

BEYOND UNIVERSAL WOMEN: REFLECTIONS ON THEORIZING DIFFERENCES AMONG WOMEN

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It is a privilege to deliver the Viscount Bennett Lecture this year along with the Honourable Madam Justice Wendy Baker. Preparing this lecture involved a relatively straightforward, although somewhat selective retrospective analysis of how feminists, specifically those working in the law, have moved beyond the idea of a universal or essential woman.¹ Essentialism, as Trina Grillo writes,

is the notion that there is a single woman's, or Black person's, or any other group's experience that can be described independently from other aspects of the person – that there is an “essence” to that experience. An essentialist outlook assumes that the experience of being a member of the group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts.²

There is now a substantive body of theory articulating anti-essentialism and intersectionality, work that examines why race, class, gender, sexuality and disability are not separable experiences. I found, however, that I could not begin this review nor develop my own anti-essentialist critique of contemporary legal theories of differences among women without establishing a pre-condition to the discussion. Simply put, I am anxious that people do not hear my words as undermining how subordinate groups describe their daily experience of oppression.

My concern for the way in which I am heard has become pronounced in the last few years owing to an emerging trend among feminist academics with whom I have a common cause and, frequently, a shared conceptual framework of anti-essentialism. I refer to an eagerness among some White feminist academics to rely on anti-essentialist theoretical approaches to critique how scholars of colour articulate their resistance to racial oppression. This lecture explores such criticisms and outlines an anti-essentialist critique of how differences among women are understood in law. The purpose of this is not only to clarify my own position but also to underscore an important point: anti-essentialism for its own sake, unconnected to anti-subordination, does not represent an advance in feminist theory.

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¹I collapse the notions of a universal woman and an essential woman, although I am aware that others do not do so. See *infra* note 32.

²T. Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House” (1995) 10 *Berkeley Women's LJ*. 16 at 19.

I want to begin by changing the official topic of this lecture. While I have been asked to speak about women's diversity, I prefer to speak about difference. Diversity too often conveys an idea of endless variety which quickly descends into a multicultural spiral that leaves dominant cultural norms in place. Difference does not escape this spiral, but in preserving from the outset a sense of hierarchy it better equips us to trace these power relations. We generally speak of difference followed by an implied or actual preposition – different from or different to. Difference, as Lila Abu-Lughod argues, usually smuggles in hierarchy, and it is hierarchy that must be kept in mind when discussing the manner in which feminists have theorized about differences among women.³ Keeping hierarchical relations among women in mind, the purpose of changing the title goes beyond semantic quibbling. It helps to keep the focus on strategies for change that confront oppressive relations. As Chandra Mohanty suggests about racial and cultural differences, "difference defined as asymmetrical and incommensurate cultural spheres situated within hierarchies of domination and resistance cannot be accommodated within a discourse of 'harmony in diversity.'"⁴ Our strategies for change must go beyond what Mohanty terms "a harmonious, empty pluralism". The problem is not how to include all women, but rather how to recognize one woman's privilege as another woman's penalty.

I would like to see a shift from a politics of inclusion to one of accountability. Accountability stresses that the point of theorizing differences among women is to assist in ending relations of domination. With this standard in mind, the second part of this lecture looks briefly at a major movement in feminist theory from an additive model of oppression to one that recognizes that systems of oppression interlock. This integrative approach emerged from a sharpened anti-essentialist critique, one in which it was understood on a theoretical level that all women do not share a common core of oppression. It enabled feminists to begin to think about how women oppress women. Part three discusses how some White feminists speak a language of anti-essentialism but use it to critique political projects of people of colour. It is suggested that unless anti-essentialism is tied to accountability – that is, unless critique is linked to the goal of ending oppressive relations – it cannot escape the limitations of essentialism. In part four, the accountability measure is applied to legal explanations for differences among women, noting again that whenever descriptions of these differences enable dominant groups to remove themselves from the picture, to disguise, in other words, their own complicity in systems of oppression, hierarchical relations remain intact.

³L. Abu-Lughod, "Writing against Culture" in R. Fox, ed., *Recapturing Anthropology* (Santa Fe, N. Mex.: School of American Research Press, 1991) 146.

⁴C.T. Mohanty, "On Race and Voice: Challenges for Liberal Education in the 1990s" (1990) 14 *Cultural Critique* 179 at 181.

From Additive Analysis to Interlocking Systems

It has been exceedingly difficult to come to an understanding of the relations of privilege and penalty among women. I would like to offer some insights from my own process over the last ten years. For me, as for many others, thinking about differences among women and seeking to move beyond the notion of an essential woman began with a personal discomfort. I could not identify all the parts of myself in those first exciting descriptions of women's oppression which feminists sought to apply to law. When, for example, I read the path-breaking and empowering *Sexual Harassment of Working Women* by Catharine MacKinnon,⁵ I did not know whether this theory encompassed my own situation as an Indo-Caribbean woman. Sexual harassment is often impossible to untangle from racial harassment, the latter often taking on a sexual tone while the former often takes shape with racist ideas. What is a White, male colleague really thinking when he suggests to me that he has heard that women from the Caribbean are highly sexed? Is he thinking about my race or my sex? Further, does it matter? It does matter in law, as Kimberle Crenshaw, Nitya Duclos and others have demonstrated.⁶ Through an analysis of Canadian human rights cases, Duclos shows how women of colour disappear unless they can present themselves as similar to Black men or White women; neither prospect enables them to bring into focus for the law their own specific realities.

