

What's Love Got To Do With It?

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A couple of years ago, a colleague told me a story that rather neatly sums up much of what I want to say about emotion, gender jurisprudence, and the law. This colleague was at a conference about agency -- a discussion about what sorts of autonomy, choice, and free will individuals should or can exercise in our society. Her panel consisted mainly of philosophers -- all of them male. After they had delivered their papers, she remarked that the lives they described, and the choices facing the individuals they described, did not seem to bear much resemblance to the lives and choices of the women she knew. The philosophers, as she describes it, collectively shot her a look of condescending pity. "Oh, one of them took it upon himself to explain to her, "that isn't the kind of question that concerns us. That's an empirical question." One reaction I had to this story was that it is somehow comforting to know that law is not the only discipline that fancies itself a closed system, that creates categories that deprive it of crucial knowledge, or that overestimates its ability to set its own parameters. But on second thought the story isn't comforting at all, because it illustrates that interdisciplinarity is not necessarily a corrective to such hermeticism. Disciplines may share a blind spot, may indeed reinforce each other's limitations. This story suggests one such debilitating and widely shared blind spot: toward the ways in which women live their lives, and the challenge this knowledge necessarily poses to assumptions, categories, even methodologies, constructed without sufficient curiosity about how women's lives differ from those of men. Challenging this blind spot, exploring these differences, are of course central concerns of feminist jurisprudence. Feminist jurisprudence illustrates the dangers of broad generalizations about the self in society and insists that attention be paid to the context from which these generalizations arise.¹ It critiques and seeks to remedy the lack of empirical inquiry into contexts

¹Martha Minow & Elizabeth Spelman, *In Context*, 63 S. Cal. L. Rev. 1597, 1605 (1990)

that lie outside the mainstream, such as the actual conditions of women's lives.² The question for today is: how do these concerns intersect with the study of emotion? I suggest that the answer is: they intersect at virtually every conceivable juncture. As I've discussed before,³ feminist jurisprudence was responsible for many of law's early forays into emotion theory. It has remained at the forefront ever since. The initial project was, in part, to argue that certain emotions had been wrongly excluded from legal analysis -- emotions like compassion,⁴ trust,⁵ and caring.⁶ These were, of course, the so-called "soft" or "feminine" emotions. The next project was to show that despite its seeming hostility to these "soft" emotions, law was not a purely rational or emotionless realm: it had merely privileged other, less visible, arguably more "male" emotional stances -- the passion for order, the zeal to prosecute, the preference for vengeance.⁷

This argument for expansion of acceptable emotions into the realm of the rational is intimately

(arguing that broad universal principles of legal and political theory must be placed in context).

²See e.g. Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 Cornell L. Rev. 1221, 1225-1232 (2000) (discussing feminist empiricism).

³For example in my article *Empathy, Narrative and Victim Impact Statements*, 63 U. Chi. L. Rev. 361, 368 (1996).

⁴See e.g. Lynne Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574 (1987); Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 Cal. L. Rev. 1011 (1989).

⁵Annette Baier, *Trust and Antitrust*, 96 Ethics 231 (1986).

⁶Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (1984).

⁷Bandes, *Empathy, Narrative*, supra note 3 at 368-69; Martha L. Minow and Elizabeth Spelman, *Passion for Justice*, 10 Cardozo L. Rev. 37 (1988).

tioned to a rethinking of the structure of the categories themselves. Does reason really exist in opposition to emotion, or can the two act in concert to enhance legal decision-making? Who does the current opposition describe, and whom does it tend to benefit? The first of these two lines of inquiry -- the wisdom of an opposition between reason and emotion -- illustrates what law can gain from interdisciplinary study. Legal scholars found that there was a wealth of information in a broad range of fields, including philosophy, psychology, anthropology, and neurobiology, that fatally undermined the traditional legal demarcation between the two realms.⁸ Although the conventional legal wisdom plods on largely unchanged, legal scholarship has grown increasingly sophisticated in its approach to the role of emotion in informing legal thought.

The second line of inquiry -- the question of why certain categories are so intractable -- is more resistant to new information. Why is law so invested in the supposed separation of emotion from reason? Who benefits from the traditional categories and whose concerns are marginalized? What strategic and political purposes are served by the construction and enforcement of the categories? As I think my anecdote about the philosophers helps illustrate, these are not the sorts of questions that are necessarily addressed by an influx of new data or by cross-cutting among disciplines. The categories we construct are often well designed to slough off information that will threaten their claimed coherence.

⁸Bandes, *Empathy, Narrative*, supra note 3 at 366-67; Susan Bandes, Introduction, *The Passions of Law* at 6-7 (Susan Bandes ed. 2000).

