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COMMUNITY, IDENTITY, AND POWER: SOME THOUGHTS ON WOMEN AND LAW IN CENTRAL AND EASTERN EUROPE

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Solidarity which is compatible with democratic self-government cannot be attained without universal justice; complex, heterogeneous societies which are increasingly becoming the norm world-wide rather than the exception cannot be based on friendship alone; only a system of egalitarian rights can create the bond of civility which is itself a precondition of solidarity; finally, communities tend to constitute themselves by excluding difference, but . . . the task of a philosophical politics is to conceptualize new forms of association which let the differend appear in their midst.[1]

The situation of many of the countries of Central and Eastern Europe has been characterised, since the revolutions of the late 1980s, by an extraordinary and perhaps unique combination of circumstances. In the first place, the restructuring of these societies spans political, economic, spatial, and cultural dimensions.

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1. Seyla Benhabib, 30 Democracy and Difference: Reflections on Rationality, Democracy, and Postmodernism (unpublished manuscript) [hereinafter Benhabib, Reflections]. A shorter version of this manuscript appears as Seyla Benhabib, *Democracy & Difference: Reflections on the Metapolitics of Lyotard and Derrida*, 2 J. POL. PHIL. 1 (1994).

The reconstruction of democracy, economic reorganisation, the constitution of new geographical boundaries, and the reconstruction of collective identities are occurring simultaneously. Inevitably, tensions arise not only about each of these concurrent projects but also about how they relate to one another. Secondly, it is a striking feature of this historical moment that, just at the time of reconstruction in Eastern Europe — a moment when many in the East are looking to Western Europe and North America not only for support and expertise but also for models of democratic, economic, and legal reform — an important current of Western political thought expresses doubt, ambivalence, and even scepticism about the very idea of political reconstruction as based on guiding normative ideals and about the project of democracy itself.[2] As Seyla Benhabib argues in the article from which the quotation above is taken, it is an irony that Central and Eastern Europe finds itself on the brink of a new era, just as Western culture begins to conceive of itself as "postmodern," "post-industrial," and "post-feminist." This consciousness implies a situation in which the commitments and characteristics which might be taken to have identified Western democracies are themselves being questioned or becoming unsettled. Indeed, Western democracies appear to be characterising themselves as "post-" many of the very features that might have been expected to provide normative resources for reconstructive projects in the East.

In this paper, I question the extent to which the postmodern temper of much Western social thought is indeed inconsistent with both a politics of normative reconstruction and with a productive dialogue between East and West. In particular, I want to consider the adequacy of some influential legal reconstructive ideals in the context of women's experience of law. What light has feminist research thrown on the general question of how far women can mobilise law as a means of defending existing needs, rights, or interests, or use legal fora in arguing for their extension, and what are the implications for the role of law in women's struggles in Central and Eastern Europe? The positive side of law in a relatively democratic society is its capacity to allow certain kinds of arguments to be made within a powerful institu-

2. In the argument which follows, I shall use the term "normative reconstruction" as a convenient shorthand to denote the idea that critical theoretical arguments and ideals can and indeed should be used as resources with which to imagine and build concrete political programmes.

tional arena whose determinations may bring with them a mobilisation of state power. But law's hidden face is its power to silence and exclude those who, for one reason or another, are not full legal subjects, whilst effecting the discursive trick of *including* them in the apparently universal definition of the legal subject. What lessons can be learnt about the power of law from women's experience of revolutionary change in Central and Eastern Europe, and, conversely, can any general insights be gained from analyses of the legal in contemporary feminist and other critical legal scholarship in Western Europe and North America?

The questions I have set out are far too broad to be addressed in a short conference paper. I shall therefore focus on one issue: that of the significance of the idea of community in contemporary legal thought. In legal and legal-theoretical discourse, the notion of community is used in a number of ways. First, it evokes a "legal community," both in the sense of the general "community" of legal subjects, and in terms of the specific professional and para-legal "interpretive communities" whose practices determine the membership of the community of legal subjects and law's substantive prescriptions, proscriptions, and frameworks. In this first sense it speaks to the identity, content, and criteria of membership of particular legal orders. Second, it often evokes a cluster of ideals — the values which the sustenance of law's community is taken to guarantee, or, particularly in critical legal theory, the values to which appeal may be made in questioning the current contours and practices of law's community. An analysis of this variety in the reference points of discourses of community will form part of the argument of this paper.[3]

An interest in these appeals to the idea of community is justified not merely by a straightforward recognition of their frequency in legal and political discourse, but also by the fact that these appeals appear to mark out issues of central importance not only to legal practices, but also to a wide range of political and social practices. Paradoxically, in several respects the apparently pre-modern figure of "community" stands as a powerful metaphor for the postmodern impulses of contemporary social thought. I shall argue that it is a metaphor which can help us to unravel the senses in which the postmodern impulse is not so much one of disenchantment but rather a recasting of "moder-

3. *See infra* parts I.A., II.A.-B.

nity without illusions." This is a modernity in which projects of normative reconstruction can be understood in terms of consciously undertaken commitments rather than the quest for universal truths — and hence a world in which democratic exchange, and a willingness to listen to and learn from difference, is the paradigm mode of ethical practice.[4]

Questions about law's community are of particular relevance in the Central and East European context for at least two reasons. First, law plays an important role in the reconstruction of cultural and political identities — the creation of new communities — that is taking place. Second, important questions about women's access to membership of the relevant communities and about women's identity as full legal subjects arise out of this experience. Whilst the universal reach of liberal legal subjecthood purports unproblematically to include women, women's experiences of law in both East and West raise pressing political questions about the conditions under which substantial as opposed to formal subjecthood can be realised.

I begin by exploring the relevance for law and legal theory of the main currents of argument within the liberal-communitarian debate in political theory. I suggest that by subjecting this debate to feminist critique we can gain some insights both about what the emergence of a discourse of community signifies culturally and about the promises and dangers it represents for social theorists committed to a transformative politics, whether in terms of the field of sexual difference or elsewhere.[5] I then consider some of the implications of the idea of community for legal practices and their reconstruction. In doing so, I want to explore whether the commitment to a project of normative reconstruction of the political, eloquently expressed by Seyla Benhabib in the passage quoted above, can be translated into a similar project of legal reconstruction which reaches beyond the confines of theoretical abstraction to engage with the particularities of legal institutional practices in the East European or indeed any other context.

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4. On the idea of postmodernity as "modernity without illusions," see Zygmunt Bauman, Postmodern Ethics 1–15, 223–50 (1993).

5. Elizabeth Frazer & Nicola Lacey, The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate, chs. 4–6 (1993).

I. The Liberal-Communitarian Debate in Political Theory[6]

One of the main spheres in which the idea of community has assumed a salient position in contemporary Anglo-American intellectual discourse is the liberal-communitarian debate in political theory. A review of that debate therefore provides a convenient starting point for my analysis. In the following section, I set out the main elements of a communitarian position: its rejection of the idea of the human subject as an individual abstracted from its social context; its critique of the individualism of liberal politics at the level of values; and its commitment to an interpretivist methodology. I then locate the emergence of a communitarian critique of liberal individualism in a particular political and historical context. Finally, I trace the resonance between communitarian and feminist ideas and explore some of the potential pitfalls of an apparent alliance between feminism and communitarianism.

A. *Characterising Communitarianism*

The delineation of a communitarian position in political theory is notoriously difficult. This is both because of the variety of positions espoused by writers associated with communitarianism[7] and because contemporary North American communitarianism has developed as a critique of certain features of influential lib-

6. The discussion in this section is a schematic one which inevitably obscures important differences among writers associated with communitarianism. For a more differentiated discussion of the debate in political theory, see FRAZER & LACEY, *supra* note 5, at chs. 4–5. The structure and argument of this section follows closely the more detailed analysis developed in Nicola Lacey, *Community in Legal Theory: Idea, Ideal or Ideology*, 15 STUD. L. POL. & SOC'Y (forthcoming 1995) [hereinafter Lacey, *Community in Legal Theory*].

