

# Exclusions and the Voices of the Excluded

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## Introduction

Margaret Davies in her paper 'Exclusion and the Constitution' makes many valid points including that the Australian constitutional order is based on exclusions, particularly of the indigenous peoples. Davies makes a convincing argument that even though exclusions are unavoidable it is important to scrutinise the mechanisms and consequences of exclusion, that we have many choices about how the lines of exclusion are drawn and that we should be aiming for a political, legal and social attitude which regards constituted identity to be provisional, hospitable to the excluded and ethically committed to self-revision and negotiation.

I am sympathetic to Davies' argument but have some reservations and shall elaborate these without detracting from my overall acceptance of her ideas. I shall discuss my responses under the sub-headings of silence of the excluded, identity formation, and why the privileged constitutional lawyers may be expected to change.

## Silence of the Excluded

Davies argues persuasively that the constitutional thinkers should shoulder the responsibility of being inclusive. This is a big and welcome step forward from an all too common strategy adopted by the privileged intellectuals of introducing disclaimers that their theories are non over inclusive as they do not claim to speak for every one. Those left out of their theories are the usual 'different' peoples. This strategy of leaving out of their theories the concerns of the differently situated is ironic indeed because these are the very people who accused the over inclusive and universal claims of mainstream theorists as being imperialistic. Rather than making a genuine effort to be inclusive many theorists adopted the easy option of abdicating responsibility in the name of being non-imperialists. It is simply unacceptable that the main stream theorists should be able to pretend that they are being responsible by not addressing the concerns of the 'others'. What they forget or purposely ignore in the process is in Linda Alcoff's words, 'the rituals of speaking that involve the location of speaker and listeners affect whether a claim is taken as a true, well-reasoned, compelling argument, or a significant idea. Thus,

how what is said gets heard depends on who says it, and who says it will affect the style and language in which it is stated, which will in turn affect its perceived significance (for specific hearers). The discursive style in which some European post-structuralists have made the claim that all writing is political marks it as important and likely to be true for a certain (powerful) milieu; whereas the style in which African-American writers made the same claim marked their speech as dismissable in the eyes of the same milieu.<sup>1</sup>

Therefore, Davies argument that the constitutional theorists (read the privileged intellectuals) must make the effort to be inclusive is laudable. The only reservation I have about her argument is that it remains strangely silent about the role of the excluded and those silenced. It is probably not intended but nevertheless the case that Davies' exhortation that it is possible and necessary for those in socially dominant positions to develop a non-appropriative attitude to the 'other' unfortunately maintains the radical separation of the self and the other. As she herself realises it is a way of the socially dominant constitutional theorists being magnanimous. Not much else has changed except that these privileged constitutional theorists can now feel less guilty because they are being inclusive or trying to be so. Where is in all this any mechanism for the 'other' to be an agent, to be heard, to be taken seriously?

Mere good intentions to be inclusive, even if they exist are not enough. In the progressive anti-discrimination scholarship I often come across an attitude of surprised delight by the writer that the subordinate group/individual has the oomph or the guts to be mocking/ridiculing/resisting the oppression. I wish to illustrate this point with an example. At a feminist conference at the Australian National University, part of the proceedings was screening a documentary film showing the relationship between an Australian tourist/film maker and a Thai woman working as a prostitute. The Australian man offered to 'buy' freedom for the woman so that she could go back to her family and community but she eventually returned to Bangkok and prostitution. The screening was followed by a discussion and one scene particularly attracted comment. In this scene, the woman was lying in bed with no clothes while the man was filming her (presumably to maintain the documentary feel of the film). She struggled to pull up the bed sheet with her toes and cover herself without having to further expose her naked body to the camera. Speaker after speaker at this feminist conference expressed delight that the protagonist woman maintained her dignity by trying to cover herself while being filmed by this man.

