworkin criticizes this view through the example of an orchestra. The orchestra undoubtedly has a collective life. Its members see it, not themselves, as the relevant unit of musical agency, and they receive praise or blame less as individuals than as members of the larger group. The orchestra's collective life, however, is limited. It does not extend to all aspects of

71. See Dworkin, supra note 9.
72. See id. at 492.
73. Id.
74. See id. at 500.
75. See id. at 493-96.
its members’ lives. In particular, the orchestra has no sex life, nor can it have headaches or high blood pressure. Although the members view some of their individual activities as expressive of and constituted by the larger entity, they do not view all or indeed most of their individual activities that way. The orchestra—under its own collective beliefs and practices—exerts strong but limited claims over its members.

So, too, Dworkin believes, for political communities, or at least our own. Despite what some vulgar communitarians may say, the state does not necessarily have a sex life. The extent of its communal life and the reach of its claims depend upon the social practices that constitute it. Do our social practices indicate that we believe our political community to be so encompassing? Dworkin thinks not. Whether one agrees with his interpretation of our particular political community is unimportant for our purposes. What matters is that one see that a community does not necessarily control any particular aspect of its members’ individual identities and that determining whether it does requires complex interpretation of social practice.

To Dworkin’s mind, political communities are unlikely ever to claim dominion over all aspects of a member’s identity. To the extent people find the experience of integration with a community desirable, they can and frequently do integrate with other, nonpolitical communities. Indeed, most often it will be easier to find community in family, clan, neighborhood, and religion than in the state. Such plural integration contradicts not only Kennedy’s first assumption about community, that it reaches nearly all aspects of its members’ identities, but also the second, that one cannot be a member of multiple communities at the same time. As Dworkin puts it, “[p]eople belong to a variety of communities and most people can belong to many more if they choose.”

76. See id. at 495. “Though the first violinist may be concerned about a colleague’s sexual habits or deviance, this is concern for a friend that reflects altruism, not self-concern for any composite unit of agency which includes him. His moral integrity is not compromised by the drummer’s adultery.” Id. at 496.

77. See id. at 495.

78. To Dworkin, determining whether the community’s claims stretch to a particular activity depends on three factors: (i) whether the particular activity is socially denominated as collective; (ii) whether the activity is “performed self-consciously, as contributing to [a] collective act, rather than as isolated acts that happen to coincide in some way”; and (iii) whether “the composition of the community . . . is tailored to its collective acts, so that a community’s collective acts explain its composition, and vice versa.” Id. at 495. He believes none of these three factors is satisfied with respect to sex. See id. at 497.

79. See id. at 498.

80. Id.
B. Reconstructing Liberalism

As the title *Liberal Community* itself suggests, that paper has another constructive aim. In addition to dispelling some common simpleminded visions of community, the paper seeks to question the perceived hostility of liberalism to community.\(^8\) *Law's Empire,\(^8\) Dworkin's larger, systematic piece in this same project, aims even more ambitiously. It tries to bring liberalism and community together by arguing that liberalism represents the best understanding of our particular political community and that community, not abstract metaphysical individualism, can best defend liberalism from critique. Together these two moves work to reground liberalism in community. In trying to pull this off, however, Dworkin recapitulates the problems he identifies in simpleminded communitarianism. The interpretation of liberal community he offers in *Law's Empire* shuts out the realistically complex notions of community he identifies in *Liberal Community* itself.

In *Law's Empire*, Dworkin argues for a conception of law and politics implicit in much of his earlier writings, a conception he calls "integrity."\(^8\) Integrity demands that the "state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are."\(^8\) In this way, we "personify" the state and take it as a single moral agent.\(^8\) In other words, we attribute to the state the coherence of value that we hope any single person would have.\(^8\) And such attribution, even in the face of individual citizen disagreement, can generate involuntary obligation.\(^8\) Like Rousseau's general will, people's agreement may lie beyond their comprehension but is no less the real for that.

Dworkin rejects any characterization of this view as "metaphysical."\(^8\) Although it takes personification seriously by imparting moral agency to the political community and speaking as if it were an entity distinct from its citizens, this view avoids metaphysics, to Dworkin's mind, because it denies the community any existence apart from the practices that make it up.\(^8\) The community exists because we believe and act as if it does, not because it has any prior, independent reality. Dworkin, like Kennedy, seems to believe that

\(^{81}\) See id. at 479.  
\(^{82}\) DWORKIN, supra note 9.  
\(^{83}\) See id. at 164-224.  
\(^{84}\) Id. at 166.  
\(^{85}\) See id. at 167-71.  
\(^{86}\) See id. at 168. This type of hope may be foolish. Individuals, as psychoanalysis teaches, can be riven with conflict. No source of authority—be it the community, the individual, or objective truth—is immune to this type of conflict and contradiction.  
\(^{87}\) See id. at 211-15.  
\(^{88}\) See id. at 167-68, 171.  
\(^{89}\) See id. at 171.
this social ontology allows him to escape many problems associated with individualism. But it does not.

The critical issue is not whether a personified community is metaphysical in this particular sense but, rather, whether it is "anthropomorphic" in the sense Dworkin describes and condemns in *Liberal Community*. Kennedy's problem, for example, resided in exactly this kind of anthropomorphizing. If Dworkin's communities are similarly anthropomorphic, then Dworkinian "personification" leads to the same kinds of simpleminded communities he attacks many communitarians for. Can we personify community without anthropomorphizing it? I think not, as Dworkin's own elaborate interpretation of our political community makes clear.

Dworkin distinguishes between two kinds of community. So-called "bare" communities are associations of individuals whose practices do not tie them together in a significant collective way. Most importantly, they have little or no sense of group responsibility. So-called "true" communities, on the other hand, do have such a sense of responsibility and see themselves as deeply collective. And, unlike bare communities, they can generate strong involuntary obligations for their members. This distinction proves important because, to Dworkin's mind, only communities that can generate such obligations can lay claim to their members' identities. In other words, only true communities count.

