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Reconstructing Identity: A Personal Pespective

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RECONSTRUCTING IDENTITY: A PERSONAL PERSPECTIVE

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ABSTRACT

Challenged by adverse experiences in the first year of law school, the author of this paper uses her experience to trigger an analysis of identity discourse in the law. In Part I, she shares her experience and characterizes it as an epistemological dilemma to the traditional legal methods of identity construction. She introduces the two traditional methods of identity construction: the impartial trajectory and the categorical trajectory and briefly demonstrates that, because her experience was specific to her first year law school at Dalhousie University, both trajectories limit her claim to knowledge. Using her own experience and others found in the literature, the author reconstructs a legal paradigm to identity. Throughout the paper, the author draws upon illustrations, literature and theory from various sources: (dis)ability, gender, race, and sexual orientation. It is in the author's view that all of these claims encounter similar challenges to expression and identity.

I. INTRODUCTION

"In order to get beyond racism, we must first take account of race. There is no other way."[1]

— *Justice Harry Blackmun*

This paper is an attempt to expose and analyse the complex of conceptions of identity and equality captured by Mr. Justice Blackmun's

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[1] *Regents of the University of California v. Bakke*, 98 S. Ct. 2733 (U.S. 1978) at 2.

directive. According to Blackmun J's quote, the imperative is that to end discriminatory practices against certain races, we must first recognize and legitimize how members of those races experience discrimination. A necessary corollary to this imperative is to use the ground upon which unequal treatment is based as the point of consideration to justify distinctive treatment. Upon first read, then, the impression is that to construct and adhere to an equality principle, the first step is to render legitimate the ground upon which the denial of equal consideration has occurred. By legitimizing it, we come to recognize that race can be a fundamental part of a person's experiences in the world and that race can be an inextricable part of the person's identity. Hence, Blackmun J suggests that to treat individuals equally does not mean to treat them the same.

However, Blackmun J's quotation begs for a more complex understanding, which is explored in this paper. The quotation reveals the circularity of the method used to move beyond discrimination. Discrimination is repulsive for the reason that characteristics are misattributed to an individual based upon the individual's physical characteristics, which may or may not play a role in the formation of the individual's identity. This perceived difference is used to justify the denial of equal opportunity. Yet, in adopting the method proposed by Blackmun J., the individual's perceived difference is used to justify the means to secure equality. The contention is that to get beyond racism, we must first locate the difference in the person and then construct an equality principle from that difference.

An individual is protected from discrimination by first identifying the grounds upon which he or she has met discrimination; thus, the individual's identity is defined by reference to the ground upon which he or she has met the discrimination. This method implies that the individual can never shed the perceived difference, because in the hopes to end discrimination, difference will be imposed on the individual as the first point of justification to create an equality principle. This method does not recognize that the problem may be with racism and not race, which would locate the problem not in the individual but in the myriad of relationships that occur in a social context.

The following is an analysis of the methods traditionally adopted to construct identities with the goal of establishing a comprehensive principle of equality. The two traditional concepts examined in this paper are

the impartial trajectory, which holds that identity can be ascertained by meritorious behaviour and is devoid of context and; the categorical trajectory, which operates under the notion that identity is only meaningful in relation to systematically classifying individuals according to perceived dominant traits. The paper demonstrates that the impartial trajectory and the categorical trajectory are inherently problematic and that an alternative to these traditional notions of identity is required. While judgments regarding identity and equality can be exclusionary, these kinds of judgments, in my analysis, are not central to the problem of identity and equality. Judgments and practices that do not subordinate, however, are key to reconstructing concepts of identity and equality. Specifically, I argue that contextual post-categorical judgment is not only an alternative to the flawed trajectories in that it overcomes the problems of subordination; but it is the necessary next step in the debate of identity and equality.

Part I of this paper provides a summary of the experiences which have compelled me to invest a considerable amount of attention to this subject followed by a brief discussion of the epistemological dilemma that arose from these experiences. Part II explores and dismisses the two traditional conceptions of equality: identity through merit and identity through categories. Relying on 'difference' discourse, Part III offers an alternative method to unsettle the traditional ways of defining identity and of constructing an equality principle. I argue that difference is not intrinsic, and that this understanding implicitly transforms traditional conceptions of identity.

It is worth noting that the method adopted in this paper is to draw upon illustrations, literature and theory from various sources and that the analysis is not limited to identity and equality claims based on race. Concerns regarding disability, sexual orientation and gender intersect in this paper because, as it is demonstrated in the body of the paper, all of these claims encounter similar challenges with regards to expression and identity. Also to adopt a method that limits the discussion to one claim of equality, in my view, is to deny the complexity of identity and equality that is proposed in this paper.

II. Framing the Issue

1. Women, Fire and Dangerous Things[2]

During my first semester of law school, a member of the legislative assembly asked the Premier of Nova Scotia for the reason why the provincial government commissions private law firms who do not employ, "one Nova Scotian black or aboriginal lawyer."[3] The then Premier of Nova Scotia, Russell MacLellan, responded to a question by stating:

> It is the fault of people who want to make believe that they are interested in minorities, the people who create a different program for blacks and aboriginals in the law school so that they can't have the same education or the same standard other students do. I'm not convinced, frankly, there's one standard all the way through [law school]. All we are doing is leading the blacks and the aboriginals on. We've got to be fair with them. I want to be sure there is an equal footing, equal stance. There seems there isn't the same standard. That's fine if you want to get through, but you have to get a job.[4]

The 'different program' to which the Premier was referring is the Indigenous Black and Mi'kmaq Program (IB&M) at Dalhousie Law School. The IB&M program is primarily a mechanism designed to facilitate admission to Dalhousie Law School for students who are black and indigenous to Nova Scotia as well as those of Mi'kMaq descent.[5]

[2] G. Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal about the Mind* (Chicago: The University of Chicago Press, 1987). Lakoff choose this title and I use it here because, although the phrase suggests that women, fire and dangerous things have something in common, they do not necessarily. He explains that the title is derived from Dyirbal, an Australian aboriginal language which has a category that includes women, fire and dangerous things. Yet the category also includes, for instance, birds that are not dangerous. He begins the book by suggesting that this is simply not a matter of categorization by common properties. Thus this holds significance for me and this paper because what Lakoff suggests here is analogous to how we all try to understand the world by looking for similarities among things, drawing conclusions from those similarities and forming categories based on what we understand to be common to those things. However, Lakoff suggests that this manner of categorization may be more complex than making associations based on what we perceive to be common to things.

[3] The member is Yvonne Atwell, NDP member of the Nova Scotia Legislative Assembly for Preston, Nova Scotia.

[4] "NDP points to lack of minority lawyers (Black and Mi'kmaq program)" *Canadian Press Newswire* (2 December 1998) D2. and Donalee Moutlon, "Comments on N.S. minority law program ignite uproar" *The Lawyers Weekly* (8 January 1999) 18(32).

[5] For additional information and an historical perspective on the IB&M Admissions Program see: C. Aylward, "Adding Color-A Critique of: An Essay on Institutional Responsibility: The

Although the IB&M program provides support during the three years of law school, designating it as a separate program is misleading for it suggests those students are instructed and evaluated differently from those students not admitted though this mechanism. In my application process to Dalhousie Law School, I was unaware that there was such an admission mechanism. In any case, being of Caribbean parentage (I was born in Québec) and a resident of Montréal, would have made me ineligible for it.

Early into my first semester of law school, I attended an "upper year dinner." Upper year dinners are social events where groups of first year law students are invited to dine at an upper year law student's home. Not long after my arrival to the upper year student's home, a conversation erupted regarding aboriginal students in their class. One of the upper year students said of an Aboriginal student "I do not regard her admission as one through an affirmative action program. Rather it is truly an equity program." The other student disagreed. I asked what they were talking about. The student who deemed the 'program' as one of equity tried to brush off the subject saying, "Oh, we are just gossiping...we should probably stop now." As she put her hand on my shoulder, she stated "The bottom line is, it is a good thing that we have a program like this for people like you." It was then that I became acquainted with the IB&M Admissions Program.

Following this discussion, I had several similar social encounters where white upper year law students mentioned to me that they genuinely thought it was a good thing that we had such a program for 'people

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Indigenous Blacks and Micmac Programme at Dalhousie Law School" (1995) 8 C.J.W.L. 470, and R. F. Devlin and A. Wayne Mackay, "An Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Programme at Dalhousie Law School" 1991 14 Dalhousie L. J. 296. Briefly, Aylward refers to it as an " 'affirmative action' program because it is quota based i.e. only twelve students are admitted per year: six Black students and six Mi'kmaq students." Once the students identify themselves on the application for admission to Law School, selected students are offered interviews. Those who were successful in their interviews are then required to attend a month-long 'Introduction to Law' class during the summer where, if they pass, they are admitted to Law School, beginning in the fall. Once admitted, the students are expected to complete identical work as those students who were not admitted in this manner and are held to the same standard. In response to the Premier, Dean Russell stated, "He seemed to think that there was a different program for minorities. That, of course, is absolutely false. All students complete the same requirements and the same bar exams. Students' exams are identified by number rather than name, so that professors don't know who they're marking." *Supra* note 2.

like me.'[6] I approached several of the black students who had been admitted through the IB&M program, to gain a balanced understanding of the program. Some of the students explained to me that all white people were racist, and suggested that the best way for me to do well in law school was to keep my distance from them. Since I did not accept this as a reasonable explanation or a sensible solution, I did not heed the advice and I did not 'stay away' from white students. As a result, over time my interactions with the black students became tenuous.

