1994

A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature

Cynthia V. Ward
William & Mary Law School, cvward@wm.edu

A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature

Cynthia V. Ward†

FEMINISM, EMPATHY, AND "LIBERAL COMMUNITY"

Both feminist and communitarian scholars have begun a rapprochement with liberalism in which the politicization of empathy plays a key role. Originally a child of liberal philosophy,[1] feminist theory has moved beyond the fight for formal liberal equality to a critique that turned "liberal legalism," liberalism's jurisprudential counterpart, from feminism's inspiration into its enemy.[2] But Anne Dailey concludes in a recent es-

---

[1] See, for example, John Stuart Mill, *The Subjection of Women*, in Stefan Collini, ed, *On Liberty: with The Subjection of Women and Chapters on Socialism* 117, 133-36 (Cambridge, 1989) (arguing for women's legal equality on the basis of liberal principles of individual autonomy, self-determination, and social mobility); Deborah L. Rhode, *Justice and Gender: Sex Discrimination and the Law* 12 (Harvard, 1989) ("American feminism is rooted in various intellectual traditions, but the most dominant influence has been liberalism.").

[2] Attacks on liberalism can be found in the works of radical feminists, of whom the most important contemporary theorist is Catharine MacKinnon, as well as relational or cultural feminists, who are frequently associated with the work of Carol Gilligan. From the radical feminist literature, see, for example, Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 157-70, 237-49 (Harvard, 1989) (attacking the liberal state and liberal theory as oppressive of women). From the relational camp, see, for example, Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va L Rev 543, 579-84 (1986) (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); Robin West, *Jurisprudence and Gender*, 55 U Chi L Rev 1, 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—and concluding that because contemporary legal theory defines human beings as physically separate from one another, it could never be inclusive of women). But see Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, in Katharine T. Bartlett and Resanne Kennedy, eds, *Feminist Legal Theory: Readings in Law and Gender* 15 (Westview, 1991) (defending the liberal feminist model of legal equality).

say that feminism's intense focus on the questions of what differences exist between women and men, and how the law should respond to them, is now steering the movement toward endorsing a new and improved version of liberalism: "a redeemed liberalism in which the philosophy of possessive individualism characteristic of classical liberalism has been tempered by a principle of empathy."[3]

The concept of "empathetic liberalism" embodies simultaneous commitments to individualist and communitarian principles,[4] an idea that would have seemed odd only a few years ago. But in the wake of recent scholarship attempting to dissolve the historically impermeable divide between liberalism and communitarianism, the concept of "liberal community" has emerged to present political and legal theory with the challenge of reconciling within a single political framework the liberal values of individual freedom, diversity, and selfhood with the communitarian vision of shared goals and collective harmony.[5] One model attempts to demonstrate that liberalism is and has always been a form of community, implying that no dichotomy

---

[3] Anne C. Dailey, *Feminism's Return to Liberalism*, 102 Yale L J 1265, 1266-67 (1993), review of Katharine T. Bartlett and Rosanne Kennedy, eds, *Feminist Legal Theory: Readings in Law and Gender* (Westview, 1991). The idea of "empathetic liberalism" both reflects the positive influence of relational and radical feminism on classical liberal philosophy and offers feminists a unified conceptual foundation upon which to build principled arguments for social justice and women's equality. See, for example, 102 Yale L J at 1267 ("I believe [empathetic liberalism] offers law's best hope for justice founded upon true social equality.").

[4] See, for example, id at 1267 (Empathetic liberalism is "[d]istinguished by its commitment to individual diversity within community . . . ."). This emphasis on community distinguishes the communitarian/feminist vision of empathy from various claims by liberals that empathic understanding is an inherent part of liberalism. See, for example, Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 Ethics 229, 236 (1989) (finding empathy in John Rawls's political theory, which posits that actors would establish a just society if they had to choose principles of justice without knowledge of their own positions in society); R.M. Hare, *Moral Thinking: Its Levels, Method, and Point* 16-17, 89 (Oxford, 1981) (explaining the centrality of empathic understanding to correct moral judgment). See also text accompanying notes 43-49.

[5] Examples of scholarship defending the dichotomy between liberalism and communitarianism include Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 Wm & Mary L Rev 57, 64-67, 73 (1987) and Sherry, 72 Va L Rev at 544-50 (cited in note 2). Writers rejecting the dichotomy include communitarians and civic republican theorists, see, for example, Frank Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 Va L Rev 1261, 1286-87 (1991); Frank I. Michelman, *Law's Republic*, 97 Yale L J 1493, 1495-96, 1504-06 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L J 1539, 1551, 1561 (1988), as well as liberals. See, for example, Bruce Ackerman, *We the People 1: Foundations* 29-32 (Harvard, 1991); William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* 43-44 (Cambridge, 1991).

ever existed between the two.[6] Other scholars apparently take the position that liberalism could become compatible with community if appropriately modified by a communitarian principle of "political empathy."[7] Add empathy to liberalism and stir, to yield a form of liberal community that would simultaneously respect equality and individual diversity and avoid liberalism's flaws: selfishness, atomistic separatism, and emotionless abstraction. By engaging all citizens in efforts to understand and relate to others of different backgrounds, interests, and convictions, empathy would serve as the theoretical glue to bind together the halves of the liberal communitarian vision.[8]

In this essay I attempt to demonstrate that this feminist and communitarian invocation of empathy is confused and misguided. Only because feminist and communitarian theorists conflate two distinct meanings of empathy can they believe that empathy will simultaneously achieve equality and diversity. As integral a part of the classical liberal tradition as of anti-liberal critique, empathy cannot validly be deployed either to attack liberal legalism or to construct its replacement.

THE USES OF EMPATHY

The scholarly portrait of empathic community evokes a compelling image: citizens of all races and backgrounds sitting around a table, accepting each other as equal participants in political debate and engaging each other in consensus-forming

---

[6] See, for example, Ackerman, *We the People* at 6-7 (cited in note 5) (arguing that the American constitutional system has from the beginning oscillated between periods of deliberative, republican politics, during which citizens mobilize around "new constitutional solutions," and periods of "normal politics" associated with pluralist liberalism); Galsten, *Liberal Purposes* at 43 (cited in note 5) ("Liberalism does not undermine community; it is a form of community . . . . [T]he concern for community and virtue . . . is not only not antithetical te liberalism but perfectly consistent with liberalism rightly understeod."). Feminist scholars have recently attempted to bring the liberal theories of justice crafted by John Rawls and Ronald Dworkin into line with key communitarian principles. See, for example, Okin, 99 Ethics at 236 (cited in note 4); Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S Cal L Rov 1171, 1174 (1992) (arguing that "the feminist critique of liberalism as presenting an atemistic and unconnected conception of the person attacks a caricatured picture of liberalism").

[7] See, for example, Dailey, 102 Yale L J at 1283 (cited in note 3), citing Sunstein, 97 Yale L J at 1555 n 82 (cited in note 5).

[8] See, for example, Dailey, 102 Yale L J at 1285 ("Empathetic liberalism would signal an end to oppositional politics and social arrangements . . . . [It] seeks to mediate the solipsistic tendency of traditional liberal individualism by helping all of us to become outspoken, engaged, and equal citizens.").

dialogue.[9] At the core of this vision lies political empathy, which enables citizens to see the issues from others' points of view and so to learn trust and respect for people very different from themselves.[10] Political empathy dissolves socially created hierarchy and fosters mutual understanding and equality amid the presence of fundamental difference.[11]

On this view the root motivation for political empathy is the need to bring political outgroups to the table and ensure their effective participation in a dialogue among political equals. As neo-communitarian theorist Frank Michelman describes it, "the pursuit of political freedom[12] through law depends on 'our' constant reach for inclusion of the other, of the hitherto excluded—which in practice means bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups."[13]

In one sense, the communitarian "citizens-around-the-table" vision assumes a satisfactory solution to the very problem that generates its call for empathic understanding—the problem of inequality. One could argue that once all citizens are collected around the table and participating in debate, political equality has been achieved and the need for political empathy declines.

