

"Make the Ring in Your Mind" (Making All the Difference: Inclusion, Exclusion, and American Law; and The Alchemy of Race and Rights)

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“MAKE THE RING IN YOUR MIND”

EMILY FOWLER HARTIGAN*

MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW. By Martha Minow. Ithaca: Cornell University Press. 1990. Pp. xii, 403. \$24.95.

THE ALCHEMY OF RACE AND RIGHTS. By Patricia J. Williams. Cambridge: Harvard University Press. 1991. Pp. 247. \$24.95.

When I agreed to review Martha Minow's *Making All the Difference*** for St. John's, I thought I'd benefit from a close reading of a work by the woman whose article *Foreword: Justice Engendered* in the *Harvard Law Review* was power and paradigm in feminist jurisprudence.¹ The book promised to render the multiple differences of race, gender, disability, and orientation, part of a whole discourse on difference. I anticipated a synthesis and a distinctive perspective which would be accessible to the general reader.

I was not disappointed; yet I realized as I read that I was more bothered than I thought I would be by the contradiction which Minow's ideas play with her genre. It is not that her way of writing is not valuable. She is remarkably lucid, and even adds from time to time what she herself calls “shimmers” to her writing. But what she names² at the outset—a relational approach, with a sensitivity to boundaries—she does not deliver. I want to investigate that conundrum, and to suggest why it seems to be—but is not—the unavoidable dilemma of the gifted female scholar in law today.

Before allowing herself to be personal or poetic, Minow apparently feels she must be “scholarly.” (If Minow is a bellwether, then even tenure at Harvard does not make the true feminine safe. But

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** Cited below by page number only.

¹ Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1989).

² Hans-Georg Gadamer calls naming the original possibility of everyday speech: “To name something is always to call it into presence.” H. GADAMER, *THE RELEVANCE OF THE BEAUTIFUL* 135 (1987).

there is the Alchemist . . .) This is how Minow herself describes the necessity of relegating feminist, relational thought to precepts but not to practice:

The rules in established academic institutions about what counts as theory offer another example. The criteria of coherence, value neutrality, and abstraction may embody the false universalism that feminists criticize. Yet to be counted by establishment institutions as theory, feminist approaches must resemble the objects of their attack (p. 238).

Three pages earlier, Minow has cited Audre Lorde's *The Master's Tools Will Never Dismantle the Master's House*,³ but apparently has not agreed with its thesis or its force. Disturbingly, the paragraphs following the above quotation suggest that she has too little desire to dismantle the Master's house or even to leave it. As the statement of a brilliant, reflective woman at the supposed acme of academic institutions of free thought and expression, it is devastating. Yet there is an alternative.

The relationship between poetry and philosophy has been the subject of discussion since Socrates and before;⁴ it has surfaced strongly in recent times. Its new turn arises in part from the emergence of the female-feminine in the world of "reason," rather than just the "feminine" imagination in man's mind and soul. Women are now beginning to speak their own selves, rather than being only spoken of or to. Women like Sandra Harding embody the dilemma of attaining a female and a feminine voice, even as we are unsure what a feminine voice might be. Harding writes in a linear, discursive style which is to first reading traditionally clear, clean, abstract, propositional.⁵ She is a philosopher of science and epistemology, speaking in a discourse dominated by men, with men, in their language. Her lucidity has the spare aesthetic of a Brancusi sculpture, of abstract art. It has its own beauty.

Harding's message is, to some extent, antithetical to her medium. She argues for the feminine, for perspectives, for experience. She is careful not to fall into "mere" phenomenology, so that her

³ Lourde, *The Master's Tools Will Never Dismantle the Master's House*, in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (C. Moraga & G. Anzaldua eds. 1981).

⁴ H. GADAMER, *supra* note 2, at 131ff ("Philosophy and Poetry"), 105ff ("On the Contribution of Poetry to the Search for Truth"); PLATO, PHAEDRUS 245; REPUBLIC 607b; *see also* M. NUSSBAUM, LOVE'S KNOWLEDGE (1990).

⁵ S. HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE? (1991).

writing cannot be dismissed by those who refuse to take experience as a primary base for discourse. Yet, what she says makes a space for just such narratives of experience, for talk textured and structured vastly differently from hers. To read one of her essays is to experience the rhythms, codes, and sequences of academic analytic philosophy, on the way to a conclusion which robs her own discourse of its solo sovereignty.