It was tempting at first to attempt to complicate the category "woman" through an additive analysis: take what happens to White, heterosexual, able-bodied, middle-class women and graft on the experience of racism, homophobia, abelism and class exploitation. It quickly became clear, however, that there are perils in taking a mathematical approach to oppression. The most obvious, as the example of sexual harassment shows, is the impossibility of separating the categories of experience. What was not so obvious, and what remained for a long time like an undiagnosed ailment, was the way in which an additive analysis made it difficult to account for privilege. It was hard to see how women oppress women, and harder still to work out a common politics that did not replicate existing hierarchies.

That systems of oppression combine at specific sites to secure privileges for some women at the expense of others first became evident to me in reading

⁵C. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979).

⁶K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U. Chicago L. Forum 139; N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 Can. J. Women L. 25.

African American feminists such as Audre Lorde, bell hooks and Patricia Hill Collins. In *Black Feminist Thought*, Collins explores how the ideological construct of White southern belles needs its opposite: Black women as slaves.⁷ Collins uses the term “interlocking systems of oppression” and describes how “a matrix of domination” exists, producing few pure victims or oppressors.⁸ Relying on the feminist theories of a wide range of Black women writers of the past two centuries, she writes that “each individual derives varying amounts of penalty and privilege from the multiple systems of oppression which frame everyone’s lives.”⁹

Hierarchical relations among women can be traced across all the categories of women. Once we begin to trace the discursive and material relations that give rise to categories of women in the first place, and we engage in the charting of various race and gender maps in a historically specific way, it becomes evident, as Anne McClintock has more recently shown, that:

Race, gender and class are not distinct realms of experience, existing in splendid isolation from each other; nor can they simply be yoked together like armatures of lego. Rather, they come into existence *in and through* relation to each other – if in contradictory and conflictual ways.¹⁰

Thus, in nineteenth century Britain, the cult of domesticity structured male/female relations, the self-definition of the middle class and was an indispensable element in the imperial enterprise. Elaborating on the same theme, Ann Stoler has shown that for Dutch colonies a “European family life and bourgeois respectability became increasingly tied to notions of racial survival, imperial patriotism, and the political strategies of the colonial state.”¹¹ Stoler has carefully elaborated the importance of the construct of the vulnerable white lady in need of manly protection: “A defense of community, morality, and white male power was achieved by increasing control over and consensus among Europeans, by reaffirming the vulnerability of White women, the sexual threat posed by native men, and by creating new sanctions to limit the liberties of both.”¹² This construct enjoyed great currency in the colonies and in the cities of Victorian England and continental Europe where it was an enduring plank in the doctrine

⁷P. Hill Collins, *Black Feminist Thought* (Boston: Unwin Hyman, 1990) at 170.

⁸*Ibid.* at 229.

⁹*Ibid.*

¹⁰A. McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Context*, (New York: Routledge, 1995) at 5.

¹¹A.L. Stoler, “Carnal Knowledge and Imperial Power: Gender, Race, and Morality in Colonial Asia.” in M. di Leonardo, ed., *Gender at the Crossroads of Knowledge: Feminist Anthropology in the Post-Modern Era* (Berkeley: University of California Press, 1991) 51 at 71.

¹²*Ibid.* at 70.

of separate spheres and, consequently, in the maintenance of patriarchy and class exploitation.

Analytical tools which examine how systems of oppression interlock differ in emphasis from those that stress intersectionality.¹³ Interlocking systems need each other and in tracing the complex ways in which they help to secure each other, we learn how women are produced into positions that exist symbiotically. Understanding the connections between systems of oppression, it is easier to see why it has been so difficult for each one of us to talk about our privilege at the same time as our penalty. An interlocking analysis reminds us of the ease with which we slip into positions of subordination (for example, the sexually vulnerable woman) without simultaneously seeing how this very location also structures race privilege. In focusing on our subordination, and not our privilege, and in failing to see the connections between them, we participate in what Mary Louise Fellows and I call "the race to innocence."¹⁴ More to the point, we fail to realize that we cannot undo our own marginality without simultaneously undoing all the systems of oppression.

An analysis of interlocking systems of oppression and a feminist political project that proceeds with a cautious eye to complicity in these systems holds much promise. Ideally, I would have liked to spend most of the time developing these themes, secure in the belief that we *have* moved beyond essential women and have taken the anti-essentialist critique to a more constructive place where an integrative analysis would enable us to devise better strategies for change. However, as I noted in the introduction, a disturbing trend has emerged, or perhaps more accurately, re-emerged, that makes my optimism premature. Of late, in important feminist journals and books, various writers have suggested that the effort to talk about race and gender oppression in the same breath is terribly flawed. That the criticism of integrative projects comes from well-placed White feminist academics is reason enough to pay attention. I share with these writers an understanding of the limits of essentialism and have in some cases gained a great deal from their theorizing. They are not theorists who should be dismissed lightly. Such critics vary in tone and intensity and certainly rely on a variety of theoretical tools, but they appear to share one common characteristic: a sense that racial subordination has diminished. The next section discusses the substance of these critiques, outlines examples of both crude and refined attacks on anti-racist

¹³Kimberle Crenshaw is generally credited with intersectionality theory in law, *supra* note 6. See Grillo, *supra* note 2 at 16 for a discussion of how this approach has been expanded by Adrienne Davis and others.

