Love, Rage and Legal Theory

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Love and rage, I believe, motivate feminist work in law, both in advocacy and in the academy. Love and rage not only move us to action, but they also inform a feminist sense of justice and of morality. This emotional root *alone* of feminist work in law renders it threatening and alien to mainstream legal discourse. As a consequence, mainstream legal discourse constitutes a tremendously powerful censor of feminist *feeling*, as well as substantive feminist views on law. The very presence, not to mention the dominance, of mainstream legal discourse and the disciplines it fosters oppress as they "discipline" the feelings that motivate and to some degree even define feminist legal practice and theory.

The main purpose of this paper is simply to suggest that feminist lawyers, judges and legal theorists feel, live with, internalize, respond to, accept, or rebel against the active oppression of these two feelings—love and rage—constantly. More specifically, what I want to identify in this paper are some of the ways that our developing feminist legal scholarship *itself* evidences the existence of oppressive and disciplining forces which have the effect and often the expressed intent of marginalizing the feelings that motivate feminist legal work. My claim is that feminist legal scholarship distinctively shows that we have unwittingly internalized as well as quite consciously rebelled against, the dominant legal culture's condemnation of the emotional root of our work. As I will show, both reactions are partial: the same piece of feminist scholarship—indeed the same paragraph—often evidences both internalization of the discipline and liberation from it at the same time. But both responses evidence the dominance of an essentially masculine view of the relation of affect to action, of emotion to reason, of particular to universal, of context to principle, of nature to culture, and of self to other, that is threatened to the core by the affective root and motives of feminist legal work and by its substantive content. The resulting oppression and repression of feminist feeling can do a great deal of psychic damage. Perhaps naming and identifying that damage may to some degree militate against it.

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First, before I catalog some of the ways our most powerful feelings are repressed, let me give a few examples of what I mean by the claim that love and rage motivate as well as define feminist legal work, and a few examples of the very different emotional grounding of masculine jurisprudence. During the last decade, a growing number of feminist legal theorists, following feminist moral philosophers and psychologists,[1] have argued that it is our "connectedness" to others, and not our detachment from them, which render us moral creatures, and that it is therefore an "ethic of care"—an ethic premised on our capacity for empathy, sympathy, or love—and not an ethic of rights, which must be the heart of a morally acceptable legal regime (assuming optimistically we will one day have one).[2] This claim *alone* (which I awkwardly have called elsewhere a "cultural-legal feminist" commitment)[3] distinguishes our developing "utopian" feminist jurisprudence from the idealistic or utopian strands of all three major contemporary jurisprudential movements: liberal legalism, economic legalism, and the critical legal studies movement. In contrast to liberal legalists,[4] these feminist legal scholars insist it is the heart and not the head, the ability to particularize, not generalize, one's *sensitivity* to context and not one's ability to transcend it, the ability to connect, identify, understand, and sympathize with the different and particular other, and not the ability to "see past" those differences to some universal essence, which is the basis of any morally ideal conception of "The Rule of Law." In contrast to legal economists,[5] cultural feminists insist that it is the capacity for trust and sense of responsibility which will facilitate a progressive and economically just legal order, rather than a relentless self-interest which necessitates a libertarian but regressive one. And finally, contra the critical legal scholar,[6] at least some feminists claim that it is our very natural and concrete biological, emotional and social connection to other human beings and not, as the critical legal scholar insists, a socially constructed and effervescent inclination toward "community", which carries the promise of a political and legal realm infused by an ethic of care.

While love informs a feminist sense of morality, and hence of ideal conceptions of law, rage informs the feminist sense of justice. We are enraged, and we are moved to act, by our identification with the gendered injuries that distinctively destroy women's selfhood and security, typically

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1. *See* C. Gilligan, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); N. Noddings, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1984).

2. *See e.g.*, Henderson, *Legality and Empathy*, 85 MICH L. REV. 1574 (1987); Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987).

