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# Defending Truth

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# Book Review

## Defending Truth

BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW. By Daniel A. Farber<sup>†</sup> and Suzanna Sherry.<sup>‡</sup> Oxford University Press, 1997. 195 pages. \$25.00.<sup>††</sup>

Reviewed by Cynthia V. Ward<sup>\*</sup> and Peter A. Alces<sup>\*\*</sup>

In the view of many radical legal scholars, liberal legal institutions can never produce social justice because they necessarily rely on a false and corrupt understanding of human beings. Against the standard liberal celebration of human autonomy and its importation into law via individual rights, radical critics urge the irreducibility of difference, the oppression inherent in the act of universalizing the rights-bearing autonomous individual, and, ultimately, the danger of grounding law in any definite concept of what “we” value most about human beings.

But this critique reveals a fundamental tension between radical theory and practice. If, as many radical theorists maintain, it is either useless or necessarily oppressive to ground one’s concept of law on a belief in certain foundational “samenesses”—such as autonomy and rationality—that are shared by all humans, then it is difficult to envision any kind of cordial relationship between justice and law, for the law necessarily enforces general understandings on particular persons and, to the extent that persons are irreducibly different, becomes an arbitrary, and therefore unjust, exercise of power over those whose views of the world are in conflict with legal rules and edicts. Yet radical legal scholars do, in fact, espouse a specific vision of law, especially of how law relates to issues of racial and

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gender justice.<sup>1</sup> On what can this vision rest, given the prior conceptual premise of radical theory that the law must acknowledge difference and reject sameness?

In *Beyond All Reason: The Radical Assault on Truth in American Law*, Daniel Farber and Suzanna Sherry examine the radical vision of justice and its relationship to law. More specifically, Farber and Sherry target four core arguments of a group of scholars they call "radical multiculturalists."<sup>2</sup> These scholars share the foundational belief that "western ideas and institutions are socially constructed to serve the interests of the powerful, especially straight, white men."<sup>3</sup> They believe the concept of "merit" that allocates societal benefits, such as admission to jobs and schools of higher education, is a mask that allows liberal legalism to hide its perpetuation of racial- and gender-based domination behind a false claim to fairness and equal opportunity.<sup>4</sup> They argue that the liberals' celebration of reason oppresses groups such as women and minorities, who possess other, equally valuable "ways of knowing."<sup>5</sup> Finally, the radical multiculturalists view the liberal commitment to certain universal, objectively "true" values—such as the virtue of individual liberty, of rational argument, and of freedom of speech—as a sham. For a radical multiculturalist, all knowledge is a matter of perspective and the claim to universal knowledge is therefore an exercise of power imposed by the privileged on the disadvantaged.<sup>6</sup>

As Farber and Sherry point out, these radical beliefs conflict directly and fundamentally with the values that ground liberal law:

Objectivity, reason, and universality are, of course, the crown jewels of our [liberal] Enlightenment heritage. At least some radicals, following Foucault, directly condemn the Enlightenment itself, as well as its progeny: liberalism and democracy. [Richard] Delgado suggests that "enlightenment-style Western democracy is

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1. See *infra* text accompanying notes 12-15.

2. P. 5.

3. P. 5.

4. See p. 31 (describing the radical multiculturalist belief that "conceptions of merit are invented by the powerful to reinforce their dominant position. What purport to be neutral standards of merit are simply tools of social subordination: 'merit is not merely contingent, it is racially biased.'" (quoting Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 CAL. L. REV. 377, 403 (1996) (reviewing RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995)))); p. 32 (stating that radical multiculturalists believe "[a]ll standards, everywhere in society, are merely social constructs").

5. See p. 25 (quoting Stanley Fish for the proposition that "like 'fairness,' 'merit,' and 'free speech,' Reason is a political entity," an "ideologically charged" product of a "decidedly political agenda").

6. See p. 30 ("The radicals, in keeping with their view that objectivity is impossible and claims to objectivity are merely power plays in disguise, argue that knowledge itself depends on the race or gender of the knower.").

... the source of black people's subordination" and "racism and enlightenment are the same thing." "Enlightenment is to racism," he continues, "as sexuality is to women's oppression—the very means by which we are kept down." He thus recommends that "if you are black or Mexican, you should flee Enlightenment-based democracies like mad, assuming you have any choice."<sup>7</sup>

The authors' project in *Beyond All Reason* is to investigate radical multiculturalist beliefs in light of the legal and societal causes that radical scholars simultaneously espouse.<sup>8</sup> Farber and Sherry ask whether the radical rejection of truth, merit, and objectivity is compatible with the radicals' own vision of political and legal justice.<sup>9</sup>

Answering this question in the negative, Farber and Sherry expose a fundamental disconnect between the philosophical and the political commitments of radical multiculturalism.<sup>10</sup> To the extent the former are accepted, the latter become impossible to achieve; conversely, in order to maintain coherently their political commitments to justice and equality, the radicals must abandon their attacks on truth, merit, and objectivity.

We approach this review of *Beyond All Reason* from different perspectives. Part I offers an exposition of the Farber and Sherry approach to radical multiculturalism. In Part II, Professor Alces mines Farber and Sherry for insights into the question of whether, and to what extent, radical legal theory "matters" to the operational structure of the law. Should scholars whose writing examines legal questions within specific, a priori doctrinal boundaries care about radical multiculturalist theory? What, if anything, can such theory offer in the way of answers to the myriad questions and conflicts that arise out of actual court decisions and thus constitute the law at work in the lives of actual litigants and their attorneys? In the final analysis, can radical multiculturalism claim to have "advanced the ball" of legal scholarship in any material way? Alces charges that, from a perspective that seeks to integrate theory with doctrine, the authors of *Beyond All Reason* have failed to make a strong case against radical multiculturalism. Professor Alces concludes that Farber and Sherry missed an opportunity to reveal the fundamental and intractable problems with radical multiculturalist theory—problems that thoroughly justify scholarly skepticism—and instead make relatively peripheral criticisms.

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7. Pp. 28-29.

8. P. 7.

9. See, e.g., p. 9 (describing the authors' "normative critique" of radical multiculturalism in the context of their attempt to "show that the ideology doesn't work: [i]t fails to keep its [own political] promises").

10. P. 9. Because of the nature of the radical criticism of traditional legal scholarship, this possibility must be of particular concern to anyone attempting to construct an internal critique of radical multiculturalism.

In Part III, Professor Ward responds by defending *Beyond All Reason* against Professor Alces's attacks. She argues that Farber and Sherry's basic critique of radical multiculturalist theory is sound, but that their critique has already been transcended within radical theory by a renewed respect for its supposed enemy—liberal legalism. In Professor Ward's view, Farber and Sherry are quite right that radical legal theory cannot coherently generate a progressive law and politics. But radical feminists and critical race scholars are bridging the gap between theory and practice by reintroducing, as a socially progressive force, the possibilities of individual agency and the capacity for self-direction. Professor Ward concludes that this development suggests that individual rights, long the arch rival of radical feminists and scholars of race, should be recognized anew as the primary legal tool of social justice.

### I. Deconstructing Radical Multiculturalism

Summarizing the principal tenets of the radical multiculturalist critique, Farber and Sherry make clear the political consequences of abandoning the quest for merit, objectivity, and truth:

If the modern era begins with the European Enlightenment, the postmodern era that captivates the radical multiculturalists begins with its rejection. According to the new radicals, the Enlightenment-inspired ideas that have previously structured our world, especially the legal and academic parts of it, are a fraud perpetrated and perpetuated by white males to consolidate their own power. Those who disagree are not only blind but bigoted. The Enlightenment's goal of an objective and reasoned basis for knowledge, merit, truth, justice, and the like is an impossibility: "objectivity," in the sense of standards of judgment that transcend individual perspectives, does not exist. Reason is just another code word for the views of the privileged. The Enlightenment itself merely replaced one socially constructed view of reality with another, mistaking power for knowledge. *There is naught but power.*<sup>11</sup>

Politics, in short, is simply another way of describing the struggle for power, while law is used to impose the perspective of the powerful on the rest of us. On this view, the key to effecting political and legal reform is not to rely on persuading others of the objective justice of one's claim (although this method might be used strategically), but to find a way to increase one's own power, or the power of one's group, so as to have the raw ability to change the law in one's favor with or without the consent of

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11. P. 33 (emphasis added).

outsiders.<sup>12</sup> As Farber and Sherry explain, the radical multiculturalist argument for affirmative action offers a telling example of this political philosophy at work. While liberals worry about how to reconcile affirmative action with the general principle of merit that allocates jobs, admissions to higher educational institutions, and other social benefits, radical multiculturalists experience no such conflict, since to them the prevailing conception of merit is itself a form of racist and sexist domination.<sup>13</sup> For radical multiculturalists, affirmative action as currently conceived does not go nearly far enough to achieve racial justice. In the context of law school admissions, for example, radical scholar Richard Delgado argues that affirmative action should be replaced with "an overhaul of the admissions process and a rethinking of the criteria that make a person a deserving law student and future lawyer."<sup>14</sup> Delgado makes clear that the proper motivation for overhauling law school admissions is to reallocate the proportion of women and racial minorities admitted to law school, irrespective of any criteria based on merit.<sup>15</sup>

Farber and Sherry argue that the radical debunking of merit, objectivity, and truth conflicts directly with the political goals the radicals say they are fighting for, including the goal of ending racism.<sup>16</sup> For example, rejecting merit compels radicals to rely on invidious racial stereotypes to explain the social and economic success of two groups that have been the victims of widespread discrimination in American society—Jews and Asians. As the authors point out, Jews and Asians have long outperformed other groups, including white gentiles, on measures including economic wealth and educational success.<sup>17</sup> If merit had nothing to do with this success, what did? Farber and Sherry make the case that a purely power-based view of social achievement compels a racist explanation of this success, one that forces multiculturalists to rely on one or another of the very myths about Jews and Asians that have historically justified discrimination against them.<sup>18</sup>

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12. See p. 118 ("Merit, law, and truth are exercises of power by one group over another. This is supposed to be a slogan of liberation—all the apparent barriers to our heart's desire can be overturned, for what lives by power can die by revolution.").

13. See p. 47.

14. P. 47.

15. P. 49 ("Such a retooling will lead to 'a proportionate number of minorities, whites, and women gaining admission.'" (quoting Delgado) (citation omitted)).

16. See p. 52 (suggesting that "the radical attack on merit inevitably has racist and anti-Semitic implications").

17. P. 59.

18. See p. 53 ("[I]f they stick to their theories, the radicals cannot avail themselves of *any* benign explanations for Jewish and Asian success. Instead, they will ultimately be forced to resort to modern versions of ancient anti-Semitic or racist myths." (emphasis in original)). See generally pp. 52-71.

Next, the radical attack on objectivity produces related, but distinguishable, difficulties when imported into the political sphere. As an example of such difficulties, the authors explore the so-called storytelling movement in legal scholarship. Rejecting the traditional scholarly approach, which relies on persuading through rational, impersonal argument that focuses on attention to what is being said rather than who is saying it, radical multiculturalists frequently present their legal and political arguments in the form of purportedly personal stories. The work of Derrick Bell, Richard Delgado, and Patricia Williams exemplifies this form of scholarship,<sup>19</sup> which depends on creating an intuitive "flash of recognition" among readers rather than on engaging their capacity for rational deliberation.<sup>20</sup> One problem is that this intuitive approach often ignores or implicitly discounts contrary facts that may interfere with the reader's intuitive "flash." Farber and Sherry report, for example, that while widely read examples of legal storytelling strongly suggest that minority law teaching candidates do not do as well as whites in the hiring market, the facts demonstrate the contrary conclusion—that minority candidates are substantially more likely to get law teaching jobs than are white candidates.<sup>21</sup> Because they deny readers the chance to "work out" analytically the factual complexities of an argument, stories written to reinforce the dangers of racism often have the effect of ignoring or even erasing such complexities.<sup>22</sup>

A related problem with the storytelling method is that it produces struggles over authenticity and "voice," both within a particular group and between that group and others, that make productive dialogue about differences either difficult or impossible.<sup>23</sup> Because radical multiculturalists discount objective facts and the dialogic potential of rational debate—which are the basis of the liberal method for transcending difference and achieving political progress—their conceptual disagreements frequently degenerate into personal attacks on other scholars, either inside or outside

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19. See, e.g., Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); DELGADO, *supra* note 4; PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

20. See, e.g., p. 77.

21. P. 77 ("About half of all new [law] faculty are hired through the [Association of American Law Schools] hiring conference. Whites who participate in this process are only about half as likely to end up with faculty positions as are minority participants. Among faculty who are hired outside of the AALS process, the percentage of positions filled by minorities is even higher. Other statistics show that the percentage of black women on law school faculties is much higher than the percentage of black women lawyers.").

22. P. 39 ("[C]ritics have been concerned about the risk that stories can distort legal debate, particularly if those stories are atypical, inaccurate, or incomplete.").

