

Book Review: Making all the Difference, by Martha Minow

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BOOK REVIEW

MAKING ALL THE DIFFERENCE. Martha Minow.† Ithaca, New York: Cornell University Press, 1990. Pp. vii, 403. \$29.95.

Reviewed by Judith G. McMullen*

Some theorists of language and human knowledge speculate that placing people and things in categories is an essential step in the process by which any individual makes sense of the world. Without categories of experience and categories of language with which to express them, experience of the world would be chaotic and overwhelming. Categories allow us to organize and apply past experiences to present situations. Theorists believe, therefore, that categories are an indispensable part of human cognition.

It is one thing to recognize the necessity of categorical analysis in general, but quite another to presume that the categories currently in use in American law and society are themselves inevitable or necessary. In her recent book, *Making All the Difference*, Martha Minow takes a critical look at the way law and society impose rigid categorizations, categorizations which themselves dictate certain predictable consequences.

Minow first examines what she calls the dilemma of difference: The problem that arises when we label people as different in order to compensate for the adverse consequences of their difference. But the very label of "different" exacerbates the adverse consequences of this difference. For instance, the label "handicapped" will make a child eligible for all sorts of special educational programs, but that same label also carries a stigma from which various negative consequences flow. In addition, it is often unclear what we are trying to accomplish with special treatment. If we are trying to achieve equality among groups, do we mean equality of treatment or equality of result? Minow uses the example of gender difference in the distribution of property after divorce (pp. 40-41). Equal distribution of property does not recognize the greater economic needs of women with custody of children, nor does it recognize the overwhelmingly lower earning power of women as a group.¹ However, awarding more property or support to wo-

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1. Lenore Weitzman has suggested that the standard of living for women and children drops 73% following a divorce, compared to a 42% rise in the standard of living for their former hus-

men following a divorce tends to reinforce negative stereotypes of women as being needy and dependent on men. The dilemma of difference is the law's dilemma about how to ameliorate unfair consequences to the powerless without further reducing their power.

Minow maintains that there are some very strong and potentially dangerous assumptions lurking in the legal analysis of differences. She explores five such assumptions in Chapter 2.

First, she says the law treats differences as intrinsic rather than acknowledging that differences are relative. Deafness makes a person "different" from hearing people, but does not distinguish him from other deaf people. Moreover, it makes no sense to assert that a person is different from himself. He must be different from somebody else.

Second, Minow's point deals with the norm implicit in this assessment of difference. If deaf is different, then hearing must be the norm. Minow argues that the law operates on the assumption that the norm need not be stated. Of course, one reason not to state a norm is that it is obvious, but that is not what Minow means. She argues that the very selection of a norm is a deliberate decision, and the failure to state the norm only disguises that decision and denies responsibility for its effects. Minow claims that the law responds as if the chosen difference and norm were somehow inevitable and dictated by objective facts, rather than by a subjective ordering of priorities and expectations.

Third, the law assumes that the observer of any given situation can see without a particular perspective. Minow questions how anyone could ever completely step away from his own unique perspective, because one's perspective is determined by everything one knows and has experienced. Even if one could take on another person's perspective, which is questionable, he would have to have *some* situated perspective. It is impossible to conceive of a person having no starting assumptions, no self-interests, and no past experiences by which to judge the meaning of present experience.

Fourth, Minow argues that the law essentially ignores any other perspectives, including (maybe, especially) the perspective of the person who is being characterized as different.

Finally, Minow says that the law operates on the presumption that the status quo is "natural, uncoerced, and good." (p. 70). In other words, the law's categories of differences and the results flowing therefrom are simply in the nature of things. We have no choice but to recognize certain differences (or so the argument goes), and it would be contrary to nature to de-

sign a system which interfered with the natural consequences of those differences.

Minow devotes the rest of the book to examining these assumptions and possible alternatives to them. In Chapter 3, she suggests that instead of regarding differences as intrinsic to the different person, we could understand differences "as a function of relationships." (p. 80). This may introduce more flexibility when we are trying to solve specific problems. For example, as long as we view a deaf child as "different," our efforts to educate him will focus on "fixing" his handicap or accommodating the system designed for "normal" children in order to meet the deaf child's needs. When we recharacterize the issue as a problem in facilitating a relationship between the deaf child and hearing children, or between the deaf child and teachers, our new approach enables us to do more creative problem solving. Minow suggests that classes could be conducted both in sign language and in spoken language with the result that both would be considered normal and expected, and no one would be "different."

Moreover, in Chapter 3 Minow suggests that looking at differences as a "function of relationships" rather than as traits intrinsic to a particular individual is one way out of the difference dilemma. She also points out that there are varying perspectives on the effects of being categorized as different. A difference could be a point of pride or a chance for special privileges and opportunities. On the other hand, it could be a source of stigma or a way of placing responsibility for the difference and its effects on the different person.

