

# Critical Strategy and the Judicial Evasion of Difference

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AFTERWORD:  
CRITICAL STRATEGY AND THE JUDICIAL  
EVASION OF DIFFERENCE

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Every symposium is a feast of sorts, a fabulous array of tastes and textures that offer far more than one can possibly consume at a sitting. Participants enjoy a dizzying period of sampling at will and then settle in for a more extended period of digestion. Viewing the proceedings here in this light, one can only offer compliments to the chefs. These articles provide a rich and rewarding set of perspectives on the struggle for equality through law and on the critical theories that have become central vehicles in that effort. But a good symposium is more than the pleasurable experience invoked by the metaphor of the feast. It is also a crucial occasion for taking stock: a barometric reading, a finger on the pulse, an infrared snapshot of a particular domain of law at a specific moment in time. Viewed in this light, the response occasioned by this gathering is more complicated. The message communicated by contributors is both exhilarating and intensely dispiriting. Critical theorists of inequality are offering increasingly sophisticated and illuminating accounts of group-based difference to a judiciary that is differentially but increasingly resistant to recognizing difference in addressing inequality.<sup>1</sup> In this Essay, I examine this paradox, particularly as it has been reflected in the contributions to this Symposium, and ask how critical theorists might begin to meet the challenge it presents. In Part I, I will survey the good news: how feminist, critical race, and gay and lesbian legal theorists have enriched legal notions of group-based identity and perspectivity, helping to reconceptualize the very notion of discrimination. In Part II, I elaborate the bad news: the judicial flight from the recognition of difference that I will refer to as “difference evasion.” In Part III, I investigate whether this impasse calls for a shift in normative strategy

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<sup>1</sup> See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). For a discussion of this paradox, stemming from a slightly earlier period, see Kathryn Abrams, *Equality and Impasse: Mobilizing for Group-Based Change in an Era of Group-Blindness*, in *REDEFINING EQUALITY* 13 (Neal Devins & Davison M. Douglas eds., 1998).

on the part of critical theorists of inequality. First, I will consider a few efforts at normative repositioning and some of the reasons why critical theorists of difference have not adopted such repositioning in response to judicial difference evasion as a central goal. I will then argue that, while such repositioning need not comprise the whole agenda of critical theorists, it offers some advantages in the near term. Finally, I conclude by offering two sorts of overlapping strategies that address this goal: one that is appropriate to what Angela Harris has called the modernist moment in critical theories of inequality<sup>2</sup> and one that is appropriate to the postmodernist<sup>3</sup> moment in those same theories.

## I

## RECHARACTERIZING DIFFERENCE AND DISCRIMINATION

The good news, made evident throughout this Symposium, is that critical theorists are developing increasingly rich and enabling ways to describe antidiscrimination claimants—whom I will refer to as the “subjects of inequality”—and the experiences they face.<sup>4</sup> Three features of the papers here reflect increasingly nuanced and illuminating understandings of the phenomena of inequality.

First, characterizations of difference have attained a comfortable, if never entirely safe, distance from the shoals of essentialism.<sup>5</sup> Articulating a theory of group-based difference need not entail reifying

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<sup>2</sup> See Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 743, 750-54 (1994). In this superb article, which has significantly shaped my thinking on critical theories of inequality, Harris identifies critical race theory as reflecting both the legacy of civil rights scholarship, with its modernist commitment to “liberation from racism through right reason,” and the legacy of critical legal studies, in whose “postmodern narratives racism is an inescapable feature of western culture, and race is always already inscribed in the most innocent and neutral-seeming concepts.” *Id.* at 743.

<sup>3</sup> See *id.* at 743, 745-50.

<sup>4</sup> See, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Darren Lenard Hutchinson, “Gay Rights” For “Gay Whites”?: *Race, Sexual Identity and Equal Protection Discourse*, 85 CORNELL L. REV. 1358 (2000).

<sup>5</sup> For more than a decade, critical theorists of inequality have agreed that reducing group members to a unitary essence, whether that essence is understood as biologically instilled or socially constructed, is a hazard to be avoided. See Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN’S L.J. 191 (1989-90) (highlighting heterosexist assumptions in feminist legal theory); Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER 402 (Toni Morrison ed., 1992) (highlighting race essentialism in feminist legal theory and gender essentialism in antiracist legal theory); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (highlighting race essentialism in feminist legal theory); Martha R. Mahoney, *Whiteness and Women*, in *Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217 (1993) (highlighting race essentialism in feminist legal theory). See generally ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988) (identifying several forms of essentialism in feminist theories across multiple disciplines).

group identity, a “voice of color” or a “woman’s voice.”<sup>6</sup> The subject of inequality, whose characterization becomes our window on group-based difference, manifests a complex identity. This identity is multifaceted, or intersectional, as we see, for example, in Darren Hutchinson’s paper.<sup>7</sup> A complex interplay between race, class, and sexual orientation determines social perception of an individual, that individual’s self-perception, and the kinds of discrimination the individual encounters. Moreover, the way that a subject’s identity is articulated, and the forms of discrimination that the subject confronts, may also depend upon the context in which the subject finds herself. Think here of Devon Carbado and Mitu Gulati’s paper *Working Identity*.<sup>8</sup> The discriminatory assumptions that arise, the way in which a subject is perceived, and the corresponding way in which that subject is required to work her identity, depend on the norms of the particular workplace and the way these norms intersect with assumptions about “outsider” identity.

Second, the subjects of inequality are not simply acted upon, but manifest a partial agency<sup>9</sup> which, like their identities more generally, may vary in its expression in different contexts. The subject of inequality is disadvantaged and constrained; but she is also capable of making choices within that constraint and resisting stigmatization to some degree. *Working Identity* is once again instructive here. The subjects described by Carbado and Gulati have some understanding of what they may be up against; they are able to make a series of choices—sometimes useful though often unavailing—about how to navigate in the face of those constraints.<sup>10</sup>

Finally, these developments have begun to change the way critical theorists characterize notions of discrimination and inequality. Discrimination is not a single kind of act or omission, but rather a network of patterns and relations which will vary for different groups, or

<sup>6</sup> There are, however, sophisticated critical theorists whose accounts of the subjects of inequality veer toward essentialism, either because they understand such subjects in that way, or because they see practical advantages to a certain strategic essentialism. See, e.g., Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 95 (arguing that critical social theory’s antiessentialism denies women knowledge of an “antisymbolic, uncultured, natural, loving, female self”).

<sup>7</sup> See Hutchinson, *supra* note 4.

<sup>8</sup> Carbado & Gulati, *supra* note 4.

