Michigan Law Review

Volume 90 | Issue 4

1992

Law, Politics, and the Claims of Community

Stephen A. Gardbaum

Northwestern University School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Law and Philosophy Commons](#), [Law and Politics Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992).

Available at: <https://repository.law.umich.edu/mlr/vol90/iss4/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

LAW, POLITICS, AND THE CLAIMS OF COMMUNITY†

Stephen A. Gardbaum*

TABLE OF CONTENTS

INTRODUCTION	686
I. COMMUNITY IN CONTEMPORARY MORAL AND POLITICAL THEORY.....	690
A. <i>Three Communitarian Claims</i>	690
B. <i>Three Communitarian Debates</i>	692
C. <i>Fostering the Value of Community</i>	695
D. <i>The Agency Debate</i>	701
E. <i>The Metaethical Debate</i>	705
1. <i>Rorty: Liberalism Goes Postmodern</i>	707
2. <i>Walzer: Moral Philosophy as Interpretation</i>	710
3. <i>Habermas: The Guardian of Rationality</i>	712
4. <i>Metaethical and Strong Communitarianism</i>	717
F. <i>The Political Debate: The Nature and Variety of Substantive Community</i>	719
1. <i>Conservative Community</i>	719
2. <i>Republican Community</i>	723
a. <i>General Features</i>	723
b. <i>Altruism and Civic Virtue</i>	728
3. <i>Communist Community</i>	730
II. COMMUNITY IN CONTEMPORARY LEGAL THEORY	732
A. <i>Antiatomism</i>	733
B. <i>Metaethical Community</i>	736
1. <i>Fiss: Interpretation and the Professional Community</i>	737
2. <i>Cover: New Worlds and Interpretive Authority</i> ..	739
3. <i>Dworkin: Integrity and Community</i>	741
a. <i>Integrity and the Coherence of Law</i>	742
b. <i>Community and the Authority of Law</i>	744

† © 1991 by Stephen A. Gardbaum. All rights reserved.

* Assistant Professor, Northwestern University School of Law. B.A. 1980, Oxford; M.Sc. 1985, London; Ph.D. (political theory) 1989, Columbia; J.D. 1990, Yale. — Ed. I would like to thank Bruce Ackerman, Robert Amdur, Cynthia Bowman, Bob Burns, Owen Fiss, Michael Perry, Rick Pildes, and colleagues in Northwestern's constitutional theory workshop for their helpful comments on earlier versions of this article.

C. <i>Conservative Community</i>	747
D. <i>The Republican Revival</i>	749
E. <i>Critical Legal Studies</i>	753
III. CONCLUSION	757

Any healthy society needs a view of itself as a political and moral community.

— Robert Bork¹

Only by rejecting the principles of subjective value and of individualism could we allow for the possibility of communal values.

— Roberto Unger²

We should look for our defense of integrity in the neighborhood of fraternity or, to use its more fashionable name, community.

— Ronald Dworkin³

INTRODUCTION

Contemporary legal theory has been dominated by discussion of "community."⁴ Yet both the content and target of communitarian claims remain surprisingly vague. Particularly unclear is the relationship of this communitarian discourse to, and the implications for, legal and political liberalism. Despite certain views to the contrary,⁵ the discourse does not appear to be uniformly antiliberal. Indeed, such noted liberal legal scholars as Ronald Dworkin and Owen Fiss have been appealing to notions of community for a number of years.⁶

Even in those cases where liberalism does appear to be the target of communitarian claims, much remains in need of explanation. Conservatism of the variety espoused by Robert Bork, works inspired by the republican tradition of legal and constitutional thought, and critical

1. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 249 (1990).

2. ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 102 (1975).

3. RONALD DWORIN, *LAW'S EMPIRE* 188 (1986) (footnote omitted).

4. Although almost all of the discussion has been of the first order, or prescriptive, variety — being either for or against "community" — rather than of the second order, reflecting upon the phenomenon itself. Among the few exceptions are Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 *YALE L.J.* 1 (1989), and a very brief treatment in RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 414-19 (1990).

5. See, e.g., POSNER, *supra* note 4, at 414 ("What principally unites the various strands [of communitarianism] is hostility to liberalism. . .").

6. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977); DWORIN, *supra* note 3; OWEN M. FISS, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982). Robin West attributes to Dworkin and Fiss, whom she describes as "liberal legal theorists," "a passion for communitarian values." Robin West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 *YALE J.L. & HUMAN.* 129, 129 (1988).

legal scholarship have all at various times attacked liberalism in the name of community.⁷ But do (or can) these three critiques, seemingly emanating from all points of the legal/political spectrum, share one and the same outlook?⁸ The initial conclusion to be drawn from these observations is that what it means to be a communitarian in the law remains extremely opaque.

While ubiquitous in current academic legal discourse, the model of community has not been internally generated, but rather was imported from the neighboring disciplines of moral and political theory where it has been a central theme for the past decade.⁹ In this regard, at least, neither *Law's Empire* nor *Law's Republic*¹⁰ is a sovereign state. Accordingly, here one might profitably and legitimately look to discover the conceptual tools necessary for understanding and evaluating the claims of community in law. Perhaps the vagueness is the result of ignoring the sources of communitarian discourse. For while the *appeal* of the communitarian model to legal scholars may well (indeed, should) derive from its ability to solve internal problems of legal theory, it does not follow that the *meaning* of the claims can be understood in isolation from their broader theoretical contexts. Because the conceptual apparatus of community has its sources outside legal discourse, an interdisciplinary approach remains unavoidable.¹¹

7. See, e.g., BORK, *supra* note 1, at 241-50; MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); UNGER, *supra* note 2; Robert H. Bork, *Tradition and Morality in Constitutional Law*, The Francis Boyer Lectures on Public Policy (1984); Frank I. Michelman, *The Supreme Court, 1986 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1987); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

8. Some commentators argue this is indeed the case, that left and right have come together over antiliberalism. See, e.g., Christopher Wolfe, *Grand Theories and Ambiguous Republican Critique: Tushnet on Constitutional Law*, 15 LAW & SOC. INQUIRY 831, 875 (1990) (reviewing TUSHNET, *supra* note 7) ("Left and right . . . have a considerable amount in common in their theoretical critique of mainstream liberalism.").

In fact, the antiliberal advocates of community appear somewhat confused over how best to categorize their claims. At the beginning of his well-known article, *Following the Rules Laid Down*, Mark Tushnet opposes the "liberal account of the social world . . . [that is characterized by] fundamental individualism" to "the communitarian assumptions of conservative social thought." Mark V. Tushnet, *Following the Rules Laid Down*, 96 HARV. L. REV. 781 (1983). In the first chapter of his book, *Red, White, and Blue*, *supra* note 7, Tushnet reproduces much of this article including this passage but replaces the phrase "conservative social thought" that he used in the article with the phrase "the republican tradition." *Id.* at 22. One of the major tasks of this article is to explain the differences, and thus the lack of interchangeability, between the communitarian claims of republicans and conservatives.

9. See *infra* Part I.

10. I am referring here to Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988), one of the leading articles articulating the republican position in legal theory.

11. Cf. Kahn, *supra* note 4, at 5 ("The move to a communitarian model in constitutional theory reflects larger trends in political and moral theory. Nevertheless, the new emphasis on community can also be understood from within the discipline itself This essay takes this *intradisciplinary perspective*") (emphases added).

However, clarifying what is happening within the legal literature by turning to the broader theoretical debates from which legal communarians have borrowed is no straightforward task. A good deal of preparatory work is required before the results can be appropriated to legal theory. This is because within moral and political theory too, the content and target of communitarian claims have remained inadequately explained.¹² There is, however, no alternative to analyzing these claims at their source and the task is, if not brief, manageable.

This article aims to provide this needed analysis and then to show how it illuminates many of the exchanges taking place within the legal academy. It argues that the first step toward understanding "the claims of community" — whether in law or moral and political theory — is to recognize that, as the phrase itself suggests, *more than one claim* is involved. Merely to observe that the various proponents of community have as yet failed to establish a common and coherent communitarian position, though certainly true, is to miss the more critical insight: they are not engaged in such an attempt. Any assumption that supporters of "community" are coworkers in one and the same enterprise must therefore be firmly rejected. In short, the confusion in all three disciplines stems from the assumption that communitarianism represents a single viewpoint. The truth is rather that the claims of community are several and arise in a number of different contexts relevant to legal scholarship.

There is no single communitarian position or debate. Use of the same term "community" to describe these various claims has disguised this fact, resulting in a discussion predicated on the false assumption that all talk of community must relate to, and be accommodated in, one debate, i.e., *the* communitarian debate. Hence, the unremitting vagueness and lack of focus that have characterized all discussion of community from the outset.

The aim of Part I is to provide the only plausible theoretical framework for understanding the claims of community in legal theory — by untangling them at their source in contemporary moral and political theory. I begin by presenting a conspicuous and influential example of both the assumption that I am challenging (that there is only one concept of community) and its major implication (that all claims making use of the term community are connected parts of a single discourse,

12. For example, what of substance do Michael Sandel, Michael Walzer, Charles Taylor, and Alasdair MacIntyre, all of whom have either called themselves, or been labeled, "communitarians," have in common? Providing an answer to this question is one of the tasks of Part I of this article.

and that those who make these claims are to be seen as coworkers in a common project). The example is provided by Michael Sandel.

I then introduce and defend the thesis that there are three separate debates involving three separate claims of community — three independent communitarian positions — and not one. These are antiatomism, a descriptive claim concerning the constitution of individual identity; metaethical communitarianism, a second order (or meta-) claim about the source of value; and strong communitarianism, a first order claim about what is valuable. I argue that these three positions are quite independent of each other — holding one does not require one to hold any of the others — and, further, that only the third claim is incompatible with liberalism; indeed only this claim of community—strong communitarianism—has liberalism as its target. Whereas strong communitarianism expresses an *antimodern* critique of modernity by employing a substantive concept of community as an alternative to liberal society, the first two claims of community, antiatomism and metaethical communitarianism, are components of the *postmodern* critique of modernity, a wholly different and essentially methodological enterprise. This critique consists of radical skepticism concerning the rationality of the individual human subject and a rejection of the enlightenment faith in foundationalist and universalistic modes of normative argument in favor of discourse ethics, hermeneutic understanding, and contextualism.

The compatibility of liberalism with antiatomism and metaethical communitarianism amounts to a rejection of the standard antiliberal charges that liberalism rests upon atomism and subjectivism. Conversely, it indicates that antiliberalism cannot derive much support from either of these two claims of community. By showing that liberalism does not rest upon any particular metaphysical or metaethical foundations, the success of the postmodern communitarian critique would force both liberals and antiliberals to recognize that ultimately they must do what they have been so reluctant to do in the past: argue directly for the merits of their substantive moral visions.¹³ Herein lies its appeal.

Part II seeks to capitalize on the work done in the previous section by showing that the claims of community in legal theory parallel those just considered. Here, I analyze and evaluate the writings of such

13. I say "ultimately" because the particular version of metaethical communitarianism defended in this article holds that the value system embedded in the social practices of a society is created and transformable collectively (intersubjectively). Such transformation, based on the respective merits of alternatives as they are collectively conceived, will not usually be an overnight event and will be related in complex ways to other changes in social life — although even here, recent events in Eastern Europe threaten to challenge these qualifications.

legal communitarians as Unger, Mark Tushnet, Fiss, Robert Cover, Dworkin, Bork, Cass Sunstein, Frank Michelman, and Duncan Kennedy. I conclude that the major potential of communitarianism in legal theory is not to undermine liberalism as some of its proponents hope and believe, but rather to illuminate our understanding of the nature and source of individual and group rights and to inspire us to strengthen and expand channels of normative dialogue, whose outcomes are reflected — directly or indirectly — in the legal system.

I. COMMUNITY IN CONTEMPORARY MORAL AND POLITICAL THEORY

A. *Three Communitarian Claims*

The intellectual tools that were the prerequisite for the current popularity of communitarian discourse in moral and political philosophy were fashioned to a significant degree by two seminal historical works, Gordon Wood's *The Creation of The American Republic* and J.G.A. Pocock's *The Machiavellian Moment*, published in 1969 and 1975 respectively.¹⁴ These tools were further refined in the two pivotal books of the early 1980s, Alasdair MacIntyre's *After Virtue* (1981) and Michael Sandel's *Liberalism and the Limits of Justice* (1982). These works achieved much of their enormous success by providing a language and a theoretical model for what until then had been largely an inchoate reaction against the abstract and universalistic philosophical liberalism of Rawls, Nozick, and Dworkin in the 1970s.¹⁵

In his editorial introduction to *Liberalism and Its Critics*, published in 1984, Sandel attempts to draw up the communitarian manifesto. He states:

Recalling the arguments of Hegel against Kant, the communitarian critics of modern liberalism question the claim for the priority of the right over the good, and the picture of the freely-choosing individual it embodies. Following Aristotle, they argue that we cannot justify political arrangements without reference to common purposes and ends, and that we cannot conceive our personhood without reference to our role as citizens, and as participants in a common life.¹⁶

14. Unlike Pocock, Wood does not believe in the prescriptive authority of the republican tradition. The importance of his work lies not in any such advocacy, but in recreating the republican tradition in its historical context and, in particular, establishing its credentials as an important (if ultimately defeated) element in the constitutional debates of the new American nation.

15. ALASDAIR C. MACINTYRE, *AFTER VIRTUE* (1981); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). For examples of the primary works putting forth this version of liberalism, see JOHN RAWLS, *A THEORY OF JUSTICE* (1971); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1972); DWORKIN, *supra* note 6.

16. Michael J. Sandel, *Introduction to LIBERALISM AND ITS CRITICS* 5 (Michael J. Sandel ed., 1984).

And, a little further on, he continues:

The writings by C. Taylor, M. Walzer and M. Oakeshott illustrate the consequences for political discourse of assuming situated selves rather than unencumbered selves. In different ways, each sees political discourse as proceeding within the common meanings and traditions of a political community, not appealing to a critical standpoint wholly external to those meanings.¹⁷

It is of enormous importance to appreciate that this passage contains *three* distinct claims. These are (1) that the "picture of the freely-choosing individual" is false, (2) that "we cannot conceive our personhood without reference to our role as citizens, and as participants in a common life," and (3) that "political discourse [proceeds] within the common meanings and traditions of a political community, not appealing to a critical standpoint wholly external to those meanings." I shall call these three claims (1) antiatomism, (2) strong communitarianism, and (3) metaethical communitarianism, respectively.

Insofar as he recognizes that there are three different claims here, Sandel clearly believes that they are intrinsically connected to each other. He explicitly claims in the passage quoted that the third claim, metaethical communitarianism, follows from the first, antiatomism, when he says of the former that it represents "the *consequences* for political discourse of assuming situated selves."¹⁸ And the whole point of his *Liberalism and the Limits of Justice*¹⁹ is to establish that the second claim also follows from the first, that strong communitarianism follows from our being situated selves. Moreover, the whole tenor of Sandel's summary is to imply that the three claims taken together provide the essential content of a distinct and antiliberal political theory, and that the thinkers who propound each of them are coworkers in a common project; that is, they are the "communitarian critics of modern liberalism."

Sandel's short passage illustrates in a nutshell the complete confusion associated with communitarianism in moral and political philosophy, a confusion that was imported into legal theory as part of the total package. Sandel's desperate, if heroic, attempt to stitch together a single comprehensive political theory by editorial fiat — by simply and provocatively placing together excerpts from the writings of a diverse set of advocates of "community" — is hardly compelling. In fact, the three communitarian claims are independent of each other and are not, as Sandel appears to think they self-evidently are, neces-

17. *Id.* at 10.

18. *Id.* (emphasis added).

19. SANDEL, *supra* note 15.

sarily connected. That each involves *a* concept of community should not mislead us into assuming that the *same* concept is involved each time. It is not. Nor should we assume that the three claims simply represent different aspects of one and the same (antiliberal, communitarian) theoretical position. They do not.

B. *Three Communitarian Debates*

Each of Sandel's three claims involves a different concept of community. These are (1) community as a causal factor in the constitution of personal identity (antiatomism), (2) community as a particular substantive value (strong communitarianism), and (3) community as the source of value (metaethical communitarianism). Further, these three concepts are engaged in three quite separate debates taking place within contemporary moral, political, and social theory.

The first debate may be termed "the agency debate." It concerns the ontological relationship of the individual to his or her community. The communitarian claim in this debate is that the community of which an individual is a member is constitutive of that individual's identity and not merely contingent or accidental to it. This claim is directed at an opposing view that is often termed "atomism." This is the idea that we are, or are usefully conceptualized as, fully formed and self-sufficient individuals outside of society who assume social and political relationships and obligations only in order to further our own predetermined (exogenous) interests and values. The major traditions of support for versions of the atomism thesis are those of early, especially Hobbesian, social contract theory, the rational choice school that he spawned,²⁰ and contemporary libertarianism.²¹ Contrary to the premise of Sandel's critique of him, Rawls never claimed — not even at his most "extreme" in the early seventies — that his theory of the self is a descriptive theory of individual identity. It is rather a theory of the nature of moral personality, of those attributes and characteristics of the actual living individual that are relevant from the moral point of view. With the issue thus joined, I argue that in this debate, the term "community" is synonymous with that of "society."²²

20. See DAVID P. GAUTHIER, *THE LOGIC OF LEVIATHAN* (1976) (interpreting Hobbes' *Leviathan* in rational choice terms).

21. The most systemic and comprehensive contemporary statement of libertarianism is undoubtedly Nozick's *Anarchy, State, and Utopia*. NOZICK, *supra* note 15.

22. This descriptive question of personal identity must not be confused with the prescriptive one of what the boundaries between individual and community should be. The answer to this latter question (unlike the question in the agency debate) will depend upon controversial normative views concerning moral ideals and the content of the good life. In the history of political

Joseph Raz, Charles Taylor, and Sandel are among those who support the communitarian position in this debate.²³ Thus, Taylor argues for the "priority of society as the locus of the individual's identity."²⁴ Sandel, however, makes the crucial error of believing that a communitarian outcome here would require, or at the very least support, a communitarian outcome in the quite separate debate between liberalism and communitarianism as alternative forms of political society. It does not. Both Taylor and Raz plausibly view a communitarian outcome to the agency debate as perfectly compatible with their support for liberalism.²⁵ This suggests that, contrary to Sandel's implicit argument, there are at least coherent versions of liberalism which, unlike the liberalism of Hobbes, do not assume or require the existence of atomistic individuals.²⁶

I term the second of the three debates involving claims of community "the metaethical debate." It concerns the nature, source, and scope of value and of normative structures generally, and seeks to answer such typical questions as: What is the most valid form of argument concerning moral and political values? Do such values express anything more than personal preferences? Do we choose which values bind us? Can or must particular moral and political values be justified — and not merely expressed — in universal terms? Or, to the contrary, are values essentially local and tied to particular political communities, contexts, and traditions? This last view expresses the communitarian position in the metaethical debate.

This debate has been a perennial and classic one in the history of moral and political philosophy. Over the years, it has been variously described as that between universalism and particularism, objectivism and relativism, foundationalism and contextualism, rationalism and historicism. However it is so labeled, a concept of community is often advanced as the particularly relevant context by those who deny uni-

thought, liberal political society has been justified on the bases of answers to *both* of these distinct questions. Hobbes, for example, grounded liberalism in an atomistic answer to the agency debate; he saw the liberal social contract as a necessary response to a world of factually autonomous individuals. Kant and J.S. Mill, by contrast, grounded liberalism in an individualistic answer to the quite separate prescriptive question; liberalism was the political system most compatible with, and most likely to promote, a view of the good life in which personal autonomy is the highest value. See Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1353-55 (1991).

23. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 390-95 (1986); CHARLES TAYLOR, *Atomism*, in *PHILOSOPHY AND THE HUMAN SCIENCES* 187 (1985).

24. Charles Taylor, *Overcoming Epistemology*, in *AFTER PHILOSOPHY* 464, 478 (Kenneth Baynes et al. eds., 1987).

25. As I shall argue more fully in section I.D.

26. The issue of whether these versions of liberalism are not just coherent, but also *compelling*, is examined in Gardbaum, *supra* note 22.

versalism and subjectivism in their various forms. That is, the particular moral and political context in which values are affirmed is always crucial to their validity. This concept of community thus has as its contrary not the notion of atomistic individuals (as in the agency debate), but the two metaethical doctrines of universalism and subjectivism.

