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ON DIFFERENCE AND EQUALITY

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The concept of "difference" forms the core of contemporary attacks on "liberal legalism"[1] and is central to proposals for replacing it.[2] Critics charge that liberal law quashes difference because it grounds political equality and individual rights in the assumption that all persons share certain "samenesses," such as rationality or autonomy. In the words of the philosopher Iris Marion Young, "liberal individualism denies difference by positing the self as a solid, self-sufficient unity, not defined by or in need of anything or anyone other than itself."[3] The claim is that this "sameness"-based vision of equality is in fact an exercise of power, reflecting a highly specific model of personhood that was constructed by and for a white male elite and ensures

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1. The phrase "liberal legalism" describes a system of law grounded in the principles of liberal philosophy; as used in feminist and critical-race theory it has become a term of opprobrium. *See, e.g.*, Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 103 (1990) (expressing frustration of critical-race theorists with premises of liberal legalism); Catharine MacKinnon, TOWARD A FEMINIST THEORY OF THE STATE 170 (1989) ("Including, but beyond, the bourgeois in liberal legalism, lies what is male about it"); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (arguing that liberal legalism is "essentially and irretrievably masculine").

2. Discussions of "difference" abound in feminist and critical-race theory, as well as in postmodern literature generally. *See, e.g.*, Anne Dailey, *Feminism's Return to Liberalism*, 102 YALE L. J. 1265 (1993) (discussing importance of "difference" question in feminist jurisprudence); Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105 [hereinafter Foster, *Difference and Equality*]; Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994); Iris Marion Young, *Polity and Group Difference*, 99 ETHICS 250 (1989); Iris Marion Young, *The Ideal of Community and the Politics of Difference*, *in* FEMINISM/POSTMODERNISM 300 (Linda J. Nicholson ed.) (1990) [hereinafter Young, *The Ideal of Community*]; Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C. R. C. L. L. REV. 111 (1987); Martha Minow, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990) [hereinafter Minow, *Making all the Difference*); Iris Marion Young, JUSTICE AND THE POLITICS OF DIFFERENCE (1990) [hereinafter Young, *Justice and the Politics of Difference*).

3. Young, *The Ideal of Community*, *supra* note 2, at 307. *See also* Minow, *Making All the Difference*, *supra* note 2, at 377 ("Rights analysis . . . fails to supply a basis for remaking . . . institutions to accommodate difference. Integrated into institutions not designed with them in mind, formerly marginalized people may simply become newly marginalized or stigmatized"). As I discuss below, most critics (including Young) attack a specific type of liberalism, which celebrates individual autonomy and agency and advocates their maximization via a legal system grounded in individual rights. Thus, not all forms of liberalism are subject to all of the criticisms made here. *See infra* note 13 and accompanying text.

its continued social dominance.[4] Liberalism's critics conclude that the achievement of social justice will be possible only when sameness-based conceptions of equality are rejected.[5]

Their argument launches two foundational attacks on liberal theory. First, the charge that liberalism "denies difference" is the primary means by which critical theorists contest liberalism's commitment to equality. Second, that charge appears to contradict the claim that liberal societies maximize "diversity" by allowing all individuals the largest possible quantity of freedom to live out their own particular visions of the good life. In response to critics like Young, for example, liberal theorist William Galston argues that "purposive liberalism . . . comes closer than any other form of human association, past or present, to accommodating human differences. It is 'repressive' not in comparison with available alternatives but only in relation to unattainable fantasies of perfect liberation."[6]

The legal and political outcomes of this dispute could be dramatic, for "difference" theorists translate their challenges to liberalism into reform proposals that could require substantial restructuring of liberal political and legal institutions. Martha Minow, for example, advocates a restructuring of rights in ways that would de-emphasize their autonomy-protecting function and instead help to preserve relationships and empathic, difference-respecting dialogue.[7] Sheila Foster claims that "we must establish institutional participatory patterns that accept and value the contributions

4. *See, e.g.*, Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1282 (1987) ("As a concept, equality suffers from a 'mathematical fallacy'—that is, the view that only things that are the same can ever be equal"); Minow, *Making all the Difference, supra* note 2, at 149 ("Both the historical and heuristic versions of [liberal] social contract theory claim to be inclusive, participatory, and egalitarian, yet both replicate the process of exclusion and subordination that preserves the two tracks of legal treatment"); *id.* (noting that "The U.S. Constitution [is based on liberal principles and] is a document produced through an indisputably exclusionary process"); Young, *Justice and the Politics of Difference, supra* note 2, at 164–66 (claiming that "politics of difference . . . promotes a notion of group solidarity against the individualism of liberal humanism," which is characterized by an "assimilationist ideal" that sets facially neutral "norms" that in fact disadvantage oppressed groups).

5. Harris, *Jurisprudence of Reconstruction, supra* note 2, at 761 (critical-race theorists advance an idea of "equality based not on sameness but on difference"; *id.* at 770 (critical-race theory attempts to refigure equality in ways beyond sameness and difference); Minow, *When Difference Has Its Home, supra* note 2, at 113 (explaining main goal of article is to argue that "categorical approaches" to law, which attribute "difference" to different people, undermine commitments to equality); Minow, *Making All the Difference, supra* note 2, at 50, 74–75 (contesting idea of equality as sameness); Young, *Polity and Group Difference, supra* note 2, at 250–51.

6. William Galston, LIBERAL PURPOSES: GOODS, VIRTUES AND DIVERSITY IN THE LIBERAL STATE 4 (1991). *See also* Bruce Ackerman, SOCIAL JUSTICE IN THE LIBERAL STATE 18 (1980) (advocating "a liberal conception of equality that is compatible with a social order rich in diversity of talents, personal ideals, and forms of community"); Ronald Dworkin, TAKING RIGHTS SERIOUSLY 272–73 (1977) (defining "liberal conception of equality" as mandating that government "must not constrain liberty on the ground that one citizen's conception of the good life is nobler or superior to another's").

7. Minow, *Making All the Difference, supra* note 2, at 227–390 (defending her vision of "rights in relationship").

of those differences that have been left out."[8] Scholars have argued that properly accounting for racial "difference" implies the abolishment of Title VII and the reimagining of the law of employment discrimination and equal protection.[9] And Iris Marion Young proposes a "politics of difference" that would incorporate "a principle of representation for oppressed groups in democratic decisionmaking bodies," as well as other group-based rights.[10]

In Part I of this Article I analyze the liberal value of diversity; in Parts II and III, I compare it with antiliberal conceptions of difference; in Part IV, I evaluate the connection of "difference," as conceived by critics of liberal legalism, to the underlying and (I argue) more fundamental value of equality.

"Difference" advocates advance their legal reform proposals in the name of *true* equality—equality grounded not in sameness but in difference.[11] I conclude that, although equality can and should *accommodate* a wide range of differences, these efforts to construct equality *from* difference eviscerate the concept of equality. To argue, as "difference" theorists do, for the prioritization and celebration of equality based on "difference" is to argue against any foundational commitment to equality. To the extent it adds anything new to legal discussion, "difference" theory is necessarily *anti*-equality.

I. LIBERAL DIVERSITY

Liberals tend to speak of respecting "diversity" rather than "difference," and this reflects more than a semantic disagreement with their critics.[12] The two

8. Foster, *Difference and Equality*, *supra* note 2, at 156.

9. *See, e.g.*, Roy L. Brooks and Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787, 804–44 (1994).

10. Young, *Justice and the Politics of Difference*, *supra* note 2, at 158.

11. *See, e.g.*, Foster, *Difference and Equality*, *supra* note 2, at 110–11 (examining concept of diversity under "hybrid equality paradigm" and concluding that "[t]o be useful in achieving the goal of equality, a diversity rationale should recognize those differences that have been constructed into a basis for, and have resulted in, systemic exclusion and disadvantage for individuals possessing those differences."); *id.* at 147–61 (affirming importance of equality goal and advocating idea that explicit recognition of socially relevant differences is necessary to achieve it); Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW ENG. L. REV. 1173, 1192 (1992) (on postmodern view of difference, "the subject becomes a site for the constant and continuing struggle to take on an identity that is conducive to a truly egalitarian society"); *id.* at 1208 ("The triumph of a truly democratic politics will only occur when the author-monarch is finally dead and a polity of truly equal readers and writers is established and lived"); Young, *Polity and Group Difference*, *supra* note 2, at 251 ("the inclusion and participation of everyone in public discussion and decision making requires mechanisms for group representation"); Young, *Justice and the Politics of Difference*, *supra* note 2, at 173 (assuming that "[a] goal of social justice . . . is social equality," which "refers primarily to the full participation and inclusion of everyone in a society's major institutions, and the socially supported substantive opportunity for all to develop and exercise their capacities and realize their choices").

12. The term "diversity" is also widely employed to refer to efforts by private and public entities to hire women and members of racial and ethnic minorities. "Diversity" is thus a

ideas have significantly dissimilar content, and in the ensuing discussion I examine and compare them.

A. Content of Liberal Diversity

Although they often fail to acknowledge it, contemporary "difference" theorists do not really attack liberalism *per se*, but only those versions of liberal thought that assume the presence of threshold levels of rationality, autonomy, and/or agency in all human individuals and draw from this foundational assumption the political conclusion that equal, and individual, rights ought to form the basis and the boundaries of the state. However, since autonomy- and rationality-based liberal theories abound,[13] such criticisms have potential power.

All students of liberalism are familiar with the slogan that a liberal state must allow each person the greatest possible freedom to pursue his or her vision of the good life.[14] This principle derives directly from two underlying assumptions; first, that people are importantly the same, and therefore deserve an equal opportunity to choose and direct their lives[15]; and second, that people are also importantly different, which means that, given an equal

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description of a particular justification for affirmative action in hiring, a justification that focuses on the benefits to the hiring organizations and/or society at large of including within these organizations members of previously unrepresented, or underrepresented groups. This political meaning of diversity should be distinguished both from the theoretical claims of liberalism outlined above, and from the discussion below of difference theory. Indeed, the diversity rationale for affirmative action is parasitic upon a society's prior decisions as to what difference is and which differences do, or should, matter. *See, e.g.*, Foster, *Difference and Equality*, *supra* note 2, at 109 ("Diversity has been used as a code word for a variety of differences"); *id.* at 111 ("the current concept of diversity is 'empty' because it lacks a mediating principle. By treating all differences the same, it ignores the 'salience' of certain differences in this society by extracting differences from their sociopolitical contexts").

13. *See, e.g.*, Ackerman, *supra* note 6, at 182, 196 (explaining importance of autonomy in liberal theory); *id.* at 4–7 (outlining conception of rationality that forms basis for author's own brand of liberalism); Richard H. Fallon Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876 (1994) ("A view tracing to Kant maintains that other values possess their worth only because rational, autonomous agents find them worth pursuing."); John Rawls, A THEORY OF JUSTICE 515–16 (1971) ("Following the Kantian interpretation of justice as fairness, we can say that by acting from these principles [of justice] persons are acting autonomously: they are acting from principles that they would acknowledge under conditions that best express their nature as free and rational beings. . . . Thus, moral education is education for autonomy").

14. *See, e.g.*, Ackerman, *supra* note 6, at 54–55 (articulating requirement that liberal principle of neutrality "does not distinguish the merits of competing conceptions of the Good"); Galston, *supra* note 6, at 10 ("the liberal conception of the *good* . . . allows for a wide though not wholly unconstrained pluralism among ways of life. It assumes that individuals have special (though not wholly unerring) insight into their own good. And it is consistent with the minimization of public restraints on individuals"); Rawls, *supra* note 13, at 92–93 ("[A] person's good is determined by what is for him the most rational long-term plan of life. . . . To put it briefly, the good is the satisfaction of rational desire").

