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# INESSENTIALLY SPEAKING (IS THERE POLITICS AFTER POSTMODERNISM?)

Allan C. Hutchinson\*

MAKING ALL THE DIFFERENCE. By *Martha Minow*. Ithaca: Cornell University Press. 1990. Pp. xii, 403. \$29.95.

Although we need to use gender-related ideas in order to challenge gender constraints, we will only be able to accomplish that objective by constantly re-examining the ideas we are using. Ultimately, in order to challenge gender constraints effectively, our use of gender-related ideas must change with our shifting cultural context and the changes within ourselves. Only by continually re-thinking who we are and why we are making the choices we make can we free ourselves from the belief that our selves are constructed by our sexual identities.

— Mary Joe Frug<sup>1</sup>

Twilight is upon us. As the contemporary continuance of the Enlightenment project, modernity has had its day. Its erstwhile champions' efforts to establish a combination of authenticity and authority as the ground for Truth and Justice — that individuals can only give meaning and value to their own lives by locating and expressing their own self-identity — have proved to be misplaced. A modernist deliverance from doubt and uncertainty remains a tantalizing, but receding prospect. The sun of Truth is unfailingly hazy and in danger of total eclipse, resembling more a fading battery of artful floodlights. Everything loses its iridescence and is reduced to a dull pastiche of bland on bland. In a way of speaking, Minerva's owl has flown the philosophical coop entirely.<sup>2</sup> No longer taking its crepuscular flights of fancy, Wisdom's bird has abandoned Western attempts to locate a fixed

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\* Osgoode Hall Law School, York University, Toronto. LL.B. (Hons.) (1974), London University; LL.M. Manchester (1978). —Ed. I am grateful to Brenda Cossman, Lisa Fishbayn, Blair Holder, Carol Smart, and Mark Warner for sharing their work and their insights with me.

1. Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1140 (1985). In her life and in her writings, Mary Joe Frug represented the rigorous practice and the exhilarating promise of postmodernism. As part of the feminist project of challenging the extensive and complicated network of sociocultural practices that legitimate the subordination of women, she paid constant attention to the gendered and situated power of discourse. Always with genuine warmth and humor, she refused to accept the imperialistic claims of many radical scholars and resisted the easy politicking of modernism. M. Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 21 (Mar. 31, 1989) (unpublished manuscript). In her personal and professional life, she demonstrated that, far from being depolitical, postmodernism is the best and most effective way to be political. It is to her happy memory and joyful example that this essay is dedicated.

2. See G. HEGEL, *PHILOSOPHY OF RIGHT* 1-13 (T. Knox trans. 1945).

flightpath by which to understand and guide human experience. Knowledge seems to be only the fleeting trace of the will to power and understanding is irretrievably in cahoots with oppression. As its joyless archaeologist, Michel Foucault has written Enlightenment's fitting epitaph: "knowledge is not made for understanding; it is made for cutting."<sup>3</sup>

## I. THE POSTMODERN PUZZLE

For many observers, this modernist failure marks the beginning of the end. With much anguish, it is lamented that humanity is fast going to an existential hell in a nihilistic handcart. However, a strong band of critical scholars has resisted that apocalyptic appraisal. These scholars have sought to seize this particular moment by turning modernism's dusk into postmodernism's dawn: it is an opening and not a closing of opportunities. Recognizing that critical success has its own limitations and responsibilities, they resist the temptation to reach for higher ground than their own theoretical challenges permit. As the obituarists of Truth and Grand Theory, they are scrupulous to ensure that any efforts at normative reconstruction do not transgress the imperatives of deconstructive criticism, whose critical force they must respect. Deconstruction is an unforgiving and remorseless taskmaster.<sup>4</sup>

For all its deconstructive verve, postmodernism is alleged not only to render the practice of reconstructive politics difficult, but to sabotage any coherent program of progressive politics. Deconstruction undercuts politics and politics marginalizes deconstruction. Nevertheless, I intend to argue that there is no contradiction between a continuing loyalty to a postmodern strategy and the practical realization of a radical political agenda.<sup>5</sup> The postmodern challenge is to open a space for a *modus vivendi* that is neither misguidedly essentialist in theory nor hopelessly historicist in practice. In short, I claim that a postmodern approach to law is both textually viable and politically radical; it is not oxymoronic or naive to be both postmodern and progressive. Postmodernism is not the ground for a progressive politics, but a complementary strategy for one.

In the jurisprudential corner of postmodern scholarship, the work

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3. M. FOUCAULT, *LANGUAGE, COUNTER-MEMORY, PRACTICE* 154 (D. Bouchard ed. 1977).

4. See A. HUTCHINSON, *Working the Seam: Truth, Justice and the Foucault Way*, in *DWELLING ON THE THRESHOLD: CRITICAL ESSAYS ON MODERN LEGAL THOUGHT* 261-94 (1988).

5. See Binder, *Radicalism Deconstructed*, 69 *TEXAS L. REV.* (forthcoming 1991); Hunt, *The Big Fear: Law Confronts Postmodernism*, 35 *MCGILL L.J.* 507 (1990). Of course, postmodernism is far from the monolithic tendency that I have suggested. Although its protagonists share a general orientation, it is a fluid and protean line of critique and politics. See *infra* notes 9-12, 25-37 and accompanying text.

of Martha Minow deserves especial attention. Her *Making All The Difference* offers an excellent occasion for working through the puzzles and strategies of postmodern politics. Infused with a postmodern perspective, her writing stands at the frontiers of modern legal thinking in its efforts to reject and move beyond the modernist project of jurisprudence. In its searching analysis and imaginative proposals, *Making All the Difference* is a book to be reckoned with — it makes a difference. This review sketches the postmodern problematic, and canvasses Minow's engagement with the dilemma of difference. Addressing her treatment of power, the review then offers the outline of a postmodern politics and traces its implications for legal activity. The conclusion points to the difficulty of all that has gone before and places it in parentheses.

## II. IMPERIAL INTIMATIONS

through they're own words / they will be exposed  
they've got a severe case of / the emperors new clothes.

— Sinéad O'Connor<sup>6</sup>

Hans Christian Andersen's fairy tale of *The Emperor's New Clothes* has done stalwart work for deconstructive critics of jurisprudential pretension and legal obfuscation.<sup>7</sup> It is a beguiling fable of common credulity, scholarly complicity, and innocent exposure. Like the law, the emperor is only sustained in his majesty by the willingness of his subjects to suspend their common sense and to see what they were expected to see. With the innocent clarity of a child, the critic informs the gullible people that the emperor is naked. Exposed but undaunted, the emperor/law "walked even more proudly and the two gentleman of the imperial bedchamber[lawyers] went on carrying the train that wasn't there."<sup>8</sup> Consequently, despite the ingenuity of the juristic couturiers of right, law stands debagged and debunked in its bare essentials of might. It is a tale intended to chastise the conspiratorial and congratulate the contumacious.

But, on the insistence of the postmodernist impulse, the time has come to abandon Andersen's tale as a critical trope. Like most metaphors, its telling begins in openness and its denouement ends in closure. As context changes, its critical message reveals more about the critics than about those being criticized. The tale lends itself too easily to the interpretive ministrations of the modernists. It suggests that, once the wardrobe of conventional costume is dispensed with, power

6. O'Connor, *The Emperor's New Clothes*, I DO NOT WANT WHAT I HAVEN'T GOT (Ensign Chrysalis Records 1990).

7. See, for example, D'Amato, *Can Any Legal Theory Constrain Any Legal Decision?*, 43 U. MIAMI L. REV. 513, 536-38 (1989).