Minow's book is similar. I recommended it to a colleague returning to academia as a superb study guide to jurisprudence today. Her footnotes are comprehensive, rich, even. Her discussion of difference is structured, leavened with story, finished with conclusions well balanced on paradoxes. It is welcoming to the reader who is not outside the mainstream; it will disorient only from time to time, always returning to a framework of the relational which is somewhat novel, yet in her rendering, comfortably consistent.

But Allan Hutchinson names its first flaw; on the level of "self-contradiction": she is absent. We cannot relate to her as a person, once we get beyond the tantalizing first introduction. We hear an elegant playing out of her political stance, sympathetic in its implications, measured in its reach. We do not hear her voice or the texture of her story. In a section titled "Absent Friends," Hutchinson talks of the effects of her self-effacement: "she manages to occupy a critical space that is both everywhere and nowhere: she floats over and through her text as a kind of postmodern phantasm . . . she comes unintentionally close to invoking the presumed authority of detached analysis and continuing the unconvincing ventriloquism of modernist thought."⁶

What might seem to be an oversight (forgetting to practice what she preaches, despite, Hutchinson testifies, her attractive personal presence) becomes more when the second implication of the absence of the entire person who is Martha Minow, is included. In her impersonal presentation, she has no poetry. We do not know her individual passions; we do not meet her poetic soul. There is little feminine about the text except for its consistently applied doctrinal priority for relationship. There are moments when the doctrine warms beyond its grey sheen, hinting strikes of color—but they are too few.

I might have continued to delve for the shimmers, the mo-

⁶ Hutchinson, *Inessentially Speaking (Is There Politics After Postmodernism?)*, 89 MICH. L. REV. 1549, 1569 (1991).

ments of poised prose which caught the poetic—but I took up Patricia Williams' *The Alchemy of Race and Rights*,⁷ and I was gone. Starting with herself, telling us we may as well know with whom we're dealing, we meet Patricia Williams in her blue terry cloth bathrobe, and she is not happy. We journey with her, and she is not sure she is sane. We risk, hurt, struggle, and laugh with her, through to the whispered incantation, hilarious after much litercrit babble: "Floating signifiers." She weaves a path in and out of normal white male discourse, carrying us along in mind, heart and spirit. She does not offer some single-layered lucidity, or analysis structured at right angles, but moves with conceptual and imaginative fluidity through lived narrative, doctrinal analysis, contemporary discourse, emotional range-finding, anger imprinted imagery, and sly, high-spirited irony. There is such richness of readerly sensation interwoven throughout the text that the reader is pulled into its flow, never to be the same. That is, if the reader is willing.

Why would the reader hesitate? I recall one Nebraska colleague's response to a paper Williams gave at a Feminism and Legal Theory conference at Wisconsin Law School a few years back, a paper which is woven into the present volume. He returned it disdainfully to me, saying that it was not scholarship, but apparently something gleaned from her personal journal. Later, the same man (an engineering grad) told me that my problem was that my style interfered with my analysis; I replied that Freud said that style was identity, and that what he found annoying, I found constitutive. It is not that Williams' discourse is antithetical to analysis; on inspection, it requires it, as Marie Ashe suggests: "*Écriture féminine* [feminine writing] is the designation used to identify writing that, in a startling and difficult-to-define manner, is both rigorously analytical and highly poetic"⁸ Like Socratic dialogue, the living milieu of the argumentative structure, adorned by the personal, gives it force. If language is a form of life, as Wittgenstein dramatically cried in liberation, then it must be lived to be true. Williams' discourse is lived—unmistakably, brilliantly, shakingly, painfully, joyously lived. Like her blue robe, it comes to life because she is vividly present in it. She discloses what has in the past been discreetly read in between the lines or through intellec-

⁷ P. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

⁸ Ashe, *Inventing Choreographies: Feminism and Deconstruction* (Book Review), 90 COLUM. L. REV. 1123, 1133 n.42 (1990).

tual histories combining biography with idea. Such self-narrated context for concepts is not solely the province of women; Stuart Hampshire's *Innocence and Experience*⁹ gains its power largely from his life narrative of the genesis of his ideas. Accounts of how thoughts come to authors and how they were wrestled into a shared story, have the same wholeness of impact as the personalities' byplay in the dialogues of Plato. Even fuller than Alcibiades' drunken profession of passion for Socrates, is Marie Ashe's story of reproduction in her life—in mind, body, heart, soul.¹⁰ These are not interacting bits of mind, but genuine human encounters, external and internal, which give breath to words.