23. See pp. 78-84 (giving examples of the conflict between commentators purporting to represent a particular group and other members of that group who take issue with the representations made about the group).

their group.<sup>24</sup> Within a world view that privileges context and personal experience over objective rules of argument, disagreements over ideas lead almost inexorably to mutual accusations of bad faith and betrayal. Needless to say, such attacks do nothing to advance the fight for racial and gender equality; on the contrary, they divert the energies and talents of these scholars from continuing that fight.<sup>25</sup>

Finally, Farber and Sherry argue that the radical rejection of truth as a basis for political and legal debate makes it impossible to distinguish good from evil in politics and thus commits the radicals to accepting all political arrangements as equally legitimate, be they liberal democracies or totalitarian dictatorships.<sup>26</sup>

It is no surprise that the end product of radical multiculturalism has affinities with totalitarianism. As part of the attack on the Enlightenment, the critique of truth suffers from a tendency to reinforce pre-Enlightenment despotism. The Enlightenment replaced individual and institutional power with more objective measures of validity, and it is no surprise that the rejection of objectivity collapses back into power as the means for defining absolute truth. Indeed, Foucault himself may have recognized this tendency, apparently implicitly applauding (as the kind of transformative politics engendered by his theoretical approach) two of the most totalitarian regimes of the late twentieth century. . . . [Foucault] gives indications of supporting both the Chinese Cultural Revolution of the early 1970s and the Iranian fundamentalist revolution of the late 1970s.<sup>27</sup>

The radical multiculturalist rejection of truth makes it impossible to condemn even the most horrific acts of government, for example the Nazi Holocaust. If there is no such thing as a true, objectively "right" political value, if all politics and political systems are entirely the result of struggles for power and domination among different and morally indistinguishable groups, then no basis exists on which to condemn the Holocaust as evil and to insist that democracy is better. Farber and Sherry argue that the "radical multiculturalist dismissal of the possibility of objective truth is fraught with peril" because it allows for no possibility of agreement on universal political truths.<sup>28</sup> Without such agreement, "there is no way to mediate among truth claims except by recourse to authoritarian fiat" and

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24. Pp. 80-81 (describing the personal nature and highly confrontational tone of the responses by some radical multiculturalists to commentators who express contrasting viewpoints).

25. Pp. 78-84.

26. P. 105 ("[M]oral relativism ultimately has no defenses against totalitarianism and other dehumanizing regimes." (quoting Richard Rorty)).

27. P. 106 (citation omitted).

28. P. 117.



no way to distinguish among various forms of political authority except by reference to their power.<sup>29</sup>

Political progress, including progress toward racial and gender equality, requires agreement about values as well as the political power to implement them. Farber and Sherry make a convincing case that the philosophical tenets of radical multiculturalism—in particular its rejection of truth, merit, and objectivity as legitimate bases for progressive political debate—necessarily imply that no transcendent political values exist, that there is no objective basis in fact or in theory on which to ground such values, and that any attempt to do so is simply a power play designed ultimately to place or maintain in power the group that attempts to invoke such values. The authors follow radical multiculturalist philosophy out to its logical conclusions, compare those conclusions to the political goals radicals say they advocate, and find the conclusions and goals to be directly in conflict.<sup>30</sup>

As an internal critique of radical multiculturalist political philosophy, Farber and Sherry's methods seem fair, their arguments clear, and their conclusions persuasive. Yet one is left with the sense that the authors have failed to come to grips with some of the most interesting and important questions about the assumptions underlying radical multiculturalist theory. The balance of this review is devoted to an exploration of different shortcomings in *Beyond All Reason's* critique. In Part II, Professor Alces suggests that Farber and Sherry provide a technically proficient formal critique of radical multiculturalism without asking whether multiculturalist theory, even taken at its word, is relevant or useful to the study and practice of law in the real world. This, Professor Alces concludes, is the real weakness of the book. In Part III, Professor Ward argues to the contrary that Farber and Sherry's criticisms are well-founded and go to the heart of multiculturalist theory and its practical limitations. However, the relevance of these criticisms to contemporary legal discourse is undercut by the book's failure to consider how radical multiculturalists themselves have perceived, explained, and transcended a relatively obvious and fundamental disconnect which emerged in earlier multiculturalist works.

## II. Going Beyond *Beyond All Reason*: Is Radical Multiculturalism Relevant to the Practice of Law?

"Sometimes a concept is baffling not because it is profound but because it is wrong."<sup>31</sup> This book presents an opportunity for scholars

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29. P. 117.

30. Pp. 138-43 (concluding that radical multiculturalism itself has anti-Semitic and other discriminatory implications).

31. EDWARD O. WILSON, *CONSILIENCE: THE UNITY OF KNOWLEDGE* 249 (1998).

who do not generally dabble in the radical but distrust it from afar to read a critique of the movement written by those who have taken it seriously. Professors Farber and Sherry are public law scholars who have perused the radical multiculturalist canon (the irony there is intentional),<sup>32</sup> and who themselves write careful doctrinal scholarship (of the type that the most traditional scholars would value).<sup>33</sup> As a formal critique of radical multiculturalism, Farber and Sherry's work makes a devastating case against at least, the extremes of the radical multiculturalist jurisprudence. This portion of the review uses a realistic perspective derived from the work of Karl Llewellyn to identify the shortcomings of *Beyond All Reason* as a critique of radical multiculturalism, and then to describe the real failure of radical multiculturalism itself as a school of legal thought.

#### A. A Perspective

Those with different scholarly perspectives make differing demands on the legal literature, looking more favorably upon scholarship that realizes what they value and responding less favorably to work that does not meet the qualifications of their own work. For a substantial portion of the scholarly legal community, radical multiculturalist scholarship is not important. Not only is it not important, it is a distraction from the serious work that should be the province of lawyers, including academic lawyers, and a waste of pages in the most prestigious journals that would be better devoted to scholarship that "matters."<sup>34</sup> A less charitable view of the genre might be even more damning: Radical scholarship is irresponsible and given to prevarication; at its best, it is merely sloppy.<sup>35</sup> Yet the radical multicultural literature that Farber and Sherry appraise has been taken quite seriously by a significant portion of the academy. Were that not the case, it would not appear in the prestigious journals in which it appears, its proponents would not have earned tenure and promotion at the nation's leading law schools, and Farber and Sherry probably would not have found it worthwhile to study. There must be something there. So it

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32. Pp. 11-12, 16.

33. See, e.g., Daniel A. Farber, *Is the Supreme Court Irrelevant?: Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547 (1997); Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L.A. L. REV. 791 (1994); Daniel A. Farber, *Beyond the Roe Debate: Judicial Experience with the 1980's "Reasonableness" Test*, 76 VA. L. REV. 519 (1990); Daniel A. Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257 (1996); Suzanna Sherry, *Justice O'Connor's Dilemma: The Baseline Question*, 39 WM. & MARY L. REV. 865 (1998); Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260 (1990).

34. See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

35. See Pp. 139-40 (concluding that radical multicultural theory involves anti-Semitic implications and other, more immediate, problems): see also *infra* text accompanying notes 70-73.

is worthwhile to ask whether there is a point to the radical multiculturalist critique that the scholar who cares and writes about the operation of fundamental commercial law conceptions, for example, should appreciate. To pursue that inquiry, we must identify the criteria which will be used to evaluate the worth of radical multiculturalism and determine whether Farber and Sherry have assessed radical theory's performance in light of these criteria.

These criteria should be based on a frame of reference that is not atypical and that captures the source of the traditional scholar's<sup>36</sup> uneasiness with the radical argument and method.

Karl Llewellyn distinguished between "'Jurisprudence for the Hundred': . . . the more esoteric [legal] tradition of the writers about the writers and for the writers. . . not in the language or in the general tradition of professional philosophy,"<sup>37</sup> and "'Jurisprudence for the Hundred Thousand': for the Bar in daily living, and for the citizen who is willing to take a moment to ponder."<sup>38</sup> He viewed Jurisprudence for the Hundred as "particular[ly] incongru[ous]," "simply 'nonsense,'" and "utterly indefensible."<sup>39</sup> He urged lawyers to "avoid abstruse theory" and to remember that "[g]ood theory cuts ice."<sup>40</sup> "[T]he wider and deeper a man's grasp of theory which does work, the more effective his own work can be . . . ."<sup>41</sup> Ultimately, scholarship must matter; it has important work to do; it must be ameliorative.<sup>42</sup> Llewellyn and his realist contemporaries would have had little patience with scholarly terrorism, or work that is titillating but essentially insubstantial. From this perspective, to the extent that Farber and Sherry reveal the radical perspective as insubstantial, those scholars whose work and appreciation of legal matters is informed by a concern for practical relevance will have no reason to credit the radical perspective. But do Farber and Sherry make the case that radical scholarship cannot meet expectations that it should meet in order to be more than titillating?

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36. Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 960-61 (1992) (recognizing that in evaluating legal scholarship diverging from the mainstream it is necessary to place such theory within a familiar frame of reference or context).

37. Karl Llewellyn, *Extracts from Law in Our Society: A Horse-Sense Theory of the Institution of Law* (1950), in WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 499 (1973).

38. *Id.* at 500. Llewellyn also distinguished a third level of analysis, "'Jurisprudence for the Hundred Million'" which encompassed "the guts of Jurisprudence," not relevant here. *Id.*

39. *Id.* at 499.

40. *Id.* at 500.

41. *Id.*

42. See *id.* at 173 (noting that Llewellyn "regularly emphasized that jurisprudence has an important practical role to perform").

### B. *Farber and Sherry's Attack on Radical Multiculturalism*

*Beyond All Reason* takes the radical multiculturalists at their word: The object of the radical critics is to enfranchise the disenfranchised by revealing the vacuity of prevailing conceptions of truth and merit, to reveal that naked power determines the distribution of the benefits the law and society can bestow, and to reveal that those of us who fail to appreciate that circumstance are fools or conspirators. Granted, shorthand description of the radical agenda is simplistic. But the formulation suffices to support review of Farber and Sherry's theses.

The radical attack on the neutrality of merit, and similar challenges to liberal argument, resonate on at least two levels: First, the terms and tenor of the attack are provocative; the charge gets your attention. It has the ring of invective, triggering the type of defensive reaction that could provoke the "The lady doth protest too much, methinks"<sup>43</sup> response. Second, protestations to the contrary notwithstanding,<sup>44</sup> it functions as a rational argument, albeit a relatively ineffective rational argument, comparing the one thing to the other in order to posit the incongruity of the contrast as well as the inevitability of the reader's bias.

This characterization of the radical critique suggests radical scholars might have grounds to complain that their movement has been misappreciated and misconstrued, actually sold short, unless *Beyond All Reason* fairly comprehends the method to the radicals' madness.<sup>45</sup> To determine whether the radical multiculturalists ultimately advance the literature in terms not appreciated by Farber and Sherry, it is worthwhile to examine four aspects of their critique using, as an example, the work of Patricia Williams referred to in their book. These four aspects deal, respectively, with the radicals' (1) reaction to the Tawana Brawley incident, (2) legal storytelling method of argument, (3) use of extraneous narrative detail, and (4) lack of attention to factual accuracy in their own work.

1. *The Tawana Brawley Tragedy*.—The circumstances surrounding the Tawana Brawley incident are recounted by Farber and Sherry in order to

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43. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2, l. 230, in *THE RIVERSIDE SHAKESPEARE* (G. Blakemore Evans, ed., Houghton Mifflin Co. 1974).

44. See p. 33 ("Reason is just another code word for the views of the privileged.").

45. Precisely because of the nature of the radical criticism of traditional legal scholarship, this possibility must be of particular concern to anyone attempting to construct an internal critique of radical multiculturalism. If the radical multiculturalists who would take issue with the Farber and Sherry conclusions are able to demonstrate that *Beyond All Reason's* exposition of the radical position is inaccurate or picks too much on the nits while ignoring substance, then radical apologists could, perhaps accurately, charge that Farber and Sherry's critique, wittingly or unwittingly, marginalizes the radical critique in order to exclude more effectively those whose causes the critical scholars champion.

provide a concrete and accessible context for *Beyond All Reason's* critique of the radical multiculturalists' reaction to the incident.

[Tawana Brawley was] a fifteen-year-old black girl who claimed she was abducted, raped, tortured, and ultimately smeared with feces by a group of white men, including a state district attorney and two police officers . . . . [These claims were later revealed to be false.] To fortify her illusion, she carved racial epithets into her clothing and wrote them across her chest with a burned cloth, then smeared dog excrement into her hair and on her body.<sup>46</sup>

The incident was provocative; it was difficult not to react to both the original accusation and the subsequent revelation that the charges were a fabrication without feeling a sense of moral outrage. The episode had some value as a measure of public sentiment and bias: Remember how you reacted when you first heard of the alleged attack, and then how you reacted when you learned it was a hoax?

Farber and Sherry recount the radical multiculturalist response to the episode; their reaction to the radical response comprises a good deal of *Beyond All Reason's* defense of truth. To support their critique, Farber and Sherry focus on the argument of Professor Patricia Williams,<sup>47</sup> particularly Williams's assertion that "Tawana Brawley has been the victim of some unspeakable crime . . . . No matter who did it to her—and even if she did it to herself. Her condition was clearly the expression of some crime against her, some tremendous violence, some great violation that challenges comprehension."<sup>48</sup> Farber and Sherry interpret Williams to be arguing that "whether it was true or false, Tawana Brawley's story tells us something about the condition of black women."<sup>49</sup> Then the authors ask if it matters whether Tawana Brawley's account was true or false. They argue that "[i]ndifference to the distinction between fact and fiction minimizes real suffering by implying that it is no worse than imagined or self-inflicted suffering."<sup>50</sup> "In what kind of legal system would it make no difference whether a woman who claimed that she had been raped was telling the truth?"<sup>51</sup> "[W]hat would we think of someone . . . who said

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46. P. 95.

47. P. 96.

48. P. 96 (quoting WILLIAMS, *supra* note 19, at 169-70).

49. P. 96.

50. P. 96. Cf. Peter A. Alces, *Toil of the Firestarters*, 92 MICH. L. REV. 1707, 1720 (1994) (book review) ("Those who charge discrimination must identify something observable in order to shock the unconscious out of their torpor and avoid trivializing the charge of discrimination, belittling those who have been, are now, and will in the future be victims of real rather than imagined discrimination.").

51. P. 96 (citation omitted) (quoting Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1279 (1995)).

she didn't care whether it had happened or not?"<sup>52</sup> Such a view, Farber and Sherry intimate, indicates that the radical conception of truth is normatively irresponsible.

