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EMBODIMENTS OF JUSTICE, ECONOMIES OF CLÔTURE

*Sandra S Berns**

Politicisation ... is interminable even if it cannot be and should not ever be total. To keep this from being a truism or a triviality, we must recognize in it the following consequence: each advance in politicization obliges one to reconsider and so to reinterpret the very foundations of law such as they had previously been calculated or delimited. This was true for example in the Declaration of the Rights of Man, in the abolition of slavery, in all the emancipatory battles that remain and will have to remain in progress, everywhere in the world, for men and for women. Nothing seems to me less outdated than the classical emancipatory ideal. We cannot attempt to disqualify it today, whether crudely or with sophistication, at least not without treating it too lightly and forming the worst complications.¹

Ideals, Ideologies and the Voice of the Other

I have no choice but to speak about justice, and what it might mean, and about tolerance, and how essential it is and about how nonetheless there are things that cannot, must not, be tolerated. Other ideals as well must be named and re-named and brought once again to the forefront of our speech and, perhaps for once, our practice. The alternative, for one who works in law, is silence. As a woman, as a feminist, I have often enough been silenced. I will not silence myself, and not to talk endlessly about justice is to silence myself.

Were it not for the impossibility of perfect transparency, there would be no need for political philosophy, no need for that speech which concerns itself uniquely with the other. Political philosophy compels us to question our relationship with the other: How should I treat the other? How may I address her? How, if at all, may we come to live in community with one another? If political philosophy calls those of whom it speaks 'citizens' and the community whose ideal form it attempts to describe 'political community', this is both a way of staking a territorial claim and a way of attempting to domesticate 'otherness', of bringing some people in some circumstances into community with me.²

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1 J Derrida (1992) 'Force of Law: The "Mystical Foundation of Authority"', trans M Quaintance, reprinted in D Cornell et al (eds) *Deconstruction and the Possibility of Justice*, Routledge, pp 3, 28.

2 Here it is well to recall all the great boundary disputes of traditional political philosophy. Who might be a citizen and who might not? Who might be fully

The notion of the citizen, both as idea and as ideal, is that of a boundary rider. For us, in our times, it establishes the limits of community, sets the bounds of justice. If, in the beginning, it was a tentative and not always successful replacement for the loyalties of hearth and clan, from the birth of social contract theory onwards it has, at least from the perspective of ideal theory, become something else as well. It has become an abstraction, a shadowy boundary rider stripped of every tatter of race, of class, of ethnicity.³ Because community has been forced beyond the early evocation of hearth and clan, because, as Derrida reminds us, politicisation is interminable, perhaps it is somehow essential that it remain an abstraction. The 'killing fields' of Cambodia barely a moment ago in our history and the struggle to the death in Bosnia-Herzegovina remind us that the concrete particulars banished by theory skulk beneath the surface of our vaunted civility. They wait and watch, rape and kill; participants in an unholy economy of death. So doing, they remind us of the horrors that await us when those we once took to be neighbours and friends become enemies joined in a struggle for supremacy.

Yet on another level, the urge to abstraction must be resisted, however necessary and even comforting it may seem. Yes, abstraction walls off otherness, denies the relevance of those traits and those characteristics which force us to acknowledge that many of our co-citizens remain other. Abstraction does something else as well. It flattens difference, reduces choice to calculation, encourages, even compels, us to put our faith in familiar dichotomies. When this happens, it defeats our aspirations towards justice because it encourages us to believe that we can do justice without coming to terms with the other as she is, and not as a projection of all we might wish to repress (or even to disavow) within ourselves.

In the not so distant past, philosophers could and did speak about justice, and in the same breath, spoke (as a separate and distinct topic) of the place of the slave, the resident foreigner, the woman.⁴ Immanuel Kant saw

a citizen and who must remain other? Of all of those who participated in the enlightenment project, Rousseau understood this most completely. Much of his work can be seen as an attempt to explain how man could live in community with the other without oppressing him or being oppressed by him. Despite his exclusion of women, I believe that we have a great deal to learn from his attempts to deal with otherness and from his signal failures.