8. H. ANDERSEN, *The Emperor's New Clothes*, in THE COMPLETE FAIRY TALES AND STORIES 81 (E. Haugaard trans. 1974).

and people will be viewed and understood in their unadorned reality: all will be free to speak truth to the world and to apprehend the true nature of things. For the modernist, knowledge is available and ascertainable, but only outside and independent of power's corrupting influence. Behind or underneath the skewed truths and perceived realities of historical living lie the Truth and Reality of Life. The tale's modernist appropriation moralizes in terms of ontological retrieval and political reclamation; it is about finding ourselves rather than remaking ourselves.

In contrast to the modernists' preoccupation with essences and essentials, the postmodern temper has no eternal truth to offer and no immutable knowledge to dispense; it accepts the historically situated and socially constructed character of truths and knowledges. It does not seek to apprehend a fixed and given at-oneness, but to encourage a contingent complex of multiple realities.<sup>9</sup> By denying the possibility of a perfectible meta-narrative or a totalizing intelligibility, it concedes the existence of neither eternal difference nor everlasting undifferentiation and puts everything into perpetual parentheses. As such, postmodernism is a dynamic thesaurus of experiential values, not a technical manual of scientific methodology; difference is evanescent and mobile.<sup>10</sup> It is a rigorous and uncompromising discourse of nonessentialism that offers no grand theory of emancipation. There are many narratives, but no meta-narrative. Postmodernism simply dares people to walk the highwire of life without a metaphysical safety net for the occasional loss of balance or nerve.

As such, the naked body of the emperor is one more construction to be deconstructed and law is one more conjunction of power and knowledge to be explored. Neither the human nor legal body will ever present itself for inspection in its unmediated self-presence; there is no lost presence to be restored and no lasting judgment of the past in the name of a present truth. The political gaze fixes the body *as* body and law *as* law. For the postmodern critic, power both produces and is produced by knowledge. Knowledge, in turn, enables the claim to truth to be made that legitimates that same power and knowledge. Truth is always and already situated within the contexts of power and knowledge that it claims to validate.<sup>11</sup> All strategies are risky and all consequences are unpredictable: everything will depend on the informing context and precise timing of any particular intervention.

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9. See Coombe, *Room for Manoeuvre: Toward a Theory of Practice in Critical Legal Studies*, 14 *LAW & SOC. INQUIRY* 69 (1989); Fraser & Nicholson, *Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism*, in *FEMINISM/POSTMODERNISM* 19-38 (L. Nicholson ed. 1990).

10. See D. FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE* (1989).

11. See A. HUTCHINSON, *supra* note 4, at 261-94; Smart, *Law's Power, The Sexed Body, and Feminist Discourse*, 17 *J.L. & SOC.* 194 (1990).

The challenge, therefore, for postmodern jurists is to ensure that they do not march on another long day's journey into night. As well as guarding against postmodernism becoming its own meta-narrative, they must effect a viable practical posture that allows them to accommodate and respond to the double bind in which their theoretical affiliations place them. Nothing is outside history and change: everything is constructed and contestable, including and especially politics. The postmodern insight undermines monolithic and stultifying claims to authority and truth derived from a universal reason and opens up a space for transformative action. While it does not provide any blueprint for change or enlightenment, it does allow individuals to decide what world and what "me" they wish to make or remake based on experiential truths: postmodernism allows them to empower and affirm their proclaimed selfness with value and legitimacy. In postmodern parlance, critics must strive to be responsible strangers in their own native land. While "we can pronounce not a single destructive proposition which has not already had to slip into the form, the logic, and the implicit postulations of precisely what it seeks to contest[,] we cannot give up this complicity without also giving up the critique we are directing against this complicity."<sup>12</sup>

In charting the sustaining and contested interrelationships of truth, power, and knowledge, the question of politics is always insinuated and implicated. Any analytical devices used to understand or evaluate history are themselves always and already part of that politics. Caught within this fundamental triangulation, those hostile to postmodernism insist that it is caught between a rock and a hard place in its efforts to sustain and sanction a progressive practice of transformative politics. It is argued that the Critics either must abandon the deconstructive method that blunts the progressive edge of their political program and fall back on a variant of the discredited formalism,<sup>13</sup> or they must forsake the radical political agenda that cramps their deconstructive verve and resign themselves to a reluctant stance of political quietism.<sup>14</sup> Consequently, despite their radical protestations, postmodernists' deconstructive efforts are dismissed as futile and reactionary because they "cannot help but bring comfort, energy, and ideas to the enemy of change."<sup>15</sup>

The long and short of it, to listen to the detractors, is that the postmodernists' attachment to a deconstructive mode of critique is in-

12. J. DERRIDA, *WRITING AND DIFFERENCE* 280-81 (A. Bass trans. 1978).

13. See Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990).

14. See generally F. KERMODE, *AN APPETITE FOR POETRY* (1989); Hunt, *supra* note 5.

15. F. LENTRICCHIA, *ARIEL AND THE POLICE* 131 (1988). For similar charges of deconstruction's conservatism, see T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 132 (1983); J. HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* (F. Lawrence trans. 1987); E. SAID, *THE WORLD, THE TEXT, AND THE CRITIC* 193, 242-43 (1983).

compatible with their reconstructive aspiration to a truly progressive program of transformative politics — if everything is always open to interpretation, how do we know what is and is not progressive? By proceeding on their campaign of critical terrorism and razing all textual strategies before them, postmodernists, it is contended, retain no place from which to launch or justify their own positive proposals for social change: how can they ground their own critique, if there is no ground on which to stand? In denying all claims to truth and neutrality, critics deny their own capacity to make evaluative or uncontroversial claims: How can critique transcend its own injunction against transcendence? If a formally coherent and substantively realizable legal order is impossible, there will be no legal system against which to mount a political critique or against which to work for progressive change. If law does not have any definite contours or shape, how can its shape or contours be good or bad?<sup>16</sup>

It is against the backdrop of this problem that Minow's work in law and politics must be understood and assessed. Her focus is the dilemma of difference, but she uses it as a window on the most punishing questions on the postmodern agenda in terms of race and gender. In particular, she asks: How it is possible to speak in meaningful and cogent ways about *race*, *gender*, or *difference*, if any knowledge or understanding is socially constructed, historically positioned, and politically partial?

### III. MINOW MOVES

Categorization is the boon and bane of human existence. While the ability to name and label the world is necessary in order to bring it down to manageable and meaningful proportions, the act of so doing ensures that there can never be an unmediated view or participation in reality. The taxonomic tendency is never value-free, but always situated within a larger normative universe; it is less a matter of technical refinement and more a case of creative designation.<sup>17</sup> In this way, understanding is always a form of misunderstanding and seeing is always a kind of blindness. The process of labeling and naming is particularly fraught with difficulties and dangers when it concerns people. While aspirations to treat everyone similarly overlook genuine differences between people and trivialize each person's uniqueness, the tendency to treat everyone differently ignores the sameness of people and fails to respect each person's humanity. To categorize is to choose and, in so

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16. See, for example, Cossman, *A Matter of Difference: Domestic Contracts and Gender Equality*, 28 OSGOODE HALL L.J. 303 (1990); Duclos, *Lessons of Difference: Feminist Theory on Cultural Diversity*, 38 BUFFALO L. REV. 325 (1990).