7. For influential expositions of communitarian thought, see ALASDAIR C. MACINTYRE, AFTER VIRTUE (2d ed. 1984); MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES (1985); CHARLES TAYLOR, SOURCES OF THE SELF (1989); MICHAEL WALZER, SPHERES OF JUSTICE (1983); and Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445 (1987) [hereinafter Selznick, *Communitarian Morality*]. These and other communitarian writers espouse a variety of relatively distinct positions. For example, communitarian theorists differ in whether or not they see their project as an immanent critique of liberalism, intended not so much to transcend as to perfect liberal politics; in how strong a conception of individual human agency or freedom they accommodate; and in the content and source of the collective values or public goods which they elaborate. For more detailed discussion, see FRAZER & LACEY, *supra* note 5, at ch. 4.

eral political theories, notably that of John Rawls,[8] rather than as a political doctrine in its own right. However, for the purpose of my argument it will be sufficient to note that communitarians typically align themselves with one or more of three distinctive positions.

First, at an ontological level, communitarians espouse a social constructionist stance in relation to both human identity and the creation of value. In other words, they argue that human identity — and hence human individuality and personhood — are created in the context of interactions with others and with social practices and institutions. Given this inevitably social context within which human life is lived and human identity constructed, communitarians are critical of the idea that an abstracted, "pre-social" conception of the human individual such as that invoked by social contract theory can be used as a starting point for ethics or for political theory. Far from being abstract entities, subjects are "situated" not only within social institutions but also within bodies, which are encoded with socially constructed meanings. And just as individual identities are socially created, so are the values to which human beings commit themselves: rather than having any "transcendent" or objective status, these values are themselves human constructs. At the level of political analysis, this constructionist stance brings with it a focus not only on individual subject and state but also on intermediate "community" practices as important sites for the construction of subjecthood and political value.

Second, at a substantive political level, communitarians seek to develop detailed conceptions of collective values such as solidarity, reciprocity, positive conceptions of autonomy and community itself, and of the institutionalised public goods which would help to sustain a fulfilling personal and a rich collective life.

Third, at the level of method, communitarians generally adopt an interpretivist approach to social theory. Their project is not the classic philosophical one of purportedly objective normative prescription spoken from and legitimated by a detached standpoint; nor does it represent the subjective expression of tastes or preferences; nor is it the empiricist's report of perceived facts about the world. Rather, it is a project of critical social interpretation which is grounded in, but not rigidly determined by,

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8. John Rawls, A Theory of Justice (1971).

the shape and content of the practices which are its subject matter.

Conceived in terms of these three substantive and methodological themes, the communitarian critique of liberal individualism and universalism can immediately be seen to connect with a number of related yet relatively discrete debates in a range of social sciences and cultural studies. Of most obvious relevance to law would be the civic republican and "new public law" debates. North American constitutional lawyers sympathetic to civic republican ideals have argued for an expanded conception of the proper scope of constitutional debate to include that about the basic goods and values on which collective life should proceed. This forms the basis for an enriched conception of a shared political life.[9] Critical legal studies[10] and, in particular, feminist legal theory[11] also share certain concerns with communitarian thought. Notable common causes include a critique of liberal legal orders' ideological construction of the legal subject as an individual abstracted from his or her broad social context, and similarities between communitarian values and the utopian visions of alternative legal and political arrangements to which critical legal theories gesture or (more rarely) which they elaborate. More broadly, links can be traced between the communitarian critique of liberal universalism and the revival of pragmatist thought in the United States.[12] Looking to Europe, intellectual links in-

9. For examples of civic republican thought, see Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1 (1989); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); and Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

10. See, for example, 1–3 ROBERTO M. UNGER, POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY (1987); and Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

11. See, for example, DRUCILLA CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW (1991) [hereinafter CORNELL, BEYOND ACCOMMODATION]; DRUCILLA CORNELL, THE PHILOSOPHY OF THE LIMIT (1992); Drucilla Cornell, *Beyond Tragedy and Complacency*, 81 NW. U. L. REV. 693 (1987) [hereinafter Cornell, *Beyond Tragedy*]; Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); and Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

12. A major exponent of contemporary pragmatism is Richard Rorty. *See* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989). Rorty's pragmatism resonates with, but goes beyond, the interpretivist rejection of any appeal to universal or transcendent values or "meta-theories." In this sense, Rorty has described himself as "postmodern," but also, it is important to note, as a "bourgeois liberal." His argument is therefore with liberalism's second order pretensions to universal validity rather than with the substance of liberal politics. For more detailed discussion, see FRAZER & LACEY, *supra* note 5, at 156–66.

clude hermeneutics, the critical theory of the Frankfurt school, and postmodernism.[13]

Also of interest is the political context within which the liberal-communitarian debate came to have a particular resonance. In purely intellectual terms, the extent to which the main arguments of Sandel's *Liberalism and the Limits of Justice* — a text which exemplifies each of the three communitarian themes delineated above — were taken up and debated in British and North American universities is rather puzzling. After all, neither the argument about liberalism's ontological atomism nor that about its impoverished political individualism were entirely unfamiliar: both had featured prominently in critical social thought at least since Marx. Nor had the liberal assertion of a priority of the right over the good — the idea that the demands of an essentially procedural justice rather than substantive questions about how people should live are the proper stuff of politics — ever effaced alternative ethical positions in which reflection on the good or the virtuous were regarded as central features of political life. Where the communitarian position came to have a particular salience, however, was in the context of a more general critique of modernity and its moral impoverishment. This is most graphically captured in Habermas's vision of the colonisation of ever greater fragments of the lifeworld by the logic of the systems world, with money and power becoming the increasingly dominant frameworks of exchange and the fora for the symbolic reproduction of values being attenuated or effaced.[14]

The social change which forms the object of Habermas' critique has also been associated with what has been called the experience of postmodernity — of disenchantment, alienation, uncertainty, fragmentation, and loss of stable identities. In Britain and North America, this postmodern moment emerged most forcefully in the 1980s, and so coincided with a period in which central political power was held by right-wing governments which eschewed traditional tory or republican values in favour of an intensely libertarian (and largely fiscally driven) commitment to rolling back the frontiers of the state and re-emphasising the

13. The hermeneutic tradition is closely related to the interpretivist methodology described above; for further discussion, see *infra* part III.A. For more detailed analysis, see FRAZER & LACEY, *supra* note 5, at 101–07; and Peter Goodrich, *Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. REV. 389 (1993).

14. JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1987).

responsibilities of the individual citizen. It is, of course, one of the ironies of these governmental regimes that they gathered a great deal of power to the centre, albeit in the name of decentralisation. Nonetheless their market-oriented policies, which introduced the language of managerial efficiency and auditing into ever widening areas of social life, can hardly be doubted to have accelerated the process identified by Habermas.[15]

For the purposes of my argument, however, the most interesting feature of both the Reagan and the Thatcher administrations was the effective use to which they put the rhetoric of community in constructing and legitimising various fiscally driven policies. Notable examples were "community policing," "community-based penalties," and "community 'care' " for the mentally ill. In each case, the delineation of the relevant "community" was obscure. Indeed, the strength or even existence of what might have been relevant and meaningful communities was often undermined by market-oriented and socially divisive policies of the governments themselves. What gave the language of community rhetorical force in these areas, notwithstanding the ease with which it could be exposed as disingenuous or as downright hypocritical window-dressing, was that it spoke to our fears at the same moment as it whispered to our fantasies.[16] We — or perhaps parts of us — like to think that we live in real, identity-fostering, caring communities, yet part of the postmodern experience is precisely the fear — indeed the knowledge — that we do not. In this context, the rhetoric of community assumes a particular power in the hands of government and other purveyors of influential social discourses.

Whilst the context of Central and Eastern Europe is clearly very different from that of Britain and North America, a number of factors suggest that the rhetoric of community might have a particular and somewhat analogous power within post-revolu-

15. On the extension of managerialism and auditing, see Nicola Lacey, *Government as Manager, Citizen as Consumer*, 57 MOD. L. REV. 534 (1994); and Michael Power, *The Audit Society, in* ACCOUNTING AS A SOCIAL AND INSTITUTIONAL PRACTICE 299 (Anthony G. Hopwood & Peter Miller eds., 1994).