3. West, *Jurisprudence and Gender*, 55 CHI. L. REV. 1 (1987).

4. Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175 (1986); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

5. R. Posner, THE ECONOMICS OF JUSTICE (1981).

6. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

with the full endorsement of legalism. The feminist legal scholar's *own victimization*—her knowledge that she too has been hurt by the social practices she condemns—is absolutely crucial to her sense of the injustice of the injuries she litigates, adjudicates or analyzes, for it is crucial to her understanding of these injuries *as injuries*.[7] The necessary by-product of that shared victimization, however—the sense of oneself as a victim as well as a lawyer or theorist—is rage, clean and simple. Feminist rage is thus indispensable to a feminist sense of justice: it evidences the theorist's understanding of herself and of other women as having been unjustly rather than deservedly injured.

The feeling of rage that informs a feminist sense of justice sharply distinguishes feminist feeling from that which moves mainstream legal discourse. This is easier to see in advocacy and adjudication than in the academy: the feminist lawyer or judge is inescapably litigating or adjudicating practices which hurt *her* as well as whatever client or interest she is representing, or whatever litigant she is judging, thus violating the lay as well as professional sense that it is somewhat unwise to be a lawyer in one's own cause, and certainly improper to be a judge in one's own case. But this conflict between the mainstream and feminist emotional root of justice pervades theory as well as practice. The feminist legal scholar's conception of justice is through and through informed by her understanding of herself as part of a collectivity of victims of injurious practices. *That* understanding in turn depends crucially upon her awareness of herself as a member of a collectivity defined by gender and injury, and of her identity as in no small part a function of the group membership.

The centrality of these experiences of shared injury, victimization, and the rage to which they lead, to the feminist sense of justice, no less than the centrality of an ethic of care to feminist jurisprudence, also renders feminist legal scholarship incommensurate with mainstream legal theory. For more than any other conviction, the vision of "impartial justice" as requiring a neutral arbiter to weigh the conflicting rights (for the liberal),[8] interests (for the economist),[9] or ideals (for the critical legal scholar)[10] unifies the otherwise diverse strands of contemporary legal scholarship. For most, if not all, contemporary jurisprudence, the neutrality that justice definitionally requires precludes the sense of engagement, identification, connection, participation, shared victimization, and collective rage that inform feminist conceptions of justice.

Underlying this disjunction between the feelings that motivate feminist and mainstream legal scholarship is an even more fundamental cleavage

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7. I have explored this elsewhere. West, *Women's Hedonic Lives*, 3 WISC. WOMEN'S L. J. 81 (1987).
8. Brest, *supra* note 4.
9. R. Posner, *supra* note 5.
10. Kennedy, *supra* note 6.

between the existential situation—the position in the world—of the feminist legal scholar and the masculine legal scholar. It is the lived reality of physical, emotional and psychic *intersubjectivity* with others which underlies the two emotions—love and rage—that motivate the feminist sense of morality and justice respectively and hence of feminist legal theory. From a feminist point of view, this is unsurprising: the overwhelmingly pervasive theme of feminist scholarship in law and elsewhere of the last two decades is that the experience and fact of intersubjectivity—of connection—is central to women's self identity. If that is right, then it is surely central to the feminist legal scholar's identity as well.[11]

By contrast, judging from the works and words of liberal, economic and critical legal scholars themselves, it seems to be the brute necessity of *separateness* from the other that underlies the collection of "emotions"—detachment, selfishness, and a pervasive sense of alienation from others—that motivate mainstream conceptions of justice, morality, and legal theory. The liberal, economic and critical scholars, of course, have widely differing responses to their experience of the necessity of separation from the other: the liberal regards the experience of separateness as the core of a detached—and hence principled and moral—regime of legalism;[12] the economist celebrates the selfishness to which separateness gives rise;[13] and the critical legal scholar seeks to overcome the sense of alienation from others to which his separateness commits him through mystical transcendence (the celebrated "intersubjective zap" of *Roll Over Beethoven* fame) or communitarian conversations.[14] But they are *all*, distinctively, committed to a vision of the self and hence of themselves as necessarily separate from the other. That shared commitment alone puts *all* of their work at odds with our developing feminist legal scholarship.

