REVIEW SECTION SYMPOSIUM
Redressing Inequality and Exclusion

Minow's Social-Relations Approach to Difference: Unanswering the Unasked

Katharine T. Bartlett

MARTHA MINOW, *Making All the Difference: Inclusion, Exclusion, and American Law*. Ithaca, N.Y.: Cornell University Press, 1990. Pp. vii+403.

SMALL HANDS

The most frequent comment made by the medical interns, residents, and students who inspected me following recent surgery concerned the short length of the incision. "Wow, how did you get away with that," said one. "We generally expect to see a longer scar," said another. "You're lucky." I finally asked the doctor who had performed the surgery whether the incision was in fact shorter than usual or whether perhaps these remarks reflected simply what doctors are trained to say to reassure their patients. She chuckled slightly as she held up her petite hands. "The truth is," she said, "I don't need as large an opening as some do. During the surgery," she went on to remark, "the chief resident complained that the opening I made was not large enough for *him* to help do the job." My still groggy mind flashed back to an interview I had had a few years back as a member of the University Committee on Women Faculty with the chairman of the Department of Surgery, who had most likely overlooked the particular advantage of small hands when he explained the absence of women in his department by their unsuitability for this rigorous medical specialty.[1]

Katharine T. Bartlett is Professor of Law at Duke University School of Law. The author is grateful to Lewis Kornhauser, Chris Schroeder, and Barbara Herrnstein Smith for their comments to a draft of this review.

1. For evidence of other advantages women, on average, may have over men, see Jean

© 1992 American Bar Foundation. All rights reserved.
0897-6546/92/1703-0437$01.00

As a society most of us are well beyond the point of thinking that women cannot be good surgeons. The traditional assumptions about women's differences from men—that they are squeamish about knives and blood, that they are not stable or decisive enough to make tough decisions in seconds, that they don't have the years or the stamina to invest in medical training—are now generally understood to be based on stereotypes that are simply not true about all women. *Some* women do have the personal characteristics and talents required of surgeons, and there is widespread agreement that the barriers to these women should be removed.

Despite the greater understanding of women's potential, however, few are surprised that not many women choose surgery[2] (or, for that matter, any other branch of medicine). There is little surprise because surgery is generally viewed as a high-powered branch of medicine requiring long and exhausting training, round-the-clock pressure, high stakes, mental and emotional toughness, and complete dedication. Some women will be surgeons but not nearly as many as men. Few women will be surgeons because—well, because most women are different. Women tend to prefer greater flexibility in their schedules, to shy away from the necessary science and math courses, to dislike intense pressure, and to require more time for family and friends. Women's differences seem to explain women's relative absence from the profession. As a result, while women with the "proper" qualifications seep into the profession, those qualifications and the institutional practices that discourage women's interest in the profession continue to be taken for granted as basically sound, rational, and good.

The notion that removing overgeneralizations about women is a necessary but insufficient step toward meaningful gender justice has not yet taken hold in this society. Evidence of the innumerable social practices that narrow women's preferences and choices is impressive, to say the least, but these practices continue.[3] Feminist scholars have developed

---

Oggins, Marita Inglehart, Donald R. Brown, & William Moore, "Gender Differences in the Prediction of Medical Students' Clinical Performance," 43 *J. Am. Med. Women's A.* 171, 173 (Nov.–Dec. 1988) (because of higher person-oriented skills, women medical students do better than men on clinical performance tests).

2. Women make up only 8% of the total number of surgeons in this country (Kathie Dalessandri, "The Surgical Work Force and Women Surgeons," 43 *J. Am. Med. Women's A.* 169 (Nov.–Dec. 1988)) and 11.7% of residents in surgery. Anne E. Crowley, Sylvia I. Etzel, & Helen A. Shaw, "Graduate Medical Education in the United States," 258 *J.A.M.A.* 1031, 1036 (1987). The number of women entering medicine generally is rising; 27% of residents in 1986 were female. Only 4.5% of female residents, however, choose surgery. *Id.*

3. The evidence of gender steering is strongest in the areas of education and employment. The most recent research in education demonstrates that while girls and boys start school roughly equal in skills and confidence, girls are behind boys by the end of high school, especially in math and science scores, and that along the way, girls experience discrimination in the amount of attention they receive from their teachers, in the textbooks they are assigned, in the tests they take, and in how their male classmates treat them. See Greenberg-Lake Analysis Group, Inc. & American Association of University Women Educational Foundation, *Shortchanging Girls, Shortchanging America* (1991). In the employment

elaborate theoretical analyses to focus attention on the extent to which correcting for mistakes in judgments about a person's qualifications does not address deeply enough the justice of the social order to which individuals are expected to conform.[4] There is little present indication, however, that the work done in this area has stimulated widespread change in social thinking or practice.

Martha Minow's work on difference represents one of the most comprehensive scholarly efforts to move thinking about disadvantage from simple explanations about individual difference to more complicated analyses about the social structures which make those differences matter. In *Making All the Difference: Inclusion, Exclusion, and American Law*, Minow focuses on how difference functions in the law to create disadvantage and exclusion. Minow emphasizes how law tends to treat difference as if it and all its consequences were attributable to the person being classified, rather than to the limitations of the world within which that classification takes place. For example, laws relating to mental handicap typically assume handicap is located in the retarded preschooler rather than in the school that assumes that normal children will have an IQ above a certain number (at 29–31, 82–86). Society locates youth in the child rather than in the restrictions that law imposes on individuals who are not allowed to vote, drink, fight, and die in war, whose physical needs are left up to her "private" caretakers, and whose legal right to choose an abortion is left up to her caretakers or the state (at 283–89). Employers locate pregnancy in the mother-to-be rather than in the workplace that does not guarantee job security after maternity leave or provide a setting conducive to maternal and fetal health (at 86–90). And so on.

In each of these examples, Minow argues, difference is perceived as an attribute of persons rather than of the social arrangements into which per-

---

area, Vicki Schultz has offered the most searching analysis of the institutional structures and practices that affect the kind of jobs in which women have an "interest." See Vicki Schultz, "Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument," 103 *Harv. L. Rev.* 1749 (1990).

4. Some of the best examples of feminist scholarship that have focused specifically on the role of the concept of difference in masking injustice in the social order are found in three edited collections of essays: Hester Eisenstein & Alice Jardine, eds., *The Future of Difference* (Boston, G. K. Hall, 1980); Elizabeth Meese & Alice Parker, eds., *The Difference within: Feminism and Critical Theory* (Amsterdam: J. Benjamin Pub. Co., 1988); and Deborah L. Rhode, ed., *Theoretical Perspectives on Sexual Difference* (New Haven, Conn.: Yale University Press, 1990). Several essays in Linda J. Nicholson, ed., *Feminism/Postmodernism* (New York: Routledge, 1990), also explore numerous theoretical and practical issues raised by difference. See also Moira Gatens, *Feminism and Philosophy: Perspectives on Difference and Equality* (Bloomington: Indiana University Press, 1991); Iris Marion Young, *Justice and the Politics of Difference* (Princeton, N.J.: Princeton University Press, 1990) ("Young, *Justice*"); Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988). Specifically in the legal context, see Katharine T. Bartlett & Rosanne Kennedy, eds., *Feminist Legal Theory: Readings in Law and Gender* (Boulder, Colo.: Westview Press, 1991), and sources listed in note 10.

sons must fit because certain unstated expectations about people are taken for granted, expectations by comparison to which difference is defined and in relation to which existing social arrangements make sense. Difference is defined in relation to generally accepted standards of normality: the ability to see, hear, walk, and read; adulthood; the state of nonpregnancy; whiteness; heterosexuality; and maleness (at 56, 82). Because these norms are unstated, however, they are usually not noticed as contestable and revisable; rather, they are treated as reality itself, with exclusions based on deviance from these norms seeming to follow as night from day (at 70–74).

To Minow, the appropriate way to address questions of exclusion in American society is not to label difference and assume exclusion based on it is natural and inevitable.[5] It is not even to insist on increased rights for those who are "abnormal."[6] It is, rather, to expose these unstated norms and to reevaluate difference primarily as a function of the social arrangements that exclude people based on these norms (at 110–14). Pursuing this methodology, which she calls the "social-relations" approach, Minow would look beyond a man's paralysis as the sole explanation for why he cannot ride a public bus, and highlight instead the characteristics of the bus—the absence of a wheelchair lift, for example—that make a paralyzed man unable to use it. She would relocate a pregnant woman's inability to maintain a "steady" job from the pregnant woman herself to conventional workplace expectations of availability for employment that do not fit the pregnant woman's availability. In the same way, she would shift responsibility for the inability of certain mentally retarded citizens to live independently from these citizens to the zoning laws that restrict location of the group homes that would enable their independence. In my example of surgery, she might attempt to explain the absence of women from the profession not by the usual assessment of women's preferences and strengths, but by the fact that the profession has chosen for itself criteria that happen to favor individuals with such assets as stay-at-home spouses and obsessive job dedication rather than small hands.

This review essay will explore the dimensions of Minow's social-relations approach, to which I will also refer as "relationalism," as a way of thinking about the structural barriers to individual opportunity and other forms of social justice. It first will pursue the potential of this approach for helping to unsettle conventional categories and concepts, including legal ones. It then will explore some of the apparent difficulties and ambiguities with the approach which might otherwise prevent the approach from "sinking in" or which might encourage its misuse. It confronts the fact, for example, that while categories are potentially harmful, they are also

5. Minow (at 105–7) labels this either/or approach to difference the "abnormal-persons approach."

6. Minow (at 107–10) calls this approach the "rights-analysis approach."

necessary and desirable; moreover, perpetual reevaluation of categories makes practice impossible and, for some, seems to confound necessary processes of identity formation. The essay discusses the problem that to eliminate harmful exclusions, categories may be necessary that might themselves either help to perpetuate these exclusions or create new ones. It also addresses the problem that criteria developed under a social-relations approach to eliminate harmful categories acquire the same misleading appearance of objectivity and inevitability that the approach sets out to discredit. Finally, the essay examines the conflicting signals about human responsibility and agency contained within the thesis that difference is socially constructed.