16. Renata Salecl has argued persuasively that there is always a "fantasy dimension" to the rhetorical power of political discourses — a dimension which cannot be understood merely in terms of their ideological meaning. *See* RENATA SALECL, THE SPOILS OF FREEDOM: PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM, ch. 2 (1994). For discussion of the role of appeals to "community" in the fantasy structure of political and legal discourse, see Lacey, *Community in Legal Theory*, *supra* note 6.

tionary political discourse. Notably, the rhetoric of community resonates with the impulse to (re)construct cultural, ethnic and political identities and to assert these reconstructed identities as counters within arguments for political and legal recognition and reform — for example, as reasons for the recognition of particular rights or for the distribution of resources such as land. Furthermore, there is always the potential here for a productive slippage between what we might call "sociological" or "institutional," and "ideological" notions of community. In other words, an apparently straightforwardly sociological reference to the "existence" of a community[17] feeds subtly into, or is even taken to provide, a political argument for recognition, entitlements, or resources. This implicit ideological loading of apparently institutional references to "communities" is arguably of particular importance in the East European context. For these reasons, it is worth pursuing the question of the strengths and weaknesses of the rhetoric of community from a feminist point of view.

B. *Feminism, Communitarianism and Conservatism*

There is an interesting but in some ways disturbing resonance between the communitarian critique of liberalism and certain features of feminist thought. It is worth noting the main points of political and methodological contact. First, a social constructionist stance has always been central to feminism, for it brings with it the possibility of critical analysis and transformation of the processes whereby, for example, masculine and feminine identities have been formed and entrenched. Social constructionism therefore illustrates a clear affinity between feminist and communitarian thought, opening up (at least when combined with an adequate account of the human subject) the possibility of imagining and working for a world in which these gendered and other features of social reality might be differently arranged. The recognition of the social constitution of human identity is also resonant with feminist concerns with connection

17. This, of course, is itself a complex reference given the role of images and ideas in identifying communities such as nation states — entities which Anderson aptly characterises as "imagined communities." BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM, ch. 1 (1993).

and intersubjectivity — persistent albeit controversial features of feminist thought.[18]

Second, the communitarian commitment to constructing a rich conception of collective values and the institutional public goods which would facilitate their realisation has clear resonance for feminist politics. This commitment connects with a number of persistent issues on the feminist agenda. These include child care, public safety, and environmental concerns — all areas in which liberal market-based solutions are arguably unstable or otherwise inadequate.[19]

Third, the communitarian recognition of the subject as "situated" in a social, interpersonal, and bodily context brings with it the possibility of accommodating as politically relevant the embodied aspects of human subjectivity. This is clearly an important matter from a feminist point of view, given the ways in which female bodies have been inscribed with meanings inimical to women's full instantiation as citizens, whilst male bodies have been constructed as "normal" or asexual, hence, paradoxically, enabling men to function culturally as disembodied. A good example here would be the way in which women's potential pregnancy is standardly used as a reason for sexually specific legal "protections" which all too often have the result of further aggravating women's disadvantaged position in the labour market by entrenching a conception of women as non-normal workers. Pregnancy and reproduction are constituted as attached to, and as problems pertaining to, women's bodies, and not as matters of broader social and political concern or shared responsibility. Furthermore, the socially situated subject of communitarian thought is identified closely with its ends and attachments in a way which sits unhappily with any dichotomised conception of reason and emotion. This is also an advantage from a feminist point of view, given the ways in which reason, the ultimate mark of full subject status, has been culturally marked as masculine in both the modern and the ancient world.[20]

18. Good examples here would be Carol Gilligan's identification of a distinctive "feminine" voice in the construction of ethical problems, generating what has been called an ethic of care and responsibility as opposed to an ethic of rights and duties, CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); and Sara Ruddick's notion of a distinctively "maternal" ethical thought, SARA RUDDICK, MATERNAL THINKING (1990). *See also* NEL NODDINGS, CARING (1984).

19. *See* FRAZER & LACEY, *supra* note 5, at ch. 4.

20. *See* GENEVIEVE LLOYD, THE MAN OF REASON: "MALE" AND "FEMALE" IN WESTERN PHILOSOPHY (2d ed. 1993).

Fourth, the focus on "community" as a source of political value and as a forum for political activity resonates with the powerful feminist critique of the dichotomisation between public and private which characterises modern liberal thought.[21] The recognition both of the political relevance of sources of disadvantage hitherto located within the private, and of the relevance of practices and institutions intermediate between state and individual in socio-political analysis and projects of political activism, are sympathetic to feminism. The women's movements of the latter part of the Twentieth Century are, after all, social movements whose political practices have been located in just such intermediate spheres and which often have been characterised (particularly in Britain) by scepticism about reformist or revolutionary activity which places its faith in the state. Finally, the interpretivist methodology espoused by communitarian writers is resonant with the strong currents in feminist thought devoted to deconstructing claims to objective truth and exposing their gendered partiality.[22]

For these reasons, it is not surprising to discover shared concerns and commitments characterising feminist and communitarian literature in political theory.[23] Notwithstanding the resonance, however, it is also important to see that these very connections mark up points of difficulty not only for feminism but also for any other politics committed to substantial social change. Most obviously, commentators have pointed out the ac-

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21. For feminist analysis and critique of the liberal construction of public and private, see CAROLE PATEMAN, THE SEXUAL CONTRACT (1988); Nicola Lacey, *Theory into Practice? Pornography and the Public/Private Dichotomy*, 20 J. L. & SOC'Y 93 (1993) [hereinafter Lacey, *Theory into Practice?*]; and Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

22. *See* DISCOVERING REALITY (Sandra Harding & Merrill B. Hintikka eds., 1987); GENDER/BODY/KNOWLEDGE (Alison M. Jaggar & Susan R. Bordo eds., 1989).

23. Salient examples are Alison Jaggar's feminist critique of liberal individualism, ALISON JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1988), and Carole Pateman's deconstruction of the liberal social contract in terms of its underlying "sexual contract," PATEMAN, *supra* note 21. For further examples of feminist political and legal theory critical of liberal individualism and the liberal public-private distinction and resonant with communitarian concerns, see Nicola Lacey, *Closure and Critique in Feminist Jurisprudence: Transcending the Dichotomy or a Foot in Both Camps?*, *in* CLOSURE OR CRITIQUE: NEW DIRECTIONS IN LEGAL THEORY (Alan Norrie ed., 1993); Nicola Lacey, *Theories of Justice and the Welfare State*, 1 SOC. & LEGAL STUD. 323 (1992); Lacey, *Theory into Practice?*, *supra* note 21; Jane Mansbridge, *Feminism and Democratic Community*, *in* [35 DEMOCRATIC COMMUNITY] NOMOS (John W. Chapman & Ian Shapiro eds., 1993).

tual or potential conservatism of communitarian thought. Why should communitarianism be thought to be potentially conservative? First, there is the possibility that the social constructionist and interpretivist stance of communitarianism collapses into a radical relativism in which all political positions have equal status and no footing for political critique can be found. Whilst this explanation arguably poses a false dilemma in implying that any move away from objectivism entails a slide into total subjectivism, not all communitarians have set out their position with sufficient subtlety to avoid the force of some such critique.[24] This difficulty seems especially relevant in the context of some of the most pressing issues for women in Central and Eastern Europe, given that the (re)discovery of identities based on particular traditions and cultural practices may bring with it norms and expectations which women want to criticise and resist.

Second, communitarians' failure adequately to characterise the various senses in which the notion of community is used contributes to the development of an essentially uncritical and even obfuscating political discourse. Notably, as I have argued, there is a productive slippage in communitarian discourse between "sociological" notions of community and "ideological" notions of community: reference to the institutional "existence" of a "community" of one kind or another transmutes into an ideological argument for a particular political position — the according of a status or the distribution of goods. This conduces to a situation in which the recommendations of "community-based" this, that, or the other are taken as read. There is no space for much needed political critique of the actual communities from which particular practices and conceptions of value emanate, let alone of the content of those practices and values. From a feminist or any other radical point of view, the failure critically to examine the recommendations of "community" entailed by this slippage is clearly disastrous, not least because the various available communitarian models — the family, the club, and so on — all mark forms of association which have historically subordinated or excluded women. Such "communities" need to be subjected to a critical analysis which communitarian theory seems incapable of generating the conceptual tools to undertake. In the East European context this problem is particularly vivid, given not only the

24. For a powerful illustration of how this dilemma can be avoided, see RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM (1983).

gendered but also the ethnic exclusions implicit within the construction of the new identities around which much political activism and organisation has formed. It therefore seems crucial to expose the slippage between institutional and ideological appeals to community, whilst recognising that the slippage itself is central to the discursive power of community in the contemporary political world.