17. See Cohen & Hutchinson, *Of Persons and Property: The Politics of Legal Taxonomy*, 21 DALHOUSIE L.J. 20 (1990).

doing, there is no escaping the responsibility of judgment or its context of power.

A crucial setting for studying the dilemma is law. Not only does law comprise a potent vocabulary for assigning and locating difference, it imposes itself coercively on the lives of those who come within its embrace: "Law backs up words and concepts with power" (p. 97). It is the burden of Minow's book to explore the ways in which the law articulates, confronts, and responds to the dilemma of difference. As the social medium and forum par excellence for constructing and enforcing difference, law provides a convenient lens through which to examine critically the production and interaction of power and knowledge. By deconstructing the limiting and limited assumptions of present legal practice, Minow strives to glimpse and act upon its reconstructive potential. Despite the current failings of the legal system, Minow maintains that it is possible to transform rather than trash law so that, suitably rejigged and reoriented, it can make all the difference in the continual struggle to turn difference into a source of pride and not a mark of discrimination.

In working towards this progressive program of legal change, Minow begins by highlighting five closely related, but unstated, assumptions that inform and energize existing legal understandings of the difference dilemma (pp. 50-74). First, differences are treated as intrinsic rather than as expressions of comparison between people; it is the person who is labeled different rather than her or his relation to others. Second, the point of reference from which the assessment of difference is made remains unstated; this gives the distinct impression that the norm of judgment is inevitable and natural. Third, the person judging difference is thought of as having no perspective rather than as having a particular situated perspective; that a perspective is widely shared does not make it any less of a perspective. Fourth, the perspective of those being judged as different is treated as irrelevant or already accounted for by that perspective; a person's perspective or self-understanding is thought of as unrelated to how others react or judge. Finally, it is assumed that existing social and economic arrangements are natural and neutral; any departure from the status quo runs the risk of partiality and interference with the free choice of individuals. In total, the collective force of these unstated assumptions is to make the difference dilemma seem inevitable and irresolvable: "Noticing difference and ignoring it both recreate difference; both can threaten such goals as neutrality, equality, and freedom" (p. 74).

Having identified the sources of difference, Minow proceeds to canvass the prevailing theoretical models available from which to construct a convincing and workable response to the difference dilemma. Although her treatment of these alternatives is informed and sensitive, she gives short shrift to contemporary legal theories and their reforma-



tive claims (pp. 146-72). In its own particular way, each of the theories that she canvasses tends to rely on one of two traditional approaches. One is the abnormal-person approach, which situates the problem of difference within a simplistic either/or construction and thereby defeats any possibility of its resolution. By treating differences as intrinsic, it makes the different person into the problem and assumes difference to be obvious and natural. This approach denies that there is some perspective or norm against which difference is perceived and measured: "The perspective of those who have been named 'different' is thought to be inconceivable — and irrelevant" (p. 215). The other is the rights-based approach, which recognizes the judgmental nature of differences, but persists in maintaining the idea of a viable distinction between normal and abnormal and in perpetuating its legal consequences. While more tailored and situation-specific solutions to problems of difference are possible, rights analysis leaves untouched the larger and objectionable patterns of power distribution that reinforce the nature of differences as static and rooted: "[Rights analysis] offers little insight into how an observer constructs what is 'real' and poses a special dilemma for those whose differences seem 'real' against the backdrop of social institutions and practices that make that difference matter" (p. 216).

In place of these unsophisticated and constraining responses, Minow offers a relational approach that takes seriously the epistemological and political ramifications of the difference dilemma: "If the problem has relational dimensions, then so should the solutions" (p. 90). While drawing selectively from a host of disciplinary insights, she relies extensively on the philosophical and practical imperatives of feminist literature (pp. 192-214). The central thrust of the relational approach is that difference is a function of actual relationships between people and social practices; the attribution of difference is the result of a comparison drawn between an individual and a normative standard that is constructed and relied upon by other individuals. Such an approach eschews elevating abstract concerns over concrete experience; it comprehends personhood as based on autonomy and separateness for caring and thinks about relationships as natural, fixed, and immutable: "[P]eople live and talk in relationships and never exist outside them" (p. 111). By treating difference as part of a historical context of social relations, Minow's preferred approach insists that, as difference is always a negotiated and constructed notion of practice, it can be renegotiated and reconstructed:

A relational approach, like the abnormal-persons approach, assumes that people live within networks of relationships; but unlike the abnormal-persons view, it challenges fixed status and attributed difference. And unlike rights analysis, the relational approach inquires into the institutional practices to determine the norm against which some people seem different, or deviant. Also unlike rights analysis, relational ideas

raise questions about how anyone knows and how the observers' relationship to the observed influences what they think they know. By stressing the unavoidability of perspective, the relational approach makes all claims of knowledge vulnerable to the same charge: "But that's just your view." It encourages more debate and highlights as human choices — rather than acts of discovery — the way we treat people, the traits we call "different," and the social institutions that embody and reinforce those assumptions. To address relationships is to resist obstruction and to demand context. [p. 216]

To operationalize the relational approach in the struggle to meet the dilemma of difference, Minow chooses to reclaim the voice of rights talk by reconstituting and revitalizing it in accordance with a relational dynamic. Junking the notion of rights as a set of fixed and abstract claims, she wants to revalorize it as a conversational discourse through which to establish community in the struggle for meaning. Detached from extant protocols of power, a concrete and expansive version of rights talk can empower the marginal at the same time it challenges the status quo. While Minow's defense of rights celebrates rather than condemns their lack of neutrality, she seeks to nurture the overlooked possibility that rights claims demand "an equality of attention" and their exercise "sustains the call that makes those in power at least listen" (p. 297; emphasis omitted). In short, notwithstanding the traditional hazards and the obvious pitfalls, "[t]here is something too valuable in the aspiration of rights, and something too neglectful of the power imbedded in assertions of another's need, to abandon the rhetoric of rights" (p. 307).

#### IV. RECOVERING POWER

In its ambitious sweep and persistent sophistication, Minow's book is the rare publication that produces a lucid and telling analysis of a problem whose present understanding and future resolution tend to elude even the most sensitive and thoughtful people. Having read this book, it is impossible not to think and respond to the dilemma of difference differently. By providing a new vocabulary with which to talk about difference, she assures that the problem of difference is transformed in the attempt to resolve it. The book's particular strength is the facility with which it moves between the exacting spheres of meta-theorizing and the practical details of concrete problems. Exhibiting a prodigious erudition, Minow follows her own central injunction always to respect and engage contexts in her situated and courageous efforts to address discrimination in Native American land claims, bilingual education, maternity leave, housing for mentally handicapped, and the employment of African Americans.<sup>18</sup>

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18. My use of "African American" instead of "black" is deliberate. Africans, including those from the continent and those in the diaspora, have been labeled by Europeans since their

Perhaps because of this enviable insistence on practical relevance and strategic significance, Minow does not attend as closely as she might to the postmodern puzzles suggested by her text: she responds to them only implicitly and indirectly. However, any approach that takes such an uncompromising and rigorous stand on the constructed and contextualized nature of all difference must confront the dilemma of how we know which differences count and how we validate such knowledge. This puts the issues of power and subordination firmly on the postmodern agenda: it ensures that the discussions of difference are about racism as much as race, and about sexism as much as gender. Although Minow is never dismissive or indifferent to the problems of power (pp. 229, 237, 381, 389), she does not elaborate fully the basis on which her own brand of postmodernism makes this challenge. In short, Minow is long on the skeptical nature of truth and knowledge, but short on the political problem of power; she attends to only two sides of the triangle of knowledge, truth, and power.

