

Issues in Legal Scholarship

THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY

2002

Article 6

I and Thou and War and the Way to Peace

Mari J. Matsuda*

*Georgetown University,

Issues in Legal Scholarship is one of The Journals of Legal Scholarship.

Copyright ©2002 by the authors.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher, which has been given certain exclusive rights by the author.

I and Thou and We and the Way to Peace

“It was a weed. Do not blame the whole camp.” A weed? A single killer? I say to you today, and I am not afraid of Pharisees and not of Sadducees, but only of hypocrisy. The incitement against Yitzhak Rabin came from headquarters.ⁱ

With these words, Mrs. Lea Rabin condemned those who incited the man who murdered her husband. The world wept then, as today, for harm done to one in the name of many. The deadly direction that group membership takes, both in marking targets and marking executioners, is on the front pages every day. Out of this time, I return to Professor Fiss’s elegant article about group disadvantage and the equal protection clause.

In recognizing group disadvantage as a social and political challenge to equal protection analysis, Professor Fiss turned the direction of a long American conversation. Courts, he pointed out, are part of the process through which we decide, as citizens and moral agents, what equality will mean. In finding that meaning, Fiss argued, courts must consider the reality of how discrimination works: it conveys via group membership. It was a relief to first read these words, for the history I knew and the America my family had always lived in, was rife with group disadvantage under law. The Alien Land Laws, race specific immigration policy, the internment of Japanese Americans, and racially restrictive housing covenants had direct impact upon my grandparents and parents as members of the ethnic group designated “Japanese American.” The Fiss article was an incursion into the standard liberal analysis of equality as an issue for individuals.

Now comes another day, in which group disadvantage is both hardened – see, eg., the statistics on poverty and imprisonment cited in Guinier and Torres, *The Miner’s Canary*ⁱⁱ – and hidden in a discursive world in which masking and denial are first principles. Comes also, the dark side: when group disadvantage couples with reactionary, fascist ideology, we live in danger. This is not the place to explain how this happens. It happens, and we live in fear of it. The dark side of groups calls on those concerned with justice to think about the way out.

Some suggest that groups themselves are the problem, that both oppression and violence will end when individuals liberate themselves from groups. Not just the withering away of the formal state, but the withering away of all informal constraints of affiliation as well, is the utopia imagined here. I have written elsewhere my response to the critics of identity politics.ⁱⁱⁱ Suffice to say here that it is not groups that are the problem, it is the choices we make out of our affiliations: to welcome or exclude difference, to resolve disputes with words or with violence, to see others as rights-holders or not. Whether or not we understand ourselves through lenses of identity, we still make ethical choices about how to live with those identities. It is the choices that require critique.

I think – although the empirical question remains open – that it is a pre-determined part of the human condition that we seek social connection and therefore devolve into groups. Not fixed, not hard-edged, and certainly not uni-dimensional, as critical race theorists have explained again and again. The experience of race, for example, is fluid, and

socially constructed, and intersectional. While some form of group connection is inevitable, what I will fight against for all my days is the practice of humans once connected to drop others from the circle of justice. All human beings are entitled to regard from all human beings. There is no other way.

This comment is short. Professor Fiss said we are deciding what equality means. His challenge has stayed with us. It is not part of traditional equal protection analysis to pledge allegiance to all world citizens and to wish peace and prosperity upon all of them at once. In fact, much of traditional equal protection analysis carries a hidden presumption that this worldview is beyond plausibility. The Venn diagrams up on the chalk boards suggest limited solutions and careful balance. Imagine a circle extending off the edge of the board, drawing in all the many groups, to say “within this line, none will kill in the name of kin, and none will mourn over loved ones slain for politics.” That is equality.

ⁱ Lea Rabin, *The Legacy of Yitzhak Rabin*, in Raphael Cohen-Almagor, *Liberal Democracy and the Limits of Tolerance* (2000)

ⁱⁱ Lani Guinier and Gerald Torres, *The Miner’s Canary*, 2002

ⁱⁱⁱ see eg, Matsuda, *Who is Excellent*, forthcoming, *Seattle Journal of Social Justice*; Matsuda, *Beyond and Not Beyond Black and White: Deconstruction Has a Politics*, in Valdes, Harris, and Culp, *Critical Race Theory: Histories, Crossroads, Directions* (2002)