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Making All the Difference: Three Lessons in Equality, Neutrality, and Tolerance

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MAKING ALL THE DIFFERENCE: THREE LESSONS IN EQUALITY, NEUTRALITY, AND TOLERANCE

*Martha Minow**

INTRODUCTION

In law, problems of distinction, or "line-drawing," unfortunately converge with the legacies of prejudice and status conflict in our society.

On the one hand, a basic tool for legal analysis is the concept of distinguishing cases. I frequently tell first-year law students that the children's program "Sesame Street" contains a segment which provides a marvelous introduction to legal analysis. Popularly known as "Which one of these things is not like the other?," this segment requires the viewer to engage in a process of categorizing objects. The viewer is presented with several items such as a chair, a table, a book, and a bed. The viewer is then asked to determine "which one of these things is not like the others?" Analogizing like cases and distinguishing unlike cases involves a similar process. That process is a critical tool for analyzing legal precedent, interpreting statutes, and persuading judges.

On the other hand, we live with the legacies of invidious discrimination in our legal and social history. Disparate and degrading treatment has been traditionally accorded to certain people based on society's assessment that they were somehow "different" from the norm. These differences have included gender, race, religion, age, and physical or mental impairments. But this list is not exhaustive. Society has historically relied upon peoples' distinctive traits to justify labeling them as members of certain groups. These groups have often been denied the ability to make decisions for themselves, or denied the right to vote. They have often been excluded from participating on juries, from certain jobs or educational opportunities, and from certain clubs or organizations.

Of course, these patterns of disparity have been challenged by people inspired by our nation's commitment to equality, neutrality, and tolerance. The legal sources for these commitments provided a basis for social and political reform movements during the nineteenth and twentieth centuries. Reformers struggled for self-governance for those who had historically been excluded. After a civil war, several constitutional amendments, endless leg-

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islative battles, and continuing civil rights and women's rights struggles, there have been dramatic improvements along these lines. However, society's embrace of these groups has been far from complete.

Why has this been the case? The answer is that there has always been, and there continues to be, political opposition to those who battle against discrimination and prejudice. Ironically, the arguments against reform are frequently couched in terms of liberty, efficiency, and the "natural" state of existence. I am interested in discussing several obstacles to reform which are imbedded in the very concepts used by the reformers themselves.

Obstacles arise because our conceptions of equality, neutrality, and tolerance rely too much upon distinction-drawing as the mode for problem-solving. The use of line-drawing by reformers as a problem-solving device may contribute to, rather than alleviate, patterns of exclusion. A reinterpretation of equality, neutrality, and tolerance might, as it were, make all the difference. The particular reinterpretation which I urge requires rethinking the particular legal rules that affect peoples who are diverse by way of gender, race, religion, age, or ability, so that those traits are neither ignored nor emphasized. I also question the traditional methods of legal analysis, which are often summarized by the ideal of objectivity and dispassionate reason.

To illustrate and support my points, I offer three exhibits into evidence. These exhibits are actually cartoons, the type that professors clip out and tape to their office doors, chiefly because they've run out of space on the refrigerator at home.

The first cartoon reveals a spotted dog who is sitting at a typewriter.[1] The dog has typed out, "The quick brown dog jumps over the lazy fox." The second cartoon depicts a judge with a bulbus nose and bushy mustache, who is looking down from the bench at a defendant with the same type of nose and mustache. The judge announces, "Surely not guilty. Next case."[2] In the first panel of the third cartoon, a minister opens a letter which says, "Dear Preacher, I don't like your holier-than-thou attitude; signed, Fed up." In the next panel, the minister writes back, "Dear Fed Up, I forgive you." In the last frame, the minister thinks to himself, "Shame on me."[3]

What is the significance of these cartoons? The best way to kill a joke is to analyze it, but that is precisely what we do in law school. Here, I will analyze the significance of these three cartoons for problems of distinction and discrimination.

I. EQUALITY

The cartoon of the dog at the typewriter highlights the difficulty our society has in fulfilling its stated commitment to equality. It illustrates what

1. Robert Mankoff, NEW YORKER, Aug. 22, 1988, at 66.

2. Charles Barsotti, NEW YORKER, Nov. 21, 1988, at 55.

3. Doug Marlette, Chicago Tribune, Nov. 28, 1988, at § 5 (Tempo Section), at 8 (this cartoon is the nationally syndicated cartoon named *Kudzu*).

prejudices and stereotypes actually are. They are simply shorthand expressions of the belief that "we" are better than "they." This point is rather obvious, but not especially funny.