If Williams's conclusion is that the veracity of Brawley's accusations is essentially inconsequential, then the Farber and Sherry critique has significant force. But there is another plausible construction of Williams's "indifference" to the truth that *Beyond All Reason* may erroneously disregard. Perhaps Williams is saying that two alternative constructions of the Tawana Brawley incident present themselves: the first, that Tawana Brawley was in fact the victim of the attack that she described; the second, that a young woman who would level such fictional allegations is deeply troubled and may have been driven to the despair or mental imbalance that provoked that response because of forces similar to those that made the charges plausible in the first instance.<sup>53</sup> These forces might include racism, sexism, other social forces, and perhaps even intrafamilial forces that others not in the troubled young girl's circumstances could not appreciate.<sup>54</sup> The tragedy is certainly different if Brawley were driven to her despair by her stepfather, and different again if her fear of him were irrational; but in ways that might be valid for the radical critique the tragedy of Tawana Brawley is no less a tragedy. It is just a different tragedy—an "expression of some crime [or other] against her."<sup>55</sup>

Williams may be wrong; Brawley's fabrication may have been simply a crime against others and she may have been the victimizer rather than the victim. But this factual scenario does not refute Williams's theoretical assertion that the truth of Brawley's accusations was more a matter of determining the way in which she was victimized than of determining whether in fact she was victimized. If Brawley were a victim, as Williams asserts she was, then when we concern ourselves with the factual truth of her allegations we are only quibbling about the manifestation of her victimhood. Farber and Sherry may be reading Williams superficially. Farber and Sherry themselves offer a construction of Williams that approaches: "[i]n other words, whether [Brawley's story] was true or false, [it] tells us something about the condition of black women."<sup>56</sup> In doing so, they reveal a shortcoming of their own critique: if *Beyond All Reason's* arguments are to be convincing, the authors must afford the objects of their criticism every benefit of the doubt, something they have not done here.

52. P. 96.

53. Cf. WILLIAMS, *supra* note 19, at 175-76 (writing that truth "takes on a life of its own . . . untruth becomes truth through belief, and disbelief untruths the truth").

54. See *id.* at 167-68 (describing the "personality slaughter" of a child by her family, in which case the child becomes a "public mirror" of the unhealthy family).

55. P. 96 (quoting WILLIAMS, *supra* note 19, at 170).

56. P. 96.

In focusing on the importance of the veracity of Brawley's account Farber and Sherry miss an opportunity to level a more compelling critique of the radical perspective. The most provocative aspect of Patricia Williams's conclusion that Tawana Brawley was a victim must be the fact that we do not know for sure what it is that Brawley was a victim of, or how tangentially, if at all, her victimhood is related to her accusations. Even assuming that invidious forces beyond her control drove Brawley to do what she did, we need to know what those forces were and how they affected the young woman the way they did.

Williams has no clear point. If Williams intended to formulate a conclusion about the law, then those who would pursue legal inquiry would want to know how the law caused the Brawley tragedy. If Williams intends instead to pose questions that go beyond legal analysis, then we would want to know what social science or philosophical inquiry corresponds to Williams's assertion. It may be that Williams and other radical scholars who pose searching questions by way of provocative epithet do not have a sense of where we are to look for answers and may not even ask the question in ways that accommodate further inquiry. Perhaps if Williams offered a clearer critique we might conclude that the forces that acted on Brawley act on a broader cross section of society. Why would we believe that the forces that acted upon Tawana Brawley do not affect other young black women, or other young women, or other women in general? They might even be akin to forces that operate on old white men, white men, or men generally, but just manifest their power in different ways, such as through embezzlement rather than through filing a false police report.

Legal scholars are not competent to make judgments about the universality of irrational reactions to powerful forces—that is not our province. And it is Williams's and other critical scholars' apparent zeal for lobbing legal Molotov cocktails that compromises the radical critique from the perspective of legal scholars who believe that intellectual honesty and responsibility require more. The problem is not that we cannot understand what Williams means when she draws broad conclusions from the Tawana Brawley accusations. The problem is that Williams does not advance the inquiry she so provocatively presents. If the object of radical scholars is to force us to confront the absurdity of the human condition, they may have nothing to add to Ecclesiastes.<sup>57</sup>

2. *"Once Upon a Time . . ."*—Farber and Sherry also take issue with the radical multiculturalists' use of storytelling to make social and

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57. See *Ecclesiastes* 1:2 (Old American Standard) ("Vanity of vanities, saith the Preacher; vanity of vanities, all is vanity.").

legal arguments. In a portion of *Beyond All Reason* that must surely cause radical multiculturalists to conclude that Farber and Sherry simply "do not get it,"<sup>58</sup> the book presents "The Story"<sup>59</sup> and then "The Story behind the Story."<sup>60</sup> Sherry relates a misleadingly provocative, but factually accurate, story of her early life and then corrects the misperceptions the rendition would elicit from the average reader. It is not necessary to recount the differences between the two versions here. It is enough to take Sherry's word for it that, at least on one level, "by putting forth to others a self that isn't accurate, the storyteller lets dishonesty poison any dialogue she might have with the larger community. In telling this kind of story, one's integrity as a person is at stake."<sup>61</sup> The author is certainly correct that, were we to assume the veracity of the first version of her story, draw conclusions from that rendition *about the storyteller*, and then later learn that the story was a hoax or at least very misleading, we would have good reason to question the efficacy of the arguments presented by the story.

But it is rare that we are concerned with the truth of the matters asserted in the course of an autobiography by a legal scholar. While it might be that we care whether the scholar is accurately recounting facts as facts, the whole object of legal argument is to present the facts in a manner most considerate of your side's position without losing credibility in the eyes of the fact finder. That is a point driven home in first-year appellate advocacy exercises. Even more importantly, however, our concern with stories as legal analysis should be with whether there is a resonance of truth in the story and whether the story elicits reactions that get us closer to an understanding that we did not have before we read the story. Ultimately, it does not matter whether the story is objectively true if its object is to provoke a reaction to its social and political plausibility. So appreciated, Farber and Sherry's inability to come to terms with the truth of legal storytelling, rather than its factual accuracy, misses the point in the same way that their critique of Patricia Williams's assertions with regard to the Tawana Brawley incident falls short.

That is not to say, however, that there is not a glaring deficiency that is common to a great deal of legal storytelling. There is nothing obvious in the training of legal educators or in the sheltered day-to-day existence of those who teach law that would lead us to conclude that this group can tell a poignant legal story more effectively than could, say, Richard

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58. See, e.g., Anne M. Coughlin, *C'est Moi*, 83 MINN. L. REV. 1619, 1630-36 (1999) (evaluating Sherry and Farber's treatment of Sherry's memoirs and its impact on their ability to evaluate Brawley's story).

59. P. 112.

60. P. 113.

61. Pp. 116-17.



Wright<sup>62</sup> or Harper Lee.<sup>63</sup> Those who are skeptical of the contributions of legal storytellers may well question whether the writers who try to capture legal argument in law review fiction are particularly skilled at the enterprise. You do not have to be too cynical to conclude that the law professors whose "scholarship" consists of legal storytelling should have their contributions judged, once they deal as loosely with the objective truth as Farber and Sherry suggest they do, by literary standards. The result of applying that type of judgment, from the perspective of those with a respect for real literature, may well be the determination that, as fiction, legal storytelling is generally not very good and not as likely to change the way we think as the works of truly great writers of fiction are.

Farber and Sherry's focus on the fictional nature of the genre would seem to be subject to the response that they fail to appreciate the literary bent of the storytellers. The real problem may not be that we cannot tell where fact ends and fiction begins; the problem may be that we are not moved by the stories themselves. While part of the problem with the stories is that they seem incredible, one sided, and unreliable, what we are really saying when we level such criticisms is that the stories are, on the whole, not very good and not effective in the way good literature is effective.

3. *Extraneous Narratives.*—Those who write careful doctrinal scholarship typically pore over primary and secondary sources to compose an argument that will advance the legal literature. Notwithstanding the grandiose claims of law review article titles, few paradigms shift. When they do, it is more often than not the courts that shift paradigms and legal scholars who react.<sup>64</sup> The fundamental question for the radical literature is whether the radical multiculturalists have shifted paradigms, or even made incremental advances in the legal literature.

Farber and Sherry clearly have something to say about this in *Beyond All Reason*, but again their argument seems to be camouflaged in their

62. See, e.g., RICHARD WRIGHT, *NATIVE SON* (1940) (recounting the tale of a young African-American man living in the slums of Chicago's South Side).

63. See, e.g., HARPER LEE, *TO KILL A MOCKINGBIRD* (1960) (chronicling one girl's experiences during the racially charged trial of a young black man in mid-twentieth-century Alabama).

64. See, e.g., Michael T. Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. COLO. L. REV. 1, 7 (1991); Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. COLO. L. REV. 845, 874 (1988); Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 447-48 (1973) (all identifying the 1938 Chandler Act amendments to the Bankruptcy Act of 1898, inspired by *Copeland v. Stevens*, 106 Eng. Rep. 218 (K.B. 1818) and *Capitol Trust Co. v. Chicago Auditorium Ass'n*, 240 U.S. 581 (1916), as shifting paradigms of bankruptcy law); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903, 907-10 (1985) (discussing modern courts' greater willingness to enforce contracts under a theory of promissory estoppel); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990) (tracing the decline of:

critique of the radical treatment of truth. One can sense Farber and Sherry's impatience with the radicals in their selection of one particular quotation of Williams's. After seeing a news item about Harvard's failure (or inability) to add an African-American woman to its law faculty, Williams reports:

So now you know: it is this news item, as I sit propped up in bed with my laptop computer balanced on my knees, clad in my robe with the torn fringe of terry bluebells, that finally pushes me over the edge and into the deep rabbit hole of this book.<sup>65</sup>

This experience led Williams to conclude that law schools continue to discriminate against minorities.<sup>66</sup>

Farber and Sherry take issue with the accuracy of Williams's conclusions. African Americans, Farber and Sherry contend, are actually favored—not disfavored—by the law school faculty hiring process.<sup>67</sup> For Farber and Sherry, a critique that ignores that “truth” is deficient. But if Farber and Sherry are really interested in demonstrating the deficiencies in Williams's argument, why do they not reproduce a portion of her book in which she makes the argument that they attribute to her? Why do they quote her account of how she came to write *The Alchemy of Race and Rights*? What is it in Williams's account of her revelation upon watching the McNeil-Lehrer Report describe Harvard's failure to hire an African-American woman that troubles Farber and Sherry? If it is just Williams's conclusion that is erroneous, why do Farber and Sherry reproduce Williams's description of the circumstances when the scales fell from her eyes? It would seem that the quotation Farber and Sherry lift from *Alchemy* is designed to ridicule Williams's prose and style as insipid, sophomoric, and ultimately unconvincing.

The Farber and Sherry critique of Williams's reaction to the Harvard appointments process could be more effective, and offer a richer legal analysis, if Farber and Sherry were more forthcoming. The reader would like to see Farber and Sherry take issue with Williams's presentation more directly by questioning whether Williams's realism is effective or too immature to be important legal scholarship and too silly to be taken seriously. In the interest of intellectual advancement, as well as critical honesty, it would be better to challenge the best case that can be made on behalf of Williams's style of scholarship.<sup>68</sup> On a substantive level, it

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65. P. 76 (quoting WILLIAMS, *supra* note 19, at 5).

66. See WILLIAMS, *supra* note 19, at 47-48, 84-90 (implying through the narration of personal experiences that law reviews and law school exams discriminate against minorities).

67. See *supra* note 21.

68. See generally Cynthia V. Ward, *Toward Cantankerous Community*, 3 WM. & MARY J. WOMEN & L. 249, 275 (1997) (praising Williams's use of the “power of empathy” to stimulate dialogue among different groups of people “despite profound, enduring, and perhaps even permanent differences”).

would be preferable to see Farber and Sherry consider Williams's perspective more directly and honestly. The authors of *Beyond All Reason* must find something curious in the complaints of a Columbia Law School professor who started teaching at Golden Gate University School of Law, moved to CUNY at Queens, and then continued at Wisconsin before joining the faculty at Columbia.<sup>69</sup> Few law professors can match that type of upward mobility. The course of Williams's career surely indicates that any deficiency she discovers is at most with Harvard rather than with the legal academy's attitude toward affirmative action and the intellectual strength of people of color generally. It is likely that the irony of Williams's complaint is not lost on Farber and Sherry. It is unclear, then, why they do not make the point directly in their response to Williams.

4. *Good Scholarship Is Hard to Do: The Consequences of Carelessness.*—Finally, in some parts of their critique, Farber and Sherry adopt an unconvincing, anecdotal approach to argue that radical works evince disregard for the truth. The style of the multiculturalists confirms for the authors of *Beyond All Reason* that legal storytelling lacks the rigor and discipline that distinguish the best scholarship.<sup>70</sup> They infer from the sloppiness of Williams, for example, that the multiculturalists harbor a contempt for truth as the majority of the academic world conceives it:

Williams . . . states that "through the first part of the century" the U.S. Supreme Court had upheld "a state's right to forbid blacks to testify against whites." This is a rather shocking assertion, but the typical reader would probably feel safe in relying on this legal claim by a Columbia professor specializing in race law. But Williams's claim is false. Since 1866, federal law has entitled blacks to testify in court on the same terms as whites. The only case Williams cites to support her assertion was decided in 1871, not in "the first part of the century."<sup>71</sup>

The authors attribute Williams's error to "casualness about truth[,] . . . legal doctrine and the historical record."<sup>72</sup> In fact, if the example Farber and Sherry cite is not an isolated one, it would seem that Williams is not a very conscientious scholar. On the other hand, if the example

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69. See *Columbia Law School Homepage* (visited December 18, 1999) <<http://www.law.columbia.edu/faculty/pwilliams.html>>

70. See p. 39 (including themselves among critics who "have called for greater care and rigor in the use of narratives within the framework of scholarly analysis"); see also *supra* text accompanying notes 58-63.

71. P. 100 (quoting WILLIAMS, *supra* note 19, at 47, 242 n.3); see also Civil Rights Act of 1866, 42 U.S.C. § 1981 (1994) (guaranteeing blacks the right to enter into contracts, to sue and be sued, and to testify in court).

72. P. 100.

cited by Farber and Sherry is isolated, then Farber and Sherry may be straining to make a point about Williams's and radical multiculturalists' contempt for truth as most of us conceive it.