---

[9] See, for example, Sunstein, 97 Yale L J at 1549-50 (cited in note 5) (describing the republican ideal of collective discussion and debate among citizens in the context of political equality); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 Fla L Rev 443, 447 (1989) ("Deliberative politics connotes an argumentative interchange among persons who recognize each other as equal in authority and entitlement to respect. The participants direct their arguments teward arriving at a reasonable answer to some question of public ordering, meaning an answer tbat all can accept as a good-faith resolution when circumstances demand *some* social choice.").

[10] See, for example, Sunstein, 97 Yale L J at 1555 (explaining the concept of political empathy); 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 the advocacy of empathy with feminist and communitarian scholars); Nancy L. Rosenblum, *Another Liberalism: Romanticism and the Reconstruction of Liberal Thought* 184 (Harvard, 1987) (linking communitarianism with a "politics of . . . empathy").

[11] See, for example, Judith Kegan Gardiner, *Rhys, Stead, Lessing, and the Politics of Empathy* 5 (Indiana, 1989) (noting tbe opposition between empathy and domination in the short stories of Doris Lessing); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich L Rev 2099, 2122-23 (1989) (locating the call for empathy in the desire of communitarian scholars to end inequality that "consistently privilege[s] some perspectives over others").

[12] Michelman's use of the term "political freedom" includes the pursuit of equality. See, for example, Michelman, 97 Yale L J at 1526 (cited in note 5) (concluding that articulation of a "process-based, republican-not-pluralist" political vision requires "reclaiming the idea of jurisgenerative politics from its ancient context of hierarchical, organicist, solidaristic communities for the modern context of equality of respect, liberation from ascriptive social roles, and indissoluble plurality of perspectives").

[13] Id at 1529.

Because the goal of political empathy is to allow individuals to transcend socially created difference and perceive essential equality, once such equality has been achieved to the point where citizens accept each other as equals in political debate, empathy has done its work.

But the literature implies a second, more challenging role for empathy in situations where perceived difference still obscures the realization of underlying equality; that is, the need for empathy arises from the imperative to *create* actual political equality represented by the metaphor of all citizens talking at a table. Empathy becomes necessary when only some citizens, those at the top of the social hierarchy, are sitting around the table, while others have not been allowed to take their seats. Empathic understanding is required primarily of the former group to facilitate the inclusion of the latter;[14] it thus provides not only a modus vivendi for political decision making in the communitarian utopia, but also an answer to the challenge frequently leveled at communitarians, "How do we get there?"

But how can introducing empathy into the political arena produce this result? To evaluate the feminist/communitarian claim that it can, we need a closer look at the concept of empathy—especially at what happens to that concept when scholars transform it from a psychological to a political principle.

A. Meanings of Empathy

As a psychological term, empathy denotes "[a]n awareness of the thoughts and feelings of another person; the capacity to understand and in some measure share another person's state of mind."[15] The presence of empathy is said to determine the ability to create and maintain friendships and other close personal ties;[16] its complete absence is often seen as an indication of personality disorder.[17]

---

[14] For an apparent endorsement of this idea, see Linda R. Hirshman, *Nobody in Here But Us Chickens: Legal Education and the Virtues of the Ruler*, 45 Stan L Rev 1905, 1925-30 (1993) (maintaining that rulers must possess empathy in order to govern a diverse citizenry successfully).

[15] Robert M. Goldenson, 1 *The Encyclopedia of Human Behavior: Psychology, Psychiatry, and Mental Health* 395 (Doubleday, 1970).

[16] See, for example, David W. Smith, *The Circle of Acquaintance: Perception, Consciousness, and Empathy* 112 (Kluwer, 1989) (explaining that only through empathic perception can we become truly acquainted with others); Heinz Kohut, *Introspection, Empathy, and the Semicircle of Mental Health*, in Joseph Lichtenberg, Melvin Bornstein, and Donald Silver, eds, *Empathy I* 81, 85 (Analytic, 1984) (noting that empathy is a precondition for proper mothering).

[17] See, for example, Gardiner, *Rhys, Stend, Lessing* at 5 (cited in note 11) (noting the

Most of us understand empathy as the ability to "walk in another's shoes." Left at the social level—where persuasion, rather than coercion, is the primary motor of change—the reason for advocating empathy is clear: Wouldn't it be nice if we all made more of an effort to understand others' points of view before condemning them as strange or wrong? The answer, of course, is yes. But moving empathy into the political and legal arenas requires the delineation not only of empathy's substance but of its process; we must understand not only what empathy is but also how it works.

Scholarly efforts to explain the process of empathizing have brought forth as the basis for analysis a definition of empathy that is at once familiar and vague. Philosopher David Woodruff Smith, for example, defines empathy as "understanding another's experience from the other's point of view, projecting oneself into the other's place as subject of her experience."[18] This definition has the advantage of explaining both what empathic understanding is and how it comes about. But it also suggests two very distinct—and potentially conflicting—understandings of empathy, both of which legal scholars have used in promoting *political* empathy. Sometimes these scholars employ empathy to mean "projecting oneself into the other's place as subject of her experience," a definition that places empathic understanding at the center of hopes for political equality; at other times, empathy means "understanding another's experience from the other's point of view," a definition that contemplates empathic engagement as a way of achieving political diversity.[19]

---

opposition of empathy to narcissism in fiction of Christina Stead); James S. Grotstein, *Some Perspectives on Empathy from Others and Toward Oneself*, in Lichtenberg, et al, eds, *Empathy I* 201, 206-07 (cited in note 16) (stating that narcissistic defects may be explained as failures to develop empathic ability); Lynne N. Henderson, *Legality and Empathy*, 85 Mich L Rev 1574, 1583 (1987) ("[R]epeated studies seem to validate the relation of lack of empathy to sociopathic persons . . . .").

[18] Smith, *Circle of Acquaintance* at 112. In her insightful article, Henderson contends that the word "empathy" captures "three basic phenomena":

> (1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another . . . .

85 Mich L Rev at 1579. The analysis in this essay focuses on the second element in Henderson's definition of empathy.

[19] These definitions may not, of course, reflect the way the concept of empathy is used in other fields, such as psychology. In this essay I employ the psychological and anthropological literature about empathy to argue that: 1) the concepts of empathic understanding employed by feminists and communitarians have roots in our actual behavior and in our

B. Empathy and Equality: Projective Empathy

Communitarian and feminist scholars have expressed the hope that empathic engagement will lead citizens of widely different backgrounds and interests to engage in dynamic, dialogic interactions that both accept others as political equals and produce societal institutions that will recognize and perpetuate that equality.[20] Indeed, some communitarians and feminists explicitly blame the inequalities present under "liberal legalism" on the alleged absence of empathy in liberal societies.[21] On this view, "real" equality is not merely a matter of liberal "equal rights," but requires that all individuals be able, through empathic interaction, to see the essential humanity of those whose race, gender, socioeconomic background, or sexual orientation are different from theirs.[22] Empathy is thus the enemy of hierarchy and the

---

characterization of it, and 2) the attempted transfer of empathy from a psychological to a political concept creates intractable problems.