Accordingly, I intend to concentrate on how postmodernism can be theoretically consistent and remain politically compelling in confronting the ubiquity of power. How can postmodernism confront subordination without suborning itself in the process? My account is offered not so much as a hostile corrective to Minow's shortcomings, but as a supportive supplement to her more practical efforts. Nonetheless, my argument does suggest that Minow should reconsider some of her institutional strategies and adopt a more radical program of change. By giving insufficient weight in her analysis to power's effects, she leaves the impression that discrimination is more a matter of cognitive misperception than a political practice of subordination. A closer attention to power's insidious presence and operation will restore a keener political edge to the postmodern project. In short, I want to combine Martha Minow's insights with those of Catharine

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original contact thousands of years ago — "nigger," "negro," "colored," and "black" to mention a few. Each of these are European-imposed terms and focus *only* on skin color. Now, for the first time Africans in the diaspora are beginning to rename and reclaim themselves and their collective culture respectively with the name "African American." See M. KARENGA, *THE AFRICAN-AMERICAN HOLIDAY OF KWANZAA: A CELEBRATION OF FAMILY AND CULTURE* (1989). The term allows, in fact *requires*, an identification with a culture, language expression, geography, and a history that denies the oppressive reduction of African Americans to a color only. Many scholars and other people of African descent recognize this as a movement-in-the-positive: liberation arising through self-definition and self-determination by way of an affirmation of consciousness and identity. From a postmodern perspective, "African American" emphasizes appropriately the organic idea of culture, not a static notion of physiological essence. The use of "white European" in place of "white" serves a similar function. Of course, an African-American or white European identity is not a monolithic entity, but is itself constituted through difference and diversity. Furthermore, the problem of race and racism is not represented solely by the engagement between African Americans and white Europeans. My focus on African-American oppression is only one, albeit widespread, manifestation of the problem. In contemporary North America, there are many sites and settings for racism among different cultural groups.

MacKinnon.<sup>19</sup> Whereas Minow can check the essentialist tendencies of MacKinnon, MacKinnon can provide the political radicalness that Minow intimates, but ultimately shies away from.

In her pioneering work, Catharine MacKinnon has more than any other scholar insisted upon the sustaining connection between epistemological framework and political power; the ability of the male point of view to appropriate the standpoint of neutrality and objectivity has been crucial to the project of institutional patriarchy. However, in her efforts to emphasize the reinforcing relation between power and knowledge, MacKinnon has fallen victim to the modernist contagion. Rather than recognize the contingent and constructed character of women's experience, she runs perilously close to grounding her analysis of women's oppression in a notion of "essential womanhood." She presupposes a presocial, supracultural, and free woman who, laboring under false consciousness, is constantly trying to throw off the yoke of male domination. Her text and critique is structured around the idea of "women's point of view" and "women's voice"; the ambition is to give women really what they want and "on [their] own terms."<sup>20</sup>

The effect of this essentializing tendency is to rob, not imbue, the work of its radical potential. It inadvertently reinforces the essentialist epistemology of the traditional thinking that it condemns and seeks to dislodge; it recovers women's subjugated knowledge as a corrective to the partial and selective truths of male thinking. So hegemonic and systemic is the male perspective in the MacKinnon scheme of things — "women exist[] in a context of terror"<sup>21</sup> — that women only feature as perennial victims and authentication is reserved only for the experience of subordination. Apart from other things, this epistemological approach is invalidated by MacKinnon's own writing, for if the male perspective is so pervasive, what can validate MacKinnon's own analysis and what is the "true" experience that is sublimated by false consciousness? By downplaying the important intersections of class, race, and sexual orientation, she risks reducing "woman" to a necessary and natural category that is as much the root of the sexist problem as it is the seed for the feminist solution.<sup>22</sup> Her account is almost so flat, static, and all-embracing that there is no space or opening from

19. See C. MACKINNON, *FEMINISM UNMODIFIED* (1986); C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989). Minow mentions, but does not grapple with, the challenge of MacKinnon to Minow's own brand of critique. Pp. 50, 217.

20. C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 19, at 88, 160, 195, 83 & 22 (emphasis omitted); Colker, *Feminism, Sexuality and Self: A Preliminary Inquiry into the Politics of Authenticity* (Book Review), 68 B.U. L. REV. 217 (1988).

21. C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE*, *supra* note 19, at 151; see also A. DWORIN, *INTERCOURSE* (1987); Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review), 41 STAN. L. REV. 751 (1989).

22. See Harris, *Categorical Discourse and Dominist Theory* (Book Review), 5 BERKELEY WOMEN'S L.J. 181 (1990).

which to launch any transformative action: she can only chronicle the sources and strategies of victimization rather than provide explanations that themselves can become forms and founts of resistance.<sup>23</sup> Domination becomes a seamless web that is total in its intelligibility and, being bereft of complexity and contradiction, is exclusionary in its politics.

Yet, as much as MacKinnon's account is in need of postmodern renovation, much is worth retaining. The great strength of the work is its unrelenting attention to power and its insidious operation. For her, the question of oppression is not about race and gender, but about racism and sexism. Inequality is not a question of difference, but of dominance: "the issue of discrimination or inequality is not centrally one of accurate categorization [but it] is one of hierarchy, the top and bottom of a hierarchy are different all right, but that is hardly all."<sup>24</sup> She is uncompromising in her view that it is male and white supremacy that must be confronted as a political phenomenon rather than as a moral dilemma. She insists that the attempt to give women a voice of their own will not be possible until substantive change is made in social arrangements as well as in people's way of thinking because, at present, "his foot is on her throat."<sup>25</sup>

For MacKinnon and her modernist kin, the flirtation with the postmodernist perspective is a *liaison dangereuse*. The essentialist leanings of their standpoint epistemology have been relatively successful in effecting legal reforms, in facilitating the entry of feminists into the "malestream" academy and in obliging its scholarly practitioners to take feminism seriously. Accordingly, some maintain that feminists "cannot afford not to be essentialist."<sup>26</sup> Any postmodernistic concessions, these feminists argue, will simply play into the hands of the white male establishment; there can be little prospect of liberation from patriarchy without a secure grounding in the possibility of a coherent self or a self-correcting reason. These fears are understandable and reasonable, but they are overstated and mistaken. Essentialists wrongly contend that postmodernism is a form of political betrayal that jeopardizes the integrity and solidarity of feminism. Moreover, they are unconvincing in their claims that significant realignments of power are probable within the existing protocols of power and knowl-

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23. See Smart, *supra* note 11, at 208.