- 3 I do not, even for a moment, wish to suggest that this community is less fragile, less problematical than it is. Struggles all around us, even within our own towns and cities, make it clear that difference always threatens to swamp community, and that the fragile and abstract bond of citizenship is always in danger of collapsing into xenophobia on the one hand, and one of a hundred forms of tribal warfare and 'ethnic cleansing' on the other. We dare not face the other as she is.
- 4 Our progress is, perhaps, less than is commonly thought. The *metic* of a Greek city state like Athens was, potentially at least, better off than 'guestworkers' in contemporary European states such as Germany. While the *metic* was, officially at least, excluded from citizenship, continued residence was normally assured and many *metics* were both educated and affluent. Contemporary

no contradiction in insisting upon a distinction between active and passive citizenship even while proclaiming that all were equal *before the law*.⁵ Women, apprentices and all of those who worked for wages were incapable of active citizenship. Theirs was an 'equality' in which the distinction between being a subject and being subjugated had been utterly obliterated. Not merely silenced, they were voiceless, even mute, their consent always already given, beyond withdrawal. The contemporary torchbearers of the enlightenment tradition, men such as Ronald Dworkin and John Rawls, no longer find it palatable (or even possible) to openly exclude, as did Immanuel Kant and Jean-Jacques Rousseau, certain groups from active citizenship. They draw the boundaries in a different way, saying not that some people may be excluded but that some relationships⁶ need not abide by standards which are otherwise inviolate. If, however, the personal is truly political, if we live our lives as a whole, this, in the end, can no more be justified than all those earlier efforts to ensure that the gates were not breached, the bounds of tolerance not exceeded.⁷

I want to explore some of the changes which must occur if justice is to be reimaged in the context of an explicitly feminist political project. Once we stop speaking of justice, and tolerance, and rights, and equality, and even liberty, it is not altogether clear what we shall have left that is worth speaking about. Their importance is too easily forgotten, too readily subordinated to economic goals such as efficiency. Too many people have already moved along that road. On the other hand, if we *do* simply *speak* about justice (or rights, or tolerance) and fail to explore what they might mean in concrete social practices, we will have allowed our 'success' in

European guestworkers are normally not guaranteed continued residence, are subjected to racial and ethnic slurs and are generally poorly educated and economically marginal. Often they are simply brought in as transient labourers and their families remain behind.

- 5 He did not even try to imagine how it might feel to be at once a 'passive citizen' and to be brought 'before the law'. Here I explicitly allude to the power given the figure 'before the law' in Drucilla Cornell's brilliant essay 'The Violence of the Masquerade: Law Dressed up as Justice'. See D Cornell (1992) *The Philosophy of the Limit*, Routledge, pp 155ff, esp pp 157-67.
- 6 Family relationships are typically beyond the limits of justice.
- 7 I am conscious, even as I seek to shed the shackles of the enlightenment project, that Rawls himself is said to believe that the boundaries once established must be held, that outside lies a return to the wars of religion on a scale as yet unimagined, and that all of today's struggles over tolerance are but the massed ghosts of these religious wars waiting to re-emerge. Perhaps so but I will not allow the gods to wage their wars with my body as their prize. They are welcome to find a new currency if they are able. See Cornell (1992) p 4: 'Rawls believes many of the heated political and moral debates of our time are religious battles, sometimes thinly disguised, sometimes openly expressed. Think, for example, of the battles over abortion, homosexuality, and pornography'. I can only add that even more than religious battles they are battles in which the ultimate trophy is woman. If contemporary political philosophy continues to conceptualise battles which are fundamentally about gender, about ways of being men and women, as religious battles it will continue to miss the point.

appropriating the master's tools to distract us from the task which compelled us to try to appropriate them. I hope to suggest why the enlightenment project (and, indeed, any project which seeks to imagine justice while repressing otherness) is a failure. At the same time, I want to sketch a reading of justice which, hopefully, escapes the *clôture*⁸ implicit in the demand that we justify our intuitions and give reasons why this outcome rather than that is just (and for an outcome to be just, or to seem just, our intuitions must be capable of justification). I want to ask whether we can find a way of looking at justice in which we are no longer afraid to say that justice belongs everywhere that we belong, in which we admit that to love the other *demands* that we struggle to deal with her justly.⁹