15. *See, e.g.*, Gerald Dworkin, THE THEORY AND PRACTICE OF AUTONOMY 31 (1988) ("Moral respect is owed to all because all have the capacity for defining themselves").

chance to choose, their actual choices will vary.[16] Because liberalism posits normatively that all people have equal moral worth, the empirical fact of human difference mandates respect for each person's "right to be different" and to have his differences tolerated by others.[17]

Three relevant conclusions follow from this. First, liberal diversity theory does not rely upon any particular account of the *source* of human diversity. By simply accepting human difference as a given and fitting respect for it within the general rubric of liberal equality theory, liberalism sidesteps continuing debates over the comparative responsibility of biology and social construction for human behavior and personality. The version of liberalism discussed here merely assumes that, whatever the source and extent of difference, adult human beings possess at least *some* autonomous control over important life choices.[18]

Second, in an important sense liberal diversity is a *derivative* value; that is, its normative status in liberal theory proceeds from the liberal's primary respect for the equality of individuals, a respect that when married to the empirical fact of human differences requires the liberal to value diversity and to create the political condition of individual freedom through which to recognize it.[19] Because humans are *the same* in certain ways, they must be given an equal chance to live their lives to the fullest; and because humans are also importantly different, an *equal* chance mandates individual freedom and a respect for diversity. Note that the strength of this diversity value can range, consistent with this conclusion, from mere toleration to affirmative respect and admiration for difference. That is, a liberal can consistently take either the view that her own way of life is best but the different choices of others must be accommodated because, as individuals possessing

16. *See, e.g.*, John Stuart Mill, ON LIBERTY: ANNOTATED TEXT, SOURCES, AND BACKGROUND CRITICISM 65 (David Spitz ed. 1975) ("Such are the differences among human beings in their sources of pleasure, their susceptibilities of pain, and the operation on them of different physical and moral agencies, that unless there is a corresponding diversity in their modes of life, they neither obtain their fair share of happiness, nor grow up to the mental, moral, and aesthetic stature of which their nature is capable"); Robert Nozick, ANARCHY, STATE, AND UTOPIA 308–09 (1974) (discussing extensive diversity of human beings); Amartya Sen, INEQUALITY REEXAMINED 19–21 (1992) (discussing impact of "extensive human diversity" on equality theory).

17. *See, e.g.*, Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687, 1702 ("In its broadest terms, then, equalities must be constructed so that those who are different are not regarded as inferiors, and conforming identities are not imposed upon them").

18. *See, e.g.*, Fallon, *supra* note 13, at 887–88 (defending conception of descriptive autonomy and noting that "the self, though situated and socially constituted, remains capable of appreciating her situated condition, of assessing and criticizing her assumptions and values, and of revising her goals and commitments. . . . The self is a creature in and of the world, but one capable of at least partially transforming herself through thought, criticism, and self-interpretation").

19. *See* Sen, *supra* note 16, at 12–16 (noting that "every normative theory of social arrangement that has at all stood the test of time seems to demand equality of *something*—something that is regarded as particularly important in that theory," and thus that "the battle is not, in an important sense, about 'why equality?', but about 'equality of what?'").

autonomy, agency, or whatever, they have the right to be wrong, *or* the view that there are many equally valuable "visions of the good life," and that she should therefore be encouraging to, and welcoming of, visions that differ from her own. Both approaches assume a value for diversity that follows coherently from a liberal understanding of equal respect for individual personhood.

Third, liberal equality serves as both the value that grounds respect for diversity *and* as the boundary to diversity. One's right to pursue one's own vision of life, which derives from the liberal's equal respect for all people, is simultaneously *limited* by the equal right of everyone else to do the same. "To each his own" is a liberal sentiment that does not apply to persons whose vision of self-maximization requires the murder or torture of others.

In short, liberal respect for diversity is both derivative of, and subservient to, the foundational liberal value of (sameness-based) equality. Over time, however, the exact relationship between these two values has shifted, driving liberalism toward visions of equality that have continued to embrace foundational sameness but have also increasingly acknowledged the profundity of human difference.

B. Diversity and Liberal Equalities

It is important to distinguish between two relevant meanings of equality. The first refers to equality as a *distributive* principle, as a particular *means* of implementing a deeper equality ideal—via libertarian "equal rights,"[20] or equal distribution of resources,[21] or of primary goods,[22] etc. At this level the argument is not over whether human beings are *the same* (and therefore equal) in some descriptive sense, but over which form of egalitarian distribution of resources will best serve an already accepted equality premise.[23] The second meaning of equality refers to the *justification* of political and legal egalitarianism, advancing an answer to the question, *Why* should we arrange society and law so as to guarantee equal distribution of _____ resource(s)?[24]

20. *See, e.g., id.* at 22 ("Libertarian demands for liberty typically include important features of 'equal liberty,' *e.g.*, the insistence on equal immunity from interference by others").

21. Ronald Dworkin, *What Is Equality? Part I: Equality of Welfare,* and *What Is Equality? Part 2: Equality of Resources,* 10 PHIL. & PUB. AFF. (1981).

22. Rawls, *supra* note 13.

23. Amy Gutmann may be drawing this distinction between liberalism's *equality assumptions,* which she defines as the function of "describing people as equal beings . . . ," and *egalitarianism,* which she defines as the "justifying a more equal distribution of goods, services, and opportunities among those people." Amy Gutmann, LIBERAL EQUALITY 2 (1980).

24. Amartya Sen, *supra* note 16, at 12–30, discusses these two ideas, noting that "[t]wo central issues for ethical analysis of equality are: (1) Why equality? (2) Equality of What?" Discussing the work of John Rawls, Ronald Dworkin notes a similar difference between Rawls's two conceptions of equality, which consist of claims with respect to the distribution of goods, and claims to equal concern and respect for all individuals, Dworkin, *supra* note 6, at 180–82.

The connection between these two meanings of equality has changed significantly within liberal theory. According to its now-standard tale, liberalism's earliest vision of egalitarianism found its legal expression in the view that individuals have "equal rights." This vision of legal equality, also characterized by the phrases "equal treatment" and "formal equality," interpreted equal rights to mandate identical treatment, resulting in the principle that the law may not treat similarly situated persons differently.[25]

The legal principle of equal treatment begins from a *justification* of equality that relies on some shared trait—some "sameness"—among all humans (for example, autonomy, agency, capacity to have a vision of the good life and act upon it, or capacity for "moral personality"), and proceeds mechanically to import this "sameness" justification into the legal and political spheres via the principle of "equal rights." Equal treatment is based on the idea that, because people are (in relevant ways) the same, the law should treat them the same.

Although fundamental sameness has remained the core justification of liberal equality, the sameness-based egalitarian principle has been succeeded by a myriad of reformulations of the meaning of legal and political *egalitarianism*, among which are the closely related principles of "equal concern,"[26] "equal acceptance,"[27] and "equal opportunity."[28] These principles began to open a divide between the sameness-based *justification* for legal equality and the proper means of implementing it. They sought legally to express the view that liberal law should endorse *different* treatment for different persons in the service of the underlying principle that people are, in the relevant liberal senses, the same. Progressive liberal theorists argued that treating everyone the same necessarily erased important and relevant differences among them. Although humans share autonomy, they also have differences that make treatment "as an equal" inconsistent with identical treatment.[29]

Two things are important about this. First, the progression of liberalism discussed above worked a significant change in the relationship between equality and diversity within the liberal framework. Equal treatment was found inadequate as a legal principle precisely because it was in fundamental tension with diversity, and liberal philosophers concluded that treating people the same took insufficient account of their differences and was therefore *a violation* of liberal equality properly conceived.

Second, the liberal progression from equal treatment to a mandate of "treatment as equals" altered the relationship between equality as justifica-

25. *See, e.g.*, Ackerman, *supra* note 6, at 18 ("Certain forms of equal treatment—say, formal equality in the administration of justice—have been central to the liberal tradition"). For a contemporary defense of this idea, *see generally* Nozick, *supra* note 16.

26. Dworkin, *supra* note 6, at 180, 272–78.

27. Littleton, *supra* note 4, at 1284–85.

28. Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 26–27 (1985).

29. Dworkin, *supra* note 6, at 180–82.

tion and equality as a distributive principle. The changes within liberalism have demonstrated that a sameness-based justification of equality does not necessarily imply egalitarian treatment, but can mandate different treatment for those with special needs.[30]

Thus, critical attacks on liberalism for advocating equality based on "sameness" do not inherently engage liberal *distributive* principles—which are now fully compatible with the idea of different treatment. The attacks must therefore address only the liberal *justification* that those distributive principles grow out of some basic sameness—rationality, autonomy, or whatever—shared by humans as humans.

It is true that justifications of liberal principles of legal equality, even in their progressive modes, are ultimately grounded in descriptive assumptions of human sameness. Asked *why* people should be "treated as equals" legally, the liberal replies by articulating some common faculty related to the capacity of persons for agency, autonomy, rationality, or a variant that justifies whatever version of political and legal equality the liberal finds appropriate. The move from "equal treatment" to "treatment as equals" simply breaks the symmetrical connection between equality as justification—the descriptive sense in which all humans are the same—and political-legal egalitarianism, which has moved from being grounded in sameness to the acknowledgment of difference. The failure to recognize certain differences has become a failure to treat all people as equals. Thus, a contemporary liberal society can justify the expenditure of public funds to construct special sidewalk and building ramps for the physically disabled, although this involves treating disabled persons differently from the nondisabled, on the principle that the disabled, as equal persons in the sense relevant to such access, deserve "equal concern and respect," which in turn commands equal access to the public sphere. And liberal feminists have argued that equal access can mean *different* treatment—such as special workplace accommodations for pregnant women[31]—that is nevertheless grounded in women's fundamental *sameness* to men.

30. Other forms of liberalism—*e.g.*, utilitarian ones—demonstrate that egalitarian treatment does not require descriptive sameness at its base. A liberal utilitarian might simply assert that equal respect for the rights and freedoms of individuals—the idea that each counts for one, and no more than one—maximizes utility, however that function is defined. (But *why* does it do so? Why does treating people equally maximize utility? Because humans generally have a *preference* to be treated equally? If so, is that in itself, or is the capacity to experience happiness or suffering, an indication of some fundamental sameness? Since a "yes" answer to that question would simply fold utilitarianism into the general argument of this essay, while a "no" answer leaves the argument untouched, I will put aside utilitarianism for the moment. *But see infra*, text accompanying note 150.

31. *See, e.g.*, Kay, *supra* note 28, at 22 (proposing "episodic analysis" that would "take account of biological reproductive sex differences and treat them as legally significant only when they are being utilized for reproductive purposes."); *id.* at 27 ("in order to maintain the woman's equality of opportunity during her pregnancy, we should modify as far as reasonably possible those aspects of her work where her job performance is adversely affected by the pregnancy.

Still, even in its contemporary forms diversity remains subservient to equality within liberalism—a fact that motivated the liberal civil-rights movement. Implied in the liberal convictions that equality is a value more basic than diversity, and that persons are equal because they share certain threshold capacities, is the notion that *differences* among humans may not be used to *undermine* legal equality. Indeed, for a liberal, history teaches the dangers of *over*-focusing on differences. Liberals are alert, for example, to the human propensity to falsely assume fundamental difference in the character, intelligence, or personality of others based on immutable characteristics such as skin color, gender, or physical handicap, which are in fact unrelated to the moral worth of persons. Liberals have attempted to see through such differences to the essential humanity[32] of (for example) women, racial minorities, and handicapped persons.