24. *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFFALO L. REV. 11, 21 (1985) (comments of Catharine MacKinnon).

25. *Id.* at 74-75.

26. Young, *Of The Essential in Criticism: Some Intersections in Writing, Political Protest and Law*, 1 LAW & CRITIQUE 218 (1990); see also Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Hawkesworth, *Knowers, Knowing, Known: Feminist Theory and Claims of Truth*, 14 SIGNS 533 (1989).

edge. It is the burden of the remainder of this essay to make the positive case for a postmodern politics.

### V. IN QUESTION?

And so, returning to the question of how do we speak of *woman*, of *gender*, and of *difference*, I believe that the answer is carefully and contingently.

— Brenda Cossman<sup>27</sup>

The postmodern imperative entails no necessary program of political action. Nothing necessarily follows from a rigorous nonessentialist mode of critique, least of all an essentialist dogma of correct politics. Postmodernists reject a belief in any single, accurate, or true vision of community or social justice; a deconstructive critique must not be allowed to become the last refuge of an essentialist scoundrel. There is no one true story to tell and all claims to knowledge must be tentative and provisional. Under a postmodern attachment, the details and priorities of a transformative program must be the continuing subject of healthy debate, respectful disagreement, and continual reappraisal. There is no place for an enforced orthodoxy or rigid conformity for "[a] just society is not a society that has adopted just laws, once and for all, rather it is a society where the question of justice remains constantly open."<sup>28</sup>

Rejecting programs and positions, the postmodern critic must attend to the local and contingent circumstances of claims to knowledge and to the situated places from which people speak. Although reality is always multiple and never transcendent, a situated truth is no less real for being situated and not stable; the experience of self is simply not real in any metaphysical sense of true, objective, or complete. The idea and experience of self is never fixed nor final, but is always fluctuating and formative. It is a site of constant struggle that cannot be worked towards, but must be worked *from* in the unfinished process of reworking. "Self" is neither separate nor separable from the constitutive practices of social life that shape and are shaped by it. Whereas the traditional metaphysics of modernism aims to settle on an abiding identity in the competing relation of sameness and difference, a deconstructive critique looks to destabilize the very possibility of grasping identity as self-presence. This is not to disavow identity, but to make its status always contingent and revisable.<sup>29</sup> The radical nature of postmodernism is its insistence that difference resides *within* identity, not outside it.

The temptation for postmodern critics is to compromise on their

27. Cossman, *supra* note 16, at 353.

28. Castoriadis, *Socialism and Autonomous Society*, 1980 TELOS 91, 104 (emphasis omitted).

29. D. Fuss, *supra* note 10, at 102-05.

deconstructive rigor and to privilege a politics of experience. This is dangerous and unnecessary. Like everything else, experience is itself always and already the product and subject of interpretation; it cannot escape interrogation by masquerading as its own grounding. The valorization and privileging of "experience" is dangerous because it trades in the devalued coinage of a false authority drawn from a counterfeit authenticity. By positing a shared or common experience for "women," for instance, it relies on reductionist notions of exclusion and universality that betray postmodernists' most basic beliefs. Experience is itself indeterminate and "[b]elief in the truth of Experience is as much an ideological production as belief in the experience of Truth."<sup>30</sup>

Instead, there must be unflinching respect for the dialectical and dynamic nature of experience and the provisionality of any emergent conclusions. This is not to trivialize experience, but to devalue it as metaphysically relevant and to revalorize it as politically significant; experience is the beginning of any skeptical inquiry, not its ending.<sup>31</sup> There is simply no available method that can validate the knowledge of any individual or collective experience. No account can (or should want to) claim to be more deserving of metaphysical sanction than any other: the experience of men, women, persons of color, and so on, is a political assertion and not a metaphysical pronouncement. It is as impossible to be only a man, woman, African American, or white European as it is to be never a man, woman, African American, or white European. Experience is a melange of "the attributed, the imposed, and the lived."<sup>32</sup>

Resort to a full-blown "politics of experience" is unnecessary because its proponents assume that, without such a base or foundation, there will be no way to galvanize or preserve the integrity and power of a political activism. Those who cling to such a belief have insufficiently shaken off the modernist mindset. Postmodernism is nonfoundational and nonessentialist, not antifoundationalist or antiessentialist. A studied antiessentialism is the mirror-image of essentialism and is always beholden to it for definition and thrust. Nonessentialism is not what essentialism becomes "when it imagines itself turned upside down."<sup>33</sup> As such, warnings of anarchy and nihilism only have force within an essentialist frame of normative reference; such warnings imply wrongly that it is only because of the very

30. *Id.* at 114; see also J. GRIMSHAW, *PHILOSOPHY AND FEMINIST THINKING* 85 (1986).

31. See Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 603 (1986).

32. D. RILEY, "AM I THAT NAME?": FEMINISM AND THE CATEGORY OF "WOMEN" IN HISTORY 110 (1988).

33. B. SMITH, *CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY* 151 (1988).

possibility of achieving the essentialist dream that such lawlessness has been staved off.

Postmodernism is itself a contingent perspective that sees itself and all others as equally and unapologetically contingent; "the best thing to do" is always open to revision and reassessment. Its protagonists recognize that a thoroughgoing nonessentialism neither deprives nor endows people with a moral sensibility or political conscience. Its proponents know that there are no easy and objective answers, but only difficult choices; that law, tradition, and the like are not a solution in themselves, but are a resource in reaching a solution. They attempt to listen to and empathize with the plight of others, to retain a willingness to rethink their own views in light of that experience, to put their own apprehended authority in question, and to initiate actions for which they are prepared to take personal responsibility. Judgment and action is about humility, not hubris.

In the urgent struggle to combat the pervasive racism and sexism in society, postmodernists must work from the operating assumption that African Americanness or "womanness" has no essence. As Frantz Fanon so pointedly put it: "The Negro is not. Any more than the white man."<sup>34</sup> The idea of African Americanness and "womanness" offers no ontological ground from which to launch a political assault on racism and sexism; such categories are best destabilized and decentered.<sup>35</sup> This is not to slip into the error of suggesting that matters of racial or sexual identity are fictional or that the experience of racism or sexism is contrived. The postmodern challenge is not to dehistoricize so as to trivialize racial or sexual identity better, but to rehistoricize them so as to validate them better. To be against racism and sexism is an engaged act of political commitment, not an abstruse question of metaphysical authorization. To believe or act otherwise is to warrant the very racial and sexual essentialism that sustains the present institutionalization of racism and sexism.

As Minow so powerfully demonstrates, domination has been perpetuated and rationalized both by embracing difference (superiority of men over women and white-skinned people over black-skinned people) and by eschewing difference (treatment of women as men and African Americans as white Europeans). Taking difference seriously will be threatening — for some people. It means giving up a whole lot of advantages that are so deeply embedded in the fabric of society that they are overlooked and taken for granted. Many claim that they do not exist. These are the advantages that have made the establishment of power overwhelmingly white and male. Recognizing that African-

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34. F. FANON, *BLACK SKIN WHITE MASKS* 231 (C. Markmann trans. 1967).