[20] See, for example, Dailey, 102 Yale L J at 1285 (cited in note 3) ("Empathetic liberalism seeks to mediate the solipsistic tendency of traditional liberal individualism by helping all of us to become outspoken, engaged, and equal citizens."); Sunstein, 97 Yale L J at 1548-58 (cited in note 5) (describing the four basic principles of the "republican revivalist" movement—deliberation, political equality, universalism, and citizenship—and explaining the importance of empathy to their realization). As I argue below, the principles outlined here apply however one defines equality—as equality of respect, of personhood, or of material result. See text accompanying notes 83-84.

[21] See, for example, Dailey, 102 Yale L J at 1285 (cited in note 3). But see McClain, 65 S Cal L Rev at 1203-09, 1218-23 (cited in note 6) (disputing the idea that the liberal philosophies esponsed by John Rawls and Ronald Dworkin are devoid of empathy and connection).

[22] There are two relevant meanings of equality here. The first relates to the presence of empathy among the citizenry. Can empathy promote equality only if *all* citizens exercise it to the same, or nearly the same, degree? Does the achievement of political equality require an equal amount of empathic understanding in every citizen? In a communitarian utopia, the answer would seem to be yes, because it would be necessary for all those seated at the political table to be able to understand the others' viewpoints. But in a world in which some groups have been effectively excluded from the discussion, communitarians focus on a second meaning of equality. This meaning emphasizes not the equal capacity for empathy in all citizens, but its usefulness in *producing* political equality via the promotion of empathic ability among only some citizens—the "insiders" already seated at the political table. Empathy's advocates emphasize that the focus of such empathy must be "outgroups" such as women and people of color. See, for example, Michelman, 97 Yale L J at 1529 (cite in note 5). Empathy, in short, is to be encouraged within society's privileged ranks and used within existing social hierarchy to produce political equality.

Given the empirical evidence that the capacity for empathy does not naturally occur in equal proportions among citizens—in fact, that individuals' empathic abilities vary considerably, see, for example, Goldenson, *Encyclopedia* at 395-96 (cited in note 15)—we mnst assume for the sake of argument that empathy can be taught. This is by no means proven, see, for example, id at 396, but the argument for political empathy cannot survive a centrary conclusion.

friend of subordinated groups such as women and minorities.[23]

To evaluate this vision of empathic understanding, we must know the nature of the relationship between empathy and equality. Is there a *natural* affinity? That is, does the experience of empathy require, complement, and/or produce a realization of equality between the empathizer and the object of her efforts? The answer depends on how we conceive empathy.

Consider a view of empathy as "projecting oneself into the other's place as subject of her experience." Imagine a machine capable of transporting the incorporeal "self" of one individual, the empathizer, from his or her own body and life circumstances and into those of another. This metaphor seems to capture the meaning of empathy as "putting yourself in the other person's place."[24] Supposing, for example, that "I" happen to be a white female law professor, how differently would "I" feel, and about what issues, if my "self" were suddenly encased in a male body? If I were suddenly to become a person of color? If I were to find myself experiencing the life of a politician, a waitress, or a construction worker?

This vision of empathy offers many opportunities to "understand and . . . share another person's state of mind";[25] it therefore qualifies as a genuine interpretation of empathy rather than some other idea. Indeed, both fact-based and fictional examples of this "projective" type of empathy are well-known in our culture. One famous example appears in the book *Black Like Me*,[26] in which John Howard Griffin chronicles the true story of his decision to disguise himself as a black man to experience directly, from the black perspective, the American racial climate of the 1960s.

---

[23] See, for example, Michelman, 97 Yale L J at 1524, 1529 (cited in note 5) (outlining a communitarian vision he labels "dialogic constitutionalism" and suggesting that, under it, "the pursuit of political freedom through law depends on 'our' constant reach for inclusion of the other, of the hitherto excluded—which in practice means bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups"); Dailey, 102 Yale L J at 1285 (cited in note 3) (claiming the feminist commitment to empathic narrative "offers the hope of improving the empathetic understanding of listeners with power . . . ").

[24] It also avoids the threshold question of whether empathy is even possible, the answer to which would require an inquiry into the possibility of knowing other minds, an undertaking beyond the scope of this essay. The goal here is to examine the claims made for empathy in the light most favorable to them; assuming that empathy *is* possible, what can it achieve politically?

[25] Goldenson, *Encyclopedia* at 395 (cited in note 15).

[26] (Houghton Mifflin, 2d ed 1977).

Of course the concept of empathy relies on the empathizer's imagination rather than his actually living the life of another. But this does not paralyze the argument. One can easily imagine, for example, how projective empathy might be very useful in the feminist fight for women's equality. Suppose, to take a typical example, that a woman receives repeated unwanted sexual advances from her boss but remains reluctant to file a lawsuit or quit her job. A successful man might react with incomprehension, or even contempt, to her situation; he might think: "*I* would never suffer such an indignity without leaving" or "*I* would never let him get away with it; I'd sue!"[27] Or perhaps the man simply considers sexual harassment a trivial matter not worth agonizing over. The transporter exercise might lead a thoughtful man to reconsider; looking through the eyes of the woman, he would see the gender-based constraints imposed on her by, for example, low pay, lack of demand for workers in her job, family responsibilities, and the consequent need for a steady income.[28] Given this opportunity, a reasonable man would realize that the dignity-conferring decisions that seem so easy from a position of economic comfort and professional prestige become much more difficult when standing in the shoes of a woman who is sexually harassed.[29]

---

[27] This would be a case of classic projection, of ascribing one's own feelings to others *without* attempting to "walk in their shoes." As many have noted, projection alone should not be confused with empathy. See, for example, Henderson, 85 Mich L Rev at 1651 (cited in note 17) (discussing the difference between empathy and projection); Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* 154 (Cornell, 1990) (perceiving, and criticizing, this type of projection in the work of John Rawls and contrasting it with empathy); Seyla Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory*, in Seyla Benhabib and Drucilla L. Cornell, eds, *Feminism as Critique: On the Politics of Gender* 77, 88-89 (Minnesota, 1987).

[28] According to statistics compiled by the United States Department of Labor, more than 34 percent of employed women worked in clerical jobs as recently as 1982. Nearly 20 percent were service workers; some 17 percent were professional and technical workers. In 1981, median earnings for all women were 59.2 percent of men's earnings. Among the 5.9 million families maintained by women workers, 22 percent had incomes below the poverty line. See *Time of Change: 1983 Handbook on Women Workers*, U.S. Department of Labor Bulletin 298 at 55-56, 82, 103 (1983).

[29] In her book *Toward a Feminist Theory of the State*, radical feminist Catharine MacKinnon suggests that the sexual domination of women is directly related to their relative ecenomic poverty; that, in effect, women are kept poor to be available for sexual harassment:

> [O]ver time, women have been economically exploited, relegated to domestic slavery, forced into motherhood, sexually objectified, physically abused, used in denigrating entertainment, deprived of a voice and authentic culture, and disenfranchised and excluded from public life. Women, by contrast with cemparable men, have systematically been subjected to physical insecurity; targeted for sexual denigration and vio-

As others have pointed out, the understanding gained through projective empathy is both rational and emotional.[30] The imaginative projection of oneself into another's body makes possible not only the acquisition of relevant new data about the other's situation but also direct sharing of the other's feelings. In the case of sexual harassment, these feelings may include fear, revulsion, guilt, anger, and denial.

It follows that the usefulness of projective empathy derives directly from its conversion of the empathizer's *self*-interest into the interest of another; one can be confident that this conversion will take place without making utopian assumptions about innate human goodness. That is, through imaginative transportation into another's circumstances, one's self-interest operates to benefit the other. When "I" am suddenly living the experiences of another, I come to understand the other in the intimate way that I understand myself. Projective empathy, then, draws its power of understanding not from feelings of altruism but from feelings of self-regard.[31] Extending help to the other becomes, psychologically, extending help to oneself; one's judgment is emotionally won over to the other person's point of view, which has, through empathic understanding, imaginatively become one's own.