In short, large groups of people, including racial minorities, women, and the handicapped, have in the past been miscategorized as inferior, when differences between them and the majority have either been invented or translated into justifications for ignoring their claim to equal personhood. The history of liberalism demonstrates that these miscategorizations can be corrected via the argument that such groups of persons share the basic samenesses that justify treatment as equals under liberal law.

In an important sense, liberalism's critics attempt to reverse the liberal relationship between equality and diversity. While liberals treat diversity as subservient to, and dependent upon, equality, critics of liberalism reject the idea that equality can or should be based on an assumption of sameness among all persons and emphasize instead the irreducible importance of human difference.[33]

II. ESSENTIALIST DIFFERENCE

A. Sameness as Domination

At the heart of most theoretical attacks on "liberal legalism" is the claim that, contrary to their express commitments, liberal institutions are main-

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Unless we do so, she will experience employment disadvantages arising from her reproductive activity that are not encountered by her male co-worker"); *id.* (episodic analysis "will enable the law to treat women differently than men during a limited period when their needs may be greater than those of men as a way of ensuring that women will be equal to men with respect to their overall employment opportunities"); Littleton, *supra* note 4, at 1283 (arguing that "equality can be . . . reconstructed as a means of challenging, rather than legitimating, social institutions created from the phallocentric perspective."); *id.* at 1284 (advancing notion of equality as acceptance and averring that "[t]o achieve this form of sexual equality, male and female 'differences' must be costless relative to each other").

32. Subdefined as rationality, capacity for moral personality, agency, etc.

33. Minow, *Making All the Difference*, *supra* note 2, at 146–47.

tained by and for a white male elite that hides its domination of society behind empty claims to respect the equal moral worth of all persons.[34] Of course, the critics do not need to claim that liberalism suppresses *all* difference; they could even acknowledge that, within the constraints of its core assumptions about human nature—assumptions that justify its view of equality—liberal theory allows the flourishing of many visions of the good life.[35] It is those constraints, however, that radical difference theorists target as parochial and highly restrictive.[36] Indeed, according to this view the liberal's bounded respect for "diversity" actually suppresses the acknowledgment of fundamental "difference."

B. The Relational "Different Voice"

Reduced to its core components, the attack on liberal diversity makes two claims. Critics charge first that liberalism misdescribes human nature by assuming and celebrating individual autonomy and choice while simultaneously excluding from law and politics important parts of the self such as its interdependence and/or relational capacity[37]; and second, that those ig-

34. *See, e.g.*, Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 6–8 (1985) (discussing contradiction between America's ideal of equality and its reality of racism, and arging that "[m]uch of what is called the law of civil rights . . . has a mythological or fairy-tale quality"); Harris, *Jurisprudence of Reconstruction, supra* note 2, at 754 (critical-race theory "puts law's supposed objectivity and neutrality on trial, arguing that what looks like race-neutrality on the surface has a deeper structure that reflects white privilege."); *id.* at 759 ("History has shown that racism can coexist happily with formal commitments to objectivity, neutrality, and colorblindness"); Catharine MacKinnon, TOWARD A FEMINIST THEORY OF THE STATE 220–21 (1989) (liberal conception of equality as employed in sex discrimination law conceals "the substantive way in which man has become the measure of all things); *id.* at 224 ("Men's physiology defines most sports, their health needs largely define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex. These are the standards that are presented as gender neutral"); Young, *Justice and the Politics of Difference, supra* note 2, at 168–69 (arguing that liberal quality theory has effect of excluding those labeled "different"); *id.* at 173 ("policies that are universally formulated and thus blind to differences of race, culture, gender, age, or disability often perpetuate rather than undermine oppression").

35. *See, e.g.*, Minow, *Making All the Difference, supra* note 2, at 146–49; Young, *Justice and the Politics of Difference, supra* note 2, at 157 ("Enlightenment ideals of liberty and political equality did and do inspire movements against oppression and domination, whose success has created social values and institutions we would not want to lose").

36. *See, e.g.*, Minow, *Making All the Difference, supra* note 2, at 152 ("The [liberal] social contract approach has been deeply exclusionary"); Young, *Justice and the Politics of Difference, supra* note 2, at 173 ("Policies that are universally formulated and thus blind to differences of race, culture, gender, age, or disability often perpetuate rather than undermine oppression").

37. Communitarians have been especially keen on this attack. *See generally* Michael Sandel, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

nored parts of the self should be both celebrated and incorporated into our legal institutions.[38]

According to some critical scholars, the liberal focus on individual autonomy, while validly descriptive of certain groups, obscures or suppresses other, equally worthy visions of the good that emphasize the primary importance of relational ability and connectedness. This suppression, they charge, has the effect in liberal societies of excluding from legal identity groups that hold more communitarian worldviews. Much relational feminist work takes this approach, arguing, in the well-known words of Carol Gilligan, for the inclusion of women's "different voice"[39] into moral legitimacy and legal institutions.[40]

The normative implications of this relational critique of liberalism are clear: "liberal legalism" should either be supplemented with a legal system that recognizes relevant characteristics, such as relational capacity, that liberal law currently ignores,[41] or liberal institutions should be replaced altogether by a system of communitarian deliberation that celebrates more important features and ideals of human society.[42]

38. *See generally* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) (citing Carol Gilligan and arguing for inclusion of women's "different voice" into law); West, *supra* note 1 (arguing that law must incorporate women's focus on connectedness as well as men's concern with individual autonomy).

39. Carol Gilligan, IN A DIFFERENT VOICE (1980).

40. For relational feminist discussions that use Gilligan's ideas to criticize liberal law, *see, e.g.*, West, *supra* note 1, at 2–4, 14–26, 42 (1988) (defending the "connection thesis"—that women differ essentially from men because they are materially connected to other human lives through the maternal experience and therefore value connection and nurturing over autonomy); Sherry, *supra* note 38, at 543, 579–84 (hypothesizing that women's concerns about connection, subjectivity, and responsibility for others accord well with communitarian legal structures while men's emphasis on autonomy, objectivity, and rights translates into liberalism). For a similar thesis in the context of race relations, *see, e.g.*, Jacinda T. Townsend, *Reclaiming Self-Determination: A Call for Intraracial Adoption*, 2 DUKE J. GENDER L. & POL'Y 173, 181 (1995) ("The Black community maintains its own set of family values, including collective responsibility, self-determination, and cooperative economics. These values help define a communitarian Black society that can be contrasted with an individual rights based dominant society").

Catharine MacKinnon, a critic of relational feminism, might nevertheless be placed in this camp as she also appears to assume that although liberal autonomy and the liberal state work well for men, they oppress women; *see, e.g.*, MacKinnon, *supra* note 34, at 157–70, 237–49 (1989) (attacking the liberal state and liberal theory as oppressive of women). Unlike the relational feminists, however, MacKinnon refuses to move beyond the critique of liberalism to define a positive vision of "woman's point of view"; that is, to paint a picture of what a postdomination world would look like. *See, e.g.*, Catharine MacKinnon, FEMINISM UNMODIFIED 45 (1987) ("Take your foot off our necks, then we will hear in what tongue women speak"). Like relational feminists, MacKinnon has been attacked for "gender essentialism"; *see generally* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (charging both MacKinnon and West with essentialism).

41. *See generally* Sherry, *supra* note 38; West, *supra* note 1.

42. *See, e.g.*, Sandel, *supra* note 37 (pointing out flaws in Rawlsian liberalism and arguing for a communitarian vision of state). Some liberals have recently argued that liberalism and communitarianism are not essentially opposed; *see, e.g.*, Bruce Ackerman, WE THE PEOPLE 1: FOUNDATIONS (1991); William Galston, LIBERAL PURPOSES (1991).

For these relational critics, recognizing the importance of "difference" *per se* is not really a fundamental goal at all; for them, a "difference" argument serves merely as a stalking horse for the endorsement of a specific vision of the good that is allegedly suppressed by liberal legalism. Either this vision should supplement liberalism, for a net gain of *one* "voice" in the law, or it should entirely replace liberalism, for a net gain of zero. Their call is not to *maximize* the number of visions of the good held in society or to celebrate "difference" in the abstract, but to claim recognition for their particular relational vision. In other words, were it irrefutably shown to these theorists that their plans for reform would *shrink* the range of permissible visions of the good (by, for example, eliminating all those that have resulted from the endorsement of liberalism in its current form), they might well be indifferent.

But if this is all that is meant by calls for the fuller acknowledgement of "difference" then there is no need to use the concept at all. We should simply proceed to evaluate the substantive visions of the good advanced by difference advocates and decide which of them (if any) to adopt.

III. DIFFERENCE AS INEQUALITY

A second line of attack on liberal diversity denies even the possibility of individual autonomy as liberals conceive it. According to this argument, which grounds much critique of liberalism from postmodern[43] feminists and critical-race theorists, liberal autonomy is a false construct that incorrectly assumes the presence and uncoerced choice-making power of a unified individual self that in fact does not exist.[44] Advocates of this second view attack liberalism by attempting to destabilize or "deconstruct" ideas such as autonomy and individual selfhood. Such scholars also attack the relational critics of liberalism for relying on falsely "essen-

43. The term "postmodern" can mean many things, and I use it somewhat loosely in this article. Angela Harris has described the use of this term in jurisprudential literature: "[Postmodernism] suggest[s] that what has been presented in our social-political and our intellectual traditions as knowledge, truth, objectivity, and reason are actually merely the effects of a particular form of social power, the victory of a particular way of representing the world that then presents itself as beyond mere interpretation, as truth itself." Harris, *supra* note 2, at 748.

44. *See, e.g.*, Hutchinson, *supra* note 11, at 1184–85 ("Rather than think of the subject as a unitary and sovereign subject whose self-directed vocation is to bring the world to heel through the exacting discipline of rational inquiry, postmodernism interrogates the whole idea of autonomous subjectivity and abstract reason; it places them in a constantly contingent condition of provisionality"); *id.* at 1192 ("postmodernists suggest that the traditional notion of authenticity—'to thine own self be true'—is an immediate patient for postmodern surgery"); Young, *The Ideal of Community*, *supra* note 2, at 300, 310 ("The idea of the self as a unified subject of desire and need and an origin of assertion and action has been powerfully called into question by contemporary philosophers"); *id.* at 308–09 (criticizing liberal conception of moral autonomy).

tialist" categories to describe, for example, the differences between men and women.[45] They criticize relational theorists for associating the "male," or white majority, with liberal autonomy and the "female," or racial minority, with nurturing and community, and then using this supposedly inherent opposition to argue for the legal recognition of marginalized groups into law via communitarian reform of liberalism.[46] Antiessentialist scholars charge that such efforts to define, for example, a "true female self" or a "true male self" deny the full range of human difference.[47]

In their critique of both liberal diversity and relational views, postmodern difference theorists promote alternatives to liberal individualism that are grounded in the celebration of difference itself.[48] To remain internally consistent, such theories must rely upon some nonessentialist understanding of persons for the charge that liberalism "denies difference"[49] and the attendant call for fuller recognition of this concept.

A. Antiessentialist Difference

How is the liberal vision of "diversity" distinct from the concept of "difference" employed by liberalism's antiessentialist critics? The latter incor-

45. *See, e.g.*, Judith Butler, *Gender Trouble, Feminist Theory, and Psychoanalytic Discourse, in* FEMINISM/POSTMODERNISM 324, 338–39 (Linda J. Nicholson ed., 1990) ("Inasmuch as the construct of women presupposes a specificity and coherence that differentiates it from that of men, the categories of gender appear as an unproblematic point of departure for feminist politics. But if . . . 'sex' itself is a category produced in the interests of the heterosexual contract, or if we consider Foucault's suggestion that 'sex' designates an artificial unity that works to maintain and amplify the regulation of sexuality within the reproductive domain, then it seems that gender coherence operates in much the same way, not as a ground of politics but as its effect").