Feminist jurisprudence makes a crucial contribution by challenging the coherence of the categories. It asks the woman question at every juncture. It insists on recognition of multiple perspectives and multiple contexts. It asks how the law fails to take into account the experiences and values of women, and how existing legal standards and concepts might disadvantage women.⁹ It exposes the bias in existing rules and methodologies, and insists on the need for new rules and methods that reflect the complexity and importance of women's concerns. The question is often asked: is this really a unique contribution? Didn't the legal realists tell us 70 years ago that legal categories are socially constructed for political ends? That they systematically exclude certain viewpoints? I find it interesting, in fact, that this charge of lack of uniqueness is often leveled at both feminist jurisprudence and emotion theory. And as today's conference will no doubt help illustrate, feminist jurisprudence and emotion theory share many goals, many insights, many conclusions -- both with one another, and with other fields. I think the operative theme is: the more the merrier. In this context, better to be reinforced, even shamelessly copied, than to be unique.¹⁰

⁹Katherine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 837 (1990).

¹⁰Bartlett, *id.* at n9, citing Martha Minow, *Beyond Universality*, 1989 U. Chi. Legal F. 115, 131.

Let me turn to some thoughts on the ways in which feminist jurisprudence and emotion theory are so closely intertwined. Law is a field in which every theory must be tested by experiential data. The question must be, ultimately, whether theoretical constructs work to encourage just outcomes in the society law serves.¹¹ It is entirely predictable that those who experience themselves as excluded from the law's reach, or misportrayed by the law's notions of human behavior, will be those with the impetus to challenge its claims of universality. They will be gifted with the ability to understand law's perspectivity in a way that those in the mainstream will not. If law extrapolates from a particular model of behavior and assumes that individuals in society are motivated by a desire for autonomy, or wealth maximization, those who share these desires are handicapped in their ability to see the partiality of such constructs. They may not even truly understand that in using such models, the law is trafficking in assumptions about desires, values, prejudices, and fears.

¹¹Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 Buffalo L. Rev. 1275, 1314-15 (1999).

Those who feel excluded from such constructs will not see their exclusion as a merely empirical question, but as absolutely central to the law's claim to justice and legitimacy. Thus, for example, feminist philosophers like Susan Moller Okin demonstrate the Rawlsian theory of justice, which builds from the perspective of a non-situated, pre-societal individual, in fact assumes that the male head of the household is synonymous with the entire family. Feminists point out that the Rawlsian theory of justice is thus based, in part, on the erasure of the individuality of women and children.¹² It is built, as Okin points out, on a failure of empathy; on insufficient care and concern for women's viewpoints.¹³ From such a theory of justice will follow a complex set of assumptions about what an individual in society values, what motivates *him*, what *he* considers a harm, and what conditions *he* considers essential to full citizenship. These assumptions will universalize from incomplete, misleading data that excludes the concerns of women.

Feminists are well situated to notice partiality masquerading as universality, and to notice the dangers of failing to put things in context. Broad generalizations about what motivates individuals, what harms individuals, what kind of society individuals want, need to be insistently placed in context. We must always ask: which individuals, or groups of individuals, are we discussing? In what context? Are

¹²Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 *Ethics* 229, 235 (1989) (critiquing works of John Rawls); Susan Moller Okin, *Political Liberalism, Justice and Gender*, 105 *Ethics* 23 (1994) (same).

¹³Okin, *Reason and Feeling*, id at 248.

we taking the full complexity of those individuals into account? Are we sure all relevant voices have been heard -- and given their due -- on this issue?

The language of legal theory, as I've written elsewhere, isn't language that tends to welcome or even acknowledge emotion.¹⁴ On the contrary, it tends to pride itself on its ability to rise above the pull of emotion.¹⁵ Emotion is variable, messy, interdisciplinary, soft and feminine, fact-based, difficult to categorize, non-rational -- in short, it has all sorts of attributes that interfere with a claim for overarching, immanent status. On the level of grand theory, it is acceptable discourse to discuss *values*, and values may include, for example, *autonomy* or *wealth maximization*. It is not acceptable discourse to talk about love, fear, dependency, maternal bonding, sexual jealousy, anger, or intimacy.

Let's consider the traditional discourse about autonomy, for example. To paraphrase Raymond Carver, what do we talk about when we talk about autonomy?¹⁶ Much has been written on autonomy and feminist jurisprudence;¹⁷ and my goal is not to replicate or summarize this impressive body of scholarship. What I want to suggest, instead, is the extent to which the traditional treatment of

¹⁴See generally, Bandes, Introduction, *The Passions of Law*, supra note 8.