<sup>9</sup> The tendency of legal decision makers to ascribe either too much or too little agency to the subjects of inequality has been a focus of critique in some of my recent work. See, e.g., Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999) (arguing that liberal philosophers, and liberal legal decision makers, ascribe too much autonomy to the often-constrained female subjects of inequality); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (arguing that dominance feminists, and legal decision makers in some kinds of cases, ascribe too little agency to the female subjects of inequality).

<sup>10</sup> See Carbado & Gulati, *supra* note 4, at 1263-67.

for the same group in different contexts.<sup>11</sup> Perhaps more importantly, discrimination or inequality is consistent with the resistance of the target; indeed, it may be readily glimpsed in the context of that resistance. A subject who actively resists, who carefully negotiates his identity in an effort to avoid unequal treatment, can still be suffering discrimination. As Carbado and Gulati suggest, the amount of identity “work” that the subject of inequality must do<sup>12</sup> in order to avoid stigmatizing or unequal treatment is often a measure of, or even an accurate manner of characterizing, the discrimination she faces.<sup>13</sup>

## II

### JUDICIAL EVASION OF DIFFERENCE

If the good news proclaimed by this Symposium concerns the enrichment and transformation of critical accounts of inequality, the bad news concerns the judicial response. Contributors describe an almost paradoxical judicial response to the increasingly varied and sophisticated accounts of what it means to be the subject of group-based discrimination. Despite the intellectual advances, courts increasingly resist—I might more accurately say evade<sup>14</sup>—group-based analysis.

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<sup>11</sup> See Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994) (criticizing much recent Title VII law as reflecting the assumption that discrimination means manifesting the attitude that “we don’t like you because you’re an X” and arguing that acknowledging the complexity of legal subjects requires acknowledging discrimination as a more complex and variable phenomenon).

<sup>12</sup> See Carbado & Gulati, *supra* note 4, at 1267-70 (comparing identity work that must be done by outsiders with identity work that must be done by more privileged employees).

<sup>13</sup> See *id.*

<sup>14</sup> I am grateful to Martha Mahoney for reminding me that Ruth Frankenberg also uses the term “evasion” to describe resistant responses to a politics of race-based difference. See RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS passim* (1993). Frankenberg, in fact, uses two terms, “color evasion” and “power evasion” to describe responses to the politics of racial difference. *Id.* at 142, 149. Frankenberg analogizes color evasion to color-blindness: “[I]t is a mode of thinking about race organized around an effort to not ‘see,’ or at any rate not to acknowledge, race differences . . . .” *Id.* at 142. She describes power evasion as a strategy of “dividing the discursive terrain into areas of ‘safe’ and ‘dangerous’ differences, ‘pleasant’ and ‘nasty’ differences, and generating modes of talking about difference that evaded questions of power.” *Id.* at 149. Frankenberg offers as one example of power evasion an interviewee’s statement that “I don’t care if he’s Black, brown, yellow, or green,” noting that this phrase “camouflages socially significant differences of color in a welter of meaningless ones.” *Id.* The judicial patterns of thought that I will describe as “difference evasion” combine elements of each of Frankenberg’s strategies. See *infra* Part III.B. Difference evasion takes color-blindness as its ultimate goal and, as a means of effectuating that goal under present circumstances, aims to deny the differences that social constructions of race create. However, judicial difference evasion is also power evasive in the sense that when judges employing this strategy are directly confronted with evidence of or arguments about racial difference (as by parties in a race-conscious remedies case), they will deny that race in fact has any contemporary social significance and may also argue that recognizing race as a basis of difference will confer upon it a social significance of a negative and potentially divisive sort. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

Martha Mahoney makes this observation in the context of housing discrimination and the *Walker v. City of Mesquite* case.<sup>15</sup> Critical theories of inequality have permitted advocates to describe housing discrimination trends in new ways and to seek more appropriate and novel remedies, such as mobility remedies in the housing context. Unfortunately, these new descriptions and remedies are often summarily rejected by the courts.<sup>16</sup> This paradox also informs the observation made by Julie Nice about the antinomies of equal protection: notwithstanding the contributions of critical theorists, courts increasingly resolve these antinomies in favor of the more conservative pole.<sup>17</sup>

Confronted with these observations, one might well ask whether there ever was a golden age of critical theoretical efficacy, when courts embraced at least some critical insights about group-based difference. If we understand this question to ask whether critical theorists of inequality ever enjoyed broad acceptance among the courts, the answer is probably no. The insights of critical theorists frankly contest the dominant assumptions of the mainstream legal theories that inform inequality doctrine, from the posture of neutrality and objectivity ascribed to judges to the pre-social formation and unitary character ascribed to legal subjects.<sup>18</sup> Moreover, many strains of critical theory—I think here of some forms of critical race theory and gay and lesbian legal theory—appear to have been catalyzed or redirected by the ascendance of abstract, group-blind reasoning in American law.<sup>19</sup> However, there were periods in the past when specific assumptions now associated widely with critical theorists of inequality made occasional, if not consistent, appearances in antidiscrimination law. The doctrinal debates over discriminatory effect or discriminatory intent, over group-based or individually-based constructions of equal protec-

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<sup>15</sup> See Martha R. Mahoney, *Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. Mesquite*, 85 CORNELL L. REV. 1309 (2000) (discussing *Walker v. City of Mesquite*, 169 F.3d 973 (5th Cir. 1999)).

<sup>16</sup> See *id.* at 1309.

<sup>17</sup> See Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392, at 1410 (2000) ("The bird's eye view of these antinomies reveals a second apparent pattern: a hierarchical arrangement prioritizing the conservative preference over the progressive one. This is so even though progressive scholars and litigators brilliantly have articulated compelling arguments on behalf of the progressive preferences.").

<sup>18</sup> For a comprehensive, if perhaps extreme, discussion of this distance from the traditional liberal perspective, see DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1998).

<sup>19</sup> For example the *Michigan Law Review* issue that first explored the role of legal storytelling was published in 1989, immediately following *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); several of the contributors in that landmark compilation used storytelling to challenge the assumptions of that opinion. See Symposium, *Legal Storytelling*, 87 MICH L. REV. 2073 (1989).

tion—now largely resolved, as Julie Nice reminds us, in favor of the latter terms<sup>20</sup>—reflect at least the inclusion of what we would now call critical perspectives<sup>21</sup> in central doctrinal debates. Moreover, fuller appreciation of group-based difference has prevailed in a few areas of gender discrimination law. In a Title VII action for sexual harassment, the conceptual structure of the basic claim acknowledges power inequalities between men and women,<sup>22</sup> and some courts have even embraced gender-differential (or other group-differential) approaches to assessing the pervasiveness of harassment.<sup>23</sup> And crimes involving sexualized violence are another area in which legislatures have often been willing to frame statutes, and courts have been willing to analyze them, in gender-specific terms.<sup>24</sup>

More recently, however, even this partial confluence has sharply diminished. The growing distance between the critical commentators and the courts has been particularly conspicuous in the constitutional context of affirmative action, a central focus of critical race theory; but it has begun to infect other areas as well. The features of what I will call “difference evasion”—the judicial approach that has fueled this growing distance—have been vividly, and painfully, illustrated by papers in this Symposium.