The difference between the emotional and existential commitments of mainstream and feminist legal work, combined with the dominance of the former over the latter, results in the repression of both intersubjectivist feminist ideas, and intersubjectivist feminist feelings. The most severe, and also the most visible technique for repression in the legal academy, of course, is as always the refusal to hire and tenure. Less severe but just as overtly repressive disciplinary techniques also proliferate just under the surface. Not the least of these is the extensive and unsupervised edits of manuscripts by the student-editors who manage the major law reviews.[15]

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11. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking* 101 HARV. L. REV. 727 (1988); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Henderson, *Legality and Empathy*, *supra* note 2; Kornhauser, *supra* note 2; Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

12. R. Nozick, ANARCHY, STATE AND UTOPIA (1974); R. Dworkin, LAW'S EMPIRE (1986).

13. R. Posner, *supra* note 5.

14. Kennedy & Gabel, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

15. This experience is not, of course, limited to women, but women authors may have or be perceived to have less authorial authority in the negotiation process with editors of the major reviews.

A close examination of these overtly repressive techniques could show many different things, but certainly one pattern that might emerge from such a study is that feminist scholarship that concentrates on virtually any manifestation of the human potential for intersubjectivity—from pregnancy itself, to the possibility of intersubjective knowledge, and the relevance of either (or both) the experience of shared victimization or an ethic of care to legal decision-making and legal ideals—is for that reason alone vulnerable to censor.

Hirings, firings, tenure battles, and edits, however, are open and pitched fights. They do their own damage, which is extensive, but I want to focus on something else: the covertly repressive messages condemning and "disciplining" our feelings. My claim is that we have to some degree internalized as well as rebelled against at least two of these messages, and the resulting schizophrenic posture we harbor toward our own feelings is well-evidenced by our work. The first such censorial message is that the "ethic of care" first identified by Gilligan, Noddings,[16] and others, and which now plays a fairly large role in feminist legal scholarship, is not really "up to the hard task" of legal decision-making: that legal analysis moved by an ethic of care just cannot do the hard work of legal analysis moved by a morality of reason, principle and detached respect. The second message is the profoundly silencing claim that our victimization by the practices we seek to eradicate and the rage to which that victimization gives rise, disable us from an adequate and objective understanding of those practices. Therefore, we are told, for reasons of *justice*, as well as reasons of status, we ought to forgo family law, rape law, and discrimination law, and instead concern ourselves in our writing with "neutral", hard-law topics in which we do not have such a "personal stake". I will give one example each of the way that our emerging feminist scholarship evidences that we have both internalized and rebelled against both of these messages. The first example will concern the substance of our developing feminist legal theory, and the second concerns its formal and stylistic distinctiveness.

First, I think there is a pervasive and disabling ambiguity in the recent feminist legal scholarship, including my own, inspired by Carol Gilligan's work, concerning the importance of judicial and legal empathic sensitivity to "differences" between people.[17] Although tremendously important, the ambiguity in much of this scholarship shows that we have partially internalized as well as rebelled against the repressive message that a morality

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Many of us have had devastating experiences with censorial student editors, but only Patricia Williams, to my knowledge, has written or spoken of this experience publicly. Speech by Patricia Williams, Critical Legal Studies Annual Conference, (Fall 1988).

16. *See, e.g.*, C. Gilligan, *supra* note 1; N. Noddings, *supra* note 1.

17. Minow, *supra* note 11; Henderson, *Legality and Empathy*, *supra* note 2; Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987); West, *Women's Hedonic Lives*, *supra* note 7.

based upon an ethic of care cannot insure morally decent legal decision-making. Let me make the point analytically. My complaint is that some of this recent feminist legal scholarship fluctuates fairly explicitly, although not always clearly, between two very different positions regarding the relationship of empathy, sympathy, and care, to legal decision-making. The first position, which I call the "cognitive" position, is that an empathic understanding of the differences of others (whether the "others" be women, Fundamentalist Christians threatened by Darwinian hegemony in the public schools, people of color, the differently abled, or "pregnant persons") constitutes an important source of *information* about the totality of persons who will be affected by a legal decision. Without this sensitivity to difference and context, decision-making will be *apparently* rational, but *in fact* skewed.[18] The second position, which is much more threatening to mainstream legal discourse, and which I call the "moral" position, is that empathic understanding of and sensitivity to the context in which differently situated others find themselves is but one aspect of a truly caring relationship with those others, even if the relationship is as fleeting and bureaucratized as judge-litigant. Empathic understanding is *therefore* essential to any moral response to that person's situation, including responses prompted by legalism.[19] When we care about the "differences" of others in this second sense, we do so because we are moved to lessen their burden, not just understand it. Sensitivity to difference is part of the work of sympathizing with the pain of others to work towards lessening that pain.

