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From Class Actions to Miss Saigon: The Concept of Representation in the Law

Martha L. Minow
Harvard Law School

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FROM CLASS ACTIONS TO MISS SAIGON: THE CONCEPT OF REPRESENTATION IN THE LAW

MARTHA L. MINOW*

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I. SETTING THE STAGE

In August, 1990, the producer of "Miss Saigon," the hit London musical decided to cancel its Broadway production because the U.S.-based actors' union denied permission for the English lead actor to perform the play in New York.[1] Actors' Equity, the union, issued a statement that it could not "appear to condone the casting of a Caucasian in the role of a Eurasian."[2] The conflict between the union and the producer produced a cause célèbre debated in the theater community, in the press, and inside Actors' Equity itself. A week after its initial decision, the union reversed itself, saying it had "applied an honest and moral principle in an inappropriate manner."[3] After weeks of negotiations securing complete casting freedom to the producer, plans for the play revived, but the issue continued to produce controversy and wide media coverage for months thereafter.

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* Professor, Harvard Law School. This lecture was presented to Cleveland-Marshall Law School as part of its distinguished lecture program. I would like to thank Joe Singer, Anita Allen, Jack Balkin, Larry Blum, Mary Ann Glendon, Moshe Halbertal, Frank Michelman, Nell Minow, Avi Soifer, Elizabeth V. Spelman, Zipporah Wiseman, Peter Lefkowitz, David Pointer, and David Wiseman for their help with this piece.

[1] Mervyn Rothstein, *Producer Cancels "Miss Saigon"; 140 Members Challenge Equity*, N.Y. TIMES, Aug. 9, 1990, at C15. The union has authority over all performers appearing on Broadway. Actors from foreign countries need union approval before appearing unless they are considered British "stars." Michael Kuchwara, *'Miss Saigon' Canceled Over Casting of White Actor*, BOSTON GLOBE, Aug. 9, 1990, at p. 79. The union said it had not reached the question whether the British actor was a "star" for these purposes. *Id.*

[2] *Id.*

[3] Mervyn Rothstein, *Equity Council Approves Accord on 'Miss Saigon'*, N.Y. TIMES, Sept. 18, 1990, at C14.

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The context of the controversy included advance ticket sales of $25 million;[4] the recent election of an African-American mayor concerned about both remedying discrimination and preserving the theater industry;[5] the political attack on controversial art by conservative American officials seeking to control the uses of federal subsidies;[6] an emerging public conflict over attention to "politically correct" claims about racism, sexism, and homophobia,[7] and the United States Supreme Court's repudiation of most public affirmative action programs.[8]

For me, there was one more context for the debate. As I read about the casting of "Miss Saigon," I could not help but draw connections to another "casting" debate, closer to my home.[9] The ongoing debate over why law school faculties remain largely white and male intensified with Professor Derrick Bell's decision to take a leave without pay until Harvard Law School hired for its tenure-track a female law professor of color. Further heightening the issue at Harvard, a group of law students sued the school and claimed that discriminatory hiring practices hindered their education.[10] Both "Miss Saigon" and Harvard Law School generated arguments

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[4] Mervyn Rothstein, *Dinkins Offers to Help in 'Miss Saigon' Dispute*, N.Y. TIMES, Aug. 10, 1990, at C3. According to one observer, only the large advance sales explain the public controversy over Equity's initial objection to casting a Caucasian. *See* Robert Armin, *Miss Saigon: Not the Final Word*, THEATER WEEK, Sept. 10-16, 1990 at 37-38. ("If *Miss Saigon* did not have such a tremendous advance sale . . . very few people outside of the theatrical profession would have batted an eye over Equity's decision.")

[5] Mervyn Rothstein, *Equity Will Reconsider 'Miss Saigon' Decision*, N.Y. TIMES, Aug. 10, 1990, at C3.

[6] Frank Rich explicitly analogized the National Endowment for the Arts denial of funding to artists depicting homoerotic and sexually explicit images with the Actors' Equity decision in the 'Miss Saigon' case. Frank Rich, *Jonathan Pryce, "Miss Saigon" and Equity's Decision*, N.Y. TIMES, Aug. 10, 1990, at C1.

[7] *See generally* Louis Menand, *Illiberalisms*, NEW YORKER, May 20, 1991, at 10 (reviewing Dinesh D'Souza's ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS); *See also* VIRGINIA DURR, OUTSIDE THE MAGIC CIRCLE (Hollinger F. Barnard ed. 1985) (discussing racism in the United States).

[8] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). *But see* Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990).

[9] Making a similar connection to underscore his own viewpoint, Robert Brustein, the director of the American Repertory Theater in Cambridge, Massachusetts, commented: "Everyone's in the casting business. You have to cast a black woman in a law school as a law professor. . . . You have to cast Asians, homosexuals, everyone, in order to get sufficiently diverse multicultural representation. That is what Yeats called the 'mad intellect of democracy,' thinking that democracy means there has to be equal representation for everything that happens." Richard Bernstein, *The Arts Catch Up with a Society in Disarray*, N.Y. TIMES, Sept. 2, 1990, § 2, at 12. (quoting Robert Brustein).

[10] *See* Debbie Howlett, *Harvard Law Hit with Bias Suit*, USA TODAY, Nov. 21, 1990, at 3A. The plaintiffs, an unincorporated student organization, claimed that Harvard Law School's faculty hiring practices discriminated against minority groups and thus violated a state antidiscrimination statute and a state statute guaranteeing equal rights in the context of contracts. The trial court granted the defendant's motion to dismiss the case. Memorandum of Decision and Orders on

about merit and about symbolism, about overcoming discrimination and about risks of new forms of discrimination, about fairness and about representation. In both contexts, one side argued that there must be someone hired from the minority community while the other side maintained that hiring must be color-blind and merit-based.[11]

Many arguments in the law school hiring context echoed those generated by the "Miss Saigon" casting controversy; see if they sound familiar to you. Jonathan Pryce, the white English actor cast by the producer for the role, commented: "What is appropriate is that the best person for the job play the role, and I think it's completely valid that I play the role."[12] Translated for law school hiring, this argument sounds like: "what is appropriate is that the best person for the job get the job; excellence must not be sacrificed for other purposes."

About "Miss Saigon," Frank Rich commented: "By refusing to permit a white actor to play a Eurasian role, Equity makes a mockery of the hard-won principles of non-traditional casting and practices a hypocritical reverse racism."[13] Similarly, though perhaps less vividly, professors have

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Defendant's Motion to Dismiss and Other Pending Motions, Harvard Law School Coalition for Civil Rights v. The President and Fellows of Harvard College, No. 90-7904-B (Superior Court Feb. 22, 1991). Curiously, in light of the themes of this article, the decision largely rested on conclusions that the students could not represent the interests of minority members who might be victims of employment discrimination by the law school. Thus, the court ruled that the plaintiff group lacked legal capacity to sue; that it lacked standing to assert the claims of any person wrongfully denied employment by the school; and that it could not assert a breach of contract regarding existing contracts between the school and its faculty, nor a breach regarding nonexistent contracts with minority candidates. *Id.*

[11] Two law professors have commented from contrasting perspectives on the analogy between the "Miss Saigon" controversy and minority preference policy in comparative licensing proceedings undertaken by the Federal Communications Commission. Compare Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 121-122 n.82 (1990) with Patricia Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*; 104 HARV. L. REV. 525 (1990).

For a thorough and provocative treatment of the law school hiring issue, see Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705.

[12] Mervyn Rothstein, *Producer Cancel's 'Miss Saigon'; 140 Member Challenge Equity*, N.Y. TIMES, Aug. 9, 1990, at C15.

[13] Frank Rich, *Jonathan Pryce, "Miss Saigon" and Equity's Decision*, N.Y. TIMES, Aug. 10, 1990, at C1, C3. He continued: "This is a policy that if applied with an even hand would bar Laurence Olivier's Othello, Pearl Bailey's Dolly Levi, and the appearances of Morgan Freeman in 'The Taming of the Shrew' and Denzel Washington in 'Richard III. . .' " *Id.* at C3. Some warn that cross-race casting should proceed asymmetrically and allows historically excluded groups the chance to play the majority of existing roles without allowing historically privileged groups opportunities to play the relatively more scarce minority roles. *See* Ellen Holly, *Why the Furor Over "Miss Saigon" Won't Fade*, N.Y. TIMES, Aug. 26, 1990, § 2, at 7 (criticizing the casting of whites into the occasional roles calling for minorities).

argued that demanding the appointment of a professor because of her sex and race contravenes hard-fought principles of equal opportunity and color-blindness.[14] Even more directly on point were arguments over a hiring controversy at Harvard a few years back: when white civil rights activists and black civil rights lawyers were invited as visitors to teach a course on civil rights, students protested the school's failure to hire a full-time faculty member of color for such a course. In its defense, the Harvard administration challenged the idea that a white person who had devoted his life to the subject could not teach about civil rights.[15]

In contrast, Ellen Holly, a black actress, commented about the "Miss Saigon" casting debate:

> Racism in America today is nothing so crass as mere hatred of a person's skin color. It is rather an affliction of so many centuries' duration that it permeates institutions to the point of becoming indivisible from them. Only when the darker races attempt to break out of the bind — and inconvenience whites in the process — do whites even perceive racism as an issue. Only when a white is asked to vacate a role on racial grounds does the matter become a front-page issue.[16]

Rich, and others, also argued that opposing the casting of one lead part in "Miss Saigon" was counterproductive because the production of the play would itself open 34 Asian, black, and Hispanic roles in the musical, and not all, he claimed, would be minor roles. Rich, *supra* at C3. Shirley Sun responded to this argument: "One wonders if anyone would have advised black actors to be content with minor roles in the current Broadway production of August Wilson's "Piano Lesson" if a Caucasian actor had been cast in the lead as Boy Willie." Shirley Sun, *For Asians Denied Asian Roles, "Artistic Freedom" Is No Comfort*, N.Y. TIMES, Aug. 26, 1990, § 2, at 7. Still a different response would query why Rich or anyone else thinks that the other roles depicting racial minorities are any more likely to be cast with nonwhite actors, or any more appropriately so, and if so, why.

[14] *See, e.g.*, Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); Abigail M. Thernstrom, *On the Scarcity of Black Professors*, COMMENTARY 22, 25 (July 1990). *Cf.* Kathleen Sullivan, *Speech to the Harvard Law School Visiting Committee*, March 15, 1991 (discussing reporter Lisa Olsen's charge of sexual harassment in the men's locker room of the Patriot football team and acknowledging that some people don't think a woman reporter belonged in the men's locker room. Sullivan then noted that on that theory, perhaps women would not belong at Harvard Law School, either.)