What of Minow's more abstract, static aesthetic? Is the shift of subject matter enough to make her work interesting and new? Her generalizations are much warmer when she is talking about her relational theory of difference, than when engaging in the ritual critique of viewpoints. She talks about the structural anthropologists, for instance, and asks "[i]f structures exist because they are functional, what would cause or produce change" (p. 186), a telling recounting of a major argument against structuralism, but hardly a searing insight. Yet on the next page, she touches on the self which is emergent through relationships with others: "The boundaries of the self are defined in relation to those other people; the boundaries are where we are in touch with others" (p. 187). This begins to sound more interesting. But, by the next page, we are on our way out of this theory and on to another, literary theory. Is it any wonder that the literary gets fewer than two pages in this book of nearly 400? There *are* three and a half pages on feminist literary theory, later—but I reflect: how fair do I have to try to be to Minow, when she dismisses the very epistemology of the aesthetic most likely to rival the dominant discourse, in five pages?

Minow uses a framework of relational knowledge consistently and deftly, showing where it emerges in a multitude of cases and stories. She has a striking working knowledge of it and maintains a well-trimmed version of relationalism through a series of intellectual schools and historical issues. However, the absence of citation to her intellectual progenitors is baffling. She cites, in her first foray into perspectivalism, many of the white male authors who

⁹ S. HAMPSHIRE, *INNOCENCE AND EXPERIENCE* (1989).

¹⁰ Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989).

initiated an attack on post-Enlightenment positivism, but fails to name Michael Polanyi, whose *Personal Knowledge*¹¹ was key in articulating to the canon-readers much of what was lacking in their search for the impersonal, neutral, "objective observer." She has little notion of phenomenology or much of what hermeneutical thought has done to elaborate relational knowledge. Although there is much to be said about how Carol Gilligan is not the only feminist who began relational writing, Minow does not say even that. Many of these insights are available in feminist jurisprudence. Given the remarkable breadth of her footnotes, the shallowness of her account of her key conceptual scheme's historical foundation is most disturbing. Even the use of considerable psychological literature fails to redress the gaps. How can she discuss this sense of knowing as relating, without the entire tradition of continental thought swirling around Emmanuel Levinas, for example, with his reflections on the Other? Surely her two pages on French feminism, and her consternation at their supposed deliberate dislocation of discourse and disruption of meaning, are not meant to be sufficient in a world in which many of the American women whom she does not argue that relations between men and women are up for grabs?

The very terms of discourse which she uses recapitulate what legal authors like Drucilla Cornell have identified as, in its fancy name, phallogocentrism, or white male discourse. This sort of writing does not relate to the reader in the way participatory texts are designed to do, nor does it tap the considerable literature on what is most closely allied to the feminist notion that the personal is the political: personal, literary, even poetic writing. Such writing is not coincidentally central to feminist method, nor is it reflected only in continental writers like Levinas. Paul Ricoeur speaks of the transfiguration of the world of action by the poem, and his "concern to combine analytical precision with ontological testimony."¹² The literary quality of writing *about* law and literature is manifest in James Boyd White's beautiful prose.¹³ Such writing shows that all knowledge is finally metaphorical and analogical—even "scientific" knowledge. Ricoeur explores this continually, as do Minow's colleague Stanley Cavell, and such writers as (Cavell's favorite) Emer-

¹¹ M. POLYANI, *PERSONAL KNOWLEDGE* (1958).

¹² Ricoeur, *On Interpretation*, in *AFTER PHILOSOPHY: END OR TRANSFORMATION* 380 (K. Gaynes, J. Bohman & T. McCarthy eds. 1987).

¹³ See especially the last two chapters of J.B. WHITE, *JUSTICE AS TRANSLATION* (1990).

son, and Elizabeth Sewell. Sewell, who is increasingly of interest to scientists, displays poetically the sort of personal knowledge of which Polanyi wrote many years ago, combining biology and verse in an "Orphic" voice which sings sense.¹⁴ Reclamations of Europeans, even dead ones, like Walter Benjamin, who claim the poetic make-up of reality (and of reality-making), are rich but unnecessary.¹⁵ Minow could have found Stanley Cavell right there at Harvard, praising Emerson in his personal, non-"philosophical" essay style, because philosophy itself is becoming indistinguishable from literature. If Cavell is right, then we have a right to ask of writers not only traditional cogency, but an "investment in words" which may even demand a style of writing.¹⁶ At the least, we can prefer the engaged writer, whose commitment dances in her prose/poetry.¹⁷ Cavell lauds and Williams demonstrates writing inhabited by both passion and dispassion, by both attachment and detachment, by both head and heart. I have little doubt that Minow has brought heart to her task, but she has subsequently hidden it under her ideology—and ideology, even in the best sense, is thinner stuff than full human "transfiguration of the ordinary" through "inhabiting our investment in words."¹⁸