Metaethical communitarians divide into two groups, each of which provides a different explanation as to *why* political values in particular cannot be grounded in universal terms, and therefore why community is the necessary forum or source of value. The first derives from the postmodern strand in contemporary epistemology.²⁷ Its reason, in very general terms, is that save for possible emotive or rhetorical effects, appeal to universal substantive values is essentially redundant if not meaningless. Among contemporary moral and political philosophers who can usefully be located in this group are liberals such as Richard Rorty and Jürgen Habermas;²⁸ among those who cannot is MacIntyre.²⁹

The second group expresses a much older tradition in political thought and has among its contemporary proponents Benjamin Barber, Michael Oakeshott, and Michael Walzer.³⁰ The reason here is that whatever role universal values may have in other contexts, they have no self-executing authority in the autonomous sphere of politics which has its own distinct criteria of validation based on the requirements of the political value of self-rule.³¹ This tradition sees the only legitimate method of generating binding political norms to be that of affirmation by the political community itself. Because universal values claim to be directly applicable everywhere regardless of internal, autonomous political processes of ratification or implementation, it considers philosophy, the "producer" of such values, as inherently antipolitical.

27. For present purposes, the relevant postmodern attitude is contained in Lyotard's statement, "I define *postmodern* as incredulity towards metanarratives." See JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION* xxiv (Geoff Bannington & Brian Massumi trans., 1984).

28. See, e.g., RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); Jürgen Habermas, *Philosophy as Stand-In and Interpreter*, in *AFTER PHILOSOPHY*, *supra* note 24, at 296-315. For my discussion of Rorty and Habermas, see *infra* text accompanying notes 69-84 and 94-117.

29. For my argument that MacIntyre is not a metaethical communitarian at all, see *infra* text accompanying notes 118-21.

30. See BENJAMIN BARBER, *STRONG DEMOCRACY* (1984); MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS* (1964); Michael Walzer, *Philosophy and Democracy*, 9 *POL. THEORY* 379 (1981).

31. See Walzer, *supra* note 30, at 397 ("But philosophical validation and political authorization are two entirely different things. They belong to two entirely distinct spheres of human activity.").

As with the agency debate, it is a fundamental error to suppose that a communitarian outcome in this second debate would require a strong communitarian outcome to the quite separate liberal versus communitarian debate. Rorty, Walzer, and Habermas all plausibly believe they are constructing coherent versions of liberalism on the basis of the communitarian position in the metaethical debate. Just as liberalism does not require the truth of atomism, neither does it require the truth of either universalism or subjectivism.³² Indeed, as we shall see, it is in fact a certain version of the communitarian position in the third debate, and not liberalism, that rests upon a universal metaethical claim (about the good life for human beings), so that it is the one potentially undermined by a communitarian outcome in the second debate.

The third debate, which I term "the political debate," is the only one in which liberalism is the *target* of communitarian claims. In this debate (but not in the other two), liberalism and communitarianism are the theories underlying two quite different types of substantive political society, structured upon radically contrasting principles of association. Ultimately, the communitarian claim here (as distinct from the other two communitarian claims I have just discussed) is that the communitarian way of life, expressed in and through a particular form of political association — the political community — is intrinsically better than others and, in particular, is better than the liberal way of life and its corresponding form of political association — the liberal state. Those making this strong communitarian claim in recent moral and political philosophy include MacIntyre, Sandel, and Hannah Arendt.³³ In the political debate, many of the communitarians in the first two debates — in particular Taylor, Raz, Rorty, and Walzer — defend liberal political values and institutions against communitarian ones, and there is no inconsistency in their doing so.

C. *Fostering the Value of Community*

As the passage quoted at the very beginning of section I.A indicates, Sandel acknowledges the centrality of "community" in the work of Michael Walzer. Additionally, he asserts that Walzer's claims are consistent with his own and, indeed, follow from them (they "illus-

32. Once again, it is a separate question whether these versions of liberalism are compelling as well as coherent.

33. See HANNAH ARENDT, *ON REVOLUTION* (1963); HANNAH ARENDT, *THE HUMAN CONDITION* (1958). For MacIntyre, see also ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988). For other writings by Sandel, see Michael Sandel, *The Procedural Republic and the Unencumbered Self*, 12 *POL. THEORY* 81 (1984); Michael J. Sandel, *The State and the Soul*, *NEW REPUBLIC*, June 10, 1985, at 37-41.

trate the consequences for political discourse of assuming situated selves").³⁴ Neither of these assertions is true. The reasons that neither is true are extremely illuminating for my purpose of untangling the conceptual muddle in which the debate over community finds itself. Accordingly, I shall briefly examine them.

In an exchange with Walzer provoked by his review of *Spheres of Justice*,³⁵ Ronald Dworkin describes what he states to be the "heart of our disagreement," namely the idea (which he ascribes to Walzer) "that the world is divided into distinct moral cultures and that it should be the goal of politics to foster the value of 'community' by respecting the differences"³⁶ Dworkin adds that this idea "has for a long time been associated with political conservatism and moral relativism. It is once again fashionable in political theory. . . ." Here, Dworkin fails to draw a critical distinction between Walzer's position on the one hand, and that of strong communitarianism on the other. This distinction has been overlooked because *both* positions can be said to assert that "the goal of politics is to foster the value of 'community.'" The senses in which they assert this goal, however, are crucially different.

Dworkin's description of his essential disagreement with Walzer contains a reasonably accurate account of the position taken by the latter in such major works as *Spheres of Justice*, *Philosophy and Democracy*, and *Interpretation and Social Criticism*.³⁷ For Walzer, "fostering the value of community," which he undoubtedly sees as a central task of politics, does entail "respecting the differences" between communities. This follows from his explicit view that it is only the traditions, cultures, and values of particular political communities that are relevant to political argument and knowledge. "[S]o political knowing is particular and pluralist in character," he says, "while philosophical knowing is universalist and singular," and

I shall call [this other kind of knowledge] political rather than philosophical knowledge. It answers the questions: What is the meaning and purpose of this association? What is the appropriate structure of our community and government? Even if we assume that there are right answers to these last questions . . . , it is nevertheless the case that there will be as many right answers as there are communities.³⁸

The essential difference between Walzer's position and the strong

34. MANDEL, *supra* note 16, at 10.

35. MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

36. Ronald Dworkin & Michael Walzer, *'Spheres of Justice': An Exchange*, N.Y. REV. OF BOOKS, July 21, 1983.

37. MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* (1987).

38. Walzer, *supra* note 30, at 393 (emphasis omitted).

communitarianism of Sandel, MacIntyre, and Arendt in particular, is that for these latter, "fostering the value of community" does *not* necessarily entail respecting the cultural differences between political communities. It is not the goal of political activity to achieve this end, but rather to attain the independently grounded human good. Accordingly, their claim is ultimately a universal one about the nature of this good. MacIntyre argues that "[b]oth [the polis and the medieval kingdom] are conceived as communities in which men in company pursue *the human good* and not merely as — what the modern liberal state takes itself to be — providing the arena in which each individual seeks his or her own private good."³⁹ Conceptually, this is a claim about the *human* good, about what is good simply in respect of being human. "But once the notion of *essential human purposes* or functions disappears from morality, it begins to appear implausible to treat moral judgments as factual statements."⁴⁰ Such "factual statements" necessarily apply to all humans. Strong communitarianism does not state that the good is whatever your community values, but rather that the good must be pursued in and through political community.

For Walzer, universal principles "have the effect of enforcing a singular over a pluralist truth, that is, of reiterating the structure of the ideal commonwealth in every previously particularist community,"⁴¹ and their establishment involves "repressing internal political processes."⁴² Hence, Walzer's essential position should be understood as arguing against the political validity of universal values, and the strong communitarianism of Sandel, MacIntyre, and Arendt is fundamentally the expression of such a value. The two senses in which "community should be fostered" thus involve radically different kinds of claims, claims that are advanced in the contexts of completely different debates, conducted at different orders of discourse — one at the second order, or metaethical level, and the other at the first order, or substantive level.

To see why Walzer is not expounding and defending a *substantive* position midway between liberalism and strong communitarianism, but is rather advancing the claims of community in a different sense, in a different debate, it is only necessary to look at his notion of shared values. In his view, liberal *theory* misrepresents the extent of our communal experience in liberal *society* and thereby forces us to misunderstand our personhood. Stripped of its superficial atomistic ideology,

39. ALASDAIR C. MACINTYRE, *AFTER VIRTUE* 172 (2d ed. 1984) (emphasis added).

40. *Id.* at 59 (emphasis added).

41. Walzer, *supra* note 30, at 393.

42. *Id.* at 395.

liberal society is seen to be constituted by deeply held shared values and commitments that define our specific tradition.⁴³

The content of these shared values is the moral and political language of rights, equality, individual freedom, voluntary association, and the separation of the various spheres of activity — including, but by no means limited to, public and private — that constitute our world.⁴⁴ But for Walzer, the fact that these shared values are broadly individualistic in *content* (and are characteristically expressed in universal terms) should no longer mislead us into thinking that their *source* is similarly individualistic. He argues that liberal ideology has often misdescribed the source of these individualistic values as the inalienable residue of the natural rights of atomistic individuals. The reality is, however, to the contrary: these values are common goods, “owned” and produced by our society and constitutive of it. They are firmly embedded in our characteristic social practices, and are protected and perpetuated by such typical means as education and socialization.⁴⁵ Individualistic values form a major part of the public culture of our society, which is a common possession of the community as a whole.

Thus, it is inaccurate to believe that the central point of Walzer's recent work is that shared values and a shared political language form the basis of substantive, albeit “latent,” community in liberal society.⁴⁶ Such a view ignores the classical sociological distinction — first drawn by Ferdinand Tönnies in the nineteenth century⁴⁷ — between society and community (*Gesellschaft* and *Gemeinschaft*), the very distinction upon which the communitarian critique of liberalism is, and always has been, based. Simply put, if liberal society, stripped of its atomistic ideology, is a community in the crucial substantive sense, then what society is *not*? And with this, of course, the distinction (and the critique) disappears.

The contemporary communitarian opponents of liberalism are hardly likely to be placated quite so easily, particularly when one rec-

43. See Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 580 (1990).

44. Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315 (1984).

45. Walzer, *supra* note 43, at 590.

46. Nancy Rosenblum argues that “[communitarians] want community, not just sociability or interdependence.” NANCY ROSENBLUM, *ANOTHER LIBERALISM* 257 (1987). She categorizes Walzer as a “latent communitarian,” or one who believes liberal society already is, despite contrary appearance, a substantive community. *Id.* at 166-69.

47. FERDINAND TÖNNIES, *GEMEINSCHAFT UND GESELLSCHAFT* (Charles P. Loomis ed. & trans., The Michigan State University Press 1957) (1887).

ognizes (as they themselves largely fail to do⁴⁸) that theirs is simply the latest, and in many ways the least hostile, version of a recurring critique of modernity.⁴⁹ What is at stake for them is not the source of value but the content: which values are pursued. The point is that, whereas shared values, history, traditions, and political language are all necessary conditions for the existence of any type of reasonably stable political society, they are not sufficient for the particular type — substantive political community — that strong communitarians wish to see established or, in some cases, reestablished.⁵⁰

It is not simply the existence of shared values that constitutes substantive community, and certainly not the mere convergence of individual preferences or values,⁵¹ but the content and scope of these shared values. Walzer is not claiming that we should acknowledge the communitarian criticism of liberalism by recognizing and affirming that, in reality, we live in a substantive political community and have the “best” of both worlds: community *and* liberal values. What he is claiming when he wishes to “foster the value of community” is that we should look to our shared values and understandings in determining what as a society we should do, rather than to claims external to our concrete moral and political traditions. The interpretation and fashioning of the latter alone, in his view, provide the proper material of democratic politics. Accordingly, in his major writings, Walzer is not essentially addressing the (substantive) issues raised by the communitarian criticism of liberalism at all.

The exact nature of the critical distinction between the two senses of “fostering the value of community” should now be clear. It is the distinction between respecting and *fostering the particular and diverse values of different individual communities* (whatever those values happen to be) on the one hand, and fostering *the* (single) value of substantive community, on the other. Walzer is a communitarian in the sense of prescribing the first of the two meanings, what he sometimes terms “radical particularism,”⁵² and as such, he rejects strong communitari-

48. Their references are overwhelmingly to classical political theorists rather than to more modern critics of liberalism from the romantic movement of the nineteenth century onward.

49. Habermas calls this debate “the philosophical discourse of modernity.” See generally JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* (Frederick Lawrence trans., 1987).

50. I say “in some cases” because, as I shall argue in section I.F, there are three relevant types of substantive community. These are conservative, republican, and communist community. Unlike the first two, the latter does not look to historical examples of substantive community for inspiration.

51. See *infra* text accompanying notes 148-49.

52. He describes this position in the introductions to two of his books. MICHAEL WALZER, *JUST AND UNJUST WARS* (1977), and WALZER, *supra* note 35, at xiv.

anism. Conversely, Sandel, MacIntyre, and Arendt argue for the second meaning and, in order to do so, they must reject the first. Given the world as it is, with its diversity of political cultures and values, these two communitarian positions are not only distinct, but mutually exclusive. The strong communitarian position does not respect the differences between cultures. It claims rather that politics should foster the particular and universal value of community, regardless of the content and context of particular moral and political cultures, and regardless, in particular, of the central — though by no means exclusive — position that substantively individualistic *values* (not facts or sources) undoubtedly play in the constitution of liberal-democratic societies.

It is the metaethical debate, of course, that forms the terrain upon which the exchange between Walzer and Dworkin takes place. Dworkin's criticism is directed only at Walzer's metaethical assertion of the value of community, and it speaks from a universalistic perspective.⁵³ As Walzer describes the argument, it is about

the scope of our conclusions. I don't hope to make arguments that are conclusive for all human beings in all societies that exist or will exist or ever have existed The hard task is to find principles latent in the lives of the people Dworkin and I live with, principles that they can recognize and adopt.

And Dworkin responds:

But the principles of justice we use to decide which features of a community are relevant to a just distribution of its goods . . . must be principles we accept because they seem right rather than because they have been captured in some conventional practice. Otherwise political theory will be only a mirror, uselessly reflecting a community's consensus and division back upon itself.⁵⁴

Strong communitarians share Dworkin's universalistic perspective; they assert community as a value directly applicable everywhere. It represents the one true conception of the good life for human beings. Moreover, just as the political debate is the latest installment of a venerable tradition of political thought, so Walzer's position can be traced back to Aristotle's critique of Plato's rationalist utopia,⁵⁵ and has been familiar ever since the French Revolution.⁵⁶

In the political debate, Walzer defends individualistic values

53. Whether Dworkin still adheres to such a universalistic moral perspective is unclear. See *infra* text accompanying notes 204-07.

54. Dworkin & Walzer, *supra* note 36.

55. ARISTOTLE, *THE POLITICS*, BOOK III.

56. See EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (Conor Cruise O'Brien ed., Penguin Books 1968) (1790) (relentless critique of the role of abstract principles in politics—in favor of tradition, continuity, and context).

against the type of society the strong communitarians would like to see established. The fact that two liberals such as Walzer and Dworkin are opponents in the metaethical debate should make it clear that this debate differs from the one in which antiliberalism is the central issue. Both Walzer and Dworkin explicitly defend free association and dissociation, freedom of mobility and choice — the very freedoms which, because they necessarily do, and historically did, undermine substantive community, could not be permitted to survive the transition.

In this and the previous two sections, I have argued that the term “community” refers to three different concepts — the constitution of personal identity, the source of binding values, and a substantive notion of the human good. In addition, I have claimed that there is no necessary connection between these three concepts of community. In particular, to be a communitarian on the issue of personal identity or metaethics does not require one also to be a strong communitarian. In the next four sections, I seek to substantiate these claims by focusing in more detail on the content of the three debates. Although the concepts of community in the atomism and metaethical debates are distinct, they are often employed in the same context. This is because they express respectively the two essential themes of the general postmodern critique of modernity: the attack on the “sovereign rational subject — atomistic and autonomous, disengaged and disembodied”⁵⁷ (the agency debate) and the critique of reason understood as the provider of transcendental and universal foundations for truth (the metaethical debate). This critique of modernity does not, however, necessarily involve a critique of liberalism as well, although it does imply an attack on certain traditional methods of justifying liberalism.⁵⁸ In the next section, I discuss the agency debate; in section I.E, the metaethical debate; and in section I.F, the political debate.

D. *The Agency Debate*

The agency debate concerns the nature and constitution of the self. For our purposes, it involves two relevant claims: first, atomism — that in terms of their identity, individuals are essentially self-constituted, unencumbered, and self-sufficient; second, communitarianism — that, to the contrary, individuals are “partly defined by the communities we inhabit.”⁵⁹ Here, the term “community” functions as a

57. Kenneth Bayner et al., *General Introduction* to *AFTER PHILOSOPHY*, *supra* note 24, at 4; *see also id.* at 67-71.

58. I am referring to defenses of liberalism that rest upon atomism or universalism. *See* Gardbaum, *supra* note 22, at 1354.

59. Sandel, *supra* note 16, at 6.

causal component in the make-up of the self. The key issue is what of substance would follow from the truth of the communitarian position in this debate (a position that I shall generally refer to as either "the social thesis" or "antiatomism").

As stated in section I.A, Sandel believes that a certain vision of politics ("we cannot conceive our personhood without reference to our role as citizens, and as participants in a common life") follows from the communitarian thesis concerning the self ("situated selves rather than unencumbered selves"). This is the clear subtext and *raison d'être* of *Liberalism and the Limits of Justice*. Elsewhere, Sandel asks: "What is at stake for politics in the debate between unencumbered selves and situated ones? What are the practical differences between a politics of rights and a politics of the common good?"⁶⁰ Sandel's second question here is not, as he implies, simply a restatement of his first — what in fact follows from a communitarian self — but is rather his *answer* to it. This time by assuming the equivalence of his two questions, Sandel again declares what he believes to be the political consequences of the encumbered self: namely, "a politics of the common good."⁶¹

This consequence that Sandel derives from the social thesis is neither logically nor practically required. First, it is a non sequitur to argue that to deny "the picture of the freely-choosing individual" *is* to imply "that we cannot conceive our personhood without reference to our role as citizens." Some argument is needed to move from a concept of the self as encumbered, to the essential nature of a *particular* encumbrance — that of citizenship. It is insufficient simply to assume that the two are equivalent, that the community that partly constitutes me is a political community. In fact, Sandel goes even further than this equivalence, because he claims that acknowledging the importance of citizenship in general requires a political community of a specific sort — one in which citizenship is the *highest* value; a political community that fosters the politics of the common good. This implies more than "reference" to our role as citizens; it implies the dominance of that role.

Second, practically speaking, if we are all constituted in part by our communities, then the type of individuals we are depends upon the nature of these communities. Indeed, Sandel confirms the point:

But if we are partly defined by the communities we inhabit, then we must

60. *Id.*

61. What this phrase means is explained in section I.F. For now, it suffices to say that "a politics of the common good" refers to a type of political association in which the cultivation of civic virtue and public spirit are the predominant values.

also be implicated in the purposes and ends characteristic of these communities Open-ended though it be, the story of my life is always embedded in the story of those communities from which I derive my identity — whether family or city, tribe or nation, party or cause.⁶²

One obvious implication of this principle would seem to be that liberal societies “produce” liberal individuals, with liberal outlooks and values rather than the strongly communal ones involved in the notion of “a politics of the common good.”

Contrary to Sandel’s argument in *Liberalism and the Limits of Justice*, we find just that. Individual identity depends significantly upon the values embedded in the social practices of society, and the individualistic values of freedom and autonomy are central values embedded in ours. In liberal societies, individuals choose their ends, but they cannot be said to choose to choose them. Rather, “[t]he necessity of making a decisive choice” (to use Max Weber’s phrase⁶³) is a social and cultural requirement of modern Western societies, societies that share the important conception that valuable activities are ones we choose.