¹⁴M.L. Fellows & S. Razack, *The Race to Innocence* (New York: New York University Press) forthcoming.

projects and suggests why this type of anti-essentialist critique is incompatible with a politics of accountability.

Critiques of Integrative Projects

The project of attending to differences among women has always been rife with conflict but the accusations of the early days – accusations directed by White women to women of colour – are beginning to resurface. When I first began a kind of anti-essentialist critique, I felt like a perennial “party pooper”, someone who had spoiled the fun of a newly felt sisterhood. Indeed, it was made known to me that I had unjustly accused White women while letting White men off the hook – I suppose they felt accused of being racist. Scholars such as myself were accused of undermining the power of the first exciting descriptions of the male-centredness of law.

Today, the word on the street (and it is of course not so much on the street as in academic journals) is that in the rush away from gender essentialism, women of colour have simply essentialised differences and maliciously cast all White women as villains. Writers often express a yearning for the good old days when the description of women’s oppression possessed the “cultural authority”¹⁵ that was gained from speaking as a universal subject. Naomi Schor, in mourning the sisterhood and solidarity that a common description of women’s oppression could provide, illustrates this response. She writes:

I would argue that such a commonality, however tenuous, however contested, however limited in its geopolitical sphere of application, did exist in the early days of feminism and did make possible some of its greatest gains.¹⁶

Less nostalgically, and more aggressively, Jane Roland Martin suggests in an article published in a leading feminist journal, *Signs*, that White women scholars are having to endure an exceedingly chilly academic climate. Whereas Canadians associate a chilly climate with sexual harassment, for Martin the chilly climate is produced by those who judge White women’s scholarship by a harsher standard than that which is applied to men’s scholarship.¹⁷ Quoting Nancy Miller, she writes that White women scholars now live in fear – a fear of other women’s critiques. It is clear that Martin (and Miller) is referring to women of colour, although there are White women scholars who make anti-racist critiques. Her resentment is shown when she asserts that the academy clearly became more

¹⁵N. Schor, “French Feminism is a Universalism” (1995) 7 *Differences* 15 at 42.

¹⁶*Ibid.* at 28.

¹⁷On this point, I would have to agree. We generally have a higher standard for those who claim to be our allies.

comfortable for those who had previously been excluded while it became an exceedingly chilly research climate for White feminists¹⁸.

No less a scholar than Catharine MacKinnon, who has otherwise enabled us to think so deeply about the social construction of gender, has declared that there is a widespread and abhorrent "trivialization of the White woman's subordination."¹⁹ Anyone who suggests that White women are also privileged, MacKinnon proclaims, is bent on "dis-identification with women". Aiming low, she claims that all such critics really want is to be in a group that includes men.²⁰ To call this backlash is unhelpful. We need to re-examine what lies behind the words (the direct thrusts as well as the more refined ones) of some of these eminent feminist scholars who think that the project of theorizing women's differences has gone so terribly awry.

Most scholars concerned with the failings of current attempts to deal with differences among women do not go to the lengths of MacKinnon and Martin in accusing women of colour of stabbing White women in the back. However, the more refined criticism – that differences are now being essentialised – conceals a similar minimizing of racial oppression in the lives of women of colour. Christina Crosby, a women's studies scholar, in an article for the influential anthology, *Feminists Theorize The Political* (which includes the work of many prominent feminist scholars), begins her criticism of the way we currently "deal" with differences by asserting that:

"[D]ifferences" are now spoken everywhere in the academy. The demand to specify, to mark the (now familiar) differences of race, class, and gender is part of a general call for diversity, pluralism, for a multicultural academy. In research and teaching, in writing or awarding grants, in admitting students, in hiring and promoting faculty, one must now deal with differences.²¹

Clearly, Canadians do not live in the same universe as Crosby, or Martin for that matter, since Canadian academic and legal institutions have remained steadfast in their position that race and class must not be taken into account. In this country, there is a deep refusal to "deal with difference" and a marked complacency about the rising incidents of racist violence in and out of the academy. So steadfast are we in our claim to neutrality that the number of faculty members of colour has not

¹⁸J. Roland Martin, "Methodological Essentialism, False Difference, and Other Dangerous Traps" (1994) 19 *Signs* 630.

¹⁹C. MacKinnon, "From Practice to Theory, or What is a White Woman Anyway?" (1991) 4 *Yale J. L. & Feminism* 13 at 20.

²⁰*Ibid.* at 21.

²¹C. Crosby, "Dealing with Differences" in J. Butler & J. Scott, eds., *Feminists Theorize the Political* (New York: Routledge, 1992) 130 at 131.

changed for a decade and has even dropped in some places.²² But Crosby is right in so far as diversity, while not in everyone's budget, is at least on everyone's lips. Some of those speaking, however, are anxious to declare obsolete a concern with difference (we are all humans, equally meritorious, etc.) or, to borrow the language of human resources and the corporate world, to speak of an ominous management of diversity.

Claiming to be a member of the team that is devoted to "building for differences", Crosby argues that the problem today is that we have taken a very old, unreflective stance towards difference. Just as we once made the mistake of understanding women's identity as pre-ordained, something we would just have to discover and could confidently say applied to all women, now we understand differences as pre-given. The question used to be "who am I?"; but this has given way to "who are we?"²³ Difference has become an essence to be recognized rather than a process – a social and historical construction.