35. See Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990).



American, female, or gay people have different viewpoints forces the dominant white, male, and heterosexual people to recognize that they have points of view. Not *the* point of view, but simply one point of view among many. Moreover, it challenges the idea that whites or males have a monolithic voice; difference is within as well as between identities. It obliges them to subject those views to scrutiny, like any other views that no longer come couched in the accent of the eternal.

Of course race, gender, and sexual orientation matter. It is not that women, gays, or African Americans possess any permanent, universal, or natural characteristics that differentiate them from white heterosexual men. Differences are culturally imposed and socially policed. A formative influence in the cultural tradition of women, gays, and African Americans is their social and historical experience of oppression. It is not the fact that they have wombs, homosexual preferences, or black skin that is important, but the way that those with wombs, homosexual preferences, or black skin have been treated. The social situation of those discriminated against affects their view of themselves and their discriminators. This results in a cultural tradition that reflects a different experience and normative viewpoint. It is essential that these out-groups speak for themselves and analyze the conditions of their domination and its possible overcoming. Indeed, in contemporary society, it is more likely that "the dominated usually understand the dominant better than the reverse. In coping with their daily lives, they simply must."<sup>36</sup> But this realization and its articulation will be an active piece of political persuasion, not a contribution to a process of metaphysical clarification.

While to deny entirely racial, gendered, or sexual identities is to fool ourselves and court complicity, to accept them entirely is to ignore their ideological production and, therefore, the possibilities for their political transformation. It is as culpable to ignore difference as it is to dwell on it as an excuse to take it seriously. The goal is not to locate and give expression to the authentic voice of African Americans', gays', or women's experience — this will ensure the continued dominance of white and male voices against which other voices will always vie for attention and whose importance will be reinforced at the very moment of their greatest threat. Nor must postmodernists engage in a neutral deconstruction in the name of a postgendered and postracial subject or a glorious refinement of the completed category of "real womanness," "gayness," or "African Americanness." The

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36. R. ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* 189 (1989). These comments raise the specter of the recent debate in the legal academy over the validity of racial critiques of the law on legal scholarship. See Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). In this debate, I clearly take the view of Richard Delgado. See Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

notions of race, sexual orientation, and gender must always be treated as neither good nor bad in themselves, but as local and unstable sites that both define and are defined by struggles over their contingent configuration and reconfiguration. Feminism and Afrocentricity are one kind of intervention in that contested process.<sup>37</sup>

The abandonment of any lingering essentialism allows postmodernists to concentrate on local conditions and their potential for constructive intervention, without being distracted by metaphysical preoccupations or ideological posturing. Although people are never not in a local context, they are never in a context that is not open to contingent revision.<sup>38</sup> Yet postmodern activists must be vigilant to avoid essentializing the local or the political as a ground for action; local politics represents "only a fragmented set of possibilities that can be articulated into a momentary politics of time and place."<sup>39</sup> In this way, it becomes viable to resist the disempowering effect of affixing women and African Americans with the stigma of "victims." The failure to distinguish between the *processes* of victimization and *women as victims* is disabling: whereas the former allows for active resistance by victims themselves, the latter makes them into only the grateful beneficiaries of enlightened despotism.<sup>40</sup> By engaging in local

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37. I use "Afrocentricity" tentatively. Combining philosophy, science, history, and mythology into an encompassing collective cognitive imperative, Afrocentricity is not a political ideology, but rather a world view that places Africa at its center. It is a cultural recentering and a historical reclaiming of African expression and symbols. See M. ASANTE, *AFROCENTRICITY* (1988). Afrocentricity strives to be a transformative agent that focuses on attitude, values, and behavior and requires an epistemological and ontological insurrection against Western hegemonic practices, values, and discourse. For the most part, it is a positive program to facilitate cultural awareness, social reconstruction, and economic empowerment through the undoing of colonized thoughts.

Like feminism, Afrocentricity is a way of talking about and being in the world and is invaluable different from the dominant "point of view." Feminism recognizes the relations of power and privilege that have characterized the silencing and violence committed against women by men in a patriarchal society. Similar to Afrocentricity, feminism is not only a political ideology, but is a recognition of the "his-storical" erasure of women's contributions and importance throughout history: it highlights the appropriation of women's sexual, productive, and reproductive capacities for the betterment of *mankind*. However, Afrocentricity is different in that it is viable, in a postmodern sense, to talk about a precolonial African culture in a way that it is not entirely possible to refer to a prepatriarchal feminist culture. The life-way of American-Afrocentricity combines a precolonial culture with the experiences and values that have grown out of the history of indentured servitude in America and with the aspiration for a nonsexist society. Both feminism and Afrocentricity seek to reclaim a cultural identity in the process of remaking it.

38. See Coombe, *supra* note 9. This effort to work the important space between the routine and the revolutionary, thereby avoiding the unnecessary obligation to either the universal or the local, is best represented in the work of Roberto Unger and his practical idea of internal development. See R. UNGER, *CRITICAL LEGAL STUDIES MOVEMENT* (1986); R. UNGER, *POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987). For a constructive critique of this project, see Hutchinson, *A Poetic Champion Composes: Unger (Not) on Feminism and Ecology*, 40 U. TORONTO L.J. 271 (1990).

39. Probyn, *Travels in The Postmodern: Making Sense of the Local*, in *FEMINISM/POSTMODERNISM*, *supra* note 9, at 176, 187.

40. See Hunt, *The De-eroticization of Women's Liberation: Social Purity Movement and the Revolutionary Feminism of Shelia Jeffries*, *FEMINIST REV.*, Spring 1990, at 23, 24.

politics, postmodernists might be able to open up a space in which the presently oppressed can reclaim their destiny and work toward a future society that is truly egalitarian.

## VI. GO NO MORE A-COURTING

Designed for more modest waterways, the ship of judicial statecraft has predictably been run aground by the rough seas of realpolitik. However, like too much modern legal scholarship, Minow's proposals seek to salvage the adjudicative enterprise rather than junk it. Indeed, a major ambition of her work is to demonstrate that "the relational turn can offer law a new model for dealing with problems of difference" (p. 227). However, in keeping faith with the courts as viable forum for transformative action, Minow leaves too much untouched and runs very high risks.<sup>41</sup> In a sense, success would be her and society's worst enemy. If the judicial form changes, but the substance of decisionmaking remains the same, courts will make a bad job look good without altering its thorough badness. Admittedly, a transformation in argumentative style might produce greater candor, but it has no necessary implications for the results reached.

Indeed, Scott Altman maintains that candor is not all that it is democratically or morally cracked up to be. He proposes that "judges holding inaccurate beliefs about their decisions might decide better than they would with a clearer understanding of their actions."<sup>42</sup> Telling the emperor that he has no clothes on is more likely to result in a redoubling of belief than in a feeling of liberation. In particular, Altman argues that the indeterminacy thesis is self-fulfilling and politically harmful as, in a world in which most judges are conservative by inclination and inculcation, the demonstration that law does not in fact constrain is a dubious achievement and the exposé of reactionary values will not lead to their official abandonment.<sup>43</sup> Yet, rather than conclude that the very process of rule by the judiciary in a liberal democracy be abandoned, Altman advocates a continuing exercise in judicial disingenuity, stamped with an academic imprimatur. For Altman, on the other side of candor lies deceit and connivance. While Minow does not countenance such duplicity, she remains unnecessarily attached to the transformative potential of litigation.