The social practices of choosing an occupation, life partner, and place of residence are central to our self-understandings and identity formation, but they are also quite specific to the modern West. Indeed, strong communitarians disdain individualistic values precisely *because* their ascendance was a crucial historical factor in the decline of community life and membership as the central identity-forming social practice in the West. As Charles Taylor says, “the free individual of the West is only what he is by virtue of the whole society and civilization which brought him to be and which nourishes him.”⁶⁴ Similarly, Joseph Raz argues that the very possibility of living an autonomous life is, in important respects, a social product: “The autonomous life depends . . . on the general character of one’s environment and culture. For those who live in an autonomy-supporting environment there is no choice but to be autonomous; there is no other way to prosper in such a society.”⁶⁵ Through its social practices, every society incorporates notions of a valuable human life, a particular view or views of the human good. Crucially, a notion of the good such as autonomy is as socially (or communally) constituted as the strongly communal substantive notion of the good that characterizes more traditional societies.

62. Sandel, *supra* note 16, at 6.

63. MAX WEBER, *Science as a Vocation*, in FROM MAX WEBER 129 (H.H. Gerth & C. Wright Mills eds., 1958).

64. TAYLOR, *supra* note 23, at 206.

65. RAZ, *supra* note 23, at 391.

This argument should begin to make clear that in the context of the agency debate, there is no difference between a socially constituted and a communally constituted self — between a social and a communal being. The atomism issue is, and always has been, that of the extent to which individuals are, or are usefully conceptualized as, socially constituted. No logical space remains in this debate for a third concept — a concept of “community” different in a meaningful way from that of “society.” What would it even mean to say that we, modern Western individuals, are constituted by our “communities” if this term refers not to society generally, but to a particular type of society that we do not inhabit?

The social constitution of identity means precisely that; our identities are “embedded” and “implicated” in the purposes and values of our societies. These are our encumbrances. It means no more and no less than the notion that, had we been brought up in a different society from the one we were in fact brought up in, we would now be different people in certain essential respects. The mileage that Sandel seeks to derive from the use of the term “community” to describe this thesis simply does not exist. No particular substantive political values follow from the bare fact of socially constituted individuality. What strong communitarians need to establish is not the truth of the social thesis, but the truth of the quite separate claim of community in the political debate — the substantive moral claim that the best life for human beings requires us to live in and as political communities. What follows from the social thesis depends on context.

The underlying premise of Sandel’s argument is that liberalism necessarily relies upon the fact of descriptively atomistic or unencumbered individuals — in the strong sense that if atomism turns out to be false, then all remaining political theories must be nonliberal. Even if it were conceded that the seventeenth-century founders of liberalism constructed their theories on atomistic foundations,⁶⁶ it does not follow that there are no others.

Since that time, many influential and central versions of liberalism have, despite their other disagreements, affirmed the view that the value of politics lies in its potential to create or promote (and not re-

66. In the case of Hobbes, this would be true in the same sense in which it might be true of rational choice theory — although even here, atomism perhaps expresses more of a motivational than ontological claim. For Locke, politics was the necessary solution to the problems (“inconveniences”) posed, not so much by descriptively atomistic individuals — after all, his state of nature is a social state — as by a theory that viewed the individual as the ultimate unit of explanation; hence, the need to explain political obligation in terms of consent. Only in this sense was politics for him the consequence of the atomism thesis. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 309-18 (Peter Laslett ed., 1965).

strict) the autonomy of individuals. That is, politics is the cause and not the effect of autonomy. Certainly this is a central theme in the writings of Rousseau, Kant, and J.S. Mill, and among contemporary liberals such as Joseph Raz.⁶⁷ But even were this not the case, Sandel's premise would still be false insofar as it posits a necessary connection between liberalism and atomism. Pinning individualistic values to a mistaken source (atomistic individuals) does nothing to challenge the content of those values, although it may well provoke us to reassess what means are available for realizing them. The consequence of the social thesis would then be to force us to rethink the source of those values, to recognize their social construction. It would not require us to abandon them. Liberalism (like strong communitarianism) ultimately rests not on any particular metaphysical or metaethical doctrines, but on the merits of its constitutive values and the institutional arrangements that follow from them.

In this section, I hope to have established two claims. First, the concept of community involved in the agency debate is essentially synonymous with society; in this context, they both express the notion of a constitutive or causal social role in the creation of the self. Second, the truth of the communitarian position in the agency debate (the social thesis) in itself would have no specific implications in terms of concrete political values or forms — it is politically neutral. In particular, it does not necessitate “a politics of the common good,” which refers to one of the versions of substantive community advanced in the third debate. The two claims of community are quite independent.

E. *The Metaethical Debate*

Three competing positions are involved in the metaethical debate concerning the source of value. The first is subjectivism, which holds that individuals are the ultimate source of value. For present purposes, the subjectivist position can be interpreted to involve one or more of the following three claims: (1) that only the individual can choose which preexisting values are binding on him or her, (2) that individual choice itself *creates* value, or (3) that there are no values, only preferences, that is, moral skepticism. The second position is universalism, which holds that there are binding values whose source — and not merely their scope — is universal. The third is communitari-

67. See JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE ORIGIN AND FOUNDATION OF INEQUALITY AMONG MANKIND (1754); THE SOCIAL CONTRACT (Lester G. Crocker ed., 1967) (1761); IMMANUEL KANT, *What is Enlightenment?*, in KANT'S POLITICAL WRITINGS 54 (Hans Reiss ed., 1970); J.S. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 30-40 (1962) (1861); RAZ, *supra* note 23.

anism, which holds that values are constituted at the level of community.

It should be clear that all three positions are formally neutral among particular values; indeed, were they not, the debate between them could scarcely be termed metaethical. Accordingly, it is perfectly possible to support both individualistic and nonindividualistic substantive values on the basis of each of these three metaethical claims or, to put the point differently, to assume the truth of any one of the claims does not also assume the truth of any particular first-order values themselves. The claims and the debate concern the source of value, not the content.

The communitarian view seeks to transcend the traditional epistemological dichotomy of either objectivism or subjectivism; that is, either values are "out there" or else they are simply personal preferences. It does so by means of the notion of the intersubjective constitution of value. Just as the social thesis argues that the individual self is in material respects a social product, metaethical communitarianism argues that so too are the values and structures of normativity from within which we view the world.

Antiuniversalism alone does not fully describe this claim of community because it omits reference to the second part of the traditional dichotomy that it seeks to transcend — namely, subjectivism. Normative orders are not derived from a set of timeless and universal truths, but neither are they illusory; they do bind the individual from the outside. Binding norms cannot simply be willed out of existence by the individual. The debate between communitarians and universalists concerns the nature and scope of this "outside." Thus metaethical community stands opposed to both the claim that moral value is individualistic in origin and the claim that moral and political truth is universal and external in its source, requiring always to be imported from the outside by any community that aspires to justice.

More specifically, the metaethical claim of community is that (1) the context in which values are affirmed is always crucial to their validity, and (2) the particularly relevant context is that of concrete, living, historical, communities and not that of either ideal or utopian communities on the one hand, or the "community" of all humankind in general on the other. It views normative structures as constituted by, and in, the concrete social practices of such historically situated communities. Community here refers to a conceptual construct — or method — for understanding the nature and source of value, and not to the defining characteristics of a particular type of society. This difference is reflected in the fact that, in this context, reference is gener-

ally made to interpretive or dialogical communities — terms with clear methodological rather than sociological connotations — and not to political communities.

Furthermore, the metaethical concept of community as I am reconstructing it is central to the postmodern critique of the ideas of universal reason, foundationalism, and the representational theory of truth. If postmodernism implies (as Lyotard suggests) “the irreducibly local character of all discourse, argumentation and legitimation,”⁶⁸ then a contextual view is the only basis for the justification of political and social practices and values, once the traditional supports or grounds (what Rorty, quoting Nietzsche, calls the “metaphysical comfort”) for them are eliminated.

Affirmation of the metaethical concept of community is the common and central theme of the recent writings of Richard Rorty, Michael Walzer, and Jürgen Habermas. In the three following subsections, I defend this claim by developing my account of metaethical community through a critical reading of these three prominent theorists. In section I.E.4, I discuss the differences between this metaethical position and that of strong communitarianism.

1. *Rorty: Liberalism Goes Postmodern*

Richard Rorty, the self-styled “postmodern bourgeois liberal,”⁶⁹ is a key figure for understanding the general position that I am terming metaethical communitarianism. The reason is that his essential concern is with how political values and institutions are justified, and the only type of justification he thinks plausible, which he calls “postmodern,” has at its heart the metaethical concept of community.

In his political writings, Rorty seeks to establish two claims. The first is that philosophical justifications, insofar as they are based on the Platonic/Kantian model of universal and ahistorical truths, are fundamentally implausible. This claim gives expression to the “incredulity towards metanarratives” which Lyotard defines as the postmodern attitude.⁷⁰ For Rorty, “[T]he pattern of all inquiry — scientific as well as moral — is deliberation concerning the relative attractions of various concrete alternatives.”⁷¹ He is not primarily voicing the claim that there are no universal truths; to do so would be to engage in para-

68. Kenneth Baynes et al., *Jean-François Lyotard, Introduction to AFTER PHILOSOPHY*, *supra* note 24, at 70.

69. Richard Rorty, *Postmodernist Bourgeois Liberalism*, 80 J. PHIL. 583 (1983).

70. *See supra* note 27.

71. RICHARD RORTY, *Pragmatism, Relativism, and Irrationalism*, in CONSEQUENCES OF PRAGMATISM 160, 164 (1982).

digmatic fashion in that "literary genre we call 'philosophy,' " whereas his argument is that this "genre" is redundant.⁷² We should refuse to continue playing the game, to "ask those questions anymore," and simply "change the subject."⁷³

The second claim is that, contrary to the belief shared by both traditional liberals and antiliberals of all sorts, liberalism itself is not undermined by the unavailability of philosophical justification: "Post-Nietzschean thinkers like Adorno and Heidegger and Foucault have run together Nietzsche's criticisms of the metaphysical tradition on the one hand with his criticisms of bourgeois civility . . . on the other. I do not think that there is any interesting connection between these two sets of criticisms."⁷⁴ Or uninteresting either. On the contrary, Rorty thinks that by relying on practical and contextual (i.e., "pragmatic") justification, it is possible "to preserve the institutions [of liberalism] while abandoning their traditional Kantian backup."⁷⁵

The nature of this justification is "mostly a matter of historical narratives . . . rather than philosophical metanarratives."⁷⁶ More specifically,

The pragmatists' justification of toleration, free inquiry, and the quest for undistorted communication can only take the form of a comparison between societies which exemplify these habits and those which do not, leading up to the suggestion that nobody who has experienced both would prefer the latter. . . . Such justification is not by reference to a criterion, but by reference to various detailed practical advantages.⁷⁷

And again, there is "no appeal beyond the relative merits of various actual or proposed communities to impartial criteria which will help us weigh those merits."⁷⁸ Our society is practically, not rationally, superior. Fortunately for us, neither the defense of liberalism nor very much else of importance depends upon philosophical justification. A good philosopher, says Rorty (matching Tushnet's quip about a good lawyer), can provide a "philosophical foundation for just about anything."⁷⁹

Rorty is at pains to deny that his position can accurately be de-

72. RICHARD RORTY, *Pragmatism and Philosophy*, in CONSEQUENCES OF PRAGMATISM, *supra* note 71, at xiii, xiv.

73. *Id.*

74. Richard Rorty, *Solidarity or Objectivity?*, in POST-ANALYTIC PHILOSOPHY 3, 15 (John Rajchman & Cornel West eds., 1985).

75. Rorty, *supra* note 69, at 584.

76. *Id.* at 587.

77. Rorty, *supra* note 74, at 11-12.

78. Rorty, *supra* note 69, at 583.

79. RORTY, *supra* note 71, at 169. See Tushnet, *supra* note 8, at 819 ("in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants").

scribed as relativist, and to stress its "ethnocentric[ity]." ⁸⁰ He does not hold that all communities are equally good (which implies just the type of objective "God's eye" view he is denying), but on the contrary, explicitly and unambiguously argues the superiority of modern Western liberal communities. The issue is by what standard they are better, once the traditional objective standard is discarded. And Rorty's answer is: by our standards.

Although he defines the "ethnocentric view" as the view that "there is nothing to be said about either truth or rationality apart from descriptions of the familiar procedures of justification which a given society — ours — uses in one or another area of inquiry," ⁸¹ it cannot, however, be merely our procedures that are being used, but must be our values too. The standard of "the best practical alternative," presumably selected by Rorty because he believes it to be the one actually incorporated in our procedures of justification, can hardly provide outcomes that are independent of particular ideas about political ends and values. What counts as the best alternative in the given context depends upon our values and priorities.

Rorty uses notions of community in three different ways in the course of his argument. First, it is the values and practices of our community that are subjected to the pragmatist's procedure of justification. Second, this procedure is our community's major *de facto* method of justification. Third, the result of this method of justification is a renewed sense of community. As Rorty puts it:

If we give up this hope [in the *a priori* structure of any possible inquiry], we shall lose what Nietzsche called "metaphysical comfort," but we may gain a renewed sense of community. Our identification with our community — our society, our political tradition, our intellectual heritage — is heightened when we see this community as *ours* rather than *nature's*, *shaped* rather than *found*, one among many which men have made. ⁸²

The "ethnocentrism" of this argument amounts to the view that our habits, values, and institutions are the best practical alternatives — by our standards. The standards by which to judge are internal to us; they are both ours and our creation rather than externally imposed. The pride in, and solidarity with, our community that we feel result from the realization and acknowledgement that our community is self-grounded, conventional rather than modeled on an external paradigm. Rorty's picture thus radically faces up to the self-referential problem inherent in contextualism. That is, contextualism is not a co-

80. Rorty, *supra* note 74, at 5-6.

81. *Id.* at 6.

82. Rorty, *supra* note 71, at 166.

herent method of justifying beliefs *inter*-societally, because it assumes by definition that certain of our beliefs, values, or practices are already justified.⁸³ The ultimate import and sense of Rorty's ethnocentrism is to make just this point.

Rorty is a metaethical communitarian because he believes that our values are to be found and justified internally and collectively. Community is that conceptual construct in which values inhere; there are no disembodied truths and values. Moreover, it is quite clear to Rorty that this conception of community differs from that advanced by strong communitarians:

We can urge the construction of a world order whose model is a bazaar surrounded by lots and lots of exclusive private clubs. . . . Such a bazaar is, obviously, not a community, in the strong approbative sense of "community" used by critics of liberalism like Alasdair MacIntyre and Robert Bellah. You cannot have an old-timey *Gemeinschaft* unless everybody pretty well agrees on who counts as a decent human being and who does not. But you *can* have a civil society of the bourgeois democratic sort.⁸⁴

2. Walzer: *Moral Philosophy as Interpretation*

As we have seen, Walzer argues the case for historical and cultural particularism. He claims that shared values and understandings between members of discrete and concrete communities, and not an imported set of universal values, provide them with their normative worlds.

Walzer describes three modes of pursuing moral philosophy: "discovery" (of a set of preexisting and binding objective moral truths), "invention" (*de novo*), and "interpretation."⁸⁵ Of these three, Walzer views interpretation as most important because for him, morality is simply the content of a given community's ("a community of experience"⁸⁶) shared understandings properly interpreted. As he says:

These questions [what a career is, what sorts of talent we ought to recognize, whether equal opportunity is a "right"] are pursued within a tradition of moral discourse — indeed they only arise within that tradition — and they are pursued by interpreting the terms of that discourse. The argument is about ourselves; the meaning of our way of life is what is at issue. The general question we finally answer is not quite the one we asked at first [what is the right thing to do?]. It has a crucial addition:

83. For an instructive discussion of contextualism, see CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 29 (1987).

84. Richard Rorty, *On Ethnocentrism: A Reply to Clifford Geertz*, 25 MICH. Q. REV., 525, 533 (1986).

85. WALZER, *supra* note 37, at 3-32.

86. "The interpretation of a moral culture is aimed at all the men and women who participate in that culture — the members of what we might call a community of experience." *Id.* at 30 n.21.

what is the right thing *for us* to do?⁸⁷

Discovery and invention are unnecessary because we already have what they purport to provide; they are futile attempts to escape. "There is a tradition, a body of moral knowledge; and there is this group of sages arguing. There isn't anything else."⁸⁸

If morality is seen by Walzer as an interpretive enterprise, the role of political community is that of the essential setting of moral argument. This claim is the conclusion derived from the following premises: (1) the subject-matter of morality is the interpretation of common meanings; (2) political community is the preeminent site of common meanings. As he puts this argument, "in matters of morality, argument simply is the appeal to common meanings," and "political community is probably the closest we can come to a world of common meanings. Language, history, and culture come together . . . to produce a collective consciousness."⁸⁹

Two features of Walzer's theories of politics and morality are of particular importance for the general metaethical communitarian position. First, although Walzer builds both theories upon a conception of specifically *political* community, this conception expresses a claim about the nature of politics and morality, and not one about their content or legitimate scope; it is a purely metaethical claim and nothing therein promotes or precludes any particular political values from being authorized by a political community.⁹⁰

Second, whereas Walzer justifies his antipathy to universal values in politics by reference to the democratic first principle of self-rule, that those subject to the law should be its authors,⁹¹ he offers no similar justificatory principle for the theory of morality as the common meanings of particular political communities. Accordingly, unlike the case with politics, there is nothing to constrain either *what* can be a shared understanding or *how* it comes to be shared — moral argument is exclusively about the proper explication and interpretation of what is in fact shared. When we engage in social criticism, "we apply stan-

87. *Id.* at 23 (footnote omitted).

88. *Id.* at 32.

89. WALZER, *supra* note 35, at 28-29.

90. Walzer himself states (hence Dworkin's claim of relativism, *supra* text accompanying note 35) that, "[i]n a society where social meanings are integrated and hierarchical, justice will come to the aid of inequality." *Id.* at 313.

91. This first principle does not appear to worry Walzer, even though it appears to be a universal political truth. Does this mean he believes there is at least this one objective value? Although he does not address this point, I think his answer would be that it is universal in scope, but not in source — that is, it is a weakly universal principle. See *infra* text accompanying notes 163-64. It is a shared understanding of all democratic societies that those subject to the law should also be its authors.

dards that we share with the others to the others, our fellow citizens, friends and enemies."⁹² Such standards depend purely on the political community under consideration; it would be incoherent to criticize a community for lacking any particular "external" standard. Thus, Walzer also extends the principle of particularism to procedures; this is perhaps what he means by "radical particularism."⁹³

3. *Habermas: The Guardian of Rationality*

Jürgen Habermas is a firm adherent of the metaethical concept of community, whose essential claims he expresses as follows: "I think pragmatism and hermeneutics have joined forces to answer this question [the role of the philosopher], by attributing epistemic authority to the community of all who cooperate and speak with one another."⁹⁴ And again: "Pragmatism, phenomenology, and hermeneutic philosophy have bestowed an epistemological status upon the categories of everyday action, speech, and common life."⁹⁵

Further, Habermas agrees that Rorty, among others, has constructed a decisive case against the traditional Kantian view of philosophy as "usher" ("clarify[ing] the foundations of the sciences once and for all"⁹⁶) and "judge" ("parceling out separate areas of jurisdiction to science, morality, and art"⁹⁷) — that is, philosophy as "the queen of the sciences." Like the other metaethical communitarian thinkers discussed in this section, Habermas believes there is a meaningful sense in which "all truths are local"; there are no disembodied truths or universals as traditionally understood.

Habermas cannot accept, however, that this position implies the destruction of reason and of philosophy's role as its guardian. While Rorty proudly proclaims that "[t]here is no longer a discipline called 'philosophy' . . . and no longer a topic called 'rationality' with which that discipline concerns itself,"⁹⁸ Habermas believes the consequence of this view is that there can be no principled way to move one way or the other — "it leaves the world as it is."⁹⁹ On the contrary, Habermas clings to the belief that "[n]orms are judged according to

92. WALZER, *supra* note 37, at 50 (emphasis omitted).

93. This is the phrase that Walzer uses to describe his moral theory. See WALZER, *supra* note 35, at xiv.

94. Habermas, *supra* note 28, at 314.

95. HABERMAS, *supra* note 49, at 339.

96. Habermas, *supra* note 28, at 298.

97. *Id.*

98. Richard Rorty, *Posties*, LONDON REV. OF BOOKS, Sept. 3, 1987, at 12.

99. Habermas, *supra* note 28, at 306.

whether they can be justified, that is, whether they deserve to be recognized as legitimate,"¹⁰⁰ and that reason plays a central role in such legitimation. He would agree with the spirit of MacIntyre's attack upon Rorty: "What postmodern bourgeois liberalism exhibits is not moral argument freed from unwarranted philosophical pretensions, but the decay of moral reasoning."¹⁰¹ Contra to both Rorty and Walzer's conventionalism, neither the existence nor the interpretation of norms can ever be the end of the story.