46. *See, e.g.*, Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989). For criticisms of feminist essentialism, *see generally* Harris, *supra* note 40; Elizabeth Spelman, INESSENTIAL WOMAN (1988). Criticism of relational feminist essentialism comes not only from postmodern scholars but also from liberal and radical feminists. *See, e.g.*, Jean Hampton, *Feminist Contractarianism, in* A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 227, 231 (1993) (In the results of Gilligan's research showing that boys are more autonomous while girls are more caring, "I hear the voice of a child who is preparing to be a member of a dominating group and the voice of another who is preparing to be a member of the group that is dominated"); MacKinnon, *supra* note 40, at 38–39 (criticizing relational feminists for valuing as essentially feminine characteristics, such as nurturing and care, that are the result of male domination).

47. *See, e.g.*, Harris, *supra* note 40, at 585 (arguing that result of "gender essentialism" is "not only that some voices are silenced in order to privilege others . . . but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice of We the People—among them, the voices of black women").

48. *See, e.g.*, Minow, *Making All the Difference, supra* note 2, at 3–4 (raising worries about the process of categorization that results in the conclusion of difference).

49. Young, *The Ideal of Community, supra* note 2, at 307.

porates five fundamental themes. First, differences between people—as least insofar as they have social consequences—are results of social construction, not biological or freely chosen phenomena.[50] Second, the social assignment of the label "different" to some groups, and the elevation of that difference to political and/or legal significance, is an exercise of power by majorities or elites over the persons or groups so labeled.[51] Difference is both the product of, and guarantor of, the continued subordination of powerless groups. A corollary is that the naming and norming process themselves help to create persons who exemplify the difference named.[52] Third, it is impossible to transcend difference in favor of any objective "truth" about it, since each person is trapped within his

50. *See, e.g.*, Foster, *Difference and Equality*, *supra* note 2, at 111 ("To be useful in achieving the goal of equality, a diversity rationale should recognize those differences that have been constructed into a basis for, and have resulted in, systemic exclusion and disadvantage for individuals possessing those differences"); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument From Immutability*, 46 STAN. L. REV. 503, 505 (1994) ("The postmodern critique of liberal explanations of the self posits that culture, not human nature, gives humans their sexual orientations"); Harris, *supra* note 2, at 762 (discussing the postmodern "problem of the subject" and claiming that "[t]he language of race creates, maintains, and destroys subjects, both inside and outside the law"); *id.* at 784 ("Racial communities, like other human communities, are the products of invention, not discovery"); Hutchinson, *supra* note 11, at 1192 ("The subject is a cultural creation, not a biological given"); Hutchinson, *Inessentially Speaking (Is There Politics After Postmodernism?)*, 89 MICH. L. REV. 1549, 1552 (1991) (book review of Martha Minow, *Making All the Difference*) ("The postmodern temper has no eternal truth to offer and no immutable knowledge to dispense; it accepts the historically situated and socially constructed character of truths and knowledges"); *id.* at 1564 ("Differences are culturally imposed and socially policed"); Minow, *Making All the Difference*, *supra* note 2, at 19–23 (discussing social construction of difference in context of the "difference dilemmas" it produces).

51. *See, e.g.*, Butler, *supra* note 45, at 326 (construction of the autonomous subject requires domination and oppression); Hutchinson, *supra* note 50, at 1563 ("Domination has been perpetuated and rationalized both by embracing difference (superiority of men over women and white-skinned people over black-skinned people) and by eschewing difference (treatment of women as men and African Americans as white Europeans). These are the advantages that have made the establishment of power overwhelmingly white and male"); Minow, *Making All the Difference*, *supra* note 2, at 50 (criticizing linkage in law between "difference" and "deviance"); *id.* at 53 ("Assertions of a difference as 'the truth' may indeed obscure the power of the person attributing the difference while excluding important competing perspectives. Difference is a clue to the social arrangements that make some people less accepted and less integrated while expressing the needs and interests of others who constitute the presumed model").

52. Harris, *supra* note 2, at 762 ("The language of race creates, maintains, and destroys subjects, both inside and outside the law"); Hutchinson, *supra* note 50, at 1554 ("The process of labeling and naming is particularly fraught with dangers when it concerns people. To categorize is to choose, and, in so doing, there is no escaping the responsibility of judgment or its context of power"); Minow, *Making All the Difference*, *supra* note 2, at 174–77 (identifying labeling theory as antecedent to her social relations approach, and explaining that "labeling theory studies the process by which an audience or community identifies some people as deviants. That very pattern of identification has consequences for the labeled person which are difficult to escape. Those consequences include recurring patterns of exclusion and deviant behavior. Labeling theory thus treats difference as an idea developed by some people to describe others and to attribute meaning to others' behavior").

or her own individual reality.[53] Fourth, the fact that difference is socially constructed rather than "natural" or intrinsic opens up the possibility of changing it and reforming society.[54] Finally, and perhaps most importantly, we should worry about the hierarchical deployment of difference labels because only in doing so will we transcend liberal sameness-based equality[55] and achieve *real* equality.[56]

1. Martha Minow's "Difference Dilemmas"

Professor Martha Minow's scholarship offers the richest discussion of this view of difference as applied to law, and for that reason it merits close scrutiny here.[57] In her book, *Making All the Difference: Inclusion, Exclusion, and American Law*,[58] Professor Minow criticizes American-style liberal legalism for reinforcing socially created difference through its reliance on five false assumptions.[59] First, legal categories reinforce the invidious idea that "'differences' are intrinsic, rather than viewing them as expressions of comparisons between people on the basis of particular traits." This assumption results in the assignment of the burden of difference to the person deemed "different" rather than to society at large. Thus, a deaf child in a

53. *See, e.g.*, Hutchinson, *supra* note 50, at 1565 ("Although people are never not in a local context, they are never in a context that is not open to contingent revision"); *id.* at 1570 ("While persons are not reducible to their autobiographies, they never fully escape them; they forge their identities through the existential tension between confronting or confounding their autobiographies"); Hutchinson, *supra* note 11, at 1187 ("Embedded in a constitute discourse of power, readers are also disciplined by the extant protocols of power — they are subjects in transition"); Minow, *Making all the Difference*, *supra* note 2, at 53 ("There is no single, superior perspective for judging questions of difference. No perspective asserted to produce 'the truth' is without a situated perspective, because any statement is made by a person who has a perspective").

54. *See, e.g.*, Hutchinson, *supra* note 11, at 1209 ("In the face of the problematized subject, postmodernism does not capitulate to or retreat from the task of struggling towards an enhanced social solidarity and experience of justice. The hope is to empower subjects by making them individually aware of their capacity for self (re)creation and collectively responsible for establishing a mode of social life that multiplies the opportunities for transformative action"); Minow, *Making All the Difference*, *supra* note 2, at 53 ("Difference is a clue to the social arrangements that make some people less accepted and less integrated while expressing the needs and interests of others who constitute the presumed model. And social arrangements can be changed. Arrangements that assign the burden of "differences" to some people while making others comfortable are historical artifacts. Maintaining these historical patterns embedded in the status quo is not neutral and cannot be justified by the claim that everyone has freely chosen to do so").

55. *See, e.g.*, notes 4–5 and accompanying text.

56. *See, e.g.*, note 11 and accompanying text.

57. *See* Hutchinson, *supra* note 50, at 1550–51 (reviewing Professor Minow's book *Making All the Difference* and noting that "In the jurisprudential corner of postmodern scholarship, the work of Martha Minow deserves especial attention. Infused with a postmodern perspective, [Minow's] writing stands at the frontiers of modern legal thinking in its efforts to reject and move beyond the modernist project of jurisprudence").

58. *Supra* note 2. Minow has also explained her view of difference, and her proposals to cure the "difference dilemma," in her other work. *See generally* Minow, *When Difference Has Its Home*, *supra* note 2; Minow, *Foreword: Justice Engendered*, *supra* note 2.

59. Minow, *Making All the Difference*, *supra* note 2, at 50–74.

classroom of hearing children is deemed "different" from the others and treated separately by law as a result of that difference.[60]

Second, this legal process of difference labeling illegitimately assumes certain "norms" from the standpoint of which it deems some persons "different": "The hearing-impaired student is different in comparison to the norm of the hearing student—yet the hearing student differs from the hearing-impaired student as much as she differs from him. . . . "[61] For Minow, this "norming" process is problematic because "[u]nstated points of reference may express the experience of a majority or may express the perspective of those who have had greater access to the power used in naming and assessing others." The relatively powerless may suffer under judgments of inferiority that result from this biased process of naming and norming.[62] Minow offers many legally relevant examples of this critique of legal categories, including the exclusionary labeling as "different" of disabled persons, of students whose first language is not English, of racial minorities, of gays and lesbians, of women, and of religious minorities.[63] In each case, Minow avers, some norm—of "ableness," or English speaking, or whiteness, or maleness, or heterosexuality—has been used to justify treating as different and inferior those who fail to comply with the norm.[64]

Third, the law falsely assumes that those who perform these naming and norming actions are themselves neutral, without a perspective.[65] Differences are assumed to be objective, observable, and capable of legal categorization, reflecting the law's "aspiration to impartiality," an "aspiration [that] risks obscuring the inevitable perspective of any given legal official . . . and thereby makes it harder to challenge the impact of perspective on the selection of traits used to judge legal consequences." The operation of the myth of impartiality, Minow contends, is illustrated by the defendant in an employment case who urged Judge Constance Baker Motley to disqualify herself from the case "because she, as a black woman who had once

60. *Id.* at 81–83 (discussing case of Rowley v. Board of Educ., 483 F. Supp. 528 (S.D.N.Y. 1980), aff'd F.2d 945 (2d Cir. 1980); rev'd 458 U.S. 176 (1982), involving dispute between Rowleys and Board of Education over whether federal law entitled the Rowleys' hearing-impaired child, Amy, to a sign-language interpreter in all her classes, or whether the school's educational plan, which supplemented Amy's experience in "mainstream" classroom with special tutoring, satisfied the law). Minow notes, *id.* at 82, that "[b]oth sides [in the case] assumed that the problem was Amy's: because she was different from other students, the solution must focus on her. Both sides deployed the unstated norm of the hearing student who receives educational input from a teacher, rather than imagining a different norm around which the entire classroom might be constructed."

61. *Id.* at 51.

62. *Id. See also,* Young, *Justice and the Politics of Difference, supra* note 2, at 169 ("The attempt to reduce all persons to the unity of a common measure constructs as deviant those whose attributes differ from the group-specific attributes implicitly presumed in the norm. The drive to unify the particularity and multiplicity of practices . . . turns difference into exclusion").

63. Minow, *Making All the Difference, supra* note 2, at 31–47.

64. *Id.* at 51–52 (describing how U.S. constitutional equality norms "[make] the recognition of differences a basis for denying equal treatment").

