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Women in the Lawyering Process: The Complications of Categories

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WOMEN IN THE LAWYERING PROCESS: THE COMPLICATIONS OF CATEGORIES*

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Professor Epstein reminds us of an important fact. She reminds us that the legal system—courts, law firms, and law schools—is rife with discrimination against women.[1] She also reminds us that the law is used as a tool for ordering and maintaining gender distinctions.[2] While focusing on the power of the law, however, we must not lose sight of the fact that the law is only one of the many agents in society which does that. Although scholars may study the legal system as a separate entity, that does not mean that the legal system actually exists as a separate entity. It does not. It exists as an integral part of the complicated fabric of racism and sexism in this country. I also want to emphasize, and I am not sure that Professor Epstein and I disagree on this point, that the harm done to women, within and by the legal system, is not a "consequence of the difference model," but a consequence of sexism. If the social goal is the repression of a particular group, the group which is participating in the oppression will use any theoretical model to achieve that end.

The notion that I find most compelling in her paper is Professor Epstein's emphasis on the power of categories in creating and maintaining differences.[3] She notes first that "categories and distinctions are necessary for analysis in science as well as in everyday social communication."[4] She then points out the problems that are created when categories become rigid, are "reified," and are "regarded as real, [and] worse, as inevitable."[5]

These notions have been important in my work. I have been interested primarily in the intersection of the race category and the sex category in American law. Historically, in both statutory and constitutional jurisprudence, analysts and courts have considered these two categories inviolable. They exist as distinct analytic frameworks within the law. There may be discrimination based on sex or discrimination based on race.

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

2. *Id.* at 321-22.

3. *Id.* at 312-14.

4. *Id.* at 312.

5. *Id.*

These categories, of course, reflect the way these issues are discussed in popular discourse: one speaks of "women's issues," or of "minority issues." One says "minorities and women." The result of this way of thinking; the creation and maintenance of these rigid categories, is that it leads to the invisibility of minority women and the invisibility of the issues which affect them. The rule appears to be that these two categories do not intersect. In my work, I have argued that this rule must be broken.[6]

More recently, I have written about the black category and the white category in American society.[7] Again, the rule is that these categories do not intersect. And again I say, "But of course they do." For I, like many other black Americans, look white. The categories of black and white are not inviolable. They can and do indeed intersect. The reaction to this is that people are disturbed. Many are troubled when the boundaries of categories are transgressed. Categories exist to make the world comprehensible and safe. The gatekeepers resist. "Stay in your place!" they shout.[8] But I can't and we can't. Our place is in several different "places."

We should all be clear, however, that I am not the only one who exists at the intersection of "non-intersecting categories." And black women are not the only group that exists at the intersection of "non-intersecting categories." Black men, white women, white men, all exist at the intersection of race and sex. But somehow, these groups are not viewed in the same way, because for some people, some of the categories are invisible. For example, for black men, the sex category is invisible. Black men are "powerful" through their masculinity, and therefore often do not focus on the gender attribute of their identity. For white women, the race category is invisible. Their race is an attribute of power, and therefore they often do not think of themselves as having a race. For white men, all categories are invisible. White men are just regular people! They are the paradigm of what is normal. All the rest of us wear some stigma of "otherness."

My favorite example of this phenomenon grows out of an employment discrimination suit against Sullivan & Cromwell.[9] In this case, Diane Blank filed suit in federal district court alleging that the law firm had

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6. *See* Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

7. Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J. L. & FEM. 305 (1990).

8. For a thought-provoking discussion of what occurs at these "gates" or "doors," see E. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 144-51 (1988).

9. Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975).

refused to hire her as an associate solely because of her sex.[10] The case was assigned to Judge Constance Baker Motley, one of the few black women judges in the federal judiciary. In a stunning display of this notion of "invisibility," attorneys for Sullivan & Cromwell filed a motion for recusal based on the notion that as a black woman, Judge Motley would not be able to be fair on the issue of discrimination.[11] Judge Motley made quick work of their "argument," pointing out that she was not the only judge with both a gender and a race, and was therefore not the only judge who might be interested in the existence of sexism and racism at Sullivan & Cromwell.[12]

So not only are there "non-intersecting" categories that intersect, there are also categories that are invisible based on one's place in the power structure. One important indicator of power is the ability to put others, and not oneself, into categories. It is the ability to not see the privilege that inheres in the categories in which one holds membership.

And we are only scratching the surface of the category issue. Let me make two other points. The first is that the perception of who we are with respect to these categories changes from time to time. The first time I noticed this phenomenon was at the Equal Employment Opportunity Commission (EEOC) in Washington, D.C. It was during the Carter years, when Eleanor Holmes Norton was pushing the agency to develop guidelines on important issues affecting employers and employees. As Special Assistant to one of the Commissioners, I had been involved in developing the agency guidelines on discrimination on the basis of religion. One day I attended a meeting which had been requested by representatives of a national Jewish organization, who wanted to comment on the proposed guidelines. The discussion was thoughtful and helpful. But then, at what I thought was the end of the discussion, the spokesperson said, "I must add that we have serious problems with your proposed Affirmative Actions Guidelines, and would like to discuss them also while we're here." Certainly there was nothing wrong with this comment. Everyone has the right to comment on all proposed agency action. But what struck me was that, right before my very eyes, the group changed categories. It transformed itself from "Jewish" to "white."