Accordingly, while Habermas agrees that all (substantive) truths are local, he disagrees with Rorty — as well as with MacIntyre — about what it is that makes local truths true, what makes them validly binding norms. Habermas believes that if reason is rejected, there is no difference between a validity claim and a power claim, in which case the dichotomy of objectivity or relativism would not have been transcended at all. Habermas neatly defines the task that he sets himself: "Nietzsche can carry out his complete assimilation of reason to power only by removing any cognitive status from value judgments and by demonstrating that the yes/no positions of value appraisals no longer express validity claims, but pure power claims."¹⁰²

The characteristic problem of modernity for Habermas (showing his newly acquired respect for Max Weber) is the necessity of "creat[ing] its normativity out of itself,"¹⁰³ of providing its own grounding. His solution to the dilemma of "either universal truths or mere power" is to describe a concept of rationality "that falls prey neither to historicism . . . [nor] stands abstractly over against history and the complex of social life,"¹⁰⁴ a concept that transcends the traditional dichotomy by abandoning the Kantian, subject-centered idea of reason shared by both camps. This different concept of reason ("communicative reason") affirms the notion of metaethical community — what Habermas usually terms "communication community." It is a "situated reason," built into the structure of social practices and everyday speech, rather than the type of abstract reason that has endlessly fascinated both the discourse and the counterdiscourse of modernity.

Two points need to be highlighted to see that what Habermas is offering is a rationalist version of metaethical community. First, com-

100. JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 89 (Thomas McCarthy trans., 1984).

101. Alasdair C. MacIntyre, *Moral Arguments and Social Contexts*, 80 J. PHIL. 590 (1983).

102. HABERMAS, *supra* note 49, at 124.

103. *Id.* at 7.

104. Jürgen Habermas, *A Reply to my Critics*, in HABERMAS: *CRITICAL DEBATES* 219, 251 (John B. Thompson & David Held eds., 1982).

municative rationality is, unlike the purely contextualist theories of Rorty and Walzer, a genuine form of rationalism because it does not question the "residual claim to reason." Habermas argues that this "claim" necessarily involves saying "something about the indispensable conditions of claims to the validity of those opinions we hold to be justified, claims that transcend all restrictions of time and place."¹⁰⁵ What precisely communicative rationality says about these conditions is that only those norms that achieve a rational consensus in a context of undistorted communication among those motivated to reach agreement are authoritative and binding.

The transcendent moment of *universal* validity bursts every provinciality asunder; the obligatory moment of accepted validity claims renders them carriers of a *context-bound* everyday practice [T]he validity laid claim to is distinguished from the social currency of a de facto established practice and yet serves it as the foundation of an existing consensus. The validity claimed for propositions and norms transcends spaces and times, "*blots out*" *space and time*; but the claim is always raised *here and now*, in specific contexts, and is either accepted or rejected with factual consequences for action.¹⁰⁶

Second, what distinguishes Habermas' universalism from the discredited variety is that it constitutes a *procedural*, and not a substantive, rationality; it does not dictate specific outcomes. His theory combines substantive particularism with procedural universalism — the universal norms of rational discourse, or the "formal conditions of a rational life."¹⁰⁷ The outcome of this procedure, what norms will be the subject of rational consensus, depends entirely upon the particular community in question; there are no necessary or uniform outcomes to such communally constituted acts of communicative action. "Communicative reason . . . conceptualizes [a] procedural rationality [I]t cannot judge the value of competing forms of life."¹⁰⁸ It is not a blueprint for an ideal society.

The theory of communicative rationality represents an empirical, or "reconstructive," theory about the actual structure of normative discourse. It states that claims to normative validity always involve truth claims not limited to space or time, which can only be redeemed by the unforced force of the better argument. It is because of this feature of his theory that Habermas at one time called it "universal pragmatics." Habermas can thus be seen as the lone figure trying to unite universalism and contextualism, reason and particularism.

105. Habermas, *supra* note 28, at 304.

106. HABERMAS, *supra* note 49, at 322-23.

107. HABERMAS, *supra* note 100, at 74.

108. Habermas, *supra* note 104, at 227.

Rorty disagrees with this universal part of the claim. Habermas states that:

The context-dependence of the criteria by which the members of different cultures at different times judge differently the validity of expressions does not, however, mean that the ideas of truth, of normative rightness, of sincerity, and of authenticity that underlie . . . the choice of criteria are context-dependent in the same degree.¹⁰⁹

Rorty, on the contrary, thinks that "[t]he term 'true' . . . means the same in all cultures But the identity of meaning is, of course, compatible with diversity of reference, *and with diversity of procedures for assigning the terms.*"¹¹⁰ And, "[t]here remains the question about whether the relevant procedures are those of our historical situation or have some sort of universal import. As far as I can see, one can go along with Habermas up to the point at which he opts for universalism, and then swerve off."¹¹¹

Habermas believes that (weak) universalism is not tied to necessity and certainty. Rorty sometimes seems to deny the content of Habermas' empirical claim, but at other times responds as if he is denying the validity of the distinction between the two types of universal claims (strong and weak). "One can say that we want philosophy to put itself in the service of democracy without expecting it to ground democracy on universal norms . . . I shall merely remark that it is one thing to go intersubjective and another to go universalist."¹¹²

A more fundamental issue than this one exists for Rorty in terms of vindicating the historicist version of metaethical communitarianism against the rationalist version of Habermas. This is the problem of authority. Rorty holds that Habermas has not "gone" sufficiently postmodern, but is still clinging to metanarratives. In particular, he claims that Habermas does not believe in discourse as its own goal (as a good postmodern should) but wants to end the conversation at the earliest possible moment, as soon as consensus has been achieved.¹¹³ His claim is that for Habermas, discourse and conversation are to be seen and valued as the means to achieving consensus and, thereby, access to the (forbidden) "Truth."

The problem with Rorty's presentation is the following: if there is no clear cut-off point at which one conversation is over and another has begun, how is it possible to know when the discourse has gener-

109. HABERMAS, *supra* note 100, at 55.

110. Rorty, *supra* note 98, at 12 (emphasis added).

111. Rorty, *supra* note 74, at 6.

112. *Id.*

113. *Id.*

ated an authoritative norm? The same problem exists for Walzer; what counts as an authoritative interpretation of shared understandings? Who, if anyone, is empowered to make one? This presents a practical problem of an authority vacuum in relation to the generation of binding norms.¹¹⁴ This problem, it should be noted, is quite distinct from that of theoretical space for the critique of historical standards, practices, and values, i.e., the charge of conventionalism. In Habermas' theory of communicative rationality, by contrast, there is closure and, hence, authority. It generates binding and authoritative norms when rational consensus is achieved, and it binds for just as long as it retains the unforced force of the better argument.

Habermas identifies the discourse that underlies all modern critiques of liberalism. He terms it "the philosophical discourse of modernity," and describes it as follows:

Since the close of the eighteenth century, the discourse of modernity has had a single theme under ever new titles: the weakening of the forces of social bonding, privatization, and diremption [sic] — in short, the deformations of a one-sidedly rationalized everyday praxis which evoke the need for something equivalent to the unifying power of religion.¹¹⁵

Habermas looks to secure the enlightenment project by promoting the growth of communicative rationality at the expense of the already seriously overdeveloped instrumental rationality of modern culture. This, he believes, involves the opening up of new public spheres, both inside and outside politics, through such vehicles as social movements.

The belief that social forces must be primarily entrusted with the task of rolling back instrumental reason in favor of communicative reason (what he terms "decolonizing the life-world") differentiates Habermas' project in crucial respects from the republicanism of Hannah Arendt¹¹⁶ and displays his essential continuity with the Frankfurt School and Marxism generally. For Arendt, the political sphere, constituted by conversation among equals, is the sphere of freedom precisely because of its autonomy from the social sphere — the sphere of mundane, everyday necessity. Her view assumes the ability of political discourse to insulate itself from the inequalities and power relationships that characterize society. Quite apart from the implausible narrowing of the concept of the political that her view involves, Habermas believes that such autonomy is impossible, that the social and political are infused with "distortions." In this situation,

114. A parallel inability of theories of interpretive community to generate authoritative legal pronouncements is the thesis of Paul Kahn's article. See Kahn, *supra* note 4.

115. HABERMAS, *supra* note 49, at 139.

116. See *infra* text accompanying notes 137-65.

progress depends upon the procedural safeguards of the universal norms of rational discourse.¹¹⁷

4. *Metaethical and Strong Communitarianism*

By contrast with metaethical communitarians, strong communitarians do not question the traditional metaethical dichotomy of either objectivism or subjectivism. Accordingly, unless values are uniform and objective, they merely express individual interests and preferences, and normative discourse in morality and politics becomes purely strategic.

MacIntyre presents this traditional metaethical position most clearly; it is paradigmatically expressed in the stark and exhaustive choice of escape route that he offers us from the failings of liberal modernity — “Nietzsche or Aristotle?”¹¹⁸ That strong communitarianism relies, both in its critique and its proposal, upon the traditional dichotomy is pointed out by Don Herzog, who in advocating a contextualist method of justification, states, “Such [contextualist] options mean that despite the plaintive laments of neo-Aristotelians, we need no highest good, no pyramidal ordering of our commitments, to sustain rational debate.”¹¹⁹

Although MacIntyre locates the source of his worldview in Aristotle’s ethical theory, it is Plato’s epistemology that underlies them both — a schema in which objective knowledge contrasts radically with the changeability and fickleness of opinion. Like Plato, MacIntyre believes that moral knowledge consists in propositions that “can be called true or false in precisely the way in which all other factual statements can be so called”¹²⁰ because, correctly understood, morality rests upon the timelessness and universality of “essential human purposes.”

It is because he is fixated by this model of moral truth and the human good as objectively demonstrable facts that MacIntyre believes modernity has no moral structure at all. To be forced to construct our own *nomos*, the peculiar fate of modernity, is simply not to have one. For MacIntyre, the very notion of normative self-grounding is self-evidently incoherent. From the perspective of the metaethical com-

117. JÜRGEN HABERMAS, *Hannah Arendt: On the Concept of Power*, in *PHILOSOPHICAL-POLITICAL PROFILES* 171, 172-84 (Frederick G. Lawrence trans., 1983).

118. MACINTYRE, *supra* note 39, at 109-20. The very idea that this could be a *choice* seems both entirely ahistorical and in conflict with the underlying strong communitarian principle of discovering our identities and ends rather than choosing them.

119. DON HERZOG, *WITHOUT FOUNDATIONS* 233-34 (1985) (citation omitted).

120. MACINTYRE, *supra* note 39, at 59.

munitarian, MacIntyre's problem is his inability to transcend the traditional dichotomy, just as Nietzsche was in reality unable to see beyond good and evil. The going beyond is intersubjectivity, the idea that our values are really there all the time, embedded in our social practices and not something in addition to them.

The crucial mistake, according to metaethical communitarianism, is the belief that modern societies do not really have normative structures. MacIntyre believes that real public values must be somehow external to the collection of living individuals constituting a community. He cannot accept that the historical change from traditional forms of society to the modern represents a change in the *content* of public values; instead, MacIntyre sees it as a change from a culture with public values to one without. What MacIntyre really wants to say is that what are called public values in modernity *are not really public*.

In fact, the whole point of the metaethical communitarian position is to deny the claim that liberal societies fail to affirm a notion of the good. It states that normative structures are necessarily communal *products*, although the particular goods affirmed are not necessarily communal in *content*. In modern Western societies there is, to varying degrees to be sure, a communally produced normative structure of, broadly speaking, individualistic values. This represents a radical change from the content of the good embedded in the social practices of premodern Western societies: from a good that presupposed an "intensely public life . . . mediated by the larger group"¹²¹ to one in which the community at large loses its predominance and retreats to a position of competition with family, vocation, religion, ethnic groups as avenues of fulfillment.

In sum, although it is unquestionably the content of this modern identity to which strong communitarians object, they sometimes argue as if the basic problem with modernity and its liberal offspring is the absence of any notion of the human good, rather than its affirming the wrong one. This ambivalence in presentation is largely strategic rather than conceptual; it is much easier for strong communitarians to argue the general case that conceptions of the good ought to be promoted by society than it is to argue compellingly for the truth or superiority of any particular one.¹²² From here, it is a small step to equate

121. CHARLES TAYLOR, *Legitimation Crisis?*, in *PHILOSOPHY AND THE HUMAN SCIENCES*, *supra* note 23, at 248, 260-62.

122. This is why strong communitarians routinely base their attacks, and generalize, upon that particular version of liberalism defined by its refusal to assume the superiority of any conception of the good. Here, I disagree with Larmore's view of the strong communitarian strategy. I think strong communitarians stress the moral emptiness — that is, the neutrality — of liber-

the general idea of cultivating *a* conception of the good with the idea of cultivating *the particular good* of civic virtue. Sandel provides the clearest example of this fallacy: "The 'neutral state' is the idea that . . . a just society is one that does not try to impose on its citizens any particular conception of the good. A neutral state does not try to cultivate civic virtue."¹²³ The strong communitarian strategy of asserting that modern society has no underlying conception of the good is just that, a strategy. The actual issue is one of radically different evaluations of the content of the modern view and not simply a misunderstanding of its nature.

F. *The Political Debate: The Nature and Variety of Substantive Community*

Strong communitarianism must be something more than antiatomism and antiuniversalism because, as has been shown in the previous sections, both of these distinct communitarian positions can be held without any necessarily antiliberal consequences. Accordingly, the arguments used to support strong communitarianism must be independent of the arguments used to support the communitarian positions in the first two debates. That is, it must be argued for directly.

Strong communitarianism is a theory of substantive community. There is, however, more than one such theory, and it becomes necessary at this point in the argument to distinguish them from each other. Not only is it the case, as I hope to have established thus far, that there are three different claims of community involved in three separate debates, but also, in the third debate itself — that concerning the respective merits of liberal and strongly communal types of political association — there are, theoretically and historically, three different types of substantive community and not one: conservative community, republican community, and communist community. It is the second type — republican community — that for the most part, strong communitarians in moral and political theory wish to see established (or rather reestablished).

1. *Conservative Community*

At times, Sandel and MacIntyre argue that what is wrong with liberalism is its essential neutrality toward ways of life. The underly-

alism as its essential intuitive weakness rather more often than the claim that it is promoting the *wrong* moral ideal, i.e., Kantian liberalism. See Gardbaum, *supra* note 22; LARMORE, *supra* note 83, at 122-30.

123. *Liberalism and the Crisis of Authority, a Discussion with Daniel Bell, Walter Dean Burnham and Michael Sandel*, 1987 DISSENT 202, 206.

ing notion seems to be that a political community has the right to defend its constitutive morality. "Communitarians would be more likely than liberals to allow a town to ban pornographic bookstores, on the grounds that pornography offends its way of life and the values that sustain it."¹²⁴ Further, "[i]n any society where government does not *express or represent the moral community of the citizens* . . . the nature of political obligation becomes systematically unclear."¹²⁵ In this critique, that political structures should reflect or express the central values of a society, it is the general link between moral and political values (the denial of which is taken to be definitive of liberalism) that appears to be the central issue at stake.

As it stands, this critique looks very similar to one that is often taken to express the essential theme of conservative political thought and the conservative model of political community. The critique to which I am referring was perhaps most famously expressed by James Fitzjames Stephen¹²⁶ in the nineteenth century against the "liberal individualism" of J.S. Mill,¹²⁷ and was repeated into the 1960s by Lord Devlin¹²⁸ in a well-known debate with H.L.A. Hart.¹²⁹ The issue dividing Stephen and Mill (and Devlin and Hart) was whether the individual is answerable to, or free from, community standards of morality in situations where no physical harm is caused by the conduct in question. Stephen and Devlin argued that an individual should be held accountable where such immorality harms society by undermining or weakening its constitutive morality. A community has the right to express, promote, and preserve its moral identity and to this end, both law and public opinion are appropriate and legitimate instruments.¹³⁰

Thus expressed, this conservative critique has the form of a second order thesis concerning the legitimate scope and function of public power. It seems to imply that *whatever* a community's morality, it should be expressed and reflected at the political and legal levels and

124. Sandel, *supra* note 16, at 6.

125. MACINTYRE, *supra* note 39, at 254 (emphasis added).

126. See JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (R.J. White ed., Cambridge University Press 1967) (2d ed. 1874).

127. See especially JOHN STUART MILL, *On Liberty*, in *UTILITARIANISM, LIBERTY, REPRESENTATIVE GOVERNMENT* (H.B. Acton ed., J.M. Dent & Sons Ltd. 1972) (1859).

128. See PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1959).

129. See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).

130. Hart terms this conservative argument "the moderate thesis" — "society may use the law to preserve its morality as it uses it to safeguard anything else essential to its existence." It contrasts with a second argument in Stephen's *Liberty, Equality, Fraternity*, which Hart terms "the extreme thesis." This second claim states that punishing immorality and thereby promoting virtue is intrinsically good even where such acts "harm no-one directly, or indirectly by weakening the moral cement of society." *Id.* at 49.

does not specify a particular morality to be expressed. There is, however, something unsatisfactory and incomplete about this account; it seems not to capture an essential substantive component of the conservative worldview.

The conservative thesis takes on the appearance of a metaposition only when it is opposed to conceptions of liberalism that deny the primacy of a particular community's constitutive morality. There are two such conceptions. The first, exemplified by Mill himself, is liberalism justified by reference to a universalistic morality — in his case, the universal value of autonomy or the experimental life — which, by implication, denies the normative supremacy of any particular community's morality.¹³¹ By contrast, the second conception is a liberalism based on metaethical subjectivism, the claim that individuals are the source of value. On this view, unless there is a convergence of individual conceptions of the good, enforcement of morality by the state is inherently coercive and fails to treat citizens who affirm a different conception of the good as equals. Accordingly, given the fact of pluralism, the state must be neutral with respect to different conceptions of the good affirmed in society.¹³² Thus, both of these versions of liberalism deny that law can legitimately enforce the community's morality, although for different reasons: either because there is a higher morality than this or because no such morality exists. When opposed to either of these accounts of liberalism, the conservative case depends only on — and thus stops at the point of — establishing the claim about the legitimate scope of law that both accounts deny. And this is why conservatism often appears to be a metaclaim about the permissible scope of law and not a substantive claim about the content of the constitutive morality in question.

The plausibility of this interpretation of conservatism as not prescribing any particular content diminishes when it is opposed to an account of liberalism that affirms the notion of metaethical community, for then the issue becomes less the general defense of the expressive and protective function of public power than the specific content of the morality to be expressed. With acceptance of the normative force of the community's morality as common ground, the question of whether moral choices should be made by or for the individual trans-

131. See MILL, *supra* note 127, at 114-31.

132. This is the account of liberalism provided by, inter alia, Rawls, Dworkin, and Larmore. See LARMORE, *supra* note 83, at 43-68; Ronald Dworkin, *Liberalism*, in LIBERALISM AND ITS CRITICS, *supra* note 16, at 60, 63-78; John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 2-8 (1987) [hereinafter Rawls, *Consensus*]; John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 4, 260-64 (1988). For an analysis of this account, see Gardbaum, *supra* note 22, at 1364-70.

lates into the question: which better *expresses* the community's constitutive morality — rather than the question whether or not the individual should be free from it. Challenged at this point, the conservative must now expound both a substantive position and an interpretive theory to support it. This substantive position will be based on the specific values of conservative community, values that give priority to history, tradition, social order, and the promotion of institutions such as family and religion that act as effective instruments of socialization and social control. This contrasts with the liberal vision that places a high value on the autonomy and self-realization of the individual.

The conservative vision was formed as a reaction to the perceived anarchy of the French Revolution which, in attempting to abolish history and create a new world order by the blueprint of reason, was seen as a logical extension of the liberal conception of political society as an artificial union based on abstract principles of individual rights and liberties.¹³³ Classical liberalism conceived the nature of political association as conventional and the ends of such association as serving the interests and values of the individuals constituting it. These ends are achieved in part through regulation of the inescapable conflicts among individuals competing with each other for scarce resources and affirming diverse conceptions of the good.¹³⁴ Conservative political theory was created around a conception of political community diametrically opposed to this liberal account. The polity is a natural, not a conventional, order whose ends are much less maintenance of the parts than of the whole. As the British conservative philosopher Roger Scruton states, "[c]onservatism arises directly from the sense that one belongs to some continuing, and pre-existing social order, and that this fact is all important in determining what to do."¹³⁵ And "conservatism presupposes the existence of a social organism. Its politics is concerned with sustaining the life of that organism, through sickness and health, change and decay."¹³⁶

Thus, conservative community rejects the granting of extensive areas of private space to the individual, not simply because in general the

133. Classic works of the formative period of conservative political theory include BURKE, *supra* note 56, and JOSEPH DE MAISTRE, *Essay on the Generative Principle of Constitutions*, in THE WORKS OF JOSEPH DE MAISTRE 147 (Jack Lively ed., 1974).