Now there are several ways to characterize the difference between these two positions, some of which can be readily assimilated into distinctions within mainstream legal theory. For example, we might describe the difference between them in this way: the cognitive position outlines a role for empathy which is necessary to "formal justice," while the moral position outlines a role for care which facilitates "substantive justice." To switch contexts for a moment, the cognitive claim can be fairly characterized as an adequate account of the consciousness required for the first wave of the civil rights movement: the fight for equal treatment and equal opportunity. The moral position, on the other hand, might be the necessary consciousness for more redistributive intervention into the racist presumptions and workings of this culture's institutions, such as affirmative action.

The difference between the cognitive and moral understandings of the role of empathy in decision-making which I want to stress, however, is that the cognitive interpretation accommodates and to some degree reinforces the mainstream insistence that legal decision-making, to be just, must be grounded in reason, principle, and generality, while the moral

18. Henderson, *Legality and Empathy, supra* note 2; Minow, *supra* note 11.
19. Henderson, *Legality and Empathy, supra* note 2.

interpretation quite overtly rebels against that insistence.[20] Read minimally, the cognitive position only demands that the legal decision-makers do what the mainstream scholar has always said they should do, but that they do it *better*: that they be equipped with more knowledge, empathically acquired, of the subjects of their analysis. The moral position does much more: it reclaims love as the root of morality. This is a much harder position to maintain, and it meets with infinitely greater resistance from mainstream legal scholars than the first. It constitutes a far greater threat to the dominant paradigm of reason, rationality and principle as the heart of justice. That we put forward the moral claim so much more tentatively than we put forward the cognitive claim when we discuss the relevance of the ethic of care to legal decision-making may reflect the force of the mainstream repression of feeling and the extent to which we have internalized it, rather than our "unbiased" assessment of the moral position's merit.

The second way that feminist legal scholarship evidences the external condemnation of the feelings that motivate it is formal rather than substantive. Feminist legal scholarship that focuses on particular gendered injuries is increasingly marked by a distinctive style: feminist legal writers who have written about particular injuries increasingly include some version of the narrative of their own victimization.[21] We do this, I think, because of our conviction that these narratives are *essential* to the substantive analysis we are trying to convey. Yet at the same time, the style in which we present these narratives records our hesitancy over even their *relevance*, much less their centrality. In a great deal of this scholarship, our narratives, and the first person voice that tells them, are *set apart* in some way from the rest of the article's "text". The narrative appears in a footnote,[22] or in a "preface" to the legal analysis that follows in the "real text,"[23] or, as in my own work, in the text, but literally bracketed—inside brackets.[24] This bracketed retelling of the first person narratives of victimization reflects two very real, and very contradictory imperatives. On the one hand, we know that our own experience of these practices and our retelling of these experiences in narrative is absolutely essential to our own as well as others' understanding of the acts themselves as *harmful*. On the other hand, we know that this narrative voice is impermissible in legal analysis. The bracketing of these narratives thus has a dual significance: it evidences the extent to which we have partially internalized as well as rebelled against the mainstream insistence that our own under-

20. *Id.*; Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

21. Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985); West, *Women's Hedonic Lives*, *supra* note 7.

22. Henderson, *The Wrongs of Victim's Rights*, *supra* note 21.

23. Estrich, *supra* note 21.

24. West, *Women's Hedonic Lives*, *supra* note 7.

standing of ourselves as victims of the practices we wish to eradicate disables us from objective legal analysis.

Bracketed narratives in recent feminist legal scholarship about gendered injuries reflect the necessity of simultaneously complying with both of these conflicting imperatives. We do include our stories, and we do write in the narrative voice, but that voice is muffled and the stories are truncated. The presence of a story of victimization or of the first person singular in a law review article is always a victory of some dimension against the dominance of a false and partial "objectivity" in legal discourse. But the practice of bracketing, footnoting, and prefacing these stories also partially reinforces—even while the *content* of what is bracketed, footnoted and prefatory, challenges—the complacent and usually false belief that the objective legal analysis contained in the "real text" of the piece can be understood on its own: that legal analysis can be read apart from—indeed "abstracted from"—the intensely subjective and intersubjective narrative from which it came.