The recent equal protection retreat provides the most familiar, and most important, example of judicial difference evasion.<sup>25</sup> Federal

<sup>20</sup> See Nice, *supra* note 17, at 1394-96.

<sup>21</sup> These more progressive alternatives in antidiscrimination law were not always framed as critical theorists would later frame them. For example, while courts in the mid-1970s argued about discriminatory effect and discriminatory intent, the few theorists who were then addressing inequality law with a broad critical lens, such as Derrick Bell and Alan Freeman, wrote about the perpetrator's perspective (implicit in discriminatory effect) and the victim's perspective (implicit in discriminatory intent). See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (analyzing school integration remedies from perspective of black plaintiffs).

<sup>22</sup> See, e.g., CATHARINE MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* 1-23 (1979).

<sup>23</sup> See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (applying the “reasonable woman” standard to determine pervasiveness of harassment); see also *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998) (holding that pervasiveness should be analyzed from the perspective of the “reasonable person in the plaintiff's position, considering ‘all the circumstances’” (citation omitted)).

<sup>24</sup> Gender-specificity in this area, however, has not been an unequivocally positive development. See *Michael M. v. Superior Court*, 450 U.S. 464, 476 (1981) (upholding gender-specific statutory rape statute against equal protection challenge). Moreover judicial solicitude toward statutes targeting sexualized violence may be more tenuous than feminist theorists had hoped. See, e.g., *United States v. Morrison*, 120 S. Ct. 1740 (2000) (holding that Congress lacked constitutional authority to enact civil remedy provision of the Violence Against Women Act).

<sup>25</sup> See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 948 (1996) (rejecting diversity as a compelling state interest).

courts have increasingly rejected group-based remedies for discrimination, because judicial understandings of group-based difference, and, correspondingly, judicial definitions of discrimination, have themselves begun to change. Courts rarely uphold remedies premised on the contributions of group-based identity because they do not view group-based identity as shaping one's perspective or contributing to one's ability to make meaning in a social or institutional setting.<sup>26</sup> Instead, courts are concerned about the potential damage done by characterizing individuals as group members.<sup>27</sup> Prima facie discrimination in the equal protection area has increasingly been defined as governmental action which classifies someone as a member of a group, rather than treating him as an unmarked individual.<sup>28</sup> This change is what Julie Nice refers to when she talks about the judicial shift in focus from class to classification.<sup>29</sup> For courts, it is no longer important whether the purpose or effect of that classification on those so classified is ameliorative or hurtful.<sup>30</sup> Consequently, what we used to call "remedy" (for discrimination against a class) is increasingly being identified by the courts as "violation" (of a more abstract prohibition on governmental classification).

However, as Tracy Higgins and Laura Rosenbury warn, this kind of group-blind conceptualization of discrimination has begun to escape the confines of the Equal Protection Clause.<sup>31</sup> The courts have begun to use equal protection analysis to limit race-conscious remedies in statutory settings such as the Voting Rights Act, settings which have explicitly group-based conceptual foundations. Moreover, as Higgins and Rosenbury note, the courts have begun to apply the same group-blind reasoning that has animated the equal protection area, to *liability* decisions in other contexts, such as Title VII.<sup>32</sup> Difference evasion in these contexts, which involve private actors, cannot even be buttressed by the ostensible justification of governmental neutrality toward various group-based identities.

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<sup>26</sup> See *id.*; see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) (rejecting "role model" theory as a compelling state interest).

<sup>27</sup> See, e.g., *Shaw v. Reno*, 509 U.S. 630, 648-49 (1993) (stating that treating voters as racial group members not only insults their individuality, but may foster racial antagonisms and encourage representatives to believe that their obligations run only to those of their race).

<sup>28</sup> See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Shaw*, 509 U.S. at 630; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>29</sup> See Nice, *supra* note 17, at 20-23.

<sup>30</sup> See *Croson*, 488 U.S. at 493 (concluding that it is impossible to tell whether a governmental classification is actually "benign" without subjecting it to strict scrutiny).

<sup>31</sup> See Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1201-13 (2000).

<sup>32</sup> See *id.*

Perhaps the most invidious development has occurred in the Title VII liability context: the courts have deployed critical theorists' nuanced tools of description against those theorists' very antidiscrimination goals. In some cases, courts seem to acknowledge descriptive themes, such as variability in identity and individual efforts at self-direction. However, in many of these contexts, judges use these nuanced accounts, not to render a more complex picture of group-based identity, but to deny that group members have suffered discrimination. Consider, for example, the lack-of-interest defense described by Higgins and Rosenbury,<sup>33</sup> and also examined by Vicki Schultz.<sup>34</sup> For this defense, the courts use the choices made by some individuals within a plaintiff group to counter the claim of discrimination raised by group members, neglecting the extent to which individual choices may be a response to elements of a discriminatory environment.<sup>35</sup> Consider also Devon Carbado's and Mitu Gulati's disturbing observation that courts may be more reluctant to recognize group-based discrimination in cases where outsiders used workplace "comfort strategies" to mitigate their exposure to stigmatizing stereotypes.<sup>36</sup> These varied forms of judicial difference evasion make clear that critical analyses of difference and group-based discrimination—illuminating though they may be—are not being embraced by mainstream judicial decision makers.

### III

#### CONFRONTING THE IMPASSE: NEW DIRECTIONS IN CRITICAL STRATEGY

Critical theorists may feel, as I do, that responsibility for this impasse lies with the courts: specifically, with their myopic view of discrimination and group-difference. The judiciary's neglect of—if not outright resistance to—a body of work offering profound and illuminating reconceptualizations of equality under law is inexplicably shortsighted. It would seem to underscore the judiciary's ideological

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<sup>33</sup> See *id.* at 1207.

<sup>34</sup> See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1752-54 (1990).

<sup>35</sup> See *id.* at 1757 ("An interpretation that portrays women as having formed their job preferences before they ever enter the workworld renders invisible all the ways in which employers disempower women from claiming nontraditional jobs.").