Furthermore, history does not justify Minow's gamble that judges will take seriously the idea of empathic encounter and act upon the vocal challenge of previously excluded perspectives. Rather, it is likely to be used as one more device to reinforce and legitimate the

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41. This argument is given a fuller airing in Hutchinson, *The Three 'Rs': Reading/Rorty/Radically* (Book Review), 103 HARV. L. REV. 555, 578-83 (1989).

42. Altman, *supra* note 13, at 299.

43. *Id.* at 348.

illusion of a privileged reality and vision of justice.<sup>44</sup> Her sincere but naive faith that argumentative style is more important than the arguer's identity implicitly assumes that which she chastises in others — judges decide as they presently do in large part because of their normative instincts and political assumptions. The intellectual act of making these instincts and assumptions more visible and self-conscious will not by itself change the decisions reached. Although the unveiling of these assumptions might spur greater reflection and motivate an occasional change of heart, most judges will validate and ratify their informing visions; they decide as they do because of, not in spite of, their instincts and assumptions. Little suggests that the adoption of Minow's empathic proposals, unless accompanied by substantial reconstruction of socioeconomic conditions, will usher in a fresh era of egalitarian justice.

Ultimately, Minow runs perilously close to falling into the same trap that ensnares Ronald Dworkin's misplaced optimism. Instead of projecting adjudication as a matter of principle, she wants very much for it to be a process of empathic encounter. Indeed, she eschews the resort to abstract principles because they "distract attention from contexts and carry an illusion of uncontroverted answers" (p. 322) and "portray a false simplicity among a rabbit warren of complexity" (p. 370). Nevertheless, she remains content to keep strategic faith with the transformative potential of courts and to portray the Supreme Court as an "institution that calls some issues from the battleground of power politics to the forum of [empathy]. It holds out the promise that the deepest, most fundamental conflicts between individuals and society will once, someplace, finally, become questions of justice."<sup>45</sup> But it is just answers that we want, not pregnant questions of good intent. Unless and until there is a change in the ideological identity of society's decisionmakers, the answers given to the "deepest, most fundamental conflicts" will remain all too familiar and all too questionable. It is not increased empathy that is required, but a substantive reordering of empathic responses.<sup>46</sup>

Progressive scholars must look for better and different ways to empower disadvantaged groups than constitutional litigation.<sup>47</sup> The first step is to raise the critical consciousness of lawyers by disabusing them of their ingrained habit of resorting to the courts as the transformative forums of choice. They must become more sensitive to the debilitating

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44. See M. TUSHNET, *THE RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

45. R. DWORKIN, *A MATTER OF PRINCIPLE* 71 (1985).

46. See Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?* 87 MICH. L. REV. 2099, 2113 (1989).

47. For an extended development of such an approach, see A. Hutchinson, *Begging The Question: Les Misérables Redux* (1991) (unpublished manuscript on file with author).

effect of extended involvement by courts in civic life. Nevertheless, while it is crucial not to exaggerate the contributions of courts, it is equally important not to overstate the democratic qualities of representative institutions nor to deny entirely the possibility that legal forums could contribute to transformative struggle. The fear of cooptation must not lead to paralysis: the categorical denial of rights-talk is almost as bad as its categorical embrace. Sensitive to the contingent possibilities of any particular moment in social history and mindful that all struggle is already situated within mechanisms to be resisted and reworked, the only available strategy is to develop legal tactics that politicize and disrupt the courts as they use the mechanisms in litigation.<sup>48</sup> The challenge is to engage in law and, at the same time, to delegitimize it by eschewing abstract notions of justice and rights in favor of concrete challenges.

Secondly, progressive lawyers must develop a posture of "strategic skepticism" toward the efficacy of even limited use of litigation in the struggle for social justice. To direct the have-nots to the courts as a matter of course is to throw good money after bad. Nevertheless, in a political culture that gives a major role to litigation and in which rights-talk possesses a special resonance, claims phrased in the rhetoric of rights might be less easily rejected and might catalyze the mobilization of popular struggle. It might be possible, for instance, to point out the frequency with which contemporary society fails to live up to its own expectations.<sup>49</sup>

A program of "strategic skepticism" would be more the cultivation of a particular mindset and the refinement of various tactical techniques than the establishment of a manifesto of litigable claims. The core idea is to act in a guerilla-like way — within a broad set of progressive objectives, to seize the possibilities of any contingent moment in order to achieve judicial decisions that heighten the status quo's contradictions and open up space for lasting political action. It is imperative in pursuing such legal tactics that lawyers do not become intoxicated by the spirit of their own rhetorical excesses. To take the reasoning of the judges seriously is once again to validate the very institution that is to be subverted: it is to fall victim to the contagion

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48. For a power-oriented rather than rights-centered approach to law practice, see Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983); Glasbeek, *Some Strategies for An Unlikely Task: The Progressive Use of Law*, 21 OTTAWA L. REV. 387 (1989); Smart, *Feminism and Law: Some Problems of Analysis and Strategy*, 14 INTL. J. SOC. L. 109 (1986).

49. The record of the civil rights and abortion movements offers evidence of the limited successes (and dangers) of obliging the political and legal establishment to honor its own half-hearted commitment to the universal dimension of rights-talk. See Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988); Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Schneider, *supra* note 31.

of traditional jurisprudence in which law thrives as a rational enterprise of abstract politics. It is only by maintaining a thoroughgoing skepticism to such talismanic tendencies and by recognizing the strategic significance of such litigation in particular socioeconomic circumstances that the viability of any use by progressive lawyers of the courts can be sustained.

## VII. ABSENT FRIENDS

If there is one motif that runs throughout the motley writings of the postmodernist crew, it is the insistence that constant attention must be paid to the time and place from which people speak. In the name of diversity and empathy, the ambition is to comprehend others as we would wish ourselves to be understood as individuals "with a concrete history, identity and affective-emotional constitution."<sup>50</sup> Celebrating the specific over the general and the situated over the abstract, postmodernism particularly rejects the idea of the oracular intellectual who pronounces global truths in a universal voice. Instead, the intellectuals' work should be informed by a solicitous sensitivity to the organic circumstances of the problem to be addressed and any solution to be professed. In the postmodern playbook, situation-sense is always preferable to abstract reflection: the personal is political and the political is personal.

A particular strength of Minow's work is its unflagging application of this postmodern injunction; she is meticulous in her attention to the detailed differences of individual circumstances, social contexts, and institutional practices. Nevertheless, her text is curiously and confoundingly lacking in one central detail — Minow is nowhere to be found. In a postmodern manner of speaking, the author is only metaphorically present in her literal absence. Although she rightly lectures on the significance of subject-positions and their political valence, she does not put in any appearance in *Making All the Difference*. The reader is left with little idea, except by inference or supposition, about the subject-position from which she herself speaks. Unfortunately, she neither presents nor problematizes herself for scrutiny or reference. In her self-effacement, she manages to occupy a critical space that is both everywhere and nowhere: she floats over and through her text as a kind of postmodern phantasm. As a thinker of specificity, she remains paradoxically unspecified in her own concreteness. In so doing, she comes unintentionally close to invoking the presumed authority of detached analysis and continuing the unconvincing ventriloquism of modernist thought. Contrary to her own postmodern desires, she re-

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50. Benhabib, *The Generalized and Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory*, in *FEMINISM AS CRITIQUE* 77, 87 (S. Benhabib & D. Cornell eds. 1988).

mains unsituated and unseen. How and in what way is she different or similar to others? For whom does she speak?