Dworkin sorts particular communities into one category or the other according to how well they meet four conditions. These conditions are (i) specialness, (ii) personalness, (iii) concern for others in the community, and (iv) equality. Another condition, reciprocity, is immanent in these four. Of these conditions, reciprocity and equality impose strong constraints on community identity. Reciprocity requires mutuality of responsi-

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90. See text accompanying note 69 supra.
91. See DWORKIN, supra note 9, at 201-02, 206-08.
92. See id. at 201.
93. See id. at 214 ("A community of principle ... can claim the authority of a genuine associ- cative community and can therefore claim moral legitimacy ... ").
94. "The question of communal obligation does not arise except for groups defined by practice as carrying such obligations: associative communities must be bare communities first. But not every group established by social practice counts as associative: a bare community must meet the four conditions of a true community before the responsibilities it declares become genuine." Id. at 203-04.
95. By specialness, Dworkin means that the responsibilities hold only within the group rather than among all persons. The obligations are "special" to the particular community. See id. at 199.
96. By personalness, Dworkin means that the responsibilities must "run directly from each member to each other member, not just to the group as a whole in some collective sense." Id.
97. See id. at 200.
98. See id. at 200-01.
99. Dworkin writes that "[r]eciprocity is prominent among [the required] conditions," id. at 198, but surprisingly he never actually lists it among them. See id. at 199-201.
bility. In other words, the community cannot generate a duty running from A to B without generating the same duty running from B to A. Dworkin is careful to say, however, that exact mutuality is unnecessary. Since social practice is interpretive, reciprocity requires only that community members act individually towards each other according to a collectively plausible account of what a particular duty requires. Thus, an individual never has to act exactly according to what another individual believes a particular duty concretely entails. So long as she acts within the range of social recognition, she will satisfy her obligation. Although reciprocity thus provides some tolerance, it also serves to ensure a high degree of consistency within community. Community agreement on many of the most important issues comes built-in.

Likewise, for equality. Although the fourth condition does not require that all community members be treated exactly the same, it does require that they be treated according to some culturally plausible account of what equality requires. The interpretive nature of equality thus allows some variation. A true community "may be structured, even hierarchical, in the way a family is, but the structure and hierarchy must reflect the group’s assumption that its roles and rules are equally in the interests of all, that no one’s life is more important than anyone else’s." To Dworkin, an army might meet this condition, but a caste system could not.

These two conditions ensure that all communities worth worrying over, that is, true communities, will be anthropomorphic. Take discreteness, the second characteristic of Kennedy’s community. Although in *Liberal Community* Dworkin notes that individuals can integrate with multiple communities, in *Law’s Empire* he is much more constrained. He allows multiple integration, but under conditions that rob it of any potential for conflict. Dworkin explores multiple integration in an extended hypothetical about whether a daughter has an obligation to defer to her parents’ wishes in a culture that gives parents the power to choose spouses for daughters but not for sons. In order for this to be a real moral issue, Dworkin must assume, although he never makes this clear, that the daughter feels that the norms of both the family’s culture and of liberalism lay some claim to her. She thus falls within two apparently true and conflicting communities at the same time.

Dworkin’s instinct is to try to make the conflict disappear. He asks first whether the culture—within its own terms—genuinely views women and men as equals. He suspects it does not. If that is the case, if the family’s

100. See *id.* at 198-99.
101. *Id.* at 200-01.
102. See *id.* at 201.
103. See Dworkin, *supra* note 9, at 498.
104. See DWORKIN, *supra* note 9, at 204.
culture does not justify parental control by good faith arguments of paternalism, we can safely ignore the conflict. Since the culture fails condition four, it is not a true community and so generates no binding obligations.\textsuperscript{105}

In the event the community is a true one, Dworkin tries another way to make the conflict disappear. He asks whether discriminating in this way against daughters is sufficiently inconsistent with other features of the family in the culture that the daughter may ignore this particular feature in the name of cultural integrity itself.\textsuperscript{106} If the feature does not survive such reinterpretation, the conflict once again disappears. In this case, the community is recognized as a true one, but the daughter's understanding of its demands exceeds the traditional one. She knows better than her parents, in other words, what being true to the traditional community consists of. In both this case and the prior one, the traditional culture gives way to liberalism. When faced with liberal culture, it either shrinks to a mere bare culture or remains true but reworks itself to conform miraculously to the demands of liberalism. Either way, it looks very different to its members than before.

Dworkin honestly admits a third possibility. The community could be true and the requirement of parental consent could fit other features of family life, which themselves conform to some notion of gender equality. This situation would presumably arise when a culture required paternalistic protection of women in all aspects of family life. If the family were not otherwise seriously unjust, if it did not require its members to commit crimes,\textsuperscript{107} for example, we would have a genuine conflict. The daughter would find herself in two true communities clearly pulling in opposite directions at the same time. Dworkin describes the problem as follows:

The other responsibilities of family membership thrive as genuine responsibilities. So does the responsibility of a daughter to defer to parental choice in marriage, but this may be overridden by appeal to freedom or some other ground of rights. The difference is important: A daughter who marries against her father's wishes, in this version of the story, has something to regret. She owes him at least an accounting, and perhaps an apology, and should in other ways strive to continue her standing as a member of the community she otherwise has a duty to honor.\textsuperscript{108}

In other words, the traditional culture again bends to liberalism. Its duties are trumped, somewhat cavalierly, by "freedom or some other ground of rights" generated by liberal culture. More revealingly, the daughter should not even feel confused or deeply conflicted. She knows what is right. To be sure, her choice is accompanied by regret, but she pays adequate respect to the traditional culture by according it the courtesy of an accounting or apol-

\textsuperscript{105} See id.
\textsuperscript{106} See id. at 205.
\textsuperscript{107} See id.
\textsuperscript{108} Id. (emphasis added).
ogy. In short, in Dworkin’s view, a person cannot be a member of two truly conflicting true communities at once. The nonliberal one either (i) is not a true community; (ii) is one, but under improved reinterpretation does not present a conflict; or (iii) is not worthy of real respect.

Dworkin’s interpretation of our political community also exhibits the other unhappy feature of Kennedy’s community: monolithicness. Monolithicness has two components: uniformity and totalitization. Dworkin’s condition of reciprocity, as already noted, ensures a high, though not complete, degree of consistency within a true community. An obligation simply does not “take” unless all others within the community understand it to run in some culturally plausible form to them. In this sense, values command all or none. The conditions of true community exclude any great dissonance.

Perhaps to rescue true community from the charge of descriptive implausibility, Dworkin admits disagreement on some occasions. Whenever he does, however, he carefully limits its consequences in order to save his notion of personification. People within a true community can disagree but only over what integrity requires in a particular situation, not over whether they live within a personifiable set of beliefs and practices. In other words, integrity may pose practical but no theoretical problems. If people disagree, they do so because they have different views of what their common practices require, not because they have different practices. The range of disagreement reciprocity permits thus never threatens the immanent integrity of the underlying scheme.