Most of us have experienced a limited form of projective empathy as analogy. By comparing some part of our own experience to another's similar experience, we gain a new understanding of that other person. For example, current legal scholarship frequently compares the experiences of victimization suffered by different social groups, such as racial minorities and women, in

---

lation; depersonalized and denigrated; deprived of respect, credibility, and resources; and silenced—and denied public presence, voice, and representation of their interests. Men as men have generally not had these things done to them .... Men have done these things to women.

MacKinnon, *Toward a Feminist Theory of the State* at 160-61 (cited in note 2).

One need not press this far to make the necessary point here. I merely note that statistically, and despite substantial progress in recent decades, women as a group remain poorer than men. This fact might differentially influence the responses of each gender to a situation of sexual harassment.

[30] See, for example, Henderson, 85 Mich L Rev at 1576 (cited in note 17) ("[E]mpathy is a form of understanding, a phenomenon that encompasses affect as well as cognition in determining meanings ....").

[31] For variations on this idea in liberal theory, see, for example, Hare, *Moral Thinking* at 124-29 (cited in note 4) (describing the process by which empathic understanding equates one's own interest with the interests of others); Okin, 99 Ethics at 244 (cited in note 4) (claiming that the Rawlsian veil of ignorance mandates empathic understanding because it "converts what would, without [the veil], be self-interest into benevolence or the equal concern for others").

the hope of deepening mutual understanding among the victims of racism and sexism.[32] Analogizing the experiences of others to one's own creates a feeling of involvement in the lives of others and leads to a deeper understanding of them.[33]

One might well conclude from this that projective empathy does produce a sense of equality between empathizer and object. To "understand" the other means to perceive through one's empathic efforts that, if one's own circumstances were those of the other, one could in fact hold the other's preferences, behave as the other does, or even *be* that other; that you and she are, in some essential way, the *same* and therefore *equal*. Empathy is psychological dynamite which blasts through apparent difference to uncover essential sameness.

But this conclusion requires an examination of what, exactly, it means to "project one's *self* into the shoes of another." As the philosopher R.M. Hare put it, "[I]f all the properties of the situation in which I had to imagine myself, including the properties of the person in whose shoes I was putting myself, were so unlike those of myself and my present situation, would it any longer be *me*?"[34]

It is immediately clear that to produce the salutary effects described above, projective empathy requires more than the imagined transfer of one's being into the *events* of another person's life. At this level one is engaged in mere projection, assigning to the other one's own acquired values and personality.[35] If projective *empathy* is to help achieve real understanding

---

[32] Legal scholars have commented on both the prevalence and the dangers of this kind of comparison. For example, Trina Grillo and Stephanie M. Wildman argue that "[c]omparing other oppression to race gives whites a false sense that they fully understand the experience of people of color." *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 Duke L J 397, 405. They emphasize that "[t]he comparison minimizes the impact of racism . . . ." Id at 401.

[33] See Louis Agosta, *Empathy and Intersubjectivity*, in Lichtenberg, et al, eds, *Empathy I* 43, 56-57 (cited in note 16) (discussing analogizing as a way of "initiat[ing] the activity of empathic receptivity").

[34] Hare, *Moral Thinking* at 119 (cited in note 4). For charges that the "self" is inseparable from the social circumstances that create difference, see generally Benhabib, *The Generalized and the Concrete Other* at 86-95 (cited in note 27); Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge, 1982).

[35] See note 27 and the accompanying text. A wonderful fictional example of projection is embodied in the character of Mr. Woodhouse, the heroine's father in Jane Austen's novel *Emma* (Zodiac, 10th ed 1983). Mr. Woodhouse was widely beloved for his compassion and concern for others—but these qualities were rooted in his unthinking belief that others were like himself. These "habits of gentle selfishness, and of being never able to suppose that other people could feel differently from himself" set severe, and often ab-

of "outsiders," it must do more. It must at least require that the empathizer attempt to imagine herself in the events of the other's life *with* the other's politically relevant differences—for example, with the other person's race, gender, or socioeconomic class.

But which differences are politically relevant? Can we really answer this?[36] Suppose that we can. The next question is Hare's: What is left of the "self" once it has taken on the life and politically relevant differences of another? There are two possible answers to this question: 1) nothing, in which case projective empathy becomes either impossible or useless; and 2) something independent of individual experience and difference, perhaps something approximating what Zeno Vendler described as "the bare form of consciousness," an abstract quality of personhood that all humans share.[37] This quality of consciousness serves as the means by which one person imaginatively "walks in the shoes" of another.

Feminists and communitarians flatly reject the abstract, universal idea of the self upon which projective empathy rests,[38] and I discuss the consequences of that rejection below.[39] It does seem clear that the concept of projective empathy as developed here contradicts the idea that empathy and liberal individualism are opposed, or, in a weaker sense, that liberalism is something to which empathy can be *added* to achieve a better society. In fact, it appears from the discussion above that projective empathy is not only positively related to abstract liberal equality, but actually gave birth to it. If one function of empathic understanding is to enable citizens to see behind apparent differences to the

---

surd, limits on his ability to comprehend others. Id at 7. For example, he finds it hard to comprehend the desire of his older daughter to marry, "though it had been entirely a match of affection," since *he* could never envision leaving the family home of Hartfield. Id. And because he had a digestive problem that prohibited him from eating rich food, he was miserable when anyone else did so, since "[w]hat was unwholesome to him, he regarded as unfit for any body . . . . " Id at 15.

[36]   For a feminist claim that we cannot, see Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L J 1373, 1377-80 (1986).

[37]   Hare, *Moral Thinking* at 119-21 (cited in note 4); Zeno Vendler, *A Note to the Paralogisms*, in Gilbert Ryle, ed, *Contemporary Aspects of Philosophy* 111, 117 (Oriel, 1976) ("How can I . . . take on another essence as it were, albeit in the imagination? . . . The answer is that the 'I,' the subject of such a transference[,] has no content and no essence; it is a mere frame in which any picture fits; it is the bare form of consciousness.").

[38]   See, for example, Henderson, 85 Mich L Rev at 1591 (cited in note 17); Dailey, 102 Yale L J at 1278-85 (cited in note 3).

[39]   See text accompanying notes 53-81.

essential humanity of all persons, then empathy is the *source* of abstract liberal equality and liberal legalism, which posit that all persons are equal and that the law must recognize this fact. Politically and legally, projective empathy translates into the idea that each individual should accord all other selves equal respect, since if "I" were literally in your shoes, I could well behave and believe as you do.

Equality, here, is based on sameness—on the essential, and politically relevant, similarity between human beings—and this analysis leads quickly to endorsement of the same abstract, liberal visions of self that feminist and communitarian critics hope political empathy will counteract.[40] Projective empathy, on this view, adds nothing to liberalism; it is in fact a core premise of liberal justice.

This conclusion does not mean that projective empathy has no implications for social reform; quite the contrary. If, as I concluded above, empathic understanding can produce a sense of equality between persons, it seems likely that empathy can result in a realization of the unjust *in*equalities created by law. Suppose, for example, that whites and blacks in America live under a system of legal segregation that is enforced by the majority white culture and is, from the perspective of most whites, "separate but equal." Since the concept of "separate but equal" seems theoretically possible—that is, there is nothing logically impossible about constructing such a system—the actual inequality of the system may remain unobserved until whites begin to imagine themselves living under it as black people. The violation of the liberal idea of equality becomes apparent only when one sees how, in the context of slavery and its racist aftermath, segregation labels blacks as inferior to whites.

