There Is No Europe—On Subjectivity and Community in the EU

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Abstract

This Paper investigates legal subjectivity in the European Union. It takes seriously the principle according to which the individual is at the heart of the Union's activities and asks what kind of legal and political subjectivity the EU can render possible. The analysis draws on the work of Jean-Luc Nancy and his conception of singular plurality. What comes to the fore is the interrelatedness of subjects and community. This implies that the subject should not be understood simply as an individual, nor as part of a communitarian whole. Neither view is ontologically plausible nor ethically sound. By conceptualizing subjectivity as both singular and plural, it may become possible to rethink the relationship between subjectivity and community in the Union. This is important because potential solutions to fundamental problems of legitimacy, solidarity, and the lack thereof, hinge on how the relationship is understood.

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A. Introduction

The European harmonization project began with an emphasis on trade and free movement, but has gradually become attentive to the human beings who are its subjects, both as actors and as those acted upon. The emphasis placed on fundamental rights in legislation and case law alike attest to this development, as does the creation of European citizenship.

A substantial amount of critical legal research on the Union focuses on its lack of legitimacy, solidarity, and democracy. As several scholars point out, these issues are entangled with the problematic status of the legal and/or political subject in the EU.[1] The relationship between the European community, if there is one, and the members of that community is put to question. This paper proposes a perspective on the said relationship where both community and its members are equally complex categories, neither of which can in itself become the cornerstone of a political philosophy of EU law. What a European community would entail and what kind of subjectivity can correspond to it are analyzed here together. The paper emphasizes their interdependence but also the similarities in their conceptual construction.

The purpose of the paper is twofold. It will introduce Jean-Luc Nancy's thinking into philosophical analysis of law. By doing so it attempts to offer a fruitful way of thinking about legal subjectivity conceptually intertwined with community. The discussion will be situated in the area of EU law in an attempt to form a nuanced diagnosis of certain problems that the Union faces as a legal and political entity. The Paper will thus try to redefine legal subjectivity as well as draw a picture of what the EU as a community would ideally entail.

The Union is a pluralist legal system, where states retain final sovereign authority. Ultimately, it is the national legal order that commands the highest authority.[2] If conflicts arise, the European Court can settle some of them, but the disparate interests of Member States themselves are seldom the kind of legal conflicts that are adjudicated. In this way, the pluralist constitutionalism of the EU necessarily opens the door to insecurity. The fundamental values of the EU are not enough to prevent conflicts between Member States.

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[1] *See, e.g*., Sègolène Barbou des Places, *The Integrated Person in EU Law*, *in* CONSTRUCTING THE PERSON IN EU LAW – RIGHTS, ROLES, IDENTITIES 179 (Loïc Azoulai, Ségolène Barbou des Places & Etienne Pataut eds., 2016); Dimitry Kochenov, *Neo-mediaeval Permutations of Personhood in the European Union*, *in* CONSTRUCTING THE PERSON IN EU LAW—RIGHTS, ROLES, IDENTITIES 133 (Loïc Azoulai, Ségolène Barbou des Places & Etienne Pataut eds., 2016); András Sajó, *Victimhood and Vulnerability as Sources of Justice*, *in* EUROPE'S JUSTICE DEFICIT 337 (Dimitry Kochenov, Gráinne de Búrca & Andrew Williams eds., 2015); Pavlos Eleftheriadis, *Citizenship and Obligation*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 159 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

[2] *See* ALEXANDER SOMEK, THE COSMOPOLITAN CONSTITUTION 21 (2014). For an interesting discussion, see also Mattias Kumm, *The Moral Point of Constitutional Pluralism: Defining the Domain of Legitimate Institutional Civil Disobedience and Conscientious Objection*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 216 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

Democracy, the rule of law, and fundamental rights do not provide a solid foundation that would keep economic and ideological interests in check. The cohesion of the Union is fragile and includes the potential for political solutions open to the self-interest of Member States and other actors. National interests tend to undermine considerations of the European common good. These problems point to a lack of unity in the European community.

This is not to say that the EU's pluralist constitutionalism is only harmful. It corresponds to the idea that the EU includes a promise of justice different from, but as valuable as, the one that nation states can achieve. The EU's legal setting is open enough to enable the pursuit of a good life according to a number of different values.[3] It not only tolerates different views of the good, but also enables life accordingly. Such a view is quite appealing.[4] The question arises, though, whether there can be any foundation for a democratic polity when the justice that the legal system essentially provides is one of openness? It can also be asked whether a pluralist Union can temper individual interests in favor of any form of social solidarity.

On the other hand, the EU is also being criticized for not being pluralist enough. Arguments abound in the Brexit-fueled debates about the EU's bullying approach towards national sovereignties and their own democratic rule. Separatist voices are heard in several Member States championing national interests against European unification.

Therefore, the Union seems to lack both a unifying essence as well as true openness to multiple views of a good life. Hence, it seems to be tainted by both flaws: It is not able to produce communitarian values, a sense of belonging or a foundation for European identity, but it nevertheless imposes a political and legal framework that is experienced as too narrow or foreign. Members feel alienated by the whole, but the whole is simultaneously not whole enough.