At this point, I was grasping for perspective on these interactions. Guided by a professor, I approached one black student in second year law and another in third year. On separate occasions they explained to me that they, too, were the only black students in their year not accepted through the IB&M program. They shared their stories, and which were similar to my own: white upper year law students assumed they were admitted through the IB&M program had approached them to sympathetically express their support for the program. Concurrently, many of the black law students admitted through the IB&M program had shunned them. My experiences culminated with an encounter after Christmas exams in a professor's office. Although I did not regularly attend class, I had received a B on a mid-term exam. I went to speak to the professor to explain why I had been missing class and to inquire about improving my grade in the final exam. As I sat down on a chair in his office, he expressed his delight that I should talk with him because he was worried that I was not doing well in his class. And, by the way, how was I managing in the IB&M program?[7]

These experiences, particularly the interaction with my professor, were painful and frustrating because they used the color of my skin as

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[6] See P. Monture, "Now that the Door is Open: First Nations and the Law School Experience" (1990) 15 Queen's L. J. 179 at 189 where she describes an event on her first day of law school where a white student expressed his anger suggesting that "...perhaps one of his friends was not present because of me" and that, "...the only reason I could have reached the hallow halls of the law school was by virtue of a special access program." She, in fact, had been admitted to law school not by a special access program.

[7] My reaction to these interactions is best described by J. Scales-Trent, *Notes of a White Black Woman: Race, Color, Community* (Pennsylvania: Pennsylvania State University Press, c.1995), where she states.... "How can one live inside the stigma, and yet remain enough untouched by it to do one's work? How can we fight against the stigma, fight against the belief that we are 'unqualified', and still retain enough energy and belief in our selves to enable us to get our work done? This is hard, but clearly it can be done." at 122.

sufficient reason to make assumptions about me. The identity of those admitted through the IB&M program remain confidential to other students, professors and staff, to be revealed only by the student upon his or her election. There was no legitimate reason for the students or this particular professor to presume that I was admitted through the program. Moreover the interaction with my professor reveals the deeper problem with these assumptions. While I was in his office, I was so surprised by his question that I was unable to articulate to him, or even to myself, the reason for my shock. Dalhousie Law School prohibits self-identification on exams, and provides code number as a means of identification. Professors do not know whose exam they are marking. Reflecting on this after the interaction with professor revealed the source of my anxiety: I believed he was worried that I was not doing well in his class because he thought that I was admitted through the IB&M program. But why would he think that I was admitted through this program? To have asked me those questions before looking at my exam mark lead me to realize that he must have been certain of his conclusions with no regard to whether or not they were valid. Because of the color of my skin, he thought I must have been admitted through the program and thus, I must be struggling through law school. My distress during that first year, was not with the IB&M program and the stigma that may or may not be linked to it: the program was not the problem. Rather my struggle lay in the assumptions that others made about me based solely on the colour of my skin; assumptions are so fundamental to other's perceptions that they did not stop to question them.

2. A Matter of Identity: Law and Epistemology

Identity is a significant factor to the understanding of law and what it means to 'do justice'.[8] Claims about identity shape and challenge the law. As a result, a meaning of equality evolves. For instance, law can be shaped by disability claims to provincial health plans[9] or by demands for the inclusion of sexual orientation in human rights codes.[10] These claims inform the law on how to do justice by insisting that the law take

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[8] J. McCristal Culp, Jr., "The Woody Allen Blues: 'Identity Politics, Race, And The Law'" (July 1999) 51 F.L.L.R. 511 at 514.

[9] *Eldridge v. British Colombia (A.G.),* [1997] 2 S.C.R. 624.

[10] *Vriend v. Alberta* [1998] 1 S.C.R. 493.

identity claims into account when choosing a just resolution to a dispute. Furthermore, programs like the IB&M Admission program are constitutionally protected in Canada.[11] The challenges inherent to being an indigenous black or Mi'kmaq in Nova Scotian have played a significant role in determining how the law should be guided to do justice. Section 15(2) of the *Charter* is an exception to the general prohibition of discrimination, making it clear that although an affirmative action program may discriminate against a member of a group traditionally regarded as advantaged, such programs are not precluded from legal protection.[12] Hence accounts of identity contribute to the formation and development of law and justice.

While identity politics contribute to the understanding of law, law in turn is pivotal to a particular type of identity formation.[13] The law significantly dictates how we define ourselves and how others define us. Implicitly, a parameter is drawn within which identity becomes meaningful and other identities are constructed and distinguished from our own identities and from others.

Postmodernist theories emphasize the contingent, indeterminate and constructed nature of categories within which we perceive and converse about the world, and within which we form our identities. Legal recognition of those 'constructions' contributes to social and political awareness – or lack thereof – of identity claims. Furthermore, implicit in the view that identity arises from legal constructions is the recognition that the law has an authoritative role.[14]

Carl Stychin argues that section 15 of the *Charter* guarantees the protection and the development of newly emerging identities.[15] He states:

> The equality guarantees within the *Charter* have facilitated an open-ended interpretation by which individuals, as members of groups not

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[11] *Canadian Charter of Rights and Freedoms* ,Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 at section 15(2). [Hereinafter the *Charter*]

[12] P. W. Hogg, *Constitutional Law of Canada*, 2000 Student Ed. (Toronto: Carswell, 2000) at 1025.

[13] M. Davies and N. Seuffert, "Knowledge, Identity and The Politics of Law" (Summer 2000) 11 H.S.T.W.L.J. 259 at 259.

[14] *Ibid* at 266.

[15] C.F. Stychin, "A Postmodern Constitutionalism: Equality Rights, Identity Politics, and the Canadian National Imagination" (Spring 1994) 17 Dalhousie L. J. 61.

> explicitly recognised within the Constitution, can claim rights to equality before and under the law.[16]

For instance, the United States political and legal system defined what it meant to be black and what it meant to be white. These constructions continue to resonate in identity formation today. The 'one drop' rule in the Unites States legally dictated what was to be considered black: any indication of black/Negro ancestry in an individual, however remote, was sufficient to designate the individual as black, and thus socially and politically insignificant.[17] Similarly, in his article entitled, "White by Law",[18] López explores how in 1790 the United States Congress began to decide whether applicants for citizenship were white through naturalization laws as citizenship was limited to white applicants. He argues:

> As a taxonomy of Whiteness, these cases are instructive because of the imprecision and contradiction they reveal in the establishment of racial divisions between White and non-Whites.[19]

In Canada, the so-called *Persons Case* illustrates how law aids in the construction of identity.[20] On appeal from the Supreme Court of Canada, Henrietta Muir Edwards and five other Canadian women asked the Privy Council to declare women 'persons' under the meaning of the *British North America Act, 1867*.[21] The Privy Council held that the word 'person' in s.24 of the Act included members of either gender. Consequently, women were eligible for appointment to the Senate. Most significantly, however, the decision altered the widespread understanding that women were not persons, thereby reconstructing what it meant to be a woman.

Not unlike most of my classmates, I entered first year law with a strong sense of self. My belief was that who I am begins with how I define myself. However, in light of my interactions with those who possessed a divergent understanding of me, I questioned myself. My

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[16] *Ibid* at 69.

[17] A part of what were known as the 'Jim Crow' laws, which were a series of statutes passed in the late 19th century by legislatures in the Southern United States.

[18] I. F. Haney López "White by Law" in R. Delgado and J. Stefancic, eds., *Critical Race Theory: The Cutting Edge Second Ed.*(Philadelphia: Temple University Press, 2000) 626.

[19] *Ibid* at 626.

[20] *Edwards v. Canada (Attorney General)* [1930] A.C 124.

[21] *Ibid.*

confidence in my identity slowly ebbed away. In the context of law school, I stopped thinking of myself as a first year law student. I started to understand myself as a first year law student who is black *and* because of my blackness I am perceived to be a member of the IB&M program *because* I am incapable of acceptance to law school on my own merits. Although I knew that I had not been admitted through the IB&M program, I often wondered whether I deserved to be in law school, whether I was capable of getting the work done. I also began to wonder about other black students. When I met a black student I often asked myself: has she been admitted through the IB&M program? I divided students between those who had been admitted through the IB&M program and those who had not. My identity at that time was conflated with what it appeared to mean to others to be black and in law school.

The foregoing examination reveals a fundamental epistemological presumption of law in the Western world: truth can be ascertained. As previously discussed, law and identity are inextricably linked: as law informs identity and as identity informs law, the presumption is that identity, conceptually speaking, is a characterization grounded in a reality that can be known. The significance of making this presumption explicit in identity discourse is that claims to equality and the formulation of an equality principle is highly dependent on the law's ability to characterize and delineate identities. The law can only perform this task if it presumes that identity is comprehensibly knowable.

The question arises then: how does the law sort through the various claims to identity with the goal of establishing and maintaining equality among individuals and groups of individuals? The difficulty in answering this question is located in the question itself. To establish and maintain equality among individuals and groups of individuals, law has traditionally adopted one of two methods. The law can choose to disregard any characterization that would render an individual other than an 'objective' claimant of the law. This method presupposes that characteristics such as gender, class, race, (dis)ability and sexual orientation are irrelevant to claims of equality. Each case must be determined impartially and strictly on its objective merits. Or, the law can favour a method that takes notice of disadvantaged or advantaged groups. This method accepts that gender, class, race, (dis)ability and sexual orientation are integral to equality claims. Both methods make claims to knowledge. The former method suggests that knowledge is attainable through im-

partial assessment, which entails one standard of knowledge. The latter method operates under the contention that knowledge is contextually attainable. It begins with the premise that the world can be experienced and understood by several subjects through various methods.