[15] To round out the analogy, one could simultaneously have argued that just as African Americans teach contracts and tax, whites should be allowed to teach about race relations. Yet this argument has the awkward implication that teaching contracts and tax are "white" roles and teaching about race relations is a "minority" role.

[16] Ellen Holly, *Why the Furor Over "Miss Saigon" Won't Fade*, N.Y. TIMES, Aug. 26, 1990, § 2, at 7, 27. Similar points appeared in testimony before the New York City Commission on Human Rights. Al Levine, a Hofstra University law professor, testified that "an all-black cast of 'Oh, Kay!' does not eliminate a history of racial discrimination." *Reprinted in* Thomas Walsh, *NYC Hearings on Theater Discrimination Uncover Anger & Demands for Action*, BACK STAGE Dec. 14, 1990, at 1 (quoting Al Levine). Bernard Marsh, an actor, criticized the virtually all-white casts of contemporary Broadway productions and noted, "We're trained to believe an actor is an actor. We've found that it only applied when the actor is white." *Id.* (quoting Bernard Marsh).

Analogously, in law school faculties around the country, individuals argue about institutionalized racism. Some observers argue that implicit preferences for people who are part of the "old-boy network" go unnoticed, while preferences for someone from a traditionally excluded group provoke an uproar. Advocates for change assert that only actual results in hiring should count as evidence that historic exclusions are being overcome.

From this point of view, what may look like a preference for a member of a racial minority is really an effort to counteract a preference for whites. But another argument for preferring members of racial minorities simply views them as specially qualified people for the job at hand. In the wake of the "Miss Saigon" controversy, the distinguished playwright August Wilson defended his demand for a black director for the film production of one of his plays. He explained:

> "We are an African people who have been here since the early 17th century. We have a different way of responding to the world. We have different ideas about religion, different manners of social intercourse. We have different ideas about style, about language. We have different aesthetics. Someone who does not share the specifics of a culture remains an outsider, no matter how astute a student or how well-meaning their intentions. I declined a white director not on the basis of race but on the basis of culture. White directors are not qualified for the job.[17]

Similarly, a professor of color is needed, many argue, because that person will bring cultural perspectives otherwise missing from the law school community. That perspective will enrich the classroom, the scholarship, the counseling of students who share that background, and the counseling of students who do not share that background. In addition, some law school faculty members may conclude that their school should hire an Hispanic professor, because the increasing numbers of Hispanic students need the knowledge held by that person and because white, Asian, and African-American students need to see a Hispanic person in the respected position at the head of the class. Hence the slogan, "No education without representation."[18]

An additional argument arises in the law school hiring debate. Professors are role models, and only members of historically excluded groups can serve adequately as role models for students of those groups, goes this variation of the argument.[19] Some who support this position maintain somewhat differently that only a variety of role models can serve the needs of all students. Thus the special pedagogical needs of students who

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[17] August Wilson, *'I Want a Black Director'*, N.Y. TIMES, Sept. 26, 1990, at A25; August Wilson, *I Don't Want to Hire Nobody Just 'Cause They're Black*, SPIN, Oct. 1990, at 70; 71.

[18] Student Posters, Bulletin Boards, Harvard Law School, 1990.

[19] Anita Allen explores the role model arguments with attention to her personal experiences while identifying the persistence of merit even within role model claims. See Anita Allen, *On Being a Role Model*, 6 BERKELEY WOMEN'S L.J. 22 (1990/1991).

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are members of minority groups are distinct from and yet complimentary to the benefit for all students from diversity among the faculty. Further, in a distributive justice sense, the focus on race and sex in hiring should serve to shift resources, including the resource of academic attention, to new agendas for legal scholarship and teaching.[20] Finally, the presence of actors of color in a play can encourage young people of color to consider acting as a career just as professors of color can inspire non-white students to pursue academic careers.

Most striking to me is the parallel between those who find the entire framework of debate unacceptable, whether in the contexts of "Miss Saigon" casting or law school hiring. Playwright David Henry Hwang, one of the first to complain about the casting choice in "Miss Saigon," later said that he could not choose between minority casting and the producer's right to cast whom he wants because that is "like asking me to pick between my father and my mother; I can't. It's real hard for me to pick between artistic freedom on the one hand and discrimination on the other."[21] Similarly, some law professors argue that the choice cannot be between excellence and diversity because both are critical. In addition, many reject the implication that schools must trade or sacrifice some excellence in order to achieve diversity.

One person struggling with these tensions concluded that at least the debate over the casting in "Miss Saigon" brought the chronic difficulties facing actors of color to public attention. Shirley Sun, director, producer and writer of the recent film, "Iron and Silk," defended the public attention provoked by the stance of Actors' Equity toward "Miss Saigon." She wrote, "a minority group should not intentionally be excluded from [a Broadway play] with impunity . . . 'Artistic freedom' should not be used to exclude any group. If the stage is a sublime place where any actor can play any role, why can't an Asian or Asian-American play a Eurasian role?"[22] If

[20] This may be more like the notions of political representation in legislatures, and the implicit idea here is that the representatives will redirect resources. *See* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 728-30.

[21] Kevin Kelly, *M. Butterfly, Miss Saigon and Mr. Hwang*, BOSTON GLOBE, Sept. 9, 1990, at B89. Journalist Kelly in turn commented that Hwang "might be considered Confucian. 'The superior man,' Confucius says, '. . . does not set his mind for anything or against anything; what is right he will follow.'" *Id.*

[22] Shirley Sun, *For Asians Denied Asian Roles, 'Artistic Freedom' is No Comfort*, N.Y. TIMES, Aug. 26, 1990, § 2, at 7. She concludes:

> While black actors have progressed to playing Shakespeare—current examples include Denzel Washington as Richard III and Morgan Freeman as Petruchio in 'Taming of the Shrew' in this summer's Shakespeare in the Park program—it is erroneous to use the black example to generalize about Asian-Americans. Clearly, Asian-Americans have not yet reached the stage where they are taken seriously enough to be able to play themselves in leading roles. Much less do they have the opportunity to be cast in non-Asian roles. Until Asian-American actors can play Hamlet or Richard III, it is ludicrous to talk about reverse racism.

Id. at 27.

theater offers the possibility that actors can entice audiences to suspend their disbelief and be transported by crafted illusions, why cannot more actors have this chance to transport the audience?[23] The casting decision in "Miss Saigon," then was not about matching the actor's race with the character's race, but about the magical creation of an illusion of reality

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Especially noteworthy here is the reminder that different groups of people of color have different experiences dealing with racism. At the same time, this comment elides the difference between the actors and the roles they play by characterizing playing Asian characters as playing "themselves." I was most struck on this front by an experimental reading of the transcript of a documentary film by Frederick Wiseman staged by actors of the American Repertory Theater in Cambridge, Ma. 1988. The actors had never seen the movie, and they performed the scenes and then they joined the audience in watching the scenes from the movie. Some uncanny resemblances occurred, as when one actress decided to play with a rubber band nervously and then turned to watched the film clip which showed the actual woman who uttered the lines in real life was chewing gum nervously as she spoke. But more striking were the differences. One of the real characters had made some racist statements; in the film clip, he seemed demonic and worked up. The actor reading the lines chose instead to read them flat, with little affect. The audience agreed that this effort by the actor was believable and more chilling than the racist statements made by the actual person who had originated the lines.

Perhaps the point about "depicting ourselves" may be somewhat different if the question involves a actor with disabilities. Perhaps there is a kind of knowledge and ease that is enabled only by having the disability, or perhaps there is a possibility of believable portrayal that the actor with a disability uniquely has to offer. It is tempting to argue that so few have the chance to play any theatrical role or be taken seriously for any role of a character without a disability. When the few roles calling for a person with disabilities are given out to someone without those disabilities, the rare opportunity to perform is eclipsed, and prejudice or ignorance about persons with disabilities may be the reason for the decision not to cast or even audition an actor who has a disability. *See* Andrea Wolper, *Beyond Tradition: Ethnic and Disabled Actors Assess the Present, Plan for the Future*, BACK STAGE, Feb. 23, 1990, at 1A, 29 (producers tell an actress who uses a wheelchair not to audition for the role of a person in a wheelchair because they feared she would not be strong or well enough). But this relative rarity of good roles resembles the situation for Asian, African-American, Hispanic actors, female actors over the age of 40.

[23] One idealized view has the actor becoming the character: HANNA FEINCHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967), at 26:

> Ordinarily the actor in a play does not claim or even pretend to be the authorized representative of anyone. He does not pretend to act on authority of Hamlet, but to *be* Hamlet. His entire manner and appearance are directed to creating the illusion that this is someone else, someone whom he is playing or, as we say, representing on the stage. *Id.* at 26.

Even less romantic views of acting celebrate the opportunity to convince an audience of an imagined world or set of possibilities.

The relative scarcity of such opportunities to create illusions through acting may be especially painful when a member of one minority group is cast as a member of another minority group. "Seret Scott, a black actress, became emotional as she told of times when she'd agreed to play Latinos, Asian-Americans and Native Americans. By complying, she said, she took jobs away from actresses from those ethnic groups." Allan Wallach, *Casting Color Aside; Must Nonwhites be Limited to Roles Written Specifically for Them?*, NEWSDAY, July 1, 1990, Part II, at 4-5.

by whichever actor gains the chance to play the role.[24] Some producers specifically endorse cross-racial casting not only to give the best candidate the chance with the role but also to enrich and challenge the plays with the different dimensions that casting choices may afford.[25] Similar ar-

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[24] Curiously, few people considered the possibility of casting a Eurasian actor for the role; both white and Asian commentators suggested that the Eurasian character would have to be played either as Asian or European. Thus, the white actor cast in the role, Jonathan Pryce, declared that "If the character is half Asian and half European, you've got to drop down on one side of the fence or the other, and I'm choosing to drop down on the European side." Mervyn Rothstein, *Producer Cancels 'Miss Saigon' 140 Members Challenge Equity*, N.Y. TIMES, Aug. 9, 1990, at C15.

No one, to my knowledge, argued that it would be best to have only people from a group unlike the one to which the character belongs play the roles in order to challenge stereotypes. This approach could broaden the range of actors and audience and break out of simply enacting actual lived experience. Yet analogous argument in a legal context is unattractive: consider the claim that members of a given group should not be allowed to sit as judges or jurors in cases involving members of that group because they lack the requisite objectivity. For strong reasons rejecting such arguments see: Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975); Pennsylvania v. Local Union 542, Intl. Union of Operating Eng'rs, 388 F. Supp. 155 (E.D.Pa. 1974).