The potential conservatism of communitarian thought can also be linked to its failure to generate an adequate account of the conditions under which subjects gain access to membership of powerful meaning-generating communities, and under which that membership includes the power not only to speak but also to be heard. A similar lack of critical analysis characterises communitarian literature in terms of the question of power relations *between* communities. Indeed, it is a curiosity as much of communitarian as of liberal political theory that the concept of power finds practically no place in the conceptual framework which the theories elaborate.[25] Amid the welter of cosy appeals to what "we" think, do, understand, or feel, there appears to be no critical space in which to reflect upon the processes of inclusion and exclusion that characterise "us." The danger here is that "the logic of identity does violence to those whose otherness places them beyond the homogenizing logic of the 'we.' "[26] It is a danger that is amply illustrated by the realities of contemporary political practice in all parts of the world. It has a special inflection for women in the context of the construction of new national identities in Central and Eastern Europe, where critical attention has (understandably) been focussed on explicit religious and ethnic exclusions, but where implicit and gendered exclusions premised on the sweeping away of some of the institutional preconditions for women's citizenship (child care, access to abortion, paid employment) are just as significant a feature of emerging political realities.

The explanation for this lack of critical purchase can be traced deep into the conceptual framework of communitarian thought. In escaping the implausibility and exclusions of the liberal concept of the atomistic subject marked by pre-social charac-

25. *See infra* text accompanying note 57.

26. Benhabib, Reflections, *supra* note 1, at 30; *see also* IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE, chs. 4, 8 (1990) [hereinafter YOUNG, JUSTICE]; Iris M. Young, *The Ideal of Community and the Politics of Difference*, *in* FEMINISM/POSTMODERNISM 300 (Linda J. Nicholson ed., 1990).

teristics, some communitarians seem to move toward a conception of subjecthood in which the person is so thoroughly situated that she is simply engulfed or determined by her social and bodily context. Such a position abandons altogether the idea of critical reflexivity which is necessary to any transformative political consciousness. Conversely, the communitarian conception of the social tends either to consist in a nostalgic vision of a pre-modern, small scale, homogeneous society consisting of stable populations subsumed within a limited number of coherent value-generating roles, traditions, and practices, or to entail a fragmented, postmodern world. In the latter, even the situated subject can plausibly be thought to attain some basis for a critical appreciation of her situation because she lives her life across many competing "communities." However, in the postmodern model this space for critical consciousness is bought at the cost of raising some difficult questions about how such a subject might make sense of her fragmented experiences, or of how such a fragmented world might hold itself together at the cultural or institutional level. Whilst the ontological clearly does not entail the political, the political weaknesses of communitarian (as of liberal) thought are intimately related to the conceptual framework in terms of which it is constructed.

II. Discourses of Community in Legal Theory

Of what relevance to contemporary legal practices and their reconstruction is this schematic account of the questions raised by the communitarian critique of liberalism? There are some important connections between the themes underlying the communitarian critique of liberalism and those informing a cluster of influential debates in contemporary legal theory. To reveal these connections, we need to think more specifically about the place of appeals to ideas of community in contemporary legal theoretical debate. In this section, I shall clarify the various senses in which ideas of "community" are appealed to in legal theoretical discourse, and then trace the connections between these appeals to community and the communitarian impulse in political theory.

A. *The Diverse Appeals to "Community" in Legal Theory*

No one perusing contemporary legal theory can fail to be struck by the frequency with which the concept of community is used in the explication of theoretical ideas about law and legal practices. To make sense of these appeals to community, we

need to make some basic analytical distinctions between different ways in which the notion of community is invoked. Starting with the notion of the "*interpretive community*" — legislators, judges and others who have the power to generate the meanings which law expresses and imposes — we already begin to encounter deep fissures and obscurities in contemporary jurisprudence. If we accept that "[t]he context of legal decision-making is that of the legal community and the values that legal order exists to protect,"[27] we nonetheless need to identify in what — or whom — this "legal community" consists. It is this very question which is notoriously clouded in much legal theory. For example, Ronald Dworkin's *Law's Empire* evokes an intensely democratic image of all as equal members of the interpretive community — legal subjects in the double sense of those who both create and submit to the law.[28] Yet in its substantive analysis, Dworkin's argument implies that some members of the interpretive community are, as it were, more equal than others. The interpretive community whose voice can be heard is, after all, a professional community, access to membership of which is carefully policed through a historically embedded set of norms, rites of passage, and social and technical qualifications.

This professional community invites the creation of communities which in one sense or another define themselves in relation to it. This entails that the professional community is not the only relevant interpretive community. For example, the academic or pedagogic community has, to different degrees in different times and places, an influence on the construction and rationalisation of the practices engaged in by the professional community, not least in the sphere of legal education and textbook writing. Conversely, critical and oppositional communities — critical legal scholars, radical practitioners, and pressure groups — develop in relation to the dominant professional community, challenging both its epistemological pretensions and the content of its practices. The interventions of non-legal interpretive communities such as those which produce commentaries disseminated by news media are also relevant here, as are the interpretive practices of a large array of regulatory agencies such as the police and health

27. Peter Goodrich, Reading the Law 149 (1986).

28. Ronald Dworkin, Law's Empire (1986); *see also* Ronald Dworkin, *Equality, Democracy, and Constitution: We the People in Court*, 28 Alberta L. Rev. 324 (1990) [hereinafter Dworkin, *Equality*]; Ronald Dworkin, *Liberal Community*, 77 Cal. L. Rev. 479 (1989).

and safety inspectorates. Whilst the legal-professional community will often have the final say on a specific interpretive question, the terms in which that question has been posed are determined to an important extent by interpretive communities outside the legal paradigm. Clearly, in the extraordinarily fluid context of several Central and East European countries, questions about membership of these various professional and quasi-professional interpretive communities, and women's place (or lack of place) within them, constitute salient feminist issues.

So far I have described legal community as a set of practices and groups in terms of which legal meanings are articulated and enforced. There is a converse and closely related sense of community which is equally important to contemporary law and which has a specific relevance to Eastern Europe. This is the sense in which *legal practices themselves create or legitimate "communities"* whose identity or sphere of existence reaches beyond the legal. One could think of professional interpretive communities from this point of view, but perhaps the most interesting example here is the role played by law in constructing or underpinning the identity of national communities, or indeed of local, federal, international, and supranational communities. Here "community" functions as part of the discursive apparatus which maintains the virtual reality not only of law but also of society: it is a fundamental part of how we *imagine* the social and political order to which we belong. Not only is law arguably of fundamental importance in the identification of, for example, the national community, but the actual or imagined distinctiveness of particular legal traditions can also be mobilised to resist the modification or reconstruction of that identity. This effective appeal to distinctiveness arguably characterises contemporary debates about national sovereignty and the limits of European integration, even in the commercial sphere.[29] It also helps to explain the sense in which the annihilation of all aspects of the East German legal system in 1989 was experienced (or has since been interpreted) by many East Germans as a form of cultural assimilation. In the context of the new political formations of Central and Eastern Europe, the role of law in constructing and legitimating certain conceptions of the national or local community is clearly of central importance. This is both because of its direct appeal to

29. *See* Roger Cotterrell, *Law's Community: Legal Theory and the Image of Legality*, 19 J.L. & Soc'y 405 (1992); Peter Fitzpatrick, Being Social in Socio-Legal Studies (unpublished paper).

citizens and because a stable and constitutional legal order is generally seen as a precondition for recognition of newly emergent nation states within the international community. It brings with it pressing feminist questions about access, membership, and power, all of which have arguably been suppressed in an essentially formalistic process of universal constitutional inclusion (at least in those countries which have achieved stable constitutional settlements).

B. *Interpreting the Communitarian Impulse in Contemporary Legal Theory*

Quite apart from these explicit references to the idea of community in legal theory, there are some subtler but equally important sources for contemporary pre-occupation with the idea. These have to do with community's promised capacity to transcend individualism; its resonance with concerns about the diversification and fragmentation of the legal form; and with its implicit ideological or ethical appeal. I shall discuss each of these in turn.