I ask myself, then, how does the law explain my claim to knowledge? My experience as a first year law student was highly contextual, and specific to me. Thus the impartial epistemological claim to knowledge does not help me. However, if I adopt the categorical method to attempt to explain my experience and to help maintain my identity, I am trapped in a method that contributed to the problem in the first place. Returning to Blackmun J's quotation, my claim to knowledge is invalid for the reason that in resorting to categorization I am lost in circularity. Indeed, I am black.[22] And those perceptions of me were based on what it means to others to be black and in law school. However, being black does not fully explain my experience. In fact, it limits my claim to knowledge by suggesting that my struggle in first year law had only to do with discrimination based on race. Both the impartial trajectory and the categorical trajectory [discussed below] lack an account of knowledge that helps me express my experience and voice my identity concerns. Therefore, the law does not provide me with a legitimate claim to knowledge. With this dilemma in mind, the following section explores in significant detail both traditional claims to knowledge and how they fail in their application of equality. The analysis is not limited to my claim to knowledge, but explores these methods in light of other equality concerns.

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[22] Crenshaw expands on the impact of this simple sentence in K. Crenshaw "Mapping The Margins: Intersectionality, Identity Politics, And Violence Against Women Of Color" (July 1991) 43 STN.L.R 1241 at 1243 at 1297. She briefly discusses the significance of making such a statement in identity discourse in constrast to making statements such as, "I am a person who happens to be Black." Crenshaw states " 'I am Black' takes the socially imposed identity and empowers it as an anchor of subjectivity."

III. Deconstructing the Traditional Paradigms

1. Identity Through Merit

(i) Discrimination as Dissimilar Treatment

For the purposes of this paper, the impartial method incorporates the traditional approaches of the colour-blind and gender-neutral doctrines. Both doctrines date back to the 1960s and are also referred in equality discourse as the merit-based approach. Justification of this doctrine lies with equality being equated with equivalence and similarity. The gender-neutral doctrine included such rhetoric as to be considered equal to men, be the same as men, where epistemologically there is one standard of knowing.[23] Catherine MacKinnon characterizes the guiding impetus as 'we are as good as you so anything you can do, we can do.'[24]

On the other hand, although the colour-blind doctrine faded significantly from equality jurisprudence in the 1980s and the early 1990s, the courts and the legislatures in the United States have been resuscitating the colour-blind doctrine.[25] The proponents of the colour-blind doctrine deem the eradication of racial categorizations as an end in itself, rather than as a means of achieving racial justice.[26] In a case dismissing an affirmative action program at the University of Michigan Law School, the U.S. District court held that, "even when used for 'benign' purposes, they [racial classifications] have the potential for causing great divisiveness. For these reasons, all racial distinctions are inherently suspect and presumptively invalid."[27] Thus to the impartialist, racism is overcome by eliminating racial categories altogether.

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[23] C. A. Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) at 33.

[24] *Ibid* at 35.

[25] See *Hopwood v. Texas,* 78 F.3d 932 (5th Cir.) 1996, cert. Denied, 116 S. Ct. 2581 (1996), *Grutter v. Regents of the University of Michigan et al.* 137 F. Supp. 2d 821 2001 and Proposition 209 passed by Californians on November 5, 1996 which is a constitutional amendment prohibiting discrimination and racial and gender preferences in areas of public employment, education and contracting.

[26] T. Kateri Hernandez, " 'Multiracial' Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence" (1998) 57 Md. L. Rev. 97 at 139-140.

[27] *Grutter v. Regents of the University of Michigan et al.* 137 F. Supp. 2d 821 2001 at 872.

(ii) Weaknesses in the Impartiality Framework

As an equality principle, the impartiality trajectory is deficient in several aspects. The following discusses how impartiality fails in its application to various identity considerations.

With regard to the content of the argument advanced by merit-based or impartiality proponents, it fails on two accounts. Insofar as there is one standard of knowing *viz à viz* uniform treatment under the rule of law, the question arises: what standard is being used? More aptly, *which* standard is being used? Impartiality is not in itself impartial. It begs a reference point that is partial to those who set the standard. Inasmuch as the proponents of the impartiality doctrine dismiss considerations based on race and gender because they are social constructs, the impartial standard is also constructed. To advance the claim that race, for instance, is a social construct is to make an epistemological claim that what it means to be associated with a particular race is not innate. How I understand what 'blackness' means is not innate to being black. Social constructionist theory suggests that those associations and conclusions are learned. However, what the proponent of impartiality fails to recognize is that the impartial standard is likewise not innate and not universal. In reference to the color-blind approach, John Powell argues:

> This colorblind position attempts to apply the late- and post-modernist insight of constructivism, but it wishes to limit this understanding to race. And there lies the error. The constructionist position is that all reality, including all concepts, are socially constructed.[28]

Respecting gender-neutrality, Mackinnon suggests "... women are measured according to our correspondence with man, our equality judged by our proximity to his measure."[29] Surely what it means to be a man is neither innate nor universal. Rather it is socially constructed. Thus the standard is substantively dictated by the prevailing status quo and, therefore, not unquestionably impartial.

Moreover, a necessary condition to this account of knowledge is that only one standard and one claim to knowledge can be maintained. Given that the impartial standard is contingent upon the prevailing dominant view, adherence to the standard must be strict. Otherwise the equality

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[28] J.A. Powell, "The Colorblind Multiracial Dilemma: Racial Categories Reconsidered" 31 U.S.FL.R 789 at 791.

[29] *Supra* note 23 at 34.

principle of 'sameness' would be compromised. The impartial trajectory thrives on the preservation of a principle that is limited to what the prevailing status quo deems as 'merited' and what is merited is dictated by its similarity to the status quo. Thus, by limiting itself to sameness, the impartiality doctrine fails to recognize those instances that require examination and validation of difference and that difference does not necessarily mean 'unmerited'. The impartialist, for fear of loosing an objective standard, must ignore 'difference'. Otherwise the standard becomes subjective and lacks meaning.

Use of the impartial standard resulted in courts holding that legislation denying appropriate consideration for pregnant women did not infringe the right to equality by reason of sex as the legislation had no application to women who were not pregnant.[30] Here the distinction between pregnant women and non-pregnant women is not the same as that between women and men. Non-pregnant women are the same as men and are thus treated equally. Dissimilar treatment is only warranted for pregnant women, not for non-pregnant women. Implicitly the courts determined a woman's claim to equality by a male standard, and only by a male standard.

The sameness standard is not limited to gender identity. It manifests itself in disability discourse as well. For instance, Dianne Pothier, a law professor who is visually disabled, recounts an incident from her days as a law student where her 'difference' was ignored.[31] She describes a mooting exercise whereby she had to rely very heavily on her notes, lowering her head almost to the table to read the notes and then raising her head to speak. Her evaluator gave her 9/10 on the substance of her presentation and 4/10 for the presentation. Reflecting on the experience, Pothier states:

> I do not pretend that my presentation was a very good one in terms of style – I was clearly relying too heavily on notes for it to be a strong presentation. But what is worth noting is what made the difference between a poor performance and a failing one. What is problematic

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[30] *Bliss v. A.G. Canada* [1973] 1 S.C.R., later overturned by *Brooks v. Can. Safeway* [1987] 1 S.C.R. 1219 in Canada and *General Electric v. Gilbert,* 429 U.S. 125 (1976), later overturned by *Newport News Shipbuilding and Dry Dock v. EEOC,* 462 U.S. 669 (1983) in the United States.

[31] D. Pothier, "Miles To Go: Some Personal Reflections on the Social Construction of Disability" (May 1992) 14 Dalhousie L. J. 527.

> from my perspective was the fact that my performance was judged as grossly substandard *because I was being assessed on an able bodied standard.* [32]

Despite its claim to equality, impartiality methodically results in the hierarchical allocation of privilege.[33] Insofar as the impartiality doctrine precludes recognition of difference, by application it contributes to economic, social and political disparities. In other words, impartiality commits itself to the eradication of that which is deemed a social construct. In doing so, categorical distinctions, which may be necessary to discern harm to subordinated populations and to direct political solutions to address such subordination,[34] are prohibited. The imposition of the 'sameness' standard onto a prevalent hierarchical system results in the advantaging of some and the disadvantaging of others. Existing social injustices remain unaddressed and the hierarchy of privilege is preserved.

Examples include the preclusion of "special accommodations made for disabled people, women and others historically treated as different."[35] As a condition of granting full time employment, Simpsons-Sears Retail required sales clerks to work Friday evenings and two of three Saturdays. Fridays and Saturdays are considered highly profitable selling times for the retail industry. The Supreme Court of Canada held that the uniform application of this condition to all full time sales clerks was in fact discriminatory.[36] In particular, the case presented a situation where a sales clerk of a certain creed, a Seventh Day Adventist, was disadvantaged by the uniform application of the condition as she was excluded from full time employment considerations upon becoming a follower of that creed. On the other hand, methodically imposing the impartial standard to law school admission by the courts have resulted in the demise of several affirmative action programs in the United States. In one case a white student who was denied admission to first year law at University of Texas School of Law claimed that the School did not make an offer to admit her because of the School's affirmative action program

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[32] *Ibid* at 532.

[33] *Supra* note 26 at 153 and *Supra* note 28 at 793.

[34] *Supra* note 26 at 155.

[35] Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at 146.