Indeed, projective empathy may have motivated the most revered court case in the history of liberal civil-rights reform: *Brown v Board of Education.*[41] Lynne Henderson, in a recent search for empathy in Supreme Court opinions, identified *Brown* as the result of empathic understanding by the Court. Henderson never explores the concept of projective empathy,[42] yet her conclusion that *Brown* is an empathic decision seems powerful once one

---

[40] See, for example, Dailey, 102 Yale L J at 1278-85 (contrasting the traditional liberal idea of selfhood with a vision of "empathetic liberalism"). See generally Benhabib, *The Generalized and the Concrete Other* at 27 (cited in note 27).

[41] 347 US 483 (1954).

[42] Henderson, 85 Mich L Rev at 1593-1609 (cited in note 17).

deploys the concept of projective empathy to analyze it. Through empathic engagement with blacks, the Supreme Court perceived the inequality inherent in legally mandated segregation. The Court therefore realized that segregation violated the liberal equality-ideal believed to exist in the Constitution and concluded that segregation must be stopped.

It appears, in short, that projective empathy *does* contain a premise of equality—but one that is based on the liberal model of abstract individualism. In fact, here the notion of empathy actually bleeds into the definition of abstraction itself, since it is the essence of the latter imaginatively to consider and categorize the commonalities of distinct entities apart from their differences.[43]

Empathy's claim to true understanding rests on the idea that when "I" project my "self" into your circumstances, "I" recognize you as an equal, or in the more typical case, I come to acknowledge that we are equal despite our differences. This capacity of projective empathy to *create* feelings of equality between individuals appears to distinguish it from related concepts that have been employed by liberal philosophers like Hare, Okin, and Rawls.[44] For example, though he never employs the term "empathy," Hare's analysis of moral judgments relies significantly on our ability to put ourselves in the positions of others who will be affected by our judgments, in order to discover their preferences.[45] Similarly, Susan Moller Okin argues that the Rawlsian veil of ignorance forces everyone behind the veil to consider equally the situations and perspectives of all.[46] Both of these views appear to assume a prior principle of equality upon which empathic understanding builds.

But political empathy must achieve more. Political dialogue, after all, *begins* with the expression of different preferences; empathy is needed here not only to discover such preferences, but

---

[43] *Webster's* defines "abstraction" as "the act or process of imaginatively isolating or considering apart the common properties or characteristics of distinct objects." *Webster's Third New International Dictionary* 8 (1961).

[44] None of these philosophers actually analyzes the process of empathic understanding, and I cannot, therefore, associate any of them with the concept of "projective empathy" as developed in this essay.

[45] Hare argues that to accept the universality of a moral prescription, we must "satisfy ourselves that we can accept the *universal* application of the prescription; and this includes its application were we in the other's position." *Moral Thinking* at 89 (cited in note 4). Doing this requires knowing facts about the other's position and his preferences. Id at 90-95.

[46] Okin, 99 Ethics at 244 (cited in note 4) ("[S]ince one does not know which person one will turn out to be, one's rational self-interest presumably directs one to being equally concerned for each.").

also to allow us to understand their origins and justifications. Beginning from difference, as expressed in different preferences, we are asked to acknowledge the justice of those preferences via empathic engagement with each other. Empathy must create a sense that the outsider's claims are just; it does so by making us realize that were we in the circumstances of the other's life, we would also make her claims. This capacity of empathic interaction to create a sense of equality is vital to empathy's potential to combat racism and sexism, both of which are based on a conviction of the inferiority of others. In terms of legal rights, it is also consistent with the liberal progression from "equal treatment" to the idea that equality is better expressed as "equal concern,"[47] "equal acceptance,"[48] or "equal opportunity."[49] Once one empathically realizes that the circumstances of another make her request for special treatment just, one can, within the framework of liberalism, move away from an equal-treatment model of law.

Of course, liberal equality and projective empathy may in fact be mutually reinforcing; just as empathic engagement may lead to a belief in essential equality among human beings, a belief in equality may generate a desire for, or a duty to employ, empathic understanding. Suppose, for example, that as a good liberal, I begin by believing that all persons deserve equal respect. That belief may itself be the result of empathic understanding. Once I have this conviction, however, it may in turn motivate me to perceive the essential humanity of others despite apparent difference; that is, the liberal *assumption* that all humans are worthy of equal respect may lead to a desire to empathize with others.

Communitarians want to reject the conclusion that political empathy is a basic component of liberalism. Yet that conclusion seems unavoidable.[50] If projective empathy is possible, it relies

---

[47] See Ronald M. Dworkin, *Taking Rights Seriously* 180, 272-78 (Harvard, 1977).

[48] See Christine A. Littleton, *Reconstructing Sexual Equality*, 75 Cal L Rev 1279, 1284-85 (1987).

[49] See Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women's L J 1, 26-27 (1985).

[50] This argument applies whether or not the object of empathic understanding is a human being. *Webster's* defines "empathy" as "the imaginative projection of a subjective state whether affective, conative, or cognitive into an object so that the object appears to be infused with it: the reading of one's own state of mind or conation into an object." *Webster's* at 742 (cited in note 43). This is often the meaning implied in references to artists as empathic. For example, in a powerful description of empathic connection one of John Keats's friends observed: "[Keats] has affirmed that he can conceive of a billiard Ball that it may have a sense of delight from its own roundness, smoothness . . . volubility & the rapidity of its motion." Richard Woodhouse, *Notes on a Letter from Keats*, in Hyden

on an abstract liberal vision of the self; to the extent that feminists and communitarians reject that vision of the self—that is, to the extent that "I" am more than "a mere frame in which any picture fits"[51]—projective empathy becomes difficult or impossible. If the self is inseparable from its social circumstances, as feminists and communitarians claim, it follows that when I employ projective empathy to understand someone else's circumstances, I inevitably bring the foundational parts of my "self"—my own intelligence, self-esteem, and courage, as well as my gender, race, and socioeconomic background—to the experience in a way that prevents any deep understanding of the other. Only if the other person is substantially the *same* as I am—that is, shares my social circumstances—is there no distortion of understanding.

It seems to follow that diversity and projective empathy do not mix well. If there is no universal element in human selfhood, then any individual "I" can fully empathize only with others whose self-developing experiences are at least closely analogous to its own; in short, projective empathy will not allow us to transcend the social differences, such as race, gender, and socioeconomic background, that contribute to the formation of the "self."

If this is right, employing projective empathy politically will bring only disaster. Though it might lead to mutual understanding and increasing closeness *within* different social groups—for example, among whites, among blacks, and perhaps among women—it could make empathy *between* groups impossible since, by hypothesis, socially created differences cannot be transcended in order to achieve it. Political use of projective empathy might therefore create an impasse between groups that have no hope of understanding each other, as well as a growing feeling of alienation from each other—in short, it may lead to the opposite of the communitarian goal. In such a context, political dialogue becomes a war between groups for advantage rather than a cooperative effort for the common good. Thus, projective empathy will either add nothing to political liberalism or lead us toward a balkanized society where political muscle, rather than empathic exchange,

---

Edward Rollins, ed, 1 *The Keats Circle: Letters and Papers 1816-1878* 57, 59 (Harvard, 2d ed 1965). See also Alfred Margulies, *The Empathic Imagination* 15 (Norton, 1989). This type of empathic engagement treats the object as having a human consciousness; that is, it does not answer the question, "How does a billiard ball feel?"—obviously a billiard ball has no feelings at all—but rather the question, "How would *I* feel if I, my human consciousness, were transplanted into the form of a billiard ball?"

[51] Vendler, *Paralogisms* at 117 (cited in note 37).

decides political contests—hardly an arrangement communitarians could endorse.

