

**Law Department**

**Droit et Amour en Europe:  
relations complexes**

**Love and Law in Europe:  
Complex Interrelations**

Y. KRAVARITOU, P. FITZPATRICK, E. PULCINI, J. L. SCHROEDER,  
N. LACEY, T. PITCH, M. VIRGILIO and L. FERRAJOLI

**LAW No. 2000/2**

**EUI WORKING PAPERS**

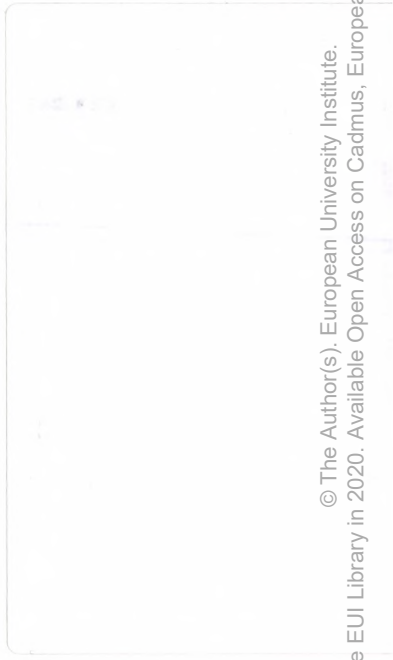


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**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**

**DEPARTMENT OF LAW**

**WP Fa9  
EUR**



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Printed in Italy in April 2000  
European University Institute  
Badia Fiesolana  
I – 50016 San Domenico (FI)  
Italy

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Le Droit est moins éloigné d'Amour qu'on le croit: les règles juridiques forge des liens affectifs, créent des liens émotionnels (subjectivité, intersubjectivité) dans le cadre de l'Etat nation, et ce à plusieurs niveaux. Au niveau étatique, le Droit renforce le lien social, génère foi et loyauté pour ses institutions qui servent aussi à ses citoyens : on y trouve l'amour pour la patrie, il peut conduire jusqu'à la mort (service militaire, guerre). Les règles juridiques adoptées aux niveaux inférieurs respecteront les prescriptions (matrice) de cet amour pour le pays et suivront sa logique, la biopolitique y oblige, qui diversifie l'emploi du corps et du temps des hommes et des femmes dans le cadre et champ juridique des relations familiales, relations de travail et autres<sup>1</sup>. Pour que le Droit parvienne à réaliser ses fonctions, il doit envelopper et discipliner le corps, capturer l'âme de l'individu et le lier aux institutions: la famille (les rapports sexuels), le système de production et ainsi de suite.

L'amour est certes paramorphosé: purifié de l'Eros - de la passion - il est au service des autres, et des objectifs qui dépassent les "intéressé(e)s". Il recevra néanmoins quelques récompenses pour les services qu'il rend: on est toujours à l'intérieur de son Etat et de la solidarité nationale. Dans le cadre de la sphère privée et du droit de la famille, l'amour a été pendant longtemps identifié (révolu) à la femme: elle vit pour son mari, ses enfants, pour offrir son "travail d'amour". Celui-ci sera reconnu par l'Etat-Providence: elle va recevoir quelques droits sociaux, mais qui ne lui assurent pas une indépendance économique. Le droit du travail a également réservé aux femmes salariées une place subalterne, vu que leur priorité est la famille, ou le "travail d'amour".

Ce n'est plus tout à fait le cas après les réformes juridiques en faveur de l'égalité des dernières décennies. Elles ont coïncidé avec le développement de l'Union européenne. Or le droit communautaire s'insère dans le corps des règles juridiques nationales. De plus, il conçoit l'égalité dans les relations du travail plutôt comme l'assimilation des femmes au statut juridique de l'homme. Qu'en est-il alors de l'"amour": qui se charge des besoins d'amour dans toutes ses dimensions: besoins affectifs, communication, travail d'amour? Et sous quelles conditions (juridiques aussi) se développerait-il un lien affectif entre l'Union et

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1 v. Yota Kravaritou, *Du Droit et de l'Amour dans l'Union européenne*, EUI Working Paper Law, No 97/5.

sa population? Dans le cadre de la première Conférence organisée par la Professoressa Yota Kravaritou le 15 décembre 1997 à la Villa Schifanoia, on a posé ces questions liées au droit et à l'amour dans le but de défricher le terrain en vue de leur conceptualisation dans le cadre de l'Union européenne.