Dworkin’s interpretation of our political community is also totalizing. Like Kennedy’s, it reaches nearly all aspects of individual identity. This claim may surprise since communitarians commonly complain that liberalism privatizes too much experience, leaving whole realms to be ruled by individual choice. Liberalism, they lament, says nothing about many aspects of identity. But this is not true of at least Dworkin’s liberalism. His is not really silent as to the areas it privatizes. As his hypothetical about marriage, one of our most private decisions, indicates, liberal norms of equality govern all realms of experience and exclude claims of other communities.

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109. See text accompanying notes 99-100 supra.

110. See DWORKIN, supra note 9, at 188-90, 211 (noting that individuals may disagree with others over the best interpretation of their common “scheme of justice” for particular encounters, although members of a community share a system of principles allocating rights, duties, and procedures for resolving disputes with integrity).

111. See id.

112. Dworkin’s discussion throughout the book focuses on political obligation and the conditions that lead to it. In several places, however, as in the hypothetical, he discusses ethical and other values in the same way. At one point, in fact, he treats political aspects of identity as continuous with other aspects. He writes:

Integrity . . . fuses citizens’ moral and political lives: it asks the good citizen, deciding how to treat his neighbor when their interests conflict, to interpret the common scheme of justice to
Dworkin’s liberal community imposes an ideology of choice respectful of equality, which may, to be sure, be more congenial, open, and flexible (to us) than other ideologies, but it remains a totalizing ideology nonetheless.

Dworkin’s criticisms of simpleminded anthropomorphism, then, ultimately come round to sting Dworkin himself. His communities, the ones that count anyway, are both monolithic and discrete. And, although his conception of community is in its particulars quite different from Kennedy’s, it is just as simplistic. Kennedy at least envisioned the possibility of real conflict between communities, even if he allowed no conflict within an individual herself. Dworkin does not even go this far. When he personifies liberal community, he squeezes all other communities out. There is but one true community in Dworkin’s world, and its name is liberalism. And, as Dworkin’s unflagging confidence in resolving our great public controversies like abortion\(^\text{113}\) and affirmative action\(^\text{114}\) suggests, the face of personified liberal community is Ronald Dworkin’s itself.

IV. COMMUNITIES OF SEX: ROBIN WEST

A. The Masculine Structure of Jurisprudence

Robin West makes the sweeping claim in her work that one “commitment underlies virtually all of our legal theory.”\(^\text{115}\) That commitment, which she calls the “separation thesis,”\(^\text{116}\) holds that “[w]hat separates us is in some important sense prior to what connects us—epistemologically prior as well as morally prior. We are distinct individuals first, and then we form relationships and engage in co-operative arrangements with others; hence the priority of plurality over unity.”\(^\text{117}\) In short, she sees metaphysical individualism structuring nearly all brands of contemporary jurisprudence.

The sweep of her claim should surprise. It captures not only traditional liberal legal theory, but its opposite, critical legal theory, as well, even though critical legal theory criticizes liberal legal theory for exactly this commitment.\(^\text{118}\) Of the two, liberal legal theory, the predominant, “official,” which they are both committed just in virtue of citizenship. Integrity infuses political and private occasions each with the spirit of the other to the benefit of both. Id. at 189-90 (footnote omitted). Liberal integrity thus governs all important aspects of individual identity.

\(^{113}\) See generally RONALD DWORIN, LIFE’S DOMINION (1993).

\(^{114}\) See DWORIN, supra note 9, at 393-97.

\(^{115}\) West, supra note 8, at 2.

\(^{116}\) Id. at 1.

\(^{117}\) Id. at 2 (quoting SANDEL, supra note 1, at 133). According to West, this is the “definitive restatement” of the separation thesis. See id.

\(^{118}\) See West, supra note 8, at 5. West argues that the basis of the critique of liberal legal theory as formulated by critical legal theory is, ultimately, a “story of inner lives dominated by feelings of alienation and isolation from the separate other, and enlivened by the possibility of asso-
strand of jurisprudence in our legal culture, more clearly reveals this commitment. In its view, human separateness and individuation are cause for celebration. It is our fundamental distinctness from one another that permits us freedom from each other, which in turn permits political autonomy and equality. This is the “up side” of separation. Autonomy, freedom, and equality all “feel very good.”

Separation also has a “down side,” however. If we are separate from one another, we are not only free from each other’s claims but also vulnerable to one another. Since your ends are only yours and may conflict with mine, you may seek to annihilate me. Without me, you may be able to pursue your ends better. Under this account, our separation determines both our greatest values (freedom and autonomy) and our greatest fear (annihilation). Hobbes had it about right. Although we may disagree with his precise prescription for how to maximize autonomy while minimizing the threat of annihilation, that is the correct task of both liberal law and politics.

Critical legal theory starts from the same assumption of separateness but develops its implications differently. The difference is that critical legal theory laments what liberal theory celebrates. Instead of leading to freedom, separateness leads to a longing for community, attachment, unification, and connection. These are its values. But separateness also leads us to feel and to fear loneliness, the absence of connection to another. In contrast to liberalism, the critical view holds that “[t]he separate individual seeks community—not autonomy—and dreads isolation and alienation from the other—not annihilation by him.” The critical position, then, starts from the same understanding of identity but develops an opposite phenomenological description of what it means.

119. Id. at 6.
120. See id.
I can form my own conception of the good life, and pursue it. Indeed, any conception of the good which I form, will necessarily be my conception of the good life. That freedom must be respected. Because I am free, I value and have a right to autonomy. You must value it as well. The state must protect it. This in turn implies other (more contested) values, the most important of which is (or may be) equality.

121. See id. at 7.
122. Id.
123. See id.
124. See id.
125. See id. at 9
126. Id. at 10.
West believes we bridge this contradiction by wallowing in it. Drawing on Kennedy's idea of a fundamental contradiction within consciousness, she argues that we understand ourselves in both these contradictory ways at once. Liberal and critical descriptions are both accurate—and both inaccurate—because we live both ways ourselves. We love our separateness and we long to end it; we fear both annihilation by and alienation from others. And, she claims, our laws reflect it: “[A]s any good law student knows, on an empirical level Kennedy is clearly right: our legal doctrine, or at least our legal ideology, does indeed reflect the contradictory fundamental urges that Kennedy has identified. . . . [T]he ‘Rule of Law’ itself reflects the fundamental contradiction.”

If we are conflicted, however, we are conflicted between two views that ultimately embody the same, single, deep assumption: the separation thesis.