<sup>36</sup> See Carbado & Gulati, *supra* note 4, at 1292 n.92 (noting that when plaintiffs use comfort strategies to mitigate their exposure to stigmatizing stereotypes associated with outsider group membership, courts may conclude that they could not have suffered discrimination because they were not viewed by defendants as members of an outsider group).

investment in, or structural support of, the racial status quo.<sup>37</sup> Yet critical theorists have rarely taken judicial evasion of their insights as an explicit point of departure; we have rarely asked what effect the courts' refusal to learn from our arguments should have on our future theoretical work. There are, of course, exceptions to this pattern. For instance, Derrick Bell argues in *Racial Realism* that claims to racial equality directed at the courts have ceased to serve the interests of people of color, particularly African Americans; minorities should recognize that equality through and under law is unattainable and redirect their efforts toward more contextually-based and individual resistance struggles that have their own political and diguitary rewards.<sup>38</sup> Other critical theorists, such as Julie Nice,<sup>39</sup> have proposed that we try new discursive strategies that are less directly implicated in the courts' dichotomous, or antinomous, modes of thought.<sup>40</sup> For the most part, however, the judiciary's utter failure to engage with critical theorists' recent insights remains a mere subtext, rather than an explicit subject of discussion. Why this has been the case and what might be gained by revisiting this question are worthwhile questions to consider.

#### A. Underplaying the Impasse: Contributing Factors

While there is unlikely to be any one correct answer to this question, there are a range of partially-illuminating possibilities. Critical theorists may have failed concertedly to address judicial neglect of their insights because they are differently situated with respect to recent patterns of judicial difference evasion. Critical theories of inequality have not been neglected across the board; rather there has been group-specific variation and context-specific variation, which may have complicated the prospects of coalescence around this question. Feminists who avoid explicitly raising race or sexual orientation issues in their work may experience a warmer judicial reception than other critical colleagues in certain statutory contexts. Difference evasion has not taken hold in cases interpreting some statutes, such as Title VII claims of sexual harassment, in which the conceptual struc-

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<sup>37</sup> Indeed, judicial evasion of difference has spawned an increasingly intense critique, with some critics claiming that difference evasion was predictable, if not inevitable. See, e.g., Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) (arguing that it is necessary to recognize the equality claims no longer serve interests of racial minorities); Guardeau Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990) (arguing that the Supreme Court serves veiled majoritarian interest at expense of racial minorities).

<sup>38</sup> Bell, *supra* note 37, at 373-78 (arguing that legal realism permits courts to disguise and manipulate concepts of racial equality, thus covertly perpetuating the inequities of the formalistic model of jurisprudence).

<sup>39</sup> See Nice, *supra* note 17.

<sup>40</sup> See *id.* at 1412-18 (exploring the benefits of a "co-constitutive" approach to equal protection analysis).

ture of the basic claim acknowledges power inequalities between men and women.<sup>41</sup> Moreover, constitutional claims for women's equality frequently involve basic institutional exclusion, for which even a difference evasive approach does not foreclose recovery.<sup>42</sup> Intersectionality remains problematic, however, as do feminist claims about group-based characteristics that are variable across contexts.<sup>43</sup>

Gay and lesbian legal theorists rightly celebrate their conspicuous victory in *Romer v. Evans*.<sup>44</sup> Yet, this decision may not reflect the victory of critical perspectives on sexual orientation so much as the success of a legal "comfort" strategy: the Supreme Court was willing to strike down a broadly and dramatically prejudicial state enactment, so long as it could avoid framing its opinion around an explicit acknowledgement of gay and lesbian difference or disadvantage.<sup>45</sup> In other

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<sup>41</sup> See MACKINNON, *supra* note 22, at 1-25. Some courts have even embraced gender-differential (or other group-differential) interpretive approaches to the application of the statute, thus inhibiting difference evasion. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (applying the "reasonable woman" standard to determine pervasiveness of sexual harassment); see also *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998) (holding that pervasiveness should be analyzed "from the perspective of the reasonable person in the plaintiff's position, considering 'all the circumstances'" (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993))). Criminal acts involving sexualized violence are another area in which legislatures frame statutes, and courts analyze them, in gender-specific terms, although not in an unequivocally positive way. See *Michael M. v. Superior Court*, 450 U.S. 464, 472-73 (1981) (plurality opinion) (upholding a gender-specific statutory rape statute against equal protection challenge).

<sup>42</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (invalidating exclusion of women from state military college on grounds that generalizations about men and women should not bar women from beneficial experiences if at least some women are able to avail themselves of such experiences); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (striking down gender-based peremptory challenges on ground that gender does not make for reliable differences of opinion and gender-based exclusions involve unacceptable stereotypes). To my mind, Justice Blackmun's majority opinion in *J.E.B.*, which denies salient differences between men and women and also invokes the negative history and effect of stereotypes, reflects some elements of difference evasion. See *id.* at 135-47. Justice O'Connor, one of the leading difference evaders in the context of race, calls attention to Justice Blackmun's evasion in her concurrence. See *id.* at 149 (O'Connor, J., concurring). Justice Ginsburg's approach in *Virginia*, on the other hand, does not strike me as difference evasive; she relies on the damaging history of stereotypes about women to reject the state's gender-based generalizations, and she also argues that there are women who, factually speaking, are indistinguishable from men and so should not necessarily be foreclosed from participation. See *Virginia*, 518 U.S. at 519-58. However, the starkly different factual contexts in race and gender cases make precise comparisons between them a complicated undertaking. For a provocative view of Justice Ginsburg's *Virginia* opinion and other equal protection cases involving women, see Mary Anne Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000).

<sup>43</sup> For a more extensive description of judicial difficulties in acknowledging such characterizations of difference in one statutory context, see Abrams, *supra* note 11.

<sup>44</sup> 517 U.S. 620 (1996) (striking down Colorado's Amendment 2, which precluded the state and its subdivisions from passing laws or ordinances protecting the equal rights of gays, lesbians, or bisexuals).

<sup>45</sup> I describe this advocacy strategy, reflected most prominently in the apparently influential brief by Laurence Tribe, see *Amicus Curiae Brief* at 3-7, *Romer v. Evans*, 517 U.S.

areas—including Fourteenth Amendment privacy claims<sup>46</sup> and equal protection challenges to the exclusion of gays and lesbians from the military<sup>47</sup>—courts are far from accepting critical theories, even as a justification for ending facial discrimination. Moreover, multidimensional analysis of gay and lesbian identity, as Darren Hutchinson reminds us,<sup>48</sup> remains beyond the pale.