First, the idea of community in legal theory speaks to the *critique of the individualism of liberal legalism* in at least two senses. At an ontological level, talk of community connects with questions about the atomistic and abstracted nature of the liberal legal subject and the ways in which the contingent but politically significant contours of the construction of that subject as an abstract individual serve to marginalise certain sorts of legal actors or claims.[30] The specific way in which the individual legal subject has been constructed also excludes any recognition of intersubjectivity or reciprocally constituted subjecthood because the prevailing system of legal argumentation and reasoning depends upon a stable and closed subject about whose identity and history only a very circumscribed set of questions can be asked.[31] One

30. Good examples would be those of land claims made on behalf of an aboriginal group, or issues raised by the proprietary or political claims of a cultural group whose identity has hitherto been unrecognised.

31. For excellent discussion of the role of this dynamic in keeping political issues out of the courtroom in criminal law, see ALAN NORRIE, CRIME, REASON AND HISTORY (1993); and Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981). However, critical socio-legal literature on informal justice has illuminated the ways in which ready contextualisation of legal subjects — for example, the tendency in popular justice to "judge the whole person" rather than merely some specific action — can itself have exclusionary and indeed repressive implications. *See* Richard L. Abel, *The Contradictions of Informal*

way of understanding the feminist demand for a greater contextualisation of legal reasoning is in terms of the need to bring into the courtroom precisely these questions about how legal subjects are constituted by contingent yet extremely powerful discursive manoeuvres.[32] A striking feature of the pre-1989 legal experience of many East European countries was the oppressive use to which the invocation of factors or characteristics having to do with collective identity (such as politically dissentient views or "deviant" lifestyles) were sometimes put in the legal system. This is an important corrective to the too ready Western assumption that contextualisation or collectivisation necessarily serves the interests of the powerless. Nonetheless, in the context of current reassessment of the wisdom of the sudden move toward adoption of a pre-socialist, liberal legal framework, and the abandonment of some of the legal forms which stretched beyond an individualistic legal structure, the communitarian critique of ontological individualism is of relevance in the East European context. No one with a passing acquaintance with feminist research on the realities of legal practices in Western Europe and North America can remain entirely confident that the process of cultural assimilation most vividly exemplified by the East German legal and political subsumption within the West German system in 1989 constituted the most democratic or progressive method of reconstructing the legal sphere in the post-revolutionary state.[33]

Politically, the idea of community suggests a transcendence of the liberal legal emphasis on individual rights as the basic units of both constitutional entitlement and legal reasoning, and promises to reconceive legal justice and equality in terms which reach beyond the formalism of liberal individualism to recognise alternative values such as empathy, solidarity, reciprocity, and care within legal practices. It is understandable that in the immediate post-1989 experience in Eastern Europe the revalorisation of individual rights was seen as of paramount importance. Yet the longer term experience of the economic and political implica-

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Justice, *in* 1 THE POLITICS OF INFORMAL JUSTICE 267 (Richard L. Abel ed., 1982) [hereinafter Abel, *Contradictions*]. For further discussion, see *infra* part IV.

32. *See* Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

33. For feminist analysis of some of the explicitly and implicitly gendered practices of Western law, see KATHERINE O'DONOVAN, SEXUAL DIVISIONS IN LAW (1985); CAROL SMART, FEMINISM AND THE POWER OF LAW (1989); Olsen, *supra* note 21.

tions of an instantiation of individual rights in the absence of previously existing forms of collective provision has already engendered some reassessment of the wisdom of wholesale abandonment of institutionalisation of the collective values honoured, at least rhetorically, by state socialism. Particularly for groups such as women, who on average have lesser access to sources of economic power, the dismantling of substantive facilities such as child care and access to abortion has had devastating consequences for the effective inclusions and exclusions of legal subjecthood and political citizenship. This remains true notwithstanding the poor quality of previous provision and notwithstanding the implication of such provision in the peculiar patriarchy of state socialism and the double burden of labour it entailed for women.[34]

Second, at a structural level, the notion of community speaks to the *growing recognition of the diversification and fragmentation of the legal form*. The modern explosion of legal regulation into ever widening areas of social life has often been remarked upon, not least in terms of its fracturing of simplistic notions of public and private spheres conceived in terms of state and society or individual. Equally significant, however, is the extent to which the relevant professional communities and means of realising legal regulation have consequently diversified. Regulatory agencies, arbitration and mediation schemes, and administrative tribunals abound, whilst circulars, informal rules, and codes of practice supplement or replace case law or statutes as tools of legal articulation or enforcement. In political theory the institutional idea of community promises to accommodate our recognition of the decentring of the state and the genuine political relevance of what were hitherto either non-existent or private practices. In legal theory it provides an analogous framework for understanding the diffusion of state legal authority formerly imposed in an unambiguously hierarchical way from the centre. Significantly, this institutional conceptual flexibility also touches an evaluative nerve. Within the diversification of legal forms looms the nightmare of ever more extensive, discretionary, unaccountable quasi-legal power. Yet it also holds out the hope of experimenting with novel legal forms which might be more normatively attractive — not so much vertical as horizontal or con-

34. For discussion of the patriarchal nature of state socialism, see Salecl, *supra* note 16, at 2–5.

sensual. In Central and Eastern Europe, particularly in those countries where unsettled political conditions entail a severe fragmentation and decentralisation of political power, the location of legal power and activities in a multiplicity of networks and groupings within civil society would seem to be of particular relevance, as would this aspect of the idea of community, for the project of rethinking the role of alternative legal forms existing in the pre-1989 world.

Finally, in part because of the normative dimension of each of the factors mentioned so far, the contemporary salience of community stands for a growing recognition that the *moral, substantively political, or evaluative aspects of critical legal analysis need to be embraced more explicitly by legal theorists*.[35] This observation has at least two sources. In the first place, it is part of the impulse to expose and articulate "the politics of law" — in other words, to deconstruct law's claims to neutrality and objectivity and to unearth the substantive ethical and political judgments which underlie ostensibly procedural or formal determinations within modern legal forms. However, in recent American and Western European legal theory, the reluctance to move beyond such deconstruction to the pursuit of a more explicitly ethical and utopian reconstructive project[36] has been substantially modified in ways which promise a productive exchange of reconstructive ideas between East and West. These developments move beyond a postmodern disenchantment or cynicism that may seem to resemble irresponsibility or even decadence when viewed from the perspective of those (whether in Eastern Europe, South Africa, or elsewhere) for whom the project of legal and political reconstruction is not an academic but a practical and indeed an everyday matter.

The idea of community therefore stands as a powerful metaphor for a number of coalescing analytical and political concerns in contemporary legal theory. In this respect, the place of "com-

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35. See, for example, Philip Selznick, *Communitarian Morality*, *supra* note 7; Philip Selznick, *Dworkin's Unfinished Task*, 77 CAL. L. REV. 505 (1989).

36. This is a reluctance which, it is worth recording, has generally characterised feminist work to a markedly lesser degree than has been the case with non-feminist work. *See, e.g.*, Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989); Olsen, *supra* note 21; Sherry, *supra* note 11.

munity" in legal theory is much like its place in political theory.[37] With its productive combination of institutional and evaluative resonance, the idea of community in legal theory speaks to a number of historically specific concerns about the identity, forms, and role of law — a practice at whose core is the generation of common meanings and standards. Yet it reproduces the problems it promises to address in the very breath in which it expresses them. Take the salient example of Dworkin's appeal to the "community of principle" which alone can generate the stable set of legal meanings which could give body to the idea(l) of law as "integrity."[38] As Tim Murphy puts it, "a 'community of principle' . . . is simply an intellectual fantasy, a vacuous abstraction whose only possible ground is the sociologically detached nature of the elite American university."[39] A single interpretive community identified on the basis of shared values could only look plausible on the basis of precisely the kind of pre-modern or romantic world-view which we saw as a feature of some versions of communitarianism. "The claim that national law represents the national community is as fictional as the assertion that the discourse of human rights represents the universal community."[40] In a post-revolutionary world characterised by struggles around competing values and the proliferation of value-creating communities, such claims look positively bizarre.

In the real world, Dworkin's idea expresses not so much a sociological naivete as a return to universalism: all become members of the interpretive community by the theorist's — or indeed the law's — definitional fiat, and questions about access to membership become not only unanswerable but also unaskable. They are defined out of existence. The "other" simply disappears, subsumed within the logic of identity — a process vividly expressed in the title of one of Dworkin's recent papers: *Equality, Democracy, and Constitution: We the People in Court*.[41] In a situation of severe contestation, the retreat into the rhetorical inclusiveness of the rhetoric of community is particularly dangerous for it

37. On similar problems for legal constructions of community, see Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992).

