Perspectives on Group Representation

By Deborah L. Rhode*

As I reviewed the initial draft of these comments, I was reminded of a characterization of Warren Harding's public statements. His speeches reportedly left "the impression of an army of pompous phrases moving over the landscape in search of an idea. Sometimes these meandering words would actually capture a straggling thought and bear it triumphantly as a prisoner in their midst until it died of servitude and overwork."¹

The thought I hope to capture for brief service here, involves how to link understandings about group identity with the realities of legal practice. This is a task approached with some caution, since building such connections is what we're always for in theory but seldom actually manage to pull off in practice. Yet having made that disclaimer, I still think the effort is worthwhile, for there are two extremely rich literatures on group representation that deserve to have more than passing acquaintance. The first body of work focuses on essentialism and its critics. A prominent issue in much critical race and feminist theory is how we can make claims for, by, or about particular groups without a homogenized view of their members' essential experience. A second body of work has to do with the practical dilemmas of representing such groups in legal actions that have class-wide significance without adequate mechanisms for class-wide accountability.

What interests me about this topic is its connection not only to crucial issues of contemporary legal theory, but also to questions of professional responsibility. Group representation provides an excellent vehicle for integrating legal ethics issues into mainstream constitutional and jurisprudential analyses. As I have argued at length elsewhere, such an integrative approach is essential to any adequate development of professional responsibility in professional education and professional practice.² Failure to address ethical issues as they arise in substantive areas encourages practitioners to

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¹ William G. McAdoo, Crowded Years 388-89 (1931).

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do the same. It also sends a message that no ceremonial platitudes or single law school course can counteract. Thinking critically about issues such as group representation should be a pervasive part of efforts to develop good law and good lawyering.

Let me begin by trying to situate the debate about essentialism in its broader theoretical context. To make a long story extremely short, contemporary feminist and critical race theorists have, in parallel ways, long differed over difference. These two partially overlapping bodies of thought include a wide range of perspectives that don’t easily coexist under a single label. But for purposes of these comments, it is possible to trace a few major themes.

Much of the effort over the last quarter century in feminist legal scholarship has centered on either challenging or reclaiming gender difference. One strategy has been to contest the way law reflects and reinforces gender stereotypes underpinning gender subordination. A second line of work has demanded that law do more to reflect and reinforce concerns traditionally associated with women.

So, for example, in contexts involving groups, feminists have demanded not only that women be admitted on the same terms as men, but also that group structures change to accommodate women’s interests. Yet how those interests should be defined points up a longstanding tension in feminist theory. By definition, what gives feminism its distinct status is its claim to speak for women from women’s experience. Yet that experience also counsels sensitivity to the variation in women’s backgrounds, perspectives, and priorities.

Building on other currents in post-modern theory, recent work in feminist jurisprudence challenges many of its own as well as the dominant culture’s assumptions about women’s essential identity. These anti-essentialist critiques have called into question certain common generalizations about gender, such as the notion that women are particularly likely to value connection to others in relationships and that women as a group share a common experience of subordination. Much of this work, which is either part of, or informed by, critical race theory, underscores the multiple and...

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shifting dimensions of female identity. From this perspective, there is no "generic woman." Rather, women's experience, and consciousness of experience, grows out of the intersection of gender and other attributes, such as race, class, ethnicity, sexual orientation, and so forth. At this point, the merits of this position have become so obvious to so many feminists that they can joke about nightmares in which their daughters grow up to be not cheerleaders but essentialists.

Yet this recognition carries a cost. Once we acknowledge the particularity and partiality of women's views, how do we make claims to speak for a collectivity? How do we prevent diffusion and dilution of women's energies? Once we deconstruct the concept of women, who will be around to organize the marches?

This same "we the people" dilemma also confronts critical race theorists. If race, like gender, is not fixed or immutable, but historically and socially constituted, particular groups can claim no authoritative core of common identity. And if the racial or ethnic experience of subordination differs materially across gender, age, class, and sexual orientation, what does it mean to speak in the voice of color?