65. *Id.*

represented plaintiffs in discrimination cases, would identify with those who suffer race or sex discrimination. The defendant assumed that Judge Motley's personal identity and her past political work had made her different, lacking the [normal judicial] ability to perceive without a perspective."[66] Declining to recuse herself, Judge Motley pointed out that "[i]f background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case [since] . . . all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds."[67]

Fourth, the perspective of those being labeled "different" is either ignored outright or assumed to have been accounted for by those who create and maintain the particular norm in question.[68] Thus,

> many legal observers have viewed affirmative action as nonneutral, compared with status quo treatments of race and gender in employment and other distributions of societal resources. Proposals to alter rules about gender roles encounter objections, from both men and women, to what is seen as undesirable disruption in the expectations and predictability of social relationships. Suggestions to integrate schools, private clubs, and other social institutions . . . provoke protests that these changes would interfere with freedom—referring, often explicitly, to the freedom of those who do not wish to associate with certain others.[69]

Fifth, these legal and social practices reinforce the false assumption that our existing institutional arrangements are natural, neutral, and therefore inevitable.[70]

Minow argues that the root problem with this way of handling difference is that it creates and perpetuates inequality: "Buried in the questions about difference are assumptions that difference is linked to stigma or deviance and that sameness is a prerequisite for equality."[71] On her view "[d]ifference is relational, not intrinsic,"[72] because "[w]ho or what should be taken as the point of reference for defining differences is debatable." From the viewpoint of the majority a person in a wheelchair is "handicapped"; from that person's perspective the majority may be termed "Temporarily Able Persons." Whose point of view should serve as the anchor of law is a question that must be discussed rather than buried.[73] A related assumption

66. *Id.* at 60–61.
67. *Id.* at 61.
68. *Id.*
69. *Id.* at 71.
70. *Id.*
71. *Id.* at 50. *See also* Minow, *Group Homes for the Mentally Retarded, supra* note 2, at 113 ("Categorical approaches"—attributing difference to different people—undermine commitments to equality).
72. *Id.*
73. *Id.* at 51.

is that "[t]here is no single, superior perspective for judging questions of difference. No perspective asserted to produce 'the truth' is without a situated perspective, because any statement is made by a person who has a perspective."[74] Assignments of difference are social decisions that reflect, and therefore offer a chance to explore, the structure of power and hierarchy in society, to reveal its plasticity, and thereby to empower ourselves to change it.[75]

Minow claims that the assumptions about difference that underly our law result in apparently unsolvable "difference dilemmas," presenting equality advocates with a choice between acknowledging certain differences, such as handicaps, race, or gender, via "special treatment" programs that may simultaneously reinforce the stigma attached to the difference, or ignoring the difference altogether, which can itself make the difference continue to matter given underlying social inequality.[76] Thus, with respect to race- and gender-conscious affirmative action programs, the "dilemma of difference" involves questions of how to avoid the stigma traditionally attached to race and gender while trying legally to remedy the wrongs done by labeling women and minorities as both different and inferior. As Minow phrases it: "How can historical discrimination on the basis of race and gender be overcome if the remedies themselves use the forbidden categories of race and gender? Yet without such remedies, how can historical discrimination and its legacies of segregation and exclusion be transcended?"[77]

It follows that solving the difference problem is not simply a matter of either ignoring difference or openly accommodating it, as both methodologies result in serious problems for groups that have been disadvantaged by treatment as "different."[78]

Minow urges the questioning and rejecting of norms that justify inferior treatment for groups such as the disabled, foreign-language speakers, racial minorities, and women.[79] And she suggests methods of furthering her underlying equality ideal by incorporating differences into the social structure in ways that purge them of hierarchy.[80] For example, she recommends dealing with communication problems between a hearing-impaired child and her hearing classmates by teaching all the children sign language. Such an approach, Minow claims, "would treat the problem of difference as

74. *Id.* at 53.
75. *Id.*
76. *Id.* at 20, 25, 27, 36.
77. *Id.*
78. *See generally id.*
79. *See, e.g.*, Minow, *When Difference Has Its Home*, *supra* note 2, at 128 ("Categories and attributions of difference can perpetuate or increase disparities of power between different groups. Attributions of difference should be sustained only if they do not express or confirm the distribution of power in ways that harm the less powerful and benefit the more powerful").
80. Minow, *Making All the Difference*, *supra* note 2, at 81–84.

embedded among all the students, making all of them part of the problem," rather than "assum[ing] that the problem of difference is located in the hearing-impaired child."

2. Rights and Exclusion

Recall the question that prompted this discussion of Professor Minow's view of difference: How does that view differ (if at all) from a liberal view of the relationship between difference and equality? The answer requires an evaluation of both Minow's critique of liberal-rights analysis and of her affirmative proposals to replace it.

a. Minow's critique of liberalism. Although Professor Minow acknowledges that liberal rights-based approaches to law can remedy discrimination against some persons, she claims that in the end liberal visions of equality, grounded in the sameness of rationality or autonomy, improperly exclude those who do not possess the requisite degree of these qualities[81]:

> Despite its liberatory rhetoric of inclusion and fundamental entitlement, the analysis of rights, developed in constitutional and statutory judicial doctrines in this country, runs aground on the shoals of the two-track system of legal treatment. One track offers basic rights to self-determination and participation for those who satisfy the criteria of rational thought and independence; the other offers special treatment and, quite often, social and political exclusion. Those treated as "different" who can demonstrate that they correctly belong on the first track may find considerable help through the rhetoric of rights. Those who fail to satisfy the test of "sameness," however, may find rights analysis a bitter remedy that undermines whatever past acknowledgment of difference there had been without producing social and political inclusion.[82]

Minow argues that liberal "sameness" assumptions endanger the few special benefits accorded to the historically "different": "Thus, efforts to eliminate gender bias in divorce law have removed alimony and child-custody provisions that preferred women, and some observers attribute to these reforms the increased impoverishment and worsened bargaining position of women following divorce."[83] In short, rights-based approaches to law end up reinforcing inequality not only by embracing the legal processes of difference-creation embodied in the five core assumptions outlined

81. *See, e.g.*, Minow, *id.*, *supra* note 2, at 147 ("Rights analysis offers release from hierarchy and subordination to those who can match the picture of the abstract, autonomous individual presupposed by the theory of rights. For those who do not match that picture, application of rights analysis can be not only unresponsive but also punitive").

82. *Id.* at 146.

83. *Id.* at 146–47.

84. *See supra*, text accompanying notes 59–70.

above,[84] but also by hiding the continuation of social, political, and legal hierarchy behind the (false) appearance of equal opportunity.[85]

At its core, this critique attacks the liberal assumption that autonomy is a species-wide trait among humans,[86] charging that this assumption illegitimately excludes some persons.[87] Thus, Minow's fundamental complaint is against liberal equality as *justification*: She argues that grounding legal rights in the descriptive samenesses of agency, rationality, or autonomy is wrong because it is exclusionary.[88]

85. *See, e.g.*, Minow, *Making All the Difference*, *supra* note 2, at 152 ("Pretense of universal, inclusive norms in the public sphere obscures the power of assigned differences in the private sphere"); *id.* at 223 ("The relational challenge suggests that [the limits set on responsibilities by rights analysis] reflect a particular perspective not because it is correct but because it expresses the worldview of those who have had sufficient power to shape prevailing social institutions"); *id.* at 217 (feminist work has contributed to the relational project by "recasting issues of 'difference' as problems of domination or subordination in order to disclose the social relationships of power within which difference is named and enforced"); *id.* at 224 (social relations approach sees "[d]ifferences that yield social distance and exclusion . . . as the self-serving expressions of the more powerful"); *id.* at 239 ("Those who win a given struggle for control may have better access to the means of producing knowledge, such as mass media and schools. Such control may even shape the terms of access so that exclusions of other points of view appear neutral, based on merit or on other standards endorsed even by those who remain excluded").

86. *E.g.*, *id.* at 155 (criticizing as inevitably situated the liberal reliance on notion of "autonomous, able-bodied" person); *id.* at 150 ("the heuristic device of the social contract presumes to address only autonomous, independent individuals"); *id.* at 216 (charging that rights analysis applies only to those who are, or can analogize themselves to, independent persons); *id.* at 147 ("Rights analysis offers release from hierarchy and subordination to those who can match the picture of the abstract, autonomous individual presupposed by the theory of rights. For those who do not match that picture, application of rights analysis can be not only unresponsive but also punitive").

87. *See, e.g.*, *id.* at 152 ("Despite the implied aspiration to universal inclusion, the social contract approach has been deeply exclusionary"); *id.* at 153 ("The presentation of a type of human being as though it described all human beings risks excluding any who do not fit or treating such misfits as deviant"); *id.* at 154 ("Rawls's difference principle preserves too much of the concept of the abstract individual—a concept that claims but fails to secure universality—to respond fully to issues of difference"); *id.* at 155–56 ("The natural rights tradition also partakes of the assumptions of the autonomous and abstract individual and excludes or subordinates any who fail to meet these assumptions"); *id.* at 156 ("The premise of a basic human nature, found in the abstract individual capable of reason, undergirds [natural law] theory and risks excluding any who do not meet it. Theories of natural law locate the justification for universal rights in human reason or cognition. This focus on reason makes problematic any persons who do not manifest to the satisfaction of those in charge the requisite capacities for rational thought," and offering children and the mentally disabled as examples of such excluded persons).

88. *E.g.*, *id.* at 146 ("The 'sameness' between people emphasized by rights analysis challenges special accommodations made for disabled people, women, and others historically treated as different"); *id.* at 152 ("All persons are equal because of this fundamental sameness—yet this sameness seems to be the emptiness left when we are each sheared of all that makes us different"); *id.* at 223 ("Equating sameness with equality, rights analysis offers a kind of certainty and a set of limits: equal treatment, yes, but limited to a comparison with the other group"); *see also* Young, *Justice and the Politics of Difference*, *supra* note 2, at 171 ("In general, then, a relational understanding of group difference rejects exclusion").

This "argument from exclusion" cannot survive analysis, for at least two reasons. First, the argument rests upon a dramatically impoverished conception of liberalism. Professor Minow writes that, despite its "admirable commitment to universality and inclusion,"

> the [liberal] social contract approach has been deeply exclusionary. It is not only that any sign of difference, any shred of situated perspective, threatens the claim to similarity, equality, and identity as an abstract individual—although these problems are serious enough; it is that this conception amounts to a preference for some points of view over others; it takes some types of people as the norm and assigns a position of difference to others (thus adopting the assumptions behind the difference dilemma).[89]

Although it is true that some forms of liberalism rely on the existence of certain threshold levels of rationality and/or autonomy in humans, it is emphatically *not* true that "any sign of difference . . . threatens the claim to similarity, equality," etc., on the liberal view. As the discussion above pointed out, liberalism accommodates a substantial array of difference and that accommodation *is explicitly grounded in the liberal's prior respect for fundamental sameness.*[90]

Second, Minow's depiction of liberal autonomy is fatally shallow. At various points she describes autonomy as synonymous with being able-bodied and with physical independence from others, suggesting that the liberal's "autonomous" person must possess not only the capacity for rational deliberation and choice making but also the ability physically to carry out those choices.[91] But this view relies on far too thin a conception of autonomous action. Can Christopher Reeve, now a quadriplegic, be said to

89. *Id.* at 152.

90. *Supra* text accompanying notes 14–33.

91. *See, e.g.*, Minow, *Making All the Difference, supra* note 2, at 155 (criticizing rights theory for its "assumption of an autonomous, able-bodied person"); *id.* at 150–51 ("The heuristic device of the social contract presumes to address only autonomous, independent individuals who can separate themselves from others and enter freely, unencumbered, into an agreement about how to conduct private and public affairs. . . . A very different design for . . . conceiving of the foundations of a society would be necessary in order to include directly those who within contemporary society seem disabled and those historically treated as incompetent and incapable of participating in the formation of a rational consensus").