[25] The Non-Traditional Casting Project defines four types of non-traditional casting: (1) societal, in which non-white and/or female actors are cast in roles of characters with their ethnicity or sex; (2) cross-cultural, which transposes an entire play to a different culture; (3) conceptual, which casts an ethnic, female, or disabled actor in a role to give it greater resonance; and (4) casting of the best actor for a role even if this departs from the script. *See generally* Andrea Wolper, *Non-Traditional Casting: Definitions & Guidelines, Backtions & Guidelines*, BACK STAGE Feb. 23, 1990, at 29.

Zelda Fichandler, the producing director at the Arena Stage Theater in Washington, D.C., has maintained that theater's task, "while not stretching credulity to the breaking point, is to stretch it as far as we can." Zelda Fichandler, *A Theater Should Live on the Cutting Edge*, WASHINGTON POST, Dec. 13, 1990, at A22. Under her leadership, that theater has pursued non-traditional casting: actors are cast to play roles not written for someone of their race or ethnicity. *See generally* Zelda Fichandler, *Casting For a Different Truth*, AMERICAN THEATER May 1988, at 8.

A multiracial cast in a performance of Thornton Wilder's "Our Town" directed by Douglas Wager at the Arena Stage led one reviewer to comment:

> standing in a mass on the stage, the cast's racial mix has seemed utterly unexceptional, but as the actors begin to step into character, it's suddenly startling. Emily and George, the two young lovers who will court, marry, and experience tragedy together, have both been cast with white performers, but each has been given a black sibling. George's father is Hispanic and speaks with a pronounced accent. Nothing whatever is made of this. This mix is casual, but also crucial, because it serves to point up the play's universality with the same understatement and lack of fuss that eliminating sets and artifice did in that original 1938 production [of "Our Town"]. By suggesting that the New England village be represented on stage by a non-specific void, Wilder made his play universal. By transforming New England into an idealized global village in microcosm, Wager is doing the same thing.

Bob Mondello, *Rival Revivals*, CITY PAPER, Nov. 30, 1990, at 30. *See generally* Dan Sullivan, *Colorblind Casting: It's Not Yet a Tradition: When Black is White, Women Are Men, And the Theater Is Challenging*, L.A. TIMES, Oct. 2, 1988, at

guments are offered for entire cross-cultural productions, such as the Cleveland Play House presentation of the "Glass Menagerie" with a black cast.[26]

The debates over casting "Miss Saigon" and law school faculties reflect the prevalence of contemporary assumptions about group differences. They reflect arguments made on behalf of historically excluded groups that group membership serves as a proxy for shared experiences and especially common experiences as victims of societal prejudice. Opponents, styled as defenders of neutrality, resist such arguments because they undermine the commitment to treating individuals as individuals.[27] Some opponents further charge that the call for hiring members of racial minorities is incoherent if the advocates really want someone who holds a particular, "politically correct" view. Skin color is no determinant of such views, this argument continues, and political litmus tests for hiring violate academic freedom.

The volley between these sides is interminable and confusing. Certainly no one on one side convinces many on the other. Maybe we can understand the debates better by seeing connections to deeper confusions about the concept of representation throughout our society, made especially vivid in legal and political contexts. Let's see how confused we can get, or how confused we already are.

If treated as problems of representation, these issues must be examined in light of the questions: who may speak for someone else? What is the difference between symbolizing or standing for another, on the one hand, and advancing the interests of another?[28] Which should a representative

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50, 52 ("If the first purpose of 'non-traditional' is to open up new jobs, the second is to open up new possibilities.") Some critics have attacked such multiracial casting as distracting and political while others suggest that non-traditional casting suits classic or universal dramas but interferes with plays written about a specific ethnic or cultural group. *See* Megen Rosenfeld, *Theater: 1990—The Year Casting Turned a Color-Blind Eye to the Stage*, WASHINGTON POST, Dec. 30, 1990, at G7; Joanne Kaufman, *Acting's Not Just for Able-Bodied Whites*, WALL STREET JOURNAL, Jan. 4, 1990, at A12, Cols. 1, 4 (discussing *The Diary of Anne Frank* and *Raisin in the Sun*). Still others emphasize that non-traditional casting is not intended to diminish opportunities for ethnic actors to play ethnic roles. *See* Lisa Yoftee, *Ethnic Casting Issues Get Soapbox Treatment*, AMERICAN THEATER Feb. 1991, at 34.

[26] *See* Josephine R. Abandy, *A Message From the Artistic Director*, in the CLEVELAND PLAY HOUSE, THE GLASS MENAGERIE (Playbill, April 4-May 7, 1989) (announcing first professional all black production of "The Glass Menagerie" as a response to the need to respect multiracial and multinational heritage). Abandy concludes, "I also hope that this new interpretation of Tennessee Williams' haunting play will offer different and illuminating insights to those of you who are familiar with it, and will open its wonders to new audiences who have never seen it before." *Id.* Reviewer Tony Mastroianni acknowledged that this all-black production reflected Abandy's effort to remedy past neglect of the Black community by the Play House, but maintained that a better approach would be to produce "good new plays by black playwrights." Tony Mastroianni, *The Casting Cracks This Glass Menagerie*, AKRON BEACON JOURNAL, April 15, 1989, at B5, Cols. 1-3.

[27] *See* Fried, *supra* note 11.

[28] *See* HANNA FEINCHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967).

pursue? I will suggest that enduring confusion about these issues of representation pervades not only controversial hiring decisions but also a range of contemporary legal issues.

One example is elected representatives. Should the representative do just what the voters say they want, such as impose no new taxes, or instead pursue what the representative understands to be the voters' real and best interests? Should the representative look like the voters, eat pork rinds or blintzes or enchiladas, or are these efforts to mirror or resemble the represented irrelevant?[29]

Another example: who should serve on a jury and who should be disqualified as biased or ill-equipped? Should all Spanish-speaking jurors be excluded from a case involving Spanish-speaking witnesses out of fear that these jurors will have special claims of expertise in the deliberations—or would such exclusion deny the parties and the society a full and fairly representative jury?[30] Who may act as a named representative in a class action: a typical member of the plaintiff group, a specially articulate member, or a member whose injuries are exemplary in the sense of displaying the full variety of those alleged by all the plaintiffs?[31]

When does the completion of a lawsuit preclude a new lawsuit on the same issue brought by different people — when do the parties in the first lawsuit adequately represent for subsequent possible parties? For example, should a suit by black firefighters suing a city for discriminatory hiring practices preclude a new suit by white firefighters dissatisfied with the resulting affirmative action remedy?[32] If the black firefighters cannot represent white firefighters, can the city defending its practices represent the whites? Or should the whites have a chance for a new day in court because their interests were not represented by either the city or the black plaintiffs?

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[29] The Supreme Court decided to apply the Federal Voting Rights Act to state judicial elections, (*see* Chisom v. Roemer, 111 S. Ct. 2354 (1991); Houston Lawyers' Association v. Texas Attorney General, 111 S. Ct. 2376 (1991). This decision prompted the *New York Times* to ask, *Are Judges Representatives?* N.Y. TIMES, June 21, 1991, at A13. This question recalls to mind Senator Roman Hruskas's comment on one of President Nixon's nominees to the Supreme Court: "Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they and a little chance?" 28 CONG. Q. ALMANAC 159 (1970).

[30] *See* Hernandez v. New York, 111 S. Ct. 1859 (1991) (Kennedy, J., plurality) (approving use of peremptory challenges to exclude all Spanish-speaking jurors). *But see* Witherspoon v. Illinois, 391 U.S. 510 (1968) (rejecting exclusion from jury of all those expressing religious or moral scruples about the death penalty because such a jury would not fully represent the views of the community). *Witherspoon* was limited, however, by Adams v. Texas, 448 U.S. 38 (1980). *See generally* Stephen Gillers, *Proving the Prejudice of Death-Qualified Juries After, Adams v. Texas*, 47 U. PITT. L. REV. 219 (1985).

[31] *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL FORUM 139, 143-150 (discussing decisions denying black women as representatives of classes asserting sex discrimination).

[32] Martin v. Wilks, 490 U.S. 755 (1989).

When does a fiduciary fully represent the beneficiary and when should doubts be raised about this representation? The fiduciary may have concerns that differ from those of the beneficiary. This might be the case with investment managers in charge of pension funds intended to benefit some workers who have interests in the ongoing viability of the industry. Those workers may prefer investments in that industry rather than investments with the highest market return.[33] Does the fact that the fiduciary is not a member of the beneficiary group affect that investment judgment? Would a member of the group make a better, more representative judgment? Or is this kind of concern for membership irrelevant to investment decision-making, and properly so?

When should an attorney for tactical purposes have certain personal characteristics because these might benefit the client? Should a woman lawyer be willing to represent a man charged with rape, and a black attorney represent a white employer charged with race discrimination? When should an attorney's membership in the same group as the client matter to the client, or to a judge? Would it make a difference if an argument for gay rights is advanced by a lawyer who is "out"? Would it make a difference if an argument on behalf of a person with a hearing impairment is made by someone with a hearing impairment?[34] Should those group characteristics have an effect? Given that they do currently have an effect, what tactical choices should attorneys and clients make, and should any ethical concerns constrain those choices?

Finally, who can and who should speak for a child or a person physically or mentally unable to speak for herself? What if a child faces a choice between medical treatment or adherence to a religious belief? Who should speak for an elderly person who cannot express a view about whether to stay on a respirator?

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[33] *See* Martha Minow & Nell Minow, *Franchise Republics: The Examples of Shareholder Voting and Women's Suffrage*, 41 FLA. L. REV. 639, 647 (1989).