The area of racial difference, of course, reflects the increasingly frank rejection of critical insights, which many of this Symposium's most discouraging observations point out. The differential judicial treatment of critical theories, across group and context, may have impeded perception of the growing impasse between courts and critical theorists, and may have complicated coalition and response even among those who have perceived it.<sup>49</sup>

Furthermore, some critical commentators who have observed this impasse may have found it strategically and epistemologically dubious to focus explicitly upon it. Critical theorists of inequality, like any scholarly movement that strives for influence, may be properly reluctant to advertise a cool reception by even one target audience.<sup>50</sup> Moreover, as a theoretical matter, a major goal of critical scholarship in this area has been to shift the epistemological center of gravity away from the perspective of privileged legal actors and toward the vantage point of "outsider" groups.<sup>51</sup> To focus specifically on the impasse,

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620 (1996) (No. 94-1039), as a "comfort strategy" because, like the comfort strategies described by Devon Carbado & Mitu Gulati in *Working Identity*, see *supra* note 4, at 1301-04, it permitted gay and lesbian advocates to function in an unreceptive environment which they did not control—an environment created by previous Court cases, particularly *Bowers v. Hardwick*, 478 U.S. 186 (1986)—by refraining from calling attention to, or even effacing, aspects of their clients' group-based difference. I use "comfort strategy," as do Carbado and Gulati, in an analytic and descriptive sense to emphasize the burdens imposed on "outsiders" in unequal, hierarchical institutional settings, and not in any pejorative way.

<sup>46</sup> See *Bowers*, 478 U.S. at 186.

<sup>47</sup> See, e.g., *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991).

<sup>48</sup> See Hutchinson, *supra* note 4.

<sup>49</sup> For example, those scholars, such as feminist theorists, who have enjoyed a more mixed reception from the courts, may be more ambivalent about highlighting disparities between their theoretical positions and the courts' pronouncements, for fear of exacerbating disparities of perspective that already exist. Or perhaps their partial victories may have made it more difficult for them to see the ways in which women—of all races and sexualities—are directly implicated in the questions of intersectionality, on which the courts have been far less responsive. See generally Elizabeth M. Iglesias & Francisco Valdes, *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 555 (1998) (decrying the failure of some leading white feminists to address problems facing nonwhite women).

<sup>50</sup> Of course, the impasse need not be characterized as a complete rejection, but also could be depicted as a correctable error or temporary setback.

<sup>51</sup> Some scholars make this epistemological point explicitly. See, e.g., Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). Other scholars simply present their critiques from this vantage point (sometimes in discursively unconventional ways, such as through the use of personal narrative) and assume that

rather than critiquing the courts from the outsiders' perspective, might seem to shift that center of gravity back toward those with institutional and group-based privilege.

Finally, critical theorists may differ over whether judicial difference evasion warrants acknowledgment, let alone a tactical change. Here, the division may be less drastic among different group-based branches of critical theory than among those who disagree over whether to take a modernist or a postmodernist position.<sup>52</sup> Modernists retain the rationalist hope that inequality can be substantially ameliorated, if not wholly abolished, through the application of right reason. They are therefore likely to be dismayed and frustrated by the failure of courts to heed critical scholars' messages. Postmodernists, on the other hand, see inequality as a consequence, not of faulty reasoning, but of complex and deeply-entrenched social structures. Because postmodernists regard reason itself (along with neutrality and merit) as infused with the perspectives of the privileged, they are less likely to be surprised by the courts' failure to respond to reasoned

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readers will make the fairly obvious epistemological inference. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

<sup>52</sup> I am grateful to Angela Harris for encouraging me to think about distinctions among critical theorists of inequality in this way. See Harris, *supra* note 2, at 743 (pointing out the tension between modernist and postmodernist views on critical race theory).

There are many ways to distinguish modernism and postmodernism. See, e.g., FRANCOIS LYOTARD, *THE POSTMODERN CONDITION* at xxiv (Geoff Bennington & Brian Massumi trans., Univ. Minn. Press 1984) ("I define *postmodern* as incredulity toward metanarratives. This incredulity is undoubtedly a product of progress in the sciences: but that progress in turn presupposes it. To the obsolescence of the metanarrative apparatus of legitimation corresponds, most notably, the crisis of metaphysical philosophy and of the university institution . . ."); Seyla Benhabib, *Feminism and Postmodernism: An Uneasy Alliance*, in *FEMINIST CONTENTIONS* 18 (Seyla Benhabib et al. eds., 1995) (listing "death of man," "death of history," and "death of metaphysics" as the central tenets of strong postmodernism). For purposes of this essay, I follow Angela Harris in placing my emphasis on a distinction between adherence to and skepticism about the Enlightenment view of reason as a crucial tool for ameliorating inequality. See Harris, *supra* note 2, at 749. Interpreted in this way, the distinction between modernism and postmodernism covers some of the same terrain as the distinction between structuralism and poststructuralism. The latter distinction focuses on the processes of social construction through which human subjects, and unequal relations among them, are formed. Poststructuralism (as compared with structuralism) emphasizes the variety, complexity, and contingency of the discursive influences that shape subject formation. Some poststructuralists also emphasize the diffusion of the "political": the range of sites from which dominant social formations and meanings can be resisted. Postmodernism and poststructuralism share an antifoundationalism and a suspicion of liberal assumptions such as epistemological objectivism or largely unencumbered human autonomy. However, if one reads postmodernism as post- or antirationalism, and poststructuralism as a complex, contingent view of subject formation and power relations, then it is possible to have postmodernists who are not poststructuralists (and vice versa). Derrick Bell, with his emphasis on the magnitude and persistence of racial inequality, might be an example. See, e.g., Bell, *supra* note 37. Vicki Schultz, with her carefully reasoned appeals to courts to embrace discrete poststructuralist insights, is a poststructuralist who is not postmodernist. See, e.g., Schultz, *supra* note 34.

argument.<sup>53</sup> Far from providing a salient wake-up call, the current impasse might seem to these critics to affirm their views about the deep entrenchment of inequality and the difficulties of seeking change through narrow institutional approaches. Yet despite their differences in perspective, I suspect that it would benefit critical theorists of inequality as a group to take the current impasse as an occasion for new strategizing. Theorists could then interrogate the impasse in hopes of finding a more productive legal strategy or shifting the critical focus to extra-legal contexts, depending on the assumptions of the critics in question. In the remainder of this Essay, I consider two sets of strategies: one for modernists who believe this impasse might be resolved through better, or better-targeted, argumentation about the dynamics of difference, and another for postmodernists, who could use it as an instrument for underscoring the systemic character of the problem and the error of focusing exclusively on courts, as opposed to addressing broader social and cultural contexts.