The second time I noticed the power of these categories to appear and disappear was when I moved to Buffalo to teach law school, from Washington, D.C., where I had worked at the EEOC. Washington, as you probably know, is a city that is predominantly black. It is a town where the mayor is black, where the school superintendent is black. It is a town where one is startled to see a white policeman or fireman! The work force

10. *Id.* at 2.

11. *Id.*

12. *Id.* at 4-5.

at the EEOC—attorneys, administrators, division heads, clerks, cooks—is also predominantly black. It was somewhat of a shock to me, therefore, to move to white academia, where the administrators, faculty, clerks, and painters were white; and to a city where the power structure was all white. I was struck by the fact that, whereas in Washington I felt a need to struggle against sexism, in Buffalo I was almost overwhelmed by the devastating impact of racism. I had changed categories. I had gone from being a woman who just happened to be black, to a black person who just happened to be a woman. Categories that had been vaguely invisible became visible. Categories that had been visible receded into the background.

My second point is that each of these categories intersects with many other categories. I was very likely invited to speak here today from the perspective of a black woman. I find nothing wrong with this. We need to try to hear as many different voices as we can. But black women are many and varied. There is a sense in which I cannot speak for a black woman with dark skin. I cannot speak for a black woman in a wheelchair. I cannot speak for the black woman who is probably cleaning my hotel room right now. The different categories of color, disability, and class also intersect with the categories of race and sex. Because of this, we are perceived, and we perceive the world, in different ways. The category "black woman" is itself a very complicated notion.

Because of these complexities in the nature of the categories with which we deal, I was troubled by the way in which Professor Epstein presented certain issues. The first concerned her discussion of discrimination against women in law firms with respect to promotion to partner. The question that I would ask here is: "Which women lawyers is she talking about?" Is she including black women lawyers? I hardly think so, because the struggle for black women in law firms is the struggle to get hired at all. A 1989 survey of the nation's 250 largest law firms showed that while white women have made impressive gains in the past ten years, there was no comparable gain for black women.[13] In 1981, approximately one-quarter of all associates in these firms were women and three percent of them were minority.[14] Yet, eight years later, while almost one-third of the associates in these firms were women, only 5% of them were minority.[15] With this kind of availability pool, the partnership

13. Jensen, *Minorities Didn't Share in Firm Growth*, Nat'l L.J., Feb. 19, 1990, at 1, col. 1.

14. *Id.* at 28.

15. *Id.* It is not surprising that the writer of this article based her analysis on the categories "minorities" and "women," thus obscuring the position of minority women lawyers in these firms. However, the one statistic she gave for black women lawyers is so stunning (only 40 of the 23,195 partners at these firms are black women) that I have

numbers are predictable. Since 1980, the percentage of women partners has more than tripled to 9.2% of the total, while the percentage of black partners increased only from 0.47% to 0.9%.[16] There are 23,195 partners in these law firms: 170 of them are black men, forty of them are black women.[17]

These numbers show us the result of the interlocking effect of racism and sexism on the opportunities of black women lawyers. Promotion to partnership and obtaining the better assignments in law firms are hardly the prime issues for black women lawyers. The prime issue is getting a job.[18] In fact, because of the difficulty in getting hired by law firms, almost half of all black women lawyers are employed by the government or by public interest law firms.[19]

At another point, Professor Epstein discussed the problem of discriminatory sentencing. She argued that the sentencing outcome depends on the degree to which the crime was at variance with the female role, the degree to which the women stepped out the gender role expectancies.[20] Again, I wonder if this is reflective of the different kinds of "gender role expectancies" for black and white women. Does the "double whammy" of racism and sexism operate differently in the sentencing process than it does elsewhere in society? I would like to know more about the complexities of this issue.[21]

All of this is to say that Professor Epstein's discussion of the importance of categories in our society led me to more questions. I would like to know more about how these categories are formed. I would like to hear more about why the structure of dichotomous categories is so

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assumed that black women in her study were included in the "minority" category rather than the "women" category.

16. *Id.*

17. *Id.* at 1, 28.

18. For a glimpse of one particularly telling recruitment interview, see *University of Chicago Bars Recruiters of Top Firms Because of Slurs*, N.Y. Times, Feb. 3, 1989, at B11, col. 3 (law firm barred from recruiting because the interviewer, a partner in the firm, asked a black woman law student how she would respond if opposing counsel called her a "black bitch").

19. Burleigh, *Black Women Lawyers Coping with Dual Discrimination*, 74 A.B.A. J., June 1988, at 64, 67.

20. Remarks by Professor Epstein at *New York Law School Law Review's* Symposium on Women in the Lawyering Workplace: Feminist Considerations and Practical Solutions (March 15, 1990).

21. Professor Kathleen Daly of the Sociology Department at Yale University suggests that studies on sentencing are likely to reflect the experiences of black women, since a disproportionate number of women in the criminal justice system are black. Telephone interview with Kathleen Daly (Apr. 10, 1990). *See also* Daly, *New Feminist Definitions of Justice*, 1989 INST. WOMEN'S POL'Y RES. 7.

compelling. And I would especially like to learn how the notion of difference within the legal culture plays out for different kinds of women.