The main purpose of this essay is to break through these apparent difficulties, some of which Minow implicitly but unintentionally encourages by her analysis, and to strengthen the case for relationalism by showing that these difficulties are not defects of the approach itself so much as artifacts of the kind of objectivist ways of thinking that the approach seeks to challenge. The problem, in short, is not that a relational approach is wrong but that it is hard to do right. I do not deny the tensions and ambiguities of resolving difficult social issues. What I do argue is that relationalism neither eliminates these tensions and ambiguities nor raises any new ones. It also does not undermine any commitments one might have to a particular form of the social good or deprive one of any rhetorical tools one might use to achieve that good. What a relational approach does is to help highlight how categories tend to privilege some characteristics above others so that what look like the natural and inevitable consequences of those characteristics are revealed as revisable social choices based on particular hierarchies of interest. In so doing, it enhances the likelihood of skepticism about what otherwise seem like natural and inevitable phenomena, and hence stimulates greater flexibility and imagination in the consideration of alternatives to the status quo.

At several points in this essay, I will extend Minow's analysis through an exploration of the recent work of William E. Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox*. This work, while it does not make reference to Minow's, uses the kind of relational thinking Minow advocates to address a broad set of themes about the late modern state: the use of categories of difference to satisfy the individual and collective need for identity and the tendency of concepts of difference to sour in the face of existential resentment into blame laying and the stigmatization of others; the role of losers and misfits as the scapegoats for a society uneasy about its collective identity; and the futility of individual and collective efforts to eliminate contingencies and achieve independence from, and superiority over, one another. Connolly's prescription for the crisis in democracy is the idealization of a brand of politics that he calls "agonistic

democracy."[7] This ideal politics is built on a commitment to the diversity, the interdependency, and the contingency of being, a commitment that structures democratic strife as a necessary and productive series of respectful engagements. I hope to show how the works of Minow and Connolly together provide the kind of theoretical foundation for thinking about difference *as a practice* that might begin to permeate contemporary understandings about social justice.

ON ONE'S OWN

Legal classifications of people are harmful, Minow asserts, to the extent that they take some characteristics or situations as normal and ordinary and stigmatize and disadvantage others as abnormal or extraordinary. Disability provides her richest example. Minow explains, historically as well as analytically, how "abnormality" and "incompetence" make sense only in relation to the assumed conditions—often undefined and unlabeled—that are taken to be "normal" and "competent." Certain social arrangements privilege certain types of persons, and because these persons are deemed normal, the arrangements accommodating them are taken for granted as natural and neutral. Alternative arrangements, on the other hand, that would enable a broader range of participation (i.e., access to meaningful education, independent living opportunities, or employment) are deemed "special" accommodations. Together, this tacit privileging, and the special accommodations needed if the unprivileged are to be included, "construct" the meaning of disability (at 80–86, 114–20).

In pressing her social-relations approach with respect to physical disability, Minow discusses in detail the case of Amy Rowley, a hearing-impaired first grader who was the subject of litigation under the Education for All Handicapped Children Act.[8] The parties in the case framed the issue as whether an educational program for Amy Rowley that lacked a sign-language interpreter for all of her classes was an "appropriate" education under the act. In so doing, not only the defendant school district but also the plaintiff's attorneys "deployed the unstated norm of the hearing student who receives educational input from a teacher" (at 82). Strategies to obtain for her the services she needed were rights-based strategies, which stayed within the dichotomized view of children as either normal children, for whom necessary educational services were ordinary and expected, or abnormal children, whose educational services were "special" but sometimes (argued to be) required. Thus in seeking the "special ac-

7. William E. Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox* x (Ithaca, N.Y.: Cornell University Press, 1991) ("Connolly, *Identity/Difference*").

8. Board of Education v. Rowley, 458 U.S. 176 (1982).

commodation" of an interpreter for the deaf to obtain equal educational opportunity for Amy Rowley, her attorneys "preserv[ed] the either/or construction of the problem"—a construction that "allows people to move the line between the norm and the abnormal but maintains the idea of the distinction and its legal consequences" (at 214–15).

Minow argues that a social-relations approach to difference reconceives the notion of difference as well as the particular categories necessary to respond to it. It "resists solution by category" (at 215), preferring instead to "inquire . . . into the institutional practices that help sustain a norm against which some people seem different, or deviant" (at 216). Under such an approach, Minow suggests, the parties in *Rowley* might have thought of more imaginative solutions that did not marginalize and stigmatize Amy as different. One alternative would have been to enrol Amy in a "special" school in which hearing-impaired students were the norm (at 82). Another possibility would have been to expand the category of difference; to the extent that everyone is different, the likelihood of stigmatization is reduced (at 95–96). Along this line, greater individualization for all students might help "to eliminate the pattern of attributed deviance, for then all students would be 'different' " (at 94). The individualization of every student's educational program would make every student different, and therefore the same.[9] An even more radical, relation-based alternative would focus the parties on "imagining a different norm around which the entire classroom might be constructed" (at 82). Minow suggests, for example, that sign language might be taught to all students in Amy's classroom and then used as the common instructional vehicle (at 84). Minow does not insist that any one particular solution would work in every context, but her suggestions illustrate the kinds of possibilities that are not likely to come to light when legal issues are framed as either/or alternatives within institutions whose contingent structures are taken for granted and assumed to be fixed.

Pregnancy is another example of a "difference" that looks quite different from a relational perspective. Typically, pregnancy is seen as a difference that is located in certain (pregnant) individuals and that, in turn, bears certain natural and inevitable consequences. Through her relational lens, Minow forces consideration of the social sources of the meaning of pregnancy and the extent to which the consequences of pregnancy are derived from mutable, contestable social arrangements.[10] She argues, for example, that the incompatibility between pregnancy and full-time, serious

9. Hence the chapter title "Making *All* the Difference."

10. Other feminists have also focused on the social arrangements that construct pregnancy in ways that disadvantage women. See, e.g., Christine A. Littleton, "Reconstructing Sexual Equality," 75 *Calif. L. Rev.* 1279 (1987); Lucinda Finley, "Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate," 86 *Colum. L. Rev.* 1118 (1986).

participation in the workforce is not compelled by the physical characteristics of pregnancy but is rather a consequence of the unavailability in most American workplaces of the maternity leave that some pregnant women find physically necessary (at 86–90). Through the same lens, she might have argued that the vulnerability of pregnant women and their unborn in some workplace settings is not biologically determined but is a consequence of the choice of workplace design, equipment, and production materials; or that the tight association between childbearing and primary child-rearing responsibilities is due not to women's special aptitude or fitness for the primary caretaker role but rather to social expectations and various economic incentives that lead women more often than men to trade off job for family.

From the relational point of view, it becomes clear that the workplace, far from being fixed, natural, and inevitable, could be structured in other ways based on different assumptions and norms. It could be ordered, as Minow suggests, around workers who are deeply committed to child-rearing activities (at 88)—individuals who will need time off for sick children, teacher conferences, and doctor's appointments. It could also assume as "normal" individuals whose safety encompasses the safety of unborn children. Because these possibilities are still unfamiliar ones in today's world, they may appear to be impractical or "special." Minow's point is that the circumstances which make these alternative arrangements seem special are products of social choice, not some natural workplace ideal.

Just as maternity leave policies are perceived as "special accommodations" for a favored few, so race-conscious remedies to address gross racial disparities in power are viewed within the usual construction of difference as discriminatory, "affirmative" action. As with other constructions of difference, Minow argues, the notion of affirmative action is founded on the unstated "background assumption . . . that the status quo is neutral and natural rather than part of the discriminating framework that must be changed" (at 76, note omitted; see also at 71). This background assumption is so strong that evidence that may appear to contradict it is, instead, made to appear as proof in its favor. Minow points, for example, to the existence of many nonacademic criteria routinely used in university admissions procedures, such as university or alumni connections, musical or athletic talents, and geographic diversity (at 386). Because these criteria are "special" in comparison to the "merit" systems otherwise in place, their existence might be expected logically to help legitimate other nonacademic considerations such as race. But while there is occasionally pressure to eliminate them, these criteria have provided no such purchase. Instead, they are seen as ordinary, "standard" criteria. The fact that they perpetuate the standards under which the success of those currently in decision-

making roles was obtained is viewed not as a reason for skepticism about them but instead as proof of their rationality. The crudity and arguably discriminatory nature of the instruments for measuring "merit" (at 386)[11] does not encourage recognition of multiple sources of merit. Instead, complaints about measurement standards are characterized as the whinings of interest groups seeking special favor for their "less-qualified" constituents.

Minow's social-relations approach offers little additional insight into intentional forms of racial discrimination which persist in our society.[12] Her approach can help us to understand, however, the bias of social circumstances that systematically favor whites over blacks. These arrangements encompass virtually every factor that might be considered relevant to the likelihood of success—from the association of certain "frightening" mannerisms with untrustworthiness, to the material correlates between race and poor health, low educational achievement, and inadequate housing.[13] The disadvantages of blacks and other minorities are so taken for granted that they may appear to be natural misfortunes rather than social injustices.[14] That blacks and other minorities do not do as well as some of the rest of us is noticed and regretted, and efforts are made to remove visible barriers to equal opportunity. Any structural foundations to their disadvantage go largely unnoticed and hence unaddressed.

---

11. For a discussion of how thoroughly cultural and normative standards of merit tend to be, see Young, *Justice* 200–206 (cited in note 4).

12. While the law is thought to be better suited to controlling intentional than unintentional forms of discrimination, it seems quite clear that the law has fallen far short in preventing even the most egregious forms of intentional employment discrimination. Minow cites a study by Kristin Bumiller showing that two-thirds of the white women and members of minority groups reporting discrimination on the job do not sue: complaining through the civil rights laws risks being labeled a troublemaker, requires acceptance of the role of victim, and is potentially demeaning and humiliating (at 92, citing Bumiller). More recent anecdotal and survey evidence reported by the *New York Times* suggests that because of the low monetary stakes in some cases and the increasingly unfavorable precedents set by the Supreme Court in job discrimination cases, victims of job discrimination simply cannot find attorneys willing to take their cases. See Steven A. Holmes, "Workers Find It Tough Going Filing Lawsuits over Job Bias," *N.Y. Times*, 24 July 1991, at A1. A survey in May 1991 by the 1,000-member National Employment Lawyers Association, for example, found that 44% of its members rejected more than 90% of the job discrimination cases that had been brought to them. *Id.* The federal agency charged with enforcing job discriminations laws, the Equal Employment Opportunity Commission, brought only 524 suits in 1990 and has a backlog of about 45,000 cases "that have yet to be even investigated." *Id.*

Group remedies are the obvious alternative to individual suits against acts of intentional discrimination against particular individuals, but such remedies have been steadily eroded by the federal courts, and it is not clear how much of this erosion will be reversed by the Civil Rights Act of 1991. Minow sees the debate over group remedies to be a debate about shifting the focus from remedial processes that "still locate the source of the difference in the 'different' person" to options that change the "usual workplace patterns and presumptions" (at 93).