## B. Modernist Strategies

If, as modernists, critical theorists believe that difference evasion and the growing analytic distance between courts and critical commentators can be ameliorated, we might profitably take this distance as an explicit subject of investigation. In particular, we could think more precisely about what beliefs, commitments, or mental habits underwrite the judicial investment in the evasion of difference and how we can begin to change them.

What factors explain judicial evasion of group-based difference? The answer is clearly complicated, but several categories may be worth considering. One set of answers lies in the realm of what we might call psychological explanations. Angela Harris's observation about essentialism also holds true of difference evasion: it is a comforting bulwark against the daunting multiplicity presented by difference.<sup>54</sup> Courts find refuge in the unity and abstraction of the phrase "We the People" because they are frightened by the boundless particularity of Borges's Funes the Memorious.<sup>55</sup> If one is tempted to dismiss this thesis as mere speculation, one need only survey those opinions that have

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<sup>53</sup> See Harris, *supra* note 2, at 745-50 ("Postmodernist thought refuses to accept any concept, linguistic usage, or value as pure, original, or incorruptible. Postmodernist narratives, as used by race-crits, contend that concepts like neutrality and objectivity, and institutions like law, have not escaped the taint of racism, but rather are often used to perpetuate it.").

<sup>54</sup> See Harris, *supra* note 5, at 605-06.

<sup>55</sup> *Id.* at 581-83 (discussing judicial and theoretical management of the tension between "We the People" and Funes the Memorious, the Borges character who remembered every detail of his past experience).

moved the judiciary toward difference evasion. In Justice Powell's *Regents of the University of California v. Bakke*<sup>56</sup> opinion, for example, one finds a vivid image of this kind of panic in the face of pluralism. The United States, Powell notes, has become:

a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a “majority” composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups.<sup>57</sup>

A daunted judiciary seems to be suggesting that it is easier to cast its lot with a unitary conception of an unmarked human nature than to determine how to parse, and adjudicate in the face of, such pluralistic complexity. As Justice Powell continues in *Bakke*:

There is no principled basis for deciding which groups would merit “heightened judicial solicitude” and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary.<sup>58</sup>

The same anxiety can be glimpsed in cases where plaintiffs make claims of intersectional identity. One court confronting a Title VII plaintiff's demand that it recognize the intersectional category of race and gender responded with telling, if arbitrary, candor, stating that it could recognize no more than two such categories:

The difficulty with [an intersectional] position is that it turns employment discrimination law into a many-headed Hydra, impossible to contain with Title VII's prohibition. Following [the intersectional model] to its extreme, protected subgroups would exist for every possible combination of race, color, sex, national origin and religion. It is questionable whether any employer could make an employment decision under such a regime without incurring a volley of discrimination charges. For this reason, analysis is appropriately limited to employment decisions based on one protected, immutable trait or fundamental right, which are directed against individuals sharing a second protected, immutable characteristic. The benefits of Title VII thus will not be splintered beyond use and

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<sup>56</sup> 438 U.S. 265 (1978) (plurality opinion).

<sup>57</sup> *Id.* at 292 (citations omitted).

<sup>58</sup> *Id.* at 296-97.

recognition; nor will they be constricted and unable to reach discrimination based on the existing unlawful criteria.<sup>59</sup>

Beyond the reflexive distancing of pluralist panic, there are also more principled grounds we might describe as philosophical explanations. A good window on these arguments is provided in Rosenbury's and Higgins's Article.<sup>60</sup> Recognition of difference and the kinds of remedies that it entails seem to fly in the face of a particular conception of the liberal government: one that envisions government as limited, and one that is wary of any action that might cause it to violate its putative neutrality toward different groups of citizens. Yet, as Linda McClain's contribution makes clear, there are many accounts of liberalism that courts could draw on beyond the neutral conception.<sup>61</sup> Nevertheless, the account that Rosenbury and Higgins identify is a mainstream version with a real hold on the political and judicial imagination of this country.

Finally, there are what we might call jurisprudential explanations. As Pierre Schlag has observed, the legal subject is, in many ways, a reflection of the judicial subject.<sup>62</sup> The terms in which judges describe subjects before the law reflect, in important respects, the ways in which judges see, or want to see, themselves. Acknowledging difference—acknowledging the importance of group membership to one's identity and experiences—means calling into question the traditional norms of good judging, namely, the ability to see subjects without affiliation or particularized, constitutive identity.<sup>63</sup> In the first part of his confirmation hearings, Justice Thomas spoke about “stripping down like a runner” to prepare for his judicial role.<sup>64</sup> Of course, it would be easier for judges if there were not too many constitutive elements of identity to strip off. Acknowledging group-based difference in the legal context raises questions about difference and its jurisprudential ramifications that most judges would prefer not to answer.

This list is daunting, to be sure; however, it does not leave us without resources in our effort to address the judicial impasse. In fact, merely by articulating these factors, we can see a number of possible remedies—some already in progress and others yet to be initiated—

<sup>59</sup> Judge v. Marsh, 649 F. Supp. 770, 780 (D.D.C. 1986) (citation omitted).

<sup>60</sup> See Higgins & Rosenbury, *supra* note 31, at 1198-1203.

<sup>61</sup> See Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221, 1249-57 (2000).

<sup>62</sup> See Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1628 (1991).

<sup>63</sup> For examples of articles that both frame and interrogate this premise, see Sherrilyn Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 1 (forthcoming 2000); Martha Minow, *Stripped Down Like a Runner or Enriched By Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201 (1992); Judith Resnik, *On the Bias: Feminist Reflections of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

<sup>64</sup> See Minow, *supra* note 63, at 1201.

that may help courts think more clearly about questions of difference. First, we might seek to mitigate negative psychological factors by, for example, approaching judges in a context outside the courtroom. Martha Minow and others have created an innovative set of judicial trainings through the "Doing Justice" program at Brandeis.<sup>65</sup> Minow seeks to have judges discuss critical insights about group-based difference in a context where they can absorb ideas about difference without immediately having to act upon them.<sup>66</sup> She reports that not infrequently she sees breakthroughs: judges acknowledging the significance of complex, group-based identity in a way that they would not have done in the context of a case.<sup>67</sup> It is her hope that, with sufficient exposure and discussion, judges might utilize these insights in adjudicative contexts.<sup>68</sup> We might address the philosophical factors by focusing on new or alternative ways to conceive of the liberal project. If judges cease to interpret liberalism as requiring an ineluctably limited, non-affirmative government and absolute neutrality towards citizens' varied goals, recognition of difference will become easier. This, I believe, is at least part of what animates Linda McClain's belief in an affirmative governmental responsibility to provide all groups with the preconditions for deliberative participation, particularly for groups whose prior inequality may have made those preconditions hard to come by.<sup>69</sup> Finally, we can address the jurisprudential factors by carefully exploring the terrain between the stripped down runner and the traditionalist's nightmare of uncabined subjectivity. In particular, we can examine the ways that group membership, which shapes both judges and the parties before them, might affect adjudication. Sherrilyn Ifill, for example, has written a fascinating article on whether and how we can understand judges to be representatives of particular communities, connected by group-based characteristics and interests.<sup>70</sup> Her paper confronts the ideal of the detached, impartial judge with the real difference—tangible, but not ungovernable—that group-based affiliation has made in many kinds of cases.<sup>71</sup> Helping judges think through the relation of their own group-based identity to their judicial role may encourage them to consider the group-based social formation of other legal subjects.