Minow's theory, wonderfully lucid, spun out in consistent loops of history and reason, repudiates itself by sustaining the undifferentiated discourse of the post-Enlightenment analytic. She claims to have read the others, if that is what footnoting does: "Rights discourse implicates its users in a form of life . . .," noting Wittgenstein dutifully (p. 298). But Wittgenstein refused precisely to continue in the pseudo-rational discourse of academic philosophy. He wrote in journals, ruminated, meditated in words about pain, about "someone" who was in pain, but who . . . well, we know, if we read these two books, that Williams is often in pain. Williams links pain and thought irreversibly, indelibly. Minow speaks of a community which would invigorate words with power (p. 299) (to restrain)—but hers are not really invigorating. She talks of pain, but rarely discloses or connects the reader to first person hurt which directly confronts the reader.

¹⁴ E. SEWELL, *THE ORPHIC VOICE* (1960).

¹⁵ Ricoeur, *supra* note 12, at 147ff; W. BENJAMIN, *ILLUMINATIONS* (1969).

¹⁶ S. CAVELL, *CONDITIONS HANDSOME AND UNHANDSOME* 34, 44, 61 (1990).

¹⁷ And we can resist the erasure of writers like Williams through what she names, in her table of contents, "The Ideology of Style."

¹⁸ S. CAVELL, *supra*. note 16, at 61.

Is it just that I prefer Williams' style? Along with the internal contradiction of bloodless feminist discourse, I think there are a number of things which I might cite to suggest otherwise. I will explore the one which is to me most obvious and most important. It is not just Williams' passion that Minow lacks; it is also the spirit. In discussing writers who might have some glimmer of spirit, Minow simply does not see spirituality as a category of discourse. She talks about De Bois's *Souls of Black Folks* but not about souls (p. 68). She mentions writers like Alice Walker, but not Walker's stark yet vibrant sense of unseen reality. Minow dutifully notes all the attacks on single perspective knowledge-claims, yet leaves *beyond* the margin, the conversation of religion. Her attack on the single, coherent view of society is in fact conflated with the attack on the notion of the design of nature and God (p. 148). This sort of history-bound blindness to the language of spirit is hardly particular to Minow, but it is illustrative of the peculiarity of a celebration of difference, of margin, of otherness, which is itself exclusive, not inclusive.

Fifteen years ago, Elizabeth Sewell used language now emergent in feminist discourse to grapple with the rigidity of Compté's triple progression (linear, of course) from religion to philosophy to positive science. She described the process as "shaking" her mind, working with circles, networks, and spirals, rather with than straight lines.

If I could, what I would now do is to set up in the middle of this linear page a circle which would say SCIENCE TO MAGIC TO SCIENCE TO MAGIC TO SCIENCE in a ceaseless ring; and it fascinates me that I cannot do that with my linear typewriter, and would have trouble, even if I attempted such a thing, with a linear minded editor and typesetter. Please make the ring in your mind, nevertheless.¹⁹

In contrast to Minow, Williams speaks from a wholeness which cannot avoid spirit. She talks of the intrusion against blacks as total—bodily and spiritual. She imagines a return to understanding property as a reflection of the universal self, to dispersing rights under an animating spirit which fires our psychès, so that we do not own gold, but that "a luminous golden spirit owns us."²⁰ She leaves the text telling us of her demand to be seen and enfolding

¹⁹ Sewell, *An Other World*, in *TO BE A TRUE POEM* 112 (1979).

²⁰ P. WILLIAMS, *supra* note 7, at 165.

herself in the watchful presence of polar bear spirits.²¹ She is telling us about a world in which she is crazy, wild, spirited, impassioned, reflective, brilliant, becoming, shatteringly bright, imperiously fragile, irrefutably alive in her sentient, pulsing intelligence beyond thought.