You get the sense from the Farber and Sherry correction of Williams's misreport of the law that, again, *Beyond All Reason* is really attacking something other than what it purports to attack. Farber and Sherry probably think that Williams is a negligent, perhaps reckless, scholar, but they do not assert this. If this were the substance of the Farber and Sherry criticism, they would need to offer many more examples of her inattention. Instead, it is, in a way, easier to accuse Williams of the more fundamental deficiency, a contempt for truth, and use an isolated incident to confirm that conclusion, than it is to acknowledge that Williams may simply have erred. A single deliberate lie is more likely to be viewed as a reflection on a person's character than a single mistake. In either case, just as when Farber and Sherry reproduce the insipid bathrobe account,<sup>73</sup> they have attacked a weak link and attached to it significance in a manner that it is appropriate to question.

### C. *Traditionalists' Unease with the Growing Irrelevance of Legal Scholarship*

If the greatest deficiency of multiculturalism is its proponents' inability to describe accurately and fairly the status quo, a response that corrects the radicals' misperception and misrepresentation is certainly helpful, but such a response to the multiculturalists still fails to address the fundamental deficiencies in the radical multiculturalists' approach to matters legal. Ultimately, all that *Beyond All Reason* does is demonstrate that some radical multiculturalists misrepresent verifiable facts in some of their work. Farber and Sherry do not address the following three problems with radical multiculturalist theory that are probably of the greatest concern to traditional, doctrinal scholars with relatively practical objectives: its irrelevance to the overwhelming bulk of legal practice and study, its failure to offer prescriptions for social ills, and its disconnection from the natural sciences that are the appropriate foundation for anthropological and metaphysical assertions of the type the radicals wish to make.

1. *Irrelevance of the Radical Critique.*—For those who toil with the mysteries and majesty of what they refer to as “real” law, it may be easy to ignore radical scholarship as unconscientious legal inquiry. It is difficult to discern the point of scholarship that will not tell you how to close a real estate deal, document a loan, or get your client out on bail that she can

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73. See *supra* text accompanying note 65.

afford. The philosophical ratiocinations of the multiculturalists may be of more interest to sociologists, psychologists, and theologians than to those who teach the law to students who need to know where to stand in court so that they will be able to repay their student loans. The subject matter of the radical perspective amounts to only the most modest sliver of the law school curriculum, and an even finer slice of the practice of law. The skeptic could question expending so much intellectual energy on developing the radical perspective of law students who may not know the difference between a check and a money order. This omission is a missed opportunity by Farber and Sherry. The academy's preoccupation with the radical left (and perhaps with "law and . . ." movements generally) has made legal education increasingly irrelevant to the lives of all but the smallest group of lawyers, most of whom will enter the academy. Regardless of what one may think of the radical perspective, it is imperative that those who offer a critique of multiculturalism come to terms with the scholarship's relationship to the practice of law.

2. *Questions Without Answers.*—Even were the radical *description* of existing social, legal, and political imbalances (real or perceived) coherent, which Farber and Sherry dispute, *Beyond All Reason* does not address the radical multiculturalists' failure to offer a coherent, reality-based *prescription*.

For doctrinal scholars, the carelessness of radical commentators is troublesome. But perhaps a greater and more fundamental problem with the radical perspective remains once the factual inaccuracies are revealed—the failure of radical commentators to prescribe a legal cure for the real social inequities that remain after the radical obfuscation is revealed. For at least some doctrinal scholars, that failure is the greatest shortcoming of the radical critique.<sup>74</sup> It is not that traditionalists, those who focus on the operation and cooperation of legal mechanisms and trust those mechanisms to respond to injustice, are simply indifferent to radical protestations. Indeed, even the most conscientious scholars would probably be willing to discount the radicals' factual errors and focus instead on a radical argument that intelligently comes to terms with real miscarriages of justice.

Farber and Sherry do not engage the radical critique on this level. They settle, instead, for what amounts to intellectual proofreading. The question we want Farber and Sherry to ask is whether the game is worth the candle. More important than whether a particular radical scholar has

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74. See Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1184-85 (1991) (stating that while radical commentators "emphasize the importance of differences between cultural groups, these commentators generally discuss only the ways in which the special strengths of historically subordinated groups have been inadequately appreciated" and "[f]ew discuss directly what the appropriate response should be").

gotten her facts right is whether, once we get the facts right, the radical perspective has told us anything about the way legal mechanisms and institutions should be retooled to respond to real inequity. It is not enough for radicals to conclude that economic inequality is a result of the concentration of wealth. More helpful would be substantial discourse that engages the most fundamental reasons why the social and economic aspirations of nearly everyone are at some time frustrated—and how the law should be changed to deal with this fact. For many doctrinal scholars, the invective of radical scholars is a tragedy because it is essentially vacuous. All the Farber and Sherry critique offers, ultimately, is a response to the sum but not the substance of factual inaccuracy.

3. *Nonscientific Basis of the Radical Critique.*—If Farber and Sherry had engaged the radical critique directly, *Beyond All Reason* could have explored the fundamental flaw of overly ambitious legal commentary, or for that matter, all social commentary, that proposes to reduce human interrelations to the head of the hegemony pin. Edward O. Wilson described the substance of that type of intellectual error in his recent book *Consilience*, which posits the reality of the unity of knowledge but expresses extreme skepticism that social scientists have succeeded in revealing the basic contours of that fundamental unity:

The full understanding of utility will come from biology and psychology by reduction to the elements of human behavior followed by bottom-up synthesis, not from the social sciences by top-down inference and guesswork based on intuitive knowledge. It is in biology and psychology that economists and other social scientists will find the premises needed to fashion more predictive models, just as it was in physics and chemistry that researchers found premises that upgraded biology.<sup>75</sup>

The radical literature is dominated by such top-down inference and guesswork based on intuitive knowledge.<sup>76</sup> The problem, to a significant extent, with the radical perspective is that the science of victimology is inconsiderate of fundamental biological and psychological premises. Rather than engage other branches of intellectual inquiry, the radical multiculturalists, at their worst, wrap emotional reaction in the rhetoric of intellectual rigor and create diatribe that is more preposterous (because not objectively verifiable) than prescient.<sup>77</sup> While Farber and Sherry do an

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75. WILSON, *supra* note 31, at 206.

76. P. 87 (discussing how radical multiculturalists think that different groups understand the world in fundamentally different terms).

77. See pp. 95-97 (criticizing Patricia Williams's account of the Tawana Brawley incident as unconcerned with whether the incident actually happened): n. 127 ("Defenders of storytelling need only

admirable job of depicting the multiculturalists' inability to afford one another even the most basic common decencies,<sup>78</sup> *Beyond All Reason* does not come to terms with a more fundamental flaw in the radical program: the lack of scientific integrity in the sense Edward Wilson intends.<sup>79</sup> The book would have been stronger if Farber and Sherry had spent more time treating that flaw in the radical perspective generally instead of criticizing the most obviously extreme absurdities of the radical movement in legal scholarship.

4. *Conclusion.*—Perhaps the salient impression left by reading *Beyond All Reason* is the profound disappointment that radical scholarship has preoccupied the highest echelons of the academic community and has maintained the attention of very significant intellects, such as Farber and Sherry, by generating much more heat than light. *Beyond All Reason* is a contribution to the literature, and not just the legal literature. In sober tones the book surveys the radical multiculturalist literature and holds its excesses up to the light. But Farber and Sherry do not delve as deeply as we might like into the incongruities of the radical critique; they take aim at only the largest (easiest) targets, and too often settle on the more egregious but least substantial failures of the radical literature. A reader could have expected much more of *Beyond All Reason*, given the talent and stature of the book's authors. The book leaves the conscientious student of the legal literature wondering whether Farber and Sherry missed something that would have made their response to the radical critique more effective.

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point out that the challengers necessarily assume the very concepts of objectivity and truth that the storytellers are attacking. The critique of truth is peculiarly immune—after all, by what standard could one judge a critique of truth itself to be 'false'?"; p. 137 (arguing that radical multiculturalists "can explain away any seemingly adverse evidence, because they know in advance that it cannot be valid," which "makes genuine intellectual engagement with outsiders difficult").

78. See, e.g., p. 14 ("[W]e have a strong distaste for the growing incivility of academic disputes."); pp. 89-90 (relating unfriendly and uncivil exchanges among radicals on a personal, face-to-face level); pp. 90-94 (recounting a rancorous debate between two prominent figures in critical legal studies and radical theory—Mark Tushnet and Gary Peller—regarding a work by Patricia Williams).

79. See, e.g., WILSON, *supra* note 31, at 11 ("Given that human action comprises events of physical causation, why should the social sciences and humanities be impervious to consilience with the natural sciences?"); *id.* at 12 ("The [mind] is the same for both enterprises, for science and the arts, and there is a general explanation of its origin and nature and thence of the human condition, proceeding from the deep history of genetic evolution to modern culture."); *id.* at 53-54 (defining science and its characteristics and contrasting it with nonscience); *id.* at 183 ("[N]ever . . . have social scientists been able to embed their narrative in the physical realities of human biology and psychology . . ."); *id.* at 188 ("[T]he social sciences are intrinsically compatible with the natural sciences. The two great branches of learning will benefit to the extent that their modes of causal explanation are consistent."); pp. 39-40 ("Radical feminists . . . thus reject the linearity, abstraction, and scientific objectivity of rational argument.").

### III. Deconstructing Radical Multiculturalism: Has It Anticipated the Farber and Sherry Critique?

In his provocative attack on the argument of *Beyond All Reason*, Professor Alces concludes that Farber and Sherry have failed to capitalize on their opportunity to expose the most fundamental defects of radical multiculturalist theory. Professor Alces suggests that the authors' selective quotation from radical writings, and their failure to extend interpretive charity to those writings, steer them toward condemnations of radical multiculturalism that do not hold up under thoughtful analysis. I want first to respond to what I take to be Professor Alces's two main examples of this failure—Farber and Sherry's critique of radical storytelling as a method of legal analysis, and their attack on what they see as the radicals' disregard for truth—by defending the thesis of *Beyond All Reason* in both respects. However, I will then move on to discuss Farber and Sherry's argument in the context of the most recent developments in radical legal theory. I argue that the core theoretical problem the authors isolate in radical theory—that such theory can never produce a system of law that advances the cause of social justice—is becoming a nonissue in the context of the most recent radical legal scholarship, which reintroduces into the feminist and critical race lexicon a respect for individual agency and (I suggest) for individual rights as a socially progressive means of securing such agency to all.

#### A. *Defending the Central Thesis*

My coauthor argues that Farber and Sherry's attack on the use of autobiographical storytelling misses the mark because the authors of *Beyond All Reason* focus too much on whether the stories are true. According to Professor Alces, the more appropriate question from the radical perspective is whether they are good stories, that is, whether they move us enough to question the way we think about the issues they raise, such as racism and sexism.

Professor Alces's argument suggests that there is no point to making a story autobiographical; instead, the story should be evaluated purely on its literary merit.<sup>80</sup> But why, then, do so many legal storytellers make clear that their stories are in fact autobiographical? Surely they mean to achieve something by writing a story that says not merely "this is what I think," but rather "this is what happened to me." In fact, the addition of personal experience to a story almost certainly evinces the writer's desire to persuade readers of the objective truth of the story's main argument—for

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80. See *supra* text accompanying notes 58-63.



example, that racism is pervasive in our society.<sup>81</sup> The readers of autobiographical stories are meant not only to sympathize with the author but to realize through the author's personal experience that racism is real and objectively harmful.<sup>82</sup> To deny this is not simply to disagree—it is to deny a truth that has been lived by the author. Such denial becomes an act of disrespect that may then itself be decried as bigotry.

The use of autobiographical legal stories drives home Farber and Sherry's point about the dramatic contradictions within radical multiculturalist theory. As they note repeatedly in *Beyond All Reason*, the substantive point of the radical argument is that objectivity and truth do not exist.<sup>83</sup> At the same time, however, the radicals' use of autobiographical storytelling seems intended to establish a set of verifiable facts about the world—the very basis for argument that radical multiculturalism condemns as inherently oppressive.<sup>84</sup> Readers are meant to be persuaded by these autobiographical accounts that the author's point of view is true. In the context of legal storytelling, they presumably intend to suggest that the author's version of truth should become the basis for law and policy. The truth of the radical stories therefore does matter within the context of the radical enterprise, and their falseness simultaneously exposes and reflects the inherent contradictions in radical thought.

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81. See p. 39 ("The new storytellers believe that stories have a persuasive power that transcends rational argument."); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1022 (1991) (explaining that narratives persuade by "depicting a conflict or event with a vividness that is impossible to achieve through abstract expression"); see also Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2272 (1989) ("When someone tells us a story, he or she invites us to enter a constructed world. . . . Our very success in understanding the story is simultaneously the narrator's success in persuading us—at least temporarily—to imagine the world in a particular way.").

82. See Abrams, *supra* note 81, at 1021 (asserting that "first person agony narratives" are persuasive because the pain experienced by the author "encourages readers' assent to her account"); Winter, *supra* note 81, at 2277 (explaining that an audience achieves understanding and empathy because it "'lives' the story-experience and is brought personally to engage in the process of constructing meaning out of another's experience"). See generally Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (analyzing the role of storytelling in legal scholarship).

83. P. 33.

84. See p. 5 ("Other[] [radical multiculturalists] attack the concepts of reason and objective truth, condemning them as components of white male domination."); p. 26 ("Rationality, objectivity, accuracy and standards of intellectual quality and merit are slogans or masks of oppression designed to convince the oppressed that subordination is justice." (quoting Neil W. Hamilton)); see also Roderick M. Hills, Jr., *Truth or Consequences? The Inadequacy of Consequentialist Arguments Against Multicultural Relativism*, 15 CONST. COMMENTARY 185, 190 (1998) (describing as a principle of radical multiculturalism the view that "objective truth is a white, male, and heterosexual social construction"); Francis J. Mootz III, *Between Truth and Provocation: Reclaiming Reason in American Legal Scholarship*, 10 YALE J.L. & HUMAN. 605, 611 (1998) ("Radical multiculturalists deny the existence of truths about which we can gain knowledge and reject the possibility of developing neutral standards by which we can make objective judgments of merit.").