What was very troubling about this reaction for me was that these well meaning critics were unable to comprehend what the 'other' the 'prostitute' might be thinking. It is plausible that she needed money and knew that the only possible way of getting it was by selling her body for sex. She may have never considered herself degraded or humiliated to the extent that she could not protect her dignity. Even if she could not escape the cultural opprobrium of being a prostitute it should still be relevant to find out what her self-definition or understanding was. The

<sup>1</sup> Linda Alcoff, 'The Problem of Speaking for Others' (1991) 20 *Cultural Critique* 5-31, 13.

feminist critics at the conference however, expected her to be completely oppressed, trapped and devoid of any sense of agency. And when they saw the evidence of such agency they labelled it resistance and were pleasantly surprised by its presence. The point being that they unproblematically believed their own world view that any woman in the position of the protagonist must be completely oppressed and when they find evidence to the contrary they term it resistance and celebrate its presence. They celebrate it because they are supposed to be enlightened and progressive but the question is why did they think like they did in the first place? True, they have the cultural capital and clout to impose their understanding institutionally, ideologically and culturally but the fact that so much effort is required to maintain the hegemony of their world views must alert every one to the fact that the socially subordinate do not necessarily subscribe to the world view or identifications made by the socially dominant. The idea that ultimate oppression happens when the oppressed or subordinated peoples accept the views of their oppressors and believe themselves inferior admits of the possibility that the oppressed refuse to see themselves as inferior or less worthy.<sup>2</sup>

There seems to be no opportunity in the present argument of Davies for the voice of the 'other' or the 'excluded' to inform the views of the theorists and analysts? Is it not extremely arrogant to presume her oppression and then laud her resistance without making any serious effort to find out what her understanding of the situation might be? A dialogue demands two-way communication. Otherwise it remains a monologue. However good the intentions may be a monologue does not accord parity to the excluded. This I believe is the stumbling block in Davies' otherwise acceptable argument. She ends up only exhorting the powerful mainstream constitutional theorists to be inclusive because it is the ethical thing to do. I would like to argue that these are the very theorists who have created the exclusions in the first place and have a vested interest in maintaining them. Change will come only if the excluded are accorded a voice—how that may be done and why it would be done remains to be detailed.

This is not a matter of being over critical as this is the issue that goes to the very heart of the fundamental matter of creating constitutional knowledge. As Lam argues in a slightly different context that the self clarification of the feminist movement in the United States stands ready to make useful progress but such progress will only materialise if women claiming various identities (that is, Native American, white, African-American, immigrant, US-born, old, young, poor, middle class, disabled, able-bodied, married, single, childless, with children, Lesbian, heterosexual, first generation, nth generation etc.) are effectively positioned, economically and politically to be the co-describers, co-interpreters, co-architects or in other words the co-authors of their needs and claims.<sup>3</sup>

This brings me to my second point about identity formation and identity politics.

<sup>2</sup> Bernard Williams, 'The Idea of Equality', in Hugo Adam Bedau (ed), *Justice and Equality* (Englewood Cliffs, NJ: Prentice-Hall Inc, 1971) 116-137.

<sup>3</sup> Maivan Clech Lam, 'Feeling Foreign in Feminism' (1994) 19 *Signs: Journal of Women in Culture and Society* 865-893, 881.

## Identity Formation and Identity Politics

Davies herself accepts that all identity formation involves exclusions and closures but her focus on the discursive fields does not allow her to explore the role of wider institutional factors. The central issue of why the voices of the excluded must be heard and incorporated in all theory I believe can be elaborated by tapping into the feminist standpoint theory.

The post structuralist argument that discourses across disciplines combine in various ways to construct social realities and ultimately all knowledge is produced, reproduced or performed on an on-going basis is no doubt correct. But it is not very useful in answering how one may judge the relative merit, desirability, or even plausibility of one view over another. Thus Davies argues that 'Truth' is a product of discourse and power, not a pre-given neutral object. That may be so but every one has goals and desirable aims—not only for themselves as private interests—but as social goals. The issue is not so much whether there is an ultimate truth or even whether your and my truth is the same but if our 'truths' can not be pursued simultaneously which should prevail and why.

Most commonly the differing consequences of such choices are manifested in the identity politics of various groups. Paradoxically it is not possible to argue for any kind of change except from a defined position. And no such definition is possible without closures, without exclusions. Increasingly and perhaps not surprisingly identity politics is being subjected to similar criticisms as much of positivist analyses. What then is the difference between the exclusions perpetrated by positivism and of radical/progressive/emancipatory identity politics?