Embodying the Citizen

Ideas such as democracy, citizenship and politics enter our discourse as loaded concepts. Try though we will, we cannot speak of them anew. They have been inscribed with old ink, on ancient parchment. Behind each lurks an imagined and half-realised world, a known yet unknown shore upon which our cultural images of citizenship and of the citizen take part in half-remembered dramas. Achilles is there and Agamemnon and Julius Caesar and Lord Nelson and Paul Revere. The ghost of Antigone has long been vanquished. The tomb of the unknown soldier stands nearby, shrouded in mist. The ideological force of images such as these lingers, only half concealed, behind the egalitarian images of theory. Theory demands these images. They nourish it, give it weight and shape. But for such cultural understandings, but for a galaxy of beliefs and attitudes about democracy, about citizenship and about politics and the meaning of 'the political', there could be no such thing as political theory. Theory is bounded by context, by time and by place. Our theories are always about how we see ourselves. They presuppose an entire ontology, a world of concrete particulars, and presuppose as well the epistemologies through which we read justice. (They are, in short, ourselves writ large.) If we cannot return to an Aristotelian world view, or even one akin to that of Aquinas,¹⁰ images drawn from Plato

8 *Clôture* is used in the parliamentary context to refer to a motion to put the question without allowing further debate. Here I use it to emphasise the extent to which our conventions about justice close off debate, consigning those who are deemed other to silence.

9 John Rawls began by insisting that justice is the first virtue of *social institutions* and spent the next 22 years trying to explain that he didn't mean that statement quite the way it sounded. I want to cling to those words, *social institutions*, and take him at his word and at his original insight. In that, I do believe, he was absolutely correct, the *first virtue*, that virtue without which no other is possible. I want to reclaim the abandoned 'utopian' moment. The gulf between J Rawls (1972) *A Theory of Justice*, Oxford University Press, p 3, and (1993) *Political Liberalism*, Columbia University Press, is immense.

10 Alasdair MacIntyre was, I believe, wrong to suggest first in (1985) *After Virtue*, 2nd edn, Duckworth, and subsequently in (1988) *Whose Justice? Which Rationality?*, University of Notre Dame Press, that men and women today potentially have access to a reading of justice grounded in Aristotelian ethics

and Aristotle, from Locke and Hobbes, from Hume and ... have all become part of the grammar of justice, at least for us. One possible schema, one way of capturing these images, these understandings and beliefs, is that set out below.

Democratic theory rests on certain assumptions about people, their interests, their relationships with other, and their relationship to the larger polity, each of which must be unravelled before our analysis can proceed. Liberal theories of democracy assume self-interested individuals with clearly felt needs and preferences. Each of these individuals aims to assure the attainment of his or her ends, or, in utilitarian terms, the maximisation of his or her interests. In theory, a democratic political community treats each of these individuals equally, guaranteeing to all its members the right to pursue their own ends as they see fit while setting as few constraints as possible on the definition of what those ends might be. Politics — and even community — take on an essentially instrumental value: We engage with others primarily for the purpose of achieving our individually chosen ends.¹¹

Such assumptions are part of the grammar of justice, for many of us, at this historic moment. Many of them are well known, so well known in fact as to operate below the level of thought and consciousness. Sometimes, as in the well-known liberal theory being developed by John Rawls, the needs and desires of citizens are spelled out in the form of a list of basic social goods, goods which are, he suggests, essential if we are to realise a life which we may call good according to our own lights. At other times, assumptions about the characteristics of citizens and about citizenship (and even about the domain of 'the political') remain tacit, forming the 'but fors' underlying his arguments. When, for example, in discussing state involvement with the education of children, Rawls asserts that its sole concern:

lies in their role as future citizens, and so in such essential things as their acquiring the capacity to understand the public culture and to participate in its institutions, in their being economically independent and self-supporting members of society over a complete life, and in their developing the political virtues, all this from within a political point of view[.]¹²

the moorings for his argument come from a range of unstated assumptions about what it means to be a citizen.

and politics. What we undoubtedly do have access to is a kind of nostalgia, a half-imagined polity grounded in our imaginings of what we might have been like if that were indeed our world, but nostalgia is all it is.