Professor Alces also suggests that Farber and Sherry go too far in accusing the radical multiculturalists of a total disregard for truth.<sup>85</sup> Focusing on Patricia Williams's account of the Tawana Brawley debacle, Professor Alces argues that Williams's attempt to carry the discussion of that incident beyond the truthfulness of Brawley's rape claim may not evidence any moral deficiency in the radical critique, but simply a desire to reach another *kind* of truth—the truth that whether or not she lied about the rape, “[h]er condition was clearly the expression of some crime against her, some tremendous violence, some great violation that challenges comprehension.”<sup>86</sup>

But Farber and Sherry would almost certainly agree with this conclusion.<sup>87</sup> Their focus here is on what should happen legally in the rape case when it becomes apparent that Brawley lied. As Professor Alces points out, they make this point by asking (via a quote from Anne Coughlin), “In what kind of legal system would it make no difference whether a woman who claimed she had been raped was telling the truth?”<sup>88</sup> In short, Farber and Sherry seem to agree with Professor Alces that, whether or not Williams's analysis of the Brawley case “tells us something about the condition of black women,”<sup>89</sup> it tells us nothing at all about how the law should respond when a criminal charge is proven to be false.

From this perspective, the thesis of *Beyond All Reason* holds up against Professor Alces's criticisms that the authors' quotes from radical multiculturalist writings are unfair, and that Farber and Sherry have failed to explore adequately the various possible interpretations of those writings. My own criticism of the book focuses on a quite different weakness, one that will become clear from reviewing and reconsidering Farber and Sherry's analysis in light of recent and dramatic movement from within the theoretical camp they attack.

### *B. Radical Theory Reaches a Dead End*

As Farber and Sherry suggest, any justice-based argument that is worthy of the name must derive from values that discriminate between good and evil in the political context.<sup>90</sup> The radical multiculturalists do, in fact, rely on objective truth and rational analysis in demonstrable

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85. See *supra* text accompanying notes 47-55.

86. WILLIAMS, *supra* note 19, at 169-70.

87. See, e.g., p. 97 (“We think readers are entitled to know which type of statement is being made, and the radicals' casual attitude towards truth eliminates the distinction.”).

88. P. 96 (citation omitted).

89. P. 96.

90. See p. 119 (stating how radical multiculturalism “defies common sense” because it refuses to discriminate between good and bad).

respects. Indeed, their own analysis, when taken to its logical conclusion, mandates a major reconstruction of their philosophical premises.

Radical theory manifestly assumes the reality of objective truth and rationality. Certain core "truths" form the basis for both its diagnosis of the ills of American law and society and its remedial proposals. First and perhaps fundamentally, when radical multiculturalists make an argument for racial equality (however that value is defined) as a matter of justice, they necessarily imply that inequality between the races is wrong, is unjust, and that striving for equality is a rightful goal. Indeed, political arguments for justice and equality are not even coherent in a philosophical context that rejects the possibility of transcendent political values. To the extent that radical scholars mean it when they speak of racism and sexism as unjust, and when they argue in favor of political and legal methods of ending these forms of inequality, their arguments necessarily depend on analytically prior assumptions about the "rightness" of equality and the "wrongness" of inequality.

As Farber and Sherry point out, radical scholarship invokes a clear and unequivocal theory about the nature and origins of civil society, according to which the conditions that individual human beings interpret as objective "reality," including their societal position and the power relations in which they find themselves entangled, are socially constructed by identifiable groups for the benefit of such groups and to the lasting detriment of others.<sup>91</sup> "Stated baldly," write Farber and Sherry, "their thesis is that reality is socially constructed by the powerful in order to perpetuate their own hegemony."<sup>92</sup>

Second, this scholarship implies a belief in certain "truths" about the effect of socially constructed environments on human psychology and development. Radical feminist scholarship may illustrate these beliefs most succinctly. Of the cultural feminist claim that women as a group view the world differently—in more relational, care-centered terms—than do men as a group,<sup>93</sup> the radical feminist explanation is that women have been socially constructed to be victims, and that part of this construction has involved the creation in individual women of a victim's psychology—a psychology primarily focused on pleasing others and on denigrating the

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91. Pp. 23-26.

92. P. 23.

93. See p. 87 (noting that such scholars have suggested that the feminine view of the world emphasizes caring and emotion, whereas the male view emphasizes rationality, abstraction, and objective thinking); see also MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 23 (1991) (explaining that feminists have "disputed the assumption that traditionally 'female' traits such as nurturing ability, emotional expression, and empathy are less worthy than such traditional 'male' traits as aggression, stoicism, and individual autonomy").

self.<sup>94</sup> Men, on the other hand, have been socially constructed to possess autonomous “selves” and to believe that preserving and developing the individual self are more important than serving others.<sup>95</sup> In short, power constructs personality, and social oppression reproduces itself in the form of personal “preferences” that in fact reflect an individual’s place in the social hierarchy.

Third, radical theory relies on core assumptions about the specific nature of the social hierarchy it critiques. This hierarchy is primarily organized along racial and gender lines,<sup>96</sup> with white males at the very top and minority females at the very bottom.<sup>97</sup> Incorporating the previously discussed assumption that power constructs personality, radical theory necessarily suggests that the various racial and gender groups share perspectives that have resulted from their relative positions in the social hierarchy. A corollary of this vision that groups share hierarchy-based perspectives is that dominated groups share important interests in their various fights for equality, interests that both reflect their socially constructed perspectives and can form the basis for group-based political and legal remedies.<sup>98</sup> Indeed, Farber and Sherry note that such sharing of perspective has been the basis of the claim by some radical scholars to speak in a unique “voice of color” that both describes the oppression and articulates the legal claims of racial minorities.<sup>99</sup> Similarly, radical

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94. See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 109-10 (1989) (asserting that conditioning to the values of the contemporary feminine stereotype, such as being passive, vulnerable, weak, and incompetent, “permeates the upbringing of girls and the images for emulation thrust upon women”).

95. See *id.* at 89 (asserting that consciousness-raising among women revealed “how women are systematically deprived of a self and how that process of deprivation constitutes socialization to femininity”).

96. Most radical theorists would probably concede that a class-based analysis would suggest that race and gender are not the only bases for oppression. For example, American society contains wealthy members of all minority groups as well as poor members of the majority white race. However, the relevance of class to radical multiculturalist analysis is a subject of some internal debate within radical scholarship, and is not very prominently featured in its arguments for justice. See, e.g., Donna R. Lee, *Mail Fantasy: Global Sexual Exploitation in the Mail Order Bride Industry and Proposed Legal Solutions*, 5 ASIAN L.J. 139, 165 (1998) (stating that in order to be a useful analytical framework for Asian Pacific women’s issues, radical feminism’s “focus on gender to the exclusion of . . . class must be avoided”). I therefore pass over it here.

97. See, e.g., Donna Haraway, *A Manifesto for Cyborgs: Science, Technology, and Socialist Feminism in the 1980s*, in FEMINISM/POSTMODERNISM 190, 197 (Linda J. Nicholson ed. 1990) (stating that minority women have been defined as a group “by conscious appropriation of negation” and find themselves “at the bottom of a cascade of negative identities”).

98. See, e.g., Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of “Diversity,”* 1993 WIS. L. REV. 105, 154-61 (propounding the importance of drawing on a shared perspective grounded in oppression in a group’s fight for equality).

99. See p. 73 (“[M]inority scholars (or at least some of them) are said to write in a unique ‘voice of color’ that makes their race part of their scholarship.”).

feminist Catharine MacKinnon frequently speaks of "woman's point of view," a mindset that is not inherently or naturally female but is created and perpetuated by a society built upon the foundational principle of male supremacy.<sup>100</sup>

If radical multiculturalist theory is grounded in the three core truths listed above, then the paradox at its core becomes immediately apparent. It seems clear as an initial matter that radical multiculturalists must deal with the problem of determinism that appears inherent in their theories. For example, if one accepts the radical feminist view that women are socially constructed to be victims it becomes difficult to explain the feminist movement. If women lack authentic individual "selves" because they have been constructed to possess the psychology of subservience, how do they come to realize that this condition is unjust? How are they able to decide that sex inequality is wrong and to organize politically to end it?<sup>101</sup> The feminist movement arose from the conviction that women were treated unjustly, and that they did not deserve inferior treatment but instead were entitled to equality.<sup>102</sup> Such beliefs must proceed at some level from women's strong sense of self and from their ability to act independently to

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100. See, e.g., MACKINNON, *supra* note 94, at 51-52 (critiquing Carol Gilligan's thesis on the different moral reasoning of women and explaining that any such "different voice" is a product of male supremacy).

The discussion thus far raises two important concerns in light of Farber and Sherry's analysis. First, is it fair to classify these principles as truths, and thus to imply that radical theorists are just as objectivist and as value-dependent as their liberal adversaries? Could radical scholars not argue that even these fundamental premises are merely strategic positions designed to further their own quest for societal power, or that the truths they suggest are matters of perspective that may be perceived only by certain persons or groups and not by others? I think both of these arguments implausible, the first because it implies bad faith on the part of radical theorists—that they are merely using the words "justice" and "equality" in order to further a quest for power that is in fact motivated only by self-interest—and the second because, to the extent that the truths about social domination and its effect on perspective are not perceivable by nongroup members, the efforts of radical scholars become inexplicable. Why waste time writing scholarship when the points you seek to make are already known by your own group as a result of its experience, and are simultaneously unknowable by other groups because they lack your experience? The most plausible conclusion is that radical scholars believe what they are saying, and that their scholarship constitutes an effort to convince others that their views are true and right.

101. See, e.g., MACKINNON, *supra* note 94, at 115. MacKinnon recognizes this problematic query:

Feminism criticizes this male totality without an account of women's capacity to do so or to imagine or realize a more whole truth. Feminism affirms women's point of view, in large part, by revealing, criticizing, and explaining its impossibility. . . . If women had consciousness or world, sex inequality would be harmless, or all women would be feminist. Yet women have something of both, or there would be no such thing as feminism. Why can women know that this—life as we have known it—is not all, not enough, not ours, not just? Now, why don't all women?

*Id.*

102. See Anne Phillips, *Introduction* to FEMINISM AND EQUALITY 1, 6-7 (Anne Phillips ed. 1987) (explaining that the view of equality embodied in the traditions of liberalism and republicanism served as an early basis for western feminist thought).

fight for their rights—in other words, from women's agency. Radical feminism gives women no credit for their efforts to transcend gender discrimination and adverse socialization to achieve equality.<sup>103</sup> Similarly, scholars of race who theorize a shared psychology of victimization among disadvantaged minority groups lack an explanation of how such groups have managed to better their political and legal situation.<sup>104</sup> Progress, and the independent thought and action necessary to achieve it, become impossible to explain (except as a gift from the privileged) in a world comprised only of victims and oppressors.<sup>105</sup>

In radical circles, this problem has become known as the sin of "essentialism." In the jurisprudential context, essentialism is the idea that large groups of people—for example, women or African Americans—possess a single, monolithic experience and world view that can be categorized and analyzed independently of the individual differences among the members of such groups.<sup>106</sup> Postmodern legal theorists charge that essentialism is fatal to the legitimacy of a political theory because it artificially creates unity amidst irreducible difference.<sup>107</sup> There is no such thing, argue antiessentialists, as a unitary "voice of color" or "woman's point of view"; to argue otherwise is to deemphasize or erase the reality of nontranscendable difference.<sup>108</sup> In short, antiessentialists apply the metaphysical assumptions of radical multiculturalist theory to radical proposals for political and legal reform. They deny the existence of a universal human nature consisting of shared characteristics (such as the capacity for rational deliberation) around which a progressive society can

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103. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 327-28 (1995) (suggesting that dominance theory tends to dismiss the possibility that women have the capacity to act outside the sphere of male domination).

104. See p. 56 (stating that "[a]tributing differing success rates to discrimination or disadvantage . . . ignores the rise of the black middle class").

105. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 612-13 (1990) (arguing that gender essentialism "has hindered the ability of women, and in particular black women, to learn to construct themselves in a society that denied them full selves").

106. See, e.g., ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* ix (1988) (criticizing the "tendency in dominant Western feminist thought to posit an essential 'womanness' that all women have and share despite the racial, class, religious, ethnic, and cultural differences among us"); Harris, *supra* note 105, at 585 (defining "gender essentialism" as "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience"); *id.* at 588 (describing "'racial essentialism'—the belief that there is a monolithic 'Black Experience,' or 'Chicano Experience'—as a 'corollary to gender essentialism'").

107. See Harris, *supra* note 105, at 615, 615-16 (deriding essentialist political theories as dangerous to the greater project of energizing legal theory because "hitherto silenced" voices will continue to be excluded under these theories).

108. See *id.* at 594-95 (explaining that feminists often superimpose a theoretical framework onto women of color that privileges the experiences of gender over race, thus ignoring fundamental questions about racial experiences).

be organized; they also deny the existence of universally valid truths about the proper structure of law and politics.<sup>109</sup> Thus, political reform proposals that rely on articulating a single "voice of color" or "women's point of view" necessarily deface the truth that human differences will always disrupt the essentialist unities underlying such theories.

At first glance, antiessentialism appears to open a space for the introduction of agency and autonomy under conditions of oppression. Without letting go of the postmodern premise that human beings are entirely socially constructed, antiessentialists point out that the experience of human beings is not as totalizing as essentialists would have it—that even those groups that have been most oppressed have often managed to develop a strong enough sense of self and justice to fight, successfully, against racial and gender inequality.<sup>110</sup>

But antiessentialism carries its own set of potential dangers and risks, which threaten to lead radical theory into a trap similar to the one set by essentialists. Antiessentialist theory introduces a mistrust of "group-think" in an effort to recognize fundamental difference. But if group desires may not be coherently articulated in group terms, then how are demands for political and legal reform to be articulated? The instant that radical feminists begin to speak about "women's point of view," antiessentialists destabilize the category "women" by pointing out that black women's experiences of oppression have been fundamentally different from those of white women,<sup>111</sup> and that lesbian women, married women, single women, rich women, and poor women all have experiences that call into question any claim to speak in a single "woman's" voice. The same destabilizing maneuver can of course be employed with respect to any other attempt at group categorization; a claim that racial minorities speak in a single "voice of color" is subject to the criticism that the Chicano experience has been fundamentally different from the black experience, that the experience of black women differs from that of black men, that black lesbian women have different things to say than have black straight women (or white straight women), and so on.<sup>112</sup>

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109. See *id.* at 592 (criticizing dominance theory as seeking to convey a universal truth, which does not adequately encapsulate the experiences of black women).