¹⁵See e.g. *DeShaney v. Winnebago County Dep't of Social Serv.*, 489 U.S. 189, 202 (1989) (arguing that judges, like other humans, are moved by sympathy, but must resist acting solely upon this basis); Bandes, *Empathy, Narrative*, supra note 3 at 362-63 (discussing role of emotion in *DeShaney*).

¹⁶See Raymond Carver, *What We Talk About When We Talk About Love* (1989).

¹⁷See e.g. Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thought and Possibilities*, 1 Yale J.L. & Feminism 7 (1989); Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (1991); Linda McClain, *Atomistic Man Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. Cal. L. Rev. 1171 (1992); Susan G. Kupfer, *Autonomy and Community in Feminist Legal Thought*, 22 Golden Gate U.L. Rev. 583 (1992).

autonomy in law and political theory discourse silences, marginalizes, and ultimately masks, the emotional variables which, inescapably, shape its meaning. Talking about autonomy sounds somehow rational, deeply philosophical, worthy of inclusion in the realm of legal discourse. Indeed, terms like autonomy draw much of their authoritative status from their very claim to transcend individuated preferences, fears and desires that are rooted in time and place, or that are shaped in part by racial, gendered and economic characteristics. But as we learn from feminist jurisprudence,¹⁸ a theory of autonomy that appears to transcend such variables is in fact rooted in particular assumptions -- assumptions that generally correspond most closely to the lives of men.

A grand theory premised on autonomy as a bedrock value has a number of problems. It assumes that women value the same version of autonomy that men purportedly value. When I say Apurportedly,@I note that of course an oversimplified notion of autonomy will misrepresent many men as well. I also note that if women were defining the terms, it is now a commonplace not only of feminist scholarship,¹⁹ but of pop culture standards like AMen Are From Mars, Women Are From Venus,@²⁰ that what men might regard as the desire for autonomy may look to women like fear of the connection and intimacy that we tend to value.

Grand theoretical constructs tend to oversimplify the notion of autonomy, and to overstate both

¹⁸As well as from critical race theory and other important correctives to mainstream legal thought.

¹⁹West, *Jurisprudence and Gender*, supra note 17 at 3-5. See also Robin West, *Caring for Justice* 94-95 and generally (1997).

²⁰John Gray, *Men Are from Mars, Women are From Venus: A Practical Guide for Improving Communication and Getting What You Want in Your Relationships* (1992).

the possibility and the desirability of achieving it. Because they insist on casting values and preferences in terms that are both overarching and bloodless, they lose the emotional complexity that better captures what individuals care about and what they fear. Nor is the problem merely linguistic, or otherwise academic. The so-called *Abedrock* notion of autonomy is the foundation for liberal theories of justice, and for prevailing theories of constitutional interpretation. It gives rise, for example, to the entrenched notion of a constitution that affords only negative rights.²¹ Such notions are translated into decisions that uphold, for example, the denial of access to abortion for poor women,²² or the refusal to constitutionalize duties to protect women or children from family violence.²³ The discourse that awards pride of place to this *Abedrock* notion of autonomy wards off challenges to its correctness by categorizing them in dismissive terms: merely empirical, soft, emotional, irrational. . . . Is it entitled to this pride of place? Can we have an informed discussion of autonomy without the recognition of emotional variables? I'd suggest that, given the high stakes, we ought to ask: what is the nature of this autonomy we are said to want? Who actually wants it? For those who don't, what do they want? And what are the real world consequences, not only of assuming a particular notion of autonomy, but of failing to ask the preceding questions at all?

I will not even try, in this brief discussion, to do justice to the rich literature on these topics. Thus I apologize in advance for what will necessarily be a not very nuanced description. What I seek to

²¹See e.g. Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271 (1990).

²²*Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); Bandes, *The Negative Constitution*, id.

do, simply, is suggest the sort of discourse about emotion that is already occurring, and must continue to occur, as a corrective to the traditional philosophical discourse.

First, is autonomy what women value most? As Robin West tells us, the traditional view of autonomy is premised on a traditional view of individuals as distinct and not essentially connected with one another.²⁴ But, she points out:

[P]erhaps the central insight of feminist theory of the last decade has been that women are essentially connected, not essentially separate, from the rest of human life, both materially, through pregnancy, intercourse, and breast-feeding, and existentially, through the moral and practical life.²⁵

This significant difference in the concept of a woman's selfhood has, of course, centrally important implications for the conditions of women's lives, and for what women value. To talk realistically about what law's role ought to be in helping women attain their own conceptions of a good life, it is necessary to talk about maternal bonding, about intimacy, about romantic love, about the love between mother and child, about dependency, about obligation and duty, and, in general, about the complex and often contradictory web of emotions with which every mother is quite familiar.

²³*DeShaney*, 489 U.S. 202; Bandes, *The Negative Constitution*, supra note 21.