- 11 MA Ackelsberg (1988) 'Communities, Resistance, and Women's Activism: Some Implications for a Democratic Polity' in A Bookman and S Morgan (eds) *Women and the Politics of Empowerment*, Temple University Press, pp 297–8.
- 12 J Rawls, 'The Priority of the Right and Ideas of the Good' (1988) 17 *Phil & Pub Affairs* 251, p 268.

To understand the implications of arguments such as these, we need to understand the public culture to which Rawls refers; we need to know its institutions and what entitles one to participate in them. That public culture lies within the grammar of justice. Its institutions have become the building blocks of syntax. When the development of the political virtues is held out as an explicit (and non-negotiable) goal of education, we immediately understand or ought to understand that these virtues are part of what Rawls means (and, perhaps, we mean) by citizenship and that their possession is in some sense a precondition for participation in the political realm. Only possession of the political virtues entitles us to act within Rawls's polity as *free and equal moral persons*. Rawls's citizens, as citizens (and only as citizens) take part in the public culture, engage in political participation and debate in its institutions, and act within that arena as political beings - meaning they act with and for the consent of others, in short, they act representatively. When he emphasises that the state is concerned with its future citizens being prepared to be economically independent and self-supporting members of society over a complete life, the picture is complete. The citizen is ready to take *his* public place, to leave the private and inexplicit far behind. The image which lingers is one which owes far more than Rawls would, I think, care to admit, to the Greek vision of politics and of the political actor. As Nancy Hartsock reminds us:

the realm of politics, the public realm, both depends on and exists only in opposition to the private realm, that is, the household. One can only be a citizen by being the head of a household...¹³ [T]he realm of freedom and leisure inhabited by citizens depends on the existence of a realm of necessity populated by women, slaves, and laborers — but defined in essence by its female nature.... [T]here is an opposition between an unstable realm in which political rule is possible — rule over formal equals where there is a constant possibility of changing from ruler to ruled — and a stable private realm in which the ruler's dominance can never be changed by the ruled. The citizen must be involved in this realm of unequals to qualify for entering the public realm.¹⁴

While Hartsock was, overtly, speaking of the classical Greek image of the *polis* and of citizenship, the vision which Rawls offers differs very little from that which she sketches. The freedom and the leisure of citizens are still purchased with the labour of those, today almost exclusively women, who remain within the 'sphere of necessity'.¹⁵ The tension, the mutual

13 Rawls (1972) p 128 suggests that, in the 'original position', we ought to adopt the perspective of 'heads of families' in reasoning about justice.

14 NCM Hartsock (1984) 'Prologue to a Feminist Critique of War and Politics' in JS Steim (ed) *Women's Views of the Political World of Men*, Transnational, pp 121, 149. While this description is intended as an account of the relationship between the *polis* and the household in classical Greek theory, every element of its structure is replicated by Rawls in *A Theory of Justice*.

15 Just what is it about 'necessary labour' which makes it unworthy of the citizen?

dependence between 'the political' and 'the affectional', as Rawls terms it, remains and, perhaps, remains inevitable.¹⁶ Perhaps that perverse alterity, the implicit demand contained within 'the political' for the private, the constant, the inexplicit¹⁷ but secure and securely hierarchical domain in which authority seems both beyond challenge and beyond the call of justice, goes some way towards explaining my sense of why, if justice is to be spoken, it must be embodied.¹⁸

Elsewhere I have insisted that the ontological question is prior to the epistemological question.¹⁹ Here I want to state that more clearly and categorically, to make it plain that it is only to the extent that the subject of justice is embodied, given bodily (and moral and social and hedonic) form that justice (and most particularly distributive justice) can be spoken at all. Needs, rights and entitlements, words which carry with them our dreams of justice, and most particularly our lingering hopes for a just distribution, are words which have meaning only to the extent that they are linked to bodies. It is only because we have bodies that we can have needs and rights and entitlements. These things are bound, inextricably, to our corporeality. Abstract citizens have neither bodies nor needs. Indeed, at the point at which all that remains is an abstraction, the only needs which can be spoken and the only dreams which can be put to the test are those which have no grounding in any world in which we might care to participate.