What is funny, however, is that the dog is a member of a group which is usually characterized as being lazy, and yet calls the stereotypically quick fox the lazy one. The saying usually reads, "The quick brown fox jumped over the lazy dog." The cartoon's caption therefore utilizes the familiar humor device of surprise or substitution. At a level of deeper significance, the first cartoon reveals the impact of perspective on our perceptions of equality and inequality. The cartoon reminds us that even commonplace perceptions of other groups, captured in sayings that we assume everyone accepts and endorses, generally fall short of universality. Instead of being universal, they actually adopt one viewpoint.

We usually do not think of our own viewpoint as being a viewpoint because it is constantly reinforced by those who are like us. Those to whom we look to to confirm our perceptions tend not to be those whom we think are unlike ourselves. The cartoon also reminds us that when we view the world from the vantage point of someone we think different from ourselves, it suddenly occurs to us that *we* may be the ones who are odd or different. Indeed, we soon realize that "we" are as different from "they" as they are different from us.[4] Difference is not something which is intrinsic in the "different" person, but rather the product of a comparison.

I have been told that in Sweden and Norway, people tend to tell a lot of the same jokes. Yet in Norway, the jokes are about Swedes, whereas in Sweden the same jokes are about Norwegians. This demonstrates how we may attribute distasteful traits to a group with which we are unfamiliar, even as they may do the same to us. The goal of equality will remain elusive so long as we pretend that the only perspective is our own, and that we assume knowledge of what traits make others different enough to warrant either differential treatment, or the imposition of a label such as "lazy."

Consider this notion within the context of the law. Equality has been construed to be a constitutional and statutory goal which requires government, employers, and schools to treat all people equally. More specifically, people must be treated similarly if they are truly the same, but if they are truly different, then the requirement of equal treatment no longer applies. Therefore, it is patently unfair to treat either similar people differently, or different people similarly.

This notion hints at the complexities which underlie the concept of equality, especially once we take multiple perspectives seriously. The United States Supreme Court recognized such complexities in its 1974 ruling in *Lau v. Nichols*.[5] The Court held that instructing all public school children in English

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4. *Cf.* MacKinnon, *Making Sex Equality Real,* in RIGHTING THE BALANCE: CANADA'S NEW EQUALITY RIGHTS 40 (1986) (men are as different from women as women are from men).

5. 414 U.S. 563 (1974).

did not accord the same treatment to students who spoke primarily Chinese as it did to those students who spoke primarily English. The *Lau* Court found that the Chinese-speaking students would be denied the same opportunity to learn afforded to English-speaking students unless the language differences were acknowledged in the curriculum.[6]

The accumulation of differences can promote a fuller application of the concept of equality. The problem, however, is determining whose perspective will be adopted in assessing those differences or similarities. Simply assuming that people who seem different actually are different in important ways may ultimately result in the imposition of one group's perspective upon another. It was this basic argument which the Supreme Court adopted in *Brown v. Board of Education,*[7] and which Congress embraced in mandating the "least restrictive" educational placement for disabled students—often mainstreaming them into the public school system.[8] Yet, at the same time, Congress directed that special services and programs must be designed to accommodate the real needs of students with disabilities.[9] While "assumed differences" should be carefully scrutinized to expose any underlying prejudices, "real differences" must be accommodated. Unfortunately, there is bound to be considerable tension between these two notions, and resolutions of that tension may well reflect simply the perspective of the decisionmaker.

The impact of perspective on the meaning of equality may be most visible in the debate over pregnancy and maternity leaves for employees in workplaces covered by anti-sex discrimination laws. The issue is whether pregnancy-related leaves of absence violate the requirements of equality by providing special treatment for women. This difficult question has been heatedly disputed both between advocates and opponents of women's rights advocates and other persons, as well as among members of the women's rights community itself.

Some might defend this alleged "special treatment" as simply acknowledging the real differences between men and women. However, this position perpetuates a specific viewpoint and fails to incorporate the perspective of the pregnant woman herself. What would change if the issue were viewed from the perspective of the pregnant woman?

