NOT ONLY FOR MYSELF: IDENTITY, POLITICS AND THE LAW, Martha Minow (New York: New Press, 1997)

In this small, elegant book, Martha Minow cements her reputation as a wise and perceptive observer of the controversies that exercise her society. Her topic is identity — the tension between situatedness in social groups, formed around attributes like race, ethnicity, sex, sexuality or degree of able-bodiedness, and the eternal quest for self-definition. The point is not to resolve the tension once and for all, she argues, but to learn to live with it more productively. To explore this tension and the various coping strategies she recommends, she draws on stories, policy debates, recent *causes célèbres*, anecdotes and legal cases, weaving all of these together in an engaging and accessible form. She touches on a wide array of legal issues — some, like jury selection and electoral laws only very briefly; others, like the correct balance in education between parental desires to shape their children's identity and state objectives in the direction of promoting tolerance and mutual understanding, receive extended discussion. Nevertheless, this is a book written more for the intelligent lay public than for lawyers *per se*. Its themes are ones she has dealt with in a more distinctly lawyerly fashion in previous work, particularly *Making All the Difference: Inclusion, Exclusion and American Law.*[1]

The central theme of the book is captured in Minow's description of a dilemma that echoes the "dilemma of difference" she has identified previously: refusal to use group-based categories — whether out of ignorance of past mistreatment or excessive commitment to individualism — makes it impossible to remedy group-based harms; but reacting to this by embracing identity politics — reclaiming of and political mobilization around previously despised identity characteristics — threatens to freeze identity and undermine the potential for individual freedom. The first horn of this dilemma will be familiar to anyone who has followed the debates about the struggle for equality — exclusive reliance on ensuring individual opportunity has proven incapable of overcoming decades or centuries of ingrained deprivation resulting in deep patterns of exclusion. In outlining the second horn, Minow goes beyond her previous insight that recognizing difference risks reinforcing stigma and stereotype. This worry focuses on the inability of disadvantaged groups to control how those in the dominant group read the invocation of group-based classifications in policy initiatives and legal norms. Here, she adopts recent post-modern critiques of identity categories to argue that identity politics is not good for equality seeking groups on their own terms — categorization reduces people to a single trait or viewpoint, neglecting multiple and intersecting memberships, and suppresses the instability or incoherence of group boundaries, thereby denying the fluidity of identity and the potential for change.

To negotiate the horns of this dilemma, Minow suggests using group-based descriptions while recognizing that these are approximate, not absolute. This would leave room for individual variation within groups as well as for change over time, and

[1] M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990).

would treat identity "not as a thing but a process, a process of negotiation."[2] She also argues that a shift in focus from identity to "purposes, visions, causes,"[3] from "I am" to "I want," will spur collective action and avoid fueling people's dependence on their status as victims.

A chapter is devoted to the role of law in identity recognition, formation or crystallization through an analysis of three legal issues. Two of these — the use of race as a criterion for naturalization as a U.S. citizen and the litigation over whether a group of people from Mashpee, Massachusetts were eligible for status as an Indian tribe — fit nicely with the general theme of group-based identity. The third, however, involving the legal definition of fatherhood, seems out of place to me.

Using the work of Ian Haney López[4] on U.S. naturalization law during the period in which "non-white" persons were barred from attaining American citizenship, she nicely illustrates a destructive use of group categories. The courts, even as they jumped from one means of determining who counted as "white," to another, talked about race as though it were a fixed and real attribute of individuals — something to be discovered by the courts. In this way, they downplayed their own role in creating and sustaining racial categories for the purposes of exclusion.

Similarly, her discussion of the Mashpee case[5] takes the court to task for relying on fixed criteria that tend to freeze cultures and peoples. Faced with a story about ebbs and flows over the course of a community's interaction with its neighbours — intermarriage, adoption of Christianity (although a Christianity influenced by Indian customs), ambiguous negotiations with paternalistic authorities — the court decided that tribal status had been abandoned. This demonstrates an unwillingness to see group identity as fluid and changeable. Minow argues that the focus on whether the people of Mashpee were a tribe sidetracked the court from the real underlying question — whether they should have enjoyed protection from unscrupulous land transactions. Unfortunately, however, she does not carry through with the argument to demonstrate how this functionalist approach would play out. If the disputed transactions are unscrupulous only if the community has a communal land ownership system, and such a system is recognized only for Indian tribes, even Minow's approach ultimately hinges on, rather than bypassing, the question of whether the Mashpee are a tribe.

The example involving the definition of fatherhood critiques *Michael H.* v. *Gerald D.*,[6] which upheld the constitutionality of a presumption that a man married to and living with a woman who gives birth to a child is the father of that child. The presumption was challenged by a man who was undoubtedly the biological father of the child in question. While Minow's criticisms of the judgment seem sound, I am not

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2 M. Minow, *Not Only Myself: Identity, Politics and the Law* (New York: New York Press, 1997) at 50.

3 *Ibid.* at 55.

4 Ian Haney López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 1996).

5 *Mashpee Tribe* v. *Town of Mashpee, et al.* 447 F. Supp. 940 (1978).