Other theorists have posited concepts of autonomy that add to rational choice-making power the existence of a sufficient range of options and of the ability to act on one's choices. *See, e.g.*, Fallon, *supra* note 13, at 886 (offering modified Razian vision of autonomy and claiming that "descriptive autonomy depends on at least four elements that constitute the "conditions of autonomy": (1) critical and self-critical ability; (2) competence to act; (3) sufficient options; and (4) independence of coercion and manipulation"). Fallon claims that under this conception of autonomy, "[a] physically helpless person, such as a quadriplegic, is not autonomous in important respects." *Id.* at 888. Once again, this view is vulnerable to the charge leveled against Minow—that it rests upon far too sparse a conception of what it means to "act."

lack a requisite level of autonomy because he cannot physically do things most others can? Is Reeve, with the money to hire others to compensate for his disability, clearly *less* autonomous than, say, a completely impoverished but able-bodied person, or a severely retarded but able-bodied person? Of course not. In fact, liberals have argued for special accommodations—such as wheelchair access—for the physically disabled, *in recognition of their possession of the threshold level of autonomy* that justifies equal rights and responsibilities. On any reasonable theory of what it means to "act," individuals do not have to be able-bodied or physically independent to be autonomous in the liberal sense; they must simply possess the moral and intellectual ability to make certain types of choices about their lives and to make meaningful attempts, *physically or otherwise*, to realize those choices.

Professor Minow is quite critical of this idea that autonomy is fundamentally a mental capacity. For example, she attacks the scholarship of philosopher David Lamb for "defining human life in terms of capacity for thought," since Lamb's definition "would exclude persons in a persistent vegetative state."[92] Suppose this is correct—that liberal justifications of equality that are grounded in descriptive assumptions of human rationality and autonomy do, in fact, "exclude" those in a persistent vegetative state and perhaps some afflicted by severe mental disabilities.[93] In this context "exclusion" presumably refers to the lack of any equality-based *justification* for treating such individuals as equals in a liberal society. Those who lack the requisite level of autonomy or rationality have no claim to be treated as equals in a regime whose justification of legal egalitarianism is defined by those qualities.

At one level this scenario simply highlights the limits of equality itself as a legal principle. Arguably, the idea of equality—however justified and however defined—does not work at all in the context of arguing for better treatment of those whose disabilities have made them permanently incapable not only of autonomous choice making but also of forming relationships, of caring for themselves physically, or (as in the case of comatose people) of even knowing who, or that, they are. We might say, for example, that the person in a persistent vegetative state has the "right" not to be killed for sport. But is this "right" an *equality*-based right? Surely not; the "right" is grounded not in the *equality* of the comatose person to the rest of humanity, but in other reasons—in our hope that such individuals will someday "wake up," perhaps; or in our compassion for them and their families; or in our

92. Minow, *Making All the Difference, supra* note 2, at 152.

93. At times Minow treats children and the mentally disabled as groups excluded by liberalism. But this is dramatically overreaching. As Minow herself concedes, liberal theory acknowledges the personhood of children as *future* autonomous agents. *Id.* at 156. And, unless one defines "mental disability" in such a way that it refers to extremely severe psychological or cognitive deficits, it is far too simplistic to assume that all mentally disabled persons lack rationality or the capacity to make autonomous choices about their lives.

conviction that allowing such killing would lead us to become callous toward greater atrocities.[94]

For the purposes of this essay, however, an even more important conclusion follows from Minow's charge that liberal sameness assumptions are unjustly exclusionary. Notice that her argument implies that "true equality" necessitates treating such people as equals. But that statement itself requires justification. Upon what theory of equality is it based? Two possibilities exist. First, she could be arguing not that sameness-based equality is *per se* unjust, but that autonomy and rationality are simply the *wrong* samenesses upon which to ground assumptions of equal moral worth and legal equality. On this theory the use of autonomy as equality's core justification is illegitimately exclusionary because (1) what makes persons equal is really something else—relational ability or empathy, for example—*and* (2) this truth has been unjustly quashed by the autonomy principle. At least one advocate for the mentally disabled, for example, has argued that assumptions of equality based on the capacity for love, empathy, and "communality" ought to replace autonomy-based legal structures that single out the mentally disabled as different and inferior.[95]

But such proposals are not available either to Minow or to other postmodern critics of liberalism, who consistently attack such ideas as "essentialist." On the postmodern view, *any* assumption of sameness among humans is suspect because it so often leads us to ignore or suppress radical difference. For this reason Martha Minow consistently condemns sameness-based equality *per se*, a position that logically compels her to reject proposals that would simply substitute one form of sameness for another.[96] Autonomy, connectedness, empathic ability—even species membership—are all samenesses that she necessarily rejects as bases for legal equality. So Minow must be arguing that, despite the fact that *no* sameness can properly ground equality, all persons should nevertheless be treated as equals. But the crucial point is this: Minow's critique of sameness-based equality *leaves her with no answer to the question of* why *we should treat all persons, including permanently comatose persons, as equals.*[97] If people are radically and irreducibly different,

94. Or perhaps the "right" is grounded in a very basic principle of "sameness"—that of species membership. But such a principle can only serve as a very weak justification for legal rights. For *why* ought species membership to justify such rights? The readiest response is phrased in terms of *some other* quality that constitutes the real justification for the right—that the human species shares the capacity for rationality, autonomy, empathy, moral personality, and so on. This takes the argument back to square one.

95. Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201 (1990) (criticizing autonomy- and rationality-based presumptions employed in judicial decisions about parenting abilities of mentally handicapped persons, and arguing that relational abilities of such persons should form the basis for a new legal standard of evaluation of parenting abilities).

96. Nevertheless, she ultimately tries to go this route, and I evaluate her attempt in the next section, *infra*, text accompanying notes 99–116.

97. And a non-sameness-based justification of equality seems entirely unattractive, for reasons I will discuss in the next section. *See infra*, text accompanying note 150.

what justifies legal equality? Minow advocates "real equality" through the proper recognition of difference; but such hopes are empty rhetoric in the absence of some underlying justification for the declared equality principle. As I argue below,[98] equality cannot be fully justified without affirming sameness of some kind—the rejection of sameness, therefore, necessarily implies the rejection of any rich theory of legal equality.

b. Minow's "social relations" approach: back to essentialism. The discussion thus far has revealed core weaknesses in Minow's attack on liberal sameness-based equality. As a little reflection makes clear, her proposed *replacement* for liberal legal structures is even more flawed. In place of conventional civil-rights methodology, which focuses on erasing *mis*categorizations of persons as inferior in behalf of an underlying belief in the rational, autonomous selfhood of all human beings,[99] Professor Minow advances a suspicion of categorization *per se*. Minow attempts to move the inquiry from one involving "true" and "false" categories to one involving the dangers of categorization itself:

> [T]he social relations approach assumes that there is a basic connectedness between people, instead of assuming that autonomy is the prior and essential dimension of personhood. . . . The social relations approach is dubious of the method of social organization that constructs human relationships in terms of immutable categories, fixed statuses and inherited or ascribed traits.[100]

Minow acknowledges that categorization is necessary, but she warns that it ought to be profoundly mistrusted owing to its history of use for the purpose of creating power inequities.

Via her "social relations" approach to difference, Minow seeks both to acknowledge social categories and to render them powerless. Her proposal contains several key elements. First, it depicts difference as hierarchical and urges that prevailing social norms be exposed as simply the points of view of the powerful and thereby robbed of their natural, intrinsic, and stable auras.[101] For Minow the key question to consider in evaluating the legal response to an alleged difference is whether and how it affects human relationships:

> The [social relations] strategy . . . considers the relationship between the namer and the named that is manifested in categories and labels and that is

98. *Infra*, text accompanying note 151.

99. *See* discussion *supra*, text accompanying notes 32–33 (liberal civil-rights methods grounded in belief that *mis*categorizations must be supplanted by correct categorizations).

100. Minow, *When Difference Has Its Home*, *supra* note 2, at 127–28.

101. *See, e.g.*, Minow, *Making All the Difference*, *supra* note 2, at 80 ("Difference can be understood not as intrinsic but as a function of relationships, as a comparison drawn between an individual and a norm that can be stated and evaluated"); Minow, *When Difference Has Its Home*, *supra* note 2, at 113 ("An egalitarian ideal would be better served by an approach that emphasizes the relationships between people").

> lived in daily experiences. Does the act of naming cut off or deny relationships? Affirmative answers to questions of this sort would support a conclusion that the attribution of difference violates the foundational premise of ongoing relationships. Such a violation should trigger protection for the constitutionally protected values of equality and freedom of association.[102]

This focus on the primary importance of relationships as the basis for legal equality immediately raises two questions. First, if it is "ongoing relationships" that ought to trigger the enforcement of constitutional protections, what happens to individuals—such as those in a "persistent vegetative state" and those with severe mental disabilities—who are incapable of forming relationships with others? Isn't Minow simply advocating a new form of essentialist sameness—the capacity to have relationships—and arguing, in direct contradiction to her simultaneous *rejection* of sameness-based rights *per se*, that this new sameness should replace autonomy and rationality as the proper justification of equality? If so, Minow's social relations approach raises the very same problem of exclusion that prompted her attacks on liberalism.

Second, the social relations approach relies heavily on the faculty of empathy as a way of producing discussions about difference between the powerful and the dominated. Professor Minow writes that the social relations theory is rooted in "learning to take the perspective of another," and she presents it as "an opening wedge for an alternative to traditional legal treatments of difference."[103] By talking and listening to others who are different, those in power will come to realize that "difference" is relational and debatable—that the hearing children in a classroom are as different from their deaf classmate as she is from them—and that issues of difference thus necessarily place both the "normal" and the "different" person in relationship to each other. Thus, Minow makes empathy, particularly judicial empathy, into the chief means of moving society from the status quo, which she depicts as illegitimately individualist and elitist, toward a greater focus upon the importance of connectedness and relationships.[104] She hopes that such empathic perspective-taking will help reconceive rights,

102. Minow, *When Difference Has Its Home*, *supra* note 2, at 130.

103. Minow, *Making All the Difference*, *supra* note 2, at 379.

104. *See, e.g.*, *id.* at 384–87, 389 (discussing importance of such perspective taking); Minow, *When Difference Has Its Home*, *supra* note 2, at 129 (discussing need for judges to adopt the perspective of those labeled "different"). At one point in her book Minow denies that her approach embraces empathy; *see id.* at 219. But she seems only to intend by that statement to separate herself from relational feminist claims that empathy is a natural, organic, and/or unreflectively easy process, at least for women. *Id.* at 219–20 (making this point in context of a short story, "A Jury of Her Peers"). In fact, Minow's advocacy of perspective taking constitutes the *definition* of empathy; *see, e.g.*, Robert M. Goldenson, 1 THE ENCYCLOPEDIA OF HUMAN BEHAVIOR: PSYCHOLOGY, PSYCHIATRY, AND MENTAL HEALTH 395 (1970) (defining empathy as "the capacity to understand and in some measure share another person's state of mind"). Whether empathy comes naturally or is an acquired characteristic, and whether or not women possess it more than men, are questions external to the definition of the concept.

preserving their liberating potential while grounding them not in rationality or autonomy but in connectedness and the recognition of untranscendable perspective.[105]

The use of empathy, or "perspective taking," as a means of improving liberalism is hardly new. Communitarians and relational feminists see political empathy as central to the effective replacement of liberal legalism with more communal, mutually interdependent, and altruistic legal structures.[106] To the extent these proposals express the view that we should all be nicer and more understanding of each other, they clearly have merit. But the attempt to deploy empathy as a new basis for legal decision making will fail—and rightly so.

