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WHAT'S LOVE GOT TO DO WITH IT?

SUSAN BANDES*

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 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 is not comforting at all because it illustrates that interdisciplinarity is not necessarily a corrective to such hermeticism. Disciplines may share a blind spot, reinforcing 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, and even methodologies, constructed without sufficient curiosity about how women’s lives differ from those of men.

Challenging this blind spot and exploring these differences are 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 that lie outside the mainstream,

* Professor of Law, DePaul University. I would like to express my gratitude to Linda Malone for conceiving of this Symposium, to the William & Mary Law School and the students of the *William & Mary Journal of Women and the Law* for hosting and organizing it with grace and professionalism, and to the contributors, for their insight, collegiality, and friendship.

1. Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1605 (1990) (arguing that broad universal principles of legal and political theory must be placed in context).

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 that they intersect at virtually every conceivable juncture.

As I have discussed previously,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 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 merely privileged other, less visible, arguably more "male" emotional stances — the passion for order, the zeal to prosecute, and the preference for vengeance.⁷

The argument for expansion of acceptable emotions into the realm of the rational is intimately tied to rethinking 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 — why certain categories are so intractable — is more resistant to new information. Why is law so

2. See, e.g., Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221, 1225-32 (2000) (discussing feminist empiricism).

3. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 367-68 (1996).

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

5. See, e.g., Annette Baier, *Trust and Antitrust*, 96 ETHICS 231 (1986).

6. See, e.g., NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION* (1984).

7. Bandes, *supra* note 3, at 368-69; Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 39-48 (1988).

8. Bandes, *supra* note 3, at 366-67; Susan Bandes, *Introduction to THE PASSIONS OF LAW* 6-7 (Susan A. Bandes ed., 1999).

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 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.

Feminist jurisprudence makes its crucial contribution by challenging the coherence of the categories.⁹ It asks the woman question at every juncture.¹⁰ 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.¹¹ 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.¹² The question is often asked: is this really a unique contribution? Did the legal realists not tell us seventy years ago that legal categories are socially constructed for political ends, and systematically exclude certain viewpoints? I find it interesting that this charge of lack of uniqueness is often leveled at both feminist jurisprudence and emotion theory. As the papers for this conference help illustrate, feminist jurisprudence and emotion theory share many goals, many insights, and 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.¹³

Let me turn to some thoughts on the ways in which feminist jurisprudence and emotion theory are 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.¹⁴ 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

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

10. *Id.* at 837-43.

11. *Id.*

12. *Id.*

13. *Id.* at 853 n.9 (citing Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 131 (1989)).

14. See Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1314-15 (1999).

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.

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 that 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.¹⁵ Feminists point out that the Rawlsian theory of justice is based, in part, on the erasure of the individuality of women and children.¹⁶ It is built, as Okin points out, on a failure of empathy, on insufficient care, and concern for women's viewpoints.¹⁷ 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.¹⁸ 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 and what kind of society individuals want need to be consistently placed in context. We must always ask: which individuals, or groups of individuals, are we discussing? In what context? Are 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 have written elsewhere, is not language that tends to welcome or even acknowledge emotion.¹⁹ On the contrary, it tends to pride itself on its ability to rise above the pull

15. See Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 *ETHICS* 229, 235 (1989) [hereinafter *Reason and Feeling*] (critiquing works of John Rawls). See generally Susan Moller Okin, *Political Liberalism, Justice and Gender*, 105 *ETHICS* 23 (1994) (same).

16. See *Reason and Feeling*, *supra* note 15, at 235.

17. See *id.* at 248.

18. See *id.*

19. See Bandes, *supra* note 8, at 6-8.

of emotion.²⁰ 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, transcendent 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.