6 109 S. Ct. 2333 (1989).

sure that anyone sees the function of this rule as the recognition or formation of identity in any meaningful sense, other than the determination of legal status for the purposes of assigning rights and responsibilities *vis-à-vis* the child. The artificiality of the presumption is palpable — neither the presumed nor the biological father's sense of who he is is likely to be altered by the judgment, although one man's desire to continue a relationship with this child will be frustrated. That is a significant hardship, but I do not see what is added to our understanding of what is at stake by construing this as a matter of legally defined identity. Further, although the father-child unit is a group in a sense, it is not the kind of group on which the rest of the book focuses. Its existence and its treatment by law raise none of the questions about the effort to remedy past mistreatment without stigmatizing or essentializing that are Minow's main concerns. Simply put, fathers (biological or legal) are not a disadvantaged group whose identity as fathers has been linked to poverty, reduced opportunities or suspicions of incapability. Therefore, working through the complexities that cases such as *Michael H.* give rise to is not fraught with the same dilemmas involved in determining how to legally recognize aspects of identity such as race or disability.

Minow's discussion of the role of law concludes with a very ambivalent assessment: "Law can help and law can fail to respond to oppression and mistreatment along group lines. At its best, the response is only partial; law can only do so much. At its worst, it reinvigorates group cleavages."[7] This is mirrored in Minow's blueprint for dealing with group-based disadvantage, in which law has only a limited role. We should, she argues, vigorously enforce anti-discrimination laws because there continues to be serious injustices inflicted on people because of their membership in particular groups; we should make reparation for discrete past instances of harmful group categorization; we should look for ways that we can improve the position of disadvantaged groups without enshrining group classifications in law; we should structure legal regimes that do use classification so that people can self-identify rather than be classified by the state. Along the way, Minow makes more concrete suggestions for reform that are promising. She suggests grounding anti-discrimination laws more systematically in the recognition that the problem lies more in the perceptions about others held by those who discriminate than in the actual characteristics of their victims. She also suggests extending or generalizing the principles of the law on freedom of religion to include the principle that people should be free to shape their own identity while the government should not formally prefer one identity over others. However, these suggestions are underdeveloped.

These modest legal recommendations are designed to do what the law can to remedy group-based harm while trying to prevent the further infliction of harm through inept use of group-based categorizations. This is supplemented by a call for the creation of more arenas for the articulation of people's stories about the infliction of group-based harm and greater use of the arts to raise awareness. These last two suggestions fall back on the need for better public education about the legacy of exclusion and broader public discussion about the complexities of the ongoing negotiation of the tension between group affiliation and individual fulfillment that is at the heart of identity formation.

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7 *Supra* note 2 at 82-83.

This will hardly satisfy those who want radical change now and expect the law to deliver it. Indeed, even as Minow warns us that legal solutions are unavailable, she seems to be critical of the law for its inability to resolve the dilemmas she identifies. Yet, it is in the nature of a dilemma that it not be amenable to a quick fix — what makes something a dilemma is precisely the fact that, whatever one does in response to it, there will be undeserved harmful consequences. A dilemma is born of the need to make some decision against a fixed backdrop, constraining the options available — exactly the features that characterize the type of adjudication by courts that Minow examines. Fully internalizing this conception of the nature of the problem will lead us to a less glorious but more realistic view of the potential for change through law. The huge achievement of the modern understanding of law, an upshot of the positivist revolution in legal theory, is the idea that because law is the product of human will and activity, normative change can be accomplished through the stroke of a pen. That which was illegal can become permissible and *vice versa.* There are many spheres within which this magical quality of law is effective. However, when the law seeks to deal with complex forms of human behaviour under circumstances in which people have their own independent sense of what ought to happen or what is important to people, law may proclaim that this or that is lawful or not, or that an X is a Y, but the messy facts of life will not necessarily go along. Legal judgments may have some influence over the course of human events, but they are unlikely to produce instantaneous conformity to "law on the books."

A fuller analysis of these kinds of limitations of law would have enabled Minow to take her analysis one step further. Just as she argues that identity should not be thought of as a thing but as a process of negotiation, she might have argued for seeing law as simply part of that process of continual renegotiation of important human values. Issues make their way into the courts because the parties cannot agree and need an answer. The judges must provide an answer, however messy and subject to change, however unamenable to clean line-drawing is the stuff of life out of which the dispute arises. That does not mean that bad decisions do not deserve criticism, but rather that the criticism ought not to take the form of lamentations that law is "inherently biased" against women, people of colour, gays and lesbians, ethnic minorities or disabled persons. Bad decisions do damage, but they do not magically transform people's purposes or sense of self or place in the community. The struggle continues, and there will be further opportunities to achieve public ratification of a more satisfactory vision.

Minow concludes with a chapter on whether "national unity is at risk"[8] as a result of the assertion of group identities. No one will be surprised to learn that she thinks the risk is exaggerated. Contrary to those who subscribe to the classic melting pot vision of American society, which she recognizes as something of a code for Anglo-conformity, Minow promotes solidarity rather than unity as an ideal. Solidarity requires forging ties across differences rather than insisting on uniformity. This will be a familiar tune to those in touch with Canadian debates about national unity and multiculturalism. I would be remiss in my patriotic duty if I did not register my

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[8] *Supra* note 2 at 134.

disappointment that Minow makes no reference to the Canadian literature, apart from the compulsory citation of Charles Taylor's work.

Despite the explosiveness of her topic, Minow maintains an even hand throughout her treatment of the issues. I know of no one who is so good at seeing both sides of an issue and representing each in a balanced fashion. This occasionally leads her to shy away from taking a stand even though someone (usually a court) must do so, but there are often compensating benefits in the greater insight into the controversy at hand that results from her careful attention to detail. Rabbi Hillel, whose famous epigram inspired Minow's title, would appreciate this book.

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