West believes, moreover, that most feminist legal theory rests on this assumption, too. She divides prevailing feminist legal theory into two camps—liberal and radical—both of which appropriate norms from outside feminism to assess women’s welfare. Liberal legal feminists start with the idea that women are the same as men. In particular, “[w]omen, like men, are autonomous individuals who, if free to do so, will choose among proffered alternatives so as to fashion their own ‘good life,’ and thereby create social value.” As in Bork’s view of liberalism, this view holds that social value consists only of “satiation of the subjective desires and preferences of the individual.” Absent harmful externalities, what’s good for the individual is good for society. Indeed, that is the only meaning social value can have. In this view, the proper role of law is to maximize opportunities for private choice. Individual freedom is the ideal.

Liberal legal feminists embrace this account as a normative matter but believe we fail to live up to it in practice. In particular, they note that although this picture purports to describe all humans, it actually describes only men. Men enjoy the autonomy it rests on; women do not. Men can choose;

127. See Kennedy, Blackstone’s Commentaries, supra note 5, at 211-13 (arguing that the community we require in order to become persons also threatens to destroy us).
128. See West, supra note 8, at 51.
129. Id. at 52.
130. See Robin L. West, The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 WIS. WOMEN’S L.J. 81, 87 (1987) (“The two major normative models of legal criticism which feminist legal theorists have thus far embraced [are] liberal legalism and radical legalism . . . .”).
131. See id. at 87 (“[F]eminist legal theorists have adopted non-feminist normative models of legal criticism, and then applied those models to women’s problems.”).
132. Id. at 83.
133. See text accompanying notes 22-32 supra.
134. West, supra note 130, at 91.
135. See id.
136. See id. at 90-93.
women cannot. Women, in other words, have the same essential nature as men—what West calls the “liberal self”—but, unlike men, they are unable to enjoy it. Their autonomy is frustrated at every occasion. To liberal legal feminism, the solution is clear. Women should be able to choose as freely as men. They, too, should be allowed to be their liberal selves, to “satiat[e] their subjective desires through consensual choices.” Through its thorough appropriation of liberalism, then, liberal legal feminism adopts the “separation thesis” of mainstream legal scholarship as a description of women’s true identity.

Radical legal feminism ultimately adopts this same deep description, although it does so very differently. It, too, begins with a description of essential human nature. Borrowing from traditional radical scholarship, it assumes that people’s well-being depends upon their having power equal to everyone else. All human beings, in this view, “suffer from relative disempowerment and inequality, and will therefore benefit from empowerment and equality.” Power is all, and equal power is what makes people happy.

The problem to radical legal feminists is that, while both men and women can suffer from disempowerment, women are as a class disempowered relative to men. As West puts it,

Women and men are not equally autonomous individuals. Women, unlike men, live in a world with two sovereigns—the state, and men—and this is true not just some of the time but all of the time. Women, unlike men, are definitionally submissive twice over; once vis-a-vis the state, and once vis-a-vis the superior power of men.

To radical legal feminists the solution is clear: Equality will be the “script for salvation.” The law should seek to make women just as empowered as men; women should become “equally autonomous individuals.” This marks both radical and liberal legal feminisms’ difference and ultimate congruity. Whereas liberal legal feminism sees women’s happiness springing from autonomy, radical legal feminism sees it springing from equal autonomy.

But both views celebrate autonomy. In other words, radical legal feminism adopts the “separation thesis” of mainstream legal theory just as completely as liberal legal feminism does. As West puts it, “[b]oth the liberal and the radical [feminist] legalist have accepted the Kantian assumption that

137. Id. at 91.
138. See id.
139. Id.
140. See id. at 113.
141. Id. at 115 (emphasis omitted).
142. Id. at 112 (footnote omitted).
143. Id. at 115.
to be human is to be in some sense autonomous—meaning, minimally, to be differentiated, or individuated, from the rest of social life.”

West sees a big problem: The “separation thesis,” “while ‘trivially true’ of men, [is] patently untrue of women.” “Women,” she continues, are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women, distinctively, are quite clearly “connected” to another human life when pregnant. In fact, women are in some sense “connected” to life and to other human beings during at least four recurrent and critical material experiences: the experience of pregnancy itself; the invasive and “connecting” experience of heterosexual penetration, which may lead to pregnancy; the monthly experience of menstruation, which represents the potential for pregnancy; and the post-pregnancy experience of breast-feeding. Indeed, perhaps the central insight of feminist theory of the last decade has been that woman [sic] are “essentially connected,” not “essentially separate,” from the rest of human life, both materially, through pregnancy, intercourse, and breast-feeding, and existentially, through the moral and practical life.

This is the “connection thesis.” Women’s lives are fundamentally different from men’s. Women are materially connected to others, and their connection has existential consequences. In particular, it means that they do not see themselves as sovereign individuals prior to the community of which they are a part. Instead, they see themselves as facets of a prior community and web of relationships. In short, “[w]omen’s lives are not autonomous, they are profoundly relational.”

Women’s relationality contradicts the descriptions both liberal and radical feminist legal theory apply to women. For various reasons ranging from women’s preganibility, to their training for the role of caretaker, and to their fear of male sexuality, women aim not to maximize their own interests, but to maximize others’. They aim to please—not themselves, but others—and so become selfless “giving selves” who define their own welfare according to that of others. Their needs are serving the needs of others; their desires are to satisfy the desires of others. As West writes, women “embrac[e] a self-definition and a motive for acting which is the direct antithesis of the internal motivational life presupposed by liberalism.”

Her critique of radical feminist legal theory runs a bit differently. Whereas relationalism leads her to question liberal legal feminism’s adoption

144. Id. at 140.
145. West, supra note 8, at 2.
146. Id. at 2-3.
147. Id. at 14.
148. See id.
149. West, supra note 130, at 140.
150. See id. at 93-94.
151. Id. at 93.
152. Id. at 97.
of liberal autonomy as a description of women, it also leads her to question radical legal feminism’s adoption of equality as a description of women. Through exploring women’s erotic lives, she comes to question and ultimately reject radical legal feminism’s location of women’s pleasure in equality. As she writes, “women report . . . that equality in sexuality is not what we find pleasurable or desirable. Rather, the experience of dominance and submission that go[es] with the controlled, but fantastic, ‘expropriation’ of our sexuality is precisely what is sexually desirable, exciting and pleasurable.”153 In other words, radical legal feminism pursues equality even when it conflicts with women’s true desires as revealed by feminist consciousness raising. The problem West sees is not just that radical legal feminists are violating women’s feelings in the name of equality, but more importantly that equality violates one fundamental aspect of women’s identity: the need to trust.154 Equality, in her view, is profoundly antirelational. It ignores dependence: the dependence of the fetus on the woman carrying it, the dependence of a baby on its mother’s milk, and the dependence of a woman, vulnerable under penetration, on the stronger man. This need to trust represents a major aspect of women’s identity.