But perhaps another interpretation of empathy is possible. Unlike projective empathy, this type might reject liberal assumptions about the universalizable self and insist that diversity goes "all the way down"—that there is no essential identity common to all human beings and upon which politics and law may legitimately be constructed. Critics of liberalism appear to make this claim.[52] Is such an interpretation of empathy viable?

C. Empathy and Diversity: Imaginative Empathy

Feminist and communitarian scholars advocate empathy as a means to promote diversity and to higlight liberalism's failure to do so. Under this view, liberal philosophy's focus on abstraction, on the design of a universal human personality—the autonomous, rational, self-maximizing, freedom-loving individual—around which to organize political and legal institutions, results in a society that suppresses diversity and punishes those whose cultural or socioeconomic backgrounds make them unable or unwilling to behave in ways that liberal legalism proclaims "rational."[53] Empathy is thus injected into the political system to bring law to earth, to force it to recognize and grapple with the actual diversity in the lives of citizens rather than assume speciously "objective" theories about human nature.[54]

---

[52] See, for example, Katharine T. Bartlett, *Feminist Legal Methods*, in Katherine T. Bartlett and Rosanne Kennedy, eds, *Feminist Legal Theory* 370, 392 (Westview, 1991) ("[T]he source of community [is] its diversity."); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 Harv L Rev 4, 32 (1986) ("The human universal becomes difference itself. Difference is what we most fundamentally have in common.").

[53] See, for example, Iris Marion Young, *The Ideal of Community and the Politics of Difference*, in Linda J. Nicholson, ed, *Feminism/Postmodernism* 300, 307 (Routledge, 1990) (Liberalism "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."); Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 NM L Rev 613, 619-20 (1986).

[54] See, for example, Dailey, 102 Yale L J at 1285 (cited in note 3). I should note that feminists and communitarians do not always agree that *all* universal principles are useless; in fact, some communitarian work can be read as favoring the construction of a universal "common good" through egalitarian, dialogic politics. For a discussion of this disagreement, see id at 1284 (criticizing Cass Sunstein for "remain[ing] loyal to a notion of 'universalism,'" and arguing that "[b]ecause of its commitment to a politics of diversity, feminist narrative is compatible with only the weakest version of [communitarian] civic republicanism, under which the 'common good' means little more than pluralist compromise"). Nevertheless, communitarians agree with feminists in condemning abstract individualism or any universal construction that denies diversity. See, for example,

This understanding of empathy is explicitly "contextual" and is frequently connected to the methodology of story-telling, which strives through narrative to illustrate the gap between liberal "formal equality" and the lived experience of disadvantaged groups, and to use evidence of that gap to reconstruct jurisprudence "from the bottom."[55] Dailey, for example, explicitly links the feminist use of narrative to the need for empathy:

> To be effective . . . the call to narrative must do more than give voice to women's stories. The feminist reconstructive effort requires that the stories be heard; women's stories must be received with the creative understanding of an empathetic listener. Empathy in this context "enables the decisionmaker to have an appreciation of the human meanings of a given legal situation." Narrative can transcend human difference only when the listener responds to the story of another by seeking out traces of her own experience.[56]

Perhaps paradoxically, empathy-based promotion of diversity has been firmly opposed to individualism.[57] Scholars depict liberal philosophy as imposing identical personalities on all individuals, thus destroying, or at least denying, diversity.[58] Their hope is that increased understanding of others through empathic engagement will lead to the recognition that diversity cannot be contained with the liberal framework positing the fundamental similarity of human beings but instead goes "all the way down."[59] In addition, these critics view the physical individual

---

Sunstein, 97 Yale L J at 1585-89 (cited in note 5) (defending the idea of proportional representation based on the right of disadvantaged groups and others to diversify views expressed in government fora). Additionally, communitarians' notion of a "common good" often appears to be little more than "pluralist compromise." See generally id. It therefore makes sense to discuss feminist and communitarian critiques of liberalism together.

[55] See, for example, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich L Rev 2320, 2322 (1989) (defending the narrative methodology of "outsider jurisprudence—jurisprudence derived from considering stories from the bottom—[to] help resolve the seemingly irresolvable conflicts of value and doctrine that characterize liberal thought").

[56] Dailey, 102 Yale L J at 1278 (cited in note 3), citing Henderson, 85 Mich L Rev at 1576 (cited in note 17).

[57] Or at least describes it as a method of changing liberal individualism for the better. See generally Dailey, 102 Yale L J at 1278.

[58] See, for example, text accompanying note 53.

[59] See, for example, Dailey 102 Yale L J at 1279 ("Many feminists now locate 'the source of community in its diversity,' affirming Frank Michelman's paradoxical insight: 'The human universal becomes difference itself. Difference is what we most fundamentally have in common.'").

not as a pre-political unit that remains unchanged by the community, but as fundamentally constructed by, and bound to, his or her society. Political empathy is thus designed both to encourage the recognition of bottomless human diversity and to locate it within a viable theory of community.[60]

Unlike liberal projective empathy, a second understanding of the concept would remain true to the feminist and communitarian value for context-based analysis of human behavior and acknowledgment of human diversity. As we have seen, projective empathy is inescapably self-focused—indeed, it works only to the extent that it is self-focused. Under this interpretation, empathy operates as "projecting *oneself* into the other's place *as subject* . . . ."[61]

In contrast, a second interpretation of empathy would place more weight on empathy as "understanding another's experience from *the other's* point of view."[62] This conception thus forces a *de*-emphasis of the empathizer's self in order to freely construct a picture of the other that simultaneously recognizes the fundamental diversity of individuals and their imaginative capacity to understand and connect with each other across the lines of socially created difference.

Something like this concept has appeared in the literature of anthropology and psychotherapy. The cultural anthropologist Clifford Geertz, for example, has written:

> In all three of the societies I have studied intensively, Javanese, Balinese, and Moroccan, I have been concerned, among other things, with attempting to determine how the people who live there define themselves as persons, what goes into the idea they have . . . of what a self, Javanese, Balinese, or Moroccan style, is. And in each case, I have tried to get at this most intimate of notions not by imagining myself someone else, a rice peasant or a tribal sheikh, and then seeing what I thought, but by searching out and analyzing the

---

[60] See, for example, Michelman, 41 Fla L Rev at 450 (cited in note 9) ("According to . . . the 'dialogic conception' [ ] of the self in society, a person's identity is partially constituted by that person's social situation, and personal freedom accordingly depends on a capacity for self-critical reconsideration of the socially embedded ends and commitments that partly make one who one is."); Sunstein, 97 Yale L J at 1549 (cited in note 5) ("The republican position is . . . that existing desires should be revisable in light of collective discussion and debate, bringing to bear alternative perspectives and additional information.").

[61] Smith, *Circle of Acquaintance* at 112 (cited in note 16) (emphasis added).