13. Gerald David Jaynes & Robin M. Williams Jr., eds., *A Common Destiny: Blacks and American Society* (Washington, D.C.: National Academy Press, 1989) (reporting on current status of black Americans in U.S. society).

14. See Judith N. Shklar, *The Faces of Injustice* 2 (New Haven, Conn.: Yale University Press, 1990) ("Shklar, *Faces of Injustice*").

I recently went to a store with my 13-year-old son to return an expensive pair of "pump" basketball shoes, the pump of which had failed after a few weeks of use. The store clerk examined the shoes briefly, asked a few questions aimed at determining whether he had abused the shoes (e.g., did he wear them outside?—"hardly ever") and then proceeded to get him a replacement pair. My son, who as an adolescent tends to face the world as an adversary, was stunned by how easily he had obtained a pair of new shoes. So was I and I thought to myself that my presence probably had added respectability to his case and helped him out. It was only from the distance of hearing him tell his father of his success that I began to wonder whether our race—the race we shared with the store clerk, the store owner, and other people who are assumed not to abuse their shoes and to be valuable "repeat" customers—was not the more significant factor.

Many of us have had the luxury throughout our entire lives of being *systematically* trusted—of being presumed to be honest paying customers rather than shoplifters, people who tell the truth, who will show up for work on time if hired, who will learn rather than disrupt the classroom. From birth, in large part because of our race, many of us have had a substantially increased likelihood of scoring well on standardized tests, of qualifying for jobs, and of having adequate food, clothing, shelter, health care, and education. What are these circumstances, if not an extremely effective, if virtually invisible, "affirmative action" plan for whites?[15]

A social-relations approach to difference challenges the characterization of race-based remedies as unfair advantage to certain individuals who cannot make it on their "own." Indeed, it questions the implied assumption that *anyone* who succeeds in this society does so on their "merits" alone. This assumption was made unusually explicit in the debate over the nomination to the U.S. Supreme Court of Justice Clarence Thomas, who was claimed to have risen from the depths of poverty on his own, without special favors, proof of the American dream that anyone with enough hard work and determination can succeed.[16] As with other unstated assump-

15. While analogies between race and sex can be dangerously simplistic, Catharine MacKinnon's analysis of society as an affirmative action plan for men provides a useful point of comparison for the advantages available on the basis of race in this society:

> [V]irtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experience and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex. For each of their differences from women, what amounts to an affirmative action plan is in effect, otherwise known as the structure and values of American society.

Catharine A. MacKinnon, *Feminism Unmodified* 36 (Cambridge, Mass.: Harvard University Press, 1987) (footnotes omitted).

16. One commentator put it this way: "there is no such thing as a person without a

tions, there was much evidence to the contrary. Thomas himself acknowledged his debt to his grandparents and to the teachers who had given him the encouragement and love he needed. In the context of the self-made man story, however, this evidence was used to strengthen, not undermine, the claim that he had made it "on his own." The efforts of Thomas's grandfather to instill in him values of persistence and determination did not count as a special advantage; to the contrary, these efforts and values became, vicariously, the efforts and values of his grandson, who was thereby able to rise "on his own" *without help* from others.[17] This transformation could not take place except within a society where family support is taken for granted as ordinary, natural, and expected.[18]

A social-relations approach also puts into perspective the claim that affirmative action cannot succeed because even when a person is helped, his or her success, and the self-esteem on which success depends, are un-

---

bootstrap. Everybody has the power to choose." Debra J. Saunders, "Strung up by His Bootstraps," *Raleigh News & Observer*, 18 Aug. 1991, at D1, D2.

17. For one challenge to the effort by Thomas's supporters to fuse his identity with that of his grandfather, see "Judge Thomas's Grandfather—and Mine," *N.Y. Times*, 8 Sept. 1991, OpEd, at A12. See also Ellen Goodman, "The Trip from the Bottom," *Boston Globe*, 25 July 1991, OpEd, at 19.

It is harder to explain how the advantages Justice Thomas received in having been admitted to Yale Law School and in having received a series of appointments and nominations based in substantial part on his race—advantages usually counted as "discriminatory" affirmative action—were reconciled with Justice Thomas's portrayal of himself as a man who had pulled himself up "by his own bootstraps." In some important measure, of course, this reconciliation was not achieved. By just about any measure, Clarence Thomas was understood to be an unimpressive nominee, having achieved none of the distinction as lawyer, judge, or intellect that one might wish to have on the nation's highest court. Within current assumptions about race in this country, this lack of distinction, along with the tangible evidence that Thomas had been aided along the way by affirmative action, could not but reinforce those extremely damaging stereotypes about the "lesser qualifications" of blacks. By appointing to the Court an unqualified black who had benefited from affirmative action, President George Bush (deliberately?) made a mockery of affirmative action and furthered its damaging construction as an instrument of special advantages for the unqualified.

Clarence Thomas benefited at the hearings to answer Anita Hill's charges of sexual harassment from other unstated norms and expectations. For example, many found it easy to understand how tragic it would be for these charges to destroy him, given that appointment to the Supreme Court was the job toward which he had been striving for many years. One columnist expressed the view of many that Judge Thomas was justified in stonewalling the charges and shading the truth, because his accusers would have exaggerated the significance of what had really happened between him and Ms. Hill and thus eliminated his once-in-a-lifetime career opportunity. See Orlando Patterson, "Race, Gender, and Liberal Fallacies," *N.Y. Times*, 20 Oct. 1991, sec. 4, at 15. In contrast, the public seemed to have a hard time understanding why a woman who had been harassed would not have immediately reported the harassment, left her job, or otherwise burned her bridges to the harasser whose endorsement would certainly have been required for any professional advancement to which she may have aspired.

18. A similar phenomenon may have been at work in the highly publicized sexual assault case of William Kennedy Smith. Even as membership in the Kennedy family is seen as the source of great advantage because of the power and influence of that particular family, the support of the Kennedy family during Smith's trial was *not* seen as an *unfair* advantage; instead, the support from his family made the prospect of a guilty verdict for Smith seem less deserved and potentially more tragic.

dermined by the individual's reliance on that "special" help.[19] This argument, too, has force only if one ignores the role of perspective in determining what it means to succeed "on one's own" or through "unfair advantage." Such judgments depend on what counts in making either determination. Only because some people have the power to determine what counts as "special" is it possible to judge that the success of some has been obtained through unfair advantage while that of others is their own.[20] Surgeons married to housewives who manage the family's household and child-rearing responsibilities, for example, are not generally perceived as having an unfair, "special advantage."[21] Once it is accepted that whether one makes it on one's own is a matter of which advantages are deemed special by those with the power to do so, the question becomes not *whether* special help should be given to some but *from whose perspective* it is to be determined what help is ordinary and normal. Moreover, once what is ordinary and normal is made explicit, measures to assure that everyone obtains it can no longer properly be denigrated as special or discriminatory.

EARTHQUAKES AND CANONS

In presenting her relational view of difference, Minow concentrates on physical characteristics—sex, race, and disability—perceived conventionally as deviant, and thus bases of stigma and exclusion. Physical characteristics provide very useful examples for her thesis because they are the ones most people would be least likely to question: they seem objective, natural, immutable—something about which nothing can be done. If the contingency of even these highly naturalized forms of supposed deviance can be established, there would seem to be categories or concepts that are off limits to relational analysis.[22]

---

19. See Stephen L. Carter, *Reflections of an Affirmative Action Baby* (New York: Basic Books, 1991).

20. As Margaret Jane Radin has written, "the dominant group—those who created the categories of subordination in the first place—controls the discourse . . . of affirmative action . . . [to reinforce] those categories of subordination." Radin, "Affirmative Action Rhetoric," 8 *Soc. Philosophy & L.* 130, 131 (1991).

21. Women surgeons are not only more likely to be unmarried than male surgeons, but even if married, they perform a greater proportion of the family responsibilities. One study showed that 51% of male residents' spouses or partners did the home chores *alone*, while only 15% of female residents' spouses or partners did so. Carol Landau, Stephanie Hall, Steven A. Wartman, & Michael B. Macko, "Stress in Social and Family Relationships during Medical Residency," 61 *J. Med. Educ.* 654, 658 (1986).

22. Consider also the example of height, a physical characteristic with a number of consequences generally perceived to be natural or inevitable—lack of competitiveness in basketball, difficulty in reaching water fountains or podiums, the need to alter ready-to-wear clothes, disqualification from consideration as a handsome "stud" or "looker." Consistent with this perception, the characteristic of shortness is attributed to certain individuals, leaving it to those individuals to seek special accommodations to their environment or to their

Ironically, categories and concepts that normalize standards other than those relating to physical human differences may be even harder to spot. A social-relations approach helps to uncover these more subtle, hidden standards as well. A relatively straightforward example comes from the case of *Lyng v. Northwest Indian Cemetery Protective Association*.[23] In *Lyng*, a group of Native American tribes sued to prevent a road planned by the U.S. Forest Service from being built through a system of wilderness lands sacred to those tribes, on the ground that the exercise of their religion required the protection of these lands. Seen from a social-relations perspective, it is clear that the Supreme Court avoided the Free Exercise claims raised by the tribes by measuring them against norms that define religion in terms of spiritual and mental beliefs, separable from any geographic notion of land. The effect of these norms was to make the tribes' claims that their ability to exercise their religion depended on a particular use of the land in question—from their perspective, an uncontestable truth—sound like an extravagant, preposterous, and deviant distortion of the First Amendment.[24]

A somewhat more complicated example of how common conceptual categories masking socially constructed norms can be unraveled from a social-relations approach is found in Judith N. Shklar's analysis of the distinction between misfortune and injustice. In *The Faces of Justice*, Shklar explains that the distinction usually turns on whether the apparent cause of the triggering event appears to be natural or human:

> If [a disaster] is caused by the external forces of nature, it is a misfortune and we must resign ourselves to our suffering. Should, however, some ill-intentioned agent, human or supernatural, have brought it about, then it is an injustice and we may express indignation and outrage.[25]

---

doctors to alter their condition. See Barry Werth, "How Short Is Too Short: Marketing Human Growth Hormone," *N.Y. Times*, 16 June 1991, sec. 6, at 14 (describing powerful, experimental drug treatment prescribed for some children to "correct" "non-growth-hormone-deficiency"—being short without medical explanation—despite uncertainty about the positive or negative effects of the treatments). Rarely is the "normal" environment that defines shortness questioned. Little more insight is demonstrated with respect to the concept of personal beauty. Although it is widely claimed that beauty is "in the eye of the beholder" (and only "skin-deep"), few are able to resist the impulse to judge others as if standards of beauty were objective and timeless, or to attempt to restructure themselves to conform to those standards. The consequences of acting on this impulse are anything but neutral. See, e.g., Naomi Wolf, *The Beauty Myth* (New York: William Morrow & Co., 1991) (demonstrating how "objective" standards of beauty are founded on assumptions that further male dominance and the subordination of women).