[34] When Michael Chatoff presented an oral argument to the Supreme Court in a case involving the educational rights of a deaf child, he became the first deaf attorney to appear in that Court. Barbara Rosewicz, Court Hears Argument by Deaf Lawyer, UPI, March 23, 1982, *available in* LEXIS, Nexis Library, UPI file. Chatoff persuaded the Court to grant him permission to use an electronic communications system that allowed him to read the questions spoken by the justices. Charles Babcock, *Deaf Attorney Argues Before High Court for Disabled Student*, WASHINGTON POST, March 24, 1982, at A2. Both this technological innovation and the appearance of a deaf attorney elicited public attention to the case and dramatized its issue which concerned the scope of accommodations required by public schools obligated by Federal Law to educate students with disabilities. *Id.* Ultimately denying the request for a sign language interpreter for the student, the Supreme Court nonetheless ruled that federal law required some degree of accommodation by the public schools. Board of Education of the Henrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). The Court concluded that the federal statutory requirements would be satisfied if the state provided sufficient personalized instruction and support services so that the individual child would benefit educationally. *Id.*

These are hard issues. With the help of some philosophic debates I will suggest that we have long been confused about them. I will then argue that two specific developments in legal and political thought cast new confusion — but also new light — on the problem of representation. I look first to the contributions of people concerned with difference, such as feminists and critical race theorists, and then to the contributions of a variety of scholars interested in empathy. After exploring the genuine tension between these two emerging schools of thought, I will return to a few of the legal questions I have just mentioned about who can and who should represent another. And perhaps, I will also get a chance to return to theater before I am done.

II. Presenting Representation

To deal thoughtfully with confusion, I like to turn to philosophers, especially analytic philosophers. It is not that I understand them. It is that they are so clear about their confusion, so the rest of us can relax about ours. Thus, if an analytic philosopher applies the clarifying tools of careful study of words and their meanings, distinctions and their applications, and analogies and their limitations, and the subject still seems confusing, the reader may conclude with some confidence that the concept just *is* confusing. Such, I maintain, is with representation as a concept, and I proffer the elegant book on the subject by Hanna Feinchel Pitkin as evidence.[35] Many contrasting meanings gather in the crevices of the word, "representation." Two contrasting consequences result. Efforts to pin down distinctive meanings may founder as the meanings shade into and evoke one another. Efforts to clarify the concept may instead convert ideal versions of representation into merely definitional notions. Pitkin's ambitious historical and analytic treatment of the concept helps to depict and describe these confusing dimensions of the notion, representation, as she runs circles around the concept and also shows that the concept is often circular as used.

Professor Pitkin identifies the relatively modern use of the concept, and notes that the ancient Romans used a similar word to mean the literal bringing into presence something previously absent, or the embodiment of an abstraction in an object.[36] She then distinguishes two dominant contemporary views of representation: the person who does what is best for those in his charge and the person who reflects accurately the wishes and opinions of those he is assigned to represent.[37] But beyond

[35] PITKIN, *supra* note 28.
[36] *Id.* at 3.
[37] *Id.* at 4. A representative *could* fulfill both of these views if the client's wishes match up with the representative's views of the client's best interests. This observation need not merely reflect the banal effect of coincidence because on occasion, the representative may conclude that the client's best interests call for expressing or deferring to the client's express views.

this conceptual distinction, Professor Pitkin demonstrates the inadequacy of any single definition for the concept.[38]

Pitkin specifies and contrasts four divergent definitions and she simultaneously explores their mutual influences and internal tensions. First, a formal definition looks to the authorized arrangement preceding and initiating the creation of a representative.[39] Pitkin criticizes this notion as circular; it lacks both any directive about the actual task to be performed and any measure of accountability for the performance of that task.[40] In a second definition, representation refers to the notion of likeness, mirror, map or portrait. Representing here depends not on authority, accountability, or any kind of acting, but instead on the representative's characteristics and ability to "stand for" those he represents.[41] This definition has a measure of the representative's success: it is the verisimilitude or believability of the representation. Because it turns on the personal characteristics of the representative rather than any actions taken, this concept resembles the emphasis on appearance in the debates over hiring in "Miss Saigon" and law school faculties.[42]

The emphasis on accuracy in this second definition is problematic. A fully accurate depiction is probably impossible, even in art (where this may not even be the goal).[43] Because of this impossibility, other dimensions of representation may operate under the name of appearance or

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[38] *See, e.g., id.*, at 10, 53, 75, 87, 90, 115, 142.

[39] *Id.* at 11, 27.

[40] *Id.* at 28, 35, 39, 49. For this reason, Pitkin finds the concept incomplete if not unworkable even by those, like Thomas Hobbes, who advocated the formalist definition. *Id.*, at 28, 35. Hobbes wishes to use the concept of representation to resolve how people with separate and conflicting wills could live in peace. *Id.* at 35.

[41] *Id.* at 61.

[42] Yet the fact that a resemblance must be believed by others raises troubling questions about the role of attitudes and concepts in constructing what people think is real. A white actor may be "made up" to look Asian. A person who may appear white may instead be African-American. *See* Ken Johnson, *Being and Politics*, ART IN AMERICA, Sept. 1991 at 155. Johnson describes a video installation by Adrian Piper entitled "Cornered." The work begins by confronting viewers with a video of Piper who

> does not appear to be black — she has neither the skin color nor the characteristic facial features of someone of obvious African descent. And so she begins by announcing, 'I'm black.' Then, in a coolly authoritarian tone she suggests, 'Now let's deal with this social fact and the fact of my stating it together.'

Id. at 155-56. This work of art includes philosophic arguments and suggests that the questions it raises might help viewers to alter their understandings of "reality." *See id.* at 156.

[43] PITKIN, *supra* note 28, at 66-69, 87. And for depictions intended to be accurate "representations" such as a map or blueprint, the thing itself must be read and interpreted. Id. at 86. Some values and guides outside the representation itself become critical in assessing its usefulness. *See* MICHAEL J. SHAPIRO, Preface, in the POLITICS OF REPRESENTATION: WRITING PRACTICES IN BIOGRAPHY, PHOTOGRAPHY, AND POLICY ANALYSIS XI (1988) ("representations do not imitate reality but are the practices through which things take on meaning and value").

imitation. Professor Pitkin notes: "As soon as the correspondence is less than perfect, we must begin to question what sorts of features and characteristics are relevant to action, and how good the correspondence is with regard to just those features."[44] Choosing which traits to make relevant raises questions of authorization or substitution. Alongside the shortfall between ideal resemblance and limited resemblance is the gap between the ideal and the real representative in other senses. The use of one trait rather than others as a basis for resemblance further confuses the relationship between ideal and real. "We tend to assume that people's characteristics are a guide to the actions they will take, and we are concerned with the characteristics of our legislators for just this reason. But it is no simple correlation; the best descriptive representative is not necessarily the best representative for activity or government."[45] As this statement by Pitkin suggests, there is something slippery and thus misleading in the use of a term like representation. One of its meanings slides into its other meanings without consistency or reliability. Similarly, talking about a representative in terms of a likeness may imply something that is typical. Yet, this too may be unsatisfactory, for the concept does not address along which lines the representative is to be typical. In asking for a representative poem, we may not mean a typical one but instead the best one, the best example. Similarly, people often choose representatives who are not typical of the class they represent.[46]

Besides the formal definition of authorized representation and the definition of descriptive likeness, a third meaning of representation, as noted by Pitkin, refers to symbolic substitution. The flag stands for the nation. The symbol "x" stands for the unknown quantity of apples; "pi" stands for plaintiff. This notion of a symbol, if freighted with meaning, may explain why a leader who is not accountable or typical is nonetheless sometimes described as a representative; that leader may in some respect be a symbol of the polity, the community, or the beliefs of those represented.[47] This definition, however, lacks any guide for what a representative is to do or how one could judge the performance of a representative.[48]

Pitkin's fourth definition actually is a range of analogies to roles through which an individual may provide, care, or speak for another. Actor, trustee, deputy, agent, steward — these are all notions with dif-

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[44] PITKIN, *supra* note 28, at 88.

[45] *Id.* at 89. Unfortunately, at this point Pitkin offers the example, from Griffiths, of a lunatic who may be the best descriptive representative of lunatics, but "one would not suggest that they be allowed to send some of their number to the legislature." *Id.* Since members of the mental patient rights movement may suggest something similar to this concept in urging representation of former mental patients on governing bodies affecting mental patients, this passage seems at best outdated.

[46] *Id.* at 75-80, 90.

[47] PITKIN, *supra* note 35, at 103-05.

[48] *Id.* at 112-13.

ferent shades of meaning pertinent to the idea of speaking for another.[49] But the selection of which of these terms to accept as an analogy replicates the central ambiguity within the notion of representation itself: should the representative do what the represented party wants or what the representative thinks is best?[50] Professor Pitkin notes how tilting to either extreme risks eliminating the very role of the representative. Doing entirely what the represented party wishes converts the representative into a mere conveyer of information, while doing only what the representative thinks is best risks eliminating any connection, obligation, or accountability to the represented party.[51] It is not enough, according to Pitkin, for the representative to choose whether or not to pursue the client's wishes. To be a representative, it is necessary also that such choices be justifiable.[52] And yet this very notion of justification simply reopens the question of what values or standards to use in measuring representation.

Talk of the interests, and even the objective interests of those represented is tempting when evaluating a representative, but the ambiguities and assessment difficulties with this set of concepts are notorious.[53] In Professor Pitkin's analysis, different theories of interests reflect contrasting political conceptions of good, justice, knowledge, and social class and social solidarity.[54] She concludes that:

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[49] *Id.* at 125-43. Edmunde Burke's theory of representation, which Pitkin explores at length, emphasizes the judgment of the representative while pursuing the constituents' interests:

> it is our duty when we have the desires of the people before us, to pursue them, not in the spirit of literal obedience, which may militate with their very principle, much less to treat them with a peevish and contentious litigation, as if we were adverse parties in a suit. . . . I cannot indeed take upon me to say I have honour to *follow* the sense of the people. The truth is, *I met it on the way*, while I was pursuing their interest according to my own ideas.

EDMUNDE E. BURKE, WORKS AND CORRESPONDENCE VOL. III at 354 (emphasis in the original (London; Rivington, 1852).

[50] *See, supra* note 28, at 145, 153. Pitkin calls this the mandate-independence controversy.

[51] *See id.* at 153, 163-64.

> All of these elements—what is to be represented, whether it is objectively determinable, what the relative capacities of representative and constituents are, the nature of the issues to be decided, and so on—contribute to defining a theorist's position on the continuum between 'taking care of' so complete that it is no longer represented, and 'delivering their vote' so passive that it is at most a descriptive 'standing for.' *Id.* at 214.

[52] *See* PITKIN *supra* note 28, at 164. So when the representative feels in conflict with the express orders of those represented, this fact calls for considering the reasons for the discrepancy and may call for a reconsideration of the representative's views. *Id.* at 164-65.

[53] *See* Pitkin, *supra* note 28, at 156-62.

[54] *Compare* PITKIN, *supra* note 28, at 173-74 (discussing Burke) *with* PITKIN, at 195 (discussing Madison).