[62] Id (emphasis added).

symbolic forms—words, images, institutions, behaviors—in terms of which, in each place, people actually represented themselves to themselves and to one another.[63]

According to Geertz, "[t]he ethnographer does not, and, in my opinion, largely cannot, perceive what his informants perceive. What he perceives, and that uncertainly enough, is what they perceive with . . . . In the country of the blind . . . the one-eyed is not king, he is spectator."[64]

It would be natural to ask how this role as "spectator" involves empathy at all, rather than purely cognitive analysis. Geertz, in fact, seems to contrast his own methodology with empathy.[65] Psychiatrist Alfred Margulies suggests a possible response: "imaginative empathy."[66] Margulies discusses his use of "imaginative empathy" first to visualize his patients' characters and then to interpret their behavior.[67] Here empathy becomes not the placement of one's "self" in another's shoes, or even the analogizing of the other's experiences to one's own; rather, it becomes the conscious *setting aside of the self* in order to construct the unique self of the patient, followed by the imaginative transformation of one's picture of the other into insights that can help her bring latent, unconfronted parts of herself to consciousness. Margulies describes the experience of imaginative empathy:

> With one patient, for example, I recall a farm in my mind's eye, the fields, the roads, the old lady who fed the patient/me ginger snaps and bananas—all experiences I have lived empathically through her. I do not recall in my own life whether I have ever even had ginger snaps and bananas together, but I can almost taste them on my mind's tongue. Moreover, I sometimes recollect such empathic sensations more readily than does the patient from whom I have learned them! . . . It is not merely my reaching into resonant experience from my own life (for example, that I have, parallel to the patient, fond boyhood memories of eating cookies and feeling happy and secure). It is more: *I now have memo-*

---

[63] Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* 58 (Basic Books, 1983).
[64] Id.
[65] See id at 59, 70.
[66] See Margulies, *Empathic Imagination* (cited in note 50).
[67] Id at 14-18.

ries empathically derived and elaborated into a relatively coherent form from someone else's experience.[68]

Margulies seems to describe a version of empathy that requires therapists simultaneously to recognize the presence of the patient's self as unique and to strive through sheer imagination to understand it. While he acknowledges "the ultimate unknowability of the other,"[69] it seems clear that this imaginative exercise is useful only to the extent that it decreases that unknowability—to the extent, in other words, that it illuminates some portion of the truth about the patient's life to him or her.

For the purposes here, the power of imaginative empathy[70] lies in its potential for curing at least some of the limitations of purely projective empathy. Imaginative empathy allows the empathizer to construct the other as a completely separate being, thereby fully acknowledging the other's diversity and removing the obstacles to perception one encounters in attempting to inject oneself into another's experience as a way of understanding it.

Is imaginative empathy, then, an appropriate vehicle for transcending difference, for understanding and respecting others as unique and separate beings? This conclusion is too hasty. When we move from projective to imaginative empathy we can recapture diversity—but we lose any inherent connection to equality.

Unlike projective empathy, imaginative empathy seeks at some level to set aside the empathizer's self in order to construct the other, thus enabling the empathizer to acknowledge and appreciate the diversity of the other. Empathy, which in its projective form is used to see through difference in order to perceive essential humanity, is here deployed in order to accomplish the opposite result: to acknowledge and appreciate the essential difference of the other. And once difference becomes the root idea, empathy's necessary connection to equality disappears.

In fact, this interpretation of empathy is entirely consistent with *inequality* in many familiar contexts. Not only is it unnecessary, for example, for a psychotherapist to assume that her patient is an equal—it may be unlikely or even impossible. Consider that Sigmund Freud, who discussed the importance of empa-

---

[68] Id at 54.
[69] Id at 57.
[70] Of course, both "projective" and "imaginative" empathy involve imagination. The name "imaginative empathy" is intended to emphasize the higher level of imagination necessary to construct the other when one's own self is taken out of the equation.

thy within the psychotherapeutic relationship,[71] also wrote that psychoanalysis presupposes "a situation in which there is a superior and a subordinate."[72] Here the empathizer is the "healthy" one, the "expert," the one with power and control, while the patient is the "sick" one, the weak one, who comes seeking help and guidance.[73]

This depiction of imaginative empathy as *intra*-hierarchical has other close analogues. For example, many scholars of psychology have written about the empathic relationship between mother and child.[74] Like the interaction between psychotherapist and patient, the mother-child relation necessarily involves what might be called "benign domination," a situation where the party with control has expertise and strength that the powerless party needs to thrive. In both cases, we expect the dominator to use her powers of empathic understanding to help the other move toward independence, although even the existence of a power differential indicates the potential for abuse.

A key point here is that the dominant party may not be the one with the greatest incentive to be empathic. The person at the bottom of the hierarchy must at some level be aware that his well-being depends on the powerful other, and so has good reason to learn that other's psychology in order to please her. Thus, therapists and mothers employ empathy out of goodness and/or professional commitment; patients and children learn it out of necessity. Those who wish to introduce empathy into the political

---

[71] See Sigmund Freud, *Group Psychology and the Analysis of the Ego* 66, 70 n 2 (Hogarth, 1948) (James Strachey, trans); Margulies, *Empathic Imagination* at xi (cited in note 50) (recounting this fact).

[72] Sigmund Freud, *On the History of the Psychoanalytic Movement* 49 (Norton, 1966) (Joan Riviere, trans; James Strachey, ed).

[73] The image of hierarchy, and especially of the power of the empathizer, is brought home even more strongly (although perhaps unintentionally) by therapist Alfred Margulies, who opens Part One of *The Empathic Imagination*, "Toward Empathy," with the following quotation from Keats: "Then I felt like some watcher of the skies, When a new planet swims into his ken . . . ." Margulies, *Empathic Imagination* at 2 (cited in note 50). What a sense of the "watcher's" power Keats conveys!

[74] See, for example, Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 7-9 (Harvard, 1982) (discussing the work of Nancy Chodorow on female development and its relationship to empathic mothering); Gardiner, *Rhys, Stead, Lessing* at 2 (cited in note 11) (discussing "mothering theory," which contends that women are socialized into empathic motherhood since "women's personalities develop in identification with their mothers through strong early bonds whose pleasures are so compelling that women throughout their lives yearn for maternal nurturance and learn to give it to children, men, and other women"). But see Henderson, 85 Mich L Rev at 1582 (cited in note 17) (discussing the "myth" that women are naturally more empathic than men).

process must first explore this phenomenon. Otherwise, a blanket endorsement of empathy might encourage those on the bottom to develop empathic understanding that is not reciprocated by those at the top. This would only fortify the power position of the latter and reinforce, rather than weaken, hierarchical social arrangements.

Once sought, the "bottom-up" variety of empathy is just as apparent as the "top-down" version.[75] Consider two examples. The discussion above makes clear that women have long been sweepingly described as "naturally" empathic, and certainly they hold the top position in the mother-child hierarchy. But women's relation to men is generally the reverse—and their incentive to be empathic may be even stronger as wives and lovers than as parents. Learning to please male authority figures has been a prime element of women's socialization, and until very recently was integrally related to their survival and success in the world. Similarly, sociologist Robert Merton concluded that blacks, as victims of socially generated race-based hierarchy, have had the incentive to learn more about whites than whites have had to learn about blacks. His 1973 analysis of the racial "insider-outsider" phenomenon remains relevant:

> That the white-dominated society has long imposed social barriers which excluded Negroes from anything remotely like full participation in that society is now known to even the more unobservant whites. But what many of them have evidently not noticed is that the high walls of segregation do not at all separate whites and blacks symmetrically from intimate observation of the social life of the other. As socially invisible men and women, blacks at work in white enclaves have for centuries moved through or around the walls of segregation to discover with little effort what was on the other side. This was tantamount to their having access to a one-way screen. In contrast, the highly visible whites characteristically did not want to find out about life in the black community and could not, even in those rare cases where they would. The structure of racial segregation meant that the whites who prided themselves on "understanding" Negroes knew little more than their stylized role behaviors in

---

[75] In the psychotherapeutic context, Margulies discusses the incentives patients have to gain empathic understanding of the therapist. See Margulies, *Empathic Imagination* at 98-99 (cited in note 50).

relation to whites and next to nothing of their private lives. As Arthur Lewis has noted, something of the same sort still obtains with the "integration" of many blacks into the larger society during the day coupled with segregation at night as blacks and whites return to their respective ghettos. In these ways, segregation can make for asymmetrical sensitivities across the divide.[76]

Imaginative empathy is thus at least as much a tool of survival for the powerless as of compassion and understanding for the powerful; in both roles it can easily serve as the friend, rather than the enemy, of social hierarchy.[77] This fact should lead us to ask tough questions of those who advocate its adoption as a political device. For example, just *how* do they propose to make empathy a tool of equality, rather than inequality? How will they levy this emotional progressive tax on social power, and motivate the socially powerful to reach out for understanding in the same way, and to at least the same extent that the socially powerless must? Jurisprudential arguments for imaginative empathy barely recognize, and certainly do not answer, these questions.[78]

Perhaps imaginative empathy, as many pro-empathy arguments imply, assumes the prior existence of hierarchy, but still

---

[76] Robert K. Merton, *Insiders and Outsiders: A Chapter in the Sociology of Knowledge*, 78 Am J Soo 9, 30 (1972).