23. 485 U.S. 439 (1988).

24. For a more thorough and complex analysis of this case along these lines, see Stephen L. Winter, "An Upside/Down View of the Countermajoritarian Difficulty," 69 *Tex. L. Rev.* 1881, 1905–19 (1991).

25. Shklar, *Faces of Injustice* 1 (cited in note 14).

Shklar challenges the natural/human intervention causal distinction by demonstrating how its application tends to be limited in advance by a particular set of assumptions about the world and about human agency. The conclusion that the consequences of "natural" disasters such as floods and earthquakes are unfortunate but not unjust, Shklar claims, is little more than a judgment about our lack of responsibility toward "victims" of such disasters. This judgment often rests on contestable interpretations of the inevitability of a particular state of affairs.[26] If the distinction is inverted, situations may be recharacterized so that their consequences seem less natural. Thus, for example, if the cause of the consequences of an earthquake is defined as the failure by public officials to be prepared for, or respond adequately to, the "disaster," it begins to seem like an injustice rather than a mere misfortune. Shklar's conclusion is that there is more choice about what is in our control, and what is not, than may first appear:

> [T]he difference between misfortune and injustice frequently involves our willingness and our capacity to act or not to act on behalf of the victims, to blame or to absolve, to help, mitigate, and compensate, or to just turn away.[27]

Shklar's approach to distinguishing misfortune and injustice, while not directly engaging the question of difference, entails a hypothesis similar to Minow's: perceptions develop and are sustained around categories that appear inevitable and natural but that are fundamentally social, mutable, and arbitrary. Shklar and Minow both challenge understandings assumed to be fixed and absolute by identifying these assumptions and describing the complex and shifting set of social perceptions that make them appear to make perfect sense. These assumptions are one way that some members of society avoid responsibility for others: the "fact" that earthquakes are natural or inevitable appears to alleviate human responsibility for their consequences. By showing that particular social arrangements may be the contingent conditions of distress, rather than the fixed context within which certain consequences inevitably follow, relationalism exposes the socially constructed nature of those understandings and thus undermines the complacency made possible by them.

A still more complex example of how relational approaches can expose the taken-for-grantedness of the dominant perceptions of the world can be observed in the recent debates over political correctness on U.S. university campuses. Those launching the attack against "political correctness" accuse those in favor of a broad array of left-leaning campus reforms of being coercive, overbearing, and dictatorial. They charge, also, that

26. *Id.*
27. *Id.* at 2.

campus radicals have assumed power, "taken over," imposing their single-minded, ideological PC views on others, politicizing the otherwise rational and apolitical enterprise of higher education, and diluting standards of academic merit.

These criticisms assume various hidden relationships: the norm of the nonpolitical, noncoercive, nonideological university to which university administrators ought to return; the "objective" scholar who speaks the truth, as opposed to the whinings and "special pleadings" of the PC crowd; the harmlessness of some labels and names to which only the "supersensitive" could take offense, in contrast to new "trendy" labels insisted upon by the radicals that are "confusing," "trivial" and, of course, "political."

A social-relations approach questions the premises of these assumptions. If what traditional white male voices say sounds nonpolitical and noncoercive, is it perhaps because those voices historically have been dominant in the academy, and hence more familiar? Do the voices of females and minorities sound too loud, rude, coercive, and self-interested because they occupy historically submerged perspectives that stray "too far" from the norms of the academy? Does criticism of professorial speech as racist, sexist, or homophobic appear to violate First Amendment values or academic freedom, while "PC" protests against it appear disruptive, coercive, and suppressive because one form of speech tracks traditional expectations while the other does not?

A few dramatic instances of apparent intolerance toward established, well-known public figures[28] have fueled the PC controversy. But if the PC charge has stuck, it is not because campus radicals have "taken over" U.S. universities. White males, at most campuses at least, appear to be still very much in control,[29] and while what Mark Tushnet calls the "basic rate" is very hard to determine,[30] it hardly seems likely that incidents of intoler-

28. For the apparent examples, see Nat Hentoff, "The Ordeal of the 'Offensive Professor,' " *Village Voice* 10–16 April 1991, at 22–23. For the persuasive case that many of these examples are misrepresented and exaggerated accounts, see Mark Tushnet, "Political Correctness, the Law and the Legal Academy," 4 *Yale L. & Humanities* 127 (1992).

29. This is certainly true at Duke University, one of the institutions singled out by Dinesh d'Souza and other critics as being a hotbed of political correctness. At Duke, traditional courses in Western civilization, Shakespeare, John Stuart Mill, and the like remain securely in place. Only courses in subject areas that are said to be watering down the curriculum—feminist theory, African-American studies, etc.—are under siege. The average female Duke student shuns the label "feminist." In contrast, no shame appears to attach to association with conservative causes. Outspoken conservative students have their own newspaper. An active chapter of the National Association of Scholars speaks freely. At Duke academic traditionalists head almost all departments and hold almost all chaired professorships. Duke has two females deans, one at the School of Law, the other at the School of Nursing; all other top leadership positions are held by white men. Bartlett, "Some Facts about Political Correctness," *Wall St. J.*, 6 June 1991, at A19. See also Tushnet, 4 *Yale L. & Humanities* at 128–29 (cited in note 28).

30. *Id.* at 154.

ance against traditional scholars outnumber those against women and minorities.[31] Political correctness works as an accusation only because those who complain of it ground their charge in assumptions about what is normal and expected in the U.S. university that are so well entrenched that they do not even need to be stated. If there is one thing that relationalism makes clear, it is that these unstated constraints tend to be the most powerful ones.

SLIP SLIDING AWAY

Once one is in the habit of viewing categories and concepts from a social-relations approach, there is literally no end to it. Difference is found to reside not merely in socially ranked individual characteristics but in any concept that divides the range of possible features into normal and abnormal, thereby naturalizing without justifying the consequences that follow. Like one of my favorite children's books which demonstrates that once you start thinking about houses, everything and everybody can be viewed either as a house, or as something that lives in a house,[32] so Minow's social-relations approach can demonstrate over and over the tendency for categories and legal concepts to privilege some standards as "normal" and stigmatize others as "different."

However illuminating the social-relations approach appears to be when it is being applied, it is all too easy to set the approach aside and ignore it.[33] One can comprehend it through repeated, conscious applications but then turn around and unthinkingly fall into the trap of viewing a particular category of "truth" as a given rather than as a social construct. This phenomenon fits especially the tendency to treat as "the way things are" familiar truths that are reinforced through habitual action.[34] Even

31. See Charles R. Lawrence III, "Regulating Racist Speech on Campus: A Modest Proposal?" 1990 *Duke L.J.* 431; Tushnet, 4 *Yale L. & Humanities* at 128–29, 156–57; Richard Abel, "Evaluating Evaluations: How Should Law Schools Judge Teaching?" 40 *J. Legal Educ.* 407, 410 & n.17 (1990).

32. See Mary Ann Hoberman, *A House Is a House for Me* (New York: Viking Press, 1978). The entire book is a close study of relationalism. Consider, for example, the following observation about the fluidity of categories and the alterability of relationships:

> A box is a house for a teabag
> A teapot's a house for some tea.
> If you pour me a cup and I drink it all up,
> Then the teahouse will turn into me.

33. Thus, even Judge Richard Posner, who is otherwise quite critical of Minow's book, concedes of her social-relations thesis: "All this is true, and important, and still resisted so strenuously as to be worth reiteration." Richard A. Posner, "Us. v. Them," *New Republic*, 15 Oct. 1990, at 47, 48.

34. The strength of familiar ways of thinking reinforced through habit has led, among feminists, to much soul-searching about such matters as why even "liberated women" continue to be the ones who wash the toilets. In an article on the halting progress of feminism, Vivian Gornick offers a partial answer:

newly revised perceptions and beliefs, however, tend to take on the same appearance of reality as had earlier ones. As Minow writes, "it becomes difficult to hold on to glimpses of the contestability of prevailing understandings of social differences, since to prevail is to make the conceptions seem real or natural" (at 238). Understandings may change as a result of thinking relationally, but each change will tend to take on the self-referential characteristics of that which it replaces, appearing again "neutral, based on merit or on other standards endorsed even by those who remain excluded" (at 239). All perspectives will tend to appear, to those who hold them, to be "reality"; only to those who do not hold them are they likely to appear as particular points of view.

The fact that new perceptions and new arrangements arrived at after careful reconsideration of old categories are no less socially constructed and no less likely to sustain themselves as natural and inevitable might seem a contradiction or flaw in the social-relations approach. Not so. Relationalism is a theory about categories that does not distinguish between the old and the new. All social arrangements use categories that tend to privilege some norms over others. The tendency to hold on to present beliefs as if they were timeless[35] is thus not a contradiction of relationalism. It is, rather, a manifestation of the theory and, at the same time, a failure to take it seriously.

In the remainder of this essay, I will explore two other issues that represent potential confusions in relationalism and show that behind these confusions are important insights that represent strengths, not weaknesses, of the theory. One issue is the role of norms within a social-relations approach. Minow speaks of the need to eliminate "harmful" exclusions of the less powerful members of society and proceeds as if that criterion were both self-evident and compelled by the social-relations approach itself. It is not. I explore Minow's unstated normative assumptions and the extent to which they operate outside of, rather than as a product

---

> It often seems to me the progress of feminism is very much like that of psychoanalysis. Roughly speaking, there are two parts to analysis. First comes insight: collecting data on the damage within; then comes extrication from the personality that has developed in response to the damage. The first part is easy, the second part hell. Insight comes in a rush: swift, exciting, dramatic. Extrication is interminable: repetitious, slogging, unesthetic. At least 32 times a year for six or seven years the patient repeats original insight as if for the first time. And then, when the analyst can hardly believe this is going to happen again, the patient announces, "Now I see clearly what I have not seen before." The analyst passes a tired hand across a weary brow and replies: "You saw that clearly last month, and last year, and the year before. When are you going to *act* on what you see?"