> [t]he more a writer sees interest[s], wants, and the like as definable only by the person who feels or has them, the more likely he is to require that a representative consult his constituents and act in response to what they ask of him. At the extreme, again, substantive acting for others becomes impossible, and a theorist must either fall back on other views of representation or declare the concept an illusion.[55]

Ultimately, the representative quality of given persons or institutions turns on their capacities to justify themselves to those who are allegedly represented or who otherwise care.[56] Again circularity of the concept appears; "representative" means what others are convinced it means. So if you and I are confused about how to measure or check whether someone is a good representative or whether a representative function is appropriate to a given role, we are in good company. Pitkin's work at least affords vocabulary for naming the possible meanings that are afloat amid the confusion.

B. The Historical Moment For The Question

Not just confusion but also conflict over the meaning of representation emerges now in the face of two recent movements in scholarly circles.

The first I will call difference theory; it has been pursued especially by feminists and critical race theorists. They have questioned the use of abstract universal terms or norms by showing how implicitly those terms or norms actually embrace the particular experiences or interests of those in positions of sufficient authority or dominance to govern. However much universal and abstract norms may once have advanced a democratic and anti-hierarchical agenda,[57] in current operation such ideas often fail to reflect — fail to represent — the experiences, interests, and needs of the full variety of human beings. Thus, traditional norms of equality and liberty may have well-suited white Christian men without disabilities but often disadvantaged any who depart from that particular identity and experience. Freedom from the establishment of a religion, according to the Supreme Court, is not violated by public displays of a Christmas crêche when combined with secular symbols.[58] For non-Christians, this

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[55] *Id.* at 210.

[56] *See id.* at 240. Perhaps Pitkin herself became confused here, or tempted to blend the related but distinct questions of what it means to be a representative and what it means to be a good representative.

[57] *See* STEPHEN HOLMES, *The Secret History of Self Interest*, in BEYOND SELF INTEREST 267, 284 (Jane J. Mansbridge ed., 1990).

[58] *See* Lynch v. Donnelly, 465 U.S. 668 (1984). In subsequent decisions, the Court further confused matters by rejecting as a violation of the Establishment Clause a display that lacked any secular figures, while approving a display that combined a Christmas tree with a Chanukah menorah. Allegheny v. ACLU, 492 U.S. 573 (1989).

"neutral" rule does not feel neutral. (Indeed, observant Christians, too, may be insulted by treatment of a significant religious holiday that renders both Santa and Jesus as simply shopping mall decorations.)[59]

Similarly, equal protection against discrimination on the basis of sex is not violated, again according to the Supreme Court, where an employer refuses to include pregnancy in its insurance coverage, because not only men but also some women are not pregnant at any given time.[60] Again, from the perspective of many women, this decision seems a bit peculiar and reflective of something other than women's experiences. A rule about what constitutes rape that requires a victim to fight back physically but does not take her verbal "no" as sufficient resistance reflects traditionally male rather than traditionally female understandings of sexuality and of self-defense.[61] Let me try one more: a rule guaranteeing freedom to enter into binding contracts may look neutral.[62] But if it lacks any prohibition against racially discriminatory treatment within those contracts, anyone in jeopardy of discrimination on the basis of race would view this as a perversely crabbed interpretation of freedom of contract. Nonetheless, this is the Supreme Court's present view.

Theorists of difference have taken such examples and explored how apparently neutral, abstract rules written without the perspective of some end up implementing the perspectives of others.[63] Advocates for persons with disabilities have been especially effective in this critique recently. They have demonstrated how historic efforts restraining the use of sign language so that profoundly deaf people could fit into the larger society actually denied those people meaningful language.[64] They have pointed out how buildings that are inaccessible to people who use wheelchairs are not neutral but disabling, and how mass transit systems that are hazardous to people with visual or hearing impairments are also not neutral but instead reflect the kinds of persons for whom they were clearly designed.[65]

If we think about people excluded by such social institutions and rules, two cautionary rules emerge. First, claims to know what others want or

[59] *See* David Cobin, *Creches, Christmas Trees and Menorahs: Weeds Growing in Roger Williams' Garden*, 1990 WIS. L. REV. 1597, 1609-10.

[60] Geduldig v. Aiello, 417 U.S. 484 (1974).

[61] SUSAN ESTRICH, REAL RAPE 29-56 (1987).

[62] *See* Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

[63] *See* CATHERINE MACKINNON, FEMINISM UNMODIFIED 1-5 (1987); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); Patricia Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987). *Cf.* PIERRE CLASTRES, SOCIETY AGAINST THE STATE (1989) (criticizing anthropological accounts that treat as universal the particular cultural patterns of the anthropologist's own society).

[64] *See* OLIVER SACKS, SEEING VOICES 25-26 (1989).

[65] *See* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis of a Second Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 418-19, 460-63, 470-81 (1991).

need are suspect if made without the basis of shared experiences along the lines of the trait used for past exclusions. Translation: You don't know, and you get it wrong. This is what the excluded group is likely to say to those outside their group who claim to speak for them. Secondly, claims to speak for others by people not in the group are vulnerable on the grounds that participation itself is a value and the process of representing a viewpoint is an exercise of power that should be enjoyed by those on whose behalf the exercise is claimed. Perhaps no representative can be fully able to know the interests of everyone in the group. But as a political matter, the group may want to give the benefit of the doubt to a member of the group. It is a matter of trust. Translation: We speak for ourselves and thus one of us should do the speaking. Speaking expresses power; it is empowering; and speaking for others depends upon their trust.

The difference critique is associated with what can be called "identity politics."[66] Some of its exponents call for proportional representation in the electoral context. Some of its opponents, and even some who sympathize, raise pointed objections. How many differences now need to be represented? Must the African-American caucus divide along gender lines and the gender caucus divide along racial lines, and all of them divide further along the lines of sexual orientation, disability, and religion? If so, how can any political movement emerge?[67] Others challenge the implicit claim that sociological traits of a person match interests or preferences and still others worry about the conflicts between notions of identity as natural or fixed and notions of identity as personally chosen or socially constructed.[68]

But this is simply a glimpse of the debates internal to this movement. The difference critique endures and affords an angle on problems of representation. Indeed, the rules and practices about given forms of representation may be vulnerable to the criticism that they veil, in the guise of a false universalism, the particular views and interests of some. For those rules and practices, justifiable representation may call for attention to the two claims: (1) you don't know, and you get us wrong; and (2) we speak for ourselves.[69]

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[66] *See generally* IRIS YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 156-91 (1990).

[67] See ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988) for an elegant exploration of these differences and a call for politics based on mutual consultation and struggle.

[68] *See* Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, 17 SOCIALIST REVIEW 10 (May-August 1987) (identifying conflict between academic arguments that gay identity is fluid and socially constructed and political argument that gay identity is natural and determined).

[69] There could be additional claims: (3) You *do* know, and you do us wrong (deliberate racism, etc.); (4) it's our turn to *do* for ourselves (nationalism response); (5) only with a representative from our group can we each have the vicarious experience of speaking and being there. Thanks to Anita Allen and Moshe Halbertal for these points.

C. The Challenge Of Empathy

A second and contrasting challenge to notions of representation questions the assumption that people *cannot* justifiably speak for others because they have sharply distinct and conflicting interests. That we each have distinct and conflicting interests is a familiar, liberal idea. The idea that we are each self-interested monads abounds, although it has not been powerful enough to preclude many models and forms of representation in law and politics. At least since Hobbes, the problem that representation was supposed to solve rested on a view that humans are separate and have conflicting wills.[70] Moreover, where theories of liberalism, democracy, and relativism dominate, as they have in recent American culture, people "tend to think that, in the last analysis, each man has the right to define his own good, and if he rejects something, no one has the right to insist that it is good for him."[71] Representation, on this view, is appropriate only for people who know their own interests and who can find an agent with no clashing interests.[72]

But maybe, just maybe, the idea that we are all basically self-interested is wrong. This is the kind of doubt posed by the second new development in scholarship that challenges rules of representation. Some feminists, some humanists, and some self-styled communitarians join a variety of people who think it wrong or incomplete to think of people as simply separate, autonomous, and self-interested. I will call these people the

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[70] *See* PITKIN, *supra* note 28, at 35 (discussing Hobbes). Note: Hobbes expressly excluded wives and "property" which encompassed slaves.

[71] PITKIN, *supra* note 28, at 159. Pitkin notes further that children and others who are thought not to be able to know their own interests cannot be represented; instead, others take care of them. "Representation enters the picture precisely where the person acted for is conceived as capable of acting and judging for himself; and of such a person we assume that he will want what is in his interest." *Id.* at 162. This does, however, lead to paradoxical ideas about who exactly is competent to know his own interests; for if someone wants something that others think is not in his interest, the others may conclude he is not competent to know his interests and thus to select a representative to advance them. *See* Martha Minow, *Why Ask Who Speaks for the Child: Review of Gaylin & Macklin, Who Speaks for the Child; The Problems of Proxy Consent,* 53 HARV. ED. REV. 444 (1983).

[72] For a thoughtful article challenging this view in the context of legal representation for children see Stephen Wizner & Miriam Berkman, *Being a Lawyer for a Child Too Young to be a Client: A Clinical Study,* 68 NEB. L. REV. 330 (1989). The authors describe three complex cases in which they represented young children in custody and visitation cases following their parents' divorces, and develop a set of presumptions for guiding lawyers in such situations to assure children's protection in and from the litigation process itself. They further call for investigation by the lawyer into the child's actual interests and advocacy of those interests. In a sense, such lawyers not only represent but also enact or embody the interests of children; the lawyer for a child assures distinct attention to the person who might otherwise be neglected or used by adults.

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empathy advocates. They argue that people (1) often want to care about the good of others (altruism) and (2) have the ability to understand and know the wants and needs of others (empathy).[73] The empathy advocates also argue that individuals act out of duty, love, and malevolence as well as self-interest, and that "people often take account of both other individuals' interests and the common good when they decide what constitutes a 'benefit' that they want to maximize."[74] Works by Amartya Sen in economics, J.G.A. Pocock in history, and Carol Gilligan in psychology indicate the variety of disciplines and specific points made by scholars advocating this view.[75]

These critics identify the power of altruism, the motivation and willingness to care for and give to others with no hope of gain for oneself.[76] They point out the power of group identity, or solidarity, that enhances cooperation without any expectation of future reciprocity or current rewards or punishments.[77] They also explain the malleability of human beings, and discuss how learning environments and social arrangements can reinforce either selfishness or sharing and altruism.[78] They have confidence in at least some cognitive and emotional capacities we each have to resonate and identify others. Translation: (1) Don't be so sure I don't care to understand you or cannot understand you, and (2) give me a chance or else *you're* the one who ensures that we'll just all be selfish.