It is hard to disagree with Crosby when she notes that there is much to worry about when we rely on a theory of identity that remains so determinedly ahistorical and essentialist. Differences, she maintains, cannot be seen as self-evident; we must ask how they are socially produced. Crosby argues that we must be able to get from the particular to the universal so that each of us does not remain trapped in our own particularism. Until recently, I would have enthusiastically endorsed what I believed was a call to attend to the production of the categories of race, class and gender and how they interlock. I am now much more guarded, but not because I dispute the constructedness of categories or the complexities of their operation in and through each other. I have begun to notice that those who complain that we now see differences as pre-given also assume that women of colour have won significant gains in the academy. When Jane Martin maintains that, in the rush to be non-essentialist, we have constructed "the trap of pre-determined categories" and that we have unduly privileged race and class as fundamental variables,²⁴ I am reminded that this is the same person who thinks that the academy is comfortable for women of colour and chilly for White women academics. In other words, those who are complaining of differences being essentialized are very often also minimizing the continuing effects of white supremacy in the lives of people of colour.

²²In my institution, we are four in a faculty body of 120, and the academy is anything but comfortable for us or students of colour. Indeed, it has not been physically safe as the incidents of Black students and faculty who have been threatened and assaulted rise.

²³Crosby, *supra* note 21 at 135.

²⁴Roland Martin, *supra* note 18 at 647.

The terrible danger in making the argument that differences are now essentialized is to miscalculate how far we have actually come on the road to racial equality. We risk ignoring, for instance, the relentless whiteness of the academy. It has been far too easy to confuse an argument about the constructedness of all identities with the view that the oppression of specific groups of people does not exist. I found to my dismay that when I noted in my graduate seminars and in my writing that races, like nations, are imagined, meaning by this that our understanding of race is socially constructed and historically specific, what some of my readers and listeners understood was that *racism* is imagined.²⁵ Encountering this reaction has led my colleague George Dei to comment:

I have seen, although never understood why, some colleagues enclose race in quotation marks. All social concepts lack scientific validity. Terms like gender, race, and class are concepts that society has chosen to engage in conversations. They are socially constructed categories whose meanings are historically specific and change in different political and cultural contexts. They are contested notions and yet it is race that appears in quotation marks. Why?²⁶

One wonders what, or more to the point, who is really being bracketed by the inverted commas?

The denial of racism and, more specifically, what Dei describes as "the wrath of oppressive practices which continue to signify skin colour as racial difference"²⁷ is, ironically, easily accomplished with the conceptual tools of social construction. When Crosby takes Audre Lorde to task for talking about difference as though it were a fact and not a process, a crucial piece of history has been omitted.²⁸ The fact of difference is, for Lorde, the reality of tremendous racial oppression. Lorde was talking primarily to White women about this fact and she was uncompromising in her insistence that the categories of race, class, gender and sexuality are interlocked. The question of audience is a crucial one here.²⁹ Lorde had to remind her audience of the difference that skin colour makes since they were

²⁵For a discussion of this concept, which is often attributed to Benedict Anderson in his book, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso Editions, 1983) see E. Said, *Orientalism* (New York: Vintage Books, 1979); P. Gilroy, *There Ain't No Black in the Union Jack* (London: Hutchinson, 1987); H.K. Bhabha, *The Location of Culture* (London: Routledge, 1994).

²⁶G. Dei, "The Politics of Educational Change: Taking Anti-Racism Education Seriously" in V. Satzewich, ed., *The Racist Imagination: The Sociology of Racism in Canada* (Toronto: University of Toronto Press) forthcoming, at 7 in manuscript.

²⁷*Ibid.*

²⁸Crosby, *supra* note 21 at 136.

²⁹This insight comes from Mary Louise Fellows in conversation.

unlikely to keep this in mind.³⁰ The way we currently talk about differences is most assuredly socially produced and specific to our historical moment, but that moment continues to be one in which white supremacy is alive and well and deeply influencing how subordinate groups talk about their difference and the way in which they are heard. We still cannot speak out loud about the complexities of racial identities without risking that the oppressive contours of racism will be denied.

Critics of what are variously called the problem of difference, identity politics, ethnic particularism or race essentialism often argue that we need to return to a concept of the universal, although most of those making this argument acknowledge that the old enlightenment universal man, rational and autonomous, has to be refashioned.³¹ For Naomi Schor, a highly ranked White academic, the problem of difference today is that, in the move away from universalism, we have turned to a particularism that is dangerous, narrow and exclusive. Her complaint, like most of this kind, focuses on racial differences, and this, I believe, is not accidental. Simply put, the complaint is that in our bid to move beyond universalism and gender essentialism (two slightly different ideas for some), we have come to a dreadful and dangerous place of race essentialism and/or regressive ethnic enclaves.³² In a sobering paragraph in which the genocide of European Jewry invoked by the name Auschwitz is conveyed, Schor writes:

If Auschwitz dealt the Enlightenment ideal of universalism – a notion rejected by fascism – a death blow, what may pass for the repetition of Auschwitz, the ongoing ethnic cleansing in Bosnia Herzegovina, has, if not revived universalism, then

³⁰A. Lorde writes about her experiences in White feminist circles of the early 1980s in *Sister Outsider* (Freedom, Ca.: Crossing Press, 1984).