"Who Says We Haven't Made a Revolution?" N.Y. *Times Mag.*, 15 April 1990, sec. 6, at 24, 27.

35. Barbara Herrnstein Smith labels this tendency "cognitive conservatism," in an article which provides a highly sophisticated analysis of the relationship between belief and resistance. See her "Belief and Resistance: A Symmetrical Account," 18 *Critical Inquiry* 125 (1991).

of, the social-relations approach she advocates. Although I argue that the social-relations approach does not compel any particular normative commitments, I also contend that it does not put any such commitments out of bounds. A social-relations approach requires recognition of the socially constructed nature of one's normative commitments but not concessions as to their validity. In other words, relationalism does not require one to abdicate one's standing to argue, from one's perspective, which social arrangements are superior to others. Truths are contingent on perspectives, but within those perspectives, normative claims make sense.[36]

The other issue I will discuss is the complex relationship beween relationalism and human agency. On the one hand, if categories are human constructions rather than natural phenomena, humans should be able to revise them. On the other hand, an account of individuals as being constructed by the categories and social arrangements that surround them seems to leave little or no possibility for the exercise of individual responsibility for those constructions. I conclude that the fact that what many people, at a particular moment, take as "true" is actually socially contingent says little, if anything, about what power they have, or don't have, to revise what those truths are understood to be. I also contend that human agency is not an all-or-nothing matter and that Minow's theory of "gaps" and her method of deliberate and critical attention to one's perspective are useful ways of thinking about and exercising choice over one's constructed world.

MOVING TARGETS

Some confusion about the implications, and potential contradictions, of a social-relations approach is created by Minow herself when she blends, from time to time, her well-drawn attack against the tacit privileging of some characteristics over others with her broader, more vague critique of categories per se. In the broader critique, she appears to take on law as a system of thought and power, of which its process of categorization is a necessary part. Minow writes, critically, of the law's "preoccupation with boundaries" (at 9) and the "powerful human need to set boundaries" (at 10), charging that "law ends up contributing to rather than challenging assigned categories of difference that manifest social prejudice and misunderstanding" (at 9). Viewed in this way, the law's harmful processes of categorization and classification seem inevitable and unavoidable. The only hope would seem to be a radical reconceptualization of law itself.

Elsewhere, however, Minow's indictment seems more narrowly fo-

36. See Katharine T. Bartlett, "Feminist Legal Methods," 102 *Harv. L. Rev.* 829, 880–87 (1990) (describing "positional" truths).

cused on particular legal categories rather than on the way law operates as a system. Seen thus, the problem is not that law uses categories but that existing categories are harmful and discriminatory. Consistent with this strand of her critique, Minow concludes that it is pointless to think about eliminating all boundaries and categories, which are, she concedes, "inevitable" (at 390). "The choice is not between boundaries and connections; it is a question of what kinds of boundaries and connections to construct and enforce" (at 11).[37] This second critique requires not the drastic reconceptualization of law but only the creation of better laws.

While Minow may unnecessarily blur these two types of critiques, I believe that she means to make both a general observation about law in general and specific criticisms about specific laws. Her general criticism, however, is not strictly speaking a criticism against the inherent harm of categories but rather a criticism of the tendency of people to endow those categories with qualities that create harm. Minow uses her criticisms of certain, specific legal categories to show how people tend to treat these categories in ways that tacitly privilege some characteristics as normal and penalize other characteristics as abnormal or deviant. According to Minow, the harm of legal categories, in significant part, is derived from societal misunderstanding about the nature of law and the categories it produces. Legal categories are taken as obvious and natural when, in fact, they are social choices, attaching consequences to characteristics that are neither inevitable nor immutable. It is not, then, just that some rules and practices based on particular categories and classifications are "wrong" from Minow's perspective; it is that the customary ways of thinking about law are likely to attribute to existing legal categories—whatever they are—a misleading appearance of inevitability. Law is not *necessarily* an instrument of harm and evil, but it becomes so to the extent that people remain ignorant of, and thereby accept, the implicit hierarchies.

As I read her work, Minow believes that when law is approached relationally, people are less likely to accept as reality or truth the privileges implicitly contained within legal categories and thus more likely to consider the merits of alternatives. Thus, a relational way of looking at law will lessen the likelihood that legal categories will cause harm. Minow illustrates this dynamic when she explains the possible ways out of what she calls the "difference dilemma," the phenomenon by which efforts to eliminate the harmful effects of difference perpetuate the categories that cause those effects (at 19–21). To Minow, the difference dilemma is not a hopeless inevitability, but "a symptom of a particular way of looking at the

37. It is in this same vein that Minow quotes Lon Fuller: "[T]he trouble with the law does not lie in its use of concepts, nor even in its use of 'lump concepts' . . . [but] in the fact that we have sometimes put the 'lumps' in the wrong places, and . . . forgotten that the 'lumps' are the creations of our minds" (at 370–71).

world" (at 79). It is not the existence of categories in itself, but their treatment as neutral and natural that creates the harm they are intended to eliminate. This problem may be alleviated if, as a result of understanding the dangers of exclusion and oppression that categories sustain, perceptions about the appropriate status to be given to categories are changed. Viewed as ever evolving weapons to be used on a series of ever moving targets rather than as fixed descriptions of the natural divisions and hierarchies of the world, categories may begin to lose their sting.

A risk to which Minow might have given more attention is that the kind of ceaseless rethinking of legal categories required by a social-relations approach can make the law as a practice an impossibility. How can law work if it must be subjected to endless rethinking and critical analysis? As Steven Winter writes, if there is no reliable bedding of truths which one may reliably internalize and act on, one is in the position of a beginning driver "whose hesitancy and conspicuous difficulty are the direct consequence of the need consciously to mediate all of her actions and decisions."[38] There is no simple response to this problem. There are risks, to be sure, in endlessly examining the assumptions of one's practice, and whether the risks outweigh the benefits depends upon one's view of the circumstances.[39] What a social-relations approach provides, against these obvious risks, is a method for identifying the comparatively less visible risks of accepting unconsciously the potentially harmful, hierarchical exclusions of the status quo, to which it is all too easy to acquiesce. The trick is achieve a balance that does not end the possibility of practice while inserting into practice a sensitivity to the processes of conformity by which exclusions become reinforced and taken for granted.

A social-relations approach might also appear to pose a threat to necessary processes of individual and group identity. These processes typically involve the attribution of differences to others in order to distinguish oneself from another and thus to define oneself. What relational approaches aim to do is break the link between the need to identify oneself in relation to one's differences from others and the impulse to denigrate or subordinate others. William Connolly argues that the reason difference becomes transformed into attributions to others of abnormality, inferiority, irrationality, weakness, or evil is that those in the position to make

38. Winter, 69 *Tex. L. Rev.* at 1882 (cited in note 24). Winter, like Minow, is more impressed with the costs of failing to expose and challenge those background assumptions than he is of the costs of instability. He writes of these larger dangers: "To the very extent that the legal decision maker gains the ability to focus her attention and imagination on the task at hand, she will be correspondingly unconscious of the implications of the conceptual tools that she employs in its resolution." *Id.* at 1883.

39. Along the same lines, Barbara Herrnstein Smith writes that whether "cognitive conservatism" is advantageous or disadvantageous depends on the conditions. See Smith, 18 *Critical Inquiry* at 138 (cited in note 35).

such attributions are insecure.[40] This insecurity derives, in part, from the gap experienced between the ideal of freedom and people's inability to control the multiple contingencies in their lives. For Connolly, it is when life, which in a democracy is supposed to be "free," seems most out of our control that we are most likely not merely to define ourselves in relation to others but also to ascribe to those others ugliness and blame for our own particular predicaments. The greater the existential resentment, the more intense are efforts to "protect the purity and certainty of a hegemonic identity"[41] and, in turn, the more necessary to society an identifiable set of "losers and misfits" becomes to provide "a living contrast through which generally admired conventions of identity and responsibility are tested, validated, and vindicated."[42]

The problem with which Connolly is primarily concerned is the conflict between social completion and social injustice:

> The human animal is essentially incomplete without social form; and a common language, institutional setting, set of traditions, and political forum for enunciating public purposes are indispensable to the acquisition of an identity and the commonalities essential to life. But every form of social completion and enablement also contains subjugations and cruelties within it.[43]

Although Connolly sees this problem as a "paradox," it is not, to him, an entirely insoluble one. Rather than choosing between identity (on either the individual or group level) and social justice, Connolly urges a form of politics by which identity is acknowledged as important but relational. Once difference is understood as having consequences that are to a great extent socially constructed rather than natural or inevitable, it becomes more difficult to disown responsibility for those consequences or to judge others for their failure to conform to some predetermined criteria. Connolly concedes that if there were such a thing as "true identity," the politics he suggests might in fact impede its realization.[44] Like Minow, however, Connolly rejects the possibility of a "true," realizable identity and, in that rejection, finds the risks of uncertainty and paralysis which for some might accompany the understanding that their own truths have no final, sure foundation less unacceptable than the risks of exclusion and marginalization that occur when those with power attempt to secure their own identity at the expense of others.

Although neither cites the work of the other, Minow and Connolly

40. Connolly, *Identity/Difference* 64–65 (cited in note 7).
41. *Id.* at ix.
42. *Id.* at 204.
43. *Id.* at 94.
44. *Id.* at 66.

are on similar tracks. Notwithstanding the harms of difference, Minow does not aspire to end categories needed to keep order and Connolly does not trivialize the human quest for individual and societal identity. Both question, however, whether these values require the we/they view of the world that privileges some at the expense of others and that hides privilege behind claims of objective truth, universal commonality, and self-evident difference. Both also are hopeful that an understanding of how categories and labels tend to exclude and marginalize might help to generate more inclusive ways of establishing order and identity.