Empathy can be understood in two ways—as the imagined projection of one's "self" into the person of another, or as an attempt to understand the other as essentially different, without trying to fuse one's identity with the other's or to assume a basic sameness of "self" between empathizer and the other. The first understanding, which I have called "projective empathy,"[107] is not merely consistent with liberalism; it is the foundation of liberal progress toward the realization of equal rights for all.[108] Projective empathy relies, in essential part, on the realization that *despite* our differences, I and the object of my empathic attention are the same and therefore equal. This view of empathy may, in fact, have motivated the Supreme Court decision in *Brown v. Board of Education*,[109] the most famous American civil-rights case.[110] It is a view of perspective-taking that would be unacceptable to Professor Minow, who repeatedly rejects the liberal notion that equality ought to be based on sameness.[111] She must rely, therefore, on a second

105. Minow, *Making All the Difference, supra* note 2, at 382–83 (defending her concept of "rights in relationship" as an important tool for challenging hierarchical effects of socially created difference).

106. For examples of empathy's promotion as a tool of political and legal reform, *see, e.g.*, Nancy L. Rosenblum, ANOTHER LIBERALISM: ROMANTICISM AND THE RECONSTRUCTION OF LIBERAL THOUGHT 184 (1987) (linking communitarianism with a "politics of . . . empathy"); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1555 (1988) (explaining the concept of political empathy and its connection to communitarian visions of law); Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817, 859 (1986) (associating promotion of empathic law with relational feminists and communitarians); *see generally* Dailey, *supra* note 2. I have been skeptical about empathy's potential as a tool for promoting legal communitarianism. *See* Cynthia V. Ward, *A Kinder, Gentler Liberalism: Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 929 (1994). The discussion in this section applies the conceptions of empathy introduced in that article.

107. Ward, *supra* note 106, at 936.

108. *Id.* at 934–45 (developing a concept of projective empathy as an inherent premise of liberalism).

109. 347 U.S. 483 (1954).

110. For discussions of empathy's possible role in the *Brown* decision, *see, e.g.*, Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Ward, *supra* note 106, at 941–42.

111. *See, e.g.*, Minow, *Making All the Difference, supra* note 2, at 50, 74–75 (citing defects of equality principle based on sameness).

vision of empathy, which I have called "imaginative empathy."[112] This understanding of empathy acknowledges radical diversity—that empathizer and other are ineradicably different and separate—but nevertheless assumes that it is possible at least partially to understand the other despite his or her difference. Imaginative empathy therefore recognizes diversity and may escape reliance on sameness—but, I have argued, loses any innate connection with equality.[113] While projective empathy *sees through* difference to find equality, imaginative empathy stops at the point of acknowledging and appreciating difference, thereby losing any innate connection to equality.[114] The point should be clear: Liberalism incorporates an equality-friendly understanding of empathy that is rooted in sameness, whereas nonliberal empathy stands in direct tension with equality. Professor Minow's social relations approach must fail because its core premise, that empathic "perspective taking" can simultaneously transcend sameness *and* embrace equality, is false.

c. The emptiness of the postmodern vision of difference. In sum, neither Minow's critical attacks on liberalism nor her affirmative proposals to replace it can survive careful analysis. Her critique of liberal rights theories reduces to one claim: That such theories improperly rely on the concept of autonomy to justify equal and individual rights. Minow argues that this reliance is wrong because it excludes some persons from being treated as equals, resulting in the labeling of such individuals as "different" and inferior. But her narrow depiction of the foundations of liberal thought, coupled with her failure to offer an equality-based justification for her universal inclusion principle, leaves this critique completely undefended.

Minow's affirmative argument for the "social relations approach" not only raises the spectre of essentialism—which she elsewhere firmly and repeatedly repudiates[115]—but also relies heavily on a difference-based concept of empathy that is actually *anti*equality. Two premises form the core of the social relations approach: First, sameness-based theories of equality are wrong because they label some persons as different and inferior; second, our shared human capacity for empathic dialogue can lead us to *real* equality. But to the extent it is rooted in the rejection of sameness, Minow's theory fights with equality; and insofar as she introduces a *new* sameness, the sameness of empathic ability, as the proper basis for rights and legal categories, Minow—like communitarians and relational feminists—simply deploys the notion of difference as a stalking horse for her own particular brand of sameness-based equality.[116]

112. Ward, *supra* note 106, at 948.
113. *Id.* at 949.
114. *Id.*
115. *E.g.*, Minow, *Making All the Difference, supra* note 2, at 230–31.
116. At least one scholar has accused Minow of communitarian essentialism; *see* Sheila Foster, *Community and Identity in a Postmodern World*, 7 BERKELEY WOMEN'S L.J. 181,185 (1992)

IV. DIFFERENCE AS EQUALITY

It would seem from the above analysis that difference-based attacks on liberalism necessarily conflict with equality. But this conclusion may be too hasty, for a third conception of difference—one that departs in important ways from the views discussed thus far—now dominates the literature in critical race theory. In this section I consider whether this view of difference is any more equality-friendly than its counterparts.

A. Difference in Critical Race Theory

Advocates of this third vision of difference share much with advocates of postmodern difference theory. In particular, they accept the social-construction explanation for the *origin* of difference, and they are even more open than is Martha Minow about the connection between difference and hierarchy.[117] Difference, on this view, is the deliberate assignment of inferiority, most prominently racial inferiority, by the white majority to racial minorities.[118] Scholars who adopt this view insist that we must recognize and institutionalize, via the establishment of affirmative group rights, group differences that originated in racial oppression.[119]

("Whether intended or not, Minow's reconstruction of "rights language" through the recognition of their "inevitable relational dimensions" leads her down a familiar path of embracing "communitarianism") (citation omitted); *id.* at 187 ("Thus, like advocates of the communitarian movement, Minow envisions a community, universal in nature, where the "language of rights" draws each claimant into the community and "grants each a basis opportunity to participate in the process of communal debate").

117. *See, e.g.*, sources cited in note 51; *see also*, from the critical legal studies camp, Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 724 ("Though communities are different in ways that are best understood through the non-hierarchical, neutral idea of culture . . . some differences are not like that. Americans pursue their collective and individual projects in a situation of group domination and group subordination. With respect to . . . common measures of equality and inequality, we all recognize that some groups are enormously better off than others").

118. This idea of difference as hierarchy is of course shared by many feminists and applied by them to the analysis of gender issues. *See, e.g.*, MacKinnon, *supra* note 34, at 219 ("Difference is the velvet glove on the iron fist of [male] domination").

119. *See, e.g.*, Roy L. Brooks and Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787, 804–44 (arguing that critical-race critiques of liberal discrimination law imply abolishment of Title VII); Sheila Foster, *Difference and Equality*, *supra* note 2, at 154 ("At the core of a substantive concept of diversity, under an equality paradigm, should be a commitment to include individuals with differences that have been constructed into a basis for systematic disadvantage and exclusion"); *id.* at 156 ("We must establish institutional participatory patterns that accept and value the contributions of those differences that have been left out"); Harris, *The Jurisprudence of Reconstruction*, *supra* note 2, at 761 ("Rather than supporting assimilation to the dominant culture, the new social movements have demanded a recognition of their members' 'difference'").

At the root of their proposed "politics of difference"[120] is the idea that disadvantaged groups—most prominently racial minorities—have developed distinct methods of viewing the world and functioning within it that, as a matter of justice to those groups, must be preserved via the explicit importation into law of group rights and special treatment.[121] The goal is to promote equality[122]—an equality based *not* on sameness, as in the liberal rubric, but on racial differences. As critical-race theorist Angela Harris puts it, "This claim to equality based not on sameness but rather on difference is at the heart of the politics of difference."[123]

On a critical-race-theory view, Martha Minow's concern for the dangers of categorization actually overlooks the *positive* aspects of difference for those groups that have been marginalized. According to Sheila Foster, for example, the danger of Minow's approach is that "Minow leaves the power of transformation, this time with respect to creating identities, in the hands of those already in power."[124] Foster argues that Minow's social relations theory constitutes an appeal to the already powerful to listen to the perspectives of the marginalized, while Foster urges more action by the latter themselves to control the meaning and consequences of difference[125]:

> Categorization . . . has been and continues to be a means by which those marginalized groups can empower themselves by redefining the assigned meaning of difference. Categories, like rights, need to be rescued to allow those marginalized by essentialist categorization to empower themselves by altering, for themselves, the meaning of categories of difference imposed on them by those in power. . . . Marginalized groups can rescue categories by claiming those categories and by transforming negative meanings associated with them into positive ones that they create. The empowerment in this process of transformation comes not only in protesting the assigned meanings of a categorical difference, but also in the recognition of the power to define that difference for the community of individuals embracing the difference.[126]

Condemning Minow's "seeming willingness to get rid of categories altogether"[127] and her "placement of the power of transformation in the hands of the powerful,"[128] Foster concludes that a universal community built upon

120. The term is used by Harris, *The Jurisprudence of Reconstruction, supra* note 2, at 159–66, and Young, *Justice and the Politics of Difference, supra* note 2.

121. Young, *Justice and the Politics of Difference, supra* note 2, at 156–91 (outlining tenets of "politics of difference" and describing specific group rights such a politics would favor).

122. Foster, *Difference and Equality, supra* note 2, at 109, 110.

123. Harris, *Jurisprudence of Reconstruction, supra* note 2, at 761.

124. Foster, *supra* note 116, at 191.

125. Foster acknowledges that Minow creates discursive space for "a different analysis" when "self-assigned differences" are at stake, *id.* at 191, but feels that Minow pays too little attention to this aspect of difference and fails to build it into her social relations approach. *Id.* at 191–93.

126. Foster, *Difference and Equality, supra* note 2, at 192.

127. *Id.* at 192.

128. *Id.*

"true equality" can be achieved only by "acknowledging and respecting the power of the marginalized to reclaim and transform the meaning of assigned categorization."[129] Foster suggests that achieving racial equality will require us "to [both] deconstruct difference *and* allow marginalized groups to empower themselves through sameness." She urges groups that have been labeled different and inferior—such as racial minorities, gays and lesbians, and possibly others—to "affirm sameness by defining a common identity on the fringes."[130]

Other critical race theorists echo this theme. Roy L. Brooks and Mary Jo Newborn, for example, explain that critical race theory (CRT) rejects the color-blind "formal equal opportunity" model (the vehicle for liberal hopes of racial equality) "for erroneously assuming the possibility and desirability of racial sameness, or equal legal treatment, and for ignoring legally significant differences between African Americans and whites."[131] They argue for an "asymmetrical model" of racial equality that will "assume the possibility and desirability of racial differences." Paralleling their deployment in theories of sexual equality, asymmetrical models of racial equality hold that the races are "often asymmetrically located in society" and reject "the notion that all [racial] differences are likely to disappear, or even that they should."[132] Brooks and Newborn contend that "a degree of racial imbalance—that is, racial empowerment—must be tolerated in order to reach this state of racial balance. . . . Racial empowerment is the only way to neutralize unconscious racial discrimination in American culture. By encouraging us to respect racial differences, racial empowerment validates the life experiences of minorities."[133]

Critical race theorist Angela Harris writes that CRT draws on insights from both the postmodern and liberal civil rights movements.[134] From the former, CRT inherits the conclusion that "racism is an inescapable feature of western culture, and race is always already inscribed in the most innocent and neutral-seeming concepts. Even ideas like 'truth' and 'justice' themselves are open to interrogations that reveal their complicity with power."[135] From the latter, CRT takes "a commitment to a vision of liberation from racism through right reason."[136] Noting the "tension" between

129. *Id.* at 193.