The United States Supreme Court's record on pregnancy has not been terrific. The Court's classic ruling concluded that employee disability benefits programs which exclude coverage for pregnancy do not discriminate on the

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6. *Id.* at 566.

7. 347 U.S. 483 (1954).

8. *See* The Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400, 1417(c) (1982) (commonly known as Pub. L. No. 94-142).

9. *See* 20 U.S.C. § 1401(16) (defining "special education"); 20 U.S.C. § 1401(17) (defining "related services"); 20 U.S.C. § 1401(18) (defining "free appropriate public education"). *See also* Kruelle v. New Castle County School Dist., 642 F.2d 687 (3d Cir. 1981) (extending the Act's benefits to a student with profound mental retardation and cerebral palsy).

basis of sex.[10] The Court reached this conclusion by distinguishing between pregnant and non-pregnant women.[11] Since both women and men may at times be non-pregnant, the Court has found that a distinction based on pregnancy is not based on sex.[12]

The Supreme Court has, however, recently improved its understanding of pregnancy. For example, the Court held in 1987 that a California statute requiring employers to provide leave and reinstatement to employees disabled by pregnancy did not violate the federal statutory demand for workplace equality.[13] The Court upheld the statute because the underlying policy was aimed at equalizing the circumstances under which both male and female employees could work and raise a family. By requiring employers to reinstate women after a reasonable pregnancy disability leave, the statute permits a woman to become a parent without having to quit or risk losing her job.[14] The leave of absence statute therefore affords women the same opportunity to combine work and family which their male co-workers had always enjoyed.

The key to analyzing this issue depends upon the starting point; with whom are the pregnant women being compared? Compared with whom are they different? A pregnant woman is "different" only if the non-pregnant male with no family duties is treated as the workplace norm. The Supreme Court ruled, in contrast, that the norm should be a person who is both worker and family member. In contrast to that norm, the pregnant worker is not "different" in any respect. Consequently, it is the workplace itself which must change in order to avoid differential treatment of pregnant workers.

I cannot, however, stop here if I am to pursue fully my concerns about neglected points of view. I must ask what weight should be accorded to the perspective of those who are not parents, and do not intend to become parents? Will they now receive unequal treatment in the workplace? I could attempt to persuade nonparents that they should not complain about workplace leaves for parents because everyone has a vested interest in the perpetuation of our species. However, the very use of the category, "parent" wrongly divides employees with children from employees with other dependents, such as elderly parents or relatives. As recent legislative proposals have suggested, a "family-related dependent care" leave of absence policy may be the best way to avoid inequality in the workplace. Even this solution offers only a glimpse of the meaning of equality. Equality is a process which

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10. *Compare* General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (holding that an otherwise comprehensive disability insurance plan did not violate Title VII because it failed to cover pregnancy-related disabilities) *with* Gedulig v. Ailleo, 417 U.S. 484 (1974) (sustaining a similar plan despite a fourteenth amendment equal protection challenge, concluding that removing pregnancy from the list of compensable benefits was not discrimination on the basis of sex).

11. *See Gedulig*, 417 U.S. at 496-97.

12. *Id.* at 496-97 n.20.

13. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

14. *Id.* at 284-90.

requires the continual re-examination of the treatment we accord to people. The lines we use to divide people must be scrutinized and rescrutinized in order to incorporate the perspectives of those who have not been consulted in the past. The search is not simply for the fox's perspective, nor the dog's, but rather a perspective that will take both in account. Although we are still left with a perspective, it is one which implies neither a norm nor a deviant position, but instead a third point of view from which to see relationships between diverse human beings.

II. NEUTRALITY

The second cartoon depicts a judge with a bulbous nose and a bushy mustache, who declares that a defendant with similar features is "surely not guilty." This cartoon offers some insight into the issue of neutrality in the legal treatment of difference. Similar to my comments on equality, the issue here is also one of perspective. Of particular concern is the perspective of the judge or expert. For these important decisionmakers, when does distinction result in bias? Is it possible for anyone to be completely unbiased?

The second cartoon acknowledges several realities which we, as guardians of the legal system, are usually eager to shield from view. First, members of the legal profession, including judges, are fallible. Second, one predictable form of fallibility is one's bias toward people who are different. Third, the starting point of any legal analysis is itself a debatable question.