There are at least two reasons that this truncating of the narrative voice of victimization in our feminist legal writing both hurts us, and hurts our writing. To put the point affirmatively, there are two reasons why we should expand the narrative voice and integrate it into the text of our legal analysis. First, liberating the narrative voice and merging our stories of victimization into the text of our legal analysis might improve our ability to communicate to the non-feminist legal audience. We need to tell our own stories in order to communicate the quality, the intensity, the seriousness, and the magnitude—as opposed to simply the fact—of the invisible injuries from which relatively silenced women daily suffer. It is simply not true that the analytic voice abstracted from a narrative account can communicate the seriousness or scope of harms which are "invisible" to the mainstream culture, such as incest, marital rape, sexual harassment, street hassling, or unwanted pregnancy. The second reason that we should push ourselves and our editors to liberate our narrative voice is that when we bracket, footnote, preface, truncate or omit altogether the stories of our own victimization by the practices we analyze, we participate in the repression of our own deserved rage. When we do so, we not only alienate ourselves as well as our readers from the affective root of our work, but we also deprive ourselves of a potent communicative tool: by communicating the rage which a societal practice has occasioned in us, we show in a very simple and direct way the profundity and intensity of the injury. Of course we need to document the severity, intensity and magnitude of these injuries in other ways as well. But by neglecting the *full* narrative of our own injuries—complete with expressions of the rage to which those injuries give or gave rise—we neglect a time-tested and honorable way of communicating the intensity of subjective pain, and of inspiring the moral

and legal imperatives of sympathy and care which that pain ought trigger in the "other".

Of course, it is not surprising that feminist legal scholars repress and to some degree distrust the feelings that motivate our work. Obviously, the feelings that motivate feminist legal scholarship have never been regarded as a legitimate source of conceptions of morality or justice. And of course, that grossly understates the problem: women's emotional lives are vilified, ridiculed, trivialized, hated and feared in all spheres of life, not just the narrowly legal. But what follows is that in legal theory as elsewhere, feminists must guard against the ever-present temptation to participate in and internalize this condemnation of our distinctive inner selves. For this repression of the legitimacy and intensity of our feelings does us tremendous psychic harm, which is only magnified by our unwitting collaboration. We need to refuse to honor the claims about the limits of an ethic of care that are themselves entrenched in misogynist hatred and fear: the claim that an ethic of care is sentimental, tribalist, or—perversely—both; the claim that love, care, sensitivity and concern for others threatens the individualistic respect which the law holds dear, that the heart cannot guard against its own excesses, or that it cannot discriminate or respond to necessity. We have no reason to acquiesce in these condemnations. We have not yet even *articulated*—much less put into practice—a vision of judging, representation, and adjudication based on an ethic of care rather than detachment, or a theory of law grounded in love rather than in egotism tempered by reason. We have not even articulated, much less tested in practice, our hearts' strengths. Until we do, we should be wary of the censorial voice inside as well as around us that tells us that our hearts are too dangerously sentimental to even try.

Similarly, we should trust our rage a little more, and our internalized repression of that rage a whole lot less. We should refuse to honor mainstream demands of objectivity and detachment that disable us from feminist methods of narrative expression that we know *have worked* for women in the past, and that we know to have worked in large part *because* they move us to an enraged response to our injuries instead of a belittling self-contempt. As we know from our daily work lives, the suppression of feminist rage means that we respond coolly in conversation only to shake with rage in our private offices, that we argue at work and cry at home, and that we differentially suffer countless sleepless nights because of interactions that are virtually unnoticed and invisible to others. As we know, this "differential sleeplessness" over office politics belittles as well as ages us. When we acquiesce in the suppression of our rage in our writing, we also injure and belittle ourselves, although the fuse is longer and the effect more difficult to discern. But we lose something else as well when we acquiesce in the suppression of rage. To date, we have neither fully articulated nor adequately defended our feminist conception of legal

justice. That may be because we deny its emotional root. To date, we have not tasted the fruits of our forbidden, suppressed, and often forgotten rage over the gendered injuries we have sustained, or the implications of that rage for "a theory of justice." Until we do, we should be wary of the many voices, both inside and around us, that insist that this rage must be cooled or extinguished, if feminists are to participate as theorists or lawyers in our societal quest for justice.