West’s notion of gender identity springs from a conception of strong community, here sexual community. She sees women and men as fundamentally different from each other and members of each group as fundamentally the same. In other words, she believes the groups are discrete and monolithic. She focuses mostly, of course, on men and women’s discreteness since she believes that nearly all jurisprudence and legal theory err by seeing women the same as men. To her, their difference encompasses nearly everything or at least everything important. According to her, “[t]he difference [between women and men] permeates virtually every aspect of our lives,”155 and the difference is a marked one: “[Women’s] potential for material connection engenders pleasures and pains, values and dangers, and attractions and fears, which are entirely different from those which follow, for men, from the necessity of separation.”156 Their commonalities are minor and unimportant.

153. Id. at 116-17.
154. West writes:
The lesson—the truth—of the erotic pleasure many feel in controlled submission may be this: while we crave liberal autonomy and radical equality, while we crave the freedom which the liberal feminist pursues and the equality the radical feminist envisions, at least in this society as it is presently constituted, we also crave—because we also need—the capacity to trust one another, including those who are stronger than we are. The weak and the strong are in fact interdependent in this society—we aren’t equally autonomous individuals—and what that means is that the weak need to be able to depend on the strong.

Id. at 132.
155. West, supra note 8, at 17.
156. Id. at 14 (emphasis added).
So, too, each group effectively totalizes its members' identities in a uniform way. To West's mind, the effects of women's connectedness and men's separateness "permeat[e] virtually every aspect of [women's] lives," certainly all significant aspects. As she writes, women's fundamental relationality "defines women's subjective, phenomenological and existential state .... [It] entails a way of learning, a path of moral development, an aesthetic sense, and a view of the world and of one's place within it." It extends from emotions and affects everything from "pleasures and pains, values and dangers, and attractions and fears" to "cognitive development, literary sensibility, aesthetic taste, and psychological development" and to morality and politics. There is no significant aspect of identity it does not sweep in. Just as important, it tends to sweep (or perhaps paint would be the better metaphor) all women with the same brush. Since all these differences ultimately spring from women's "biological, reproductive role," the "potentiality for motherhood" rather than its actuality, these differences extend to virtually all women in a similar fashion. This is not to say, of course, that all women are absolutely identical, just that in these fundamental ways they are identical to each other and different from men. West, in other words, recapitulates on the level of gender the assumptions of autonomy she criticizes on the level of individuals. Women may not be distinct as individuals, but as a group they are distinct from men. Women's taste for sadomasochism, it turns out, may refute Kant, but it entrenches both sexual difference and sexual group identity. West succumbs to anthropomorphizing identity, then, just when she believes she has triumphed over these same assumptions as to individual selves.

B. Categorical Community and the Central Debates of Feminist Theory

Feminist legal theory, like many other brands of contemporary legal theory, has often succumbed to categorical community. Unlike these other brands, however, feminist legal theory—and feminist theory more generally—have worried over its dangers. Indeed, the two central and seem-

157. Id. at 17.
158. Id. at 14-15.
159. Id. at 14.
160. Id. at 17.
161. See id. at 17-18.
162. West, supra note 130, at 140.
163. Id. at 141 (emphasis added).
164. Critical race theory has also worried over these dangers. The whole debate over the "voice of color," for example, concerns the differences between how whites and blacks view the world and the depth of those differences. Compare Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (arguing that differences are stark and extend to nearly all significant aspects of identity), with Alex M. Johnson, Jr., Racial Critiques of Legal Academia: A Reply in Favor of Context, 43 STAN. L. REV. 137, 160-63
ingly independent theoretical debates within feminism, the same-
ness/difference and essentialism/antiessentialism debates, are actually de-
bates over the two characterizing features of categorical community. At
bottom, the sameness/difference debate concerns the discreteness of men and
women, while the essentialism/antiessentialism debate concerns the monoli-
thicness of gender identity.

The sameness/difference debate addresses whether women are funda-
mentally the same as or different from men.165 Liberal feminists take the
sameness side in this debate. Believing that women are fundamentally the
same as men, they argue that women should enjoy all the opportunities that
men do.166 Women should have the same social, political, and civil rights, as
well as the same economic power to exercise them effectively. They admit,
of course, that women differ from men in their reproductive capacities but
believe that this particular difference entails no further significant conse-
quences.167 Equality demands, then, allowing women the same freedom that
men enjoy and allowing them the same power to enjoy it. Women, in this
view, are basically "men in skirts." They think, act, and talk as men—only
their dress is different. Like Scotsmen in kilts or priests in cassocks, they are
men in an untraditional costume.

Difference feminists, especially so-called cultural or relational feminists,
reject this description. They hold that women differ fundamentally from
men. To some, like West, women’s different reproductive capacities mark
not a superficial but a deep difference, a difference from which many others
spring.168 Other relational feminists, while recognizing that reproduction
does represent a difference, remain agnostic as to how significant it is and
identify other differences as primary. Carol Gilligan, for example, the most
influential and most well-known difference feminist, argues that women both
reason differently and value differently than men do.169 Whereas men think

165. See Joan C. Williams, Dissolving the Sameness/Difference Debate: A Post-Modern Path
Beyond Essentialism in Feminist and Critical Race Theory, 1991 DUKE L.J. 296, for a description
of this debate and of its implications in various fields of law.

(reviewing Catharine A. MacKinnon, Feminism Unmodified (1987)) (using term of "difference"
to describe liberal feminism); see also Martha Minow, Introduction: Finding our Paradoxes,

167. See Wendy W. Williams, Equality’s Riddle: Pregnancy and the Equal Treatment/Special

168. See West, supra note 130, at 140-41.

169. See generally Carol Gilligan, In a Different Voice: Psychological Theory
And Women’s Development (1982).
hierarchically, acontextually, and abstractly, women think contextually; whereas men value autonomy, women value relationship to others.  