In this age of heightened professional ethics, the concern for any appearance of impropriety by legal professionals almost overshadows the issues of wrongdoing which are on trial. If one can offer support for one cartoon by citing to another, I point to the cartoon depicting a man kneeling by his bed, praying, "Lord, please protect me from the appearance of impropriety." Should we never allow someone to adjudicate any matter in which that person may be perceived as having some interest?

Perhaps it was this very concern which motivated the defense in a sex discrimination suit to seek to disqualify Judge Constance Baker Motley on the grounds that, as a black woman, she would identify with those who had experienced either race or sex discrimination.[15] In denying the defendant's motion for her disqualification, Judge Motley explained that, "[i]f background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex . . . ."[16] Thus, there are several twists in recognizing the partiality inherent in viewpoints. As suggested by Judge Motley, it is not enough merely to doubt the objectivity of a particular judge faced with a litigant whom she resembles in some respect.

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15. Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975).
16. *Id.* at 4.

We must also ask whether the alleged resemblance raises special concerns because that shared trait is itself perceived as "different" from the perspective of society's majority or powerbrokers. The fact that Judge Motley was the same gender as the plaintiff stood out to the defendant because of its assumption that maleness is the norm in the courtroom, in the law firm, and in the application of law. If such deeper assignments of difference are at work, then the issue of "bias" in judgment actually boomerangs. The question becomes whether those who would assume a woman is favorably biased toward other women are themselves adversely biased toward women. The recognition of bias and partiality within a particular viewpoint must work both ways. Neutrality is as threatened by those whose viewpoints happen to coincide with the majority viewpoint as with those whose viewpoints stand somewhat apart.

I have puzzled over several related questions raised in the sex discrimination charges which the Equal Employment Opportunity Commission ("EEOC") brought against Sears, Roebuck & Co.[17] The EEOC originally argued, based on statistical studies, that women were under-represented in the high paying commission sales jobs at Sears because of discriminatory behavior by Sears as an employer. Sears defended by maintaining that their employment patterns did not reflect discriminatory behavior, but merely reflected the job preferences of female job applicants. To support this position, Sears engaged a well-known historian of women's culture, Rosalind Rosenberg, to testify on its behalf. Rosenberg testified that the EEOC incorrectly assumed that women were like men, and therefore desired commission sales jobs. In contrast, Rosenberg argued that women have historically differed from men in the types of jobs which they pursued. In response, the EEOC offered the testimony of another historian of women's culture, Alice Kessler-Harris. She argued that women's job preferences and choices only reflected the real economic opportunities available to them. According to Harris, whenever men's jobs became available to women, especially when due to a shortage of men to fill them, women traditionally pursued those jobs.

After a lengthy trial, the district court ultimately rejected the EEOC's view and accepted the defense offered by Sears.[18] The lawsuit has provoked enormous controversy over the nature of sex discrimination, the role of experts in litigation, and the ethics of expert testimony.

Many issues in this intricate and fascinating case come to my mind whenever I think of the cartoon of the judge with the nose and mustache. First, how is a judge in the 1990's likely to assess the issue of women's career choices? On the one hand, a judge who is alerted to issues of gender equality may well think it important to view women as the architects of their own destinies. For example, if statistics revealed that not many women were employed as commission salespersons—if indeed, as Sears maintained, women

17. EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986).
18. *Id.* at 1276.

simply did not want these jobs—then that result would merely reflect the autonomous and self-determining decisions made by the female employees. Under this view, holding employers like Sears liable for sex discrimination would only serve to undermine women's freedom of choice.

On the other hand, a judge who is alerted to issues of gender equality might instead think that even if women did not consciously pursue certain jobs, this fact would not reflect autonomous, self-determining career choices by women. Instead, such decisions would demonstrate that women have absorbed the messages communicated by either their employer, or by society in general, as to what constitutes "women's work." If women do not pursue certain positions, they must be accepting the types of work which society has deemed compatible with traditional stereotypes of femininity. For example, if Sears had associated the commission sales jobs with the image of an aggressive salesman, it would have contributed to the societal process of excluding women from these higher paying jobs.[19]

It is an interesting reverie, then, to consider the dilemmas facing a feminist judge who might preside over one of these cases. In the way I have just described it, the dilemma resembles a dispute over a surrogate motherhood contract which the surrogate mother seeks to repudiate. Are the interests of women's rights well-served by respecting and enforcing a woman's autonomous contractual power as if she were as self-determining as any man? Alternatively, are the interests of women's rights better served by looking to the broader social context that might lead a woman both to enter into such a contract, and then find it impossible to go through with it after carrying and bearing the child? It is debatable whether either approach is a sensible framework for understanding the "Baby M" case,[20] or many others. One might ask whether a judge in either a surrogate mother case or the *Sears* case would be correct in choosing the approach which would most enhance equality for women. However, one might similarly inquire whether such a question itself is of a biased nature.