³¹*Supra* note 15. Schor cites several prominent thinkers who argue this way, including several French feminists: Cornel West, Seyla Behabib, Nancy Miller and others. Although I cannot do so here in depth, I argue that there is a qualitative difference in the way in which many scholars of colour call for a revised universalism and the way some White feminists interpret this goal. The latter often indirectly mean a universal and unracial woman, as the writings of French feminists and of Schor herself indicate, when paying attention to race is considered essentialism or ethnic chauvinism.

³²*Ibid.* at 24-25. Schor makes the distinction between universalism and essentialism an important point in her article, giving the example of Simone de Beauvoir, who believed in a universal human nature but knew that men had defined this in such a way that women had no access to it. For Schor, de Beauvoir knew that all women did not share a common feminine nature, and she was extremely hostile to the idea of an eternal feminine. She was not, therefore, a gender essentialist. As much as this distinction is valid in de Beauvoir, Schor describes "certain communities of feminist theorists", namely those who wanted to build a counter canon of Black women's writing, as making universalizing moves. She also notes that the reason for returning to universalism is that, in giving it up, feminists of the 1970s gave up commonality and political clout. Here it seems to me that the distinction between universalism and essentialism has collapsed in her work.

called into question the celebration of particularisms, at least in their regressive ethnic form.³³

Significantly, it is only in a footnote attached to the end of this quote that Schor completes the progression of signs that begins with Auschwitz (where the Nazis clearly did not believe in a universal humanity), moves to Bosnia and ends, cryptically, with a footnote that references a point made by Cornel West, a Black scholar who writes that the new cultural politics of difference is about trashing the monolithic and the homogeneous in the name of diversity and multiplicity. Since West warns of ethnic chauvinism at the same time that he decries a faceless universalism,³⁴ and is clearly in favour of the new cultural politics of difference, it is unclear whether Schor means to indicate that he endorses her position. Certainly many Black scholars share her concerns about the dangers of particularism, but they also note, usually in the same sentence, the persistence of racism and the need to counter its destructive effects.³⁵

Recognizing differences and multiplicities should not be automatically conflated with a terrible celebration of particularisms. I doubt that Schor would say that all articulations of difference lead to Bosnia, but the risk is clearly present and it is a risk that makes most of our hearts skip a beat. If paying attention to differences can take us to Auschwitz and Bosnia, let us stamp out the evil before it is full-grown. I can read such passages no other way in spite of the author's numerous distractions, philosophical detours and earnest declarations of being really and truly in favour of diversity. This is a different kind of critique than the one made by women of colour to White women that a homogeneous description of women's oppression re-centers White women and leaves racism unexamined. Schor's critique speaks to something more terrible than a maintenance of the status quo. It is addressed to "ethnics" who would speak of their differences in so essentialist a fashion, or perhaps, who would speak of their differences at all. In this way, as Ann duCille has noted of the response to Black women scholars, legitimate complaints about oppression and attempts to resist are dismissed as anti-intellectual identity politics.³⁶ That this is the case in as refined a criticism as Schor's is evident in her vague references to the misery caused by identity

³³*Supra* note 15 at 28.

³⁴C. West, "The New Cultural Politics of Difference" in R. Ferguson et al., eds., *Out There: Marginalization and Contemporary Cultures* (New York: The New Museum of Contemporary Art, and Boston: The MIT Press, 1990) 34.

³⁵See S. Hall, "New Ethnicities" in J. Donald & A. Rattansi, eds., "Race", *Culture and Difference* (London: The Open University, 1992) 252; P. Gilroy, *The Black Atlantic: Modernity and Double Consciousness* (Cambridge, Mass.: Harvard University Press, 1993) 32; West, *supra* note 34 at 29; Grillo, *supra* note 2 at 24.

³⁶A. duCille, "The Occult of True Black Womanhood: Critical Demeanour and Black Feminist Studies" (1994) 19 *Signs* 591 at 606.

politics,³⁷ to “all we have lost” as a result of it³⁸ (begging the question, who has lost what?) and to the good old days of 1970s feminism.

Along with bell hooks, I am suspicious of those who warn of the dangers of identity politics, race essentialism, or ethnic particularism without noticing that dominant groups engage in essentialism all the time, and without contextualizing the responses subordinate groups make to domination, thus distinguishing acts of resistance from acts of domination.³⁹ As hooks suggests in her assessment of Diana Fuss’s exploration of the misuses of essentialism by minority students in the classroom, critiques of identity politics may be “the new, chic way to silence students from marginal groups.”⁴⁰ Those who end up having to talk about their differences are likely to be heard as whiners, complainers and party poopers – the early 1990s response – or, in the later 1990s, as Nazis in the making. Those who end up having to listen to the talk about differences get to sit in judgment. In such a scenario, those who judge have a better chance of appearing calm, confident, all-knowing and in control while the natives, pleading their case, can only be described as restless.⁴¹ Without the context of persistent and destructive racism, it is possible to equate Black women’s desire to set up a counter canon of Black women’s writings with the universalizing of enlightenment thinkers who did not think Black people could have access to their notion of the universal. Similarly, only in failing to keep the realities of white supremacy front and center could one see in Audre Lorde’s “fact of difference” a similarity to the willingness of Charlotte Bronte’s heroines to make themselves into universal subjects.⁴²

We can and we must transcend these positions and we must do so by talking about how we are implicated in the “particularisms”, which I *will* put in quotation marks. I am not suggesting that articulations of difference by subordinate groups remain beyond critique but that those making this critique closely examine their own subject positions. Who is describing and assessing the realities of whom; how do we hear these descriptions and what relations do they secure? As Paul Gilroy has warned, those who critique race essentialism have often been “insufficiently alive to the lingering power of specifically racialized forms of power and

³⁷*Supra* note 15 at 29.