This debate between liberal and difference feminists corresponds to the debate between metaphysical individualists and categorical communitarians. The first side of both debates sees all humans as at bottom the same. Both liberal feminists and metaphysical individualists believe that people in different groups can have different tastes and values and express different preferences. They both believe, however, that these differences are subsidiary ones that do not reflect people’s fundamental identity.  

Difference feminists and categorical communitarians, on the other hand, see people in some particular groups, especially gender groups, as fundamentally different. On certain questions, people from different groups—even men and women—can, of course, arrive at the same answer, but only because two different paths may sometimes lead to the same place. The feminist sameness/difference debate, then, is really a debate about discreteness. To what extent are men and women really different, and how deeply do their differences matter? Does it make more sense to think of men and women as humans with superficial differences or as members of separate groups who sometimes exhibit superficial similarities?  

This debate also plays out in feminist legal practice, as the recent litigation involving the Virginia Military Institute (VMI) demonstrates. VMI, a state-funded military institute, excluded women. It defended its exclusion policy by claiming that the presence of women would destroy its unique adversative training program. The United States sued, however, contending that women could take advantage of the program without undermining VMI’s mission. The district court upheld the exclusion on the grounds that VMI’s single-sex status and distinctive adversative educational method enhanced the diversity of Virginia’s higher education system. Admitting women, it felt, would destroy both features.

The court of appeals reversed and found a clear violation of equal protection. After all, the state did not have an even remotely analogous program for women. The court refused, however, to strike down the admissions exclusion; rather, it gave VMI three options: admit women, go private, or


171. Compare Williams, supra note 165, at 308 (“[S]ameness arguments ... claim that people who are as 'obviously' different as men and women ... are actually the same.”), with Bork, supra note 17, at 10 (discussing very different aspects of personality and belief as all on a par with mere “gratifications”).


start up a comparable—"separate-but-equal"—program for women.175 VMI took the last option and founded the Virginia Women’s Institute for Leadership (VWIL), a military training program for women at Mary Baldwin College, an all-women’s school.

On remand, the district court approved the plan even though VWIL provided none of the adversative training that men received at VMI.176 Relying on the testimony of Elizabeth Anne Fox-Genovese, a prominent difference feminist, the district court determined that the schools’ different programs reflected real, underlying differences between the sexes.177 Indeed, this was the flip side, so to speak, of the reasoning in the district court’s earlier opinion. Just as the first opinion held that the differences between men and women justified excluding women to preserve the unique educational environment for men,178 so, too, the later opinion held that those differences justified excluding men and the adversative pedagogies believed appropriate for their education from this environment for women.179 Because of their basic differences, mutual exclusion and different cultures were the only ways to lead men and women to the same point: “If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination.”180

The Supreme Court ultimately rejected VMI’s position. It found no substantial evidence to support the state and district court’s assertion of difference. Indeed, it argued that difference was merely a self-fulfilling prophecy, a form of invidious discrimination disguised as necessity: “The notion that admission for women would downgrade VMI’s stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other self-fulfilling prophecies... once routinely used to deny rights or opportunities.”181 An understanding of the politics of difference underlies the Court’s rejection of VMI’s plan. While difference proponents may celebrate women’s distinctiveness and thereby lend women unique dignity, difference rhetoric may also, as the Court understood, be used to exclude women in the name of protecting their special virtue. Under the guise of respect, difference rhetoric may deny women concrete opportunities.

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175. See id. at 900.
177. See id. at 480-81.
179. 852 F. Supp. at 480-81.
180. Id. at 484.
181. 518 U.S. at 542-43 (footnotes and internal quotation marks omitted).
Feminist theory has long sought to resolve this sameness/difference conflict. To my mind, the most successful attempts at resolution have sought either to break down the opposition by localizing it or to overcome it by analyzing it politically. Joan Williams, for example, takes the first course. She argues that men and women are both alike and different from one another. For some purposes, they are the same or should be treated the same; for others, they are different and should be treated differently. Most people presumably believe, for example, that men and women are equally capable of making political decisions and so should be allowed to participate in politics on equal terms. On the other hand, most would presumably believe that men and women do not have identical reproductive capacities and so would allow some difference in treatment in this respect. Williams urges us to throw away any global description of men and women as either the same or different and instead settle for the messy and contentious task of describing individual features of their lives one way or the other.

Catharine MacKinnon, one of the most prominent feminist legal theorists, prescribes a somewhat different strategy. Her dominance feminism tries to get beyond sameness and difference by looking at the overall standing of men and women. Once we do that, she believes we will see that gender is not a question of similarities and differences but a "matter[] of imposed status." We will come to "se[e] the inequalities of the social world from the standpoint of the subordination of women to men," which, to her, is the proper "feminist" perspective.

This is, of course, an unabashedly political approach. It does not proceed, as Joan Williams's approach does, by asking whether individual differences between women's and men's treatment reflect women's true condition. Such an approach, MacKinnon believes, implicitly endorses men's perspective. Rather, her dominance approach proceeds through a process of "con-

182. See Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 798 n.2 (1989) for a representative sample of works that identified sameness/difference in the mid-to-late 1980s as the fundamental divide in feminist theory.

183. See Williams, supra note 165, at 307 ([A]lthough race and gender may prove determinative in some particular context, this is a far cry from a reified 'minority perspective' or 'women's voice' that determines how a given individual will react in every situation.

184. See id. at 308-09.

185. See id. at 307-08.


187. Id.

188. See id.

189. See id. at 44 ("In the dominance approach, sex discrimination stops being a question of morality and starts being a question of politics.

190. See id. at 34 ("Gender neutrality is...simply the male standard...").
which allows women to begin to understand themselves from their own subordinated perspective. This process looks at the totality of women’s lived experiences in order to “reveal[] and document[] the kind of world women inhabit socially and some of what it feels like for them to inhabit it, how women are systematically deprived of a self and how that process of deprivation constitutes socialization to femininity.”

By analyzing women’s felt insults, exclusions, and degradations, consciousness raising creates space for women to understand the innumerable ways in which male power subordinates them.

Under MacKinnon’s approach, similarity and difference do not matter. What matters instead is whether existing social practices devalue women—regardless of how those practices treat men. While a woman may ask in interrogating a particular social practice whether it treats men and women the same or differently, she does not have to—sameness and difference may simply not bear on subordination.