Personally I have no difficulty with the argument that the former maintains privileges while the latter allows for at least some social transformations towards a less oppressive and more just social system. In other words the bottom line is to be able to choose between the consequences likely to flow from different sorts of exclusions. Davies herself argues that the political consequences of different types of exclusions should be attended to. She however, stops short of explaining why some exclusions are or should be less acceptable than others. Is there anything in the deconstructionists method or argument that legitimise such a choice? Deconstructionist analyses typically focus on the project of showing that choices are made in constructing any knowledge—whether legal, medical or political. They do not explain or cannot say which choices are more desirable and should have precedence for that reason.

Moreover, deconstruction of positivist approach to show the practical and conceptual inextricability of law from its social others and to show that the ideology of separation is an ongoing act of force is good as far as it goes but it does not go far enough. It does not tell very much about another and more inclusive conception of law. For example, what would it be like to not talk of law and its others but a non-separate, non-divided, seamless something? The point being that in this seamless picture it would be difficult to talk about, among other things, the human subject and the law. I suggest that the notion of law being involved in the construction of the human subject is a relatively weaker argument than that put

forward by Fitzpatrick<sup>4</sup> and discussed by Davies that 'The human subject (as distinct from the legal person) is autonomous, is individual, is free *because* it is left alone by the law—it obtains its positive character and content negatively.'<sup>5</sup>

The emphasis on *because* gives too much credence to the importance of the relationship between the law and the individual subject. The human personality or the human identity is constituted not only by law and the same issue would be approached very differently by psychologists, anthropologists and even social scientists. Whether positivists theorise the law and the human being as radically separate is only part of the story.

Similarly Davies says, 'Although we do use the term 'law' as if it was easily identifiable, it is a construct which is produced by language and systems of power.' I would like to pause and ask who is the 'we' in this sentence. Who is 'I' for that matter. The point I am trying to make is that to enter into any conversation self identity comes into play—who am I is not answerable by reference to one's self understanding alone. It must also include an explanation of how such a self-understanding is made possible. But just because 'I' is constituted by a complex of discourses does not mean that 'I' does not exist as an identifiable or separate entity. I am other than you and to that extent the function of this or any other definition is to create an island, an entity separable from everything else. We can not function without such definitions and the consequent exclusions. So independence and separation are the other side of dependence and seamlessness. And Davies herself agrees that the simple critique of positivist notions of separation and separability does not break the chain. She is aware of the difficulty that the marginalised and dispossessed have often invoked separatism to argue for their interests. But her response that separatism of the dispossessed and dominant is different does not resolve the sticky issue of how a constitution may be made more inclusive and non-oppressive.

The fundamental issue of why the voices or perspectives of the non-dominant must be heard and taken seriously has long attracted the attention of feminist theorists. The resulting body of literature is loosely collected under the title of feminist standpoint theory. Susan Hekman has provided a review of some of these developments.<sup>6</sup> She explains how Nancy Harstock's book *Money, Sex and Power*<sup>7</sup> changed the landscape of feminist theory. Harstock argued that the truth claims of feminism could be justified because they were based on women's unique standpoint. Feminist theorists like Dorothy Smith, Sandra Harding, Patricia Collins and Jane Flax among others have further developed feminist standpoint theory in various disciplines.<sup>8</sup>

<sup>4</sup> Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992) 134.

<sup>5</sup> Emphasis added.

<sup>6</sup> Susan Hekman, 'Truth and Method: Feminist Standpoint Theory Revisited', (1997) *22 Signs: Journal of Women in Culture and Society* 341-365.

<sup>7</sup> Nancy Harstock, *Money, Sex and Power* (New York: Longman, 1983).

<sup>8</sup> Dorothy Smith, 'A Sociology of Women', in Julia Sherman and Evelyn Beck (ed), *The Prism of Sex*, (Madison: University of Wisconsin Press, 1979) 135-87; Dorothy Smith, *The Everyday World as Problematic: A Feminist Sociology* (Boston:

This scholarship is in my opinion directly relevant to Davies' present argument. Within this scholarship there is an ongoing debate as feminist theorists have struggled with the seemingly opposing pulls of standpoint theory and the insights of poststructuralism. While standpoint theorists have sought to demonstrate that all knowledge is situated and not only feminist knowledge they have had to find reasons for claiming that feminist standpoints are worthy of recognition (or as some would say they are truth claims). Standpoint feminist theorists have sought to acknowledge multiple feminist standpoints without giving up the possibility of viable feminist politics and have tried to avoid the paralysis of relativism.