I want to emphasize that I intend to suggest by these remarks nothing suspicious or sinister about Martha Minow's identity of motivations. On the contrary, in any personal or textual interactions with her, I have admired her genuine commitment to improve the plight of the disadvantaged. Indeed, I am sure that inserting herself into *Making All the Difference* would not only enhance its methodological integrity, but would strengthen its political cogency. My point is that her absence from the text is simply puzzling in light of her own postmodernist concentration on the politics of identity and difference. Moreover, I want to take advantage of that oversight on her part to explore the implications of postmodernism for intellectual and political practice. However, rather than engage in idle speculation about the terrain that is Martha Minow, it is much more pertinent to reflect on the "concrete history, identity and effective-emotional constitution"<sup>51</sup> that makes up the individual known as Allan Hutchinson. As a member of the establishment by color, gender, culture, and sexual orientation, it promises to be more instructive. From where do I speak? From what standpoint do I squabble with Minow? What is my situation and subjectivity in the struggles over racism, sexism, and homophobia? What turf am I defending?

For the postmodernist, these matters ought to be much more than of indulgent or voyeuristic concern. While persons are not reducible to their autobiographies, they never fully escape them; they forge their identities through the existential tension between confronting or confounding their autobiographies. Indeed, one of the first things that people like myself can and must do is actually begin to recognize and accept that they do have a racial, sexual, gendered, and cultural identity. It is an integral part of being a white, heterosexual, English man to *not* think of oneself in such terms. Race, sexual orientation, gender, and ethnicity are the burden of others — "I am simply me, but you are lots of different things." As Minow so astutely observes, for my stereotypic individual, difference is intrinsic to others and perspective is what others have (pp. 50-74): I am the norm because I am normal. It is this cultivated arrogance and metaphysical elitism that must be named and rooted out. Heterosexual white European men must learn to accept that equality is not simply about ensuring that everyone shares the same privileges, but that their position has always been one of privilege and was obtained at the expense of others. Affirmative action has been around for a long time, at least for white European, heterosexual males.

As a white European, heterosexual man, it is important that I play

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51. *Id.*

a part in the struggle against racism, homophobia, and sexism: passivity is the unwitting ally of continued oppression. By recognizing my own gendered, racial, and sexual identity, I might begin to decenter my own experience and authority and make present this empowering absence. But any intervention must be self-consciously cautious. The challenge is to follow and not to lead, to learn to listen as well as to speak. In particular, I must studiously avoid the possibility of appropriating the experience of others and claiming to speak on their behalf. Similarly, I must not posit or empower the Voice of others, but must recognize that there are many voices that must be heard. In the process of coming to know myself afresh in racial, sexual, gendered, and cultural terms, I can decenter myself both metaphysically and politically. In that way, I might be able to contribute positively and appropriately to the making of a community in which genuine dialogue and difference can become truly realized and respected.<sup>52</sup>

The goal is not to achieve justice on my terms: it is not toleration, but affirmation that is needed. The ambition is to strive for a future that is neither entirely white European nor African American, male nor female, heterosexual nor homosexual. But nor is it to establish a society that is a homogeneous mush of bland sameness. It is a mistake to imagine that the options are limited to handing over the establishment to the presently disadvantaged or allowing them entry on the condition that they forget who they are and become the same as those presently in power. A society that truly seeks to become diverse must recognize that *everyone* will be transformed with the eradication of sexism, racism, and homophobia. Losing our identities as oppressors and oppressed, we will be able to meet as equals and celebrate the cultural diversity that makes each of us partly who we are and partly what we can become. It is in this aspiration and cause that people can achieve a solidarity that will make all the difference.

Finally, I must recognize that the clearing of the postmodern throat at this particular time is not without controversy or skepticism. For some, it is highly suspicious that changes against essentialism and foundationalism should come at precisely the moment that other voices, previously silenced and stilled, begin to make themselves heard: "Should postmodernism's seductive text gain ascendancy, it will not be an accident that power remains in the hands of the white males who currently possess it."<sup>53</sup> Of course, the danger of postmodernism's appropriation and domestication by the establishment is always a real and serious threat: no theoretical perspective is immune to such cooptation. Postmodernism is both liberating and

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52. See Hutchinson, *Talking the Good Life: From Free Speech to Democratic Dialogue*, 1 YALE J.L. & LIBERATION 17 (1989).

53. Hawkesworth, *supra* note 26, at 557; see also B. HOOKS, *Postmodern Blackness*, in YEARNING: RACE, GENDER AND CULTURAL POLITICS 28 (1990).



limiting to cultural groups that have been oppressed through a calculated misappropriation of Objectivity, Truth, and Knowledge by a white male establishment. There is nothing intrinsic to postmodernism to prevent further abuse.

Yet, as I have tried to explain, when pursued rigorously and responsibly, a postmodernist approach can be the most fitting and effective complement to a progressive politics. Progressive scholars must articulate the kinds of diverse society toward which we must struggle. Through such an enterprise, it might be possible to avoid the loss of valuable experiences and cultural truths that should be part of what is now believed to be an improved society in concrete but flexible and accommodating terms. Present essentialist strategies already work within rather than against the theoretical framework of established power. The risk of complicity would not be threatening in a truly democratic society that was representative of all groups and affirmed the intrinsic value of all culture, race, gender, and sexual orientation; self-determination, not majority rule, would be facilitated rather than frustrated by the state. Postmodern critique can help pull the political plug on the establishment and allow society to be galvanized by a different source of transformative energy.

### VIII. CONCLUSION

*Making All the Difference* will not make all the difference, but it will and should make a difference. The difference that it does make will, like all differences, depend on the conditions into which it is published and received. It will touch different readers in different ways. By contributing to greater empathy between lawyers and those on the margins of society, Minow has encouraged the creation of public openings for the dispossessed to build their own culture for their own lives. This, in turn, might enrich and transform the lives of lawyers. Different viewpoints must be valued for themselves and not as quaint contrasts to our own. Within this larger project, Minow's book epitomizes the contribution that the legal academic can make in working toward a legal system that is more democratic and less aristocratic in its practices and principles.

As Minow strives to demonstrate, the dilemma of difference goes to the very crux of social theorizing. It is the burden and benefit of the human predicament that we cannot entirely shrug off our present identities any more than we can hope to liberate our one true selves: "No one is saved, and no one is totally lost."<sup>54</sup> Through her turn to postmodernism, Minow reminds us and reassures us that we can struggle individually and collectively to ensure that we forgo the

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54. M. MERLEAU-PONTY, *THE PHENOMENOLOGY OF PERCEPTION* 171 (C. Smith trans. 1962).

empty attractions of an essentialist metaphysic and make good on our own commitment and confidence in ourselves. In this way, postmodernism is not a submission to the dark forces of nihilism, but a call to energize our lives through dint of our own illuminating efforts at personal and institutional renewal. In her short years, Mary Joe Frug kindled a bright spark which, with care and attention, can serve as a bright beacon for all those committed to ushering in the dawn of a postmodern society. Martha Minow keeps that flame alive.