When Mari Matsuda insisted that, potentially, we all have the capacity to see the world from the standpoint of the oppressed and, equally, that we must come to know that world in its concrete particulars, the particulars of which she spoke lie beyond and outside of the discourse of citizens. Our sisters carrying buckets of water up five flights in a welfare hotel, our sister in a battered women's shelter, our sisters in the killing fields of Bosnia-Herzegovina, Somalia and the West Bank are not citizens.²⁰ Their needs,

Could it be, perhaps, the bodies of those who perform it?

- 16 It seems clear to me that we define and understand the political by that which it is not. Most significantly, it is not the domain of the particular, the individual, the concrete, the actual. To be a subject within the political is to be everywhere at once and therefore nowhere at all, to occupy every position and therefore no position.
- 17 Its inexplicitness muffles the silence of those within it. 'The alternative to speaking for myself representatively (for someone else's consent) is not speaking for myself privately. The alternative is having nothing to say, being voiceless, not even mute': S Cavell (1979) *The Claim of Reason*, Oxford University Press, p 28. As Cavell reminds us, 'To speak for yourself then means risking the rebuff — on some occasion, perhaps once for all — of those for whom you claimed to be speaking; and it means risking having to rebuff — on some occasion, perhaps once for all — those who claimed to be speaking for you...': *ibid*, p 27.
- 18 J Rawls 'The Domain of the Political and Overlapping Consensus' (1989) 64 *NYULR* 233, p 242.
- 19 SS Berns, 'Through the Looking Glass: Gender, Class and Shared Interests, The Myth of the Representative Individual' (1993) 11 *Law in Context* 95.
- 20 MJ Matsuda, 'When the First Quail Calls: Multiple Consciousness as

their desires, their pleasures, their pains and their dreams are not 'basic social goods', such as income and wealth. Unless we allow them to speak for themselves *and for us*, we dare not claim to speak for them, representatively, for their consent. To do so is to presume too much — to speak the unspeakable.²¹

To speak of justice one must, I think, speak representatively. One must, in short, have a political voice. If one is to do that, one must see oneself as politically equal, as entitled to speak, not only for oneself but for others. Even to begin to think of oneself as *politically equal* smuggles in a comparison. One need not, of course, compare oneself to actual present or future citizens. One must at the very least compare oneself to an ideal. Only if one has done this can one see oneself as *politically equal*, as entitled to speak for (these imagined) others, for and with their consent.²² What I am seeking to discover here is those conditions under which it may become possible for those whose speech is heard as silence, whose voices are not simply muffled but not understood as voices, to find (or recover) their voices.²³ It is not, I think, enough that they consent, for if silence is not consent, it nonetheless is routinely taken to allow all. It is they that must gain speech, come to be counted among those whose consent is actively sought, desired, so that it *matters* whether or not they '*recognize others to have consented with [them], and hence that [they] consent to political equality*'.²⁴ Until or unless this happens, until their consent matters, they cannot speak of justice, and, more importantly, unless their consent counts, their needs, their desires, remain buried, outside and beneath the domain of justice. It is *this* idea which seems to me to be central, true and valuable in the idea of a *social* contract, that it identifies those whose consent counts, whose needs, whose desires must, in part at least, be met if their consent is to be secured (and it must be secured anew, not simply renewed, at every moment) and that they are '*to recognize the society and its government, so constituted, as [theirs]; which means that [they] are answerable not merely to it, but for it*'.²⁵ I cannot, I think, be answerable *for* that which simply assumes my consent (or my equality)²⁶ although I may be answerable to it.

Jurisprudential Method' (1989) 11 *Women's Rights Law Reporter* 7, p 9.