All of these strategies involve some deployment of the rationalist's tools: we can begin the dialogue in quasi-professional contexts that

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<sup>65</sup> This approach is detailed in Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1689-95 (1990).

<sup>66</sup> See *id.* at 1689.

<sup>67</sup> See *id.* at 1693.

<sup>68</sup> See *id.* at 1694.

<sup>69</sup> See McClain, *supra* note 61, at 1237.

<sup>70</sup> See Ifill, *supra* note 63.

<sup>71</sup> See *id.*

are less threatening to judges, create resting points on the slippery slope that leads to unfathomable plurality or uncabinable judicial subjectivity, and highlight the conceptual or institutional breadth of the liberal framework to which judges claim allegiance. Yet, there is a final set of factors shaping difference evasion, readily discoverable through this modernist inquiry, that seems less predictably amenable to the forces of reason.

We might describe these factors as political in nature. In the same section of *Bakke* that betrays the impulse of pluralist panic, we find this statement: "Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then *the only majority left would be a new minority of White Anglo-Saxon Protestants.*"<sup>72</sup> It is rare to find such an overt statement of the political anxiety occasioned by a thorough-going recognition of difference, but I suspect that this anxiety is quite prevalent.<sup>73</sup> Justice Powell rightly suggests that such recognition of difference would create new entitlements and new ways of understanding equality and discrimination. More salient, though, is the forceful expression of self-interest contained in Justice Powell's remark. A court that feels authorized to place such a perspectival statement at the heart of a landmark opinion either views self-interest as the ultimate expression of reason or regards this expression of self-interest as neutral—that is, not perspectival at all. In either case, such a decision maker promises to be hard to reach through an appeal to right reason. As Derrick Bell has argued, decision makers committed to the defense of their group-based self-interest can be persuaded to protect the interests of subordinated groups only when such protection converges with their own goals.<sup>74</sup> Judges who regard defense of their own privilege as a neutral undertaking will be even harder to persuade, as they will view critical claims on behalf of outsider groups as perspectival special pleading.<sup>75</sup> Therefore, even strategic ap-

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<sup>72</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, at 295-96 (1978) (plurality opinion) (emphasis added).

<sup>73</sup> Other examples include Justice O'Connor's argument in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1989), that Richmond's effort to correct decades-long patterns of entrenched discrimination might best be understood as a black majority's efforts to help its own and turn the tables on the former white oppressors, and her suggestion in *Shaw v. Reno*, 509 U.S. 630, 648 (1993), that creating minority electoral districts would generate a system wherein minority representatives might understand themselves as representing only minority constituents and racial tensions would be exacerbated.

<sup>74</sup> See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

<sup>75</sup> Legal theorists Daniel Farber and Suzanna Sherry, who are sometimes prepared to characterize the courts' investment in the doctrinal status quo as neutrality, also evince this view of much critical theory addressing questions of inequality. See FARBER & SHERRY, *supra* note 18, at 36-37.

proaches which begin with modernist premises may have to acknowledge the limits of reasoned argument directed to the courts.

### C. Postmodernist Strategies

For critical theorists who believe that judges are not persuadable—or not entirely persuadable—through reasoned argument, a different combination of approaches seems appropriate. Here, too, a few examples may point the way toward a fuller set of strategies. While the theorists and approaches examined below are distinguished by their skepticism (or in some cases, their agnosticism) about the value of rationalist, equality-based appeals to the judiciary, they also manifest salient, if subtle, overlap with the rationalist strategies examined above. This overlap suggests that the modernist-postmodernist dichotomy may more accurately be described as a continuum, or a tension, between two related critical impulses.

Perhaps the most radical approach, exemplified by critical race theorist Derrick Bell, favors contextually-based policy initiatives and individually-enacted resistance strategies while renouncing equality-based legal arguments. Bell concludes in his article, *Racial Realism*,<sup>76</sup> and his book, *Faces at the Bottom of the Well*,<sup>77</sup> that it is not possible to end racial inequality in this country, and that, in any case, courts are not persuadable by any of the available legal arguments aimed at equality.<sup>78</sup> He argues that, instead of focusing on change through legal equality claims, Blacks should engage in legal and policy initiatives aimed at ameliorating the material circumstances of Blacks and in contextually-appropriate individual resistance strategies. Such strategies are aimed, not at transcending inequality, but at improving conditions preserving personal dignity, and achieving satisfaction in nonacquiescence.<sup>79</sup> Critical theorists endorse such strategies both because they are usually feasible—there are opportunities for resistance

<sup>76</sup> Bell, *supra* note 37.

<sup>77</sup> DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 12 (1992) (“*Black people will never gain full equality in this country.*”).

<sup>78</sup> *See id.*

<sup>79</sup> Bell argues that the survival strategies of American slaves should serve as a model for this resistance: “Knowing there was no escape, no way out, the slaves, nonetheless continued to engage themselves. To carve out a humanity. To defy the murder of selfhood. Their lives were brutally shackled, certainly—but *not without meaning despite being imprisoned.*” *Id.* at 197.

Individual resistance strategies are also advocated by postmodernist and poststructuralist scholars who emphasize the dispersal and circulation of power. Many postmodernist and poststructuralist theorists cite Michel Foucault for this proposition. *See* MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 92-96 (Robert Hurley trans., Pantheon Books 1978). For an interesting account that relates this Foucaultian insight about the dispersal and circulation of power to the stagewise evolution of pluralist accounts of democracy, see Kirstie McClure, *On the Subject of Rights: Pluralism, Plurality and Political Identity*, in *DIMENSIONS OF RADICAL DEMOCRACY* 108 (Chantal Mouffe ed., 1992).

even in the context of systematic oppression—and because their predictable consequences are not so small that they can be dismissed out of hand—that is, one can never be certain, *ex ante*, how restricted or extensive the effects of such resistance might be. Individual resistance strategies have been particularly prevalent in the realm of cultural production—the creation of liberatory erotica is one example<sup>80</sup>—where the goal is to challenge the hegemonic force of dominant accounts of group-based difference and to offer new materials from which dissonant images, and ultimately, new combinations, might emerge.