Not surprisingly standpoint feminist theory has lost ground with the ascendance of poststructuralism. But I find it much more useful than the currently popular poststructuralist analyses including the influential views of Wendy Brown. She argues that the contemporary politicised identity is formed as a reaction or as an effect of domination that reiterates impotence, a substitute for action, for power and self-affirmation. Such articulation of politicised identity reinscribes incapacity, powerlessness, and rejection. Politicised identity may present itself as self-affirmation but it is predicated on and requires a sustained rejection by a hostile external world. Wendy Brown goes on to argue that 'in its emergence as a protest against marginalisation or subordination, politicised identity thus becomes attached to its own exclusion, both because it is premised on this exclusion for its very existence as identity, and because the formation of identity at the site of exclusion, augments or 'alters the direction of suffering' entailed in subordination or marginalisation, by finding a site of blame for it.'<sup>9</sup>

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Northeastern University Press, 1987a); Dorothy Smith, 'Women's Perspective as a Radical Critique of Sociology' in Sandra Harding (ed), *Feminism and Methodology* (Bloomington: Indiana University Press, 1987b) 84-96; Dorothy Smith, *The Conceptual Practices of Power: A Feminist Sociology of Knowledge* (Boston: Northeastern University Press, 1990a); Dorothy Smith, *Texts, Facts, and Femininity: Exploring Relations of Ruling* (London: Routledge, 1990b); Sandra Harding, *The Science Question in Feminism* (Ithaca: Cornell University Press 1986); Sandra Harding, *Whose Science? Whose Knowledge? Thinking from Women's Lives* (Ithaca: Cornell University Press 1991); Sandra Harding and Merrill Hintikka (eds), *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and the Philosophy of Science* (Dordrecht: Reidel, 1983); Patricia Hill Collins, 'Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought' (1986) 33 *Social Problems* 14-32; Patricia Hill Collins, 'The Social Construction of Black Feminist Thought' (1989) 14 *Signs: Journal of Women in Culture and Society* 745-773; Patricia Hill Collins, *Black Feminist Thought* (Boston: Unwin Hyman, 1990) and Jane Flax, 'Political Philosophy and the Patriarchal Unconscious: A Psychoanalytical Perspective on Epistemology and Metaphysics' in Sandra Harding and Merrill Hintikka (eds), *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and the Philosophy of Science* (Dordrecht: Reidel, 1983) 245-281; Jane Flax, 'Postmodernism and Gender Relations in Feminist Theory' in Linda Nicholson (ed), *Feminism/Postmodernism* (New York: Routledge, 1990) 39-61; Jane Flax, *Disputed Subjects: Essays on Psychoanalysis, Politics and Philosophy* (New York: Routledge, 1993).

<sup>9</sup> Wendy Brown, 'Wounded Attachments: Late Modern Oppositional Political

While her overall argument is nuanced and sophisticated Brown nevertheless depicts identity politics as investment in perpetuating one's own injuries. Keeping aside for the moment the merits of the rest of her analysis I argue that such an analysis smacks of taken for granted privileges. It is no consolation to the presently excluded and dispossessed sections of society to be told that first the entire economic and political structure will have to be dismantled before you can expect any justice. The point being that the presently experienced oppressions demand immediate action and not only by the ones experiencing them. It is unrealistic to expect the subordinated groups to ignore the consequences of enforced subordination. The groups who are socially injured and want such injury to stop cannot but work within the given system. Short of overthrowing the entire ideological and material conditions how is any change possible if the injured are not even allowed to name their injuries? Thus my interest in my womanhood, ethnicity, sexuality etc is precisely that I experience disadvantages on these bases. For Wendy Brown to argue that these aspects of my lived experience ought not be emphasised is tantamount to earlier mainstream theorists' arguments that for women or homosexuals their gender or sexuality would not be a problem if only they would resist focusing public attention on them! All theorists and social commentators must keep in perspective the short term and longer term strategies for transformation. Instead of pursuing the logical extensions of theoretical ideas to the nth degree it might be much more pertinent to examine the consequences that flow from ones theoretical stance.