Williams' alchemy, threaded through with persistent strands of the rational, is a crucial magic for the law. In a stunning essay, "Law Courts and Dreams,"²² Sewell talks of the connection between dreams as internal court of judgment, and the public fantasy and nightmare which can be law.²³ She finds the jury a counterbalance against rule-bound code, introduced into the logical structure of the law court, for "plurality, disorder, unreason."²⁴ She lauds the tension of reason and unreason, of logic and dream, calling these components the very essence of the tension mind, of sanity—and of poetry.²⁵ She taps the parallel evoked in Plato, of the correspondence between the individual and the polity, and touches on what Emerson called the Oversoul, that collective place of less-than-full consciousness. This is the world which Williams traverses with such fierce grace, drawing us from the realm of the "obvious" public logic of law, down, through, and returning, from what lies beneath. I defy a reader to face, unmoved, Williams' narration of the killing of a sick old black woman by white shotguns. She asks after the "animus that inspired such fear and impatient contempt in a police officer that the presence of six other well-armed men"²⁶ could not overcome his fear, his need to blow her to pieces (with an egregious second shot). She looks for an "offensive spirit of his past experience," for a "spirit of prejudgment, of prejudice"²⁷ which provided him such a "powerful hallucinogen" (these are the same words Sewell cites to describe the spectral political trials which haunt us—of Weimar, of McCarthyism). She taps cultural archetypes, voices speaking of an unwanted past—and warns that so long as these voices of racial hatred are scoffed at as superstitious, paranoid, they will speak in their neglect from the shadows of inattention, and the enlightened, ignoring their demonic selves, will

²¹ *Id.* at 236.

²² Sewell, *Law Courts and Dreams*, in *TO BE A TRUE POEM*, *supra* note 19, at 17.

²³ *Id.* at 20.

²⁴ *Id.* at 24.

²⁵ *Id.* at 21.

²⁶ *Id.* at 144.

²⁷ *Id.*

make the barbarism only larger, "until the nearsightedness of looking-glass existence is smashed in by the terrible dispossession of dreams too long deferred."²⁸ I challenge you to read this chapter of shotgun chaos, *Fire and Ice* (133ff), and sleep the same as before. Read it, read for your life.

I have done it again, I think. I am telling you why Patricia Williams is alive for me and beautiful, Martha Minow only helpfully clear. This issue of style is not incidental. All the different ways of knowing and writing suggested by feminists are part of the postmodern movement to newness-in-difference. Thus religious philosopher Mark Taylor chronicles Heidegger's development, in which Heidegger realizes that "style itself is more than a question of style," and concludes that new style is an opening into a new way of thinking and writing. "The names given to this alternative style of reflection vary: *poesie*, literature, sometimes simply writing."²⁹ It more closely approximates art than science, literature than philosophy.³⁰ Taylor attributes the force of new writing both to its intrusive nature and its impact. "To think differently we must write differently and vice versa." Further, to change style is to tamper with "the complex institutional networks constructed to separate the legitimate from the illegitimate."³¹ Taylor says such writing courts punishment; Williams supplies the stories of verification.

If you are really open to letting a book change your soul (and the thoughts and feelings resounding in it), read this alchemist's tale. If the world of Patricia Williams simply cannot yet speak to you, please read Minow. Her book is flawed, but makes much of what might open you to Williams, intelligible. Minow might succeed in tapping in you as reader some curiosity, some openness to the "difference" of Williams. Minow might persuade your mind that Williams has a place, is of value. But, if only your mind knows, you will still not hear Williams. By now, that will be your loss. No longer the new faculty member at Wisconsin presenting those strange papers, Williams began this fall as full professor at Columbia. Without knowing any of the inside story, I would bet that Williams is the one, consciously or not, Derrick Bell has been

²⁸ *Id.* at 145.

²⁹ Taylor, *The Cutting Edge of Reason*, 71 *SOUNDINGS* 315, 324 (1988).

³⁰ See H. CIXOUS & C. CLEMENT, *THE NEWLY BORN WOMAN* 64-65 (1986); see also *THE POETICS OF GENDER* (N.K. Miller ed. 1986).

³¹ Taylor, *supra*. note 29, at 325.

holding out for, the tenured black woman Harvard needs. And, even with the lucidity of Martha Minow, Harvard needs Patricia Williams more than, in this generation at least, it is likely to understand.

What will Harvard's loss mean to the rest of us? Will we be bound by the ritual denial which Clarence Thomas repeated dutifully: his personal beliefs would have no bearing whatsoever on his decisions as a judge. He is all abstraction, no connection. In person in-personating, Patricia Williams is connecting for us all; she is among the women who are, in the words of Jew Judith Plashow and Christian Carol Christ, *Weaving the Visions*³² anew. She engages for us the terrors of knowing that her "round brown face" can close doors and sunder minds. She binds the law to the texture of reality, intertwining the threads of the legal with the particularity of her story and those of persons of color and poverty to whom she is so passionately attached. The sick old woman, the remarkable black judge who lost her mind, the Patricia Williams who defied the Dartmouth summer's obliviousness to her marginal race—these portraits of the personal caught up in the world of law, are undeniable, beautiful, gifts.

³² J. PLASKOW & C. CHRIST, *WEAVING THE VISIONS* (1989).