³⁸*Ibid.* at 41.

³⁹b. hooks, *Teaching to Transgress* (New York: Routledge, 1994) at 83.

⁴⁰*Ibid.*

⁴¹No better explication of whose voices are heard as Native exists than in T.T. Minh-Ha, *Woman, Native, Other* (Bloomington: Indiana University Press, 1989).

⁴²*Supra* note 21. Crosby begins and ends her article with the example of Lucy Snowe, Bronte’s heroine in *Villette*, who gains access to the male universal by remaking herself.

subordination."⁴³ Schor declares that her goal is a revised universal that "would include all those who wish to be included, and that would above all afford them the opportunity to speak universal while not relinquishing their difference(s)."⁴⁴ For me, this goal is still questionable and is unreachable unless we keep the goal of anti-subordination at the centre of our theorizing.

Before talking about a new universal, we should look at the conditions of communication that prevail. What truth are we each obliged to produce? We should also examine the social relations that structure us into different sides of binary oppositions. The challenge, in the words of Ann Ducille, is:

How do we negotiate an intellectually charged space for experience in a way that is not totalizing and essentializing – a space that acknowledges the constructedness of and the differences within our lived experiences while at the same time attending to the inclining, rather than the declining, significance of race, class, culture, and gender?⁴⁵

In reflecting on the journey beyond universal women, I have come to see that, while it is crucial to dispense with a notion of differences as pre-given and to pay attention to how they are produced (and I consider this to be the goal of my own work), I do not want to be confused with those who make the same argument in order to suggest that we return to the universal woman, uncomplicated by categories, or that we delegitimize the struggles of subordinate groups. Above all, I do not want this position to be interpreted to mean that there is no distinct fact of domination. I want to work with an anti-essentialist understanding of difference at the same time that I retain the modernist notion of the "fact of blackness", a phrase that Fanon used to convey the deeply entrenched, oppressive practices that structure blackness as a denigrated state.⁴⁶ I want my critique of various essentialist ways of talking about differences to be heard as an argument for dominant groups to look at the fact of their domination whenever we try to make sense of women's differences. What has prevailed in the views I have so far been discussing is that dominant groups have been arguing from a point of subordination, a position of innocence and non-implication in systems of oppression. It is White women who are really denigrated, these scholars argue, and it is they who are the outsiders in the academy today.

⁴³Gilroy, *supra* note 35 at 32.

⁴⁴*Supra* note 15 at 41.

⁴⁵*Supra* note 36 at 608.

⁴⁶F. Fanon, "The Fact of Blackness", *supra* note 35 at 220.

Packaging Differences as Pre-Given in the Court Room

It may be unclear at this point why I have thought it necessary to devote my attention to what may appear to be mere academic sparring. The connections between critiques of integrative projects prevalent in the academy and contemporary approaches to understanding differences among women in law lie in the realm of accountability. As I noted in my introduction, the point of theorizing differences among women is not for the sake of inclusion but for the sake of anti-subordination. There is little chance of disturbing relations of domination unless the relations of privilege and penalty and how they structure our various responses are examined. What most distinguished the critics discussed above was their inattention to these relations, an inattention that led to a denial of the continuing effects of white supremacy (for example, the erroneous view that women of colour now have most of the jobs in the academy and get all the grants), claims of mutuality between vastly different contexts (Auschwitz, Bosnia and attempts to establish a counter canon of Black women's writings), and an arrogance of subject position that does not ask about the sources of the yearning for the good old days of lost sisterhood and the rush to critique how women of colour essentialize differences but not the way in which White theorists do so. What all of these features secure is innocence, a determined non-involvement in the social relations being analyzed. This is also the hallmark of both feminist and non-feminist approaches to differences among women in law. Here, innocence is enabled not by anti-essentialism but by essentialism, this time from members of dominant groups.

There are an infinite number of ways to establish our own innocence in law. The notion that differences are pre-given and not socially produced has enabled dominant groups to leave themselves out of the picture when the lives of subordinate groups are drawn. Two constructs in particular package difference as pre-given and facilitate the race to innocence of dominant groups. The first of these is the description of women with disabilities as vulnerable. The second is the description of Aboriginal women and women of colour as culturally different.

Why are some explanations of differences more attractive to us than others? In the case of the vulnerable disabled and the culturally different woman, the descriptions take us away from our complicity and a critical examination of what makes the violence against these groups of women so possible. The violence is naturalized in both examples. It disappears or emerges as a natural consequence of the difference we have identified, hence it requires no interrogation. It is a kind of recognition of difference that is ritualized: I see you and you're more vulnerable than I am, and definitely culturally different, but I don't have to look any further to discover how your penalty is my privilege. More than this, I can even appear less imperialistic and more generous if I appear to notice your difference and even to privilege it.