These are significant problems, but it is worth noticing that they often draw on a view of community and its members as separate entities. Such a conception may lead to a portrayal of society where individuals and the common are pitted against each other, or occasionally on the same side, but nevertheless clearly distinguishable by default.

There is, though, a possibility to analyze community and its members as mutually constructive. This Paper offers one possibility for such a conceptual standpoint from which to study the Union. The discussion moves both on the level of the relationship of the

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[3] *See* FLORIS DE WITTE, JUSTICE IN THE EU: THE EMERGENCE OF TRANSNATIONAL SOLIDARITY 207–15 (2015). According to Sangiovanni, the most plausible view of European solidarity should not begin with, for example, European identity fellow feeling, or democracy, but with the special character of the public goods generated by participation in European institutions. *See* Andrea Sangiovanni, *Solidarity in the European Union: Problems and Prospects*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 348 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

[4] This view, though, may come close to the tolerant utopianism of Robert Nozick, which is tainted by the classic failures of extreme libertarianism.

Members States with the Union, as well as the relationship of legal subjects with a European community. It introduces the idea that a clear distinction between singularity and community cannot be made, nor should it be attempted. Whether such an alternative understanding of a singular plural community can become influential in the current climate of populist politics is another hard question and not for this paper to answer.

According to Nancy, "community" does not refer to a common being or participation in a shared unity. Community is portrayed as the sharing of something that is not really shared— that is, sharing the lack of a common substance or identity. Under this philosophy, a common set of values or a common identity is therefore not a prerequisite of community.[5] Accordingly, there is no specific definition of the common good that can be seen as the ideal to evaluate or criticize law. The content of the common good, in order to stay common, must include indeterminacy and openness towards the future. If this is what community means, what would it demand of the EU?

B. Nancy: Singular Plurality

What makes Nancy's philosophy so compelling is the amount, and depth, of thought he devotes to defining community and to the question of how the relationship between singulars and community may be understood. He does not prioritize singularity or community, nor does he make any easy distinction between the two. He also cannot be understood as a spokesperson for any political program. Rather, his philosophical project, which resembles Derrida's deconstructive endeavors, consists of attempts to think through the complex relations between community and singularity.

Yet, before delving into questions of community, it is helpful to take a look at Nancy's overall project, which is based on a detailed and complex ontology. It lays the foundation for his political thinking and therefore merits some examination. Nancy's theory of singular plurality develops Heidegger's critique of the subject.[6] Following on from Heidegger, he investigates the being of humans, but he finds a founding plurality in the kernel of *Dasein*. Being is, above anything else, being-in-common. We are *with* and this "being-with" is not accidental. Ontology has to be understood as primarily plural. Plurality is not secondary in relation to singularity because being is, in essence, plural. This leads Nancy to state that a single being would be a contradiction in terms. A being that would be its own foundation and origin cannot be.[7]

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[5] *See* Philip Armstrong, Jason E. Smith, & Jean-Luc Nancy, *Politics and Beyond: An Interview with Jean-Luc Nancy*, 43 Diacritics 90, 94 (2015).

[6] *See* Andrew Norris, *Jean-Luc Nancy and the Myth of the Common*, 7 Constellations 272, 274–75 (2000).

[7] *See* Jean-Luc Nancy, Being Singular Plural 12 (2000).

Being is singularly plural and plurally singular, but not in the sense that these would be attributes of being. For Nancy, the essence of being is singular-plural. This is the constitution of being that is reflected in every single, substantial essence of being. For existing beings, including people, animals, and things, this means that whatever exists coexists. The implication of existing is the sharing of the world. Understandably, Nancy argues that there can never be any real philosophical solipsism, just as there can never be a theory "of the subject" understood as a closed off singular being.[8]

Because he conceptualizes being as "being-with, Nancy recognizes the foundational importance of the term "with." If being is being-with, then the with comes to constitute "being." With is not simply an addition to some prior being, or a predicament of being, or a definition of certain beings. With is at the heart of being. This implies a reversal of the order of philosophical exposition compared to quite a few philosophers. For Nancy, the with does not come second to being, as it does for instance in Heidegger's analysis of *Dasein* and *Mitsein*.[9]

Because there is always an element of plurality in being, according to Nancy, he needs to explain how anything could be singular at all. He does this by explaining that the very idea of a singular being implies singularization from others. A singular being is one that can be distinguished from other singularities. The singular, or a "one," for Nancy means primarily "each one," that is, a being amongst others.[10] This leads to the conclusion that there can be nothing singular without there being other singulars. Moreover, if there can never be one singularity without there being others, then being is always both singular and plural. This is the very nature of being, and the foundation on which Nancy's thinking rests. Being cannot be anything but singular *and* plural.