110. See, e.g., Harris, *supra* note 105, at 612-13 (noting that African American women have managed to reconstruct their identity in the face of oppression).

111. See SPELMAN, *supra* note 106, at 125 ("Such an [additive analysis of sexism and racism] distorts Black women's experiences of oppression by failing to note important differences between the contexts in which Black women and white women experience sexism."); Harris, *supra* note 105, at 686 (explaining that black women have been arguing that their experience calls into question the notion of a unitary "women's experience").

112. As professor Anne Dailey observes:

Anti-essentialism ultimately challenges the authority of all standpoint epistemologies by denying that any particular perspective has a special claim to truth. No matter how

Indeed, this fracturing of group-think into smaller and smaller subgroups does not even stop at the level of the physical individual.<sup>113</sup> The antiessentialist Angela Harris has written that “we are not born with a ‘self,’ but rather are composed of a welter of partial, sometimes contradictory, or even antithetical ‘selves.’”<sup>114</sup> The individual body is important simply because it is the site of experience, but experience does not create a unified individual “self.” Instead, the human mind is a vessel containing partially assembled pieces from different jigsaw puzzles.<sup>115</sup>

Thus, antiessentialist theory reintroduces the problem of agency. While radical political theory made agency<sup>116</sup> seem impossible under its totalizing assumption that disadvantaged groups are constructed to be victims, antiessentialist thought views human consciousness as a “brown bag of miscellany propped against a wall,”<sup>117</sup> treating any idea of an “essential” or “core” self as a dangerous myth that ignores the foundational reality of difference.<sup>118</sup> In this view, autonomous, willed action becomes happenstance. Rather than being a function of a shared human desire for justice or the product of a core ability for rational deliberation, agentic action represents the chance occurrence in some human bodies of experience that happens to produce a preference for social equality and a desire for justice.

If difference is the most profound truth about human psychology, then the concepts of right and wrong and of justice and injustice cannot transcend individual consciousness and cannot, therefore, be used to craft laws generally applying to all without coercing some. Taken to its logical

carefully we parse the dimensions of difference, further distinctions will present themselves. A politics based on the connections among black women can splinter along lines of class; a politics based on the connections among black middle-class women can splinter along lines of sexual preference; a politics based on the connections among black middle-class lesbian women can splinter along lines of religion, and so on. What we seem to be left with after the anti-essentialist critique has exhausted itself is a politics of the self.

Anne C. Dailey, *Feminism's Return to Liberalism*, 102 YALE L.J. 1265, 1272 (1993) (book review).

113. See *infra* text accompanying note 131.

114. Harris, *supra* note 105, at 584; see also *id.* at 608-12.

115. See, e.g., Dailey, *supra* note 112, at 1272. Dailey gives the following explanation: And not even that. Anti-essentialism has led some feminists beyond women's difference from men or from each other to reach fundamental questions concerning the unified nature of human identity. For many . . . theorists . . . identity or selfhood cannot fairly be viewed as a fixed transcendent whole, but is instead a socially-constructed mix of contradictory impulses and fears.

116. In the radical lexicon, “agentic action” denotes “resistant action” by an individual in the face of oppression, rather than nonagentic action or passivity. See Abrams, *supra* note 103, at 352 n.198, 369.

117. Harris, *supra* note 105, at 613 (quoting ZORA NEALE HURSTON, *How It Feels to Be Colored Me*, in I LOVE MYSELF WHEN I AM LAUGHING . . . AND THEN AGAIN WHEN I AM LOOKING MEAN AND IMPRESSIVE 152, 155 (Alice Walker ed., 1979)).

118. See *supra* note 115.



conclusion, this line of thought, like that of the essentialists, weighs against the very possibility of a just politics and law. If individual persons consist merely of passive intersections between the various social constructs that have formed them as distinct psychological entities, on what basis can the law mediate between their different claims? On what basis can individuals come to a noncoerced agreement about the correct premises and proper ends of legal institutions? And supposing that such agreement could be reached within a particular society, what justifies that society in seeking to develop its own context-driven values—even basic values such as equality and respect for the dignity of all persons—in other cultures that reject those values? This is, of course, Farber and Sherry's central point; radical legal theory cannot justify progressive law or politics.

### C. *The Structure and Contribution of Radical Theory*

Radical theorists want to talk about injustice and argue for an end to inequality in terms that are persuasive to everyone. Their search is for a political mode of discourse that grants maximum recognition to human difference while also offering the possibility of agreement on fundamental political values and legal institutions.<sup>119</sup>

The radicals' attempt to escape this paradox has led them into rethinking, and in some cases reconstructing, the values and assumptions of liberalism and of liberal individual rights.<sup>120</sup> In a jurisprudential field dominated by radical attacks on "liberal legalism"—particularly its purportedly atomistic conception of the individual, its suppression of radical difference among people, and its reliance on the universal applicability of abstract values—this statement may seem incoherent. But radical legal theory seems to be finding its way toward a reconstruction of Enlightenment values that ultimately celebrate both the importance of the individual and the necessity of designing the law around the protection of individual rights.

Postmodern scholars assail liberal legal systems on three main grounds. They contend, first, that the conception of the reason-following "autonomous individual" that underlies some liberal visions of legal rights

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119. See, e.g., CAROL C. GOULD, *MARX'S SOCIAL ONTOLOGY: INDIVIDUALITY AND COMMUNITY IN MARX'S THEORY OF SOCIAL REALITY* 9 (1978) ("The whole or unity that is reconstituted in these internal relations among the individuals is thus mediated or differentiated by their individuality, hut unified by their communality.").

120. See, e.g., Kathryn Abrams, *Autonomy and Agency*, 40 WM. & MARY L. REV. (forthcoming 1999); Abrams, *Sex Wars Redux*, *supra* note 103; PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT* (1991); Harris, *supra* note 105; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (advocating a theory of separation assault as a way to rethink the problem of domestic violence that would emphasize the batterer's behavior, not the victim's).

and equality is a myth. There is no such thing as a shared human capacity for rational autonomy as liberals understand it.<sup>121</sup> Second, postmodern critics argue that liberalism suppresses fundamental "difference" among humans, masking such difference by assuming a universal human capacity for autonomy and designing the state and the law to honor that capacity by remaining neutral among individual visions of the good.<sup>122</sup> Critics of liberalism attack liberal neutrality as a myth that cloaks the continued social dominance of elites that have amassed power in the absence of state coercion.<sup>123</sup> The third postmodern claim is that the character and behavior of human beings is a function of social constructs, especially those of gender, race, sexual orientation, and class.<sup>124</sup> Since the particular

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121. See, e.g., Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW ENG. L. REV. 1173, 1184-85 (1992) ("Rather than think of the individual 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 . . ."); *id.* at 1192 ("[P]ostmodernists suggest that the traditional notion of authenticity—'to thine own self be true'—is an immediate patient for postmodern surgery."); Iris Marion Young, *The Ideal of Community and the Politics of Difference*, in FEMINISM/POSTMODERNISM 300, 310 (Linda J. Nicholson ed. 1990) ("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 the liberal conception of moral autonomy).

122. See, e.g., Young, *supra* note 121, at 307 ("[L]iberal 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.").

123. See, e.g., MACKINNON, *supra* note 94, at 220 (arguing that the 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 defined 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."); Derrick Bell, *supra* note 19, at 6-8 (discussing contradiction between America's ideal of equality and its reality of racism, and arguing that "[m]uch of what is called the law of civil rights . . . has a mythological or fairy-tale quality"); Angela P. Harris, *Forward: Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 754 (1994) (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."); Young, *supra* note 121, at 168-69 (arguing that the liberal ideal that "applies the same standards to all perpetuates disadvantage because real group differences remain that make it unfair to compare the unequals"); *id.* at 173 ("[P]olicies that are universally formulated and thus blind to differences of race, culture, gender, age, or disability often perpetuate rather than undermine oppression.").

124. See, e.g., MINOW, *supra* note 93, at 19-23 (discussing social construction of difference in the context of the "difference dilemmas" it produces); Foster, *supra* note 98, 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 123, at 762 (discussing the postmodern "problem of the

constellation of formative contexts<sup>125</sup> faced by each individual will differ—with added force between cultures—postmodern critics advance the idea that it is necessarily an illegitimate assertion of power to design the law around a universal set of assumptions about human nature and values.<sup>126</sup>

These attacks contain important truths. First, they correctly expose as illegitimate the attempts of some liberal philosophers to insulate liberalism from value-laden political debate by positing the liberal state as neutral among visions of the good.<sup>127</sup> Such liberal neutrality is a myth. Liberal jurisprudence reflects a particular vision of human beings and of their proper relation to each other and to the state, a vision that is just as vulnerable to contention and debate as any other political and legal theory.<sup>128</sup>

Liberal theory has benefitted greatly from radical attacks on certain liberal attempts to separate individual rationality, agency, and autonomy from the social circumstances that undoubtedly influence the development and exertion of those qualities.<sup>129</sup> But the most important discovery that

subject" and claiming that "[t]he language of race creates, maintains, and destroys subjects, both inside and outside the law"); *id.* at 784 ("[R]acial communities, like other human communities, are the products of invention, not discovery."); Hutchinson, *supra* note 121, at 1192 (arguing that identity "is a cultural creation, not a biological given"); Allan C. Hutchinson, *Inessentially Speaking (Is There Politics After Postmodernism?)*, 89 MICH. L. REV. 1549, 1552 (1991) (book review) ("[T]he 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.").

125. See, e.g., Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 583 (1983) ("Deviationist doctrine sees its opportunity in the dependence of a social world upon a legally defined formative context that is in turn hostage to a vision of right.").

126. See MINOW, *supra* note 93, at 124 (noting that "liberal individualism" excludes "infants, married women, slaves, servants, apprentices, the very poor, and the mentally deficient" and asserting that the law "governing these people retained qualities of the status relationships that had been all but eliminated from others"); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 166-67 (1990) (noting that "liberal humanism . . . ignor[es] differences of race, sex, religion, and ethnicity," whereas "[t]he politics of difference insists on liberation of the whole group of Blacks, women, [and] American Indians").

127. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 55 (1980) (indicating that the liberal principle of neutrality "does not distinguish the merits of competing conceptions of the good"); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272-73 (1977) (observing that the liberal conception of equality mandates that government "must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's").

128. See, e.g., MACKINNON, *supra* note 94, at 249 (asserting that liberal jurisprudence "rationalize[s] male power by presuming that it does not exist").

129. See, e.g., p. 8 ("Rich and interesting scholarship has come from the pens of radical feminists, critical legal scholars, gay legal scholars and critical race theorists. They have much to add to discussion of issues like affirmative action, where the conventional debate has become stale and our society desperately needs some fresh perspectives."); Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 488 (1989) ("We can have only the thoughts, and ambitions, and convictions that are possible within the vocabulary that language and culture provide, so we are all, in a patent and deep way, the creatures of the community as a whole."); Phillip E. Johnson, *Do You Sincerely Want to Be*

has resulted from such criticisms is that liberal legalism is not rendered irrelevant by the importation of social influences into its conception of the autonomous individual—that the possibilities of autonomy, reason, and agency have transcended this necessary change in liberal ideas and continue to form the proper basis of, and justification for, law.<sup>130</sup> This discovery has driven radical multiculturalists inexorably towards rethinking their own views about autonomy, reason, and agency—a response which renders much of Farber and Sherry's analysis moot.

#### D. *From Agency to Rights*

1. *The Idea of Agency.*—Radical feminists have taken the first step towards resurrecting the liberal belief in individual autonomy and individual rights by introducing the concept of agency into the radical dialogue. For example, the recent work of Professor Kathryn Abrams traces the emergence within radical feminism of a concept she calls “partial agency,” which she describes as an attribute that allows women, who are significantly burdened by the socially constraining force of male domination, to nevertheless act against their oppression in ways that demonstrate a capacity for self-direction.<sup>131</sup> Although Abrams pays tribute to radical feminist dominance theory, she recognizes that its complete reduction of women to passive victims of gender hierarchy neither describes the real experience of women nor serves the feminist purpose of achieving gender equality.<sup>132</sup> Professor Abrams argues for a “respectful supplementation”

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a *Radical?*, 36 STAN. L. REV. 247, 289 (1984) (admitting that “there is a core of truth in [the] radical critique of liberal theory”).

130. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 1 (1986) (formulating a modern theory of liberalism that “may turn out to include elements borrowed from other political traditions”); *id.* at 19 (noting that freedom as a value is “intimately intertwined with others, and cannot exist by itself”); Stephen F. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L. J. 2243, 2278 (1993) (noting that “autonomy—as understood in postmodern terms—lies not in our disengagement from the constraints of community and tradition” but instead in “our conscious participation with others in tradition”); Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideas After All*, 104 HARV. L. REV. 1350, 1353 (1991) (asserting that liberals “can support the policy agendas of those critical movements that are inspired by and consistent with the goals of furthering and strengthening the substantive liberal values of freedom, equality, and human dignity”).

131. Abrams, *supra* note 120; Abrams, *supra* note 103, at 304 (describing the emergence of a contemporary critique, whose focus has shifted from the possibilities of transgressive, self-directed female sexuality to the possibilities of women's agency and resistance).