Consider the traditional discourse about autonomy, for example. To paraphrase Raymond Carver, what do we talk about when we talk about autonomy?²¹ Much superb work has been done on the topic of autonomy and feminist jurisprudence,²² 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 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. As we learn from feminist jurisprudence,²³ however, 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 saying “purportedly,”

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

21. See RAYMOND CARVER, *WHAT WE TALK ABOUT WHEN WE TALK ABOUT LOVE* (1981).

22. For example, see Kathryn Abrams' work on autonomy and agency, including Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) and Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999). See also JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990); Susan G. Kupfer, *Autonomy and Community in Feminist Legal Thought*, 22 GOLDEN GATE U.L. REV. 583 (1992); Linda McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thought and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

23. Similar lessons are found in critical race theory and other important correctives to mainstream legal thought.

I note that 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,²⁴ but of pop culture standards like *Men Are From Mars, Women Are From Venus*,²⁵ 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 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 "bedrock" 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.²⁶ Such notions are translated into decisions that uphold, for example, the denial of access to abortion for poor women,²⁷ or the refusal to constitutionalize duties to protect women or children from family violence.²⁸ The discourse that awards pride of place to this "bedrock" notion of autonomy wards off challenges to its correctness by categorizing them in dismissive terms: merely empirical, soft, emotional, or irrational. Is autonomy entitled to this pride of place? Can we have an informed discussion of autonomy without the recognition of emotional variables? I would 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 do not, 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. I apologize in advance for what will necessarily be a not very nuanced description. What I seek to do, simply, is suggest the sort of discourse about emotion that is already

24. ROBIN WEST, *CARING FOR JUSTICE* 94-100 (1997); West, *supra* note 22, at 3-5.

25. JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS: A PRACTICAL GUIDE FOR IMPROVING COMMUNICATION AND GETTING WHAT YOU WANT IN YOUR RELATIONSHIPS* (1992).

26. See, e.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

27. *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); Bandes, *supra* note 26, at 2272, 2297-300.

28. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989); Bandes, *supra* note 26, at 2275-76, 2287-90, 2294-97.

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."²⁹ But, she points out, "perhaps 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."³⁰ 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.

Second, to the extent women do value autonomy, how much resemblance does this autonomy bear to the traditional version? The autonomy women value might be one that allows them to choose love and connection. Women in families might well prefer a version of autonomy that recognizes the web of love and duty binding them to their children.³¹ We might value opportunities to choose independence in a way that will not 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 may want less punitive divorce³² and custody laws, or recognition of same sex marriages.³³ We want to be able to leave abusive relationships without fear of physical harm or

29. West, *supra* note 22, at 1-2 (citing Naomi Scheman, *Individualism and the Objects of Psychology*, in *DISCOVERING REALITY* 225, 237 (Sandra Harding & Merrill B. Hintikka eds., 1983)).

30. *Id.* at 3.

31. See Colker, *supra* note 4, at 1023-24; Sara Ruddick, *Maternal Thinking*, 6 *FEMINIST STUD.* 342 (1982).

32. Cf. Martha 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, 268-74, 277-78 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991) (describing negative implications of divorce laws for women).

33. Cf. Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love*, in *THE PASSIONS OF LAW*, *supra* note 8, at 217 (discussing the particular notion of romantic love that underlies legal definitions of marriage as heterosexual).

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.³⁴

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 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.³⁵ 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.³⁶ 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 their lives.³⁷

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 riddled 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.

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.³⁸ 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.³⁹ 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

34. See Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 *YALE L.J.* 1331, 1342-67 (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).

35. West, *supra* note 22, at 59-60.

36. *Id.* at 59.

37. *Id.*

38. Nourse, *supra* note 34.

39. *Id.*

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.⁴⁰ It was traditionally believed that to allow legal sanctions for domestic violence would "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."⁴¹ 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.⁴²

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, and 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.

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

41. *Id.* at 2153 (citing *State v. Hussey*, 44 N.C. (Busb.) 123, 126-27 (1852)).

42. *Id.* at 2196-200; Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 *N.Y.U. L. REV.* 1682, 1739-50 (1992).