Part II of the book examines with painstaking thoroughness the historical roots of the way the law treats differences. Minow discusses approaches which focus on rights, social relations, or assumptions that some persons are abnormal. She compares, contrasts, and integrates these theories. She also discusses these theories in the context of cases, as well as disciplines such as literature, psychology, and feminist theory. Minow demonstrates an impressive ability to reflect on a wide range of ideas about perspective and the treatment of difference.

Finally, in Part III Minow suggests an approach which combines an emphasis on individual rights and differences with a focus on solving problems within the context of relationships. While the effort to meld rights with relationships is largely theoretical, Minow does examine some of the practical ramifications of her suggestions in the context of medical treatment of severely disabled newborns.

Overall, this book is creative and thoroughly researched, although it often lacks a certain practicality. Some of Minow's most interesting ideas have to do with the ways she challenges the five basic assumptions about

difference that she attributes to the law. I want to specifically examine Minow's core assertion that differences are a comparison between a deliberately, sometimes arbitrarily, chosen "norm" and a "different" person, rather than characteristics intrinsic to the "different" person. If, for example, we compare deaf children to hearing children without using hearing children as the norm, we see that our issue becomes one of establishing a common language. We can then use both sign language and spoken language to assure communication among all of the children as Minow suggests.

Minow's point that certain differences become relevant in society because we single them out and use them for comparison is well taken. If everyone had blue eyes or black skin or was the same gender, then we would presume these characteristics as automatically as we presume that each living person has a head. It would make no sense to base differential treatment on traits shared by everybody. Moreover, even where all people do not share a particular trait, there is a distinct arbitrariness to choosing certain traits over others as the basis for any kind of differential treatment, at least in the abstract. Why should political status, economic position, or educational opportunity depend any more on race than it does on, say, eye color?

The initial decision by someone eons ago to make race outcome determinative is an example of an assignment of value to a trait, where such assignment became entrenched in the society. Since race has dictated certain past legal results it is similarly possible today that race can still possibly influence theoretically irrelevant decisions. Specifically, should present society use race as a decision-influencing factor in an attempt to redress the past inappropriate use of that factor in apportioning rights? This brings us squarely up against what Minow calls the difference dilemma.

In Chapter 4, Minow details three distinct theoretical approaches to difference: the abnormal persons approach, the rights-analysis approach, and the social relations approach. She is clearly not impressed with the abnormal persons approach in which "assertions about a person's basic or immutable nature locate him or her [in the normal class or in the abnormal class]." (p. 106). This classification results in different legal treatments. She is more receptive to the rights-analysis approach, which "inspires a skepticism about the accuracy of particular assumptions and classifications of difference. Attributions of difference have so often been faulty, expressions only of prejudice and power, that they must be subjected to intense scrutiny." (p. 107). If true intrinsic differences are found, then a denial of rights may be justified, but it will be based on evidence rather than on prejudice. Minow is concerned that this theory still rests upon an unstated norm

and "retains a general presumption that differences reside in the different person rather than in relation to norms embedded in prevailing institutions." (p. 108).

Although she recognizes many of its limitations (SEE Chapter 8), Minow seems to be, on the whole, more impressed with the social relations approach, which "demands analysis of difference in terms of the relationships that construct it." (p. 112). This approach acknowledges that the assignment of the label of difference is an act of power. "The name of difference is produced by those with the power to name and the power to treat themselves as the norm. Though the difference does not reside in any one person, the comparison is drawn by some to distinguish themselves from others." (p. 111).

Minow discusses many examples of the social relations approach. Among them are the writings of Thomas Szasz and R.D. Laing. They have characterized mental illness as a relative concept whereby the more powerful "sane" distinguish themselves from the insane by defining sanity in terms of themselves.

One of Minow's main objectives is to make us realize that many bases for assigning goods and rights in society were originally founded on initial determinations to consider one trait the norm and all others abnormal. On a theoretical level, we can claim that all "norms" and "differences" are chosen by power-holders to further their own power, rather than to pursue the norms which were somehow originally logical or necessary. By playing with our assumptions, we can do some very creative problem solving. For example, if we considered women the norm rather than men, blind people the norm rather than sighted people, or psychotic persons the norm rather than non-psychotic persons, we would have a differently structured society.

"Perceptions and assessments of difference pick out the traits that do not fit comfortably within dominant social arrangements," says Minow, "even when those traits could easily be made irrelevant by different social arrangements of different rules about what traits should be allowed to matter." (p. 55). While acknowledging that members of the dominant social arrangements hold the power, this statement leaves open the possibility that some traits *must* matter in a society and that some traits could be more easily made irrelevant than others. Minow chooses not to emphasize the latter point. At times it is unclear whether Minow intends to make this point at all. While it is theoretically possible to alter the dominant social arrangements such that any trait would no longer matter, I question whether this concept is useful or practical.