132. Abrams, *supra* note 103, at 354–55. Distinguishing between agency and dominance theories, Abrams explains:

[The partial agency] critique takes issue with dominance theory for its often-strategic repression of the possibility of such resistance. This muting of the agency theme in dominance-based accounts of the female subject provides an incomplete picture of contemporary women's lives, and may cause its message to be manipulated by opportunistic critics, or misunderstood by potential allies, such as the courts. This version

of dominance theory to incorporate partial agency, and she makes a powerful case that her reconstructed vision of agency should become the basis for changes in the law.<sup>133</sup>

Another widely respected example is the work of critical race theorist Angela Harris. In her well-known critique of feminist essentialism, Professor Harris criticizes the feminist view<sup>134</sup> that women share a collective identity or self, and that individual human beings are born with, or "naturally" develop, coherent, unified "selves." But Harris also argues that the idea of individual "will" can be rehabilitated and serve as the engine of human development and moral progress in a way that incorporates the mistrust of postmodern scholars for the rigid categorization and simplistic group-based politics that have categorized both our existing legal system and many proposals to reform it:

It is a premise of this article that we are not born with a "self," but rather are composed of a welter of partial, sometimes contradictory, or even antithetical "selves." A unified identity, if such can ever exist, is a product of will, not a common destiny or natural birthright. Thus, consciousness is "never fixed, never attained once and for all"; it is not a final outcome or a biological given, but a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated.<sup>135</sup>

Harris, and other antiessentialist critics, rescue the postmodern critique of liberalism from normative oblivion by introducing, alongside the reality of social construction, the transcending qualities of will and imagination.<sup>136</sup> These theorists see the human capacity for creative action

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of the agency critique seeks to highlight this repressed element through a respectful supplementation of dominance theory. . . . [T]he goal would be to depict women as possessing a constrained but nonetheless salient capacity for self-direction, while addressing the underlying conditions of women's oppression.

*Id.*

133. See *id.* at 354-76. Abrams also discusses the writings of five other scholars in the feminist and critical race camps who are seeking ways to reintroduce a value for agency into radical legal theory. See *id.* at 335-346.

134. Harris focuses specifically on "gender essentialism" in the work of Catharine MacKinnon and Robin West. See generally Harris, *supra* note 105.

135. Harris, *supra* note 105, at 584; see also Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 9 (1989) ("Holding on to a multiple consciousness will allow us to operate both within the abstractions of standard jurisprudential discourse, and within the details of our own special knowledge." (emphasis in original)); Dailey, *supra* note 112, at 1266-67 (asserting that the antiessentialist movement has "led feminism toward the articulation of a renewed liberalism . . . commit[ted] to individual diversity within community").

136. See, e.g., JUDITH BUTLER, *GENDER TROUBLE* 142 (1990) ("My argument is that there need not be a 'doer behind the deed' but that the 'doer' is variably constructed in and through the deed."); Matsuda, *supra* note 135, at 9 ("[T]he best lawyers . . . are able to detach law and to see it . . . from a particular viewpoint. Those lawyers can operate within that view, and then shift out of it. . . . [Such]

not only as a means of constructing personal identity from the fragments of experience but also as a way of building political unity while simultaneously recognizing the profundity of human difference.<sup>137</sup>

Neither Abrams nor Harris allies the rediscovery of agency to traditional liberal theory; indeed, they would undoubtedly protest such a connection.<sup>138</sup> Nevertheless, the reconstruction of agency within radical legal theory has potentially far-reaching consequences, for the quality of self-determination, will, or imagination that it celebrates contains the three elements essential to a redeemed concept of individual rights under law. First, it acknowledges that societal forces dramatically influence personal development; as I discussed above, this represents a much-needed improvement over some liberal visions of the "autonomous individual."<sup>139</sup> Second, it nevertheless treats the individual person as the basic unit of agency and responsibility. Angela Harris acknowledges that this recovery of individual responsibility can be realized only at some cost to certain schools of feminist thought, but she concludes by emphasizing its upside potential:

This insistence on the importance of will and creativity seems to threaten feminism at one level, because it gives strength back to the concept of autonomy, making possible the recognition of the element of consent in relations of domination, and attributes to women the power that makes culpable the many ways in which white women

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multiple consciousness . . . encompasses . . . the search for the pathway to a just world."); JOAN SCOTT, *GENDER AND THE POLITICS OF HISTORY* 42 (1988). Scott writes:

Within these processes and structures, there is room for a concept of human agency as the attempt (at least partially rational) to construct an identity, a life, a set of relationships, a society within certain limits and with language—conceptual language that at once sets boundaries and contains the possibility for negation, resistance, reinterpretation, the play of metaphoric invention and imagination.

*Id.*

137. See Harris, *supra* note 105, at 615. Harris concludes:

Finally, on a collective level this emphasis on will and creativity reminds us that bridges between women are built, not found. The discovery of shared suffering is a connection more illusory than real; what will truly bring and keep us together is the use of effort and imagination to root out and examine our differences, for only the recognition of women's differences can ultimately bring [the] feminist movement to strength.

*Id.*

138. Abrams, in particular, argues that her concept of partial agency should be distinguished from traditional liberal accounts of individual autonomy. See Abrams, *supra* note 103, at 351 ("[L]aw tends most frequently to assume a simplified version of the liberal subject: a subject capable of uncompromised agentic self-determination, to whom legal authorities ascribe full responsibility for actions taken, and on whose behalf they are generally reluctant to intervene."); *id.* at 376 ("[T]he simplified liberal premises that underlie legal subjectivity may need to be revisited in accordance with more sophisticated accounts of liberal subjectivity or post-structuralist accounts of a decentered subject, who unproblematically juxtaposes agency with constraint." (citations omitted)).

139. See *supra* text accompanying note 129.

have actively used their race privilege against their sisters of color.

. . . However, at another level, the recognition of the role of creativity and will in shaping our lives is liberating, for it allows us to acknowledge and celebrate the creativity and joy with which many women have survived and turned existing relations of domination to their own ends. Works of black literature like *Beloved*, *The Color Purple*, and *Song of Solomon*, among others, do not linger on black women's victimization and misery; though they recognize our pain, they ultimately celebrate our transcendence.<sup>140</sup>

Finally, this recaptured conception of individual will serves as the engine for moral and legal progress. As the power which can (at least partially) liberate us from our social determinants, individual agency becomes the shared human faculty that both unites our striving for the good and makes them possible. Rights offer the maximum room for the exercise of difference while grounding legal equality in the "sameness" of agentic capacity. It follows that, to the extent the law should be a force for justice and social progress, the law should protect the exercise of individual will, creativity, and imagination. Perhaps the law, according to this reconstructed respect for liberalism and liberal values, should even go so far as to take as its core function the protection of individual rights. If so, radical theory has now come full circle, from treating "liberal legalism" as public enemy number one to endorsing a vision of the person and of agency that celebrates—even makes mandatory—the organization of the law around the dignity of the individual and the legal protection of her rights.

2. *Individual Rights as the Outgrowth of Agency.*—Legal rights institutionalize respect for the individual, and this serves at least two important goals. First, rights give direct protection to individual choices deemed important.<sup>141</sup> Second, the construction of law around rights acts on society. Law is both a socially constructed and a socially constructing force—its form both reflects societal judgments and creates those judgments.<sup>142</sup> Thus, the choice of individual rights as the form of legal protection will inevitably reinforce the importance of individual agency in society. Indeed, this fact is the basis for many attacks on liberal legalism, especially from communitarians.<sup>143</sup>

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140. Harris, *supra* note 105, at 613-15.

141. See *infra* text accompanying note 147 for a discussion of what these choices ought to be.

142. See Janet E. Ainsworth, *Speaking of Rights*, 37 N.Y.L. SCH. L. REV. 259, 267 (1992) (book review) ("The discourse of law is more than just an instrumental tool, it is a 'species of social imagination' that is 'constructive of social realities rather than merely reflective of them.' Law, like other cultural systems of signification, both creates cultural meaning and mediates the way in which we ascribe meaning to our experiences." (citation omitted)).

143. See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14 (1991) ("In its relentless individualism, [rights talk in American society] fosters a

These effects of rights have not gone unnoticed by radical legal scholars, some of whom have argued for the retention of rights for both substantive and instrumental reasons.<sup>144</sup> A claim to a legal right in political discussion ensures some protection against the power of disagreeing majorities. A rights claim usually earns the claimant a respectful hearing in a society and legal system that is dominated by this form.<sup>145</sup>

But the appeal of rights for the disadvantaged is not purely instrumental. Indeed, Patricia Williams has written powerfully of the substantive importance of rights for African Americans, and of her fear that those on the left who reject rights do so from a racially privileged position:

The white left is perhaps in the position of King Lear, when he discovered in himself a "poor, bare, forked animal" who *needed* no silks, furs, or retinue, only food, water, and straw to sleep on. . . .

. . . Reduced to the basic provisions of food, water, and a straw pallet, kings may gain new insight into those needs they share with all humankind. For others, however—slaves, sharecroppers, prisoners, mental patients—the experience of poverty and need is fraught with the terrible realization that they are dependent "on the uncertain and fitful protection of a world conscience," which has forgotten them as individuals. For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being. For blacks, then, the attainment of rights signifies the respectful

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climate that is inhospitable to society's losers, and that systematically disadvantages caretakers and dependents, young and old.").

144. See, e.g., WILLIAMS, *supra* note 19, at 164 (recognizing a need for rights both to raise a person to the position of a "social being" and to gain power in relation to others).

145. See, e.g., MINOW, *supra* note 93, at 297 (remarking that rights claims demand "an equality of attention" and "make[] those in power at least listen" (emphasis in original)); *id.* at 307 ("There is something too valuable in the aspiration of rights, and something too neglectful of the power embedded in assertions of another's need, to abandon the rhetoric of rights."); Ainsworth, *supra* note 142, at 266. Professor Ainsworth avers that

an appeal to rights-based claims in the judiciary has been instrumentally effective, particularly for racial minorities and women. Rights are recognized as "shields" against the exercise of legal power by all actors in the legal system, thus serving to temper state power in ways that would not occur absent the invocation of rights. True, such rights-based appeals are not invariably successful; but given the disproportionate lack of access to the material wealth needed to compete in the electoral political arena, subordinate groups should be loath to give up a strategy that has provided some measure of legal protection to them. . . . [F]or groups with neither voter strength nor financial resources . . . rights discourse may be the only plausible way to protect their interests.

*Id.* (footnotes omitted).



behavior, the collective responsibility, properly owed by a society to one of its own.<sup>146</sup>

Rights convey equality and respect for all persons—the foundational goals of all movements on behalf of disadvantaged groups.

If we accept the foregoing argument that legal rights are the proper focus of efforts to further social justice, a more difficult question yet remains: Which rights would best achieve this goal? Which rights would be best designed to protect and develop individual agentic capacity?

For the purposes of argument, start from the idea developed above<sup>147</sup> that all humans share agentic capacity and that protecting and developing this capacity ought to be a central project of a legal structure that is concerned about achieving social justice. The autonomy reconstructionists have crafted the concept of agency or imagination or will by adding to the liberal conception of autonomy the corrective idea that human beings are not completely independent and free-acting but are instead powerfully influenced by the social forces and relationships that envelop their formation as persons.<sup>148</sup> Accepting this model of the person, the question becomes what specific rights the law, acting as one such social force that protects agency, should confer on persons in the interest of achieving justice for disadvantaged groups?

At the very least, the traditional liberal “personhood” rights are obvious candidates for legal protection. Such rights offer all citizens the chance to express and develop directly their agentic capacity. Examples of such rights include the right to openly dissent from the majority view on controversial issues, the right to vote, the right to own (at least certain kinds of) property,<sup>149</sup> and the right to privacy, understood as the right to bar others from accessing personal information about oneself without good reason.

However, the reconstructed vision of autonomy suggests that such rights cannot be viewed as the sum total of the state’s responsibility to further agency. These traditional liberal rights are aspirational insofar as underlying societal conditions prevent members of some groups from benefiting from them. As feminists have pointed out, the equal right to dissent under the First Amendment may be at least partially vitiated by socially

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146. WILLIAMS, *supra* note 19, at 152-53 (emphasis in original) (footnote omitted) (quoting WILLIAM SHAKESPEARE, *KING LEAR*, act 3, sc. 4, ll. 106-08, in *THE RIVERSIDE SHAKESPEARE*, *supra* note 43; MICHAEL IGNATIEFF, *THE NEEDS OF STRANGERS* 53 (1984)).

147. See *supra* text accompanying notes 93-118.

148. See Abrams, *supra* note 103, at 346 (discussing the idea of “partial agency” as one “that foregrounds questions of agency, more concretely juxtaposing women’s capacity for self-direction and resistance, on the one hand, with often-internalized patriarchal constraint, on the other.”).

149. See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957-1014 (1982) (distinguishing between forms of property that have meaning to persons and forms that are essentially fungible, market goods).

enforced silence.<sup>150</sup> The equal right to vote can be destroyed by physical intimidation. The equal right to own property can be corrupted by economic conditions that are rife with bigotry and hierarchy.<sup>151</sup> Because societal forces can so powerfully influence the development and exercise of individual agency, the law should intervene to create rights that will adjust those forces when necessary, so that they become agency friendly, particularly with respect to historically disadvantaged groups.

Such a second tier of rights might include, for example, the right to be protected against physical and emotional abuse and even the "right" to the punishment of an abuser. Although the work of Angela Harris,<sup>152</sup> Martha Mahoney,<sup>153</sup> Elizabeth Schneider,<sup>154</sup> and others demonstrates that individual agency can and does survive despite abuse, surely a legal structure that celebrated agency would attempt to destroy, or at least punish, forces of abuse that limit that capacity. Thus, the protection of agency implies protecting all individuals against the horrors of rape and domestic violence.

Individual rights, on this view, also ought to include the right to act, with the backing of the state, against group-based bigotries such as sexism and racism. Such bigotry fails to appreciate individual agentic capacity, instead assuming certain truths about an individual based on his or her group membership, whether that membership be based on race, gender, ethnicity, choice of sexuality, or any other characteristic.<sup>155</sup> Such assumptions flatly contradict the premise, fundamental here, that persons are to be treated with respect as individuals on the basis of their capacity for agency.