38. DWORKIN, *supra* note 28, at 195–202.

39. W.T. Murphy, *One of Us? Politics, Difference and Affirmative Action*, CURRENT LEGAL THEORY (forthcoming 1995).

40. COSTAS DOUZINAS & RONNIE WARRINGTON, JUSTICE MISCARRIED: ETHICS, AESTHETICS, AND THE LAW 149 (1994).

41. Dworkin, *Equality*, *supra* note 28.

presages a hardening of conflict-producing identities — indeed of identities premised on exclusion, hatred, and opposition — rather than progress towards the political dialogue and mutual recognition which alone could contribute to tolerance and to the management or attenuation of conflict. The rhetoric of community may also presage a tendency to fix subjects within particular identities which they may wish to resist — another issue of prime concern to women. The experience of women in post-1989 Central and Eastern Europe graphically illustrates the need to keep these questions firmly on the legal and political agenda, given that formal membership of the democratic and legal community and the investment with individual rights have been accompanied by significant disinvestments in meaningful citizen status. These disinvestments are facilitated by a primary focus on a libertarian, negative conception of freedom — freedom as the absence of coercion. They are realised through the institution of a differently configured private sphere which is beyond political critique and into which many issues of utter centrality to the quality of women's lives and women's real access to citizenship are placed — sexual violence, child care, social welfare and pension entitlements, the distribution of domestic labour, and workplace rights. In the conceptualisation of law which appeals to ideas of community, questions of membership and power all too easily slip off the theoretical agenda. Their absence can not be regarded as politically innocent, but rather must be seen as part of modern law's legitimating ideology. We need, therefore, to return to the question posed by Seyla Benhabib with which this paper opens. Can any critical foothold for the entitlements of women or any other group be constructed without some appeal to universal, shared membership of a community — a community conceived as a democratic entity, but not as a source of fixed and substantial cultural identity of the kind that would inevitably exclude the other and suppress difference and dissent within? As in the case of the role of appeals to community in political theory, the communitarian impulse in legal theory points up some important questions. For example, if we give up the notion of the individual agent as claimant, we may deprive ourselves of a necessary component of one of the positive aspects of contemporary law — that law can provide a forum for *challenging* dominant meanings and arrangements as well as for confirming and enforcing them. The challenge of reconstructing a notion of legal subjecthood adequate to critical legal practice is a central question for contem-

porary jurisprudence. Similarly, questions arise about the possibility of extending law's communities — both in terms of access to powerful interpretive communities and of substantive questions about the meaning of membership of law's community as subject.[42] These questions in turn raise an issue about whether such questions can be addressed without appeal to some substantive ethical conception.

III. COMMUNITY AND RECONSTRUCTION

In the remainder of this paper, I want to examine the implications of some of these general themes underlying appeals to community for women and law in Eastern Europe. In particular, I want to reflect on the significance of the figure of "community" for the re-emergence of an explicit concern with the ethical and with projects of normative reconstruction in legal theory; on the challenges which arise for reconceptualising law in less authoritarian terms; and on the contributions of different kinds of legal scholarship to this project. Each of these issues assumes a particular importance in political contexts in which the structure and content of legal practices are in question.

A. *Critique and Utopia*

The tendency of contemporary critical legal theory to "deconstruct" or "trash" without "reconstructing" has been much remarked upon.[43] Of course, the reluctance to produce normative blueprints is not confined to contemporary critique. Rather, it is a principled feature of many critical traditions. Yet feminist thought, which has always had a strong utopian strand and a disposition to speak in the voice of moral and political judgment, is an interesting and significant (partial) exception to the critical hesitation about reconstruction[44] — hence the degree

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42. *See* Austin Sarat, *"... The Law is all Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990).

43. This is not to imply that reconstruction and deconstruction are antinomous. If reconstruction is understood as the project of both imagining other possibilities and of working towards their realisation, it is clear that deconstruction in the post-structuralist sense has a strong ethical moment. *See* CORNELL, BEYOND ACCOMMODATION, *supra* note 11, at 1–20, 79–118 (1991); Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority," in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE (Drucilla Cornell et. al. eds., 1992).

44. Compare, in the legal sphere, the work of Catharine MacKinnon, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987), with that of Tove Stang Dahl. TOVE STANG DAHL, WOMEN'S LAW: AN INTRODUCTION TO FEMINIST JURISPRUDENCE (Ronald L. Craig trans., 1986).

of ambivalence expressed by many feminist writers about the advent of postmodernism.[45] In contemporary debate, hesitations about the place of a reconstructive project derive from a number of deep theoretical commitments. For example, the constructionist insight that our thoughts, identities, and values are inevitably grounded in our particular situation and experience poses an intimate relationship between theory and practice. That relationship entails the theorist's need to attend to the complexity of the world and, in what is at root a democratic impulse, underlines the potential inefficacy, insensitivity, and even violence of imposing blueprints for reform.[46] Furthermore, a constructionist position undercuts the pretensions to objectivity or the possibility of a "view from nowhere" often thought to ground and validate normative ethical and political judgments. This is of particular relevance to a dialogue between Eastern and Western feminists: after all, what has so often been lacking is an awareness of the arrogance inherent in the prescription of blueprints devised from the abstraction of distance rather than the proximity of praxis.

In many theoretical discourses, however, attempts are being made to resurrect a more vigorous conception of critically reflective subjectivity as a precondition of radical political agency, and moreover to do so in terms which explicate a basis for utopian or reconstructive thinking as an inspiration for political practice. One particularly interesting model for a reinsertion of the ethical within the legal is that provided by the tradition of critical theory. Critical theory seeks to reconstruct legal argumentation in terms of its potential as critical discussion, drawing on the notion of discursive legitimation, the idea that dialogue under conditions of undistorted communication can generate just or ethically legitimate decisions which can be affirmed by all participants.[47] On this conception, the violent aspect of the legal as the assertion of will and power is legitimated (or perhaps effaced, or merely attenuated) in terms of procedural criteria based in a context-transcending conception of reason. Critical theory occupies an

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45. See, for example, the essays in FEMINISM/POSTMODERNISM edited by Linda Nicholson. FEMINISM/POSTMODERNISM (Linda J. Nicholson ed., 1990).

46. For discussion of some of the specific problems of imposing blueprints by means of legal regulation, see Cotterrell, *supra* note 29; Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post-Regulatory Law, in* DILEMMAS OF LAW IN THE WELFARE STATE 299 (Gunther Teubner ed., 1986).

47. On the application of the ideas of critical theory to legal reconstruction, see Antonie A.G. Peters, *Law as Critical Discussion, in* DILEMMAS OF LAW IN THE WELFARE STATE, *supra* note 46, at 250.

interesting position on the spectrum of modernist and postmodernist approaches to ethics and politics. On the one hand, its commitment to a transcendent conception of reason locates it within the philosophical discourse of modernity. On the other, its emphasis on the procedural and its refusal to avow substantive values entails an openness — an embrace of the contingency of just and ethical outcomes — which is resonant with postmodernist thought.[48] It could therefore be argued that recent developments within critical theory represent a reconstructive theoretical project which is modernist yet shorn of substantive universalist illusions — a project in which questions about how to live together are the subject of decision, creation, and commitment rather than a matter of objective prescription or discovery.

Emerging from critical theory, one aspect of what has been called "dialogic communitarianism" — the creation of and commitment to values through an ongoing process of democratic debate[49] — seeks to rescue and revive what is of real importance in the ideal of the rule of law. Dialogic communitarianism fixes on what it sees as an inherent duality in legal practices, which not only represents the imposition of authority but also provides a space for challenge and debate. This space is, crucially, premised on the openness of language:

> The value of concepts for critical discussion derives from their transcendent quality, their "excess of meaning," which points beyond positive reality to fuller social achievements and which enables us to disengage ourselves morally from positive reality and criticize it. Concepts like contract, rule of law, fair trial, human rights, democracy etc., lose their transcendent quality when they are reduced to their operational meaning.[50]

One way of looking at dialogical communitarianism is as an attempt to realise the ethical impulse to attend to the differences of outlook, experience, and interest which emerge within any social grouping — "letting the differend appear in their midst."[51] This

48. In this context it is significant that one of the foremost feminist contributors to philosophical debates about postmodernism, Seyla Benhabib, also works within the tradition of critical theory. *See* SEYLA BENHABIB, SITUATING THE SELF: GENDER, COMMUNITY AND POST-MODERNISM IN CONTEMPORARY ETHICS (1992) [hereinafter BENHABIB, SITUATING THE SELF].