²⁴West, *Jurisprudence and Gender*, supra note 17 at 1-2; citing Naomi Scheman, *Individualism and the Objects of Psychology*, in Sandra Harding and Merrill B. Hintikka, eds., *Discovering Reality* 225, 237 (1983).

²⁵West, *Id* at 3.

Second, to the extent women do value autonomy, how much resemblance does this autonomy bear to the traditional version? The autonomy we value might be one that allows us to choose love and connection. Women in families might well prefer a version of autonomy that recognizes the web of love and duty binding us to our children.²⁶ We might value opportunities to choose independence in a way that won't unduly violate our children's trust or interfere with their nurturing. We might favor government guarantees of longer, paid, maternity leaves, for example, or affordable, high quality child care. Women might also seek greater opportunities to choose the families we want. Women might want less punitive divorce and custody laws,²⁷ or recognition of same sex marriages.²⁸ We want to be able to leave abusive relationships without fear of physical harm or death. We might thus favor greater enforcement of laws against domestic violence, or rethinking the law of provocation so that it is far less forgiving toward men who kill or harm women who leave relationships.²⁹

Women might prefer a version of autonomy that recognizes the particular threats to our independence, the particular invasions of selfhood, that we most fear. Such a notion of autonomy would

²⁶See generally, Sara Ruddick, *Maternal Thinking*, 6 *Feminist Studies* 342 (1982); Colker, *Feminism, Theology, and Abortion*, supra note 4.

²⁷Martha Albertson Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, in *At the Boundaries of Law: Feminism and Legal Theory* 265, 268-274, 277-278 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

²⁸See Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love* (in *The Passions of Law*, supra note 8 (discussing the particular notion of romantic love that underlies legal definitions of marriage)).

²⁹See Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 *Yale L.J.* 1331 (1997) (citing empirical evidence that many successful provocation defenses are advanced by men whose source of provocation was that their wife or girlfriend left them, or even engaged in flirtation with another man).

take seriously the fear of unwanted pregnancy, the desire for sexual self-definition, and the desire to balance the love of family with the demands and attractions of one's career, as important values undergirding the availability of contraception and abortion. It would take seriously the invasion of selfhood that women experience when they are raped, rather than searching for other physical analogues to measure the harms involved.³⁰ For that matter, it would take seriously the threat to autonomy presented by living with the day to day fear of rape, a fear that has real-world consequences for the way women live our lives.

The question I began with, the title of my paper, is "What's Love Got to Do With It?" My project has been, and continues to be, to illuminate the myriad unacknowledged ways in which law is shot through with assumptions about our emotional lives, and the myriad unacknowledged ways in which law regulates our emotional lives. I want to briefly highlight a couple of the examples I mentioned above, to illustrate how much love does, in fact, have to do with law.

³⁰West, *Jurisprudence and Gender*, supra note 17 at 59.

First, there is the question of provocation to commit homicide. In an important article, Victoria Nourse asks what is really occurring in criminal courts when men charged with killing women argue provocation as a mitigating factor. She demonstrates that in a significant percentage of such cases, the provocation defense was held justified for the killing of wives or lovers who were not even unfaithful, but were simply attempting to leave miserable or abusive relationships.³¹ Whose autonomy does the law advance in such cases, and at the expense of whose autonomy? What is the nature of the passion or provocation that the law values in assigning responsibility? The law is not very accustomed to asking such nuanced and empirical questions, and so acts in willed ignorance of the answers.

Second, there is the question of the law's response to domestic violence. Reva Siegel traces the history of domestic violence law, to show that protection of marital love has long been used as a reason to insulate domestic violence from the reach of law. It was traditionally believed that to allow legal sanctions for domestic violence would, as she quotes:

break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery, contention and strife, where peace and concord ought to reign.³²

³¹Nourse, *supra* note 29.

³²Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 *Yale L.J.* 2117, 2153 (1996).

More recently, as she and other scholars document, this same discourse of love, with a gloss of federalism, has been used to argue against the Violence Against Women Act, on the ground that domestic violence is a local rather than a federal concern.³³

A legal discourse that acknowledges love, intimacy, caring, fear, and all those other complex human emotions would sound strange to our ears. The problem is, the discourse is occurring below the radar. Unless lawyers, scholars, jurists, legal philosophers, can start talking the language of emotion, decisions about women's lives will go on being made based on seriously incomplete or erroneous notions about our emotional needs and desires, or on a failure to address them at all. If law is to take seriously the notion of equal justice, that is one empirical problem it cannot afford to ignore.

³³Siegel, *id* at 219-2200; Judith Resnik, *Naturally@Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. Rev. 1682 at 1739-50 (1992).