- 21 The danger here lies in entering an economy of oppression, in which instantiations of oppression are laid before us, hierarchially ordered, measured and quantified.
- 22 To speak for someone's consent is to speak with the knowledge that it can, at any moment, be withdrawn.
- 23 I say to find or recover their voices but this is not truly what I mean. If these voices are to be recovered, to become political, part of the polity, it is hearing which must be recovered far more than speech. If hearing is to be recovered, if lack and loss must first be acknowledged, the deficit admitted. Hearing and speech will return when their consent is understood to be essential, worth having.
- 24 Cavell (1979) p 23 (original emphasis).
- 25 Ibid (original emphasis).
- 26 RM Dworkin (1986) *Law's Empire*, Belknap Press, p 200, suggests that a community has complied with the political demand for 'equal concern' so long

When, at least in part to escape the *clôture* explicit in those accounts which wore their assumptions about the subject of justice, more precisely, the male subject of justice, on their face, liberal theories sought instead to offer a universal and formally equal subject,²⁷ most of these assumptions vanished from the face of the text. Today, we typically find them only by reading 'between the lines' of justice. No longer the fundamental building blocks of theory, they have become instead the trace elements of justice. At best, their fleeting half-lives might be glimpsed as a transitory fire-fall of tracery seen through an electron microscope. Rawls's economically independent and self-supporting citizens are officially stripped of all identifying marks and disembodied. Beneath the surface of the text, of course, they can be glimpsed in suits and ties or in overalls and helmets, taking up their assigned roles in the calculus of economic justice, that calculus in which the least advantaged class is explicitly identified with the unskilled labourer and in which, in a momentary lapse, Rawls acknowledges that groups other than occupational groups could only form the 'least-advantaged class' for theoretical purposes where they were deprived of the basic liberties. For them, at least for those among them whose bodies cannot be reconciled with the body of justice (women, for example),²⁸ it is no longer enough that they be economically deprived, that they be deprived as well, perhaps, of access to leadership and the social bases of self-respect, even deprived of fair equality of opportunity. Only where, in a society which is, perhaps, otherwise nearly just,²⁹ they are deprived of the basic (political) liberties is their disadvantage recognised as real. Reasoning such as this simultaneously reveals and conceals the body of justice, reveals it as a male body even while concealing the ways in which its maleness obliterates many questions which might otherwise be foregrounded. Paramount among the gaps in the ensuing text, its silences, are those silences surrounding the continued invisibility of the realm of necessity, the 'absence' of those within it and the silence of their voices, a silence so complete they seem not to exist at all. At the same time and present, inevitably not only within the text but on its face, is the almost absolute privacy of the realm of necessity, the way in which its privacy is not only acknowledged but demanded and becomes, ultimately, the fulcrum upon which the overlapping consensus revolves.

as it 'assumes' that its roles and rules are equally in the interests of all.

- 27 Equality, formal or otherwise, impels us towards an abstract subject, a subject identified by the absence rather than presence of concrete particulars.
- 28 This is, I think, another way of saying that in (almost) all the important ways, their consent does not matter and that, for that reason, what they may or may not have consented to also does not matter. It is a measure of my exclusion, my identification of myself as one whose consent does not matter, that, being less even than mute, I am unable to speak for myself politically. Before I may speak for myself, politically, my consent must matter, it must somehow be relevant that I speak for others. My voice must be truly representative.
- 29 I do not know how a society which excised some of its members from the body politic because of an accident of race or gender or ... might nonetheless be nearly just. That the possibility exists and that Rawls explicitly acknowledges it says a great deal about justice and about the body politic.

I mention, even insist upon, this because of a further question which it inevitably raises, a question implicit in my sense that justice is necessarily embodied. If we can only imagine justice in the flesh, if the *body* of justice must be identified and defined if we are to say what is and what is not just, if our knowledge is in that way bounded by the body so that our only retreat from embodiment lies in that which is private, and in that way inexplicit, how can we, how do I, speak of justice without enforcing clôture, drawing a circle by which other voices are banished from my polity. If to speak of justice (specifically, to speak of the economy of justice) compels me to identify those needs which are relevant, those conditions whose absence ought to compel me to withhold my consent or lead me to withdraw it, how can I, how do I do so, save from a position which, for better or worse, I occupy? Even more significantly, how can I do so without excluding from the *body* of justice those needs and those desires which lie beyond my imagination, those consents whose withholding lies beyond my ken?