49. For discussions of dialogic communitarianism, see *id.*; FRAZER & LACEY, *supra* note 5, at ch. 6; and Cornell, *Beyond Tragedy*, *supra* note 11.

50. Peters, *supra* note 47, at 270–71 (citation omitted).

51. *See* Benhabib, Reflections, *supra* note 1, at 30, quoted at greater length at the beginning of this paper.

is an impulse which also characterises a number of positions developing "postmodern ethics" or attempting to realise multiculturalist ideals.[52] Each of these theoretical positions seeks to exploit the critical space opened up by the communitarian construction of the "we"; in other words, to find a foothold for immanent critique of their own exclusions and marginalisations within democratic legal practices. Such a critique aspires to exploit the inclusive aspect of the "we" and constantly to question rather than to surrender to its exclusions. Only by being aware of the nature of these inevitable exclusions can we have any hope of pursuing the central democratic project of limiting their effects.

As applied to legal theory, the idea of discursive legitimation has the specific advantage of appearing to promise a critical footing for projects of normative reconstruction which could realise themselves in changes in concrete institutional practices:

> A discursive design is a social institution around which the expectations of a number of actors converge. It therefore has a place in their conscious awareness as a site for recurrent communicative interaction among them. Individuals should participate as citizens, not as representative of the state or any other corporate and hierarchical body. No concerned individuals should be excluded . . . . The focus of deliberations should include, but not be limited to, the individual or collective needs and interests of the individuals involved. . . . Within the discursive design, there should be no hierarchy or formal rules, though debate may be governed by informal canons of discourse. A decision rule of consensus should obtain. Finally, all the features I have enumerated should be redeemable within the discursive design itself. Participants should be free to reflectively and discursively override any or all of them.[53]

Yet in the very moment in which discourse ethics suggests itself as a source of ideas for institutional design, the difficulty of realising this in terms of reconstructed legal institutional practices becomes apparent. Is it possible to imagine or reconceptualise law without hierarchy or formal rules? Discursive legitimation as an ethical and institutional model of how we might accommodate and attend to difference leaves us with some intriguing puzzles

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52. For relevant discussions on the space for the ethical within a postmodern deconstruction, see CORNELL, BEYOND ACCOMMODATION, *supra* note 11, at 1–20, 79–118; and DOUZINAS & WARRINGTON, *supra* note 40; who develop a postmodern jurisprudence whose ethical dimension is drawn from Emmanuel Levinas' "ethics of alterity" — the call to responsibility implicit in the Other's irreducible difference.

53. JOHN S. DRYZEK, DISCURSIVE DEMOCRACY 43 (1990).

about its implications both for political practice around law and for a reconstructed legal practice.

In seeking to reinsert the ethical into the legal, the proponent of law as critical discussion has to address the problem of the "logic of identity" — the danger of suppressing difference in the process of abstraction, generalisation, or identification.[54] Here the problem of relativism is re-encountered. What are the ethics of the call to attend to otherness where that otherness consists in racism or fascism? In Benhabib's words, "Theorists of difference have not indicated where the line is to be drawn between forms of difference which foster democracy and forms of difference which reflect anti-democratic aspirations."[55] In the tradition of discourse ethics, there is a willingness to appeal to transcendent criteria. The puzzle remains how the basically procedural criteria of this attenuated modernist position will necessarily give a substantial critical foothold in actual cases. Yet if the community of discourse were to define itself in terms of substantive context-transcending criteria, this would appear to raise once again the problem of the violent suppression of otherness implicit in the authoritarian imposition of standards which is arguably characteristic of legal practice. Such a position abandons what I identified above as the postmodern impulse of critical theory, which construes ethical standards as open and as based on human commitment rather than on some transcendental ground. If the basic values underlying the conditions of ideal communication or of attention to difference are substantive ones, it is not at all clear that this suppression of difference which the postmodern impulse resists can indeed be avoided.

Benhabib addresses this problem by distinguishing between "integrationist" and "participationist" discursive models.[56] In the former, the community of discourse is defined in terms of shared values and therefore reproduces the logic of identity. In the latter, the discursive community is defined in terms of second-order context-transcending commitments. All participants have to accept the terms of and commit themselves to a particu-

54. For productive reflection on the problems of this kind of exclusion *within* feminist legal thought, see PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

55. Benhabib, Reflections, *supra* note 1.

56. *See* Seyla Benhabib, *Autonomy, Modernity and Community: Communitarianism and Critical Social Theory in Dialogue*, *in* SEYLA BENHABIB, SITUATING THE SELF, *supra* note 48, at 68.

lar kind of discursive process: they are nonetheless free to challenge those terms from within the confines of the game once they have accepted its limits. The question here is whether these procedural criteria will turn out to have enough teeth to generate the kind of critical practices which a genuine return to the normative and ethical would seem to require. In conditions of substantial contestation such as those vividly exemplified by the situation of post-revolutionary Central and Eastern Europe, enormous difficulties arise even about attaining initial agreement upon and commitment to democratic discursive procedures.

Even if such an initial agreement can be reached, tricky questions arise about the realisation of the ideals of discursive democracy. A central problem has to do with the power differentials which are bound to characterise subjects' entry to the dialogic forum and which threaten, in the real world, always to "distort" communication. What counts as "undistorted" communication in this context? One of the strengths of the discursive model for normative and democratic reconstruction in legal theory is its willingness to engage in the project of re-imagining concepts such as justice, equality, and human rights which have constituted the central ideals held out by law to its subjects. It promises productive reflection on the ways in which the contours of the legal subject might be reconstituted in more empathetic and solidaristic terms rather than in the atomistic and competitive terms which characterise the liberal notion of legal subjecthood. In other words, it holds out the hope that the project of post-revolutionary legal reconstruction might be genuinely transformative rather than merely one which reproduces the well known limitations of Western liberal legal models. However, if this approach is to be developed in a satisfactory way, its normative pre-occupation with justice and legal subjecthood will have to be matched by an equally sophisticated conception of notions such as power, subordination, and oppression, and an application of these normative concepts, as well as those of justice and equality, to a critical analysis of the terms on which subjects *enter* the discursive community.

For example, it is now *de rigueur* in progressive legal theory to make some reference to the power of law in the discursive, Foucaultian sense (as well as, or sometimes (in my view mistak-

enly) instead of its sovereignty or property-like sense).[57] Many legal theorists are now in the process of thinking through how a critical analysis of law is affected by a conceptualisation of power not only as something primarily owned or exercised, but also as something which inheres in disciplines, discourses, and practices; which circulates intangibly around the social and legal body; and which has productive as much as repressive aspects. However, there is relatively little reflection on what makes this kind of power legitimate or illegitimate as opposed to merely productive. This is, of course, in keeping with Foucault's own approach, which eschewed making such normative judgments about the operations of power. If we are to employ Foucault's "practice" conception of power in critical legal theory, as I think we can, and if, like the writers I have discussed, we are concerned to reconstitute an ethical dimension to this theory, the question of legitimacy, and with it the questions of what is an oppressive exercise or manifestation of power, become absolutely central. If we are to understand what counts not only as speaking but also as being properly "heard" in law, the conditions of undistorted communication (articulacy, power, knowledge, and absence of subordination and oppression) would have to be met.

The pursuit of such conceptual reconstruction is well beyond the scope of this paper, but it is worth noting both that it is relevant to its theoretical concerns and that some important instances are already instantiated in feminist scholarship.[58] For example, the attempt to reconstruct notions of legal subjecthood in order to accommodate some recognition of human mutual dependence or even intersubjectivity could be seen as risking the subsumption or suppression of difference — a threat which is all too present once one moves away, as political and legal institutions often do, from the face to face encounter.[59] The danger of suppressing and rendering difference invisible has found particularly forceful expression in the work of feminist writers, many of whom have responded to this danger by emphasising the need,

57. See MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–77 (Colin Gordon ed., Colin Gordon et. al. trans., 1980); for a discussion of the relevance of Foucault's ideas to feminist legal theory, see SMART, *supra* note 33.

