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DECEPTIVE DICHOTOMIES

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Professor Cynthia Fuchs Epstein has alerted us to the perils of assuming that there are significant differences between women and men. She points out, first of all, that there are as many differences among women as there are between men and women.¹ She also contends that most of the legislation predicated on the existence of distinctions between women and men actually works against the best interests of women, even when that is not the intended result.² In the spirit of Professor Epstein's encouragement to take differences among women seriously, I shall in my brief remarks talk about such differences and suggest some questions they pose for us as we think about women in the lawyering workplace.

Professor Epstein wants us to be very attuned to the legal, social, and psychological processes by which, she says, strict distinctions between men and women are created and maintained.³ Like those between blacks and whites, free people and slaves, she says, such distinctions "are particularly powerful in creating and maintaining differences."⁴ Strictly dichotomous thinking about women and men obscures important differences among women and, by implication, among men: differences in behavior, attitude, ethnicity, education, location, race, class, age, and, we ought to add, sexual orientation, physical mobility, and religion.

No small measure of the dichotomous thinking to which Professor Epstein calls our attention is the influence it has on her own presentation of the processes and institutions which create and maintain distinctions between women and men.⁵ She reminds us that we have learned that

most differences between women and men in the professions and other spheres of society come not from the organic qualities of the human body or the deeply rooted attributes of psyches distinct for each sex, but from the strong arm of the law, from social force or its threat, and from the mechanisms that provide the subtle restraints and persuasions of social life.⁶

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1. Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35 N.Y.L. SCH. L. REV. 309, 335 (1990).

2. *Id.* at 326-27.

3. *Id.* at 310-14.

4. *Id.* at 312.

5. *Id.* at 312-13, 314 n.29, 322, 323, 333-34.

6. *Id.* at 310.

But gender distinctions in any society which is racist and classist as well as sexist do not distinguish simply between women and men, race and class unspecified. When feminists and others insist on a distinction between sex and gender, we are pointing to the difference between assignment to the biological category of "female" and the psychological, social, political, and legal construction of "womanhood." As our everyday lives attest, females are always being asked to present their credentials as real or true "women," and males to present theirs as real or true "men." But females are not expected simply to be or act as "women"; in a race-conscious and racist society, a class-conscious and classist society, we are expected to live up to the definitions of womanhood for females of our race and class. For differences among women do indeed cut very deep—so deep they appear in our gender identities themselves.

The dichotomies which Professor Epstein refers to—men and women, black and white, etc.⁷—are not parallel, but intersecting.⁸ This means that what Professor Epstein calls the dichotomy between women and men does not in fact work as a simple dichotomy; it does not and can not, as long as other rigid distinctions are created and maintained by a society or culture. Insidious and invidious distinctions between races could never take hold unless differences between females of different races were etched into the normative notions of "woman."

For example, although the image of women as "too delicate, pure, and refined to undertake public functions"⁹ is extremely powerful, when, in the United States, was that ever an image of poor black women? Judith Rollins' *Between Women: Domestic Workers and Their Employers*¹⁰ illuminates the role of some women in the social processes by which such distinctions are maintained. Rollins provides a very textured description of white female employers' control over interaction between themselves and their black employees, which maintains a higher sense of self-esteem in the white women predicated on their perceiving a higher form of womanhood in themselves than in their black domestic workers.¹¹

Professor Epstein's recounting of the history of the treatment of women before the law is not sensitive to the very differences among women upon which it is the burden of her work to insist. As a result, she

7. *Id.* at 312.

8. For discussion of such intersections, see Scales-Trent, *Women in the Lawyering Process: The Complications of Categories*, 35 N.Y.L. SCH. L. REV. 337, 337-40 (1990); Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM. 305, 324 (1990).

9. Epstein, *supra* note 1, at 323-24.

10. J. ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* (1985).

11. See *id.* at 155-232 (examining, through independent interviews and her own experiences as a domestic worker, many facets of these relationships).

misses numerous occasions for inquiry into the significance of the fact that women are from different races, classes, ages, etc. In exploring such differences, we might, for example, ask how assumptions made by judges and police officers, not to mention criminologists, about the race, class, or national identity of the women in question affect those authorities' perceptions of the women's likely involvement in crime and of the most fitting punishment for their deeds.

Studies such as Carol Smart's *Women, Crime and Criminology: A Feminist Critique*,¹² point to the ways in which class bias exists in classical and contemporary studies of female criminality. As any black, Latina, or Chicana woman is all too well aware, the law and its vigilantes distinguish between her and white Anglo women when she browses in the aisles of a drug store in any predominantly white Anglo neighborhood.

Similarly, when Professor Epstein recounts the ways in which real gains in women's "full participation in government and employment"¹³ are undermined by worry about declining birth rates, she relegates to a footnote the intimate connection between attempts to end abortions given white middle-class women and the fear of "foreigners."¹⁴ There, and in a passing reference to William J. Goode's comments on nonlegal sanctions against "inappropriate matings between men and women"¹⁵—those which undermine rather than bolster race and other stratifications—Professor Epstein misses the opportunity to explore the crucial difference women's racial or cultural identities make to issues around the control of women's fertility and reproduction. Gender distinctions and hierarchies are always operating in the context of other distinctions and hierarchies, such as race and class. So Professor Epstein's proposal that it is now time to talk about differences among women,¹⁶ suggesting that law, public policy, force, and the threat of force have not heretofore created and maintained distinctions among women,¹⁷ obscures the long history of those differences among women which she wants to bring to our attention.

Let us keep in mind the differences among women which Professor Epstein wishes us to consider. What implications do they have for us as we think about women in the lawyering workplace? I think Professor

12. C. SMART, *WOMEN, CRIME AND CRIMINOLOGY: A FEMINIST CRITIQUE* (1977).

13. C. EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* 126 (1988).

14. *Id.* at 127 n.24. Although abortion had been widely used by middle-class women until outlawed in 1880, legislators and physicians feared that the American population would become inundated with foreigners if white, middle-class women exercised their right to limit reproduction. *Id.*

15. C. EPSTEIN, *WOMEN IN LAW* 337 (1983).

16. Epstein, *supra* note 1, at 335.

17. *See generally id.*

Epstein's hope is that we will all do our best to cease talking simplistically about differences between men and women, whether we are involved in shaping legislation, doing sociology, writing textbooks, or just conversing with friends or enemies.

But if we are going to do full justice to the facts which she marshals on behalf of her claim that there are as many differences among women as between men and women, then we ought to think seriously about how those differences among women exist and operate in the workplace. One important difference Professor Epstein does not explicitly refer to is the difference between lawyers (or professors) and their secretaries. Another is the difference between lawyers (or professors) and the women who clean their offices. Most colleges and universities are still little fiefdoms in terms of relations between faculty, staff, and physical plant; my guess is that many law firms, courts, and legal agencies are too. A significant question is left unanswered: Which women are to be included in our discussions of "women in the lawyering workplace?"