Individual resistance strategies have also been embraced by those who are less skeptical about reasoned appeals to the courts and more sanguine (or at least more agnostic) about the possibilities of ultimate transformation. These strategies vary from the modest to the elaborate, yet most of them share certain assumptions. They view the entrenched character of judicial difference evasion as a product of law's intertwinement with other structures, institutions, cultural norms, and practices. While these scholars may not all believe that shaping the broader discursive environment will ultimately affect legal conceptualizations, they do share the belief that the continuity of law and other norms and practices justifies legal scholars' move toward a more multifaceted approach. Their strategies thus involve expanding criticism beyond the domain of legal doctrine to address these interrelated structures. In some versions of her training programs, for example, Martha Minow asks judges to read and discuss works of fiction reflecting critical perspectives on difference.<sup>81</sup> Minow's approach builds an interesting bridge between the modern and the postmodern<sup>82</sup>: it combines rationalist discussion with fictional accounts that aim to persuade, not solely or perhaps even primarily through the operation of reason, but by "demonstrat[ing] common emotive ground"<sup>83</sup> between the reader and those "others" whose lives are depicted in the fictional accounts. Outsider narratives, like other acts of resistant cultural production, seek to challenge dominant assumptions or articulate alternative assumptions that might ultimately displace them, or might be combined with them, in novel and productive ways. These narratives may be targeted specifically at judges—either in the course of litiga-

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<sup>80</sup> For a thoughtful and lively discussion of this potential mode of resistance, see Susan Keller, *Viewing and Doing: Complicating Pornography's Meaning*, 81 GEO. L.J. 2195 (1993).

<sup>81</sup> See Minow, *supra* note 63, at 1689-95.

<sup>82</sup> I am grateful to Ali Nathan for this insight.

<sup>83</sup> Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protections for Lesbians and Gay Men*, 46 MIAMI L. REV. 511, 521 (1992). Fajer notes that "stories create empathy by convincing the listener that he is like the subject of the story in some significant way—often through a shared experience of a powerful emotion or an important event." *Id.*

tion<sup>84</sup> or through judicial training—or they may be offered to contest and modify assumptions held by the greater society of which legal actors are a part.

Angela Harris, who seeks to engage the social norms that shape law, advocates the creation of “resistance culture.”<sup>85</sup> This form of resistance involves several steps: “the self-conscious formation of identity groups that have been subject to racial oppression and now demand equality”; the “recovery and reworking of what has been lost or suppressed concerning ‘race’ in legal doctrine and policy”; and the “transform[ation] [of] existing jurisprudence and political [or social] theory.”<sup>86</sup> According to Harris, these processes proceed not *seriatim* by simultaneous processes, but work at different times in different communities.<sup>87</sup> The focus of much of this work is not on rationalist persuasion, even at these wider social and cultural sites. The first stage emphasizes the articulation of alternative norms and practices reflecting the perspectives and experiences of outsider groups. The second stage involves the excavation of submerged themes and patterns in dominant political and jurisprudential accounts—particularly those ways in which an ostensibly neutral political system, comprised of the interactions of autonomous agents, can create racialized subjects.<sup>88</sup> The third stage, in which one transforms dominant norms and theories, may involve persuasive efforts,<sup>89</sup> yet it may also occur as the generation of alternative norms permits the formation of new conceptual frameworks that better reflect the realities of group-based difference. For Harris, who is subtly skeptical, but not entirely disillusioned about the prospects of legal change, this cultural work may occur in conjunction with more focused efforts at doctrinal reform.<sup>90</sup>

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<sup>84</sup> Marc Fajer proposes using outsider narratives that contest legal decision makers’ dominant “pre-understandings” about gays and lesbians in the course of litigation. *See id.* at 633-51.

<sup>85</sup> Harris, *supra* note 2, at 763-66. Harris takes her inspiration for this approach from the forms of cultural resistance described by Edward Said in the context of post-colonialism. *See* EDWARD SAID, *CULTURE AND IMPERIALISM* 209-20 (1993).

<sup>86</sup> Harris, *supra* note 2, at 765-66.

<sup>87</sup> *See id.* at 766.

<sup>88</sup> *See id.* at 762.

<sup>89</sup> Although Harris uses the distinction between modernism and postmodernism to frame her discussion of the “Jurisprudence of Reconstruction” she views these characteristics as primary tendencies in individual works, and not as sharp dichotomies. *Id.* at 766. In fact, she believes that many critical theorists—including, one assumes, herself—have both rationalist and postrationalist tendencies in their work. *See id.* at 782 & n.202 (discussing modernism and postmodernism in the work of Anthony Cook and Cornel West). She regards the potential productivity of critical race theory as lying in its management of the tension between modernism and postmodernism, hence she advocates jurisprudence of “sophistication” (i.e., complicated modernism) and “disenchantment” (i.e., keeping a careful distance from the romanticization of reason). *Id.* at 766-85.

<sup>90</sup> *See id.*

These strategies illustrate that even those who have become skeptical or uncertain about the prospects for reasoning with the courts have aspirations and concrete resources for ameliorating group-based inequalities in the legal context. Some theorists have been slow, however, to aim these strategies explicitly at judicial evasion of difference. Highlighting this connection when it exists may perform a number of useful functions. It may explain and help justify a nontraditional direction for legal analysis and scholarship, and may underscore the self-knowledge and agency of critical scholars in a period of doctrinal constraint. In emphasizing the interpretation of legal, social, and cultural norms, it also may challenge the presumption of legal autonomy which is far too prevalent among legal scholars. The suggestion that we identify our strategy in an explicit way reflects a bias toward communication—a modernist tendency paradoxically ensconced in a postmodern proposal. Nevertheless, the future promise of critical theories of inequality, as Harris has argued, may lie in creatively exploiting the tension between modernist and postmodernist impulses.<sup>91</sup>

#### CONCLUSION

The articles in this Symposium offer a vivid glimpse into this paradoxical, yet potentially promising, moment in inequality theory. The courts have thus far been resistant to increasingly variable and illuminating accounts of inequality. Yet acknowledging and exploring this impasse represents the first step in a renewed effort, in which both rationalist persuasion and broader strategies of culturally-based resistance may play a role.

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<sup>91</sup> See *id.*