If these critics are onto something, they too provide a set of questions to test existing rules and practices about representation. If people already can take the perspective of others and care for them, then maybe people who are not like me can nonetheless represent me. And if people learn

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[73] *See* LAWRENCE A. BLUM, FRIENDSHIP, ALTRUISM, AND MORALITY (1980).

[74] JANE J. MANSBRIDGE, BEYOND SELF INTEREST at ix, x (1990). Mansbridge suggests that this approach involves in part a return to pre-modern understandings while also preserving the insights of modern social science.

[75] *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975); and Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory, in* SCIENTIFIC MODELS AND MEN 317-44 (H. Harris ed., 1978).

[76] E.g., ALFIE KOHN, THE BRIGHTER SIDE OF HUMAN NATURE: ALTRUISM AND EMPATHY IN EVERYDAY LIFE (1990); Virginia Held, *Mothering vs. Contract, in* BEYOND SELF INTEREST 287, 294 (Jane J. Mansbridge ed. 1990).

[77] Robyn M. Dawes et al., *Cooperation for the Benefit of Us—Not Me, or my Conscience, in* BEYOND SELF INTEREST 97, 99 (Jane J. Mansbridge ed., 1990).

[78] KOHN, *supra* note 76, at 118-204 (discussing social science research indicating that predispositions to share and to be selfish can be reinforced or snuffed out); Jane J. Mansbridge, *The Rise and Fall of Self-Interest in the Explanation of Political Life, in* BEYOND SELF-INTEREST 3, 20-21 (Jane J. Mansbridge ed., 1990) (describing James Buchanan who won the Nobel Prize in economics for applying to economics a rational choice model based on self-interest and then "repudiated the single motive of self-interest in favor of looking at context" and interdependence between people and rules and institutions, concluding that "we should try to design institutions to encourage motivations we believe on normative grounds are either good in themselves or will lead to good and just outcomes").

and grow more or less empathetic toward others depending upon the worlds and others they encounter, then maybe we should bet on rules predicated on empathy instead of rules presumed on narrow self-interest.[79]

Have you noticed that these questions point in quite different directions for the inquiry prompted by the difference critics?[80] The difference critics call for skepticism about the possibility of representation by people who are not themselves members of the represented group. They remind us that representatives often get it wrong. They remind us that participation itself is a value and should be enjoyed by members of the actual groups that have not been allowed to speak for themselves in the past. The empathy advocates in contrast urge greater confidence in people's capacity to care for others and also recommend reconstructing rules and institutions to expect and reinforce that capacity. They remind us of the possibility that people can be other-regarding, and the possibility that societal rules affect this very possibility. How about that for confusion! But maybe this is *good* confusion. Keeping in mind contrasting commitments may make things seem complicated but also genuine and honest.[81]

Keeping in mind the philosopher's confusions about representation, I now add the two contrasting set of inquiries as I turn to examine examples of current rules and practices about representation. Besides pursuing the questions prompted by each set of criticisms, I will also try to evaluate the probative power of each critique in light of which problem has been more severe in each context: a failure to acknowledge differences or a failure to consider human capacity for empathy.

III. SCRUTINIZING RULES OF REPRESENTATION

I will not have time to examine each of the legal contexts of representation I mentioned at the start. But here are two, and a mention of the others in hopes of prompting further discussion.

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[79] Contemporary African-American theater often analogously challenges the assumption of a separation between audience and stage and seeks to use theater to create or reinvent cultural unity and militant nationalism. *See* GENEVIEVE FABRE, DRUMBEATS, MASKS, AND METAPHOR: CONTEMPORARY AFRO-AMERICAN THEATER 104-05, 108, 218, 236-38 (1983).

[80] These questions point in quite different directions in evaluating a theory of representation like Edmunde Burke's. The difference critique might well raise suspicions about his claims that a representative's own judgment may be better in pursuing constituents' interests than their express views, while the empathy critique might provide renewed support for Burke. Yet the notion of empathy seems to refer to a more egalitarian relation between representative and constituent than Burke's elite enlightened trustee who may sympathize with others from a superior position. *See* EDMUNDE BURKE, III WORKS AND CORRESPONDENCE 354 (1852).

[81] The contrasting commitments here arise along at least two dimensions. Thus, understanding human self-interest and altruism reflects one contrast; recognizing each individual as the important unit of analysis contrasts with a view of the group as the important unit of concern.

A. Juries And Group Representation

The Supreme Court recently considered "whether a prosecutor's proffered explanation that prospective Latino jurors were struck from the venire because he suspected they might not abide by official translations of Spanish language testimony constitutes an acceptable 'race neutral' explanation"?[82] The lower court acknowledged in this case that the defendant had demonstrated a prima facie case of discrimination.[83] The question posed was whether the government provided an adequate explanation for using its peremptory challenges. The case presented two related problems. First, is the use of peremptory challenges that results in a jury with apparently no Hispanic members a violation of an equal protection? And, secondly, if these challenges do produce a jury lacking members of Spanish heritage is that result a constitutional violation?[84]

Earlier cases questioned the apparent exclusion of racial and ethnic minorities and women[85] from juries and jury pools. Even when the legal doctrine at stake is equal protection,[86] the notion of representation is close at hand. The popular conception of the jury as a group of peers is rooted in the institution's origins.[87] In addition, for some period of time, English law demanded that a suit involving a foreigner be tried by a jury composed at least in part by foreigners.[88] Social class, country of origin, race, ethnicity, and gender thus each have had significance in assuring the representative fairness of a jury.

At stake in the composition of juries is a conception of that decision-making body as a representative cross-section of the society.[89] Achieving

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[82] Hernandez v. New York, 111 S. Ct. 242 (1990) (granting cert. limited to this question and a question about the proper standard of review). The Court rejected the challenge. Hernandez v. New York, 111 S. Ct. 1859 (1991).

[83] People v. Hernandez, 528 N.Y.S.2d 625 (N.Y.App.2d 1988)(citing Batson v. Kentucky, 476 U.S. 79 (1986)).

[84] One prior related case is United States v. Alcantar, 897 F.2d 436 (9th Cir. 1990) (remanding for new trial in similar case because none of the information regarding exclusion or acceptance of jurors was available to the parties or the court). In *Alcantar*, the prosecutor objected to Spanish-speaking jurors because some of the evidence introduced would be tape recordings of the defendant discussing her crimes. *Id.* at 437. The prosecutor feared that Spanish-speaking jurors would interpret the tapes different from the official translation and, claiming a special expertise, influence the other jurors. *Id.*

[85] Taylor v. Louisiana, 419 U.S 522 (1975); Hoyt v. Florida, 368 U.S. 57 (1961); Strauder v. West Virginia, 100 U.S. 303 (1879).

[86] *See* Castaneda v. Partida, 430 U.S. 482 (1977); Hernandez v. Texas, 347 U.S 475 (1954). Other similar cases interpret the Sixth Amendment. Taylor v. Louisiana, 419 U.S. 522 (1975).

[87] CHARLES REMBAR, THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM 116-71 (1980).

[88] *See* Marianne Constable, The Jury 'De Medietate Linguae': Changing Conceptions of Citizenship, Law, and Knowledge (1989) (unpublished Ph.D. thesis, University of California (Berkeley)).

[89] Tracy L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 *Stan. L. Rev.* 781, 787-93 (1986).

at least symbolic community participation in justice, this cross-section appearance provides the "likeness" version of representation, the resemblance to the larger community.[90] It also helps promote the apparent legitimacy of the result. As one commentator put it, "the jury is not a scientific instrument but rather a body that, through its diversity, can be fair."[91]

Besides the appearance of fairness through representation, the cross-sectional jury also promises to give insights based on the range of particular experiences that different kinds of people have. The film, "Twelve Angry Men" for example, suggests how a juror with the same kind of background as the defendant could bring knowledge about how street kids use switchblades.[92] Differences of gender, race, and ethnicity provide for different kinds of knowledge relevant to the tasks of a jury. In this conception, the dimension of representation that matters is not the formal authorization idea, nor the trusteeship, but the descriptive or portrait representation.[93] Although interests of the represented group may be germane as well, it is as much the interests of the whole, diverse community in being mirrored aptly that is here at work. Moreover, the deliberative process within a group of diverse members brings the community within the institution of justice.

By this theory, the prosecutor improperly used peremptories to strike all Hispanic and Spanish-speaking jurors in *People v. Hernandez*.[94] Striking otherwise eligible jurors because of their special knowledge undermines the purposes of bringing that special knowledge into the process and also removes otherwise eligible jurors because of their ethnic identity.[95]

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[90] *Id.*

[91] *Id.* at 790-91.

[92] *Id.* at 791 n.50. In a different way, "Silence of the Lambs," a movie depicting a serial killer with insight into how another serial killer will behave, suggests how people may understand others like themselves. However, I am unsure that this calls for representation of serial killers on juries. Insight does not mean judgment.

[93] *See supra* n.41 (discussing Pitkin). Thus the descriptive dimension is achieved as traits like race and ethnicity become proxies for the variety of persons and knowledge in the society.

[94] 582 N.Y.S.2d 625 (N.Y. App.2d 1988). The basic doctrine in the field holds that the defendant's right to a fair and impartial jury does not guarantee "jury of any particular composition," but instead that the jury be drawn from "a source fairly representative of the community." Taylor v. Louisiana, 419 U.S. 522, 538 (1975). *But see* Batson v. Kentucky, 476 U.S. 79 (1986) (which added to the mix the requirement that the use of peremptory challenges not reflect racially or ethnically discriminatory purposes).

[95] This was not the Supreme Court's conclusion. A plurality of the Court concluded that the prosecutor offered a sufficiently race-neutral explanation by noting that the Spanish-speaking jurors might have difficulty accepting the English translator's version of Spanish testimony. Hernandez v. New York, 111 S. Ct. 1859 (1991) (Kennedy, J., plurality opinion). None of the opinions in the case explored the complex and partial relationships between ethnicity and fluency in Spanish.