THE GOOD, THE BAD, AND THE UGLY

Minow speaks often of the improvements in social arrangements one might expect from following a social-relations approach. Whether any particular reform is an "improvement," of course, depends on the existence of criteria by which they can be judged. Minow claims to obtain her primary criterion from the social-relations approach itself—whether power will be more evenly distributed among society's members:

> [T]he social-relations approach points toward a particular, normative evaluation of legal assignments of difference: attributions of difference should be sustained only if they do not express or confirm the distribution of power in ways that harm the less powerful and benefit the more powerful. (At 112)

Minow's concern for the relatively less powerful members of society is a constant throughout her book. In tracing the intellectual roots of the social-relations approach, she searches sources that share her concern for the members of society most often thought of as marginalized.[45] She chooses her examples to illuminate the invisible oppressions particularly of children, the disabled, women, and religious and racial minorities. The success of her social-relations approach is evaluated in light of its promise for members of these groups. Thus, for example, she finds her approach vindicated when, applied to the subject of pregnancy and childbirth, it justifies work leaves, adjustable work hours, and other institutional supports for working families (at 88–89). The approach "works" when applied to the issue of the rights of the hearing-impaired child, when it serves to support what Minow concludes is the best answer: that the child's classmates be invited to learn to communicate with the child in her lan-

45. For example, Minow quotes the questions asked by Barbara Johnson, a professor of French and comparative literature: "How can the study of suppressed, disseminated, or marginalized messages within texts equip us to intervene against oppression and injustice in the world?" (at 202).

guage (at 227). Applied to the issue of affirmative action, the approach proves itself when it justifies measures to ensure inclusion of previously excluded or underrepresented groups (at 386).

There are two types of problems with Minow's use of the criterion of avoiding harm to the less powerful. First, she leaves vague the meaning of the key terms and, in so doing, skirts some of the difficult problems that would need to be resolved for the criterion to be useful. "Harm," for Minow, plainly has a broad scope, encompassing such things as the "social distance and exclusion" that "are likely to be . . . the self-serving expressions of the more powerful" (at 224). What meaning will these concepts actually be given? To be entitled to have one's perspective given special attention, for example, how powerless does one have to be? Is absolute equality of power an essential, self-evident good? Perhaps powerlessness is a comparative norm, but if so, what degree of disparity in power warrants recognition? How will determinations of powerlessness be made (and by whom)? Should children be as powerful as their parents? How are comparative claims of disadvantage and oppression to be weighed? To what compensating redress will the powerless be entitled? Are the powerless to be afforded all possible advantages until they are no longer comparatively powerless?

Apart from a general disposition in favor of certain dispossessed, it is especially difficult to discern how, in Minow's scheme, competing social goals would be addressed. Minow supports mandatory job-security legislation for pregnant women, for example, on the grounds that such protection helps to "replace . . . the unstated norm of the male worker without family duties with a new norm of a worker with family duties" (at 88). But what would a workplace that reflects the norm of the working parent actually require: Is a 3-month disability leave in connection with the woman's pregnancy and childbirth enough? What about another 6 years to stay at home raising her preschool child? Or 18? And why stop at unpaid leave—why not paid leave as well? What about double pay, to reflect the extra hours, or the loss of seniority and benefits of work experience?

Minow also does not discuss the values that potentially would be frustrated by any sort of mandatory job security for pregnant women. To take just three, job-security laws cost money and may be inconvenient to the employer; they encourage woman to go back to work instead of staying home with their newborn children; and they create "advantage" for workers with one kind of need (pregnancy and childbirth) vis-à-vis others (other medical or family problems, for example). Note that each of these values can be linked to powerlessness: small-business employers steadily losing ground to the multinational corporations that can more easily absorb the costs of maternity leave; children whose needs are arguably all too often

subordinated to the interests of adults; and workers whose ill health or other family responsibilities leave them less competitive in the workplace.

A way out of this particular example might be to challenge the particular empirical premises of each of these competing values. How much would it *really cost* to institute minimal maternity leave policies? Are unemployed mothers really more beneficial to children than employed ones? Why not leave it up to the employer who is concerned about horizontal equities to voluntarily extend job security to other classifications of employers?[46] The point here, however, is not whether mandatory job-security legislation for pregnant women is sound; it is that Minow's goal of eliminating classifications that harm the less powerful does not tell us how to evaluate any such specific measures when the competing values of others who lack power are implicated.

Moreover—and this is the more fundamental difficulty with Minow's attempt to link the social-relations approach to particular substantive outcomes—even if Minow could be more specific about the criteria she proposes to use, a social-relations approach would not compel it. A social-relations approach sets up a problem, underlining the presence and importance of unstated norms: it searches for the difference of pregnancy not exclusively in the pregnant woman, but in the social arrangements that impact on pregnancy, including the workplace; it "questions why the individual worker must bear responsibility for differing from the norm" (at 89). The approach taken alone, however, does not, and cannot, demonstrate what social arrangements are better than others; indeed, its central insight is that such demonstrations are contingent upon one's particular circumstances and external commitments.

This point may be further clarified by examples of categories and exclusions that may seem to many quite uncontroversial. Consider the category of the "lazy" worker. Is laziness a trait it would be wrong to "locate in" the individual rather than in the social arrangements that currently penalize this trait? Minow's approach trains us to look carefully at the label "lazy": Is it hiding some other oppressive and unjustified judgment? But what is oppressive and unjustified? Might it be argued that there are circumstances when laziness should be overlooked, such as when the employee did not receive the advantages of an upbringing that taught her the values of hard work and determination?

46. This was the suggestion the Supreme Court endorsed in the *CalFed* litigation. See California Federal Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987). The point of the litigation, of course, was to test the limits of legislative action, not employer prerogative. The ability of private parties to avoid discrimination is not ordinarily a defense to state-created discrimination. Moreover, even if the problem of fairness is shifted to the employer, the normative questions simply reappear: Where does the employer have to stop? Is it enough to offer job security to workers who take leaves for any medical disabilities? Any family-related temporary leave? Temporary leave for any good reason? What is good reason?

What about rules and policies that stigmatize or condemn members of the Klu Klux Klan, skinheads, or any number of other "hate groups"? Is it appropriate to "marginalize" members of these groups?[47] Does the principle of inclusion require accepting groups that exclude?[48] Minow writes that this problem is especially acute in public education where certain common values, like tolerance and participation, are taken as fundamental: "If legal norms . . . embody a kind of intolerance for difference, it is difficult to imagine any shared normative endowment" (at 385).

Perhaps the exclusion of any marginalized group that itself does not respect the inclusion principle could be justified. Under this "golden rule" approach, one should not be able to seek the benefits of a principle one is not willing to extend to others. The problem is that this rule merely restates, without resolving, the question begged by the inclusion principle: What exclusions are acceptable and what ones are not. Some exclusions may be defensible in order to address the oppression of the excluding group. Do feminists, for example, have "good" reasons for excluding men from their "consciousness-raising" support groups? If so, does this exclusion render them an exclusionary group, thus not entitled to inclusion by others? How about single-race or single-sex schools dedicated to restoring black male self-respect or the confidence of middle-class adolescent women? Law schools that exclude some applicants of both sexes and all races on the basis of standardized test scores and undergraduate grades? Consumers who exclude pizza chains whose president financially supports a cause they don't like? (Does it matter whether the cause itself is on behalf of a marginalized group? Do women seeking abortions qualify as a marginalized group?) In short, an approach that attempts to eliminate exclusion of the "less powerful" may seem "good" as a general matter, but it may provide so little guidance that it will only affirm existing sensibilities about which traits should be viewed empathetically, as characteristics for which society must accept responsibility, and which ones should continue to be used as a basis for exclusion and denial.

The failure to provide more concrete, practical criteria for evaluating and reconstructing difference will be, for many, highly frustrating. This is essentially Judge Richard Posner's complaint when he states that Minow's book doesn't solve any difficult problems.[49] Ironically, however, it may be in offering solutions rather than in failing to offer enough where Minow is most vulnerable. Minow herself, at several points, recognizes that the social-relations approach is not supposed to yield determinate, verifiable so-

47. Note that one does not have to be *completely* excluded—as blacks, children, the handicapped, etc., are not completely excluded from our society—to be marginalized. One can have a safe place to go, financial resources, and even a U.S. senator to represent one's group—and still have virtually no power or standing outside the confines of one's group.

48. Minow (at 385) labels this problem the "paradox of intolerance."

49. Posner, *New Republic*, 15 Oct. 1990, at 47, 48 (cited in note 33).

lutions to concrete problems: "Relational concerns do not 'tell us what to do' in times of conflict and difficulty" (at 222). It shifts frames of reference, making us skeptical of prestated commitments and helping us to see alternatives to "a rigid either/or thinking that constrains moral understanding" (*ibid.*). But the impossibility of settling normative questions through the method alone is at the heart of the approach that she urges; substance cannot be evaluated transcendentally but only from the point of view of particular and contingent perspectives.

Minow offers examples because she is herself pragmatic and wants solutions to real life problems.[50] But she cannot give solutions based on the social-relations approach alone. For concrete answers, she needs some particular frame of reference, substantive commitments, and norms, all of which commitments are necessary to practice, but they are separate from the social-relations approach itself, which cannot either prove or disprove their validity. Relationalism is a theory about how hierarchy is created through categories, not which hierarchies are better than which. While Minow does not consistently own up to the distinction between the social-relations approach and the substantive criteria she brings to her applications of it, she is usually careful to make it clear that her approach applies to all categories and solutions regardless of the criteria which underlie them. Thus, even as she makes proposals for reform of rules and practices affecting the excluded, she warns against "simply enshrin[ing] a new and better norm against which to judge difference" (at 89).

For Minow, then, it is not that there are, *for her*, no useful criteria for determining truth; it is that any individual committed to relationalism must seek to understand many different criteria, from many different perspectives, or else be caught in the kind of categorical thinking that causes difference to be identified and reified in unthinking, potentially harmful ways. These criteria are mediated daily, as human actors attempt to resolve social conflict and broker what counts as harm. To cut short this mediation by preestablished norms is to abandon relational thinking altogether.

Minow's most interesting discussion of this point occurs in her analysis of the well-known story by Susan Keating Glaspell, "A Jury of Her Peers." In this story, a sheriff's wife and her friend go with the district attorney and sheriff to a farmhouse to investigate a farmer's murder. The farmer's wife has been arrested for the crime, and in gathering some of her belongings, the two women find clues that implicate her, including a clue which suggests a motive: the farmer's wife's dead pet bird, whose neck the

50. Posner writes that when Minow does attempt to address a concrete problem, her solutions are not "reassuring." *Id.* at 48. The example he cites is Minow's proposal that all the children in a class which includes a deaf child learn sign language. In fact this proposal has been implemented in a school in Albany, California, with excellent results. Telephone conversation between author and Evelyn Frank, 9 Feb. 1992.

women believe the farmer had broken and on whose behalf the farmer's wife appears to have sought revenge. The two women come to understand the anger and desperation the farmer's wife must have experienced and, in sympathy, hide the clues they have found.