Standpoint theorists are well aware of the logical extensions of the critiques mounted by poststructuralists but they are equally alert to the possibility of political paralysis in the name of theoretical integrity. Thus Nancy Harstock argues that 'standpoint theories are technical theoretical devices that can allow for the creation of accounts of society that can be used to work for more satisfactory social relations.' She goes on to say that some knowledge must be privileged over others as they offer the possibilities for envisioning more just social relations.<sup>10</sup> Similarly Sandra Harding argues that although all knowledge claims are determinately situated, not all such social situations are equally well suited as sites from which to see how the social order works. Dominant groups have more interests in not formulating and in excluding questions about how social relations and nature 'really work'. Thus intersectionality approaches work because thought that begins from conceptual frameworks designed to answer questions arising in the lives of differently situated women starts from outside the Eurocentric conceptual frameworks of much mainstream (including feminist) theory.<sup>11</sup> This comment takes

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Formations' in Joan Landes (ed), *Feminism, the Public and the Private* (Oxford: Oxford University Press, 1998) 448-474, 486. See also Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, New Jersey: Princeton University Press, 1995).

<sup>10</sup> Nancy Harstock, 'Comment on Hekman's 'Truth and Method: Feminist Theory Revisited': Truth or Justice?' (1997) 22 *Signs: Journal of Women in Culture and Society* 367-373, 370, 373.

<sup>11</sup> Sandra Harding, 'Comment on Hekman's 'Truth and Method: Feminist Standpoint Theory Revisited: Whose Standpoint Needs the Regimes of Truth and Reality?'' (1997) 22 *Signs: Journal of Women in Culture and Society* 382-391, 384-5.

me to my third and last reservation about Davies' argument.

## Theoretical Responsibilities

If constitutional theory is to be non-exclusionary, provisional and hospitable to the excluded the question to be asked is *why* is it exclusionary in the first place? I suggest that Davies (and many other poststructuralists) have very ably shown *how* it is that legal theory manages to be exclusionary but they have yet to explain *why*. The advent of deconstruction and other forms of postmodern analyses has shifted the focus of inquiry away from over arching explanations of why oppression and exclusion happens. In my opinion, the exclusive focus of much contemporary radical theory on the matters of discourse is misplaced and is singularly unable to explain why exclusions are maintained.

I find myself in complete agreement with Davies' aspirations and goals but am left feeling very uncomfortable that there is not much by way of explaining why or how such changes may be realised. Davies describes well the mechanisms of exclusion in the formation of identity, specifically for the legal discourse. However, her critique of the claims of positivism only shows that these are dubious claims and does not say much about why they would be abandoned. The self-assurance and the remarkable hegemony of positivism are not likely to be shaken by merely deconstructing the legal discourse. If that is likely surely it would be the case that by now all aspects of the legal system and scholarship had become truly inclusive of all sorts of differences. After all feminist scholars, critical race theorists and those writing in the areas of sexuality have for a long time now exposed the main stream legal theory, including positivism, as less than objective and indeed oppressive to the non-dominant sections of society. But all this effort has not compelled the main stream theory to correct its exclusions, to change its attitude to difference or to make provisional claims. So, why would anything be different due to the contributions of deconstructionists in constitutional theory?

After all if there is no one truth then my understanding of non-oppression is no better or worse than some one else's. Thus in contemporary Australia when commentator after commentator can claim with a straight face that the race power in the federal constitution can be interpreted as authorising curtailing legal rights of indigenous Australians.<sup>12</sup> What can or have deconstructionists been able to do about it? It is worthwhile to remind ourselves that even within positivist world view it is possible to argue for an interpretation of the race power that would allow only beneficial measures to be enacted by the legislature. The crucial issue therefore, is that of being able to implement this vision or interpretation of the constitutional law. In a slightly different context Elaine Stavro-Pearce similarly argues that we have to theorise the conditions of choice and agency. In an article discussing the feminist debates whether prostitutes are oppressed or freely choosing agents she argues that 'agency cannot simply be assumed. The problem of attending overly to the discursive and not to extradiscursive socio-economic relations is evidenced

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See *Kartinyeri v The Commonwealth* (1998) HCA 22.



here. Again it is important to distinguish between freely chosen acts and acts which contribute to freedom-enhancing movements. In so far as poststructuralism fails to make this distinction it assumes all acts of creative self-expression lead to social and political change'.<sup>13</sup>

The very reason why those wanting social justice in the present world view of positivist law cannot get their interpretations accepted will also prevent the deconstructionists from persuading others to have their interpretation accepted. If the ultimate goal is one of making social justice and non-exclusion mandatory in constitutional discourse the deconstructionists have not made much more headway than any other social transformers.