3. *The Chimera of Group Rights.*—A remaining question raised by the idea of partial agency is what it implies regarding theories of "group rights" such as those proposed by Will Kymlicka, who argues that liberal societies have over-focused on individual rights and have ignored the potential of group rights:

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150. See MACKINNON, *supra* note 94, at 195-214 (discussing the damaging effect on women of protecting pornography under the First Amendment).

151. See Radin, *supra* note 149, at 961-62 (contending that objective criteria in labeling something personhood property is needed, otherwise there is a risk of "ethical subjectivism" in determining whether the property is legally recognized).

152. See *supra* note 105.

153. See *supra* note 120.

154. See Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 220-21 (arguing that agency must be examined in trials involving battered woman syndrome in order to explain how or why the woman could overcome her victimization and take action).

155. See MINOW, *supra* note 93, at 235 (asserting that "[w]hen some people assign others to a group, such as a racial minority, this assignment may trigger in the observers mental associations with other [negative] traits" (footnote omitted)).

In particular, [liberals] reject the claim that group-specific rights are needed to accommodate enduring cultural differences rather than remedy historical discrimination. . . .

However, it has become increasingly clear that minority rights cannot be subsumed under the category of human rights. . . .

. . . The right to free speech does not tell us what an appropriate language policy is; the right to vote does not tell us how political boundaries should be drawn, or how powers should be distributed between levels of government; the right to mobility does not tell us what an appropriate immigration and naturalization policy is. These questions have been left [by liberal theories] to the usual process of majoritarian decision-making within each state. The result [is] . . . to render cultural minorities vulnerable to significant injustice at the hands of the majority, and to exacerbate ethnocultural conflict.<sup>156</sup>

Radical scholars of race and feminism have also argued that individual rights perpetuate race- and gender-hierarchy and are thus the antithesis of justice.<sup>157</sup> These scholars have proposed that the law respond to group-based bigotry by building group rights into our economic and political institutions. In the context of law school admissions, for example, Richard Delgado argues that current affirmative action policies should be "overhaul[ed]" in favor of a system under which "a proportionate number of minorities, whites, and women [gain] admission."<sup>158</sup> Other scholars of race echo this call for proportional representation in various contexts, ranging from election to political bodies to allocation of jobs in both the private and public sectors.<sup>159</sup> Additionally, legal and political theorists have recently argued in favor of a variety of specific group rights, including the right to speak a particular language,<sup>160</sup> the right to group-

156. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 4-5 (1995).

157. See, e.g., DELGADO, *supra* note 4, at 157-163 (warning of the dangers to disadvantaged minorities of Enlightenment liberalism); MACKINNON, *supra* note 94, at 157-70 (describing perpetuation of women's oppression in the liberal state); MINOW, *supra* note 93, at 147 (averring that individual rights theories result in the exclusion of some groups from societal power); *id.* ("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."); *id.* at 377 ("Rights analysis . . . fails to supply a basis for remaking . . . institutions to accommodate difference."); *id.* at 382-83 (defining the idea of "rights in relationship"); Young, *supra* note 121, at 300 ("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.").

158. P. 47 (quoting Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 572 (1984)).

159. See, e.g., *infra* note 161.

160. See, e.g., Anthony Housefather, *Where Are the Bilingual Signs in Montreal's Stores?*, *GLOBE & MAIL*, Aug. 5, 1996, at A13 (recognizing that the Supreme Court of Canada agreed with all lower

based representation in elected legal bodies,<sup>161</sup> and the right to the protection of property that a particular group's culture holds to be sacred.<sup>162</sup> Other societies have responded to injustices by directly recognizing group interests:

[T]here [is] an alternative legal and constitutional language [to that of individual rights] to protect individuals who are penalized because of a group affiliation . . . [it is the] specific[] guarantees [of] the rights of groups, by name, . . . [which] specifically reserve for groups a certain proportion of posts in government, in the civil services, in the universities, in business. This kind of approach to group rights is clearly just as compatible with a regime committed to human rights as the approach that focuses only on the individual. In one measure or another, we see this kind of approach in Canada, Belgium, Indian [*sic*], and] Malaysia.<sup>163</sup>

Most of these policies to promote group rights either ignore or denigrate the value of individual agency which is defended here. The group-rights advocates treat individualism as their mortal enemy and justify group rights on some other basis, such as the achievement of racial or gender diversity or the preservation of a particular culture.<sup>164</sup>

In the view of some radical scholars, such as Kymlicka, group rights can protect agentic capacity itself, as well as group well-being, more effectively than individual rights:

[L]iberals should recognize the importance of people's membership in their own societal culture, because of the role it plays in enabling

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courts and the United Nations in striking down a law that prohibited public signs from being in any language other than French).

161. See, e.g., KYMLICKA, *supra* note 156, at 34-48 (arguing for a group right to proportional representation); Derrick Bell et al., *Racial Reflections: Dialogues in the Direction of Liberation*, 37 UCLA L. REV. 1037, 1090-91 (1990) ("The solution must come from proportional representation, not the remedies of the Voting Rights Act."); Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 265 (1989) ("Until and unless group oppression or disadvantages are eliminated, political publics, including democratized workplaces and government decision-making bodies, should include the specific representation of those oppressed groups, through which those groups express their specific understanding of the issues before the public and register a group-based vote.").

162. See, e.g., Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 B.U. L. REV. 559, 641-70 (1995); see also Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1994) (granting ownership rights of Native American cultural items excavated on federal or tribal lands to the lineal descendants of the Native Americans or the applicable Native American governing authority); 18 U.S.C. § 1170 (1994) (imposing fines for the unauthorized sale, purchase, or trafficking of Native American human remains).

163. Nathan Glazer, *Individual Rights Against Group Rights*, in THE RIGHTS OF MINORITY CULTURES 123, 126 (Will Kymlicka ed., 1995).

164. See, e.g., Young, *supra* note 121, at 305-07 (noting that contemporary critics of liberalism proffer community as the preferred polar opposite); see also *supra* note 157.

meaningful choice and in supporting self-identity. While the members of a (liberalized) nation no longer share moral values or traditional ways of life, they still have a deep attachment to their own language and culture. . . . group-differentiated rights that protect minority cultures can be seen, not only as consistent with liberal values, but as actually promoting them. . . . certain group-differentiated rights are required by the principles of liberal justice.<sup>165</sup>

4. *The Agentic Subordination of Group Rights to Individual Rights.*—

To the extent that achieving group goals maximizes individual choice and helps develop agency, group rights are defensible under the partial-agency theory outlined here. But to the extent that the good of the group is depicted independently of, or is inconsistent with, the agency of individual members, group rights must be rejected. Thus, the reconstructed agency approach to rights changes the entire focus of the debate over social justice. Justice for groups becomes a value that is purely derivative of, and dependent on, justice for its individual members.<sup>166</sup> For example, to the extent that “diversity” is put forth as a justification for group rights that is inconsistent with the goal of promoting individual agency, the goal of achieving “diversity” becomes illegitimate.<sup>167</sup> Likewise, organic visions of community, under which the good of the group is depicted as greater than the sum of the good to its individual members, become incoherent under this vision. As Kymlicka has admitted, “In some cases, measures to protect cultural membership may be unnecessary, or come at too high a price in terms of other liberal goals.”<sup>168</sup>

Indeed, the community is properly seen as the enemy in many cases, the enforcer of discrimination, bigotry, and the domination of women. This is because, in deciding the agentic potential of group rights, one has to keep in mind the powerful impact of the law as a socially constructing force.<sup>169</sup> This suggests that the structure of rights will have an impact on the structure of personalities because human psychology and behavior will be affected by how we construct the law. Indeed, this fact has long been

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165. KYMLICKA, *supra* note 156, at 105-06.

166. The philosopher Michael Hartney suggests that group rights can *only* be justified in terms of the interests of the individual members of the affected group(s). See Michael Hartney, *Some Confusions Concerning Collective Rights*, in THE RIGHTS OF MINORITY CULTURES, *supra* note 163, at 210-13.

167. Acceptance of this proposition would have a dramatic impact on the debate over group rights, which is largely, although not exclusively, premised on the rejection of liberal individualism and liberal respect for individual autonomy. See *supra* note 157.

168. KYMLICKA, *supra* note 156, at 105-06.

169. See *supra* text accompanying notes 141-45 (arguing that law helps form societal judgments).

a primary ground on which communitarians criticize liberal rights. On their view, a system of legal justice built upon individual rights produces a society in which persons possess a grossly exaggerated sense of entitlement, an impoverished feeling of obligation toward others, and an attenuated capacity to empathically engage human difference.<sup>170</sup> Communitarians argue that liberal rights create a citizenry consisting of mutually alienated individuals who tend to view others as potential threats to their freedom rather than as vital participants in society.<sup>171</sup>

Even if the communitarians were correct with respect to the majority, surely there can not be too much agency for members of disadvantaged groups, who may only recently have been able to assert their rights as persons.<sup>172</sup> If this is correct, then for disadvantaged groups the attractions of individual agency and the related appeal of rights will be especially strong.

More importantly, group rights come with their own set of pathologies—pathologies that directly threaten the goal of protecting and developing individual agentic capacity. As Nathan Glazer explains:

If we choose the group-rights approach we say that the differences between some groups are so great that they cannot achieve satisfaction on the basis of individual rights. We say, too, that—whether we want to or not—we will permanently section the society into ethnic groups by law. . . . [Despite the] claim [that] this is a temporary solution to problems of inequality . . . it is inconceivable . . . that benefits given in law on the basis of group membership will not strengthen groups, will not make necessary the policing of their boundaries, and will not become permanent in a democratic society, where benefits once given cannot be withdrawn. In effect, American society, which was moving toward an emphasis on individual rights in which group affiliation and difference were to become a matter of indifference to the state, in which the state was to be concerned only that such affiliation did not affect the fate of individuals, will become something very different if it continues to move along the path of group rights. More groups will join [those] already selected as special beneficiaries. And with every movement in the direction of

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170. See generally Glendon, *supra* note 143.

171. See generally Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 544-48 (1986) (asserting that the underlying theme of individualism is autonomy and separation); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 7 (1988) ("Every other discrete, separate individual—because he is the 'other'—is a source of danger to me and a threat to my autonomy. I have reason to fear you solely by virtue of the fact that I am me and you are you. . . . [B]y definition my ends are not your ends.").

172. See WILLIAMS, *supra* note 19 (arguing that society should grant blacks certain affirmative individual rights and that a formalized equal opportunity policy is empty and aesthetic after years of second class citizenship).

group rights, the individual's claim to be considered only as an individual, regardless of race, color or national origin, will be reduced, as more and more places are reserved to be filled on the basis of group affiliation.<sup>173</sup>

From the agentic perspective these consequences would be obviously, and perhaps fatally, destructive, flowing from the profound tension between the individual and group when it comes to structuring legal rights. To the extent, in short, that a concern to protect individual agency does not result in *individual* rights, the goal of protecting and developing agency through law would certainly be harmed, and could be nullified by any expansion in group rights.

And to the extent that group rights necessarily strengthen group affiliations and weaken respect for the individual agency of group members, they violate the agentic approach to social justice. So, under an agency-based analysis, the benefits of proportional representation must first be great enough to outweigh the pathologies of group rights and still advance individual agency more than the individual-rights approach to affirmative action. At the very least, this would be a heavy burden for group rights to bear, and probably establishes at least a presumption in favor of rejecting proposals for proportional representation and adopting instead an individual-rights approach to racial justice.

In any case, such a policy debate would be new and refreshing. Shed of all talk of "groupness," community, or diversity except as derivative values, it would refocus the issue of social justice where it belongs: on individual rights, and more specifically, individual opportunities to exercise autonomous capacity.

*5. Conclusion: Rights and Justice.*—If the argument here is correct, then rights grounded in individual agency are not the enemies of disadvantaged groups, as many radical scholars have claimed, but instead bear a crucial, and positive, relationship to the attainment of social justice. This agency-based perspective also allows us to realize that, contrary to the claims of communitarians, there may be a fundamental tension between the good of community and justice for its disadvantaged groups. The community, after all, is the source not only of the good in a culture but

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173. Glazer, *supra* note 163, at 137. A large body of political science literature makes this point. See, e.g., ROBERT DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* 47 (1982) ("[B]y reinforcing civic orientations that encourage group egoism, foster distrust of other groups, and weaken perceptions of a general interest more important than the specific concerns of each organized group, organizations encourage more serious consideration of alternatives that promise visible short-run benefits to a relatively small number of organized citizens than alternatives that promise substantial long-run benefits to a larger number of unorganized citizens."). See generally THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979).

also of the corrupt and evil. Communities preserve as "culture" the prejudices, the bigotries, the injustice, and the historically sanctioned hierarchies that block the way toward social justice. And even the culture of disadvantaged groups, which can be a source of strength and cohesion within the group, also absorbs, contains, and enforces externally imposed bigotries that may continue to oppress group members once the external forces of oppression have weakened or disappeared. This is the message of Catharine MacKinnon's critique of relational feminism and of antiessentialist concern about the power of fixed social categories. It is community feeling and standards that are often the enemy of social justice. Changing those standards may well require a renewed allegiance to rights that protect the development of will, imagination, and agency of individuals willing to defy their communities on behalf of social justice, either for themselves or for others. Not only can agency-based rights advance the cause of justice for women and minorities; such rights are the best, and perhaps the only, way of doing so.

Farber and Sherry are correct that the philosophical premises of nonagentic radical multiculturalism will not generate a political theory that takes a firm stand against injustice. To the extent that radical theorists want to argue for an end to racism and sexism, they must accept the possibility of authentic human agency and of developing shared values across difference. Radical theory has itself moved to acknowledge these facts, and in the process it has found itself allied to a reconstructed version of liberalism that has adapted to the best of radical critique while simultaneously insisting on the value of human agency, the primacy of individual dignity, and the necessity of crafting shared values in a legal context that respects difference by protecting individual rights.