[36] *O.H.R.C. & Theresa O'Malley v. Simpsons-Sears,* [1985] 2 S.C.R. 536.

which benefited African-Americans and Mexican-Americans.[37] The Fifth Circuit court held that race could not be used, even in a multiplicity of factors in law school admissions. The court maintained that to continue to include race as a consideration in law school admission would exacerbate the already existing preferential treatment of certain groups over others. Thus the court concluded that ending racism entails treating all applicants the same. To put an end to affirmative action programs does not equalize opportunity between blacks and whites. Rather this 'impartialist' strategy exacerbates prevailing inequities. For instance, research has suggested that the number of black law students would significantly drop in the absence of affirmative action programs.[38]

Finally, an individual's experience of economic, political or social subordination and exclusion[39] is devalued by the impartiality doctrine. Provided that only one account of knowledge is sustained and that claims of 'difference' prohibited, the experience of exclusion and subordination cannot be acknowledged. To acknowledge such experiences would compromise the impartialist's singular claim to knowledge. This is accomplished by the application of two techniques. First, because the impartialist views categories as divisive, the grounds whereby categories are formed are the source of inequality. Powell suggests that impartiality assumes "that the major race problem in our society is race itself, rather than racism."[40] Second, impartiality adopts an ahistorical approach.[41] It "undermines whatever past acknowledgement of difference there had been without producing social and political inclusion."[42] Concluding its judgment, the Fifth Circuit court in *Hopwood* asserted:

> In summary, we hold that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order

[37] *Hopwood v. Texas,* 78 F.3d 932 (5th Cir.) 1996, cert. Denied, 116 S. Ct. 2581 (1996).

[38] L. F. Wightman, " The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions" (1997) 72 N.Y.U.L.Rev.1

[39] This is borrowed from the definition of racism in Richard F. Devlin , " Towards An/Other Legal Education: Some Critical and Tentative Proposals to Confront Racism of Modern Legal Education" (1989) 38 U.N.B.LJ 89 at 90."Racism can be conceived of as a conscious or unconscious, personal or institutional, belief ideoloy or practice that, in response to a person or group's racial origins, has as its purpose or effect, the cultural or economic subordination/ exclusion of that person or group."

[40] *Supra* note 28 at 793.

[41] *Supra* note 26 at 153.

[42] *Supra* note 35 at 146.

> to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate the present effects of past discrimination by actors other than the law school.[43]

In sum the impartial trajectory presumes that identity is ascertained through merit and, that in turn, meritorious acts perform the task of adjusting social, political and economic inequities. However, the complex nature of identity as well as the various epistemological claims that follow are ignored by the impartial trajectory. It fails as an equality mechanism in two ways: not only does it create and maintain a principle that disregards the specificity of lived experience, but the impartial trajectory perpetuates privileging a constructed paradigm over diverse claims to knowledge.

Indeed, I was admitted to law school on my own merits, based on the 'normal' merit evaluation for Dalhousie Law School. And I continue to work hard and do well based on my own efforts. Similarly, all other students are admitted to law school on their own meritorious acts. However, identity formation and identity epistemologies are far more complex and subtle than what the impartial trajectory offers. I shared my struggles with several professors in first year law with the goal of finding a professor who understood what I was going through and who could impart advice of how to deal with my struggle. Most of the professors failed to understand why I could not simply brush off the asserted assumptions from other students and professors. They did not understand the reason that these interactions were distressing to me. A typical response was "Why couldn't you just tell them that you were not accepted through the program and that you were accepted like everybody else?" It was not so simple because at those particular moments and for days afterwards the inferences drawn about me solely on the basis of my skin color undermined what it means to be me. All my past and present accomplishments which informed me of my own identity were invalidated when professors and students expressed to me that they

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[43] *Supra* note 37 at 962. The court also stated, " The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon physical size or bloodtype of applicants" at 945. Clearly the court here disregards how race has been used in historically significant ways to oppress and exclude, and this dynamic may significantly affect the way people of color experience the world.

thought that because of my skin color I could not have been accepted to law school on my own merits. Their claims were irrefutable at the time because it is not a matter of merely suggesting "No, I was not accepted through the IB&M program."

A validating response must explicitly demonstrate that their 'impartial' assessment of my circumstances and of me was substantively constructed by what they think it means to be black and in law school and it was imposed onto me. How does a black woman explain to a white man that what he has just said not only reveals what he really thinks of her but also of all other black people without being perceived as confrontational? More significantly, how do the images described in the previous sentence play out for the impartialist? Are the merits extracted from her position without regard to the context or to the labels used in the sentence to identify the dynamic? Indeed, my experiences are invalidated by the impartialist trajectory.

2. Identity through Categories

(i) Same yet Different

The traditional alternative to impartiality is categorization. In perception, thought, action, and speech there is nothing more fundamental than grouping things according to resemblance and contrast.[44] In an ongoing process, we observe and conclude that "things within a category are relevantly similar [and] they are collectively differentiated from things outside the category."[45] Thus categorization is a kind of essentialism where those things that are within a category share *perceived* fundamental qualities that make it sufficient and necessary for the thing to be considered as a thing of that type. The protection against discrimination on enumerated and analogous grounds in human rights legislation[46] and in the *Charter*[47] is illustrative categorization as a tool in law.

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[44] *Supra* note 2 at 5.

[45] N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1994) 19 Queen's L. J. 179 at 182-183.

[46] Federally, *Canadian Human Rights Act,* R.S.C 1985, c.H-6 [hereinafter *CHRA*] and *Human Rights Act*, R.S.N.S. 1989, c. 214 as a provincial example.

[47] S. 15(1) states: Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

For instance, Mackinnon suggests that categorization, "is the only place in mainstream equality doctrine where you get to identify as a woman and not have to mean giving up all claim to equal treatment ..."[48] Such legal protection is allowable because categorization accepts that there can be multiple accounts of the world. The categorical trajectory works from two premises. First, insofar as there are multiple accounts of the world, categorization delineates according to shared perceptions and from dissimilar experiences. Second, the various claims grounded in similarity and difference are regarded by the categorical trajectory as valid and equal claims to knowledge. To identify as a woman implies something different from what it means to identify as a man. While implications may differ, to identify as a woman or to identify as a man both presume equality. Identity, then, inheres in similarity and difference.

(ii) Weaknesses in the Categorical Framework

Although the categorical trajectory attempts to overcome several of the shortcomings of the impartial trajectory, the following analysis reveals inherent problems with characterizations of similarity and difference.

In the process of assigning identities to individuals according to similarities and differences, genuine perceptions of those similarities and differences must occur. For instance, making distinctions based on race, gender, (dis)ability and sexual orientation involves grouping according to what is perceived to be inherent to each group. Blacks are grouped together because they share similarities in skin pigmentation, African ancestry and, arguably, certain experiences. Grouping also involves the determination of what is distinctly unlike each category. Those whose skin pigmentation and related experiences differ are categorized differently from one another. Often commensurate with this process of demarcation, distinctions become exaggerated such that categorization is no longer limited to the reflection of the initial difference. It often produces imagined difference, which results in labels, stereotypes and stigma. Because categorization results in the validation of difference, individual members of a category are themselves regarded as different and those real and imagined differences are attributed to one's

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[48] *Supra* note 23 at 39.

identity. Thus categorization is problematic for the reason that in forming real and conceived differences about categories, identity ceases to be a meaningful expression of the individual. Individual identity is ignored as assumptions about categorization are accentuated.

An example of the aforementioned problem is caught in Langston Hughes' essay "Who's Passing for Who?"[49] One evening, Hughes encounters a friend in Harlem who is accompanying three white friends (a bachelor, husband and wife) who are visiting from out of state. He decides to have a drink with them. As they are conversing, a brown skinned man hits a blonde woman. One of the friends from out of state intervenes in the altercation yelling 'Keep your hands off the white woman'. However, he immediately apologizes to the man when he is informed that the woman is not white. He is told that she is the wife of the brown skinned man. He states to the man "I thought she was a white woman." Later he explains to Hughes and his friends, "I didn't mean to be butting in if they were all the same race."

Once the other members of the party reproach the man for his racist attitude, he leaves. The remaining party, which included Hughes, his friend and the married couple, began discussing the phenomenon of blacks that pass for white. The wife interrupted the discussion by stating that she and her husband were quite familiar with passing for white, as they had been doing it for a number of years. After the initial surprise, Hughes states, "[A]ll at once we dropped our professionally self-conscious "Negro" manners, became natural, ate fish and talked and kidded freely like colored folks do when there are no white folks around." At the end of the evening, as the couple was whisked away by a taxi, the wife leaned out the window and exclaimed, "Listen, boys! I hate to confuse you again. But, to tell the truth, my husband and I aren't really coloured at all. We're white. We thought that we just kid you by passing as coloured ..."

What is significant about this story is that it tells the reader only one thing about the characters. The story does not tell us who *is* black or white. It does not explain to the reader the reasons behind the bachelor's behaviour or what the married woman and man were like as individuals. Rather the story informs us only about the characters' assumptions of

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[49] L. Hughes, "Who's Passing for Who? in Akiba Sullivan Harper, ed. *Short Stories Langston Hughes* (New York: Hill and Wang, 1963) 170.

others according to racial classification. Upon reading the story, we know with certainty how each character reacts and behaves once they have discerned to what race the other characters belonged. The story does nothing to help us to be acquainted with the characters' identities. This story is a challenge to the validity of the categorical trajectory in that it demonstrates how categorization based on perceived difference can result in distorted assumptions by others.

Insofar as identity inheres in categorization, it is epistemologically untenable for identity to participate in more than one category. Categorization dismisses a multifaceted account of knowledge thereby forcing one to choose among categories, create others, or remain invisible. This occurs in three steps. First, a characteristic or a bundle of characteristics is deemed to be intrinsic to a group. Martha Minow suggests that by pigeonholing people into sharply distinguished categories based on selected facts and features renders difference intrinsic to the group in that difference becomes a trait of the group.[50] Second, those selected facts and features become the group's identifier, "which is regarded as wholly constitutive of that group's social identity."[51] Third the group's social identity is attributed to the individual's identity. This attribution precludes recognition that an individual is not constitutive solely of the group's personality. Thus difference within groups is ignored, which contributes to tension among groups.[52]

Moreover, as an equality principle, categorization suffers from inherent contradiction. To classify one's self as like or unlike another according to group affiliation is to adopt a particular approach to perceiving and explaining the world.[53] Categories are presumed to exist independently from one's perception and thus we react passively to them by merely sorting experiences, perceptions and problems through them.[54] They go unchallenged. Similarities between members and non-members of a category are suppressed, while intra-group differences are ignored. Engaging in this process, Minow suggests that, "we identify one thing as unlike the others, we are dividing the world; we use our

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[50] *Supra* note 35 at 53.