Example #1: Vulnerable Women With Disabilities

The first point to make about our understanding of the difference that is disability is that few legal scholars and activists have bothered to theorize disability at all. Most of us think that disability is simply a special issue and one that does not enable us to say anything about race, gender, class or sexuality. This is perhaps the underlying logic of what I am calling moves of innocence routinely made in the attempt to understand difference. If we understand the realities of groups subordinate to us as different or special, we plunge into hierarchy. On the other hand, if we start from the premise that non-disabled people are implicated in what happens to women with disabilities, we might stand a better chance of detecting when we are simply re-installing our superiority by noticing difference. The question for us – those of us in a dominant group – must always be “what do I gain from understanding something in this way?”

On those rare occasions when we have thought about disability, we have done so on the basis of pity. This is how feminists have thus far understood the situation of women with disabilities. Relying on additive analysis, we have been content to describe the situation of women with disabilities as one of double vulnerability. For example, NAC (the National Action Committee on the Status of Women) in its lobbying for a preamble to the criminal code expressly naming categories of vulnerable women, argues that “many women with disabilities because of their dependence on care-givers, difficulty in resisting or expressing their lack of consent and objectification as passive, are more vulnerable to sexual assault than able-bodied women.”⁴⁷

With the concept of vulnerability, we successfully manage to see disability as a condition that is pre-given, a biological essence or even a social condition – but one that simply is. As I have said elsewhere, when we rely on vulnerability we privatize the condition and do not ask questions about the social relations that transform a physical and mental situation into one of great vulnerability.⁴⁸ Martha Minow also makes this point when she notes that when difference is thought to reside in the person rather than in the social context, we are able to ignore our role in producing it.⁴⁹ I think that feminists have begun to cut through disability as pre-given but have stopped short of interrogating how it comes to be a social condition of vulnerability. What we feel for a vulnerable person is pity:

⁴⁷S. Razack, “From Consent to Responsibility, From Pity to Respect: Subtexts in Cases of Sexual Violence Involving Girls and Women with Developmental Disabilities” (1994) 19 L. & Social Inquiry 891 at 901.

⁴⁸*Ibid.* at 903.

⁴⁹M. Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, N.Y.: Cornell University Press, 1990) at 174.

I am so sorry that you are in this terrible situation; I will help you. I, of course, had nothing to do with your unfortunate situation but I am a good person and will help you anyway.

How do these sentiments enter the court room? In the case of sexual violence, vulnerability keeps the focus on the consent framework – on those who say yes versus those who say no, on virgins and whores. The consent focus makes it difficult to talk about the actual violence, its magnitude, who perpetrated it and what enabled it to happen. Disabled women are thought to be unable to say no, either because they are diseased lusts who will take sex when they can get it, or because they simply cannot resist their attackers. In a highly publicized American case, *Glen Ridge*,⁵⁰ where four men sexually assaulted a woman with a developmental disability using a baseball bat, a broom handle and a stick, while thirteen others watched, the focus of the trial remained on whether the victim said yes or no. An important contributing factor keeping the focus on consent was the way in which disability was conceptualized in law. In this case, there was an actual law on the books stating that sex with someone known to be “mentally defective” can be considered sexual assault. Thus the trial turned on whether or not the accused knew the victim was developmentally disabled.

Our law is not this explicit, but the implication behind the vulnerability construct is essentially the same: it is not easy to prove consent if the woman in question is in a category of persons deemed less able to say yes. A higher standard of proof will obtain in these instances but it tends to be proof of the extent of her disability and whether or not it was known. It is not an interrogation into the histories of domination of the accused. In the *Glen Ridge* case, rape shield laws were ruled inapplicable since the victim’s sexual history – a history of saying yes – had to be probed. While her past sexual history emerged and was deemed relevant, her social history, which emerged only incidentally, was not relevant to the discussion about consent. This was a history of continuous marginalization and violence, ranging from being forced to eat dog feces as a child by the very same boys accused of raping her, to actual rapes perpetrated by others. This social history should have shed light on the defendants themselves, on their desire and capacity to engage in these acts of violence, her consent notwithstanding. It could not do so because the consent framework, turning as it did on her capacity to say yes, a capacity related to her disability, effectively shut it out.

Had the trial begun with an understanding of her difference that was less pre-given and biological and more enmeshed in social relations, the focus might have

⁵⁰R. Hanley, “Verdict in Glen Ridge; Four are Convicted in Sexual Abuse of Retarded New Jersey Woman” *The New York Times* (17 March 1993) A1. See also *supra* note 47.

been on the nature of the violence itself and questions might have been asked about what makes it possible to dehumanize a woman to this extent. Women with disabilities are not so much vulnerable as they are unjustly treated. Our response to this difference must be anti-subordination, not pity. By this I mean that we must insist that disability only has meaning within the context of power relations – and that non-disabled people are implicated in these relations. Our legal task, and scholarly one as well, must be to discover how to trace these power relations in the specific case at hand. Pity will not take us far in this quest because it shuts down an interrogation into social relations and, specifically, into complicity. We need a theory of difference that accounts for the violence and our complicity in it.

By complicity I refer to our reluctance to challenge ableist narratives as narratives that are about what non-disabled people do, and not about who women with disabilities are. I also include in the meaning of complicity our acceptance of the consent framework, a framework that positions us as women differently and unequally in relation to each other – as women more or less likely to say yes. Non-disabled women need to begin asking some hard questions about what they gain from the existence of a category of women labelled disabled and vulnerable.