Unfortunately, this reverie of dilemmas potentially facing a feminist judge has little to do with most judges' viewpoints to date. There are more immediate problems, as epitomized in the *Sears* case, which involve political and personal factors that bring us back to issues of bias. These problems are three-fold. First, between the initial filing of the lawsuit in *Sears*, and the EEOC's formulation of its arguments, there was a change in administration. While the *Sears* case was initially filed under a Democratic administration, it was ultimately prosecuted by the Republican appointees to the

19. Professor Mary Joe Frug developed this interpretation of the Sears case. *See* M. Frug, Sexual Equality and Sexual Difference in American Law (Apr. 8, 1988) (unpublished talk presented to the Symposium on Sexual Equality, Sexual Difference and Law, given at the West Virginia College of Law) (available from Professor Frug's office at the New England School of Law).

20. *In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).

EEOC. Some observers argued that the newly-appointed EEOC personnel made no secret of their desire both to lose the *Sears* case, and to lose it in a manner that would preclude future EEOC officials bringing class-action suits based on statistics.

Second, Judge Nordberg, the judge who ultimately heard the *Sears* case, was himself appointed by President Ronald Reagan. The judicial selection process which produced Judge Nordberg had involved deliberate and explicit attention to political preferences approved by the Reagan administration.

Third, there were several motivating factors behind Rosalind Rosenberg's decision to testify on behalf of the defendants. For example, her ex-husband worked for the law firm that defended Sears. She was also known to have been friends with the man who headed that firm. Furthermore, Rosenberg believed that Sears was already doing enough for women through a recently adopted affirmative action program, especially given the absence of any individual complaints about the alleged past discrimination.

These factors suggest a more traditional meaning of bias—a posture influencing or undermining objectivity in legal judgment—than the analysis which I have offered. I would not go so far as to conclude on this basis that the Sears decision is entirely deficient. Obviously, the experts can disagree in good faith, and their status as women neither strengthened nor undermined their testimony. The issue of bias requires more than an analysis of the gender of the individual involved. Larger patterns of political preference, friendship, and loyalty and ideology may be more important in assessing bias than simply referring to external traits such as the sex, race, or even the nose and mustache of the judge.

Indeed, in our vigilance against the kinds of biases that undermine justice, we must resist the unfortunate convergence of the lawyer's penchant for line-drawing, and the traditional distinctions created by sex, race, ethnicity, or religion. The aspiration to impartiality is far more important and challenging, even if it forever eludes our grasp.

III. TOLERANCE

In the third cartoon, a minister, charged with a holier-than-thou-attitude, responds to the complainant by stating, "I forgive you." What is humorous about this cartoon? The scene reveals the self-serving framework that supports so many of our beliefs. The minister recapitulates exactly what he is charged with even in his effort to respond. The cartoon has the quality of the familiar paradox, "I'm the most modest person I know."

One of my favorite jokes summarizes the essence of this paradox. A rabbi, a cantor (the singer), and a shammas (the custodian) are together in a synagogue. As he prepares for the service, the rabbi suddenly throws himself to the ground. Staring upwards, he says, "Lord above all, before you I am nothing; I am less than a speck of dust. Protect me, bless me!" The cantor, preparing his music, looks over at the rabbi. Then he too throws himself to the ground. The cantor similarly shouts, "Before you Almighty God, I am nothing; I am less than the squeak of a door. Bless me, protect me!" The

shammas, the custodian, has been in the back mopping up. He sees the rabbi and the cantor on the floor. What should he do? The shammas also throws himself to the floor and says, "Before you Lord, I am nothing! Bless me, protect me!" Then, the cantor nudges the rabbi, points to the shammas, and says, "Look who thinks he's nothing."