134. Such a view appears in the writings of, among others, Hobbes, Locke, Hume, and Rawls. See THOMAS HOBBS, *LEVIATHAN* (C.B. Macpherson ed., Penguin Books 1968) (1651); DAVID HUME, *A TREATISE OF HUMAN NATURE* (L.A. Selby-Bigge ed., Oxford, Clarendon Press 1888) (1732); JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* (Peter Laslett ed., 1963) (1690); RAWLS, *supra* note 15.

135. ROGER SCRUTON, *THE MEANING OF CONSERVATISM* 21 (2d ed. 1984).

136. *Id.* at 25.

law should express communal standards of morality (whatever they are), but because such space undermines communal solidarity and order. The specific function of public power in conservative political theory is to defend and secure a conception of the social order as a particular type of substantive community, rather than to promote a society in which individuals are conceived as the major object of value, as is the case in liberal theory. In both, however, politics plays an essentially instrumental role.

2. *Republican Community*

a. General Features. Like conservatives, although Sandel and MacIntyre often appear to be making the claim for a general bridging of the gap between politics and morality, in reality they are more essentially arguing for a particular bridging, for a particular morality and type of substantive community. It is not, however, conservative community that Sandel and MacIntyre seek to promote, but rather the morality of the historically and conceptually distinct political tradition of republican thought, which has its own conception of political association and community. Sandel writes, "If the party of the common good is right, our most pressing moral and political project is to revitalize those civic republican possibilities implicit in our tradition but fading in our time."¹³⁷ And, "If the 'republican school' is right about our ideological origins, then perhaps there is hope for revitalizing our public life and restoring a sense of community Perhaps we can clothe the naked public square not with religion but with civic virtue."¹³⁸ MacIntyre states that "[r]epublicanism . . . represents an attempt at a partial restoration of what I have called the classical tradition,"¹³⁹ the tradition he wishes to see reinstated.

Within this paradigm, politics plays not an instrumental or reflective role as in both liberal and conservative political thought, but an essential and creative one. It is in the particular role of citizen within a common life mediated by the political community that the human good is attained; this is the specific morality of republicanism.¹⁴⁰ As Sandel puts it, "the republican ethic seeks to cultivate civic virtue, and

137. Sandel, *supra* note 16, at 7.

138. Sandel, *The State and the Soul*, *supra* note 33, at 39.

139. MACINTYRE, *supra* note 39, at 237.

140. In his otherwise excellent book, Will Kymlicka fails adequately to distinguish republican community from conservatism, arguing that the former seeks to defend the "ways of life" of particular communities. He thus overlooks the fundamental distinction between the two senses of "fostering the value of community." More generally, Kymlicka does not sufficiently acknowledge the centrality of the republican element in the work of Sandel and MacIntyre — the extent to which they see politics and the role of citizenship as necessary to the attainment of the good life. See WILLIAM KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989).

to orient citizens to a common good beyond the sum of individual interests,"¹⁴¹ and "we cannot conceive our personhood without reference to our role as citizens, and as participants in a common life."¹⁴² In reconstructing this paradigm, MacIntyre says that

the concept of virtue remains a political concept; for Plato's account of the virtuous man i[s] inseparable from his account of the virtuous citizen. Indeed this is an understatement, there is no way to be excellent as a man which does not involve excellence as a citizen and *vice-versa*.¹⁴³

Pocock states that "classical republicanism . . . entails the affirmation that *homo* is naturally a citizen and most fully himself when living in a *vivere civile*"¹⁴⁴ And Arendt, in charting the betrayal of the American revolutionary spirit between 1776 and 1787, says of Jefferson:

What he perceived to be the mortal danger to the republic was that the Constitution had given all power to the citizens, without giving them the opportunity of *being* republicans and of *acting* as citizens. In other words, the danger was that all power had been given to the people in their private capacity, and that there was no space established for them in their capacity of being citizens.¹⁴⁵

The claim, in short, is that living in and as a political community is the best way of life. The end of political association is, in Aristotle's terms, not life (as in liberal political society), but the good life.¹⁴⁶

Now we are approaching the very heart of the republican version of strong communitarianism. Sandel, MacIntyre, and Arendt argue for a rejection of modern (liberal) politics and a return to republican politics. The central reason for this return is not simply the neutrality of liberalism towards morality (as both republicanism and conservatism are often taken to claim), but that implicit in the liberal self-understanding is a radical *misunderstanding* of human nature and the human good.

Republicanism posits a human good. That is, a good common to all humans, fixed and immutable, the same for us as for the ancient Greeks — even though the form in which it is manifested may differ between cultures and over time. As MacIntyre puts it, "[T]here exists a cosmic order which dictates the place of each virtue in a total harmonious scheme of human life. Truth in the moral sphere consists in

141. Sandel, *The State and the Soul*, *supra* note 33, at 39.

142. Sandel *supra* note 16, at 5.

143. MACINTYRE, *supra* note 39, at 141.

144. J.G.A. Pocock, *Virtues, Rights, and Manners: A Model for Historians of Political Thought*, 9 POL. THEORY 353, 355 (1981).

145. ARENDT, ON REVOLUTION, *supra* note 33, at 256.

146. See ARISTOTLE, THE POLITICS Book III, ch. 9.

the conformity of moral judgment to the order of this scheme."¹⁴⁷ And elsewhere, "Both [the polis and the medieval kingdom] are conceived as communities in which men in company pursue *the* human good"¹⁴⁸ The good is not a matter of choice either for the individual or for individual societies; in terms of ends, the individual is neither a self-defining unit nor is she part of one. Instead, the good is given by being human.

This does not, of course, tell us *what* the good is, for it is a metaclaim about determination of the good rather than a claim about its content. Republicans believe not simply that the good must be pursued through politics (which still does not state what it is), but that the content of the human good is active citizenship in a virtuous political community. This claim as to the substance of the human good also implies the manner in which it is to be attained: communally and in public space. This means not just that it cannot be attained "on one's own" in the sense of solipsistically, in isolation from other people, but also in the sense of purely through one's own civic virtue regardless of the virtue of other citizens. Thus, for republicans, the individual neither determines what the good is nor can the individual rely only on herself for attainment of the given good.

By contrast with this essentially ethical role of politics, MacIntyre believes that the function of politics in liberal theory is to provide the "arena in which each individual seeks his or her own private good."¹⁴⁹ The tragic fallacy of this view for him is that "I am never able to seek for the good or exercise the virtues only *qua* individual."¹⁵⁰ To the contrary, "the individual is identified and constituted in and through certain of his or her roles, those roles which bind the individual to the community *in and through which alone specifically human goods are to be attained*"¹⁵¹ More particularly,

There is no way of my pursuing my good which is necessarily antagonistic to you pursuing yours because *the* good is neither mine peculiarly nor yours peculiarly — goods are not private property The egoist is thus, in the ancient and medieval world, always someone who has made a fundamental mistake about where his own good lies and someone who has thus and to that extent excluded himself from human relationships. For many seventeenth- and eighteenth-century thinkers however the notion of *a shared good for man* is an Aristotelian chimera; each man by

147. MACINTYRE, *supra* note 39, at 143.

148. *Id.* at 172.

149. *Id.*

150. *Id.* at 220.

151. *Id.* at 172 (emphasis added).

nature seeks to satisfy his own desires.¹⁵²

Thus for MacIntyre, there are two possibilities: either there is a "shared good," which implies that it can only be attained communally, or else (as he claims liberalism posits) the good is not shared but is a private matter for each individual. In using this dichotomy of "shared" and "private" good, however, MacIntyre conflates two different questions and, as a result, is himself guilty of mischaracterizing the moral structure of modern society. These two questions are first, does human nature or does the individual determine what the good is and, second, how is it attained, communally or individually? MacIntyre believes the good is shared in both senses, it is both "owned" and pursued in common. But these two are separable: that is, one can believe that the individual is not the source of the good and also that the good is not necessarily pursued in common; in fact, this combination is quite familiar for it is a central tenet of Protestantism.¹⁵³ Moreover, on the question of source itself, a universal human good based on a "cosmic order" is not the only option for one who affirms a shared good; there are at least two others. These are (1) that the good is the good, not of humanity in general, but of a particular society taken as a whole rather than the "private property" of the individuals who comprise it, and (2) that the "private" goods of individuals converge on one and the same good.

Rawls, for example, understands by the notion of a shared good this third meaning: convergence of individual conceptions. Indeed, he bases his theory of liberalism around the claim that on this understanding of the term, our society is characterized by the absence of a shared good. "[S]uch a conception [of justice] must allow for a . . . plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life (or what I shall call for short 'conceptions of the good') affirmed by the citizens of democratic societies."¹⁵⁴ The result of this "fact of pluralism," according to Rawls, is that the state cannot promote any of the competing individual conceptions but must rather remain neutral among them.

152. *Id.* at 220.

153. See, e.g., MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1905) (Calvinism holds that serving God requires private and worldly acts of good works — particularly accumulation of capital). John Locke, a devout Calvinist, based his case for political toleration on the idea that pursuit of the human good (which he took to be serving God) was intrinsically both a private, nonpolitical matter and one that was pursued individually (on one's own), through the unmediated relationship between the individual and God. In this situation, politics is powerless to enforce the good; faith is exclusively a matter of private belief, and it is not possible to force someone to believe. See JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 81 (Mario Montuori ed., Martinus Nijhoff 1963) (1689).

154. Rawls, *Consensus*, *supra* note 132, at 4.

Here, MacIntyre and Rawls are talking past each other. On Rawls' view, what is required for political community is a shared good in the sense of a convergence of individual views of the good. And it is the impossibility of such (voluntary) convergence in the modern world that undercuts the communitarian case in the political debate. "This possibility [of political community] is excluded by the fact of pluralism together with the rejection of the oppressive use of state power to overcome it."¹⁵⁵ For republicans, a convergence of individual views of the good is not equivalent to the shared good that constitutes republican political community. Clearly, such convergence could, in principle, occur in relation to *any* particular notion of the good, however pursued. Thus, Rawls' conception of political community is purely formal, whereas the republican notion is defined by its content; the good's being both owned and pursued in common, as distinct from merely universally affirmed (which does not necessarily require either), is essential.¹⁵⁶

The liberalism defended in this article separates the good being owned in common from it being necessarily pursued in common. The nature of the shared ownership, however, is neither that of Rawls' convergence of subjective values nor MacIntyre's universalistic "cosmic order." The good is rather that of society, by which is connoted the socially constructed character of our normative universe. There is a quite distinct notion of the good embedded in our social practices and institutions; in relation to the individuals comprising that society it is at any particular point in time a given, but unlike MacIntyre's universalistic conception, it is a given that is intersubjectively constituted and (as the history of Europe from medieval to modern society makes abundantly clear) transformable. The content of the good embedded in our modern society is one of self-realization and autonomy, a good that presupposes a significant degree of individual choice as to the path of fulfillment, whether through family, community, politics, or isolation. This is our shared good; how it is attained is in an important sense a private matter for each of us, but that this is the good we must strive to attain is not.

155. *Id.* at 10.

156. Thus, for example, if every individual in Locke's society shared his view of the human good, *see supra* note 153, then by Rawls' definition, there would be political community. But such a society would be at the most extreme opposite from a political community as far as strong communitarians are concerned. That everyone in a society happens to agree on the same comprehensive and general notion of the good (let alone, as in the example of Locke, the same private and individualistic one) does not make political community.

b. *Altruism and Civic Virtue.* The model of republican community derives much of its current appeal from the fact that it appears to offer an alternative to the pursuit of self-interest widely taken to be characteristic of liberal politics.¹⁵⁷ As it stands, this portrayal of liberalism conflates the pursuit of individual (self-)interest and individualistic values. More importantly still, it depends on the drawing of an exhaustive distinction between civil society as the arena in which individuals pursue their selfish interests, on the one hand, and politics as the arena for altruism, the only avenue by which individuals can come together as a community and transcend their self-interest, on the other.

This traditional dichotomy, which traces its roots to Aristotle,¹⁵⁸ lost its plausibility when public and political life became no longer coextensive. But, in any event, it is misleading to believe that republicanism (unlike nineteenth-century romanticism) is essentially concerned with promoting altruism. To understand why, it is necessary to distinguish between two sets of polar motivations. The first is selfish versus altruistic motivation; the second is private versus public motivation. Crucially, both sides of the first dichotomy (self and others) fall within the "private" side of the private versus public dichotomy. Thus, within the sphere of civil society (the private domain), I may act either selfishly or altruistically — in my own self-interest or in the self-interest of other individuals — and in both cases, my motivation would be private as distinct from public.¹⁵⁹

The logic of its position firmly and exclusively locates republicanism within the terms of the private/public dichotomy; it is public motivation and spirit, behaving as *citoyen* and not *homme*, that republicanism seeks to encourage. It must be essentially irrelevant whether an individual, when behaving as *homme*, acts selfishly or altruistically. Indeed, if republican community had as its goal the countering or transcending of selfishness, there would be little reason to take seriously its claim that politics has a unique and privileged role; intermediate communities in the private realm of civil society — such as family, neighborhood, church, profession — would be likely to do

157. As we shall see in *infra* text accompanying notes 235-45, this is the starting point for republican legal theories.

158. See ARISTOTLE, POLITICS, BOOK I.

159. A classic example of a situation involving the public/private dichotomy is that of the dilemma of Sartre's pupil, torn between staying with his deranged mother and going to England to join the Free French Force. This example is used by Steven Lukes. See Steven Lukes, *Making Sense of Moral Conflict*, in LIBERALISM AND THE MORAL LIFE 127, 129 (Nancy L. Rosenblum ed., 1989).

as well, if not better.¹⁶⁰ After all, republican politics (like other varieties) has never been renowned for its suppression of egoism; true republican heroes — such as Cincinnatus and George Washington — seek and attain the greatest glory and honor of all.¹⁶¹ Republicanism, however, is not essentially about countering egoism; its claim is that public spirit (not altruism) is the path to the human good and that politics is the unique forum in which to cultivate it.

In sum, republican community has several essential features. First, it represents a substantive moral claim. This distinguishes it from all types of “methodological communitarianism,” whether expressing specifically metaethical claims, such as those discussed in section I.E, or various other conceptions of “interpretive community” currently fashionable in both literary and legal theory.¹⁶² In particular, it must be firmly stressed that republican community does not argue the broadly contextualist metaethical claim that the good is whatever your community values, but rather the substantive moral claim that the good involves *living in and as* a political community.

Second, and despite statements to the contrary by its adherents, republican community expresses a strongly universal claim;¹⁶³ it is a

160. Charles Larmore takes this view. He argues that once the fallacy of the exhaustive distinction between egoism in civil society and altruism in politics has been identified, nothing prevents the undoubted emotional and psychological need to transcend one's own egoism — a need that political romanticism addresses and one that lies at the root of its appeal — from being fulfilled in the realm of civil society, through membership in various intermediate communities. Larmore states:

Hegel simply ignored all those *intermediate associations*, those common forms of life we share with restricted groups of others, that generally play the dominant role in our socialization. . . . [T]he premise of [the] Hegelian argument is patently false. The private realm, as contrasted with the political, does not consist solely in self-interested behavior.

LARMORE, *supra* note 83, at 105.

However, because Larmore tends not to distinguish republicanism from general political romanticism which, unlike the former, *does* focus on the selfish/altruism dichotomy, he overlooks the republican emphasis on the private/public dichotomy.

161. Hannah Arendt is instructive in this regard. She wrote that “the political predicament of the poor” is that of “the crippling consequences of obscurity” and that “their lives are without consequence . . . they remain excluded from the light of the public realm where excellence can shine.” And she quotes John Adams approvingly when he discusses in relation to a life devoted to politics, the “passion for distinction” and the “desire not only to equal or resemble, but to excel” that “next to self-preservation will forever be the great spring of human actions.” See ARENDT, ON REVOLUTION, *supra* note 33, at 69.

162. See *infra* text accompanying note 186.

163. A principle can be correctly termed universal in two senses: weak and strong. The weak sense states that a principle is universal if it is, as a matter of fact, recognized, affirmed, or applicable in every particular “jurisdiction.” This weak sense of universal, which may be thought of as *de facto* universality, refers to the *scope* of a principle; were the principle not recognized in any single jurisdiction, it would no longer be universal in this sense. By contrast, the strong sense refers to the *source* of a principle rather than its scope, and states that a principle is universal if the source of its validity is external to the individual jurisdictions themselves. It is directly applicable everywhere, whether or not it happens to be recognized as such in any particular jurisdiction, because its validity does not derive from “community,” but from some aspect of the general “human situation.”

claim about the *human* good, about what is good simply by the external fact of being human. "But once the notion of essential human purposes or functions disappears from morality, it begins to appear implausible to treat moral judgments as factual statements."¹⁶⁴ Such "factual statements" would necessarily apply to all humans.

Third, republican community is a monistic moral claim. It is not merely a view about what is of value to human beings, but what is of the *highest* value; it is a claim about *the* human good. Consequently, it is incompatible with any other first-order theories of the good.¹⁶⁵ It is neither itself a pluralistic moral theory (there is only one relevant value), nor is it compatible with a pluralistic view of morality as a whole (accommodating a number of different monistic theories).

3. Communist Community

Having differentiated the republican conception of substantive community from the conservative, I now turn very briefly to explaining the essential respect in which the communist conception of substantive community differs from the other two.¹⁶⁶ Conservative, republican, and communist political theories all employ conceptions of substantive community to express principles of association antagonistic to those of liberal theory. The nature and type of communal association implicit in classical Marxism, however, is radically different from either conservative or republican community.

If, as I have argued, the conservative model of community can be seen as in part a reaction to, and rejection of, the privatization of *morality*, the republican model can be seen as a reaction to, and rejection of, the privatization of *politics*, which it sees as constitutive of liberalism. Among republicans, Arendt argues this latter point most explicitly. For her, liberalism represents the conquest of politics, the realm of freedom ("the only realm where men can be truly free"¹⁶⁷),

164. MACINTYRE, *supra* note 39, at 59.

165. This characteristic of republican community is analogous to the case of utilitarianism, which allows no other moral value but its own.

166. The aspect of communism that I focus on in this extremely brief treatment is dictated entirely by the two purposes I have in undertaking it; there is obviously no intention here of being comprehensive in my presentation. The two purposes are first, to show that there is a theory of substantive community that, unlike republicanism and conservatism, does not exalt either the role of politics in human affairs or the importance of historical models of community. Second, because I shall argue in Part II that one strand of critical legal studies derives much of its inspiration and agenda from the vision contained in the writings of the early Marx, it is necessary to give at least the flavor of that vision at this point. My discussion here refers exclusively to the communism of classical Marxism; this is because of the many theories of socialism, classical Marxism offers the most radical contrast with the conception of substantive community prescribed by republicanism.

167. ARENDT, ON REVOLUTION, *supra* note 33, at 114.

by the "social question," the realm of necessity — the mundane world of needs and desires. The result of this "complete victory of society" has been that "action" (politics) was replaced by "the administration of things."¹⁶⁸

From this perspective, communist community can be seen as the perfection of liberalism, and thus the complete antithesis of republicanism. The reason is that Marxism views politics as a purely historical phenomenon, as a form of human activity without intrinsic value, and as ultimately nothing more than a particularly effective mechanism (through the use of coercion and legitimating ideology) by which the economically dominant class — including the proletariat during the transition to communism — expresses and maintains its hegemony.¹⁶⁹ It is not a permanent feature of the human condition but will be transcended and abolished with the coming of classless society. Politics and political functions, as a specialized activity, will be reabsorbed by society. For Marx, human emancipation necessarily involves the emancipation of man *from* politics. As he argues:

Political emancipation is the reduction of man on the one hand to the member of civil society, the *egoistic, independent* individual, and on the other to the *citizen*, the moral person.