The singular can be understood as an ego, but not really as a subject like, say, the relation of a self to itself.[11] Rather similar to Derrida's *différance*, singularity is neither me nor you, but that which is distinguished when the two are seen as distinct. It is the cut that differentiates between beings. Hence the importance of the term being-with, which refers to singulars singularly together. But it is important to note here that singulars do not form a sum nor are they incorporated into a common being.[12] Singulars, like individual human

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[8] *See id.* at 28–29.

[9] *Id.* at 30–31. *See also* Frédéric Neyrat, *NO/US: The Nietzschean Democracy of Jean-Luc Nancy*, 43 DIACRITICS 66, 73 (2015).

[10] *See* NANCY, *supra* note 7, at 33.

[11] *See* JEAN-LUC NANCY, THE INOPERATIVE COMMUNITY 26–27 (1991).

[12] *See* NANCY, *supra* note 7, at 32–33.

beings, can never be defined completely without reference to others, nor do they form a totality that erases their singularity.

What emerges from this ontology is a difficulty concerning the third person. How can one say "it is" or "there is," when a point of view outside being-together seems to be impossible? There is no perspective exterior to being-with from where one could announce what exists. Nancy suggests that the way for being to speak itself is by saying "we are."[13] This problematic theme of how to speak—and write—of and about being troubles Nancy throughout *Being Singular Plural*. The work struggles to communicate being, that is, to communicate something to others, when the focus of the communication is the being with others itself.

According to this kind of ontology, then, the question of being and the question of the meaning of being, become questions of being-with. Being is never either singular or plural but always being-together-with-others. On the level of human life this means that we are always with others, and not only with other human beings—animals, things, ideas, and machines share the world with us as well.[14] We are each singular, but our being in the world implies being singular together.

An illuminating way of expressing the core idea of singular plurality is the definition of "the one" that Nancy gives. The one is always more than one, not because it would somehow divide itself, but because it equals more than one. One cannot be counted without counting more than one.[15] There is nothing that could be only one because that could never be counted at all. Counting one implies already others from which to count. Otherwise there could be no singularity at all, only a great mass of totality.

Nancy consistently stresses that neither singularity nor plurality can be given primary status. The social or communitarian dimension is not something added onto the singular being. One often hears such views: First there is the subject, then there is the group. In a number of theories, the rights-bearing subject comes first, followed by real social relationships.[16] Conversely, Nancy's argument is not that sociality and alterity determine the subject. Coexistence is not additional.[17] It is the way things are and have to be, a necessary feature of existence.

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[13] *Id.* at 33.

[14] *See, e.g.*, Graham Harman, *On Interface: Nancy's Weights and Masses*, *in* JEAN-LUC NANCY AND PLURAL THINKING: EXPOSITIONS OF WORLD, ONTOLOGY, POLITICS, AND SENSE 95 (Peter Gratton & Marie-Eve Morin eds., 2012).

[15] *See* NANCY, *supra* note 7, at 39.

[16] *See* Toni Selkälä & Mikko Rajavuori chapter in this volume, 18 GERMAN L.J. (2017).

[17] *See* NANCY, *supra* note 7, at 44; NANCY, *supra* note 11, at 28.

Nancy gives examples of areas that are represented as singular practices, even though they could be and should be understood differently. Two of them are particularly illuminating: psychoanalysis and the economy. Psychoanalysis deals with relations, but paradoxically holds on to a strange individualized form. The same is true of the economy, which in its essence means co-action, relations, and exchange. The unequal appropriation of exchange, though, has made the co-ordinary nature of the economy vanish. Atomization has followed both in psychoanalysis and the economy, each of which have become global and now exert substantial influence on thinking and ways of living.[18] The founding condition of "with" has become indiscernible.

Even though Nancy does not give preference to either singularity or plurality, when discussing society, he does make an interesting observation. He argues that being can only be understood by starting from being-with-one-another. The question of social being must therefore *constitute* the ontological question of being.[19] Because of such commitments, Nancy's ontology is not completely void of normative content.

Nancy is a materialist. His philosophy revolves around bodies, not mere abstract ideas, language, or signs. Ever since the publication of *Corpus* in 1992, his thinking has grown distant from deconstruction with its focus on writing. For Nancy, the world is a world of bodies and bodies are matter (even though they are not merely matter).[20] Singular bodies are possible because matter interacts, they are "with." Bodies are in relation with one another but impenetrable to one another. For such a relationship, Nancy has developed the term "touching."[21] Bodies touching each other form singular plural existence, which can be properly described only from a point of view of the "we," not an outsider's "there is."

C. Community, Not Common Essence

There is a strong tendency of law to treat humans as autonomous self-same subjects. Accordingly, the protection of individuals' dignity, freedom, and subjective personhood are considered important aims in the EU. Judgments from the European courts refer repeatedly to individual autonomy and the need to respect personal identity. Indeed, it can be argued, as Weiler does, that Europe is profoundly committed to the individual and his or her rights, relentlessly placing him or her at the center of attention. Weiler asserts that "[s]ocial mobilization in Europe is strongest when the direct interest of the individual is at stake, and

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[18] *See* Nancy, *supra* note 7, at 45; Nancy, *supra* note 11, at 75–76.