If we step away from theory just a little and assume only that human beings are partially defined and their potentiality largely determined by the

fact that they interact and survive within some kind of society, then the decision to establish certain norms is no longer only an act of dominance by the more powerful among us. At the extreme, someone who is catatonic or acutely psychotic is "different" in the sense that he cannot meaningfully participate in the sort of social interactions that lead to physical survival and emotional fulfillment. It is possible to posit a society where such a person were the norm, or where his "difference" would not matter, but it would not be a society in a useful sense of that term. On the occasions when I have encountered the psychotic man who sleeps on the park bench across from the law school, I have not found claims that sanity and insanity are merely norms assigned by the powerful to be useful. It seems ridiculous to attribute this man's diminished opportunities to a decision to compare him with a potentially alterable norm. There is indeed something intrinsic in him which prevents him from interacting in anything which we would characterize as society. It makes no real sense to view this as a problem of comparisons or relationships when there is indeed a characteristic, or group of them, which makes entry into almost any relationship impossible for this person.

I also question Minow's implication that it is adults and their categorizations which single out a child as different in a school or other peer setting. As the mother of two children, I have often been shocked by the quickness, sureness, and rigidity of preschool and young school age children's categorizations of their peers. On one occasion, I recall returning home with my children from a visit at the home of friends who have a special needs child. "What's wrong with him?" my six year old daughter asked during the ride home. I explained that nothing was "wrong" with him, that every child is different, and that some people find some things like language to be harder to learn. My daughter responded, "Oh, I get it. He isn't as smart as other kids, just like Johnny Doe who has to repeat kindergarten." (Johnny Doe is a learning disabled child at my daughter's school.) We discussed how Johnny is in a situation that is especially hard for him, but that he has abilities that would allow him to do better in some situations than other children. My daughter was polite, but written all over her face was a look which said, "Mommy isn't as smart as other moms. She just doesn't understand about Johnny."

This is not mere childish cruelty. My daughter recognizes these children as being different solely because they cannot, or at least have not so far, been able to perform many of the developmental tasks through which one learns to cope effectively in society. At certain levels, society is rigid and arbitrary and should change its requirements for coping instead of always requiring individuals to change themselves. At some point, however, an

individual is not excluded by the label of "different" as much as the label of "different" is descriptive of a trait which makes it impossible or extraordinarily difficult for that individual to participate in certain social relations at all. We can argue about where to draw the line between functional and dysfunctional persons, but it is counterintuitive to assert that we must never draw a line at all. My daughter was labeling another child as different, not so she could claim power and superiority over him, but because her six year old instincts told her that this child had to deal with the difficult problem of not being able to fit in and accomplish certain things within the range of what the rest of his peers could do.

Society, in my view, should not hold certain differences as potential norms because to do so would be to tolerate the causes of those differences. I am thinking of a book in which Morton Schatzman discusses the life of Judge Schreber, a nineteenth century paranoid schizophrenic of some repute.² The author presents a convincing case that delusions induced by Schreber's illness made sense when considered in the light of his abusive early home environment. His bizarre and psychotic behavior and specific delusions could be viewed as an attempt to cope with his sadistic father and the dysfunctional household his father commanded. In other words, the behavior made sense in terms of the context in which it was learned, but appeared to be completely irrational when judged according to the norms of larger society. Specifically, the author links Schreber's delusions of thought control and physical punishments to certain disciplinary techniques of his father which could be fairly characterized as brainwashing. Thus, Schreber's behavior could be considered a norm, but only in a hellish environment. Although there may be a social relations problem here, it is not so much between Schreber and society as it is between Schreber and his internalized father. If society adapts too fully to Schreber's dysfunction, it makes it all the easier for sadistic parents to operate in this society.

Schreber's case is extreme and somewhat sensational, but in fact we encounter the same problem whenever we deal with a child who is the product of an abusive, dysfunctional, or poverty-stricken environment. We do not want to dismiss children as hopeless because of environmentally induced handicaps. However, we must recognize that some individuals have traits (whatever their cause) which will hinder or prevent any kind of meaningful relationship within society. Of course, recognizing such traits must in no way imply that the person having such a trait is somehow at fault.

Minow seems reluctant to admit that some labels of difference and some norms are essential in society. She may be disturbed by the ease with which

2. MORTON SCHATZMAN, *SOUL MURDER* (1973).

we assume that existing norms are essential. She may also be concerned with our readiness to blame those who differ from the norm for their differences and to shift the entire burden of overcoming their differences upon those persons.

Denying people with blue eyes the right to vote would be ludicrous, but denying this right to someone who is catatonic and unresponsive is necessary. Denying black people the right to vote should be equally laughable as denying it to the blue-eyed person. However, some in the past have claimed that it was as necessary as disenfranchising the catatonic, because skin color may be correlated with illiteracy. Illiteracy may be correlated with the inability to respond to a ballot, and the inability to respond to a ballot is the underlying reason we would not let the catatonic vote. This is a horrible slippery slope, and if we slide down it, we can justify almost any norm as necessary, which is exactly what Minow says the law often does and should not do any more.

If this book claims that all categories and norms are arbitrarily chosen, comparisons which could be made irrelevant by changing the socio-legal structures, then it is naive. On the other hand, if the book is meant to jolt us out of our complacent acceptance of all implicit norms as necessary, then it is insightful. I prefer to think that it is the latter.