Yet, as Mary Anne Case has noted, the situation is not really so simple. In critically evaluating whether a social practice subordinates them, women must at some point ask how men are treated. Without asking that question—either with respect to the particular practice, related practices, or all social experience—women cannot judge their own power relative to men, which is what subordination and hierarchy are all about. Looking just at how a social practice treats them may tell women they are powerless, but subordination requires more. It requires that the oppressors themselves be more powerful. At some point, then, women must compare how the two groups are treated, and they must evaluate justifications offered for those practices they feel to be oppressive. Otherwise, their analysis of social practice is hardly critical, as MacKinnon’s consciousness raising demands.

Powerlessness may be oppressive but it is hardly subordinating with respect to other, equally powerless groups.

By rejecting both global sameness and global difference, Williams and MacKinnon complicate the notion of community. They claim the existence of a women’s community but admit its overlap with men’s. In other words, while they posit two gender communities in rejecting sameness, they simultaneously deny these communities’ discreteness in rejecting difference. Men and women, as groups, can differ without differing in everything, just as they

191. For a full description of this process, see CATHARINE A. MACKINNON, Consciousness Raising, in TOWARD A FEMINIST THEORY OF THE STATE 83 (1989).
192. Id. at 89.
193. See Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1, 102 n.359 (1995) (arguing that MacKinnon “doesn’t quite succeed in allowing one to avoid a commitment to sameness or difference in answering” the question “whether [a social practice] contributes to the subordination of women”).
194. See MACKINNON, supra note 191, at 101.
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can, as groups, be in some ways the same without being everywhere identical. To my mind, this type of description paints a much more accurate, complex, and detailed picture of both groups. While giving up discreteness may disable us from making striking claims, like West’s, about men and women, it may allow us better to discover and understand both groups’ actual needs and values.

The essentialism/antiessentialism debate in feminism concerns the other feature of categorical community: monolithicness. This debate asks how uniform the category of women is. To what extent do all women have the same identity?\textsuperscript{195} The antiessentialists make two claims. First, much feminist theory, including feminist legal theory, has tended to describe all women identically regardless of their actual differences.\textsuperscript{196} Black women, poor women, lesbians, and rich white women are all lumped together as the same: as women “unmodified.” The antiessentialists admit, of course, that women share certain minimal characteristics, but they ask whether the people who share these particular traits are really in any meaningful way the same? After all, many of these women’s values, needs, and experiences, particularly their experiences of oppression, are different. Poor black lesbians lead quite different lives than rich white heterosexual women. While most feminist theorists acknowledge differences among women, the antiessentialists claim that many do so in a way that trivializes these differences. Although they may nod in a footnote or two to certain differences, they never allow these differences to guide or disrupt their description of the category “women.”\textsuperscript{197} Most feminists, according to this critique, acknowledge difference in a way that robs it of any significance. And, in fact, many essentialists at times suggest that focusing on differences impedes women’s progress by threatening women’s unity—at least their unity of description.\textsuperscript{198}

Second, the antiessentialists argue that lumping all women together into a single homogenous group has a very bad effect: It not only misdescribes many women’s lives but also erases many women’s actual identities. By taking the feminist theorists’ own experience—largely that of upper-middle class, white, heterosexual women—as central, this lumping together asserts a commonality that attempts to appropriate the identity of other, different


\textsuperscript{196} See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 585 (1990) (criticizing the gender essentialism of MacKinnon and West).

\textsuperscript{197} See id. at 592-93, 595-96 (discussing Catharine MacKinnon).

\textsuperscript{198} See Jane Flax, Postmodernism and Gender Relations in Feminist Theory, 12 SIGNs 621, 633 (1987) (“[W]ithin feminist theory a search for a defining theme of the whole or a feminist viewpoint may require the suppression of the important and discomforting voices of persons with experiences unlike our own. The suppression of these voices seems to be a necessary condition for the (apparent) authority, coherence, and universality of our own.”).
women for the writer’s particular cause. This not only makes much feminist thought irrelevant to the lives of many women but also helps maintain the privilege that “typical” women—i.e., upper-middle class, white, heterosexual women—enjoy. In other words, feminist essentialism achieves a unitary women’s identity at the cost of reinforcing other traditional forms of oppression, such as those of race, class, and sexual orientation. In this view, essentialists are not just insufficiently attentive to the importance of women’s differences but are also complicit with many dangerous forms of oppression.

The two central theoretical debates in feminism, then, are debates over the two central features of categorical community: discreteness and monolithicness. Even more interesting, perhaps, is the relationship these two seemingly independent notions—both in feminism and more generally—bear to one another. It is hardly surprising, for example, that sameness and difference language structures both the sameness/difference debate and the debate over different communities’ discreteness. After all, discreteness measures difference between groups: Discrete groups are different; nondiscrete groups are the same. It is less obvious, however, that difference/sameness language should structure the essentialism/antiessentialism debate and the debate over whether a particular community is monolithic. These debates, after all, concern whether a meaningful community exists, not whether it shares fundamental features with another. But on further thought we can see that these two seemingly independent concerns are actually related. Sameness/difference and discreteness ask the identity question across communities: Are two groups largely similar or different? Essentialism and monolithicness, on the other hand, ask the same question within a particular community: Are people in the same group largely similar or different? The inquiry, however, is the same in each case. Although essentialism and monolithicness address domestic affairs while sameness/difference and discreteness address foreign relations, they ask the same question.

CONCLUSION

Most of the major currents in legal theory over the past twenty-five years share a premise and object of attack. Belief that community represents the proper unit of social and political analysis is the premise, whereas legal liberalism, the belief that the individual represents the appropriate unit of such analysis, is the common target. Shifting the frame of analysis away from the individual to the group to which the individual belongs overturns or at least

199. See ELIZABETH V. SPELMAN, INESSENTIAL WOMAN 165 (1988) (arguing that essentialist feminism universalizes the particular experiences of white middle-class women); see also Harris, supra note 196, at 588 (arguing that gender essentialists associate the experiences of privileged, straight, white women with all women).

200. See SPELMAN, supra note 199, at 166-67.
complicates many of the accepted normative underpinnings of traditional legal analysis—concepts like individual autonomy and choice. The critics who proceed from community are right to question the starting point of much liberal legal theory—the free-standing, ontologically unencumbered self. The community does matter to identity in a way traditional liberal legal theory cannot well account for. Community does at least partly constitute the individual and is not wholly reflective of unencumbered individual choice. Unfortunately, however, these critics of legal liberalism recreate what they would destroy. Just as much legal liberalism rests its analysis on autonomous, free-standing individuals, the critics rest theirs on autonomous, free-standing communities. In both cases, the fundamental units of social analysis are monolithic and discrete. Only the size of the unit—the person or the community—is different.