[19] *See* Nancy, *supra* note 7, at 57.

[20] *See, e.g.*, Anne O'Byrne, *Nancy's Materialist Ontology*, *in* Jean-Luc Nancy and Plural Thinking: Expositions of World, Ontology, Politics, and Sense 79 (Peter Gratton & Marie-Eve Morin eds., 2012).

[21] *See also* Irving Goh, *The Risk of Existing: Jean-Luc Nancy's Prepositional Existence, Knocks Included*, 43 Diacritics 8 (2015).

at its weakest when it requires tending to the needs of the other, as the recent Euro crisis, immigrant crisis, and other such instances will readily attest."[22]

Hard cases often become hard because they bring to the fore uncomfortable tensions between individual rights and some common or public goods. Situations like these have long troubled jurisprudence. But the common good makes its appearances in EU law usually in the form of rights. Also here, there are impossible balancing acts between the public and the private, but both tend to be rights. One such instance is displayed in the *Google Spain* case, where the core values at stake were the general right to information against the right of an individual to have their data deleted.[23]

Being centered on rights, it is understandable that the law itself does not take a stand on which conception of the common good would be ideal in the EU. What the pluralism of the legal system brings with it is exactly a myriad of ideals, values, and ways of life—those of individuals, peoples, companies, interest groups, and states. This opens the scene for politics, where struggles for definitions of the common good are played out.

In *The Inoperative Community,* Nancy ponders the connections between the community and politics. Politics certainly have to do with community and being in common, not merely with questions of order and administration. Following this line of thought, politics are not simply a sphere of power relations, even though it is that as well. Relations of force and struggle are important to notice, but, more than anything, what is at stake in the political is community.[24] And community is what should be at stake in politics. Occasionally in Europe, politics morph into transnational executive government guided by the appearance of necessity. The financial crisis is a pertinent example.[25] Effective problem solving becomes the focus, and issues of community are moved aside.[26] In these instances, considerations of community tend to give way to the logics of the market.

Nancy's thinking does not provide ready-made tools with which to combat instances when the political turns into administration in the name of effectiveness or economic necessity. But his theory does give well-grounded reasons for considering community as something valuable that should be at the center of politics. He provides an elegant attempt to articulate an ideal understanding of community that is grounded in a specific and well-theorized

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[22] J.H.H. Weiler, *Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 137, 158 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

[23] Case C-131/12, Google Spain SL v. Agencia Espafiola de Protección de Datos (AEPD), 2014 ECLI:EU:C:2014:317.

[24] *See* NANCY, *supra* note 11, at xxxvii.

[25] *See* SOMEK, *supra* note 2, at 22–23.

[26] *See, e.g.*, Gareth Davies, *Social Legitimacy and Purposive Power: The End, The Means, and the Consent of the People*, *in* EUROPE'S JUSTICE DEFICIT 259 (Dimitry Kochenov, Gráinne de Búrca, & Andrew Williams eds., 2015).

ontology, when he says that "we are brought into the world, each and every one of us, according to a dimension of 'in-common' that is in no way 'added unto' the dimension of 'being-self', but that is rather co-originary and coextensive with it."[27]

It is important to stress that, according to Nancy, we should not be seeking the essence of community. Thinking of community through a unifying essence, like nationality, religion or language, can lead to the closure of the political. It assigns to community a common being. Nancy's community is something different, namely, existence in common but without common substance. To be in common is not to be fused into one united substance or social body. On the contrary, being in common means not having such a substantial common identity and *sharing this lack of identity*.[28] Could such a view be fruitful when considering the EU? The appearance of a European polity—a political demos—understood as including some common identity is nowhere in sight. But community should not and cannot be built on common identity. Community, in order to be community, is fundamentally lacking.

The myth of Narcissus illustrates the point: To gaze purely and only at oneself without any interference by otherness is impossible. Having access to what is properly oneself requires exposure to others. This means that my face is always turned toward another and faced by him or her. Such is the starting point, and also the reason for politics. Because we are always already in contact with others who are different from us, space for the political is opened up.[29]

Western philosophy—including philosophy of law—is in the habit of conceiving society as conceptually intertwined with humanity itself. For instance, social contract theories include the idea that to have society there must be human beings, but in order for these beings to be human, they must by definition be social. The concept of a contract presupposes human beings capable of entering into contract, even though it is the social contract that makes humans properly human.[30] Similar argument structures are found in natural law theories starting with Aristotle. Legal subjectivity includes a loop: in order to be a subject in the eyes of the law one already has to belong to the group of beings that can be regarded as subjects. Such circularity is apparent in a longstanding definition of legal personhood as a right-and-duty-bearing unit. To be a subject of law one has to have rights, but to have rights one has

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[27] NANCY, *supra* note 11, at xxxvii. As we emerge as subjects, we simultaneously become exposed to others. Here, in creation of our own subjectivity, we are being defined by the community. Being in common is not something secondary to being oneself. Both features – or rather both modes of being – are original, i.e. co-originary. Nancy's writing plays extensively with the prefix 'co' and he also assembles and disassembles words in order to express his unique theory.