In discussing the possible reactions to this story, Minow writes, "[s]ome may worry that the story . . . condone[s] a kind of relativism, a suspension of judgment about right and wrong" (at 221). But the story's point, according to Minow (and here is where she remains truest to the relational approach she advocates), is to "reject the whole idea that principles, norms or abstractions can or should 'tell us' anything" (at 222). For those willing to try to hold in abeyance habits of thinking in either/or terms and of assuming that the good or bad one perceives is the real or true, Minow's willingness to defer from having the answers to the questions she poses is not a cop-out; it is proof that she means what she says. The "truth" of difference is relational—what makes the most sense to somebody at a particular time and place.[51] It is shifting, contingent, and forever in play. Judgment must be reserved, waiting for others to speak and for missing perspectives to be manifest. It is, in the end, the very ambiguities of right and wrong that a social-relations approach is intended to expose.[52] Its purpose is not to provide final answers but to alter the status of finality usually given to claims of right or wrong.

---

51. For different versions of nonfoundationalist normativity, see Bartlett, 103 *Harv. L. Rev.* at 880–87 (cited in note 36) (positional truth); Donna Haraway, "Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective," 14 *Feminist Stud.* 575–84 (1988) (partial, locatable, critical knowledges); Richard A. Schweder, *Thinking Through Cultures: Expeditions in Cultural Psychology* 29 (Cambridge, Mass.: Harvard University Press, 1991) (multiple objective worlds); Barbara Herrnstein Smith, "The Unquiet Judge: Activism without Objectivism in Law and Politics," in Allan Megill, ed., *Rethinking Objectivity* (forthcoming 1992) ("Smith, 'The Unquiet Judge' ") (constructivist-interactionist accounts of knowledge). A number of theorists have situated their concepts of relational truth in specific evaluative domains. Some have focused on the concept of our best moral selves. See, e.g., Charles Taylor, *Sources of the Self: The Making of the Modern Identity* 58 (Cambridge, Mass.: Harvard University Press, 1989) (we evaluate what is better and worse in reference to the "best account" we have of ourselves); Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* 5 (Berkeley: University of California Press, 1984) (moral truths determined by "the best picture I have of myself"). Others emphasize the degree of orderedness that any candidate for truth may offer to existing perceptions. See, e.g., Robert O. Johann, "An Ethics of Emergent Order," *in* H. Beckley & C. Swezey, eds., *James M. Gustafson's Theocentric Ethics* 190 (Macon, Ga.: Mercer University Press, 1988) (arguing that reasoned ethical values are those which "fulfill our quest for good order"); Steven L. Winter, "Indeterminacy and Incommensurability in Constitutional Law," 78 *Calif. L. Rev.* 1441, 1505 (1990) (judging his own understanding of the Constitution by what "makes the most sense in terms of what you already know to be true of your own experience").

52. Again Connolly's relational approach runs parallel, although without explicit reference, to Minow's. To Connolly, ethical life is replete with paradox, and it is the effort to deny or submerge paradox that stimulates authoritarian politics. See Connolly, *Identity/Difference* 64–94 (cited in note 7).

GAPS

The final problem I will address in this essay is the problem of human agency. Minow's social-relations approach appears to point in two opposite directions. On the one hand, she emphasizes that the givens that define difference are "humanly constructed . . . human inventions" (at 178) and that "the ways we treat people, the traits we call 'different,' and the social institutions that embody and reinforce those assumptions" are "human choices" rather than "acts of discovery" (at 216; see also at 390). These emphases might lead one to conclude that there is reason to be optimistic about the human capacity to effect change. Reality is *not* simply a given or something to put up with; it is constructed, by people, who then perceive it as real. It would seem that what is humanly made should be able to be humanly unmade.

Consistent with the view that human choices are "mutable" (at 390), Minow seems to put great stock in the potential for meaningful change at the individual level. Minow's methodology begins with individuals paying "deliberate attention to [their] own partiality" (at 389), engaging in "self-reflection" (at 178), and making an effort to develop a "sensitive awareness of perspectives other than [their] own" (at 63).[53] Minow appears to assume that when one is critical of one's own perspective and attempts to understand perspectives that are not represented in the prevailing perceptions of society (at 67 ff., 95),[54] one's own perspective will change and this change will make a difference.

On the other hand, Minow also appears to appreciate that the social constructedness of our social perceptions makes it difficult to imagine alternatives to existing categories and arrangements, or even to acquire the will to do so. She cites approvingly Mary Douglas's point, for example, that individuals have little independence of perception in the face of broad institutional forces: "Institutions establish what count as correct and incorrect patterns of thought . . . When the institutions make classifications for us, we seem to lose some independence that we might conceivably have otherwise had" (at 79). Minow affirms elsewhere that it is the "community" which has responsibility for categories and their meaning, not iso-

53. Minow's notion, here, is similar to Drucilla Cornell's notion of the "self that constantly seeks to divest itself of sovereign subjectivity." See Drucilla Cornell, "Post-Structuralism, the Ethical Relation, and the Law," 9 *Cardozo L. Rev.* 1587, 1625 (1988). For other legal theorists who have sought to incorporate the notion of effort into some notion of situated truth seeking, see Bartlett, 103 *Harv. L. Rev.* at 881 n.229 (cited in note 36).

54. Minow's examples of what can happen when this individual effort is made tend to emerge from discussions of how judges ought to look at the cases before them. She argues, for example, that a challenge to the death penalty looks quite different from the perspective of the black defendant who is 4.3 times as likely to be sentenced to death for killing a white than for killing a black (at 66–68) and that a challenge to a zoning ordinance restricting group homes looks quite different from the perspective of persons who have no meaningful opportunity for independence except in group living situations (at 114–18).

lated individuals (see, e.g., at 176),[55] and while she does not examine fully the implications of this observation,[56] it would seem to undermine to some degree the faith she exhibits in the potential for individual change. Indeed, the core of relational thought is social contingency, which by its own terms negates individual control. To even imagine "human choice" is to assume, at the least, a "relatively autonomous subject,"[57] a version of the self which the social construction thesis forcefully rejects.[58]

The tension between Minow's method of individual self-conscious attention to one's own partiality and her analysis of institutionalized mechanisms of control and contingency parallels a central postmodernist paradox: The social-construction thesis appears to free the individual to exercise some responsibility for the power imbalances in society by exposing the extent to which reality is humanly created rather than a fixed set of givens, only to take that freedom back by locating the power to define reality in the remote and social forces which preemptively shape our environments, our beliefs, and our emotions.[59] This apparent tension, again, is less a weakness than an affirmation of the theory. It presents itself as a confusion, initially, because of the ambiguity of the concept that perceptions are "socially constructed." When Minow states that categories are "humanly made" (at 390), I believe that she is making the limited claim that these categories are not divine, natural, or inevitable. While it may sometimes appear otherwise, she is making no claim about the degree of human control that individuals exert over the process of "human" construction. Thus, she can consistently assert that difference is a social rather than a natural phenomenon while still leaving room for varying roles for individual humans and for other institutional and social groupings in the social processes of construction.

---

55. Jack Balkin makes a similar point in describing the social theory underlying critical legal studies work: "The very structure of individual perception, belief and desire, and thus the terms of individual choice, are already shaped by culture and ideology even before the individual begins to choose." J. M. Balkin, "Ideology as Constraint," 43 *Stan. L. Rev.* 1133, 1137 (1991). For the "classic" statement of this position, Balkin cites Peter L. Berger & Thomas Luckmann, *The Social Construction of Reality: A Sociology of Knowledge* (Garden City, N.Y.: Doubleday, 1966).

56. Nor does she distinguish the dynamics of *individual* and *institutional* acquisition and transformation of belief. For an excellent discussion of both, see Smith, 18 *Critical Inquiry* 125 (cited in note 35).

57. See Philip Schlag, "Fish v. Zapp: The Case of the Relatively Autonomous Self," 76 *Geo. L. Rev.* 37 (1987).

58. Again, William Connolly's work (*Identity/Difference*, cited in note 7) is helpful in extending Minow's analysis. To Connolly, a unified, self-responsible agent is the version of the self that "contains resentment in its very formation" and therefore that most tends to transform difference into otherness, evil, abnormality, and irrationality. To the extent that individuals are seen (mistakenly) as entirely responsible for themselves, it is easier to judge their differences (and the consequences of those differences) as blameworthy or deserved. *Id.* at 78.

59. For a discussion of this tension within the CLS movement, see Balkin, 43 *Stan. L. Rev.* 1133 (cited in note 55).

Once the way is cleared to begin considering the question of human agency, Minow's instincts appear to be that human agency is not an either/or proposition. Minow urges critical self-reflection and understanding the perspectives of others, while admitting, tentatively, "it is unclear whether anyone can ever really take the perspective of another" (at 113; see also at 63). To the extent we have access to our current, apparently settled ways of thinking, it is because there are inconsistencies and anomalies which create *gaps* between "prevailing perceptions and [our] own experiences" (at 80). These gaps constitute openings through which individuals might grasp those parts of the conceptions of others that might otherwise be blocked from view.[60] William Connolly refers to these gaps as "imperfectly colonized [audiences]."[61] Gaps are "obstructions, frictions, and contingencies" built into the interdependencies of what otherwise presents itself as "a smooth, harmonious pattern of mutually sustaining parts."[62] Minow would agree with Connolly, I think, that some elements of our identity are less susceptible to reconstitution—more entrenched, so to speak—than others.[63] Nonetheless, both seem to find that the ways in which individual experiences interact with the social experiences within which these experiences are processed are complex enough

60. Mary Douglas, whom Minow quotes, puts it in terms of "non-fit": "mercifully, the system of classification never fits. When there is non-fit, there is choice" (at 371–72). See also Elizabeth M. Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement," 61 *N.Y.U. L. Rev.* 589 (1986) (describing how legal rights expanded and evolved as existing legal doctrines were made to fit women's actual experiences); Smith, 18 *Critical Inquiry* at 135–38 (describing how experiences affirm, alter, and winnow beliefs) (cited in note 35).

Jack Balkin, among others, has developed a notion of subjective experience as one both dependent on and differentiated from the cultural constraints arising from settled social arrangements. See Balkin, 43 *Stan. L. Rev.* at 1146 (cited in note 55). See also Winter, 78 *Calif. L. Rev.* at 1493–94 (cited in note 51): "The elaboration of meaning is simultaneously the product of past sedimentation, current human intentions, and larger cultural contexts that support its advent."