[51] *Supra* note 45 at 191.

[52] K. Crenshaw "Mapping The Margins: Intersectionality, Identity Politics, And Violence Against Women Of Colour" (July 1991) 43 STN.L.R 1241 at 1243.

[53] *Supra* note 23 at 34.

[54] *Supra* note 35 at 3.

language to exclude, to distinguish-to discriminate."[55] Thus where differentiation is analogous to discrimination, categorization is in itself discriminatory.

In her examination of the Supreme Court of Canada *Mossop* decision,[56] Nitya Iyer recognizes that this is a problem.[57] The father of Brian Mossop's partner had died. Mossop applied for bereavement leave pursuant to his collective agreement in order to attend the funeral. Bereavement leave, under the agreement, applied to the death of certain family members. However, his employer denied him leave. The reason for denial was that since Mossop's partner was a man, his partner's father was not within the meaning of family member. Pursuant to section 3 of the *Canadian Human Rights Act*,[58] Mossop alleged discrimination on the grounds of family status. Sexual orientation was not an enumerated ground in the *CHRA* at the time. The Supreme Court dismissed the case for the reason that none of the protected grounds in the *CHRA* applied to him. Iyer notes that Mossop may have chosen to characterize his claim as discrimination based on family status because this is how he may have experienced the discrimination, with his sexual orientation secondary to that experience. Iyer concludes that Mossop fell through the cracks, "because his experience of discrimination on the basis of a social characteristic [did] not correspond to the dominant social understanding of that characteristic."[59]

Insofar as categorization contributes to tensions among groups and the demand to choose among groups, the experience of a woman who is disabled provides an excellent example of the tension between the disability movement and feminism, and how she opts to remain invisible:

> For the disabled feminist, neither the disability nor the feminist movement fully address her concerns. In the disability movement the disabled feminist has to contend with sexism. In the feminist movement she must contend with colleagues who do not understand her disability-based political concerns. In response to this predicament, she far too often opts out of the political process altogether.[60]

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[55] *Ibid.*

[56] *Canada (Attorney-General) v. Mossop,* [1993] 1 S.C.R. 554.

[57] *Supra* note 45 at 194-199.

[58] *Supra* note 46.

[59] *Supra* note 45 at 196.

[60] M. Blackwell-Stratton, M. Breslin, A. Byrnne Mayerson, and S. Bailey, "Smashing Icons: Disabled Women and the Disability and Women's Movements" in M. Fine and A. Asch, eds.

The social construction of categories implicitly entails the use of a dominant referent to organize experiences and perceptions and frame them within a category such that it is distinguishable from all other categories, including the dominant one. This becomes problematic in two instances: when the distinction from the dominant group is used detrimentally against other groups and when the dominant members of the group solely define a group. Similar to the impartial method, categorization results in the hierarchical allocation of privilege where the dominant group remains unchallenged.

In the first instance, Iyer suggests that distinction is not only about difference.[61] It is also an expression of hierarchies and the assertion of power. This concern is evidenced in the manner that libraries are organized. While browsing in the library, Packwood describes his realization that the usefulness of the library extends beyond the services that it provides. The experience exposed, "a map of power, a guide through the ordering principles by which power places ideas and experience into categories and rigidifies knowledge."[62] He was appalled to find that sex crimes, homosexuality and prostitution were together. Packwood also observes the hierarchical implications of categorization. He remarks that under the heading 'Sexual behaviour and attitudes', the category of girl follows the category of boy, the category of woman follows the category of man, and a catch-all category is tacked on at the end that conflates the aged, handicapped, and sick.[63] In the second instance, the feminist movement illustrates how the perspectives of the dominant members of a group form the identity of the group, ignoring other member's concerns. bell hooks argues:

> [W]hite women who dominate feminist discourse today rarely ask the question whether or not their perspective on women's reality is true to the lived experiences of women as a collective group. Nor are they aware of the extent to which their perspectives reflect race and class biases, although there has been a greater awareness of biases in recent years.[64]

Women with Disabilities: Essays in Psychology, Culture and Politics (Philadelphia: Temple University Press, 1988) 306 at 307.

[61] *Supra* note 45 at 185.

[62] N. Packwood, "Browsing the Apparatus: Homosexuality, Classification, Power/Knowledge" (1993) 28 Border/Lines 19 at 20.

[63] *Ibid* at 22.

[64] b. hooks, *Feminist Theory: From Margin to Center* (United States: South End Press, 1989) at 3.

In sum, the categorical trajectory is attractive in that it recognizes some of the identity considerations that the impartiality doctrine ignores. It accepts the premise that the world is knowable from various sources and that true equality recognizes and celebrates difference. However, the categorical trajectory encounters numerous problems. To group individuals in accordance with perceived similarities and differences discriminates; it contributes to the stereotyping of groups and individuals; it derogates from the value of inter-group associations; it creates and maintains a hierarchy of privilege; it overlooks intra-group concerns.

Once the black Nova Scotian law students realized that I was not admitted through the IB&M program and that I choose not to follow their advice regarding 'those racist white people', invitations to events were less forthcoming. I did not fit into what they determined it meant to be black in Dalhousie Law School. To include me in their activities would not allow them to portray a united front against others. I exhibited very little of the traits that they thought a black law student in Nova Scotia should exhibit. I sat with white students in class and I socialized with them. Often I was one of two black students at law school social events. At a meeting of the Dalhousie Black Law Student Association (DBLSA), I wanted to know how a member could run for one of the elected positions. I was told that a black student who is not from Nova Scotia could not run for any of the positions. This restriction was understandable to me because I can understand that someone from the outside of the community cannot always voice the concerns pertinent to the community. However sometime after that meeting, I was dismayed to hear that in selecting students to sit on various committees in the law school, the DBLSA members objected to a particular black student's membership on a committee on the grounds that "he could not possibly address our concerns, he attended private school."

The imposition of what it means to be black was not limited to my experiences with black students. Although this example does not directly relate to law school, it is useful because of what it illustrates. A white male friend from law school shared with me his budding interest in a woman and he asked me what I thought of her. I told him that I thought she was pretty but I thought that he could do better. My friend responded to me by saying, "Isn't that funny? I would have thought that as a minority, who would never be considered in the rating system, you

would object to using a rating system yourself as do most minorities." Both examples highlight the dangers of categorization and the reason that categorization limits my claim to knowledge. What does it mean to be black? What does it mean to be a 'minority'? Does 'blackness' and the status of being a 'minority' mean specific social attributes and expressions? Whenever someone calls me a 'minority' I am baffled because the only thing that I can discern that makes me a minority is the color of my skin, not how I vote, my citizenship, my educational aspirations, nor my family and personal life.

IV. A New Approach: A Framework of Difference

Stemming from the foregoing analysis, it is evident that an account of identity must be comprised of at least two features. First, identity is the consequence of social construction. Stripped of historical perspective, cultural influence, political energy, and philosophical musings, there is nothing that is essential to identity. Identity cannot exist in the absence of meaning and meaning is empty without perspective. Yet social constructivism does not imply that identity is not knowable. Nor does it imply that it is insignificant. It implies that identity is knowable and that is acquires its significance in the social world. Second, identity is multiplicitous, drawing upon knowledge and experience from several worlds. The meaning of a subject's identity is not limited to one category nor is it solely derived from merit-worthy acts. Rather, identity is an expression of acts, context and self. Given these considerations, an account of identity must be expressive of its contingency as well as its dynamic ability to derive meaning from several worlds. However, in light of these considerations, an inquiry into whether there can be a comprehensive account of identity arises. It is my view that, given the unique and conditional nature of identity, an all-encompassing account of identity cannot be acquired. Therefore the following analysis is offered as a tool to facilitate an improved and refined understanding of identity, how it is constructed, and the derivation of equality therefrom.

Having explicitly delineated these features, the analysis in Part II also warned that regardless of how identity is construed, the hierarchical allocation of privilege remains invariable. Thus an account of identity must also guard against, implicitly or explicitly, treating identity as

justification for subordination. Part II demonstrated that 'difference' is the means whereby identity is labelled and subordinated. Considering this unfortunate use of difference, the analysis adopted in the present section shall navigate through feminist 'difference discourse' in order to provide a functional account of identity.

1. The Foundation

(i) Anti-Essentialism

> John Powell – a former colleague of mine and also the legal affairs director of the ACLU – tells a story of going to a Thanksgiving dinner with his son, Fon. John and Fon are vegetarians. The host said to Fon, "This is the regular dressing and the other is the vegetarian dressing." John said to the host, "No, there is vegetarian dressing and there is meat-eater's dressing, but neither one of them is regular dressing."[65]

Trina Grillo's example demonstrates how anti-essentialism functions as a theory of anti-subordination. The essentialist position entails that the intelligibility of things, and in particular the experience of being a member of a group, "requires that there be one complete, consistent, comprehensive and coherent description of reality."[66] The presumption that there is one coherent representative account of a particular category disregards difference within the category thereby reinforcing exclusion and the devaluation of other's experiences. Thus anti-essentialists negate this conception by asserting intra-group difference whereby race, gender, class, sexuality combine in historically specific ways to define identity and to explain experiences of discrimination.[67] For instance, it recognizes that the experience of a white woman dealing with a white man raising a white child may not the same experience of a black woman dealing with a white man raising a mixed child.[68] To suggest that there is one representative description of woman that is essential to

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[65] T. Grillo, "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" (1995) Berkeley Women's law Journal 16 at 20. Grillo notes that the story also appears in Charles Lawrence III, *If He Hollers Let Him Go: Regulating Speech on Campus,* (1990) Duke L.J. 431 at 473.