Yet the critics of difference and empathy would shed contrasting lights on this problem. Suspicion of abstract rules for favoring some groups over others supports a challenge to the prosecutor's allegedly neutral reasons for striking the Spanish-speaking jurors. Fears that those jurors would not limit themselves to the official translation or would attain special influence in the jury room sound neutral but have the effect of preferring Anglos and disfavoring Hispanics.[96] Any jury selection process, however neutrally defined, that produces juries excluding people who look like the defendant, exposes the process to the following questions: how can these people judge someone unlike themselves, and isn't it time for members of the group to participate?[97] These questions cast some doubt on the very premise of the peremptory challenge. In contemporary practice, the ability of the prosecution and of the defense to excuse a number of jurors without stating a cause responds to a perceived need to screen out biased jurors.[98] One kind of presumed bias is that the juror has experiences like those of the defendant; the fear here is that the juror will be unable to judge objectively if he or she resembles the defendant. Critics respond: why is someone so different likely to be objective? Perhaps the very grounds of difference give rise to bias. If you exclude all women from a jury called to judge a woman charged with killing her husband, why assume that men on the jury are objective?[99] Moreover, even without bias, someone quite different from the defendant may simply fail to understand her experiences. Especially if the juror belongs to a group that in general dominates the political and social worlds, that jury may lack awareness of the perceptions and motivations of someone outside that group, and may even lack tools to understand someone so different.

The empathy inquiry may seem to cut in the opposite direction, but it, too, gives grounds for questioning any peremptory challenges. It suggests that people can and do act out of motives beyond their own self-interest, and that people have capacities to empathize with others. It is not clear how wide that capacity is, and whether it can reach across the kinds of

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[96] Another effect is to elevate the English translation — or representation — of the evidence over the Spanish version. The actual effects on the outcome if Hispanics jurors participate in a criminal trial involving an Hispanic defendant are hardly obvious. Members of the same group may be tougher than others in judging criminal matters. Yet they may also better understand excusing circumstances or more critically evaluate the law enforcement practices. In addition, diversity within the group called Hispanics renders predictions about their voting patterns on a jury dubious.

[97] These are the difference claims: how can you know, and we should speak for ourselves.

[98] Altman, *supra* note 89, at 795. *Cf.* Commonwealth v. Local Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 115, 177 (E.D. Pa. 1974) ("Black lawyers have litigated in the federal courts almost exclusively before white judges, yet they have not urged that white judges should be disqualified on matters of race relations.").

[99] *See* Hoyt v. Florida, 368 U.S. 57 (1961). Historian Linda Kerber is exploring the historical context for the arguments in that case.

differences that have come to matter in this society: race, ethnicity, gender, class. But why permit a rule about peremptory challenges that would presume that people *cannot* empathize across lines of difference? Not only could such a rule be untrue to human possibilities; it might also be a self-fulfilling prophesy.[100]

It remains fair to ask whether empathies run differently between people who share those traits compared with people who do not.[101] My tentative answer is: I don't know. That very answer supports an argument for preserving the fullest cross-section possible and limiting or ending peremptory challenges. Only then can the full range of empathic and non-empathic possibilities be played out. If the jury is to be representative, it should represent this kind of social variety.

B. Class Action Representation

The civil procedure rule that allows a group to serve as a party presents the courts with the difficulty of representation: who can speak for the group and who can lead them or exemplify them before the court? The federal rule, and the rules of states that copy it, specifically require that the parties selected as representatives be typical of the group[102] and be able to demonstrate their ability adequately to represent the group.[103] This element often applies as much to the parties' ability to secure attorneys who can provide adequate representation for the class as it does to the named parties' own representative capacity.[104] Where the representation is adequate and the court certifies the class, a final judgment

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[100] *See* Altman, *supra* note 89, at 800 (discussing possibility that people are more or less empathetic in relation to rules and institutional expectations).

[101] Sharing a trait does not entail understanding one another even in light of that trait, much less in relation to other traits that are not shared.

[102] FED. R. CIV. P. 23(a)(3).

[103] FED. R. CIV. P. 23 (a)(4).

[104] *See, e.g.*, Goodman v. Lukens Steel Co., 777 F.2d 113, 124 (3d Cir. 1985); Susman v. Lincoln Am. Corp., 561 F.2d 86, 90 (7th Cir. 1977), *cert. denied*, 445 U.S. 942 (1980). A special problem arises where an attorney who is a member of the class seeks to be its named representative as well as its counsel. *See* Kelly A. Freeman, Note, *Conflicts of Interest in Class Action Representation Vis-a-Vis Class Representative and Class Counsel*, 33 WAYNE L. REV. 141 (1986). *Cf.* Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975)(non-lawyer prisoner denied right to represent others in pro se class action, largely for questions of competence). *See generally* Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (exploring potential conflicts in goals between public interest lawyers and their clients).

binds all its members, for they are deemed to have had a fair opportunity to be heard.[105]

The rule's demand that the class representative be typical seems to adopt one of Professor Pitkin's types of representing: the descriptive standing for another, the mirror providing a likeness or portrait of the others.[106] Yet with adequacy of representation, the rule seems to have opted for a definition more concerned with the kinds of action the representatives can and will take; what matters is not simply their characteristics but also their behavior as representatives — and their lawyers' ability and accountability in that regard.[107] The rule seems attuned to the difference critique; with adequacy of representation it seems to consider the empathy view that one may speak for others as members of a group with shared interests in the absence of conflicting interests.[108]

Yet perhaps most importantly, both terms show how the class action rule opts for *some* notion of representation. It is not enough for the representative simply to be able to enforce legal rights for others.[109] It is not enough merely to protect or advocate a legal interest. The representative also must be free from conflicting interests. And the representative in some way must stand for, symbolize, or depict the members of the class. As Professor Bryant Garth has noted, "A court presented only with arguments, not with the representatives of real constituencies, might ignore the interests and views of what might be a majority of a lawsuit's beneficiaries."[110] Part of the advocacy, part of the right to be heard seems to include the presentation and representation of actual people who in some important way *look like* those they represent. That resemblance may serve as a proxy or predictor for who is likely to share interests or have access to knowledge about the interests of the others. But that resemblance may

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[105] *See* Deborah Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1192 (1982). This article provides a comprehensive analysis of the special representation problems presented where a class includes potentially conflicting interests and of procedural mechanisms for dealing with the problem of discerning the views of a large class. For a proposal for an exception to the attorney-client privilege to help absent class members enforce the representational obligations of named parties, see Note, *The Attorney-Client Privilege in Class Actions: Fashioning an Exception to Promote Adequacy of Representation*, 97 HARV. L. REV. 947 (1984).

[106] *See supra* note 47 (discussing Pitkin's theory of standing for as a descriptive representative).

[107] *See supra* note 51-2 (accountability and action as dimensions of representation).

[108] Especially for defendant classes, some have proposed that those shared interests should predate the litigation itself. *See* Scott P. Miller, Note, *Certification of Defendant Classes Under Rule 23(b)(2)*, 84 COLUM. L. REV. 1371, 1395 (1984).

[109] Bryant Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U. L. REV. 492, 503 (1982). Even an argument for eliminating class representatives concludes by recommending a continued role for "exemplary class members." *See* Jean W. Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 194-95 (1990).

[110] Garth, *supra* note 109, at 520.

be important separately for the symbolic effect in the represented community and in the fora where they perform their representative tasks.

I think that this dimension helps to explain some court decisions such as *Johnson v. Georgia Highway Express, Inc.*[111] There a black man who had been discharged from employment sought to represent a class of "all similarly situated Negroes seeking equal employment opportunities" in a case claiming that the employer discriminated on the basis of race not only in discharges, but also in hiring, promotion, and the operation of segregated facilities. The trial court rejected this broadly defined class and restricted the class to those persons discharged because of their race.

The appeals court reversed and allowed the broad class, reasoning that the allegations of racial discrimination throughout the employer's practices was sufficiently common to, and typical of, the claims of the broader class. It acknowledged that the named representative might not be adequate to speak for class members whose injury arose not from discharge but from other employment practices, but the reviewing court did not conclude that this factual and legal difference *would* render the discharged party an inadequate representative. The common trait of membership in the minority racial group apparently stood out in the court's mind as the salient factor justifying both the broad definition of the class and the possible representation by the discharged party. The trait of racial minority membership, I suggest, would allow that individual to stand for all others claiming discrimination, albeit a variety of discriminations, on the basis of race.[112] The Supreme Court has subsequently rejected this kind of "across-the-board" class,[113] and I wonder whether this reflects a failure to understand symbolic and depiction aspects of representation.

How would the "across-the-board" class, represented by someone who shared only the trait of minority race membership, survive the difference critique and the empathy inquiry? Many difference theorists are currently engaged in questioning whether shared racial membership alone represents a real and significant similarity, or whether talk of the perspective of blacks, or even the perspective of black women, obscures the "rich diversity" existing among people who can be identified that way.[114] Professor Patricia Hill Collins has defended the notion of a black feminist standpoint to encompass "the plurality of experiences" that nonetheless also include "a distinctive set of experiences that offers a different view of material reality than that available to other groups."[115] The fact of

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[111] 417 F.2d 1122 (5th Cir. 1969).

[112] *But see* General Telephone v. Falcon, 626 F.2d 369 (5th Cir. 1980), *vacated in part and remanded*, 457 U.S. 147 (1982)(rejecting class certified to represent both employees denied promotion and applicants denied employment). *See also* Watson v. Forth Worth Bank & Trust, 798 F.2d 791 (5th Cir. 1986) (approving the splitting into two classes of employees and applicants).

[113] *See* George M. Strickler, Jr., *Protecting the Class: The Search for the Adequate Representative in Class Action Litigation*, 34 DEPAUL L. REV. 73 (1984).

[114] Patricia Hill Collins, *The Social Construction of Black Feminist Thought*, 14 SIGNS 745, 747 n.8 (1989).

[115] *Id.* at 747 & n.8.

subordination is critical to her identification of a black feminist standpoint. She acknowledges social class variations that help explain why not all African-American women share the standpoint she articulates.[116] Nonetheless, membership in a racial minority stands as a symbol of historic subordination which, for some purposes, should count as a basis for adequate representation.[117] I think the same could be argued for sex, although the courts have often viewed racial differences among women as salient enough to deny class representative status to a black women for a class of white and black women.[118]

What about the empathy inquiry?[119] The Supreme Court itself has permitted the certification of a class whose representative no longer has a live, viable claim to match the claims of the represented class.[120] In these cases, the Court emphasized not only that the class representative

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[116] *Id.*

[117] Similarly, one court approved a woman as a representative in a sex discrimination class although the named representative also held a position as an officer in the defendant corporation, apparently on the grounds that the position was only honorary. Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590 (2d. Cir. 1986). Perhaps the court approves the woman as a representative because sex is thicker than job titles.

[118] May black women serve as class representatives in law suits asserting both race and sex discrimination? *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 143-44. In applying the class action rule to refuse this class representative status to black women, several courts remain vulnerable to the difference critique.