58. See, for example, YOUNG, JUSTICE, *supra* note 26; Littleton, *supra* note 36; and Nedelsky, *supra* note 36.

59. *See* LUCE IRIGARAY, J'AIME À TOI: ESQUISSE D'UNE FÉLICITÉ DANS L'HISTOIRE (1992); Alain Pottage, *Recreating Difference*, 5 L. & CRITIQUE 131 (1994).

given the historical shape of women's oppression, to reconstruct politically adequate notions of space, autonomy, rights, and privacy.[60] The reciprocity inherent in the constitution of subjects' identities which derives from the necessary encounter with the other needs to be seen in terms of a simultaneous recognition of *sameness and difference* — a refusal either to dichotomise self/other or to collapse one into the other.

IV. Theory and Practice

I want to return finally to the more concrete question of what the theoretical arguments outlined above mean for critical legal practice and for productive dialogue between feminist lawyers, legal theorists, and sociologists of law in different countries. For each of the approaches I have sketched, a central dilemma turns on the characteristic of law as a practice which makes *determinations*, and which has a top-down, vertical, authoritarian imposition of power as its central mode of operation. In this gesture of imposition, it seems that the violence and excluding force of law is inevitable. The law-creating subject and the subject of law's power are irreducibly divided, whilst simultaneously being rejoined discursively in the name of the neutrality, objectivity, and universality of legal judgment. For critical approaches, therefore, a central part of the reconstructive project is to unearth and revalorise what Peters identifies as the "other" aspect of law: its status as a forum for critical discussion, for challenging established practices, and for questioning prevailing definitions of the legal community.[61] Meagre though these opportunities may be within the legal systems in which we work, they constitute one of the few hopeful realities which we can grasp. Critical legal theorists would, at the very least, be contradicting their avowed affinities with critical legal practitioners if they were not quick to seize upon and try to think through the implications of this critical space within legal argumentation.

Notwithstanding the power of established interpretive communities, the possibility of subversive interpretation is implicit in the recognition of the discursive quality of legal texts. Although we may recognise that political and professional interpretive communities have the power to impose certain meanings on a

60. *See* Irigaray, *supra* note 59; Salecl, *supra* note 16, at ch. 8; Young, Justice, *supra* note 26, at chs. 1, 2 & 8; Nedelsky, *supra* note 36.

61. Peters, *supra* note 47.

legal text, this very recognition is premised on the implicit acknowledgement that an alternative meaning might have been constructed — that there is an "intrinsic dialogue" within the text.[62] Textual critique is therefore a form of genuine political activism. Can this political resistance at the level of critical textual analysis be accompanied by any more concrete practice? Can we make any progress toward the greater realisation of law as critical discussion without risking disguising the irreducible violence of legal determinations? Can the analogy between political and legal dialogue be usefully pursued?

One obvious possibility is to focus on the development of alternative legal forms. Paul Kahn, a sympathetic commentator on the emergence of appeals to "community" in legal theory, raises some serious questions about the potential of such a strategy when he notes: "The community of discourse that emerges in the platonic dialogue is always *an alternative* to the state. The legitimate community of dialogue stands always against the coercive community of state authority."[63] We should not be misled, in other words, into thinking that real conditions of discursive legitimacy obtain simply because we are dealing with *forms* of legal determination which are apparently closer to the ideal of discursive community. Some salutory lessons in this respect can be learnt from the debate about informal justice and alternative dispute resolution in recent socio-legal studies.[64] Socio-legal and anthropological research in these areas shows that alternative legal forms often develop in the shadow of state justice, drawing on and reproducing state power, whilst obscuring the power differentials and the exclusions which are at least relatively transparent features of formal legal processes.[65] Yet it seems too soon to abandon entirely exploration of the implications of a more fragmented conception of the legal.[66] This is an area in which

62. GOODRICH, *supra* note 27, at 217, 220–21.

63. Kahn, *supra* note 9, at 83 (emphasis added).

64. Important contributions to this debate are included within 1–2 THE POLITICS OF INFORMAL JUSTICE, *supra* note 31; and the special edition of SOCIAL AND LEGAL STUDIES entitled *State Transformation, Legal Pluralism and Community Justice* edited by Boaventura de Sousa Santos. Special edition, *State Transformation, Legal Pluralism and Community Justice*, 1 SOC. & LEGAL STUD. 131 (1992).

65. For an empirically grounded exploration of the idea of informal justice as "shadow justice," see CHRISTINE HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT (1985).

66. Even the most stringent critics of informal justice tend to be reluctant to abandon all hope that the progressive ideals which undoubtedly inform some of its manifestations could, in certain political contexts, be realised. *See* 1–2 THE POLITICS

cross-cultural exchange is likely to be productive, particularly given the wide experience of East European lawyers with forms of legal organisation both before 1989 and in the turbulent post-revolutionary era with which West European and North American lawyers are unfamiliar.

It is the clear lesson of socio-legal research, much of it undertaken by feminist scholars, that the diversification and informalisation of legal forms do not necessarily entail a parallel advantaging of the powerless. Nonetheless, particularly in terms of how we might realise a more horizontal or participatory approach to legal practice, socio-legal research generates certain insights or visions of difference: workplace participation in the development of codes of practice or rule-making; mediation schemes in certain areas; and popular participation *not merely in the enforcement but also in the construction of the standards to be applied*. All of these have found expression (albeit imperfect) in a multiplicity of practices which socio-legal scholarship has rightly reminded us are highly relevant to the social meaning of law. Indeed, if we have learnt anything from this work, it is that an understanding of these broader practices and their role in the effective construction of legal standards is indispensable to an appreciation of the deep meaning of the legal norms articulated more formally at more visible points in the legal hierarchy. It is therefore a curiosity of contemporary West European and American legal theory that this accumulated body of socio-legal research has barely impinged on either orthodox, or, even more surprisingly, critical conceptualisations of law and the legal.[67] Its relevance is highlighted by the situation of many countries in Central and Eastern Europe, in which projects of concrete legal

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OF INFORMAL JUSTICE, *supra* note 31 or Abel, *Contradictions*, *supra* note 31; Maureen Cain, *Beyond Informal Justice*, *in* INFORMAL JUSTICE? 51 (Roger Matthews ed., 1988); Boaventura de Sousa Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, *in* 1 THE POLITICS OF INFORMAL JUSTICE 249, *supra* note 31; and *State, Law and Community in the World System: An Introduction*, 1 SOC. & LEGAL STUD. 131 (1992) [hereinafter de Sousa Santos, *World System*]. On the possibility of a more pluralistic conceptualisation of law, see ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW (1993); Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869 (1988); Roger Cotterrell, Legal Studies: Between Policy and Community, Plenary Lecture Delivered to the Socio Legal Conference, University of Exeter (1993).

67. For more detailed discussion of this point, see Nicola Lacey, *The Jurisprudence of Discretion: Escaping the Legal Paradigm*, *in* THE USES OF DISCRETION 361 (Keith Hawkins ed., 1992); Lacey, *Community in Legal Theory*, *supra* note 6. For exceptions to the lack of dialogue, see HUNT, *supra* note 66; de Sousa Santos, *World System*, *supra* note 66; Cotterrell, *supra* note 66.

reconstruction occupy such an important place on the political agenda.

CONCLUSION

In conclusion, I suggest that, despite the particular legal and political conditions facing women as legal subjects in Central and Eastern Europe on the one hand and in Western Europe and North America on the other, at root we all confront some rather similar dilemmas. These dilemmas have to do with finding a framework adequate for the normative reconstruction of law and legal practices in a fragmented world. In particular, they have to do with how law can be mobilised to serve the needs and interests of women in a world in which, as developments in Central and Eastern Europe so depressingly show, the political and economic gains for women in the second half of the Twentieth Century are more fragile and easily reversible than any of us imagined. As a reaction against postmodernist scepticism and a search for the space for commitment and reconstruction within the postmodern sentiment develop in the West, and as disenchantment with Western models grows in the East, there may yet be a simultaneity of political and legal-reformist movements in the two regions. This conference is a promising instance of just such productive communication.