[66] C. Spinosa and H.L.Dreyfuss, "Two Kinds of Antiessentialism and Their Consequences" (Summer 1996) Critical Inquiry 735 at 736.

[67] S. H. Razack, *Looking White People in The Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 157.

[68] *Supra* note 65 at 19, the example is altered.

both women in this example would exclude the expression of one of these experiences and the critical role that specificity plays in their lives thereby privileging one over the other.

Returning to the Thanksgiving dinner illustration, the 'regular' dressing is considered to be the paradigm whereas the 'vegetarian' dressing is regarded as the deviation from that paradigm and is therefore accorded the value of 'other'. Anti-essentialism challenges this type of classification by reminding us that identity is a social construction grounded in the specificity of lived experience thereby rendering no one account of knowledge to rightly represent all accounts of knowledge or to be considered as the dominant account of knowledge.

Furthermore, Sherene Razack suggests that anti-essentialism is not limited to the goal of inclusion because the implication remains that subordinated groups must conform to a prescribed standard.[69] Insofar as there is recognition that there is no essential categorization, anti-essentialism guides the subject to ask how he or she is implicated in the subordination of others.[70] By re-framing difference in this manner, Razack asserts that we examine our own complicity in the subordination of others and "only then can we ask questions about how we are understanding differences and for what purpose."[71]

Anti-essentialism helps me gain a deeper understanding of my situation, in that both the black students and the white students used an essentialist conception of what they perceived blackness to mean. For instance, the IB&M program is cast as the deviation from the entrenched norm of the 'regular' admission process. Those admitted through the IB&M program and anyone who is sufficiently similar to those admitted through the IB&M program are deemed as 'other'. Anti-essentialism entails that we expose how we are implicated in the creation of what is different. The sole consideration that renders the IB&M program different or the individuals perceived to be associated with the program as different lies in our own construction of difference and the imposition of that construction. The anti-essentialist approach reveals that the 'regular' admissions program reflects a certain constructed paradigm, which

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[69] *Supra* note 67 at 159.
[70] *Supra* note 64 at 159.
[71] *Ibid* at 170.

should not be valued over others. Accordingly, the 'regular' admissions program can be dismantled and re-constructed.

(ii) Intersectionality

> Whenever something like this happens in discussion of gender and race, I cannot separate them. I do not know, when something like this happens to me, when it is happening to me because I am an Indian or when it is happening to me because I am an Indian woman.[72]

Patricia Monture, here, recounts a painful experience where she was affected by a discussion she was observing. The discussion was on the subject of whether the sole issue in that discussion should be "racism, not gender."[73] Monture quite candidly reveals that race and gender cannot be separated in a discussion regarding discrimination because this is not an accurate reflection of how she understands herself and how she experiences her pain. Monture's frustration is indisputable insofar as one's understanding of one's self is entirely specific. Thus, in adopting her reasoning, she need not stop at identifying herself as an Indian woman. Monture can easily continue to define herself as an able-bodied, Canadian-Indian, middle–class, heterosexual woman, for example.

However, other authors warn that "the full implications of the infinite regress into specificity"[74] should be addressed. For instance, Jennifer Nedelsky suggests that categorization is necessary "for both political theory and legal reasoning as we know it."[75] Yet the infinite regress into specificity threatens the usefulness of categories. Elizabeth Spelman asks whether it is "possible to give the things women have in common their full significance without thereby implying that the differences among us are less important?"[76] The implications of these concerns lie in the political and social effectiveness of categories where categories facilitate the expression of political will and, in turn, provide grounds for

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[72] P. A. Monture, "Ka-Nin-Geh-Heh-Gah-E-Sah-Nonh-Tah-Gah" (1986) 1 C.J.W.L. 159 at 167.

[73] *Ibid* at 166.

[74] J. Nedelsky, "Embodied Diversity and the Challenges to Law" (February, 1997) 42 McGill L.J. 91 at 98.

[75] *Ibid* at 97.

[76] E. V. Spelman *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988) at 3. Although I mention this concern in this section, it is equally a concern for anti-essentialism.

the sharing of power. If categories collapse and voices are grounded in specificity, the fear is that the credence of race or gender discourse, for example, is forfeited because it becomes impossible to talk about oppression.

In her works regarding discrimination experienced by African-American women, Kimberlé Crenshaw offers a method that can be used here to reconcile the effectiveness of categories as social constructs with the genuine need to account for specificity.[77] Crenshaw's research exposed the complexities of discrimination faced by African-American women. She claims that categorical associations inadequately address the experience of specificity in the lives of such women and, consequently, discrimination laws fail to recognize and remedy discrimination experienced by African-American women. By ignoring intra-group difference, the way racism, classisism, and sexism intersect in the lived experience of discrimination and oppression is suppressed. Thus she offers the theory of intersectionality, not as a new comprehensive theory of identity, but as a method that highlights, "the need to account for multiple grounds of identity when considering how the social world is constructed."[78] Deeply embedded in this assertion is the recognition that insofar as the social world is currently constructed in terms of subordination and exclusion, intersectionality provides the means with which to deconstruct dominance.

Alexandra Natapoff provides an interesting illustration of intersectionality.[79] He explicitly uses Crenshaw's research regarding African-American women to reconstruct the characterization of the oppression and discrimination experienced by deaf children who come from non-English speaking homes. Natapoff cites instances where the failure to teach English to deaf children whose mother-tongues are Hispanic and whose homes are non-English "disrupts home life and the children's ability to communicate with their families and thus to learn."[80] To prioritize deafness over bilingualism, therefore, does not

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[77] *Supra* note 52 and K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U. Chi. Legal F. 139.

[78] *Supra* note 52 at 1245.

[79] A. Natapoff, "Anatomy of a Debate: Intersectionality and Equality for Deaf Children from Non-English Speaking Homes" 24:2 Journal of Law and Education 271.

[80] *Ibid* at 276.

account for the lived experience of these children. In exposing how deafness and bilingualism interface, he refutes claims that suggest that deafness is the most significant factor in organizing an educational strategy for the children. Natapoff suggests that "these children represent the paradigmatic case of intersectionality."[81] He states:

> They must navigate their way through society with heavily culturally loaded traits, each triggering complex and potentially conflicting legal obligations on the part of educators and government officials, each with potentially devastating or beneficial results for the child and his or her notion of self.[82]

My first-year law experience is another illustration of the effectiveness of using intersectionality to reveal the complexity of identity, and how intra-group interaction reorganizes how we perceive the world. Difference was emphasized in those interactions. Difference was associated with the perceptions of the colour of my skin. Intersectionality demonstrates that my experience was, indeed, related to perception regarding the colour of my skin; however, the experience was also contextually specific to law school, and in particular, to Dalhousie Law School. Furthermore, if the moments of interaction were reconstructed so that my skin colour did not supersede all else, those students may have come to understand that my identity is grounded in an intersection of a multitude of categories and that, perhaps, we share more in common that we what we do not.

Having defined intersectionality, it is worthwhile to make explicit that intersectionality forbids reductionism for everyone, not solely for subordinated groups. Thus, through the lens of intersectionality, the complex identities of white women or white men cannot be neatly separated and prioritized. Their identities too must be deconstructed to reflect and account for their lived specificity. Grillo suggests that "for a black woman, race and gender are not separate, but neither are they for white women."[83] Thus intersectionality provides a mechanism to dismantle subordination that recognises the universal manifestation of constructionism.

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[81] *Ibid* at 278.
[82] *Ibid* at 278.
[83] *Supra* note 65 at 19.

In order to deconstruct dominance through intersectionality, Crenshaw asks the reader to first recognize that the identity groups in which the individual finds him or herself are coalitions. Although self-identification happens, she is implicitly arguing that categorization is not necessarily individual driven. Rather the individual is located to a particular group whereby the members thereof coalesce to articulate the needs of the group. Recognizing the function of categories as coalitions clarifies the value of intersectionality. It provides the foundation to reconceptualize categories as a means for political and social change. Insofar as "we all stand at multiple intersections of our fragmented legal selves,"[84] categories can be reformulated that allow for interconnectedness among groups. Crenshaw argues that

> [t]hrough an awareness of intersectionality, we can better acknowledge and ground the differences among us and negotiate the means by which these differences will find expression in constructing group politics.[85]

By reinforcing the interconnecteness of groups, intersectionality can provide the means to dismantle power structures because subjects stop organising the world into categories dictated by the dominant culture.[86]

2. A Framework Proposed

Intersectionality and anti-essentialism both constitute the same critique, however they commence "from two different starting points."[87] Anti-essentialism begins by questioning essentialist approaches to similarity and difference whereas intersectionality begins with the recognition of the way the social world is constructed and how it imports meaning into the specificity of lived experiences. Both critiques offer a theory of difference where difference is not relegated under the label of 'other'. Rather both critiques suggest that difference is constructed among subjects, that difference is not ascertainable free of social relationships. In recognizing that difference is not intrinsic to the person, we begin to see that we are complicit in the construction of difference.

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[84] *Supra* note 65 at 18.
[85] *Supra* note 52 at 1281.
[86] *Supra* note 65 at 20
[87] *Supra* note 65 at 17.