[119] Interestingly, Professor Collins also identified the ethic of caring for others, including the capacity for empathy, as elements of an alternative, African-American feminist epistemology. Collins, *supra* note 114, at 765-68. This suggests that although tensions between difference critiques and empathy critiques exist, so do important points of specific connection. The development of a black feminist epistemology partly reflects a difference critique attacking feminism for assuming that all women share something as women. *See* ELIZABETH V. SPELMAN, *supra* note 67. Collins notes how the commitment to caring is a point of convergence between white and black feminists. Collins, *supra* note 114, at 768. Yet, this point begins to raise questions about what exactly is the meaning of claims that "caring" is specific to the African-American feminist viewpoint.

[120] *See* United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980)(named plaintiff allowed to appeal the denial of class certification even after his own claim had become moot); Sosna v. Iowa, 419 U.S. 393 (1975)(permitting class to proceed although the named plaintiff had already satisfied the residency requirement and obtained a divorce and so no longer had a live claim against the state one-year residency requirement for a divorce); McCoy v. Ithaca Housing Authority, 559 F.Supp. 1351 (N.D. N.Y. 1983)(class action can proceed even though part of named plaintiffs claim became moot). *See generally* C. Douglas Floyd, *Civil Rights Class Actions in the 1980's: The Burger Court's Pragmatic Approach to Problems of Adequate Representation and Justiciability*, 1984 B.Y. U. L. REV. 1, 31-44. Different concerns arise where the named plaintiff seeks damages while the class seeks equitable relief, for a conflict of interest appears when the defendant offers to the named plaintiff a cash settlement or a settlement precluding further action by the class. *See* Williams v. Vukovoch, 720 F.2d 909 (6th Cir. 1983); Franks v. Kroger, 649 F.2d 1216 (6th Cir. 1981); Robert P. Schuwerk, *Future Class Actions*, 39 BAYLOR L. REV. 63, 198 (1987).

had no conflicting interest with the class,[121] but also that the representative could actually competently urge the interests of the class, even while lacking an actually identical claim.[122] In one case, the Court went further and characterized the named representative as a "private attorney general."[123] If the reference to "attorney general" means anything in this context, it includes the respect for someone entrusted with pursuing the legal rights of others even without needing to have an actual personal claim.[124] It also means the possibility of empathy, proper incentives and resources.[125]

Yet, in each of these instances, the named representative had at one time been a member of the class or experienced the kind of injury alleged by the class as a whole. That historical experience may be irrecoverable, but still the individual can remain a class representative. Thus, one court approved as a class representative for a law suit challenging the employer's maternity policy a woman who had been sterilized.[126] She had once been able to become a mother, and that was enough to allow her to serve as a representative of mothers. The possibility of empathy without a common historical experience is not regarded by the courts as adequate for representation. Thus, the Eleventh Circuit recently approved the district court's denial of class certification where the named plaintiff for the proposed class of Haitian citizens facing United States deportation or exclusion proceedings or seeking political asylum in the United States did not allege that he himself was a member of that class.[127] Instead, noted the appellate court, "He is an attorney who represents Haitians facing action by the INS."[128]

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[121] Sosna v. Iowa, 419 U.S. at 403.

[122] *Id.*

[123] United States v. Parole Comm'n v. Geraghty, 445 U.S. at 403.

[124] *See* Strickler, *supra* note 113, at 144-45.

[125] *Id.* This notion is also compatible with the view of litigation as a form of expression and political action. See NAACP v. Button, 371 U.S. 415 (1963) and *In re* Primus, 436 U.S. 412 (1978), in which groups and organizations may become involved in litigation that actually focuses on a smaller number of actual litigants. Derrick Bell has criticized this particular dimension of school desegregation litigation. Bell, *supra* note 104. This criticism has prompted sustained debate since its publication.

[126] Association of Flight Attendants v. Texas Int'l Airlines, 89 F.R.D. 52, 62 (S.D. Tex. 1981). The court did not consider whether this individual retained a live interest in the maternity policy should she adopt, nor whether the policy covered adoption.

[127] Ray v. United States Dept. of Justice, Immigration and Naturalization Service and State Department, 908 F.2d 1549, 1558 (11th Cir. 1990). The court did not therefore pursue an argument empathy advocates would advance: that empathy can arise even in the absence of an identical experience and they would defend as a representative someone who both wants to care and demonstrates understanding of those needing representation.

[128] *Id.* at 1558.

Thus, the difference and empathy critics converge in supporting the approval of class representatives who share social and historical characteristics of past experience with the class, even if the representative no longer has the same experience or same legal claim. This underscores the significance of the depiction and symbolic dimensions of representation, alongside evidence that the representative can, in fact, adequately advance the views and claims of the constituent group.[129] A representative is sufficiently like the class if the representative actually once had experiences similar to those of the other class members.

C. Other Rules Of Representation

With more time and space, I would now turn to more representation issues. Consider preclusion rules: when is someone adequately represented in one law suit and therefore subsequently barred from bringing a new lawsuit?[130]

When is someone an adequate fiduciary for a beneficiary? Is it helpful or harmful to share interests or social experiences with the beneficiary in making, for example, investment decisions for a pension fund?[131]

How should we judge the representation of clients by professional such as lawyers and doctors? How should we judge the tactics pursued by the client who wants a lawyer from his or her own "group"?[132] Is this a wise tactic or one that undermines professional representation? How about when the client seeks someone from a different group, such as when a man charged with rape seeks a woman defense attorney, or when a white employer charged with racial discrimination seeks a black or hispanic attorney? Are these legitimate and wise tactics or, instead, efforts to take advantage of stereotypes and prejudice?

What about employment itself? Is being hearing-impaired an important qualification for serving as the president of Galladette University, and if so, why?[133] Does sharing a trait with one's students enable service as a role model, an expert, or as a representative, and if so, in what sense?

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[129] Taking this point one step further, a distinguished civil rights lawyer has noted that the disparity in socioeconomic circumstance "between the average civil rights attorney and the average client or class member in a civil rights case" can "create problems in the relationship." Julius Chambers, *Class Action Litigation: Representing Divergent Interests of Class Members*, 4 U. DAYTON L. REV. 353, 355 (1979). Chambers does not suggest that these problems rise to the level of challenging the adequacy of representation (which covers the lawyer as well as the named representative) but instead urges greater attention to this problem of distance by the legal profession in general. *Id.*

[130] *See* Martin v. Wilks, 490 U.S. 755 (1989); Hansberry v. Lee, 311 U.S. 32 (1940).

[131] *See generally* BETTY KRIKORIAN, FIDUCIARY STANDARDS IN PENSION AND TRUST MANAGEMENT (1989).

[132] *See supra* note 34 (discussing deaf lawyer who represented a deaf student in the Supreme Court).

[133] *See* OLIVER SACKS, SEEING VOICES 127-63 (1990).

Are parents in any sensible sense representatives of their children?[134] Or are parents people with interests separate and conflicting with their children's interests and creating a need for independent representatives for the children? Before you start to chuckle at the idea of a child bringing her lawyer over to meet her parents, consider the problems posed when parents seek to commit their children to mental hospitals, order them to have an abortion, or seek to withhold medical treatment from them.

IV. Intermission

Behind all the representation problems I have discussed, I see the distrust of difference and the hope of empathy. These lie even deeper than the concerns generated by "Miss Saigon" and law school hiring. Beneath the clashing assertions of essential differences and meritocracy, and the claims of reparations countered by hiring freedom, I believe, are our common experiences: betrayal by those who claim to speak for us but do not understand, and connection with those who often seem so different. Law, at its best, cannot resolve such deep conflicts. Law can only manage them, temporarily.

For something more insightful, we need art. I cannot help but think of another contemporary play: "M. Butterfly."[135] Playwright David Henry Hwang read a *New York Times* account about an actual affair between a male French diplomat and a Chinese opera singer who appeared to be a woman but was actually a man. According to the *New York Times* story, the actual gender identity of the opera singer remained unknown to the diplomat, and Hwang asked, how could this be?[136] In the news story, the diplomat said he had never seen his Chinese lover naked and thought "her" modesty reflected Chinese custom. Hwang explained his own brilliant chain of thought:

[134] After longstanding tradition recognizing parents as representatives of their children for purposes of litigation, the Supreme Court denied a group of African-American parents standing to sue on behalf of their children who were denied admission to private, tax-exempt schools. The Court reasoned in part that any stigma due to racial discrimination could be challenged only by the individual who was personally injured. Allen v. Wright, 468 U.S. 737, 757 (1984).

[135] It is the longest running straight play since "Amadeus". Kevin Kelly, *M. Butterfly, Miss Saigon, and Mr. Hwang*, BOSTON GLOBE, Sept. 9, 1990, at 92.

[136] *Id.* at 93. In this way, the play challenges the audience to think not only about the gender of the character, but also the gender of the actor, and thus the possibilities of cross-gender casting. Cross-gender casting, while uncommon, is not without precedent. *See* Dan Sullivan, *Colorblind Casting: It's Not Yet a Tradition—When Black is White, Women are Men, And the Theater is Challenging*, LA TIMES, Oct. 2, 1988, Calendar Section, at 50.

> I thought, wait a minute here, that's not a Chinese custom? I begin to think, maybe the guy had not fallen in love with an actual person but with this sort of fantasy stereotype of the Orient. I was driving along one day, somewhere, thinking, hey, the diplomat thought he had found Madame Butterfly! I pulled into a record store, bought Puccini's opera, looked at the libretto, and, right there, in the store, I began to structure the beginning of the play where the diplomat fantasizes that he's Pinkerton and has found Butterfly. He realizes — by the end — that he, himself, is, in fact, Butterfly. He's the one who has been sacrificed for love, exploited by his lover, who turns out to be a spy. Once I had all this, I knew I could start writing at the beginning and go through to the end.[137]

"M. Butterfly" teases the audience about the identity of the opera singer. The playbill lists only the actor's last name and first initial to keep the real person's sex a mystery. The play gradually, methodically, and fantastically explores the projection of fantasy on what we think is different; the projection of gender difference on top of racial and national difference, in the midst of searching for human connection, and in the midst of the jeopardy of betrayal. It is critical to the play that the audience suspend disbelief about who is the opera singer, who is the diplomat, and ultimately, who are we all, struggling to know and be known. As this play opens possibilities for new understandings, it exemplifies representation: the representation of human experience, present and absent from our consciousness. From Miss Saigon, to class actions, to M. Butterfly, representation is changing even as it changes us.

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[137] Kelly, *supra* note 135, at 93.