These issues have considerable practical as well as theoretical significance. Litigation by and for a group often presents difficulties in defining the group's identity and interests. Members may

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differ on legal strategies, remedial objectives, and willingness to compromise. Trade-offs may be necessary between current and future class members and between prospective or compensatory relief. As is obvious from litigation like the Boston school desegregation case described in Derrick Bell's classic article, such conflicts are not adequately addressed by vague procedural mandates about adequate representation of class interests. And for equally obvious reasons, the problems are even more pronounced in settings where group concerns are implicated but not formally represented.

Although that last point seems too self-evident to belabor, it often goes unacknowledged in standard treatments of social reform legislation and litigation. For example, in conventional treatments of pornography, the relatively few cases, casebooks, and commissions that consider feminist challenges rarely explore the diversity of perspectives among women. So too, proponents of antipornography ordinances tend to speak from the "women's point of view" without noting the risks many women express about inviting more state repression—"more sexual shame, guilt and hypocrisy, this time served up as feminism."

All of this raises the question: if essentialist concepts of groups are what we're against, what exactly are we for? This is hardly an uncomplicated issue and fortunately I am almost out of time. But in broad outline, what we need are alliances based both on the particularity of individual experience and a recognition of common patterns. At the theoretical level, we need a fuller acknowledgement of the multiple sources of identity and the intersecting patterns of

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10 Of its two thousand pages of reported testimony, the Attorney General Commission's on Pornography heard from 30 women reporting injuries from pornography but none that enjoyed it or used it therapeutically. See Robin West, The Feminist-Conservative Anti-Pornography Alliance, and the 1986 Attorney General's Commission on Pornography Report, 1987 Am. B. Found. Res. J. 681. Of the major constitutional law casebooks published by Foundation, Little Brown, and West, only three have any sustained discussion of feminist challenges.
inequality. At the practical level, we also need more procedural tools that force group representatives to take account of group diversity.

For example, courts and counsel in class actions should have to make a record concerning any conflict of interest and the adequacy of measures taken to address it. Such measures should more often include intelligible forms of notice, solicitation of preferences, and subsidized intervention for unrepresented interests. Under current procedures, opportunities for participation typically occur too early, too late, or not at all. Potential participants may not have notice except at the class certification stage, before they realize the implications of judicial relief, or at the conclusion of a lawsuit, when the shape of remedial intervention has already been worked out and objections are least likely to have impact. A more adequate conception of group identity would require that affected parties have earlier opportunities to address their differences and to forge their own accommodations. That is particularly necessary in contexts involving structural changes, where long run effectiveness will depend on group members' own skills at building coalitions.

From that perspective, legal action can serve as a means to broader ends of group empowerment. For example, in a recent case challenging racial and sexual discrimination by the San Francisco fire department, various subgroups with competing economic interests played a direct role in shaping litigation strategies. For lawyers, the process was complicated, confrontational, and risky, since the defendants attempted to exploit schisms within the class. But the end result was a united front—a refusal to accept any settlement that would fail to address all of the intersecting patterns of inequality. And perhaps even more important, the process itself strengthened the capacity for alliances between various women's and civil rights groups.

A similar process needs to occur in many cases that do not formally proceed as class actions. Feminists that sought better antipornography strategies might have had greater success by forg-

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15 See generally Rhode, supra note 8.
14 See Davis v. City and County of San Francisco, 890 F.2d 1438 (9th Cir. 1989), cert. denied, 111 S. Ct. 248 (1990).
15 See Shauna Marshall, United We Stand: A Look at the Class Desegregation Suit Against the San Francisco Fire Department (1992) (unpublished manuscript, on file with the Kentucky Law Journal).
ing coalitions with other feminists groups, rather than with right-
wing organizations that supported traditional gender roles.\textsuperscript{16} Activ-
ists like Catharine MacKinnon are clearly right in questioning
whether male decision makers, who claim to "know pornography
when [they] see it," see the same things as women. But those
activists also need to acknowledge that not every woman sees only
what they see.

What we need, in short, is more attention to the problematic
nature of group identity and the process by which it is constituted,
challenged, and claimed. Clearly, that focus comes at a cost: it
means giving up some of our pretensions and aspirations to unity.
But the result is likely to be a richer sense of commonality than
one that suppresses differences. As is often said about Wagner’s
music, it may be better than it sounds.