Concluding Remarks

For me, speaking as a woman, the web of consents embedded in 'the political' is particularly telling. If to consent to the political is to consent to speak representatively, to speak for others and to allow others to speak for me in their turn, as a woman I begin at an immediate disadvantage. Even if, by accident, my voice is heard so that my speech is no longer mistaken for silence, it may still count for nothing.³⁰ In a whole range of critically important ways, I have been defined — legally, economically, culturally and politically — as *one whose consent does not matter*. What matters, has mattered legally, continues to matter (I believe) politically, is whether or not others believe that my consent has been given. At law, in a rape case for example, the question is never whether the victim actually consented. Whether or not she consented is irrelevant. What is relevant is whether or not the accused believed that she consented and whether (at least in the more 'progressive' jurisdictions) that belief was reasonable.³¹ The same is true within the political. If, in the end, what is relevant is whether others believe me to have consented, nothing will have changed. My consent, my willingness to speak representatively and to allow others to speak for me will still count for nothing. Until others recognise my consent as my own, to withhold or to give, unless others consent to political equality with me, so

30 Indeed, given the way in which, in our cultures, women's work becomes at every level a leisure activity and is understood in terms of its difference from real work, work done by men, it would be far more surprising if my speech counted. See M Waring (1988) *Counting for Nothing: What Men Value and What Women are Worth*, Allen & Unwin.

31 Underlying this, I believe, is not simply the traditional 'male' belief that 'no' means 'maybe' but something more striking, something that permeates the adversarial structure of the criminal trial. Because the onus of proof lies on the prosecution, because the Crown must prove all the elements of the offence beyond a reasonable doubt, a tacit presumption of consent is always present and must be displaced. The logic of law (and its maleness) demands it.

that I may, in my turn, represent them, nothing will have changed. I will remain one whose consent does not matter. What is needed is more than belief in consent; it is recognition, knowledge that I come before them at once as ego and as other, knowledge that my consent, my willingness to put my voice on the line, representatively, for them and for their consent, is essential to the survival of the polity. Until this happens, until 'the political' abandons its presumption of an (unwithdrawable) consent and offers actual recognition, consent will remain a simulacrum of self, a mirror in which citizens view themselves larger than life and believe that they confront the other. Whether it can, and how, what form such recognition will take and whether it will become possible, at that point, for ego and other to recognise sameness within difference and difference within sameness so that self and other become simply facets of human potential, I do not know.

Even more, I do not see clearly if, or even whether, should the unimaginable happen, should I be seen as among those whose consents matter, such an extension of the polity will portend truly radical change or whether the lines of exclusion will simply be redrawn, so that others are cast aside. The logic of interest group politics, that logic which is simultaneously the logic of Rawls's overlapping consensus and of Stanley Fish's 'No Bias, No Merit: The Case Against Blind Submission',³² allows us to fight for inclusion and to insist that our interests and our needs be recognised and included in the canon; but what it cannot do is unseat the provisionality of the canon itself. It cannot even ensure that, once we are included, our inclusion will signal a more inclusive polity in any sense beyond the bare multiplication of those who take their places within the political (in suits and ties or overalls and hard hats). As Hanna Pitkin suggests, this kind of bare representation,

does not allow for an activity of representing.... It has no room for any kind of representing as acting for, or on behalf of, others which means that in the political realm it has no room for the creative activities of a representative legislature, the forging of consensus...³³

The kind of consent of which I speak, a consent which includes within itself the recognition that those who are included are included, not simply because their interests and needs are entitled to count for as much as the interests and needs of others, but because they too are entitled to speak as representatives, to speak with and for the consent of others is very different. That kind of consent is not, I might add, the kind one might encounter behind a veil of ignorance. Still less could it ever be tacit or attained by conquest or capitulation. Rather, such a consent affirms difference, affirms diversity, plurality, polyvocality. It speaks of politics as debate and creation, where even fundamental and enraging differences are, *for that reason*, an

32 S Fish (1989) 'No Bias, No Merit: The Case Against Blind Submission' in *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Legal and Literary Studies*, Clarendon Press, p 163.

33 HF Pitkin (1967) *The Concept of Representation*, University of California Press, p 90.

essential part of the public agenda, the subject of debate and dialogue and of an ultimate consensus which is forged out of dispute and out of inclusion, not exclusion.

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