Martha Minow suggests that in the 'dilemma of difference', we are complicit in 'making the difference'.[88] She believes

> [d]ifference can be understood not as intrinsic but as a function of relationships, as a comparison drawn between an individual and a norm that can be stated and evaluated.[89] ... A difference stance would treat the problem of difference as embedded in the relationships...making all...part of the problem.[90]

For example, Minow asks us to re-think certain cases. In *Eaton v. Brant County Board of Education*[91] the parents of a twelve year old child, Emily, with cerebral palsy asked the Supreme Court to set aside the tribunal's decision to place the child in a special education class. They grounded their claim in s.15 of the *Charter,* alleging discrimination based on disability. The court reviewed the tribunal's findings of fact. They found that Emily was unable to speak. She was incapable of using sign language meaningfully and she had no established alternative communication system. Although she used a wheelchair frequently, Emily was capable of bearing her own weight to walk a short distance with the aid of a walker. Since kindergarten Emily was placed in a class with other students her own age on a trial basis. During that time a full-time educational assistant was assigned to the classroom to attend Emily's special needs.

However, "a number of concerns arose as to the appropriateness of [Emily's] continued placement in a *regular* classroom."[92] In fact, the Tribunal had considered "the testimony presented on the subject of the "parallel curriculum" approach in which an adapted curriculum is delivered in the *regular* classroom setting."[93] However, the Tribunal concluded that

> [e]xperience demonstrates that in practice, 'parallel curriculum' benefits the receiver when it is realistically parallel. But when a curriculum is so adapted and modified for an individual that the similarity – the parallelism – is objectively unidentifiable, the adaptation becomes a mere artifice and serves only to isolate the student.[94]

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[88] *Supra* note 35.
[89] *Ibid* at 81.
[90] *Supra* note 35 at 84.
[91] [1997] 1 S.C.R. 241.
[92] *Ibid* at paragraph 7. [Emphasis added]
[93] *Ibid* at paragraph 17. [Emphasis added]
[94] *Supra* note 88 at paragraph 17.

Using the 'best interests' of the child, the Court upheld the Tribunal's findings of fact and found that Emily's placement did not impose a disadvantage. Nor did it constitute the withholding of benefit or advantage. The court held that the tribunal's decision was based solely on the determination of the child's best interests and upheld its decision to place Emily is a special education class.

There is no doubt that both the tribunal and Emily's parents were attempting to seek the best educational forum for Emily. The tribunal reasoned that a class that can provide special accommodation would be the best alternative for Emily. To keep her in the mainstream class would merely hinder her learning and further stigmatize her. On the other hand, Emily's parents regarded her displacement to another class as stigmatizing. They were also concerned that being in a special education class would compromise the quality of education that she would receive.

However, Minow asks us to seek a third alternative, to realise how, in this context and through the myriad of relationships captured by this issue, difference was attributed to Emily. By doing this, the problem is assumed to be Emily's problem and, using Minow's analysis, both sides of this issue agreed on this point. They both situated the problem around the implied norm of abled students learning from a teacher, "rather than imagining a different norm around which the entire classroom might be constructed."[95] A third alternative to this issue would recognise that 'difference' inheres in relations and not the subject. The goal of the teacher should be to construct a learning environment that would benefit all the children in the class thereby "resisting the temptation to treat the problem as belong to the 'different' child."[96]

For instance, the learning environment can be dismantled and restructured such that the school itself involves *all* the children and staff, where 'difference' is not attributed to Emily (the 'other'). Based on the tribunal's findings of fact, Emily, dependent on a wheelchair and/or a walker, should not be restricted to a confined space. Emily's school environment could be designed where Emily and all the other students and staff have much space within which to move and learn.[97] The

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[95] *Supra* note 35 at 83.

[96] *Ibid* at 84.

[97] Both R. Byrns Curry and Christie Public School in the Ottawa area are elementary schools that function in a similar manner.

demands of the school could entail an open area concept where the school is circular. The library, which could be wheelchair accessible and open to all classrooms that border it, could be in the centre of the school. The classrooms could be designed such that all students can move around freely and are not limited to traditional use of desks. Considering that Emily and other students like her are challenged in the traditional sense of communication, the use of technology, as an easily manipulated means of communication can be integrated into the classroom. All students in the school could learn through technology.

Structuring the school environment in a manner that reconstructs what is deemed to be the 'norm' diminishes, for all students and staff, the potency of the stigma of difference. Where the stigma of difference was institutionalized in both solutions that were proposed by the school and Emily's parents, the reconstructed norm becomes institutionalized such that the community becomes part of the solution. Yet, inclusion, here, is not the goal. Inclusion presupposes an entrenched norm from which the stigma of 'other' gains meaning. Inclusion would mean, therefore, including Emily in the 'regular' classroom environment. Rather, reconstructing the school environment, such that the 'norm' is exposed and re-evaluated through the function of community relationships, brings to an end subordinating practices. Emily, in this environment, is recognised as different from some of the other students but she is not subordinated as other.

A second example highlights how the re-conceptualisation of the norm can begin to influence daily activities. Nedelsky explains how she has adopted a technique in her classroom to disrupt the norm.[98] She explained to her law students that in deciding which students to call on to comment she would call on them in the order that they raised their hands. However when a student who barely participates in class discussion raises her hand, she gives the student priority. She was concerned that solely using the strategy of calling on students as they raised their hands would perpetuate the disproportionate participation of men.[99] In recognising that difference inheres in relation and context, Nedelsky applied the same rule regardless of which class she taught. Thus, in her feminist theory class where more white women tend to participate more

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[98] *Supra* note 74 at 111.

[99] *Supra* note 74 at 111.

than others in class discussions, she used this rule to equalize participation of women of colour and men. Nedelsky exposed and evaluated the norm, which permitted her to reconstruct the learning environment in her classroom. In her example, she displaced difference. It was no longer ascribed to the student. Rather she involved the entire class in the act of exposing and evaluating how interactions construct difference. The classroom provided the forum where those interactions are evaluated and reconstructed such that the norm is altered, resulting in equality in that context.

Finally, a significant aspect of Minow's strategy is to reconstruct the norm. In order to do that the realisation that difference is not embedded in the subject is crucial. It implies that those structures and institutions currently in place function to subordinate because they are structured on the presumption that difference is found in the subject rather than being a function of relationships. Thus programs that are founded on 'accommodation' or 'benefit' in order to achieve equality objectives must account for their complicity in the 'dilemma of difference'. Minow suggests

> [s]olutions to dilemmas of difference cannot work if they redeposit the responsibility for redressing negative meanings of difference on the person who is treated as different. Solutions that emphasize individual responsibility run this danger, perhaps because most social institutions still define "the individual" in light of an unstated norm and degrade those who depart from that norm.[100]

In dismissing the constitutional validity of the affirmative action program at the University of Michigan Law School, the United State District Court suggested alternative mechanisms for law school admission.[101] In accepting evidence on trial that suggested that the LSAT predicts success at law school and in the legal profession rather poorly,[102] Justice Friedman states:

> The law school seeks students who "have substantial promise for success in law school" and a strong likelihood of succeeding in the

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[100] *Supra* note 35 at 93.

[101] *Supra* note 27 *Grutter v. Regents of the University of Michigan et al.*

[102] Justice Friedman quotes the correlation as within the range of 10% to 20% with law school grades and states that it does not predict success in the legal profession at all.

> practice of law" one must wonder why the law school concerns itself at all with the applicant's LSAT score.[103]

Thus he suggests that the law school consider relaxing or eliminating the LSAT as a requirement for law school admissions. He further suggests that the law school should reduce its reliance on the student's GPA as well as reconsider its policy of preference for the children of alumni of the law school. Although Justice Friedman couches these suggestions in colour-blind rhetoric, in effect the suggestions would completely dismantle the institutional presumption that difference is located in the subject. Highlighted in these suggestions is that the norm can be exposed, re-evaluated and re-constructed. Institutions would no longer be complicit in subordination and stigmatization. Rather the world can be re-ordered with the view of terminating the hierarchical allocation of privilege.

Specifically, for those law schools whose admission policies are two-fold, that the law school seeks to offer admission to students of high academic excellence and to be able to reflect members of its community, the law school must move towards contextual post-categorical judgements. In order to meet this objective, law school admission mechanisms must be evaluated to expose how 'difference' is attributed to their students. For example the dichotomy between 'regular' admission and 'special' admission to the extent that subordination occurs in the law school should be evaluated. The law school must, also, evaluate the integral role played by it in the construction of difference and subordination.

An illustration of a reconstructed admission structure would involve the law school investing in a substantial commitment of time, resources and self-evaluation. The law school should be able to ask itself as well as its students questions that would expose the strengths and weaknesses of its admission procedure. This alternative admission procedure involves at least four steps, depending on how a particular law school adapts its admission procedures. First, the law school should articulate a profile of its ideal first year class. This process would not involve asking how many aboriginal or black students the school should admit. Rather, it involves the law school asking difficult questions about what it hopes to

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[103] *Supra* note 27at 148.

achieve through its admission policies. A significant aspect of this question is for the law school to engage in deliberations with community members, faculty and students of what it means to be a member of a targeted community. For instance, what does a law school value about having a black law student as a member of its student body? What does it mean to be a black student? The law school and the community should be aiming for answers that expose the meaning, within the community, of categorical classifications. Once those meanings are exposed and evaluated, they are no longer categories of individuals and of 'others'.