[28] *See id.* at xxxvii–xxxviii.

[29] *See id.*

[30] *See* Armstrong et al., *supra* note 5, at 91.

to be a legal subject. Capacity presupposes capacity. Nancy's solution to this paradox where the common precedes the individual and the individual precedes the common is at the core of his thinking: Being-in-common has to be being that does not presuppose a common substance.[31] The challenge for politics is to operationalize a community without substance and without identity. And the challenge for legal philosophy is to rethink subjectivity without any founding essence.

The lack of essence is what makes community. A community cannot have a fulfilled and unified identity. It can rather be understood as the "between" that that we have between us. If it becomes a single thing—a body, mind, fatherland—it necessarily ceases to be "in-common." Yet the opposite fate is also possible, and this too dangers community. An individualized society is equally in fear of losing community. It becomes the reduction of the political to management and to power, and to the management of power, as may be seen in the EU. Thus, the tricky question is how to think of community in between these two negations of being-in-common. How can the community without essence, nation or destiny be? What kind of politics does not stem from the will to unify? And, on the other hand, what kind politics allows people to exist singularly together?

It is not easy to transfer Nancy's philosophy to the level of everyday politics or the law. This problem shall be discussed in more detail below. Suffice it to say for now that for Nancy, community is one thing, politics another. Politics refer to a space that needs to be filled. There has to be closure and therefore, there has to be law. Community, on the other hand, includes openness that stays open.

D. The World is Not Given, We Must Make It

Freedom is a focal concept for Nancy, but it is understood differently than in liberalism or in any other philosophy that departs from Kant and moves towards rights as the actualization of freedom.[32] Nancy values another kind of freedom, the sort that consists of sharing. A community conceived of in this way would be grounded in freedom and a sharing of relations, not in individuals relating to each other as independent individuals.[33] Because subjectivity includes being-with, logically there cannot really be any independent subjects. In Nancy's words,

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[31] *Id.* at 92; NANCY, *supra* note 11, at xxxix.

[32] *See* Susanna Lindroos-Hovinheimo, *Excavating Foundations of Legal Personhood: Fichte on Autonomy and Self-Consciousness*, 28 INT'L J. SEMIOTICS L. 687 (2015).

[33] *See, e.g.,* B.C. Hutchens, *Archi-Ethics, Justice, and the Suspension of History in the Writing of Jean-Luc Nancy*, *in* JEAN-LUC NANCY AND PLURAL THINKING: EXPOSITIONS OF WORLD, ONTOLOGY, POLITICS, AND SENSE 129 (Peter Gratton & Marie-Eve Morin eds., 2012).

> [f]reedom cannot be presented as the autonomy of a subjectivity in charge of itself and of its decisions, evolving freely and in perfect independence from every obstacle. What would such an independence mean, if not the impossibility in principle of entering into the slightest relation—and therefore of exercising the slightest freedom?[34]

To define the autonomy of the subject is not what Nancy is conveying, but freedom is, nevertheless, an important concept. Singular being, being just this once, is possible because freedom grants it the space to take place. Hence, freedom precedes singularity. Freedom is that which spaces and singularizes.[35] It is therefore perhaps best understood as the circumstance that needs to be presupposed for there to be singular beings.

According to this terminology, a singular being is not the same as an individual. In trying to figure out this distinction and its importance, one may think of the term "individual" as pointing towards an instance of a larger whole. An individual is often used to indicate an example of something. This particular cat is an individual who shares an essence with other cats. There are cats and here we have one example, this brown lazy cat. Singularities, on the other hand, do not share an essence with anyone. They are unique instances, each one completely different.

The term individual, then, is not singular enough for what Nancy is trying to explain. It also needs to be borne in mind that singularities are not just humans nor things, but also thoughts, cities, cars, communities, and religions. Anything that exists somewhere with others is a singularity.[36] In order to include all of these, Nancy often uses the term singular instead of individual.

It becomes evident that the subject, a political or legal one, requires re-conceptualization. It, he, or she cannot be understood as a self-same ego. Being-in-common defines a subject who has no essence. The only subjects share is what divides them:

> My birth and my death are present to me and are my own only through the births and deaths of others, for whom in turn their births and deaths are neither present nor their own. We share what divides us: the freedom of

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[34] JEAN-LUC NANCY, THE EXPERIENCE OF FREEDOM 66 (1993).

[35] *See id.* at 78.

[36] *See* NANCY, *supra* note 11, at 3–4; *see also* Marie-Eve Morin, *Nancy, Violence, and the World*, 16 PARRHESIA 61 (2013).