Example # 2: Culturally Different Women

I am anxious to pursue another example, in quite a different realm, in order to repeat my point that we cannot continue to conceptualize differences as pre-given, thereby taking them out of the social relations that invest them with meaning. We cannot continue to take ourselves out of the picture. If we do so, the violence that occurs is naturalized. That is to say, we come to accept it as given and fail to see either how we produce it, maintain it, or benefit from it. When we talk about culture, we often mean race⁵¹: cultural differences perform the same function as a more biological notion of racial differences does – they mark inferiority. The difference that is culture is viewed as pre-given and is abstracted from social relations.

Cultural explanations enable us to ignore the material and the specific. Cultural explanations predominate in law whenever Aboriginal women and women of colour are discussed. What does it mean when a White judge takes the cultural contexts of Aboriginal men into account during a rape trial? It can mean, and it has, that the rapes are viewed as a kind of cultural practice: these people do these

⁵¹For a discussion of this theme in education see S. Razack, "Schooling Research on South and East Asian Students: The Perils of Talking About Culture" (1995) 2:3 *Race, Class and Gender* 67.

kind of things.⁵² In this instance, cultural difference as inferiority comes to be a mitigating factor, if it does not work to exonerate the male Aboriginal offender altogether. Of course, the culturally different man has to fit this stereotype of primitiveness. In one case, the defendant could not manage to do so because he had bound his victim with a tape recorder cord and was therefore not seen as sufficiently primitive.⁵³ These moments of overt inferiorizing of Aboriginal culture form one expression of the cultural approach. It is more common, however, in Canadian courts, to find a more refined version of cultural difference as pre-given and as a marker of inferiority. Canadian judges are now less inclined to rely on overt pronouncements about the inferiority of cultures (with the exception of land claims disputes in which overt inferiorizing is still *de rigueur*) and are more interested in cloaking their opinions in a mantle of sensitivity to cultural differences. In this manner the judge appears progressive and even anti-imperialist by practising a certain familiarity with Aboriginal culture and history.

The judge or the lawyer, the law professor or the law student, or indeed, anyone responding to a subordinate group who feels that he or she has learned the appropriate cultural rules (for example, the apparent rule that Aboriginal people do not look you in the eye, therefore when Native defendants do this their behaviour cannot be interpreted as an admission of guilt), is in danger of using culture – frozen in time and stereotypical – as a marker of racial inferiority. In some instances, learning the cultural rules may even incorporate an understanding of the social condition of colonization. Thus, a culturally sensitive judge might understand that colonization has wreaked havoc on Aboriginal communities, leaving a trail of alcoholism and a legacy of sexual abuse in residential schools. This different history, along with different cultural rules, must all be taken into account by the culturally sensitive judge in order to understand the offender. They are not taken into account to understand the victim. More importantly, they do not lead to an understanding of the current workings of white supremacy. A cultural differences approach is not a discussion of contemporary White/Aboriginal relations but a discussion of who Aboriginal people are. Colonization, when it is mentioned, achieves the status of a cultural characteristic, pre-given and involving only Aboriginal people – not White colonizers. We may know how colonization changed Aboriginal people, but do we know how it changed White people?

⁵²This discussion of culture in the courts draws on my article "What is to be Gained by Looking White People in the Eye? Culture, Race and Gender in Cases of Sexual Violence" (1994) 19 *Signs* 894.

⁵³*R. v. Naqiarvik* (1986), 26 C.C.C. (3d) 193 (NWT C.A.). This case is discussed in M. Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 *Ottawa L. Rev.* 71 at 92-93.

A cultural sensitivity approach keeps people of colour and Aboriginal peoples firmly in place as objects of study. Were judges and scholars actually to resurrect their part in colonial and continuing violence, were they to question how it comes to be that they are the knowers and brown and black people the things known, what would be at stake is their own sense of identity. This is an identity as benevolent people with every right to be in this land and to rule over it. Stories of genocide and racism are profoundly shocking, as Coco Fusco reminds us, because they deeply upset a notion of self.⁵⁴

Some may complain that I am being harsh; after all, there are cultural differences that influence what people do and cultural differences need not be understood in a stereotypical way. Again, I see a direct parallel to the move that was made around vulnerable women. Culturally different women are seen as a distinct and separate group. The social relations that structure their options are not considered – not even in the basic way of asking about the hierarchy implied in calling them different. If they are different, who are we? Once we start examining the hierarchy that makes them different and ourselves the norm, we have to jettison such concepts as eye contact and move into the area of white supremacy, a field in which we are implicated.

Final Cautions

When I criticize essentialist understandings of difference, this is a critique of how dominant groups construct explanations for difference. How subordinate groups articulate their difference is explicitly not the focus of this discussion. As I noted at length when I began, a unique set of options produce the packaging of difference by subordinate groups themselves. Moreover, we have not created the conditions for a discussion between insider and outsider groups on the meaning of difference. That conversation is even less possible today than it was a few years ago. Before we can attempt that critique with integrity, we need to examine how we explain difference to ourselves and we need to ask: where am I in this picture? Am I positioning myself as the saviour of less fortunate peoples? As the progressive one? As more subordinated? As innocent? These are moves of superiority and we need to reach beyond them. I return here to my notion of a politics of accountability as opposed to a politics of inclusion. Accountability begins with tracing relations of privilege and penalty. It cannot proceed unless we examine our complicity. Only then can we ask questions about how we are understanding differences and for what purpose.

⁵⁴C. Fusco, "The Other History of Intercultural Performance" (1994) 38:1 *The Drama Review* 143 at 145.