The cartoon and the joke reveal both an underlying paradox, and an apparent "unself-consciousness." Simply put, people often repeat the very mistake which they intend to correct. I suggest that this same problem permeates the search for tolerance in the law. The issue of religious tolerance is a good example. Judges are often unaware of their own intolerance, even as they seek to implement commitments to tolerance, and therefore they merely perpetuate traditional distinctions.

Some instances of religious intolerance seem apparent in hindsight, as our society has shifted from dominantly religious to dominantly secular in character. The outcomes of several early religion cases now seem particularly offensive. For example, the state of Connecticut was practically a pioneer in its adoption of statutory religious freedoms. Nevertheless, a Connecticut court found no problem in refusing to accept testimony from trial witnesses who refused to swear an oath on the Protestant bible.[21] The state court reasoned that excluding the testimony of those witnesses did not prevent them from practicing their own religions. The court also reasoned that no one had an absolute right to participate as a witness at trial. Therefore, the state's refusal to accept their unsworn testimony did not burden their religious freedom. Similarly, an early Supreme Court decision allowed a Mormon to be criminally prosecuted for practicing bigamy, despite the fact that his religion urged polygamy.[22] While the Court asserted its "commitment" to the separation of church and state, it nonetheless proclaimed that polygamy had always been perceived as "odious among the northern and western nations of Europe."[23] There is perhaps a less palpable, but continuing tendency for our courts, while purporting to act in the interests of protecting religious differences, to treat one perspective as the norm, and others as deviant or different. For example, the Supreme Court recently rejected a Native American Indian tribe's claim that the federal government was violating its religious freedom by planning to construct a road that would intrude upon and destroy the tranquility of sacred Indian grounds.[24] The Court admitted that the proposed construction would burden the religious freedom of the tribe members, and also conceded that the government's interest was not compelling. Nonetheless, the Court rejected the tribe's

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21. *See* Atwood v. Welton, 7 Conn. 66 (1828). *See generally* Weisbrod, *On Evidence and Intentions: "The More Proof, The More Doubt,"* 18 CONN. L. REV. 803 (1986) (discussing *Atwood* and other early religion cases).

22. Reynolds v. United States, 98 U.S. 145 (1878).

23. *Id.* at 164.

24. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

challenge, and thereby failed to appreciate the severe burden to the exercise of their religious beliefs.

The Supreme Court has similarly rejected a claim that the presentation of a creche scene on public property violated the constitutional prohibition against the establishment of religion.[25] In doing so, the Court was insensitive to non-Christians by doubting that they would be offended by the display. At the same time the Court was insensitive to observant Christians by suggesting that a crèche was no longer a religious symbol, but was merely an earmark of the season much like Santa Claus.[26]

These decisions are especially striking compared to moments when the courts somehow understand what the state, and the majority, do not always seem to understand. It is in these moments that the courts implement tolerance by changing the ground rules. For example, in 1987, the Supreme Court in *Hobbie v. Unemployment Appeals Commission* considered whether a state could deny unemployment benefits to a woman who had left her job because her employer required her to work on her Sabbath day.[27] The state law only allowed people to receive unemployment benefits if they were unemployed through no fault of their own. The Court reasoned that it would be improper to treat her religious beliefs as her own "fault." Rather, the proper question was whether the denial of her benefits burdened the exercise of her religious beliefs. The Court answered this question by ruling that the state's denial of the woman's benefits created an unacceptable burden by punishing her religious observance.

I find the Court's recognition of an alternative starting point—the demands of religious observance—to be especially powerful. This is because it departs significantly from the earlier view that it is constitutionally valid to exclude a person from otherwise available opportunities simply because that person elects to exercise his or her religion. Thus, the *Hobbie* Court recognized that it was wrong to use the norm of the non-religious person to determine the availability of unemployment benefits, and to treat the religious person as "different." The Court's reasoning was also powerful because it comprehended the complexity of choice. The Court understood that one can choose to observe one's religion, despite resulting employment conflicts, and yet not be unemployed due to one's own fault.

The Supreme Court's perspective in the religion context is particularly remarkable in contrast to the Court's treatment of issues involving gender differences. The same year as the *Hobbie* decision, the Court upheld a state's denial of unemployment benefits to a woman who left her job due to pregnancy.[28] The state statute refused benefits to anyone who left a job for reasons unrelated to the employer. Here, again, an apparently personal choice

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25. Lynch v. Donnelly, 465 U.S. 668 (1984).
26. *Id.* at 685-86.
27. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).
28. *See* Wimberly v. Labor & Indus. Relations Comm'n, 479 U.S. 511 (1987).

was used to justify precluding the receipt of otherwise available benefits. The Court permitted the norm of non-pregnancy to establish the boundaries of a state unemployment compensation plan.