Only when real, individual man resumes the abstract citizen into himself and as an individual man has become a *species-being* in his empirical life, his individual work and his individual relationships, only when man has recognized and organized his *forces propres* as *social forces* so that social force is no longer separated from him in the form of *political* force, only then will human emancipation be completed.¹⁷⁰

Liberalism sees conflict as a permanent feature of human association and politics as the means of regulating it.¹⁷¹ Communism, like both conservatism and republicanism, denies this liberal premise of permanent conflict and believes instead in natural social harmony.

168. *Id.* at 273; ARENDT, *THE HUMAN CONDITION*, *supra* note 33, at 44.

169. This view of the intrinsic value of politics did not prevent Marx or his followers from engaging in detailed study of its strategic importance both under capitalism and the dictatorship of the proletariat. See, e.g., KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* (1852) (discussing the class alignments of the political parties under the Second French Republic); KARL MARX, *THE CIVIL WAR IN FRANCE* (R. Postgate ed., 1921) (1871) (discussing the political form of the future dictatorship of the proletariat). On twentieth-century Marxist theories of politics, see, e.g., Antonio Gramsci, *The Modern Prince*, and Antonio Gramsci, *State and Civil Society*, in *SELECTIONS FROM THE PRISON NOTEBOOKS* 123, 206 (Q. Hoare & G. Smith eds., 1971); NICOS POULANTZAS, *STATE, POWER, SOCIALISM* (Patrick Camiller trans., 1978).

170. KARL MARX, *On the Jewish Question*, in *EARLY WRITINGS* 211, 234 (Lucio Colletti ed., Rodney Livingstone & Gregor Benton trans., 1975).

171. The distinctive aspect of contemporary liberalism is to transform the object of interpersonal conflict from material (often self-)interest, as in the case of Hobbes and Locke, to "ideal interest" or conceptions of the good. This change, however, does not abolish the centrality of conflict.

But unlike these two other theories of substantive community, its particular method of transcending conflict is to render politics redundant. The result is community, but that of the free association of producers, and not citizens.

In this sense, communism (and not liberalism) represents "the complete triumph of society," for it represents the complete, whereas liberalism represents only the partial, abolition of citizenship. There is no possibility of political, only social and economic (or in Marx's sense, human) community. Accordingly, communist community is to be seen as extreme antirepublicanism.

In sum, while it is true that the concept of substantive community engaged in the third debate is always antiliberal in that it represents and prescribes contrary and incompatible *principles* of association, it is also the basis for radically different *types* of association. Conservative, republican, and communist community represent three such types. Within contemporary moral and political theory, communitarian critics of liberalism generally want community of the second sort, that is, republican political community. As we shall see in Part II, strong communitarianism among legal theorists has taken on all three forms.

Having completed the analysis of the claims of community in the broader context from which legal communitarians have borrowed, we are now in a position to clarify and evaluate the claims of community in law.

II. COMMUNITY IN CONTEMPORARY LEGAL THEORY

The various claims of community in contemporary legal theory are essentially applications and modifications of the communitarian positions that were identified and distinguished in Part I — antiatomism, metaethical communitarianism, and three forms of strong communitarianism. Each of these claims of community has its proponents in legal theory. First, antiatomism is advocated in both "legitimate" and "illegitimate" forms. The "legitimate" claims are not only that individuals are in part socially constituted, but also that among the social phenomena that constitute them, a community's legal system plays a very significant role. The "illegitimate" form is the familiar, but fallacious, argument that because liberalism rests upon atomism, the communitarian thesis concerning identity supports a version of substantive community.

Second, advocacy of community by such liberal legal theorists as Fiss and Dworkin is not aberrational, but rather parallels the work of metaethical communitarians in moral and political theory. The essen-

tial claim here is that community is the source of that subset of public values and principles that constitutes a legal system.

Finally, each of the versions of substantive community has its adherents in contemporary legal theory. Robert Bork is the most influential advocate of conservative community; and republican and communist community respectively provide the conceptual points of departure for "the republican revival" and certain important strands within critical legal studies (CLS).

A. *Antiatomism*

The notion of a constitutive relationship, rather than a purely contingent and instrumental one, between self and society is the central claim of the communitarian thesis in the atomism debate. This claim is incorporated into both the republican revival and CLS. A central feature of legal republicanism is hostility toward what it takes to be the dominant instrumental conception of politics as an area for furthering preexisting (self-)interests and an emphasis instead on the transformative potential — in terms of both identity and interests — of dialogue with others in public space.¹⁷² Belief in the social construction of the subject is also a central tenet of CLS. One of its major insights is to understand and explain the role of the legal system within the cultural matrix that shapes individual consciousness.¹⁷³

This role is not necessarily a passive one. In denying the purely instrumental or "functionalist" conception of the law-society relationship whereby the legal system mechanically reflects the "needs" of society, certain CLS theorists have argued that, to the contrary, law is constitutive of a large number of crucial social relationships and thus of major aspects of individual consciousness. It thereby contributes to making us who we are. Thus, many of the social relationships that are fundamental to our identity are legal relationships, such as husband-wife, landlord-tenant, and employer-employee. As Robert Gordon put the point, "the legal forms we use set limits on what we can imagine as practical options: Our desires and plans tend to be shaped out of the limited stock of forms available to us"¹⁷⁴

As I have argued, the political and normative consequences of the social thesis are open ended, historically contingent. Although as a general matter, both CLS and republican revivalism should be understood not merely as acknowledging, but as underscoring, this contin-

172. See, e.g., Michelman, *supra* note 9, at 1528-37.

173. For an extremely helpful discussion of the centrality of the social thesis to CLS, see Jack Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133 (1991).

174. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 111 (1984).

gency of outcomes, there is nonetheless a strong and conspicuous undercurrent in both suggesting that antiatomism has specific implications — implications of substantive community similar to those claimed by Sandel.¹⁷⁵ This undercurrent more often than not stops short of spelling out the supposed direct connection between antiatomism and antiliberalism and instead repeats only the major premise of the “syllogism” — that liberalism rests upon an atomistic view of human nature — leaving the conclusion (that liberalism falls with atomism) clear if unstated.

Roberto Unger and Mark Tushnet, however, are among those who have expressly connected denial of the atomism thesis with support for substantive community. A central feature of Unger's early writings, particularly *Knowledge and Politics*, is his emphasis on the self and the critique of liberal psychology as a basis for community. As Unger puts it, “[a] theory of the self . . . establishes the vantage point from which one can begin to piece together an alternative to . . . liberal theory and a resolution of its antinomies.”¹⁷⁶

For Unger, total criticism of liberalism as a hegemonic metaphysical system reveals its deep structure to combine a psychology in which people are viewed as “isolated individuals”¹⁷⁷ separated from the world of others and a metaethic in which values are seen as purely subjective. These two essential features of the liberal system of ideas are mutually supportive, for in a world of mere preferences, with no independent normative standard for ordering social life, outcomes turn purely on domination and power — even if widespread appreciation of this fact is masked by ideological forms.

It is because of the liberal conception of the self as atom that there cannot be the type of shared understandings and values that would resolve the antinomies of liberal thought in community. “[T]he conception of such a community [of understandings and values] is surely inconsistent with the idea that men are bound together by rules and kept apart by their individual and subjective ends”¹⁷⁸ Unlike

175. Indeed, in some cases, direct reference is made to Sandel. Thus, Drucilla Cornell summarizes her understanding of LIBERALISM AND THE LIMITS OF JUSTICE as follows: “Michael Sandel suggests that we can overcome the ethical crisis of liberalism only if we adopt an intersubjective understanding of the subject, for only then could we accept as legitimate the kind of community life we would require in order to succeed in ethical reconstruction.” Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 360 (1985). As I argued in Part I, the claim that rejection of the unencumbered self results in substantive political community is the central fallacy of Sandel's work.

176. UNGER, *supra* note 2, at 191.

177. *Id.* at 211.

178. *Id.* at 111.

Rawls,¹⁷⁹ Unger correctly notes that a sharing of values is not merely a convergence of individual preferences but "refers to group values that are neither individual nor subjective."¹⁸⁰ This is why for him, it is "[o]nly by rejecting the principles of subjective value and of individualism [that we could] allow for the possibility of communal values."¹⁸¹

There is, however, no a priori reason to think that such genuinely shared or common values must be communal in substance, that group or communal values must necessarily be antiindividualistic. The sharing refers to the source and not the content. The values are in and of the community as a whole; they are a social fact, and not a fact about individuals.

Mark Tushnet connects the communitarian positions in the three debates in virtually identical terms. In *Following the Rules Laid Down*,¹⁸² he argues that the consequence of acknowledging an antiatomistic conception of the person is the disappearance of liberal thought and its individualistic values. In by now familiar fashion, Tushnet first ties liberalism to atomism — and also to moral skepticism — as follows:

Liberalism's psychology posits a world of autonomous individuals, each guided by his or her own idiosyncratic values and goals, none of which can be adjudged more or less legitimate than those held by others. In such a world, people exist as isolated islands of individuality who choose to enter into relations that can metaphorically be characterized as foreign affairs."¹⁸³

It is this state of affairs, he argues, that creates the need for constitutional theory as a way to prevent judges tyrannizing us in furtherance of their own preferences and interests. But any plausible constitutional theory, says Tushnet, presupposes the type of shared understandings — continuities of meaning and history — that render atomism a false account of human nature and thus undermine the premises of liberalism. Accordingly, we are left with the paradox that constitutional theory is both necessary and impossible for liberalism.

Regardless of the accuracy of his portrayal of liberalism,¹⁸⁴ Tushnet's argument conflates the fact of autonomy with the value of autonomy. Like Unger, he seems to be saying that once a society has the type of cultural matrix and shared values that qualify it as a "com-

179. See *supra* text accompanying notes 154-56.

180. UNGER, *supra* note 2, at 102.

181. *Id.*

182. See *supra* note 8.

183. Tushnet, *supra* note 8, at 783.

184. See DWORKIN, *supra* note 3, at 440 n.19 (Dworkin criticizes Tushnet for producing and arguing against a caricature of liberalism that misrepresents its essential features.).

munity of understanding,"¹⁸⁵ and thus render atomism a false account of individual identity, then these shared values must be communal and antiindividualistic in content. This is why according to Tushnet's account, there would be no need for the type of restraints on either judges or the majority that constitutional theory concerns itself with. But, once again, the content of shared values is not given by the fact that they are shared, any more than individualistic values depend on the fact of atomistic individuals. Content is independent of source.

B. *Metaethical Community*

Owen Fiss and Ronald Dworkin share a common vision of law, a vision that, either in part or in whole, has been under severe attack from a variety of directions in recent years. This vision contains and expresses many of the traditional claims that form what, for the sake of convenience, may be termed the liberal theory of law.

Despite numerous differences both of detail and emphasis, at the most general level both Fiss and Dworkin defend the following four claims: first, that law is a normative enterprise; second, that this enterprise is distinct from politics and morality both in method and content; third, that there are meaningful criteria for ascertaining the truth of a proposition of law; fourth, that propositions of law are *prima facie* authoritative.

In making such claims of the legal system, Fiss and Dworkin are, of course, stubbornly resisting the major trends of contemporary legal theory. Contra the views of a variety of schools, including critical legal studies, law and economics, and modern natural law theory,¹⁸⁶ they vigorously deny that law is reducible to anything else, whether politics, the market, or morality; contra the indeterminacy thesis of skeptics of various types, they argue that as a general matter, questions of law can be answered internally, by means of legal reasoning without recourse to external factors; and contra both critical legal studies and law and economics, they defend the view that law is a normative system, a matter of principle and value, and not an instrumental system of power or utility maximization.

Crucially both Fiss and Dworkin employ notions of community to express and defend this liberal vision of law. Fiss makes use of the idea of the interpretive community to ground the claims of objectivity, correctness, and authority made by particular acts of adjudication. Dworkin uses community to ground both the coherence of the legal

185. Tushnet, *supra* note 8, at 826.

186. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

system and the general authority of law. The question is what to make of this communitarian turn. Does it represent an acknowledgment of, or compromise with, the substantive claims of community that have liberalism as their target? Or, is the appeal to community in their works of a different (logical) order, part of a different debate? Not surprisingly, I shall argue that the latter is the case: these liberal legal theorists employ a metaethical concept of community.

1. Fiss: *Interpretation and the Professional Community*

In his essays, *Objectivity and Interpretation* and *Conventionalism*,¹⁸⁷ Fiss sets out to "render coherent the central ideal of the profession — decision according to law."¹⁸⁸ This means confronting the familiar contemporary figure of the "nihilist," the critic who denies there is any basis in law for choosing between the many possible interpretations of legal texts (that is, primarily the Constitution, statutes, and judicial opinions), so that consequently judges decide cases on the basis of their own values, with the result that "[a]ll law is masked power."¹⁸⁹ A less conspiratorial version of the same argument might state that judges *cannot* choose among the possible interpretations on the basis of law even if they wanted to, and accordingly must choose on the basis of extralegal considerations. These might include in addition to their own values, objective moral truth, general policy considerations, private interests, or whim.¹⁹⁰ What is at stake for Fiss in this confrontation is the ability to keep faith in "the redemptive possibility of law."¹⁹¹

Fiss' strategy is, first, to show that nihilism is premised on the traditional metaethical dichotomy of truth being either objective or subjective. In the case of law, this dichotomy entails that unless legal decisions are independent of the interpretation placed on a text by any particular judge (in the way that the role of judges in civil law jurisdictions is officially limited to mechanical application of the relevant code

187. Fiss, *supra* note 6; Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985).

188. Fiss, *Conventionalism*, *supra* note 187, at 189.

189. Fiss, *supra* note 6, at 741.

190. If law cannot provide the standard for choosing between rival interpretations of a legal text, this does not automatically mean that a judge deciding on the basis of morality is imposing her "personal preferences." Whether such a situation is best interpreted this way depends on the truth of moral skepticism. (Robert Bork bases his argument for "originalism" on such moral skepticism. See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9-11 (1971). This view sits somewhat uneasily with his espousal of the conservative claim that law should protect a community against moral harm. See *infra* text accompanying notes 230-33). Those arguing for the autonomy of law believe that even "objective morality," unless already incorporated into law, would be an illegitimate and unnecessary criterion for making legal decisions.

191. Owen Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1128 (1991).

provision), then they are subjective. Second, Fiss seeks to transcend this dichotomy by means of the idea of "bounded objectivity," which he states to be the "only kind of objectivity to which the law — or any interpretive activity — ever aspires . . ."¹⁹² His task is to explain the nature of the boundedness in law, to describe what binds the judge from the outside.

The notion of "bounded objectivity" in law exactly parallels the metaethical concept of community in the field of general normative theory. Both ideas provide a conceptual path through the Scylla and Charybdis of objectivity and skepticism. Just as Walzer advances the claim that the general mode of moral inquiry is interpretation, rather than either discovery or invention, so Fiss proclaims that "[a]djudication is interpretation."¹⁹³ Moreover, for Fiss, as for Walzer, interpretation requires community. Community provides both the object of interpretation — what we interpret; that is, the texts and social practices of a given legal or moral community — and the standards of interpretation — what counts as a correct interpretation.¹⁹⁴

Fiss argues that it is the authority of the interpretive community of the legal profession that ensures the possibility of (bounded) objectivity in legal interpretation; that is, the possibility of law. The interpretive community recognizes and accepts, not the interpretations directly, but the "disciplining rules" or "professional grammar" that constrain the interpreter and thereby provide the standards for judging the objectivity and correctness of an interpretation. As Fiss states, "the possibility of an inter-subjective meaning [is] rooted in the idea of disciplining rules and of an interpretive community that both legitimates those rules and is defined by them."¹⁹⁵

Fiss borrows the concept of an "interpretive community" from literary theory.¹⁹⁶ It refers to the source of authoritative meaning for the interpretation of texts, and stands in contrast to the polar claims that meaning either is discovered — inheres — in the text (objectivism) or that the interpreter is free to invent meaning (subjectivism). Thus Fiss

192. Fiss, *supra* note 6, at 745.

193. *Id.* at 739.

194. Walzer states, "The readers [of the moral 'text'], I suppose, are the effective authority: we hold up our interpretations for their approval." WALZER, *supra* note 37, at 30. Walzer's apparent reluctance ('I suppose') to accept this authority stems from his fear of early closure in the event of disapproval; it is essential to "continue the argument." *Id.* at 32. Thus, it is not the issue of interpretive authority that Walzer questions, but the consequences of (substantive) political authority.

195. Fiss, *supra* note 6, at 750.

196. See, e.g., STANLEY FISH, *IS THERE A TEXT IN THE CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

employs the concept of interpretive community in a methodological context, concerning the nature, possibility, and source of meaning.

Consequently, anyone who sought to question the legitimacy of an otherwise legally correct interpretation by raising the issue of whether the relationship among members of the legal profession is such as to constitute a "community" in a substantive (i.e., sociological) sense would be guilty of what the British philosopher Gilbert Ryle termed "a category mistake."¹⁹⁷ Even though Fiss' justification of the authority of the legal community (over both dissenting members and non-members generally) is incomplete,¹⁹⁸ it is clearly not the specifically *communal* nature of the legal profession that gives it the power to create meaning and the authority to enforce it. This is to say, Fiss' account of the concept of community is a metaethical one in my terms; it expresses the "boundedness" of bounded objectivity and states the alternative to the dichotomy of objectivism or subjectivism.

Fiss' defense of objectivity in the law would be unproblematic if he also believed that only one among a number of competing interpretations would normally qualify to receive the imprimatur of the disciplining rules. In terms of defeating the nihilist challenge, what the theory offers in cases of multiple permissible (that is, plausible) interpretations is not entirely clear. Moreover, as we shall see in the following section, Robert Cover raises the possibility that multiple meanings may reflect not indeterminacy within a single interpretive community, but rather determinacy among several different communities. This question of "one interpretive community or several" puts the issue of authority in its starkest form. In addition, much disagreement within the legal community concerns the disciplining rules themselves: what are the standards for correct interpretation. Fiss pushes this concern to the background by arguing that the amount of such disagreement is exaggerated and by relying on the hierarchical court structure to resolve such disputes. However, Dworkin makes precisely this issue of disputed grounds of law, what he terms "theoretical disagreements" in law, the central focus of his recent work.

2. Cover: *New Worlds and Interpretive Authority*

Robert Cover is the theorist *par excellence* of metaethical community in contemporary legal theory. In his article *Nomos and Narrative*,¹⁹⁹ he describes a normative world as the creation of a collective

197. GILBERT RYLE, *THE CONCEPT OF MIND* 16 (1949) (allocating a particular term to the wrong category).

198. See Kahn, *supra* note 4, at 47-51.

199. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

process and as being held together by the force of common interpretive commitments. Cover expresses this idea as follows:

The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common "script" renders it "sane" — a warrant that we share a *nomos*.²⁰⁰

A legal tradition is part of this broader *nomos*, which means in turn that "the community [is] the source and sustenance of ideas about law."²⁰¹

This intersubjective constitution of normative universes raises the problem of authority where divergence of legal meaning results from the existence of multiple interpretive communities within a single territorial jurisdiction. Each community of meaning demands for itself norm-generating autonomy, so that the problem of the state, the "federal" authority standing over these particular communities, is that its own *nomos* does not include shared interpretive commitments acknowledging its claim to authority, its supremacy. That is, there is no interpretive or internal superiority of any one legal meaning over any other, including the state's over that of the particular *nomoi*; there is only the imposition of the state's meaning backed by the coercive force at its disposal.

Cover should not be understood as a strong communitarian arguing for the moral superiority and reestablishment of the substantive communities such as the Amish and Mennonites that he discusses in the article. His argument is not about, and does not depend on, the sociological or normative merits of insular religious communities or redemptive movements. Rather his point is to challenge the assumption that political-legal units, such as the individual states or the nation at large, can be construed as single communities of meaning, an assumption that simplifies the task of justifying political or legal action and conceals their essentially coercive nature.²⁰² Cover's is the challenge of interpretive anarchism, not the antimodernism of MacIntyre.

Through his particular choice of *nomoi*, however, Cover paints a very idiosyncratic picture of the sociological landscape and the relationship between individuals, group membership, and political life — a picture that in many ways is akin to Hobbes' ontology of political society but with *nomoi* substituted for individuals: autonomous and self-

200. *Id.* at 10.

201. *Id.* at 38.