130. Foster, *supra* note 116, at 193 (quoting from Alexander Chec, *A Queer Nationalism*, OUT/LOOK 15, 17 (Winter 1991); *see also* Kennedy, *supra* note 117, at 730 (discussing the "irreducible link of commonality in the experience of people of color: rich or poor, male or female, learned or ignorant, *all* people of color are to some degree 'outsiders' in a society that is intensely color-conscious and in which the hegemony of whites is overwhelming") (citation omitted).

131. Brooks and Newborn, *supra* note 119, at 800.

132. *Id.* at 802.

133. *Id.* at 802–03.

134. Harris, *supra* note 2, at 743.

135. *Id.* at 743.

136. *Id.*

these two planks of critical race theory,[137] Harris nevertheless urges the movement to work within this tension and, via a "jurisprudence of reconstruction," to "continually rebuild modernism in light of postmodern insights."[138] Harris argues that CRT will be aided in this task by its engagement in the "politics of difference,"[139] which she characterizes as containing a "dual commitment to eliminating oppression and celebrating difference."[140] "[T]he domestic politics of difference," continues Harris, "has focused on . . . the constitution or reconstitution of the subordinated community and the transformation of the dominant community."[141]

B. Sameness Revisited

These ideas may have much political utility[142]; the effort here is to isolate and analyze the concept of difference they employ. Two fundamental assertions lie at its base. First, critical-race theorists urge groups that have been assigned the label "different" as a badge of inferiority to *embrace* that difference in order to "reclaim" it.[143] Second, their goal appears to be to craft racial equality *from* such difference, to build a "politics of difference" that, grounded in the group's *internal* sameness of shared oppression, takes racial equality to be its foundational goal.

1. Sameness from Difference?

To reclaim difference in the name of equality, when difference has meant *in*equality, is to embrace an internal tension. But, consistent with the postmodern conviction that individual character and personality are socially constructed, this theory of difference proposes to resolve that tension by giving the *power* to transform the meaning of difference to those who have been labeled inferior. On this view reclaiming difference means both acknowledging the negative impact of socially assigned difference on the members of disadvantaged groups, and transforming the negative *content* of the "difference" label into an affirmation of group identity and group-based politics.[144]

137. *Id.*
138. *Id.* at 744.
139. *Id.*
140. *Id.* at 760.
141. *Id.* at 764.
142. CRT scholars have emphasized the importance of their work to the political fight for racial justice. *See, e.g.*, Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 CAL. L. REV. 2231, 2239 (1992) (critical-race scholarship "must . . . respond to the immediate needs of the oppressed and subordinated"); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 673–74 ("Outsider scholarship is often aimed not at understanding the law, but at changing it"); Brooks and Newborn, *supra* note 119, at 844 (citing Lawrence and Delgado for these points).
143. Foster, *Difference and Equality*, *supra* note 2, at 193.
144. *See generally* Foster, *supra* note 116; Foster, *Difference and Equality*, *supra* note 2.

This view is in some meaningful way antiliberal; it views liberal individualism and individual rights as masks for white domination of minorities, while it celebrates the liberating potential of group identity and group rights. It also deepens the conception of group identity beyond that contained in liberal pluralism, which envisions "interest groups" that are constructed by preformed individuals who engage in collective behavior only as a result of preexisting, distinct interests that happen to coincide.[145] The "difference"-based view insists on the primacy of group identity as a factor in constructing individual identity, and on the importance of membership in societally powerful groups.[146]

Upon examination, however, this third view of difference collapses of its own weight. Consider first that the acquisition of the power to transform meaning must be justified by a purpose other than (or at least *in addition to)* the mere effects of power-holding. The CRT conception of difference focuses upon the raw experience of power as transformative, but doesn't itself answer the central question of *what values that power will serve.* Toward what end, in other words, do difference advocates argue for the reclamation and reinforcement of difference via the simultaneous transformation of its *content* into a positive one? If CRT theorists were asked to state the *purpose* of the "politics of difference," they would surely answer "the achievement of racial justice." And what constitutes racial justice? The usual answer is, "equality between the races."[147] The new and transformed content of difference is meant, perhaps, to give positive meaning to the phrase "separate but equal"—to affirm the *equality* of groups whose relationship has long been that of oppressor and oppressed but which are now to be treated as simply

145. *See, e.g.,* Sunstein, *supra* note 106 (describing liberal pluralism in these terms); Cynthia V. Ward, *The Limits of Liberal Republicanism: Why Group-Based Remedies and Republican Citizenship Don't Mix,* 91 COLUM. L. REV. 581 (1991) (contrasting liberal pluralism with communitarian republicanism).

146. *See, e.g.,* Foster, *Difference and Equality, supra* note 2, at 158–59 ("The dominant culture has exercised its power to develop social and cultural definitions for those deemed outside of that culture. Consequently, the story of Blacks and other minorities has been created and told primarily by Whites, with little contribution from the subjects themselves. Blacks and other minorities have been effectively rendered 'invisible' not because Whites cannot see them, but because 'whites see primarily what a white dominant culture has trained them to see' and because the Black stories 'simply do not register'"); Kennedy, *supra* note 117, at 722 ("An important human reality is the experience of defining oneself as 'a member of a group' in this strong sense of sharing goals and a discursive practice"); *id.* at 723 ("Communities have cultures. This means that individuals have traits that are neither genetically determined nor voluntarily chosen, but rather consciously and unconsciously taught through community life. Community life forms customs and habits, capacities to produce linguistic and other performances, and individual understandings of good and bad, true and false, worthy and unworthy"); Young, *Justice and the Politics of Difference, supra* note 2, at 163 ("Today and for the foreseeable future societies are certainly structured by groups, and some are privileged while others are oppressed").

147. But *see* Derrick Bell, *Racial Realism,* 24 CONN. L. REV. 363, 373–74 (1992) (arguing that African Americans should abandon quest for racial equality and focus on bettering their situation in society); Derrick Bell, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 12 (1992) ("Black people will never gain equality in this country") (emphasis omitted).

different from, but nevertheless *equal to*, each other. But "equal" in what sense? The creation of group-defining "sameness" from shared oppression—or from cultural traditions that *originated* in shared oppression—actually *relies upon* the continuing existence of difference *between* groups. Difference from the other becomes the basis for sameness within the group, for the very definition of the group as a group.

On what basis, then, can group A argue that its members should be treated *equally* to group B? Group definitions that rely upon the shared "difference" of oppression might create community and a sense of equality *within a group*, but cannot justify the establishment of equality *between* groups. If the goal is to win equality for one's group vis-à-vis all other groups in society, some other justification of the intergroup equality principle must be advanced.[148] I submit that this justification can only be grounded in sameness—not only the sameness of group members to each other, but the sameness of all groups to all other groups, or in other words, the sameness of all human beings.

2. Can Equality Be Based on Difference?

At one level the critical-race view of difference simply constitutes an argument for a *distributive* principle of equality. Difference theorists argue for equal distribution of resources and power to groups whose subordination previously comprised the steps in the social ladder. Once again, however, this principle of distribution must be justified at a deeper level—must answer the question of *why* we should distribute power equally.

At the level of justification this strain of difference theory is incoherent. CRT scholars reject the liberal idea that rationality and autonomy are the proper bases on which to construct legal rights, arguing either that those ideas are innately biased in favor of the white male elite and designed to perpetuate its dominance, or that autonomy and rationality are ephemeral to start with. Instead, radical theorists argue for equality *based on difference*,[149] and although this might work at the distributive level—it is at least theoretically possible to decide which "differences" have created relevant groups and to distribute money, jobs, and/or political positions equally among all groups deemed relevant by the agreed-upon criteria of difference—it is completely unintelligible at the justificatory level, a fault that leaves difference theory without any equality-based answer to the question

148. Relational feminist theory also faces this problem. Some of Robin West's work, for example, suggests that women are profoundly different from men at every level. *See, e.g.*, West, *supra* note 1, at 17 ("According to the vast literature on difference now being developed by cultural feminists, women's cognitive development, literary sensibility, aesthetic taste, and psychological development, no less than our anatomy, are all fundamentally different from men's. . . . The most significant aspect of our difference, though, is surely the moral difference"). If this is true, women's equality to men (rather than preferential or inferior treatment) requires an independent argument showing why women, although so very different, nevertheless possess equal worth.

149. *See, e.g.*, Harris, *supra* note 2, at 761.

of *why* we should distribute power equally among racial groups. To the extent difference theory demonstrates the existence of radical, irreducible difference among groups, it undercuts the justification for working toward equality for those groups. Why, in short, should we treat people as equals if they in fact are irreducibly different? At the very least, an answer to this question requires an analysis of what differences exist between groups and some conclusion that, although different, the groups' values, identities, purposes, etc., are nevertheless equal. No such discussion appears in radical difference theory.

3. Equality without Sameness?

There are of course justifications for political principles of equal distribution that do not rely on the establishment of sameness among all persons. One could argue, for example, that treating people as equals is necessary to preserve law and order, or to maximize happiness or minimize suffering—a utilitarian view. But such justifications capture neither the spirit nor the pronounced beliefs of radical difference theory. The peace-and-order rationale is both empirically dubious—law and order have been preserved for long periods in hierarchical societies and dramatically violated in egalitarian ones—and politically uninspiring. It shrinks discussions about the proper vision of social justice into squabbles over the comparative virtues of various bureaucratic peacekeeping strategies. At least some utilitarian views may be similarly limited, as critical-race theorist Derrick Bell's writings illustrate. On a straightforward reading of Professor Bell's work, one could reasonably conclude that a utilitarian approach to racial justice would result in the retention of a rigid racial hierarchy in the United States. Bell believes that subordinating blacks is an essential part of the white majority's identity in this country, and in fact that whites have such a strong preference in favor of oppressing blacks that they will never allow racial hierarchy to end.[150] If this is correct, calls for racial justice rely at their peril on utilitarian rationales.

V. CONCLUSION: DIFFERENCE AND DOUBLESPEAK

It would seem that *any* acceptable justification of equality requires the establishment of some descriptive sameness among people. At the moment one asserts that *no* important commonality of persons can be established or

150. *See generally* Bell, *Racial Realism*, supra note 147; Bell, FACES AT THE BOTTOM OF THE WELL, *supra* note 147; *see also* Brooks and Newborn, *supra* note 119, at 798 (racism is "normal science" in the United States); Harris, *supra* note 2, at 749 ("Derrick Bell argues that racism is a permanent feature of the American landscape, not something we can throw off in a magic moment of emancipation. And in a moment of deep pessimism, Richard Delgado's fictional friend 'Rodrigo Crenshaw' has suggested that racism is an intrinsic feature of the 'The Enlightenment' itself") (citations omitted).

can legitimately form the basis of citizenship, one is left without a rich defense of egalitarianism.

The assault on "equality as sameness" must take one of two routes. Either its consists of a charge that the *wrong* sameness has grounded politics and law, or it implies the rejection of equality altogether. In the first instance, difference theorists are left to find and defend some new commonality (a task they have so far rejected as "essentialist")[151], in which case the current focus on the "difference" question ought to be transcended in favor of an open debate over *which* vision of equality is the best. In the second instance, difference advocates are left to discover an entirely new, nonequality-based structure for law and politics. If political and legal equality are not proper goals given the "difference" critique, what *should* be our goals? In the name of what principle should we worry about differences in power between the races and genders? In an environment of irreconcilable "difference," how should we make justice-based arguments for change, or even think about justice itself? Scholars who deploy radical views of difference in order to argue for social justice must bear the burden of answering these questions.

151. *See generally* Harris, *supra* note 40; Elizabeth Spelman, *supra* note 46.