> an incalculable and improbable *coming* to presence of
> being, which only brings us into presence as the *ones* of
> the *others*. This is the coming to presence of *our*
> freedom, the common experience of the exposure in
> which the community is founded . . . .[37]

Subjects' exposure to the incalculability of their birth and their death is the common thing that they share. And this very fundamental thing is not something shared at all, because my birth and my death are not really my own. I am not present in either of these events.

For Nancy, freedom is not a right nor an end towards which people should strive. Freedom is more like a fact. It is the original state that precedes singularity and sharing. Freedom cannot be given nor guaranteed by the law, it is expressed in the groundlessness of existence. Such groundlessness is in Nancy's theory the opening for justice.[38] Such justice is not a theory or a measuring rod, but the unending questioning of justice without ground.

According to Morin, the core of Nancy's ethics forms an anti-Kantian understanding of the subject. Where Kant sees the subject constituting himself as his own, autonomous sovereign, Nancy rejects the idea of subjects as autonomous controllers of themselves. A subject is not given to itself and therefore such a self-present agent cannot be the foundation for ethics. For Nancy the self may be understood as relation, as opening, or as difference.[39] For the self to identify itself there needs to be another, difference, and spacing.

This is one way in which ontology can be developed into ethics: Existence is an exigency, which requires us to become what we ontologically already are. The structure of the argument is then that ontology itself includes an ethical element, unlike most Western philosophy, where it has usually been done in a descriptive manner. This would mean that already on the level of existence, a demand is present. Nevertheless, the ethical importance of being-with does not stay on this abstract level. It transcends to the more active plane of action. What is important to note, though, is that the distinction between the internal—the structure of the subject—and the external—the subject's relations to others and the world—is one that Nancy adamantly tries to dismantle.[40] There is no easy distinction between the inside and the outside because being is always already singular plural.

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[37] NANCY, *supra* note 34, at 95.

[38] *See* Hutchens, *supra* note 33, at 139.

[39] *See* Marie-Eve Morin, *"We Must Become What We Are": Jean-Luc Nancy's Ontology as Ethos and Praxis*, *in* NANCY AND THE POLITICAL 21 (Sanja Dejanovic ed., 2015).

[40] *See id.*; *see also* NANCY, *supra* note 11, at 15. An interesting comparison can be made here with the Levinas, who claims that ethics is first philosophy, that is, something prior and more fundamental to ontology.

The ontological demand requires a decision for the world. It implies a requirement to inhabit the world in a way that the world can really form a world, not a totalized essence, but a plurality of singularities co-existing. No essence or principle summing up the world or its meaning can or should be sought. To inhabit the world requires to stand within the world which has no firm ground.[41] This way, the world is created. There is no meaning of the world and when we share this lack of meaning, we create a world.

Such a normative challenge is by no means unambiguous. Of course, Nancy has views on politics and justice that can be interpreted in a straightforward manner. The community is not a totality with an essence, nor should politics aim at such. That would be totalitarianism. But neither is it atomic and detached. Still, Nancy does not always lend his thoughts to such simple interpretation.

In the *Truth of Democracy,* he clarifies the distinction between ontology and the political. It becomes clear in this text that an analysis of existence does not automatically spill over into politics informing a normative stance. It is important that existence is understood as undefined and open, and thus politics should not colonize ontology by stating what the sense of existence is, or by defining the meaning of (good) life. Existence is without essence and without definable sense, and staying open to such a view is the requirement that Nancy places upon politics.[42] He thus demands of politics an openness to creation(s) of the world, that is, space for different worlds to come into being and various things to exist.

> *To create the world* means: immediately, without delay, reopening each possible struggle for a world, that is, for what must form the contrary of a global injustice . . . . But this means to conduct this struggle precisely in the name of the fact that this *world* is coming out of nothing, that there is nothing before it and that it is without models, without principle and without given end.[43]

To create a world means to choose a world, one world among innumerable alternatives. This most serious ethical and political challenge permeates Nancy's thinking: The world is not given, we must make it. Such is the categorical imperative in this theory: To stand in the open, in the senselessness of the world. It is not a command to occupy the place of God, but to keep that place open, and nevertheless occupy the world. There is no truth about the

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[41] *See* Morin, *supra* note 39.

[42] *See* JEAN-LUC NANCY, THE TRUTH OF DEMOCRACY 17–18, 26–28, 34 (2010).

[43] JEAN-LUC NANCY, THE CREATION OF THE WORLD OR GLOBALIZATION 54–55 (François Raffoul and David Pettigrew ed., 2007).

world, no sense of the world, and no world, until we inhabit it by creating it. A world is always to be made and remade.[44]

In *The Experience of Freedom* this interpretation gets confirmation. When discussing evil, Nancy identifies how difficult evil is for philosophies of freedom. If there is freedom, it follows that there is a chance of wickedness. Our world presents us with this reality every day. The definition of evil or wickedness is that which hates singularity. It does not hate this or that singularity, but singularity as such and the relation of singularities. It hates freedom, which is the openness allowing for singularity. Evil and freedom, though, go hand in hand because evil is a constant potential inscribed into freedom. Evil belongs to the essence or structure of freedom because freedom can enable both good and evil. It contains both possibilities.[45]

If there were any politics—understood as a program or policy—in Nancy's philosophy, it would by communism. For him communism offers possibilities for thinking that can escape the impasse of present politics. Such communism would be attentive to singular pluralities, not just capital flows, and it would challenge the atomized ontology reigning supreme in Western thought. This version of communism would not, though, be of the kind that posits one value, truth or principle by which to make political and moral choices. If an absolute value were posited as the foundation of ethics, it would fix the meaning of existence thereby closing the space for alternative worlds. Every singular being would then make sense of the world through reference to this absolute value instead of making sense of its own existence with others.[46] This kind of society would not correspond to the idea of community and is certainly not what Nancy is after.