202. See ROBERT COVER ET AL., PROCEDURE 729-30 (1988).

sufficient entities whose interactions with the state are purely instrumental. But in so doing, Cover begs the important question. This is whether as a general matter we should understand ourselves to be like the Mennonites, for whom membership of a single comprehensive nomos sufficiently expresses their most significant normative commitments with the result that all other nomoi — and particularly the state — are alien, redundant, and potentially threatening,²⁰³ or whether, by contrast, our commitments cut across a number of different, less all-embracing nomoi of which we are members. If our commitments to interpretive communities are not all mutually exclusive, then perhaps the state can be conceptualized as something other than Cover's amoral maintainer of order — as a limited nomos constituted by shared normative commitments among a citizenry who inhabit many such worlds and not only one.

3. Dworkin: Integrity and Community

Law's Empire contains Dworkin's most systematic thinking to date about the nature of law. An extremely conspicuous feature of the work as a whole, especially to those acquainted with "the liberal versus communitarian debate" that has dominated much of moral and political theory for the past decade, is the central role that Dworkin gives to the idea of community. Moreover, at least part of his appeal to community appears to be of a substantive nature, as if ceding ground to the strong communitarian attack on contemporary liberalism — the body of thought with which he is primarily associated.

I shall argue that such an interpretation of Dworkin's communitarianism is mistaken. He should rather be seen, like Fiss and Cover, as espousing a version of the quite separate metaethical concept of community — community as the source of law. Any appearance of real concessions to the general idea of substantive community is a mirage.

Law's Empire as a whole, including Dworkin's discussion of community, should be seen as continuous with Dworkin's earlier work, and in particular with *Hard Cases*, originally published in the *Harvard Law Review*²⁰⁴ and reappearing as Chapter Four of *Taking Rights Seriously*.²⁰⁵ In *Hard Cases*, Dworkin describes the task of the judge as follows: "But when Hercules fixes legal rights he has already taken

203. If so, the issues raised in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) — whether a nomos should be exempted from state regulations that threaten its way of life — would be paradigmatic rather than exceptional.

204. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

205. See DWORKIN, *supra* note 6.

the community's moral traditions into account, at least as these are captured in the whole institutional record that it is his office to interpret."²⁰⁶

The judge decides issues of law not by importing principles external to the legal system but by interpreting the internal principles of the system itself, including internal principles of political morality insofar as they have been incorporated into the legal system. "[Hercules'] theory identifies a particular conception of community morality as decisive of legal issues; that conception holds that community morality is the political morality presupposed by the laws and institutions of the community."²⁰⁷ Dworkin's use of "community" here is quite clearly of the metaethical variety: it refers not to a particular type of political association, but to the source of law. Right answers in both hard and easy cases derive neither from discovering universal legal truths nor from the personal preferences of judges, but from interpreting the "constitutional morality" of the community as enshrined in previous legal practice.

In unveiling his conception of law as integrity in *Law's Empire*, Dworkin develops but does not depart from this concept of community. What judges do is interpret the community's legal and constitutional morality as a coherent scheme of principle. Where Dworkin might, however, appear to depart from this purely metaethical claim of community is in his attempt to bolster the case for integrity by arguing that it provides not just coherence, but also legitimacy for law: that law as integrity can also ground political obligation. Dworkin could be understood to shift from a metaethical to a substantive concept of community because he argues that acceptance of the model of integrity presumes a political community *of a certain sort* — a "community of principle" — which, in turn, engenders the associative obligations of a "true community." Examination of the necessary characteristics of such communities, however, reveals them to be identical to Dworkin's longstanding conception of liberal political association.

a. Integrity and the Coherence of Law. Dworkin's task in *Law's Empire* is to defend a particular vision of law — that of an autonomous, coherent, comprehensive and authoritative scheme of public principles — against the onslaught of skeptical attacks that have constituted the major trends in contemporary legal theory. Dworkin recognizes his most significant opponent as the "global internal skeptic,"

206. *Id.* at 125-26.

207. *Id.* at 126.

the critic who stands for the proposition that our legal system is so replete with contradictions that no interpretation of it as a uniform and coherent system of principle is possible.

In terms of interpreting what particular acts of adjudication represent, the possible conclusions that such a skeptic might draw are numerous. Among the most often heard are the following: judges make law by deciding hard cases on the basis of their own values or preferences (subjectivism); cases are decided on the basis of policy grounds (pragmatism); resort is made to norms external to the particular legal culture (objectivism, either legal or moral). By contrast, Dworkin is committed to the view that there are right, internally generated, legal answers to both hard and easy cases, just as Fiss is committed to the view that there are internal standards of objectivity and correctness for interpretations of particular legal texts.

His interpretation of the legal system as characterized by the virtue of integrity is Dworkin's most fundamental answer to the global internal skeptic. It is precisely the possibility of such an interpretation that the skeptic denies, for integrity enables us to interpret the law as a coherent scheme of principle. Dworkin's problem in defending this interpretation is that integrity can only be ascribed to a single moral agent; the term refers to the virtue possessed by the moral agent who is committed to a consistent set of values or projects over time.²⁰⁸ Thus, Dworkin's first task is to locate such an agent. His response is to find it in the community as a whole. The community viewed as an entity morally distinct from the individuals who compose it is this single moral agent, the single author of our laws.²⁰⁹ In this way, and in this way only, can the law be viewed as a single, unfolding and continuous historical narrative, capable in principle of the coherence Dworkin seeks.

For Dworkin, law is a set of public acts whose author is the community as a whole; legislation and adjudication are part of "the community's communal life,"²¹⁰ that is, not something engaged in by members of the community in their individual, or private, capacities, but as representatives of the community personified. Thus, law is

208. On personal integrity generally, see, e.g., BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985).

209. Dworkin is at pains to point out that this personification of the community does not posit — as traditional organicist political theories, including certain versions of conservatism, do posit — some form of independent metaphysical existence. Rather, it involves an interpretation of our own language and practices. We can personify community just as we can attribute distinct agency to, for example, corporations and orchestras. See DWORKIN, *supra* note 3, at 168-71.

210. Dworkin uses this term in a later article. See Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 492 (1989).

neither an expression of the will of individuals — judges, legislators, or constituents — nor is it imported from an external source. Community is the source of law.

This is the sense in which Dworkin employs the metaethical concept of community, not as the source of value generally, but as the source of that subset of norms comprising a community's enforceable public commitments and principles — that is, its legal system. It should be pointed out that integrity refers to the form of law and not its content; nothing about the virtue of integrity per se determines the content of the public principles that form the coherent whole. As Dworkin himself points out, integrity is a second order, not a substantive, value.²¹¹

Dworkin proceeds to argue that a political society that accepts integrity as a political virtue is "a special form of community," one that "fuses citizens' moral and political lives."²¹² He describes such a community as "a community of principle" — one whose members accept that they are governed by common principles, not just by rules hammered out in political compromise — as distinct from both "a de facto community" and "a rulebook community."²¹³ But in reality, acknowledging that one is governed by a scheme of principle is hardly a characteristic that would divide any set of actual political societies into two mutually exclusive groups, those that are and those that are not substantive political communities. In other words, political societies exhibiting only the characteristics of de facto or rulebook communities would not be long for this world. All remotely stable political societies are governed by principle; all exhibit communal acts. As Dworkin himself makes clear elsewhere,²¹⁴ the real difference between liberal political societies and those that can be said to be political communities in the strong sense as advocated by communitarians of the third debate, concerns the *scope and extent* of its communal life, not its *existence*.

b. Community and the Authority of Law. Dworkin seeks to defend a second claim in addition to that of the coherence of the legal system. This is the authority of law. Unlike Fiss, however, Dworkin is not concerned with the authority of particular textual interpretations, but with general authority. In other words, is there a moral obligation to obey the law?

211. DWORKIN, *supra* note 3, at 164-67.

212. *Id.* at 188-89.

213. *Id.* at 190-215.

214. Dworkin, *supra* note 210, at 491-99.

Dworkin adduces two separate arguments in support of such an obligation. The one I briefly take up first is mentioned only in passing by Dworkin and is not obviously consistent with the thrust of his major claim that, under certain specified circumstances, consent is not a necessary condition of political obligation. Dworkin argues in effect that in authoring the law — that is, in our capacity as members of the community personified — we have voluntarily obligated ourselves to obey it, much as we do when we create other self-assumed obligations, such as promises. This is a straightforward application of the principle, expounded by Rousseau and Kant, that in order to be free, those subject to the law must be the authors of it.²¹⁵

The second argument is both more original and more central to Dworkin's (and my) purpose. It is that political obligation can be seen, under certain well-defined circumstances, as a species of "associative obligation," or obligation of role, such as we have to members of certain groups — for example, family and friends — *regardless* of any deliberate acts of assuming or consenting to such obligations. Dworkin argues that such associative obligations exist between members of "true communities," and that communities of principle come closer to true communities than any other community that is possible among people like us who disagree about ultimate values. Accordingly, political societies that accept integrity have a better case for the legitimacy of their law than those that do not.²¹⁶

As Paul Kahn has noted,²¹⁷ this noninterpretive claim, importing as it does an external criterion of legitimacy, is seemingly inconsistent with the interpretive nature of Dworkin's entire enterprise.²¹⁸ However, the point I wish to stress here is similar to the one I made earlier concerning the requirements for a community of principle, namely, how "thin" the four conditions of "true community" are.²¹⁹ In fact, no great examination is necessary to reveal that Dworkin's "true community" expresses his longstanding account of the nature and require-

215. DWORKIN, *supra* note 3, at 189.

216. *Id.* at 214.

217. See Kahn, *supra* note 4, at 78-79.

218. An underlying uncertainty in *Law's Empire* is the extent (if any) to which Dworkin still adheres to his earlier clear statements of metaethical universalism (what he calls "abstract justice" or "abstract morality" in *Law's Empire*). For an example of his universalistic views of justice, see his exchange with Walzer, *supra* text accompanying notes 35-37.

219. The four conditions of true community are: first, members must "regard the group's obligations as *special*, holding distinctly within the group, rather than as general duties its members owe equally to persons outside it. Second, they must accept that these responsibilities are *personal*. . . . Third, members must see these responsibilities as flowing from a more general responsibility each has of *concern* for the well-being of others in the group. . . . Fourth, members must suppose that the group's practices show not concern but an *equal* concern for all members." DWORKIN, *supra* note 3, at 199-200.

ments of liberalism; equal concern and respect for all the members of the community being the crucial requirement in both — what he sometimes refers to as treatment as equals.²²⁰ Moreover, for Dworkin, it is this principle of equal concern and respect that requires the liberal state to be officially neutral among the conceptions of the good held by members of the community.²²¹ Once again, this will not do for the strong communitarians of the third debate, whether conservative, republican, or communist. Their substantive claims of community go well beyond Dworkin's four conditions, indeed well beyond anything that is consistent with, let alone constitutive of, liberalism.

Dworkin is not even prepared to say that these four requirements of true community represent attitudes that must actually be held by a majority of the community toward their fellow members. "These are not psychological conditions. . . . The concern they require is an interpretive property of the group's practices of asserting and acknowledging responsibilities . . . not a psychological property of some fixed number of the actual members."²²² In fact, Dworkin's position on strong community is revealed when he describes what he terms "a more communitarian vision" of the law.²²³ This, he says, "supposes law purified of individual rights that corrupt the community's sense, which this vision endorses, that the only good is communal good, that lives are best lived under shared standards of what lives are best."²²⁴

Thus, for all the apparent concessions to strong communitarianism expressed by his approval of community of principle and true community, the concept of community that Dworkin accepts is the metaethical one: community as the source of law. His substantive conditions and prerequisites for interpreting law as integrity turn out to be minimal conditions that any viable political association must meet: the acceptance of governance by common principles rather than rules of political compromise, and the capacity to interpret formal political acts — both legislative and adjudicative — as part of the communal life of the political community. Breaking out of the self-imposed interpretive straitjacket in order to ground not simply the coherence but also the authority of law, Dworkin argues that the "true community" creates obligations without consent. The "true community," however, is one that recognizes equal claim and respect among its members so that it would appear to follow, for example, that traditional societies

220. See, e.g., Dworkin, *supra* note 132, at 62.

221. *Id.* at 64.

222. DWORKIN, *supra* note 3, at 201.

223. *Id.* at 408.

224. *Id.*

could not generate communal obligations. Strong communitarians are unlikely to be placated quite so easily.

C. *Conservative Community*

The conservative model of substantive community, as we have seen,²²⁵ is a reaction to the privatization of morality that its proponents see as constitutive of liberalism. That is, it rejects the idea that moral choices are in principle purely private — choices for which one cannot be held accountable to communal standards. Rather, it subordinates the independent pursuits of individuals to preserving a conception of society as the fundamental moral unit, as the predominant object of value. The overriding function of law is to express and defend this communal self-image as a historical, continuing entity based on an inherited (rather than created) constitutive morality — as Burke puts it, “a partnership not only between those who are living, but between those who are dead, and those who are to be born”²²⁶ — and not to serve the needs, interests, or values of the individuals who compose it.

Among legal thinkers, Robert Bork has been the most prominent recent proponent of conservative community. He has located himself directly in the intellectual tradition of Stephen and Devlin by identifying J.S. Mill as the source and chief architect of “the peculiar notion that what the community thinks to be moral harm may not be legislated against. . . . An idea that tends to dissolve social bonds.”²²⁷

Bork, like Stephen and Devlin, might perhaps be interpreted as arguing only the metacase for a general bridging of law and morality, that a community's moral judgments may be translated into law. This, however, would be to ignore the substantive target he and they have in mind, which is the fact of privatization and not the metaethical grounds for it. That is, privatization would still be bad — because it undermines the conservative conception of community — even if it expressed the community's morality. Bork equates the “rampant individualism” of the Warren Court (which turned “individual autonomy into a constitutional principle that sweeps far beyond any constitutional provision”²²⁸) with moral relativism, but it is the individualism with which he is mainly concerned and not the moral relativism on which he claims it stands. Indeed, in claiming that when a judge in-

225. See *supra* text accompanying notes 126-30.

226. BURKE, *supra* note 56, at 194-95.

227. BORK, *supra* note 1, at 249.

228. *Id.* at 246.

validates legislation without explicit support from the text of the Constitution, that judge is simply imposing her own moral preferences on that of the majority, Bork is himself relying on moral relativism.²²⁹

Thus, Bork frames the issue in *Bowers v. Hardwick*,²³⁰ the case concerning the constitutionality of a Georgia statute that criminalized sodomy, as whether or not the community may express its sexual morality in a law prohibiting homosexual conduct. But, on the metaethical communitarian view, this way of framing the issue begs the important questions: What precisely is the content of the community's sexual morality, how and at what level of abstraction is it determined,²³¹ and what is the relevant community for constitutional purposes — Georgia or the nation?

Bork does not argue that the justification for criminalizing activity *X* is that *X* is morally wrong. He is careful to deny that his position involves taking such a position on the merits of any disputed moral proposition, such as homosexual conduct, abortion, or contraception. The community's right to enforce its morality by law does not depend on the truth of the moral positions protected, but on its right to enforce its moral convictions.²³² As long as one assumes a particular (conservative) content to these convictions, arguing for them not directly, but on the basis of the general right to enforce the community's moral convictions (whatever they are) serves conservative ends. But once this assumption is challenged and debate focuses on what the community's moral convictions are, the metaposition is no longer determinative of the preferred outcome to a case such as *Bowers* from the conservative perspective. It becomes clear that affirming the general right to enforce moral convictions is not itself what is really at stake for conservatives, but is rather a strategic argument calculated to win support from those who might disagree over *which* moral convictions to enforce.²³³ What is at stake in *Bowers* are the unmistakably conservative values themselves — family, religion, and preserving the in-

229. *Id.* at 123.

230. 478 U.S. 186 (1986).

231. For example, that a community believes homosexual conduct to be immoral may not be a sufficient reason under community morality for criminalizing it — either in itself or because such criminalization would be inconsistent with other, or more general, tenets of community morality.

232. Sandel terms these two ways of defending laws that enforce morality, the "naive" and the "sophisticated," respectively. See Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 521 (1989).

233. This is similar to the strategic argument of republicans in political theory that liberalism is morally empty: it is easier to obtain support for the general proposition that politics should concern itself with morality than for the specific morality that republicans wish to pursue.

herited moral tradition that expresses the continuity and identity of the society over time.

Bork's conservatism expresses a substantive communitarian claim because it envisions a community whose constitutive morality is that morality is an essential part of its communal life, rather than a central arena for individuals to exercise their judgment in finding and defining themselves. The conservative community has, to use Dworkin's vivid conception, "a communal sex life" and not simply, as in liberal political society, a communal life limited by the community to its formal legal and political acts.²³⁴

D. *The Republican Revival*

As we have seen,²³⁵ republican community expresses a substantive moral vision — that human beings lack moral self-sufficiency outside the confines of a political community, and that citizenship and civic virtue are at least necessary conditions of the good life. As MacIntyre, Sandel, and (most strenuously) Arendt argue, the privatization of politics — the process whereby politics has come to be viewed as an instrument to further private, prepolitical interests rather than the locus of moral life — is the negation of political community.

The republican revival in legal and constitutional theory similarly targets the conquest of politics by private interest — what its adherents term the "pluralist" or interest group model of American politics — as the central problem in contemporary public life. Within the legal academy, however, republicanism is offered as an alternative model not because such privatization prevents attainment of the human good, but rather because it prevents meaningful democracy and citizen self-rule. As a result of this difference, legal republicans have felt themselves able to jettison the substance of a substantive view — the specific ethic that had originally provided the context for, and point of, political participation at a time in history before democratic principles were a sufficiently relevant force to promote such participation as an end in itself. Thus Michelman is not shy of proclaiming that "I do not know what is good for the soul. I do not know in what (if anything) personal freedom essentially consists. I do not know whether citizenship is a fundamental human good."²³⁶ What legal republicans have retained are the procedural aspects of republican community — the deliberative nature of political participation and its

234. See Dworkin, *supra* note 210, at 495.

235. See *supra* text accompanying notes 137-65.

236. Michelman, *supra* note 9, at 1504.

noninstrumental, transformative potential. The result is "a process-based, republican-not-pluralist" view.²³⁷

Both Michelman and Cass Sunstein had, in their first attempts to construct such a "modern republicanism," offered up versions that adhered to, rather than jettisoned, one of the more notorious features of classical republican community — a feature that was radically inconsistent with their democratic transformation of republican logic from a substantive to a procedural theory. This was the elitist conception of citizenship and its economic and intellectual prerequisites that entailed only a small fraction of the total inhabitants of the polis were enabled to live their lives in pursuit of the good.²³⁸ Sunstein accepted the "Madisonian" position that it was hopelessly optimistic to expect the ordinary citizen to practice civic virtue rather than to pander to private interest and faction.²³⁹ For Michelman, the impracticability of popular self-government in the modern world left only the possibility of a much smaller subset of the citizenry representing to the rest of us by its own self-government what we have lost.²⁴⁰

Thus, Congress for Sunstein and the judiciary, especially the Supreme Court, for Michelman were to constitute the communities of discourse that practiced republican civic virtue and self-government.²⁴¹ Having become mindful, however, that one need not espouse republicanism to believe that Congress is required to pursue the public interest,²⁴² and that even in modern republican terms it is not obvious how the rest of us would derive vicarious benefit from the dialogical community of judges,²⁴³ Sunstein and Michelman determined to conceive broader republican communities.²⁴⁴ The result was to match Bruce Ackerman in devising a national community of dialogue. How-

237. *Id.* at 1526.

238. The locus classicus of this position is expressed in ARISTOTLE, *THE POLITICS*, Book III.

239. See, e.g., Sunstein, *supra* note 7, at 38-45. ("Madison viewed the recent history as sufficient evidence that sound governance could not rely on traditional conceptions of civic virtue and public education to guard against factional tyranny. Such devices would be unable to overcome the natural self-interest of men and women, even in their capacity as political actors." *Id.* at 40.)

240. Michelman, *supra* note 7, at 73.

241. *Id.*; Sunstein, *supra* note 7.

242. The pursuit by the ruler of public rather than either personal or sectional (factional) interests was what distinguished political from tyrannical rule in classical political thought.

243. It is not that Michelman overlooks this question, but that his answer is too cryptic to be of use. His theory of "virtual representation" is an attempt to explain this vicarious benefit. "The Court at the last appears not as *representative* of the People's declared will but as *representation* and trace of the People's absent self-government." Michelman, *supra* note 7, at 65. And again, "the courts . . . seem to take on as one of their ascribed functions the modeling of active self-government that citizens find practically beyond reach." Michelman, *supra* note 7, at 74. But what citizens derive from this modeling remains unclear.