This move to categorical communities—ones that are both monolithic and discrete—leads to many problems. For one thing, it is false. Communities, for the most part, do not possess these two features. As feminist theorists and many critical race theorists have pointed out, most common identity categories are anything but monolithic. Women and blacks, for example, vary much among themselves.201 The life of a rich, white, married woman without children may share little of importance with the life of a poor, black, unmarried mother of two. Ignoring these kinds of differences means that the master category will, whatever its definition, seriously misdescribe many of the people in it.

Second, monolithic identity categories entail certain kinds of politics. Taking either of the above descriptions of particular women as definitive of the whole group, for example, centralizes the concerns of those particular women.202 While it ostensibly enlists all women behind those concerns, it actually marginalizes women who are different. Taking a third, different group of women as typical would, in turn, marginalize to varying degrees both these first two groups. In general, creating a monolithic identity category where none really exists privileges the members of the group who match the description—who, not surprisingly, often happen to be those who created the category in the first place—while marginalizing every other group member. That we often view as typical those whom we already privilege, as when we view upper-middle class white women as typical of all women, threatens to reinforce existing forms of oppression.

Third, most common identity groups are not discrete. A black woman is both a black and a woman, and her personal identity is partly defined by the cross-cutting claims of these two different groups. For some purposes, she may perhaps be considered a member of one group; for other purposes, a

201. See text accompanying notes 164-165 supra.
202. See text accompanying notes 195-199 supra.
member of the other; for other purposes still, a member of both. In fact, for some purposes, the claims of both may be strong enough and conflict enough that the person cannot meaningfully be described as a member of either. Unescapable conflicts between communities may produce a creature of neither, like the child raised as a member of two conflicting religious traditions who, as a result, grows up with a strong intellectual appreciation of both but without belief. Personal identity often springs from the complex overlapping of and conflict between different communities, each of which exerts membership over the individual. In these cases, identity is multifaceted, complex, and highly provisional, and describing a person as a member of only one group fundamentally misdescribes him. Maintaining a theoretical purity of identity thus seriously misrepresents who we are.

Given the serious problems with categorical community, what explains it? Angela Harris has offered four different explanations: its intellectual ease; the emotional safety it offers to some, particularly to underprivileged members of the group; the opportunity it provides members of the group to play power games among themselves and with others; and our cognitive need for categories to organize experience. Each plays an important role and she discusses them all well. I want to offer yet another explanation, however. Categorical community is a powerful political tool. Just as the simplifying assumptions of metaphysical individualism allow one to generate all sorts of political results (from respecting individual autonomy to the primacy of certain rights) so, too, does categorical community—just different ones. Its simplifying assumptions—in particular, that each person belongs in only one community and that each community is everywhere the same—are exactly what allow it to do its political work.

First, assuming discreteness and monolithicness avoids much messy and contentious intellectual analysis that can frustrate political identification and activity. Gone are debates about which of several, perhaps competing marginalized communities can lay claim over particular aspects of a person’s life. Such debates can only drive wedges between groups that otherwise might share a political agenda, making individual identification with any of the groups more difficult or at least more tentative and partial. Second, these simplifying assumptions allow the theory to say more. As in economics, simplifying the model often gives it more reach. In particular, discreteness obviates any need to worry about judgments across communities and allows one to identify individuals as manifestations of a single group. Monolithicness, on the other hand, allows one to identify every member of the community as identical in all important ways with every other member.

Together, these two assumptions generate almost automatic political entitlement and empowerment. If each community represents an entity unto

203. See Harris, supra note 196, at 605-07.
itself, each is entitled to the same respect as any other, just as each individual in metaphysical individualism is entitled to equal respect. For an identity group making demands on other groups, this international relations model comes as a great help. No longer do members of the group have to justify their particularistic claims according to a standard of universalistic reasoning. The validity of the claims follows almost automatically from their enunciation. Just like the values held by Borkean individuals, these community claims have no "intrinsic validity." We cannot say—except from the perspective of whatever autonomous community we happen to belong to—whether these claims are "good" or "bad," "right" or "wrong." All we can really say is that the particular community we are describing does or does not hold them. Categorical community, its proponents believe, incapacitates us from authoritative outside judgment. Furthermore, each group can insulate its relations with its own members from outside scrutiny. If all members are everywhere the same, as monolithicness holds, there can be no fear of tyranny of the community.

As Judith Butler has noted, the "totalization performed by identity categories is a necessary error." Without it, people outside the mainstream would find it difficult to press their claims for respect and recognition. But it is an "error" nonetheless. Its good work comes at some cost to many of those it would benefit. In other words, as desirable as such community empowerment might be, it is also very dangerous. Categorical community may recognize and so empower groups that actually fail to represent the interests of many of their putative members. When it does, it both injures many of those members individually and collectively disempowers the other communities they inhabit. It simply misrepresents them. Thus, by avoiding the messy questions of how particular communities interrelate and exert sometimes conflicting claims on their members, categorical community can

204. See Bork, supra note 17, at 10.
205. Butler, supra note 64, at 230.
206. It is tempting to think that the current proliferation of categorical identity categories might redeem this project. Although any one category might misdescribe some of those who inhabit it, the availability of other categories might ease concerns of misrepresentation. An individual could simply escape one categorical community by asserting allegiance with another that better describes her for a particular purpose. In this way, someone could simply slide from one categorical community to another as the purposes of description change. Through such rolling integration people might seem to avoid misdescription even though individually all the categorical communities would misdescribe them. In a sense, then, one might hope that competition among categorical communities might allow individuals to avoid the dangers that integration with any particular one might cause.

Unfortunately, this type of serial integration overlooks how people actually find themselves. Identity is complex but not in this protean way. Most of us do not shift dynamically from one simple totalizing description to another. More of us assume instead one complex identity for a period of time. This complex identity is dynamic, of course, because the many different communities a person may inhabit at any one time exert constantly changing claims over his identity.
misdescribe what may be the most important features of an individual's identity.

Instead of simplifying identity in these dangerous ways, we should disaggregate and refine it—that is, acknowledge communities as fundamentally important but also as messily complex. In this view, individuals, instead of lying within a single community, would often lie at the intersection of many different ones. Those different communities could each exert claims over different parts of the individual's identity and sometimes exert conflicting claims over the same ones. This type of analytic move would not make an identity politics impossible but would make its arguments more complex, difficult, and open to disagreement. That may be the price, however, of making identity politics more responsive to the needs and values of the individuals for whom it purports to speak.