Nancy sees a real danger in the liberalist idea that everything is valuable. Every singularity cannot be equally valuable because sense and value come through differences. The whole concept of value is dependent on comparison of different alternatives. Hence this theory cannot accommodate the thought of radical equivalence. Therefore, even though no absolute value can be posted as the truth or the ground of ethics or politics, this should not lead to the equal value of everything.[47] One thought is not a priori as valuable as another, and distinctions can surely be made between good and evil acts.

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[44] *See* Jean-Luc Nancy, *From the Imperative to Law*, *in* JEAN-LUC NANCY: JUSTICE, LEGALITY AND WORLD 11, 11–18 (B.C. Hutchens ed., 2012).

[45] *See* NANCY, *supra* note 34, at 128–29, 135.

[46] *See* Morin, *supra* note 39, at 67.

[47] *See id.* at 67.

E. Can There Be a European Community?

For Nancy, the capitalist economy is *the* example of politics of equivalence. "Capitalism is the result of a decision on the part of civilization: value is in equivalence."[48] It threatens to turn singularities into flat commensurable beings. The aim of politics is, then, to contest equivalence.[49] This is a task for the EU as well. As Daniel Augenstein argues, the Union is still ultimately an organization centered on economic logic, not politics:

> Whatever is deficient about EU political justice is not a problem of political *unity*. By conferring rights on individuals as a matter of European law, the ECJ posits the peoples of Europe as citizens of the European Union. Concurrently, by calling upon this citizenry to cooperate in the functioning of the European Union, the Court derives the authority of EU law from a people of Europe. Rather, what is problematic is the EU's *political* unity; that is, recovering the politics of European market integration from behind the veil of the statist separation between the national-as-political and the European-as-economic.[50]

According to Augenstein, the economic cart has been put before the horse. The Union claims to represent the people of Europe and to act in our name, which poses the problem of ownership over the polity.[51] It raises questions of how we can endorse the policies that are presented as ours, even though they are in fact driven by management of economic necessities.[52]

A truly pluralistic Union in the sense of singular plurality would be a community where members are different from each other. They would share the difference, not necessarily

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[48] Nancy, *supra* note 42, at 23.

[49] *See* Neyrat, *supra* note 9, at 77–79.

[50] Daniel Augenstein, *We the People: EU Justice as Politics*, *in* Europe's Justice Deficit 153, 159 (Dimitry Kochenov, Grainne De Burca, & Andrew Williams eds., 2015).

[51] *Id.* at 159.

[52] Alexander Somek demands social justice: "[M]onetary union appears to have resulted in the rise of a collective Bonapartism that benefits bankers and harms low earners in the Union." Alexander Somek, *The Preoccupation with Rights and the Embrace of Inclusion: A Critique*, *in* Europe's Justice Deficit 295, 309 (Dimitry Kochenov, Grainne De Burca & Andrew Williams eds., 2015).

anything else, and be fundamentally in relation to one another this way.[53] Such community would not be defined by nationality, as most Member States still are, nor left to the mercy of economic policies, as the Union still occasionally is.

There may already be potential for such a pluralistic relationship between the community and its members in the Union. As Azoulai argues, there is something profoundly anarchical about EU law's understanding of the individual. It includes the aspiration of self-realization and combines the opportunity to opt for different territories, lifestyles and regulatory systems with the capacity to leave one's own country and to question the prevalence of the bonds of nationality.[54] Understood this way, Union law—especially through EU citizenship—may display a logic resembling singular plurality.

Unfortunately, legal practice does not always correspond with such ideals. Recent citizenship jurisprudence presents an uncomfortable example of the loss of community. Nationality discrimination is reported by scholars who have shown how strongly Member States tend to pursue their own interpretations of EU law, thus ultimately corroding both the core of EU citizenship as well as free movement rights.[55] It appears that the ECJ is unable to stop this development, as may be seen for instance in the *Dano* decision.[56]

Nevertheless, the need to temper nationalist interests can easily lead to such Union community building that pursues a common European identity. The risk is then that the Union itself becomes constructed as a subject that has an identity immanent to it.[57] If Nancy's theory of singular plurality has anything to teach, it is that there is no Europe. To be a community, the Union needs to accept its lacking identity and not aim at revealing or producing some common European essence.[58]

There is reason to be worried about the normative fetishization of being-in-common, especially when it develops into a myth of communion like the bond of love among the members of the community. Yet Balibar asks a pertinent question: Does not such a myth

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[53] *See* Andrew Norris, *Jean-Luc Nancy on the Political after Heidegger and Schmitt*, *in* JEAN-LUC NANCY AND PLURAL THINKING: EXPOSITIONS OF WORLD, ONTOLOGY, POLITICS, AND SENSE 143 (Peter Gratton & Marie-Eve Morin eds., 2012).