244. These are unveiled in *Law's Republic*, Michelman, *supra* note 9, and Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) respectively.

ever, a question remains as to whether either of them has fully overcome earlier doubts about the viability of such a model—in Sunstein's case, the "Madisonian" concerns, concerns that led Ackerman to "economize on virtue" by expecting and accommodating in the constitutional system only periodic bouts of engaged and mobilized citizenship in between the business-as-usual of "normal politics";²⁴⁵ in Michelman's case, how conceptualizing politics as an arena of genuine self-government is possible.

Both Michelman and Sunstein offer up a model that focuses on the deliberative and transformative nature of political dialogue among full and equal citizens. What this theory of modern republican community holds out to the ordinary citizen is a solution to the puzzle of adhering to both the ideals of self-government and government of the laws: how one can be autonomous in society. Their model thus borrows from Kant and Rousseau in defining freedom as self-authorship of the law and requiring for its attainment that when acting as citizens, individuals act on the basis of a potentially consensual public good rather than necessarily differing private interests.

Unimpressed, however, with the introspective, independent, and solipsistic nature of the process by which for Kant and Rousseau the individual comes to understand the general good ("too solitary and insufficiently dialogic"²⁴⁶), as well as with the diverse conclusions to which individuals appear to be led by this process, legal republicans offer an intersubjective and deliberative alternative, focusing on the interaction of self with concrete community. Public life becomes *how* self-rule is achieved and not merely *what* the citizen must think about in order to achieve it. Through the process of dialogue and deliberation with fellow citizens in a variety of arenas, prepolitical preferences, values, and identities are mediated and transformed. Understandings of self and the world undergo change as a result of encounters and exchanges with others. Only this capacity of the individual to practice dialogical self-revision offers the possibility of commitment to both self-government and government by laws so that "everyone subject to those [law-like] utterances can regard himself or herself as actually agreeing that those utterances, issuing from that process, warrant being promulgated as law."²⁴⁷ Sunstein says that

[t]he republican commitment to universalism amounts to a belief in the

245. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1031 (1984).

246. Sunstein, *supra* note 244, at 1571.

247. Michelman, *supra* note 9, at 1526.

possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue. The process of mediation is designed to produce substantively correct outcomes, understood as such through the ultimate criterion of agreement among political equals.²⁴⁸

In reconstituting republicanism along procedural lines, as a community constituted by dialogue, the revivalists affirm the social thesis and metaethical community. Individual identity and preferences are transformable through dialogue in public space. Similarly, the rights that individuals exercise are not conceptually prepolitical but conventional, and must be justified in public terms, particularly important among which is their role in securing meaningful participation in the community of discourse.²⁴⁹

In fact, it is their focus on the constitution of metaethical community that primarily distinguishes the republican revivalists from liberal communitarians, rather than (as with the case of republicans in moral and political theory) affirmation of a different concept of community. Whether in law or in moral and political theory, liberals engaged in the various debates have tended to concern themselves with expressing and defending the metaethical account of norm generation and have not sufficiently addressed the fact that this account itself is neutral with respect to the particular mechanisms by which a community's normative universe comes to be constituted. Thus, neither Cover nor Fiss concerns himself with the hierarchical structure of jurisgenesis²⁵⁰ — in the insular religious communities or the legal system. Although, as we have seen, Dworkin, unlike Walzer, regards equal respect as necessary for the normative authority of the community, he generally takes the community's morality as a given, as part of the narrative whole that the individual judge is required to interpret when rendering judgment in a particular case.

Like Habermas, the revivalists are deeply concerned with issues of inclusion and power distortion in the structure by which the community generates and transforms its normative universe. Thus, Michelman reconstructs the right to engage in homosexual conduct from a pure privacy right to a right to engage in public space as a homosexual; he argues that laws criminalizing homosexual conduct deprive homosexuals not only of a right to choose how to act in private but also of a right to challenge established (normative) orders by

248. Sunstein, *supra* note 244, at 1554.

249. *Id.* at 1551.

250. This is the term that Cover uses to refer to the creation of legal meaning. See Cover, *supra* note 199, at 5.

"full and effective participation in the various arenas of public life."²⁵¹ Similarly, Sunstein discusses access to the media as a central free speech concern to be balanced more favorably than heretofore against the potentially distorting effects on public debate of free speech rights deriving from property ownership. "[G]overnment inaction . . . allows the political process to be excessively influenced by disparities in private wealth and private access."²⁵²

E. Critical Legal Studies

Critical legal studies is a broad school of legal theory characterized by complex relationships among its members and between itself and other critical movements in contemporary legal scholarship, such as feminism and critical race theory. Whether CLS as currently constituted has any affirmative programmatic theory, or indeed whether it involves any essential theoretical positions at all — critical or positive — is decidedly unclear. What is clearer is that the growth of CLS in terms of scope, numbers, and acknowledgment as part of the scholarly universe has made such questions harder to answer than in the formative years.

At its founding, CLS was inspired by the vision of human emancipation contained in the early writings of Marx.²⁵³ Indeed, one way to understand the early project of CLS — and hence also the variety of approaches it encompassed — is to see its task as completing the account of the form of human emancipation that Marx began but abandoned when he set out on the structural path that culminated in historical materialism. It is this later, "scientific" Marx that CLS scholars have always firmly and unequivocally rejected,²⁵⁴ for in deciphering the inner workings of history, Marx is taken to have betrayed his earlier, "humanistic" vision of the radical contingency of social structure and the seemingly boundless transformative potential of uncaged human subjectivity in favor of a deterministic theory of economic development.

For the young Marx, human emancipation required overcoming

251. Michelman, *supra* note 9, at 1533.

252. Sunstein, *supra* note 244, at 1578.

253. MARX, *supra* note 170; KARL MARX, CRITIQUE OF HEGEL'S DOCTRINE OF THE STATE (Joseph O'Malley ed., Annette John & Joseph O'Malley trans., Cambridge Univ. Press 1970) (1843); KARL MARX, ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS OF 1844 (Dirk Struik ed., Martin Milligan trans., 1964).

254. See, e.g., Robert W. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 413 (David Kairys, 2d ed. 1990). As was also the case with the Max Weber of "the iron cage of rationality." See Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1525 (1991).

the separation of individual and community that has characterized all previous societies and that liberalism had taken to its ultimate form. In his view,

Where the political state has attained its full degree of development [*i.e.*, the liberal state] man leads a double life, a life in heaven and a life on earth, not only in his mind . . . but in *reality*. He lives in the *political community*, where he regards himself as a *communal being*, and in *civil society*, where he is active as a *private individual*, regards other men as means . . . and becomes a plaything of alien powers.²⁵⁵

Human emancipation requires the integration of these two sides, the absorption of the abstract, communal being — the citizen — into the *everyday* life of the concrete, “private” individual. Community is the condition of such human emancipation. “[T]he *community* against whose separation from himself the individual is reacting, is the *true* community of man, *human* nature.”²⁵⁶ Only in true community can the individual cultivate her gifts in all directions and, thus, only there is personal freedom possible.²⁵⁷

This communitarian vision of human emancipation represented the point of departure for the CLS enterprise and continues to do so for a wing of the movement that may for convenience be termed “utopian.” It provides the vocabulary, key conceptual categories, issues, and agenda. Unger had made clear his support for the general notion of egalitarian community in *Knowledge and Politics*. Duncan Kennedy, although purposefully elusive on such issues,²⁵⁸ has talked of the “fashioning of an unalienated collective existence.”²⁵⁹ Hutchinson has defined the ultimate goal of CLS as “the emancipation of individuals in order that they might realize their own potentials,”²⁶⁰ and Simon states, “The affirmative or programmatic aspect of Critical legal writing consists of a series of particular proposals linked to the ideal of nonhierarchical community,” a position shared by Richard Parker.²⁶¹

255. MARX, *supra* note 170, at 220.

256. MARX, *Critical Notes on 'The King of Prussia and Social Reformism,'* in *EARLY WRITINGS*, *supra* note 170, 401 at 419.

257. Karl Marx & Friedrich Engels, *The German Ideology: Part I*, in *THE MARX-ENGELS READER* 146, 197 (Robert C. Tucker ed., 1977).

258. Kennedy believes that the tendency of key concepts to quickly become sloganized and reified makes the formulating of them counterproductive to the liberating ideals of CLS. See Duncan Kennedy & Peter Gabel, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 36-44, (1984).

259. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209, 212 (1979).

260. Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 242 (1984).

261. William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 507 (1984); Richard D. Parker, *Issues of Community and Liberty*, 8 HARV. J.L. & PUB. POLY. 287, 288 (1985).

Moreover, as in the early Marx, the critique of liberal psychology, the development of a theory of personality, and the connection between this theory and the possibilities for transforming the social world were central themes in the foundational work of CLS. Similarly conspicuous was the theme of the separation and dichotomy between individual and community, and whether and how it can be overcome.²⁶² Thus the fundamental premises of CLS in its founding period were those of the "humanistic" Marx — the goal of emancipation, the requirement of overcoming the separation of self and other, the contingency of social structure (contrasted with the false claims to universality made by liberal society — and its predecessors), and substantive, unalienated, and nonhierarchical community as the form of emancipation. In a sense, therefore, everything else was filling in the details, although certainly here as much as anywhere else, one became mindful that the details are everything.

On the details themselves, there were and are many differences — between CLS and Marx, between CLS and the many other schools of social theory following broadly in the Marxist tradition, and (of course) among CLS members themselves. For example, although CLS takes as one of its starting points the Marxist view of the radical interdependence of all social spheres,²⁶³ contrary to both the general liberal theory of their separation²⁶⁴ and the particular liberal theory of the autonomy of law, there is general dissent from that view's attribution of causal primacy.

Thus, whereas Kennedy argues that one of the goals of CLS "is to break down the sense that legal argument is autonomous from moral, economic and political discourse in general,"²⁶⁵ both he and his colleagues firmly reject the traditional Marxist model explaining the nature of that interdependence — namely, positing an economic base whose needs are reflected in the superstructural phenomena of law, morality, and politics. For CLS, even though law in class society undoubtedly has substantial coercive and ideological effects (turning "might" into "right" by means of legal constructs such as "property," as Marxism maintains), the detailed content of the law is not determined by "society" — not even in the "relatively autonomous" sense that resort to law by the dominant class inevitably results in certain

262. See *infra* text accompanying notes 268-72.

263. See, e.g., Tushnet, *supra* note 254, at 1524.

264. See Walzer, *supra* note 44.

265. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1724 (1976).

constraints on the exercise, and hence the extent, of its power.²⁶⁶ Rather, the content of the law is too indeterminate to have such a narrowly functional role. More importantly still, law is also constitutive of social categories and relationships, so that legal reform can be independently transformative of society.

However, as Sanford Levinson has pointed out,²⁶⁷ there is a crucial ambiguity about the ultimate value of law for CLS, not so much in the transformative process (although even here, to be sure, there is a wide divergence of view²⁶⁸), but in the emancipated condition itself. If law is politics, and the existence of politics as a distinct and specialized sphere of social activity represents alienation, what role is left for law?

A second example of difference over "detail," this time internal, concerns the dichotomy between individual and community, or self and other, that was a central hallmark of early CLS. Unger and Kennedy set the terms of the debate in *Knowledge and Politics* and *Blackstone's Commentaries*, respectively, although with seemingly different conclusions.²⁶⁹ As we have seen,²⁷⁰ Unger's work attempts to show how rejecting the liberal theory of personality allows a resolution of the self/other dichotomy in terms of (organic) community. Kennedy, by contrast, seemed to believe that the "fundamental contradiction" — the catchphrase in terms of which the subsequent debate ensued — "that relations with others are both necessary to and incompatible with our freedom"²⁷¹ is a permanent, and not an historical, feature of the human condition, so that hopes of resolution or integration would forever be in vain. Others have rejected this "pessimistic" view and affirmed the possibility of transcending the alienation of self from the community along the lines of the early Marx.²⁷²

Thus, a substantive communitarian vision — of communist com-

266. See, e.g., Douglas Hay, *Property, Authority and the Criminal Law*, in *ALBION'S FATAL TREE* 17 (Douglas Hay ed., 1975).

267. Sanford Levinson, *Escaping Liberalism: Easier Said Than Done*, 96 HARV. L. REV. 480 (1983) (review of *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 1982); for second edition, see *supra* note 254).

268. This internal debate centers around "the critique of rights" — about whether advancing claims in the form of rights, i.e., through the legal system, is cooptive in the long run battle of consciousness in that the perception of acceding to some claims can become a legitimating force for the legal and political systems as a whole. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Mark V. Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1364 (1984); Kennedy & Gabel, *supra* note 258, at 26-36.

269. See UNGER, *supra* note 2; Kennedy, *supra* note 259.

270. See *supra* text accompanying notes 176-81.

271. Kennedy, *supra* note 259, at 213. He subsequently appears to have retracted both the substance of his position, and even the phrase, for the reasons stated *supra* in note 258.

272. See, e.g., William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 131 n.236 (individuality and community are not antagonis-

munity overcoming the separation of self and others — was central to early CLS and pervaded the spirit of its enterprise, even if explicit discussion of community was rare in CLS work. In this, there is further similarity to the structure of Marx's opus: critique by contradiction replaces elaboration of the alternative vision. For CLS writers, the reasoning is evident, if not necessarily compelling. This is the fear of following in Marx's footsteps in succumbing to instrumentalist thought and constructing yet another reified structure to dominate human subjectivity. Indeed, in their hostile reaction to the structuralism of the later Marx, some CLS writers have gone so far in the opposite direction as to affirm a radical subjectivity that disdains talk of "human nature" as reification and that borders on envisioning emancipation not as a social phenomenon at all, but as something that is achievable only on an individual basis.²⁷³

III. CONCLUSION

The two most prominent sources of contemporary communitarian ideas have been the quite distinct perspectives that for convenience I have termed postmodernism and antimodernism. Postmodernism, which is highly influential in contemporary epistemology as well as moral and literary theory, is essentially a methodological and metaethical enterprise that challenges the dominance of subject-centered and foundational/universalistic modes of thought that trace their roots beyond Kant to Descartes. By contrast, antimodernism, which is most influential in history, sociology, and political theory, is a substantive view. Under the guise of republicanism, it has been the most prominent strand of strong communitarian thought and its confrontation with liberalism has dominated these disciplines over the past decade. Republicanism harks back to the conception of politics and political community held in the ancient world and to the rhetoric of much of the American and French Revolutions before the antagonism of philosophical liberalism and conservatism established itself as the characteristic political discourse of modernity in the nineteenth century.

The communitarian positions in the agency and metaethical debates when read together stand for the proposition that the modern Western individual is situated within a social, economic, and norma-

tic norms but interdependent ones). Hutchinson & Monahan, *supra* note 260, at 239-40 (the fundamental contradiction is based on "impoverished notions of freedom and community").

273. See, e.g., Gordon, *supra* note 254, at 418-22. On the structuralist/subjectivist "split" in CLS, see Balkin, *supra* note 173; James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 762-69 (1985).

tive structure that prioritizes autonomy, choice, and the privacy of the moral realm. That is, liberal society sees it as valuable for individuals to choose their priorities among competing commitments — including commitments to themselves, families, and communities of various sorts. In particular, liberal society leaves it up to the individual to decide how much time and energy to devote to public and private affairs.²⁷⁴ This is why strong communitarians generally argue from a universalistic stance that this liberal structure of society must be overhauled. It produces individuals with identities and priorities that make civic and communal commitments just another option.

Agency and metaethical communitarianism taken together amount to a strong denial of the standard charges that liberalism rests upon atomism and subjectivism. Accordingly, perhaps now at last, antiliberals of all varieties will do what they have been so reluctant to do in the past: argue *directly* for the merits of their substantive moral visions. Moreover, in arguing first, that atomism is implausible as a theory of human nature and thus as an axiom of political association, and second, that values derive from the community rather than from individuals, the first two claims of community radically alter the traditional account of the nature and source of rights — both individual and group. This account conceptualizes members of political society as self-sufficient individuals who handed in their full natural freedom at the entrance to political society on condition that they retain certain of their preexisting and absolute rights. On the communitarian view, rights are public and not private property, having their source in the political community and not the individuals who comprise it. They are constitutive of the community's public morality. Accordingly, rights cannot be immutable and unconditional "trumps" over social claims,²⁷⁵ for they are themselves social claims and are revisable through the public forum in the light of other competing and changing social claims.

The liberalism that emerges from the analysis is thus one freed from the constraints imposed by atomism and subjectivism and is based firmly on the substantive moral vision of self-realization and autonomy, a vision that requires the availability of *both* private and public space. This freedom from the constraints imposed by implausible theories of social ontology and metaethics presents a new opportunity:

274. Although interestingly there are differences among liberal political societies here. Thus, in Australia, it is mandatory to vote in national elections.

275. This is the claim that Nozick makes at the beginning of *Anarchy, State, and Utopia*. NOZICK, *supra* note 15, at ix ("Individuals have rights, and there are things no person or group may do to them (without violating their rights).").

to take these individualistic values seriously. It enables liberal theory to regard public power with something other than unqualified hostility, to view it also as a potential and available means for enlarging (increasing the aggregate amount of) genuine freedom and autonomy in society. The challenge is to take full advantage of the opportunity to practice creative self-definition that is provided by our unique historical self-awareness that normative structures are intersubjectively grounded.

Liberal political theory, like republicanism, predated modern society. It should not be forgotten that the original problem to which liberalism was offered as the solution, and thus the *raison d'être* of the liberal state, was the protection of individuals from *each other*. The solution was to confront actors of roughly equal power with the deterring concentration of power that is the state. This solution, of course, created a potentially threatening new actor, and hence also the schizophrenic liberal view of politics as both the sole guarantor and the major enemy of freedom. Thus, at the time of its birth, the liberal state was both in theory and in practice, in fact and by design, the one entity in society with sufficient concentration of power to threaten freedom on a grand scale. The only other potential such entity was organized religion, but in England it was effectively neutralized as a power *independent* of the state by its legal establishment; in this country, the combination of the Establishment Clause and the fact of sectarianism rendered it independent but much less concentrated.

This social landscape has long since been transformed; today, there are many other concentrations of power so that the entire logic of the original solution to private overreaching has been undermined. Yet among all these modern concentrations, it is still only the state, the one concentration with the duty and mandate to protect our freedom from others, that is officially deemed a threat to it. To thus focus exclusively on the danger of the state rather than on the threat posed to freedom by (no longer roughly equal) nonstate actors, is to forget the original problem to which the liberal state was offered as a solution. Despite atomistic conceptions to the contrary, it was always the case that meaningful rights (whether against individuals, groups, or the state) depended on public power in terms of creation and enforcement through law. In order to perform its traditional function in a radically changed social and economic environment, collective protection of individual freedom is required against the "new" concentrations of power — whether they are formally deemed "public" or "private" — that have rendered obsolete the classical liberal formula. The distinction between formal and substantive freedom, the modern rationaliza-

tion for adhering to the original formula despite the rapidly changing social environment, was unknown and would have been absurd to the age into which liberalism was born. It is time to change the formula and abolish the rationalization.

But liberal political theory also predated democracy, and the coming of democracy expanded the political meaning of individual freedom to include collective self-government and the understanding of public space as a generally available forum for self-definition and self-realization. At its founding, the liberal state was conceptualized as an entity distinct from the citizenry — it was the entity with which the citizenry contracted for their everyday freedom in exchange for political obedience. Democracy (who constitutes the state) is distinct from both popular sovereignty (to whom the state is ultimately answerable) and limited government; it transforms free subjects into citizens. The rise of democracy meant that collective self-government and not merely protection of everyday freedom became an end of politics. For the first time, public life — previously closed to all but the political class — became an arena in which ordinary individuals could, through participation and dialogue with others, define and realize themselves.

Liberal political theory has yet to come fully to terms with these two revolutions in its social and normative environment. In doing so, however, there is a major pitfall to avoid. This is to view politics as the sole locus of collective self-government and to overlook defects — of access and power — in what for a liberal polity are the other, broader and less tangible processes by which a community establishes and changes its *nomos*. Although politics gave us the democratic form, the applicability of this form is not limited by its origins. To think otherwise is the very last refuge of those who would remain in chains.