[77] Both liberal and radical feminists reject the celebration of "feminine empathy" for this reason. Radical theorist Catharine MacKinnon rejects the labelling of women as naturally "empathic" and relational, partly because she sees that the assignment of such personality roles both reflects and perpetuates male domination. See, for example, Catharine A. MacKinnon, *Feminism Unmodified* 38-39 (Harvard, 1987) (criticizing Gilligan for celebrating the idea that women's moral reasoning is morality "in a different voice" and commenting that "[w]omen value care because men have valued us according to the care we give them . . . . Women think in relational terms because our existence is defined in relation to men."). Liberal philosopher Jean Hampton agrees, noting that Gilligan's interviews with two children she calls Amy and Jake, indicating that girls are more relational or empathic than boys, may be more a cause for caution than celebration:

> I find it striking that these children's answers betray perspectives that seem to fit them perfectly for the kind of gendered roles that prevail in our society. In their archetypal forms, 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. Neither of these voices should be allowed to inform our moral theorizing if such theorizing is going to be successful at formulating ways of interacting that are not only morally acceptable but which also attack the oppressive relationships that now hold in our society.

Jean Hampton, *Feminist Contractarianism*, in Louise M. Antony and Charlotte Witt, eds, *A Mind of One's Own: Feminist Essays on Reason and Objectivity* 227, 231 (Westview, 1993).

[78] See, for example, Daily, 102 Yale L J 1265 (cited in note 3).

produces results that weaken it—in other words, empathic attempts to include marginalized groups might originate in hierarchy but nevertheless result in equality. From the discussion of *Brown*, above, we have seen that this might be true of projective empathy. Still, as the preceding discussion indicates, imaginative empathy has no innate connection to equality, and that conclusion leaves us to doubt whether this form of empathy can combat social hierarchy at all. We have seen that, while those at the bottom have a strong incentive to learn empathic understanding of those at the top, the reverse is not automatically true. And without reciprocation from the powerful, empathy would almost certainly have the effect of keeping the powerless at the bottom. Where such "bottom-up" empathy is present, perhaps even prevalent, imaginative empathy alone, while able to recognize diversity, cannot produce social or political equality.[79]

Finally, one could attempt to construct an argument for imaginative empathy that would rest on the prior existence of liberal ideas of equality. Once we have established liberalism, this argument would proceed, we should then employ imaginative empathy to enhance diversity. This view would not require one to make liberalism empathic per se, but would simply hope for peaceful coexistence between liberal equality and empathic diversity, between projective and imaginative empathy. It is certainly true that accounts of empathy as a tool in psychotherapy have discussed the use of empathic understanding as involving elements of *both* projective and imaginative empathy,[80] and this idea has found its way into legal accounts of empathy.[81] However, that move from psychology to politics and law is extremely problematic. It may already be clear from the preceding discussion that the two concepts of empathy are not merely different-but-compatible substances, like political salt and pepper; rather, they are mutually destructive. Imaginative empathy could work

---

[79] Does a *third* type of empathy exist, one that involves an exercise in projection that results in appreciating diversity? If so, it must share the same problems I have raised for imaginative empathy; indeed, the problems may be greater. If I project myself into your body and realize that even when living in your circumstances I would not make the same choices or have the same views, it would surely be difficult to find any essential sameness between us that could give rise to a feeling of equality. I am indebted to Jeffrie Murphy for discussion that clarified this idea.

[80] See, for example, Rohert L. Katz, *Empathy: Its Nature and Uses* 26-54 (Free Press, 1963) (describing stages of empathy that involve "oscillating between identification and detachment"). Katz does not discuss projective and imaginative empathy per se.

[81] See, for example, Henderson, 85 Mich L Rev at 1586 (cited in note 17) (identifying empathy as "affect plus cognition").

to destroy equality; projective empathy to mute or erase diversity. Choosing between the two thus involves exploring the importance of the underlying values they further.

EMPATHY AS POLITICAL VALIUM

Understanding the conflicts inherent in advocating "political empathy" has obvious implications for scholarly attempts to replace or reform liberalism by introducing empathic community. But, still more significantly, the preceding discussion highlights a serious underlying political problem that is largely masked by vague endorsements of empathic understanding. That problem is the apparent conflict between the political values of diversity and equality (as those concepts are defined and defended by contemporary opponents of liberalism), and particularly the implicit attack on the latter by the former.[82] Minimal, but necessary, assumptions about the sameness of all human individuals, an identity of being that justifies equal treatment under the rules established by liberal law, are fundamental to liberal equality.[83] And indeed, upon what basis other than sameness *can* equality be justified? Diversity advocates must perceive one, since they are able to announce their devotion to equality *and* diversity while simultaneously denouncing legal and political equality based on liberal abstractions about the individual self.[84] But how can one *not* make such assumptions if one is concerned with establishing equality? If we look only at *differences* among people, at human diversity, then we are left with no basis for political equality or legal rules that respect it. Furthermore, such blind insistence on diversity forms the basis for an *attack* on equality, an attack that confronts diversity advocates with a choice between these two core values that they presumably wish to avoid.

---

[82] So-called liberal diversity rests on liberal visions of the self; the essential idea is that humans all have a capacity to run their own lives. That capacity both justifies liberal equal rights and argues for minimal interference with them, so that each autonomous, rational, self-directed person has the "right" to her own life as long as she does not violate the similar rights of others. Radical diversity appears te be based on a different idea, the notion that recognizing diversity requires rejecting any universally applicable selfhood. These differing uses of diversity explain the complaints of some critics that liberalism denies diversity. See generally Young, *Ideal of Community* (cited in note 53).

[83] John Rawls, for example, appears to concede this point in *A Theory of Justice* 504-08 (Harvard, 1971).

[84] See generally Matsuda, 16 NM L Rev at 613, 629-30 (cited in note 53).

Empathy can offer no escape from this choice, for endorsing it as a political principle requires analysis of its content, and such analysis collapses back into the choice being avoided. That is, projective empathy is premised on the liberal equality communitarians would reject, but limits the recognition of bottomless diversity. On the other hand, imaginative empathy introduces the danger of sacrificing equality for diversity.

In the end, advocating political empathy is a cop-out. One of the toughest questions that the "liberal communitarians" face is how to increase our sense of community without impermissibly violating our freedom. In the face of evidence that political empathy is not natural, must be learned, and is present to a significantly different degree in different individuals,[85] questions immediately arise as to how this empathic democracy is to be achieved. These are very uncomfortable questions because they raise issues of coercion, forced change of personality, and political monitoring of individual psychology. Simply advocating "empathy," without more, hides these issues beneath a cloak of voluntariness, as if the use of the "empathy" label alone would magically produce this quality in enough abundance to convince the politically and socially powerful to give up, or at least to share with the less fortunate, advantages that many have spent their lives acquiring and that have become integral to their sense of self. Empathy is political Valium: it neither changes the polity nor maps out a plan for achieving change; it simply makes us less anxious about the fact of social inequality and less determined to confront the hard questions about how, or even whether, to end it.

---

[85] See, for example, text accompanying note 27.