We could all learn from those occasions when we do happen to catch a glimpse of a viewpoint other than our own. Such occasions remind us that we must be more actively tolerant whenever we assume that our viewpoint is the only one we need to know. Indeed, we must ask what starting points we should use to avoid mistaking our own intolerance for tolerance.

IV. THREE LESSONS

Looking back at these three cartoons and the accompanying commentary, I think there are several lessons to be learned. These lessons could help us to subdue the unfortunate legacies of racial, sexual, and religious distinctions which arise in the field of law.

The first lesson concerns equality. To be meaningful, equality requires us to look at things from the perspectives of those who risk unequal treatment. This does not mean devolving into revolving door jurisprudence, meaning I look at you looking at me, nor does it mean adopting the relativism of "anything goes." It means paying attention to context, and acknowledging the limits of our own point of view. It also means selecting better ideals for society as a whole, such as equality between men and women, not merely for women who adapt themselves to the male role.

The second lesson concerns neutrality. Again, to be meaningful, neutrality requires us to look for starting points, subject them to criticism, and recognize the partiality inherent in every viewpoint. It also requires us to guard against disqualifying a viewpoint merely because it is partial. This means we must search for more systematic signs of unfairness than simply a judge's or witness's membership in the racial, gender, or religious group at issue in the given controversy.

The third lesson concerns tolerance. To be meaningful, tolerance similarly requires us to expose the unstated norm or starting points, as well as to challenge our own points of view. Only then can we guard against the ignorant trampling of others' rights under the ostensible guise of tolerance.

In my forthcoming book, I refer to these lessons as ways to make all the difference, because recognizing that we are all different from one another is the only way to break the cycle of discrimination. Then perhaps we can resist the temptation to view difference as the problem of a "deviant" group in whom the difference resides.

Hopefully, these three lessons point toward more inclusive solutions. More inclusive solutions require us to look at minority perspectives which have been long ignored, and perhaps also redistribute burdens so as to avoid accentuating historic differences. One inclusive solution has arisen in the context of hospitals which care for AIDS patients. Health care professionals understandably want to know in advance which patients have AIDS so they may protect themselves. The problem is how to identify quickly those patients who have AIDS. Any attempt to identify publicly those who have the virus

could harm them. Therefore, many hospitals have developed what they term "universal isolation," a practice of treating every patient as though he or she carries the AIDS virus. This solution requires all medical personnel to wear protective gloves, or take other precautions. Thus, the "universal solution" addresses the needs of the medical staff while simultaneously respecting the privacy of patients with AIDS.

Some may object that a "universal solution" to every problem would be too costly and overbroad. Others may argue that tampering with the lines of difference will eventually overwhelm us by undermining all sense of order and by ignoring actual differences. I would argue in turn that the costs to society from unremedied stigma and inequality are even more significant. Is not the cost of disorder acceptable where the price of maintaining order is the oppression of some people by others? Has history not taught us enough about the erroneous assumptions of real differences and inferiorities based on gender, race, disability, or religion to caution against taking any "understanding" of these traits for granted? I realize that my responses to these questions may not be wholly satisfactory. Indeed, it is at this juncture that I begin my current work-in-progress. It is there that I examine the sources of our beliefs about difference, and the alternative approaches to difference which we might pursue.

CONCLUSION

I close by suggesting such an alternative, and in doing so I return to "Sesame Street." The question is, "which one of these things is not like the other? The chair, the table, the book, or the bed?" "Sesame Street" itself has recently changed the answer to this question. Rather than providing an answer that adopts a single conceptual scheme, the television program now offers its viewers at least two answers. In the above example, perhaps the book is the anomaly, since the other items are articles of furniture. Alternatively, perhaps the bed is the odd-ball, if the category is defined as what items belong in a study. The various options available open up the possibility that there may be more than one way to categorize an item, and that it all depends on the purpose of the category and once revealed, purposes can be debated. I suggest that opening up to this possibility would no longer make "difference" seem so intrinsic and immutable, or operate to signify people's just deserts and dues in life. Opening up to this possibility could make all the difference.