Ultimately the issue is not one of definitions only but to what use are such definitions put. Therefore, the argument by Davies that we need an attitude which regards constituted legal identity to be provisional, hospitable to the excluded and other, ethically committed to self revision and negotiation is commendable but is it achievable? This is an aspiration that needs to be supported by plausible arguments as to why may we believe that it would be realised. After all the past efforts of feminists, critical race theorists and those writing in the many different areas of non-discrimination have not compelled the main stream theory to correct its exclusions, to change its attitude to difference or make only provisional claims. It seems too naive to believe that once the errors of their ways are exposed the proponents of exclusionary theories will mend their ways.

The only way forward is to acknowledge the need for structural change in legal thinking. Davies argues that 'We could regard a constitution not as a historical event, and much less as a document, but as a *process* or *performance* which forms a national and legal identity.' The question therefore, is how such a change in our vision may be brought about? It cannot be a matter of individual conscience or ethical preference. It also has to be a process or performance of more than the dominant sections of society. Davies argues that the materiality of a constitution arises from the conversation which takes place between the text and its interpreters and agents. And therefore, it can be changed not only by the legally prescribed procedures but also by communal and judicial attitude. I agree with this understanding of the materiality of a constitution but am unable to distinguish it from what happens even now. The point being that the process or performance that is a constitution is obfuscated by certain metaphysics and the usual legal ideology. The power to impose certain understandings, especially the foundational and abstract character of constitutions lies with the socially dominant. Davies does not explain how and why this state of affairs can be expected to change?

I suggest that legal reasoning has to incorporate the need for justifying the consequences of adopting any position. The contemporary constitutions can coexist with exclusions and oppressions because the conceptual tools of objectivity and impersonal reasoning are available. There is nothing in our lexicon of legal reasoning that pins responsibility for the consequences of any point of view on

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<sup>13</sup> Elaine Stavro-Pearce, 'Towards a Posthumanist Feminism' (1994) 23 *Economy and Society* 217-246, 241.

anybody. Thus in Australia the legal thinkers who can argue with a straight face that the race power allows for discriminating against indigenous Australians are able to do so because they have the conceptual means of disassociating themselves from the consequences likely to flow from their views. If anything is to change these conceptual shelters will have to go.

I will illustrate my argument with the help of Giroux's argument made in the context of developing anti-racist pedagogy.<sup>14</sup> Giroux effectively argues that conservative and Liberal approaches to multiculturalism merge in not questioning the construction of 'whiteness' as a historical and social construction. By focusing on the issues of ethnicity, race and power the naturalness of 'whiteness' is perpetuated. Thus the critical thinkers (pedagogists in Giroux's argument) should move away from an exotic or objective encounter with the marginal groups and instead focus on how their own subjectivities and practices are present in the construction of the margins. He relies on Toni Morrison's question that the central question may not be why Afro-Americans are missing from dominant narratives but what intellectual feats had to be performed by the author or his critic to erase blacks from a society seething with their presence. He thus provides a means of pinning responsibility for holding a point of view on the person. Racism is thus no longer a 'problem' of the others but is maintained by devices that allow 'whiteness' to masquerade as natural or pre-given. Anyone who continues to ignore this insight thus is shown to be actively perpetuating racism.

I find this argument very appropriate for legal reasoning as it at once takes away the pretence of legal knowledge as objective or impersonal. Davies' argument that constitution should be made more hospitable to the excluded can become much stronger if every one had to justify the consequences that flow from their point of view. It no longer is a matter of individual preference or whether the individual subscribes to critical theory or is or is not a feminist. This also strengthens her argument that much change can be achieved not only by the explicit reformulation of law's fundamental conception, but also by more subtle attitudinal and cultural development. The required attitudinal and cultural development could be guided by this ethic of responsibility rather than by the artificial formalism of legal reasoning.

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<sup>14</sup> Henry A Giroux, 'Post-Colonial Ruptures and Democratic Possibilities: Multiculturalism as Anti-Racist Pedagogy' (1992) 5 *Cultural Critique* 13-34.