The conclusions drawn from this process should provide the law school with meaningful input about what it wants to achieve and not numerical minimums/maximums within the constraints of a first year class. This process of questioning, exposing and evaluating engaged by the law school in consideration of all its admission objectives should not be limited to historically disadvantaged communities. Therefore community should be defined in the broad sense. For this method to be effective, all admission considerations need to be exposed, re-evaluated, and re-constructed, including asking questions about what it means to be a white male and a white woman. The aim of this process is to force the law school to dynamically engage itself in creating a profile of its first year class by delicately balancing non-categorical assumptions and maintaining a contextual assessment of its admission procedures. By adopting this approach, the law school reconstructs its relationship to its students, staff, and community thereby no longer being complicit in locating difference in individuals.

The second step of the process includes the law school translating its profile research into a profile questionnaire to be sent out to law school applicants. The questions asked of the law school's prospective students should be designed to provide a sorting mechanism that distinguishes those students who meet the law school's profile from those who do not. The results of the profile application should be considered equally with reference letters, a personal statement and an assessment of the GPA. The significance of GPA and LSAT, as admission criterion, should be deflated such that a comprehensive profile can play a greater role in determining whether an applicant is offered an interview. Disallowing the GPA and LSAT from playing their historically significant roles does not mean that both should not play a role in the admission process. The LSAT score, indeed, has been recognised as a poor predictor of law

school performance and should be eliminated in order for the GPA and the profile to play greater roles. The GPA, however, should continue to be a factor in determining academic excellence and it should be used with the profile (and letters of reference and personal statement) to determine who is granted an interview. By the means of a carefully constructed and thorough sorting mechanism that elicits whether the applicant meets the law school's requirements, the overarching goal of the admission process should be to evaluate the applicant as a whole.

Once the law school has received the application package, applicants are selected for interviews. The committee that determines who is interviewed should consist of members from the faculty of the law school, a lay member of the community as well as a current student of the law school. There should be a total of three committees in the admission process. The second committee should be responsible for interviewing applicants and the third committee should be mandated with making the final determination regarding offers of admission. However, only the committees responsible for determining who is granted an interview and for interviewing the applicants should consist of members from the faculty of the law school, a lay member of the community and a current student of the law school and they should not be staffed by the same individuals. For instance, the lay community member of the committee that determines whether to grant an interview should not be the same person as the lay community member in the committee that interviews the applicants. Having three committees mandated with separate tasks is necessary for the reason that it allows for a complete assessment, aligned with the goals of the law school's admissions policies, of the applicant. In addition, the reconstruction of a law school admission process must safeguard itself from reverting back to the traditional notions of an ideal law student.

As the third step in the admission process, the law school should interview all students who meet the aforementioned criteria. Interviews should be considered essential and should be structured such that those skills, perspectives, life experiences and achievements valued by the law school are expanded upon and evaluated. The membership of the committee and the questions asked in the interview provide a mechanism where, through a collective discussion, the reconstructed ideas of the profile and the goals of the law school admission program meet to assess the qualifications of the applicant and whether the applicant would meet

the needs of the institution and the community. The fourth and final step involves the admission committee evaluating the conclusions of the committee that determined who would be interviewed and the conclusions from the panels that interviewed the applicants. This committee should consist of the law school Dean and faculty members. This reconstructed paradigm, therefore, attempts to confront and evaluate what current admission mechanisms fail to address, to the extent that they encourage dilemmas of identity and equality. It is a method where the law school is engaged in re-evaluation and is held accountable for the reconstruction of the 'norm'.

A hint of the epistemological claim that supports the theoretical premise of the aforementioned strategies is found in bell hooks' preface of *from margin to center*:

> Living as we did – on the edge– we developed a particular way of seeing reality. We looked both from the outside in and from the inside out. We focused our attention on the center as well as on the margin. We understood both. This mode of seeing reminded us of the existence of the whole universe, a main body made up of both margin and center.[104]

To adopt this strategy is to adopt a particular way of looking at the world and how we attain knowledge in it. Under this claim to knowledge the knower conceives truth as situated and partial.[105] Bartlett suggests that positionality is useful as an epistemological claim in that it locates truth in relationships and, consequently, regards truth as partial and as plural. Indeed it follows that, under this claim to knowledge, difference in itself is contingent and contextual. As difference inheres in relations and as relationships are the source of knowledge, it becomes unsupportable to ascribe independent meaning to difference. Given that the attainment of knowledge is achieved through context and relationships, Bartlett suggests "the key to increasing knowledge lies in the effort to extend one's limited perspective."[106] In doing so, diversity becomes the starting point of understanding commonality. Bartlett submits that " from the positionality stance, I can attain self-knowledge through the

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[104] *Supra* note 64 at ix.

[105] K. T. Bartlett, "Feminist Legal Methods" (February 1990) 103:4 Harvard Law Review 829 at 880.

[106] *Ibid* at 881.

effort to identify not only what is different, but also what I have in common with those who have other perspectives."[107] Thus positionality re-places the strategy on all individuals rather than on only those who are considered different. It provides a basis for, "commitment and political action, but views these commitments as provisional and subject to further critical evaluation and revision."[108]

(i) A Practical Application of the Framework to Identity

By engaging in an analysis regarding 'difference' and equality, an account of identity emerges where identity is meaningful and sufficiently flexible to allow personal and political expression. Difference discourse has challenged us to re-locate difference from the individual to relationships. Relocating difference exposes how we are complicit in constructing difference. However what difference discourse teaches us is not limited to our complicity in constructing difference. It also reveals something about identity.

Returning to the example provided by Nedelsky, it is evident how she fundamentally changes a customary method in her classroom in order to re-locate difference from those students who speak less often to the actual dynamic of the classroom. A consequence of what she does is that identity is no longer the site of difference. The female student who rarely speaks in class comes to learn that her opinions are valued in class. Other students come to value her input.

To understand how this change occurs, it is worth exposing the dynamic of a typical classroom and to make certain psychological assumptions.[109] When a student does not raise her hand to speak in class it is normally for two reasons. Either the student is disinterested in the material or she is too shy to participate in the discussion. A large part of that shyness is based on the student's belief that her input is valueless.

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[107] *Supra* note 104 at 886.

[108] *Ibid* 880.

[109] Nedelsky suggests that, "a simple set of interactions requires a series of substantive judgements: Who talks the most? Are there patterns to the participation rate? Who appears to be 'disadvantaged?' in terms of access to discussion? Is that disadvantage related to systemic disadvantage? Is such a relation necessary before trying to remedy it by rules of differential access (i.e. 'jumping the queue')? Is equality of access more important, for educational purposes, than rewarding quickness, self-confidence, aggressiveness or quality of contribution?" *Supra* note 74 at 112.

The current classroom dynamic favours and values those students who raise their hands frequently and are able to get their hand seen by the professor before others can. However, using Nedelsky's method places the value on all students, not only those who raise their hands before anyone else. The dynamic is altered. The dismantled dynamic reconstructs how that student regards herself and how others regard her. She no longer thinks of herself as someone who rarely speaks in class. Nor do other students regard her as someone who rarely speaks in class. She is no longer considered 'different' because she rarely speaks in class, in that the value is relocated from those who raise their hands often to promoting an atmosphere that encourages diverse participation. In the context of the classroom, the student begins to identify herself in the absence of feeling different. Likewise other students gain an understanding of her in light of the content of her character and not according to her difference from everyone else.

Using Nedelsky's example demonstrates that the methodology of locating difference in relations and using this method to dismantle prevailing structures plays a significant role in how we identify individuals and how individuals identify themselves. This method can equally apply to the two additional examples provided in the previous section. For instance, the reconstruction of a classroom involving all the students and the professor would have contributed to how Emily understands herself and how others understand her. If everyone is engaged in the reconstructed classroom, Emily's impairment ceases to signify stereotyping and stigma. Rather the response to the trait becomes an issue for the entire community.[110] Similarly, dismantling the entire admissions process to law school where reliance on traditional mechanisms are minimised would significantly unsettle how identities are constructed in law schools. One can envisage a reconstructed process with regards to law school admission where, in response to substantive changes, law schools maintain a high level of academic excellence and reflect the communities in which they are situated without contributing to stigma and stereotypes.

Difference discourse has provided me with a technique to re-examine my experiences. It is evident that the problem lies in how we

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[110] *Supra* note 35 at 84.

construct difference and how we have institutionalized that construction. My experiences demonstrated that when other students encountered me, they saw difference. Based on that difference, assumptions and conclusions were formed and the students focused the relationship into those conclusions. Therefore my identity was construed based on conclusions that they had formed prior to my relationship with them. This flawed method exposes the manner in which difference becomes to be understood as wholly constitutive of identity. Moreover this method reveals our complicity in constructing difference and identity. However, in order to dismantle exclusionary and subordinating practices, energy must be focused on the formation of relationships committed to equality wherein the relationship informs identity and identity informs the relationship.

V Conclusion

Although Mr. Justice Blackmun's quote is loaded with a complex account of identity and equality, his quote misleads the reader to regard the problem of exclusion and subordination as one of identity. He suggests that to get beyond racism we must first consider race. Implicitly, according to Blackmun J's quote, law works to accommodate those who are targeted because of who they are immutably perceived to be. The analysis of the impartial trajectory and the categorical trajectory revealed that to cast the problem of racism in this manner perpetuates the privileging of some over others based on their difference. Either we disregard difference or we accommodate it. Both methods inform the law that difference is inherent to the individual.

However, by targeting exclusionary and oppressive practices, intersectionality and anti-essentialist critiques reveal that the specificity of lived experiences does not necessarily require the law to accommodate. Rather, insofar as difference inheres in relations, identity is formed within context. Inspired by my experiences in first year law, this paper asks that the understanding inherent in Blackmun J's quote be reformulated. To get beyond subordination, we must first use the law to ask substantive questions that will reveal how difference is constructed and we must first take into account the answers therefrom to reconstruct identity and equality.