[54] Loïc Azoulai, *The European Individual as Part of Collective Entities (Market, Family, Society)*, *in* CONSTRUCTING THE PERSON IN EU LAW—RIGHTS, ROLES, IDENTITIES 203 (Loïc Azoulai, Ségolène Barbou des Places, & Etienne Pataut eds., 2016).

[55] *See, e.g.*, Charlotte O'Brien, *Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights*, 53 COMMON MKT. L. REV. 937 (2016).

[56] *See* Azoulai, *supra* note 55; s*ee also* Charlotte O'Brien, *Case Law. The ECJ Sacrifices EU Citizenship in Vain: Commission v. United Kingdom*, 54 COMMON MKT. L. REV. 209 (2017).

[57] *See* Norris, *supra* note 6, at 275.

[58] *See* NANCY, *supra* note 43, at 61–74.

haunt every communal construction, even when there is no totalitarian politics attached to it that would want to produce the community on the basis of the myth?[59] Is not all community threatened by the myth of "us"?

As Balibar reads him, Nancy responds to this problem by distinguishing between communication and communion. Communion may be based on the myth, but communication is not. Communication is then not seen simply as the transfer of information from one subject to another, but as the separation of subjects that makes the transfer possible.[60] Because of the separation, a simple unifying "us" becomes impossible. Communication involves exposure to others and does not reduce singularities into a common whole. Already Rousseau noticed this: Society is developed as a bond *and* as the separation of singularities. In sum, community consists of singular beings that are in common but not totalizable.[61]

The question of European community has no definite answer, nor a definable solution, neither on the level of theory or empirical reality. It is not for political philosophy to posit an ideal for the Union according to some values or axioms. Nevertheless, in order for it to develop, it must achieve something new, something unprecedented. According to Nancy, "Europe will either invent an unheard-of form or it will cease to exist."[62]

Democracy still serves a purpose. It has the potential, if not always the tendency, to rupture the reigning economic logic of equivalence and create community without falling into pitfalls of totality. Here, democracy is not only a form of government, the reign of the people by the people. This would be too narrow a way to conceptualize democracy especially in the EU, where there is no people. The potential of democracy lies rather in the way it opens up the political space, that is, a space for questioning, probing, shaping, and redefining community. Instead of producing a common form or a shared identity, democratic politics can open a space for being-with.[63]

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[59] *See* ÉTIENNE BALIBAR, WE, THE PEOPLE OF EUROPE? REFLECTIONS ON TRANSNATIONAL CITIZENSHIP 69 (James Swenson trans., 2003).

[60] For more on this understanding of communication, see also Norris, *supra* note 53, at 147.

[63] *See* BALIBAR, *supra* note 59, at 70–71.

[62] Armstrong et al., *supra* note 5, at 95.

[63] *See* Neyrat, *supra* note 9, at 80.

F. Conclusion

It has been asked in this article what kind of legal and political subjectivity the EU renders possible. The theoretical framework has been based on an ontology of singular plurality. According to the analysis developed, being-in-common defines the subject, which means that subjects are not primarily autonomous, self-same agents. A subject can be a subject only in a community and community can only exist if its members' singular plurality is respected. Hence the question becomes: What would it mean for the EU to be a community? According to Nancy, it would require sharing a lack, not being subsumed under a common idea or defined as a unified whole.

This article has understood community as conceptually stretched between atomism and unity. The European integration process is threatened both by tendencies towards atomism and unification, as evidenced by separatist Member States, economically driven agendas and nationalist identity politics.

The EU is haunted by two risks: Equivalence and totalitarianism. The first implies a blurring of differences and values, a system such as capitalism, where every singularity becomes a tradable, comparable, calculable unity. Totalitarianism, on the other hand, implies the view that society has—and needs to have—a unifying essence, as seen in nationalist ideology. The kind of community where singularities would stay singular and singularly valuable, is one where we exist together but without common substance. To be in common in a European community would not mean fusion into a social body, nor would it mean individualistic atomism.

Community in singular plural is the task of European politics. It requires recognition of the fact that there is no Europe to be identified with. This may pose an impossible demand in general and an especially difficult one for the EU. It requires us to inhabit the world in a way that can really form a community, not a totalized essence, but a plurality of singularities co-existing. No essence or principle can or should be sought, but a world has to be formed nevertheless. Co-habitation is the key, that is, existence together with others in a way that values singularity without everything being made equally valuable. Commercial interactions of seemingly independent subjects do not form a community.