61. Connolly, *Identity/Difference* at 210 (cited in note 7).

Anthropologist Richard Schweder's work on anthropological understandings of objectivity and subjectivity suggests a possible source of the capacity to identify gaps and to understand other perspectives. In attempting to explain the apparent diversity of human conceptions of reality, Shweder hypothesizes the "universal latency" of all perceptions, "in which everyone has got everything," coexisting with "specialized institutionalizations of incompatible and diverging manifestations." Shweder, *Thinking Through Cultures* 6 (cited in note 51). "Others are not fundamentally alien to us," Shweder writes, "just inconsistently and importantly different in their conception of things. . . . Yet the conceptions held by others are available to us, in the sense that when we truly understand their conception of things we come to recognize possibilities latent within our own rationality, or existent in the history of our own reason, and those ways of conceiving of things become salient for us for the first time, or once again." *Id.* at 5. I read Schweder's hopeful hypothesis to be that if we are born with the capacity to adopt any one of a number of set of cultural assumptions, it is possible that the capacities not yet engaged remain dormant, but (with some effort) retrievable, like learning a new language or way of expressing emotion.

62. Connolly, *Identity/Difference* at 204 (cited in note 7).

63. *Id.* at 176.

to stimulate discovery of extensions or voids even in the most familiar pockets.

While the outlines of a theory of human agency are not fully developed in Minow's book, it appears that Minow's relational approach to difference presupposes a blend of choice and constraint which both limits and enables creativity.[64] The social construction of difference limits individuals more than the deeply engrained assumption of the "autonomous self" would suggest; but to Minow, it seems inconceivable that individuals self-conscious about their situated worlds and determined to comprehend the perspectives of others will not be able to see (occasional) openings between prevailing perceptions and their own experiences of the world, through which they may drive wedges, glimpse new realities, and help to alter those prevailing perceptions.[65]

Minow focuses on the individual's "struggle" to give relentless attention to the tendency to oppress on the basis of difference. Minow also understands the importance of struggle at a more institutional level among the groups that have an interest in those categories. "Simplifying constructions of reality are not made by individuals or by a society in unanim-

---

64. Steven Winter, in almost everything he has recently written, urges such a blend. See his "Foreword: On Building Houses," 69 *Tex. L. Rev.* 1595, 1603 n.35 (1991) (collecting references).

Since to some extent what makes sense to us is shaped by the conceptions on which previous categories were made, it is almost inconceivable that those norms will represent a vastly significant break from the past. See Winter, 78 *Calif. L. Rev.* at 1468 (cited in note 51). In Winter's view, self-consciousness is not a means to achieve "spontaneous freedom to reconstruct the social world. To the contrary, the potential yield of situated self-consciousness is rather more like a topographic map of the sedimented field in which transformative efforts necessarily take place." *Id.* at 1502.

65. Efforts by scholars who identify themselves with the postmodern project to make the case for human agency have almost invariably fallen back on the sorts of objectivist premises ruled out of order by that project. See, e.g., Margaret Jane Radin & Frank Michelman, "Pragmatist and Poststructuralist Critical Legal Practice," 130 *U. Pa. L. Rev.* 1019, 1058 (1991):

> It seems a possibility worth considering that there is not, and is not going to be, any critical speaker for whom the reconstructive, the visionary, the committed moment is not always already coming, and thus is not always already here. We can deconstruct because we can reconstruct. . . . As the reconstructive moment seems ineradicable, so too does the human experience of agency. It seems, in other words, a possibility worth considering that the problematic, elusive, "humanist" experience of subjectivity—agency—is an historically irreversible, inexpungible, constitutive aspect of our experience, of (human) being. Part of what we do, as concept-making strivers caught in forms of life, is think about the good—the better—world and ourselves acting towards it. We cannot deny our own agency. (We cannot speak the sentence of denial except as speaking subjects, affirming by speaking the sentence [t]hat the sentence means to deny.) We can call agency into question, and we had better, but to call into question is also to (re) affirm, (re)create, (re)construct.

William Connolly takes a different track, although he, too, finds it necessary to make certain (in his case, negative) assumptions about the nature of the human subject: "We are not predesigned to be responsible agents, but we cannot dispense with practices of responsibility." Connolly, *Identity/Difference* 116 (cited in note 7).

ity; instead, they are shaped by political, economic, and social struggles over competing pictures of reality" (at 239).

William Connolly, again without reference to Minow, offers an expanded description of the notion of group struggle, which he calls the politics of "agonistic democracy." This is a politics which holds respect for diversity as a ideal while structuring that diversity as interests which are both interdependent and in strife. "[It is] a practice which disturbs the dogmatization of identity [and] folds care for the protean diversity of human life into the strife and interdependence of identity/difference."[66] It "affirms the indispensability of identity to life,"[67] but an identity that refuses "to live its own identity as intrinsic truth."[68] Connolly's ideal of freedom appreciates that contingency[69] cannot be eliminated and criticizes "modes of existential resentment that intensify social dogmatism with respect to identity, responsibility, and otherness."[70] In fact, the inevitability of contingency is the backbone of Connolly's politics of identity, the premise by which a democratic politics both expresses and unsettles personal and collective identities. When politics proceeds on the basis that commonalities are "complex contrivances," their "elements of contestability" can be brought out and the "possibilities suppressed" exposed.[71]

I doubt that Minow would find much with which to disagree in Connolly's ideal politics. While Connolly is far more explicit than Minow about the necessity and creative potential of strife and conflict,[72] both of them rely on what Connolly calls the "creative tension of contrary perspectives"[73] to unsettle congealed difference and to unmask new possibilities for the terms of human interdependence. In addition, while emphasizing the contingency of all that seems natural and good, both preserve a strong role for individual responsibility. Responsibility represents how one manages the tension between the sense of truth and harmony, normality and difference derived from the social contexts within which individuals function, and the sense of imagination, energy, creativity, and subjectivity individuals experience with respect to those same contexts.

---

66. *Id.* at x.

67. *Id.* at 33.

68. *Id.* at 46.

69. For Connolly's extended discussion of the multiple forms of contingency, see *id.* at 173–75.

70. *Id.* at 34.

71. *Id.* at 200.

72. By difference in emphasis, I mean not only how prominent the notion is in the overall thesis but how highly valued the notion appears to be. A subtle example arises in each scholar's use of the concept of distance. For Minow, "social distance" is a form of exclusion to be avoided (at 224), while for Connolly, the "distances that divide us" are a value to be acknowledged and preserved, through a respectful engagement among adversaries. *Id.* at 196–97. My point in using this example is not that either would disagree with the substantive point that the other is making but that their respective usages of the concept of distance reveal somewhat different orientations.

73. *Id.*

For Connolly, freedom itself means "[t]hat one has the *will* to self-responsibility."[74] For Minow as well, it is important to use whatever control we have consciously and deliberately: "We can and should confront our involvement in the responsibility for what happens when we act in a reality we did not invent but still have latitude to discredit or affirm" (at 381).

SMALL HANDS

Near the end of her book, Minow writes, "This all sound lovely, you may say, but awfully abstract. What actually happens?" (at 381) Interesting question. What does thinking about difference in the way Minow urges *actually do* for anyone?

Unlike some postmodern scholars,[75] Minow appears to reject the view that a theory that denaturalizes categories and denies the possibility of objectivity makes no difference to ongoing substantive debates about what social arrangements are better than others. I have argued, and I think Minow would concede, that there is nothing inevitable about where, substantively, a social-relations approach might lead anyone. Indeed, the uncertainty of results is not, for Minow, an unanticipated consequence; it is, rather, *the point*: there is little, now or later, that is inevitable about social arrangements. While specific results are not inevitable, however, I agree with Minow that relational approaches and the attitude of self-criticism and openness they cultivate may enhance the possibilities for social change. The premise of Minow's social-relations approach to difference is that an awareness of the social contingencies, the interdependencies, the relationships between truth and power, and the pain that categories can cause will stimulate the will and the way to loosen settled ways of thinking. For those who understand the relational dimensions of those versions of reality constructed through existing categories and rules, the power of those constructions to shape ongoing perceptions of reality may be weakened and, conversely, the power and willingness to reconstruct alternatives enhanced.

To the extent relational approaches become the norm, what needs to be justified and what counts as justification may change. Once it is accepted both that existing social arrangements are not presocial and natural and that no substitutes will bring all "interdependent and contending elements" into "perfect alignment,"[76] the question is not what is neutral or

74. *Id.*

75. See, e.g., Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* 1–33 (Durham, N.C.: Duke University Press, 1989) (the abandonment of formalism does not have any normative consequences); Smith, "The Unquiet Judge" (cited in note 51) (the elimination of objectivist claims would not eliminate all respectable justifications for legal or political claims).

76. See Connolly, *Identity/Difference* 35 (cited in note 7).

perfect but from which particular perspective it is most appropriate to determine what is desirable and just. Restating the question in this way will not *necessarily* change the answer currently offered by the status quo, but forcing a more explicit recognition of the existence of the implicit assumptions of the status quo and the revisability of those assumptions should enhance the likelihood that the openings for change will be recognized and considered.

As the burden of justification becomes more intense, so a social-relations approach might facilitate a drift toward labels that better reveal the social dimensions of difference. To give one brief example, a great deal of criticism has been made of the distinction favored by political conservatives between the "deserving" and the "undeserving" poor.[77] While I object to the substantive content of this distinction, I take heart in the fact that these categories do less to hide this content than more subtle terms, like dysfunctional families, welfare mothers, or single parents, often do. The incremental improvement may be small, but by comparison to these other terms, I believe the terms "deserving" and "undeserving" are more explicitly judgmental and thus are more exposed to public view, criticism, and debate. The values so expressed may be despicable (again, from one's particular perspective), but they can hardly pass for objective, natural, or inevitable.

Whether the revised social arrangements that may follow from a social-relations approach will be improvements to the ones that currently exist depends, of course, on the perspectives from which they are judged. One of the intriguing aspects of relationalism is that it suggests so much—a whole different view of the relationship between individuals and the social arrangements that organize them—while promising nothing. It opens up possibilities that cannot be specific in advance, evaluated objectively, or certified for all time as the best that can be. It situates responsibility for new visions of justice in individuals whose abilities to think and act freely (not to mention wisely) are, at best, highly suspect. It teeters between naive optimism and relentless cynicism. Whether these ambivalences make relationalism more or less appealing depends, once again, on one's substantive dispositions. Although relationalism compels no particular social arrangements, it is a particular way of looking at the relationship between individuals and their social contexts that will ring more true to some than to others. Somehow, for right now, I see no better alternative.

77. For one such criticism, see Martha L. Fineman, "Images of Mothers in Poverty Discourses," 1991 *Duke L.J.* 274, 282–85.