Le présent «Collective Working Paper» réunit la majorité des travaux – réélaborés – de cette Conférence.

## *L'amour inscrit amplement au droit*

Yota Kravaritou

En traitant de l'Amour et du Droit, l'intention est de dégager certaines relations qui peuvent exister entre ces deux notions et la façon suivant laquelle celles-ci peuvent s'exprimer au niveau de la citoyenneté européenne: ou comment sont elles liées d'une façon générale à la Démocratie.

À première vue, les deux termes Amour et Droit se présentent comme étrangers l'un à l'autre, et même inconciliables. On se sentirait presque gêné(e) de les traiter dans le cadre d'une recherche juridique: l'Amour relève du domaine de l'intimité, du personnel le plus strict et le Droit, ses règles juridiques objectives et neutres sont lointaines des émotions et de nos sentiments – que celui-ci nous laisse tranquilles à les vivre profondément et loin de lui, sans lui. L'impression est donc que l'Amour se trouve d'un côté de la rivière, le Droit de l'autre: cela peut être il en est ainsi inscrit dans notre inconscient collectif, des européens et européennes, étant donné que au temps de l'invention de l'amour romantique en occident, pendant le douzième siècle, l'amour ne coïncidait pas avec la légalité du mariage. 1, 2 Ainsi la croyance est répendue,<sup>3</sup> suivant laquelle l'Amour est en réalité hors loi, il fleurit en dehors de ses frontières, de ses limites et contraintes. On considère même que l'Amour, quand il y est, est plus fort que la Loi: il est

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1 Denis de Rougemont, *l'Amour en Occident*, Librairie Plon, Paris, 1972.

2 Peter Goodrich, *Law in the Courts of Love*, Routledge, 1996, R. Howard Bloch, *Medieval Misogyny and the Invention of Western Romantic Love*, The University of Chicago Press, 1991.

3 On pourrait faire une analogie avec la Grèce antique où le mariage avec une femme, pour fonder une famille et avoir des enfants est une chose, mais l'amour en est une autre: il se trouve hors mariage. La relation amoureuse se nouait d'habitude avec quelqu'un qui appartenait au même sexe et, parfois, avec une hétéra. Les hétéras sont d'ailleurs des femmes d'une certaine culture: elles connaissent la poésie, récitent, chantent, savent bien discuter. La raison en est dit Protogene dans l'Erotic de Plutarque, le "contact spirituel", l'échange et la communion intellectuelle qui n'existe pas dans le mariage. Cette possibilité n'existe pas parce que les femmes ne reçoivent pas l'éducation des hommes, --philosophie, lettres, arts, leurs sont interdits --, elles investissent leur temps et énergie à d'autres occupations domestiques, et ne participent pas au corps et activités pour la défense de la patrie. Le mariage est une institution nécessaire, affirme Protogene, mais le vrai amour se trouve ailleurs. V. *Toutes les oeuvres de Plutarque* édité par Robert Flacelière, Collection des Universités de France, Paris, 1980, et présentation de l'Erotic p. 61-73



au-dessus de la Loi. Parce que il l'ignore, le dépasse et en même temps triomphe sur elle. Le désir et la passion brûlent les conventions des règles juridiques, les anéantissent pour pouvoir s'exprimer et se réaliser. La littérature grande et petite, et la poésie, illustrent bien cette perception des choses.

Le Droit, a-t-on l'impression, qu'il ne s'occupe pas des émotions, il doit le fait seulement quand elles provoquent des situations dramatiques illégales. Dans ce cas elles sont de la compétence du droit pénal: le crime passionnel d'amour, par exemple. Il existe d'ailleurs depuis déjà un certain temps des écrits juridiques suivant lesquels il faut que l'amour soit laissé libre, absolument libre et en dehors de toute sorte de réglementation<sup>4</sup> : c'est la condition indispensable de son propre épanouissement.

Or par amour on entend dans ce cas l'*eros*, l'amour érotique, ou l'amour passion qui, bien qu'il soit tant désiré, ne paraît pas être le lot de tous les humains et qui d'ailleurs ne semble représenter qu'un moment – ou un aspect – des relations sentimentales et sexuelles qui unissent deux êtres humains, habituellement de sexe opposé. Il est vrai que ce qu'on appelle amour-passion est, d'une certaine façon, laissé en dehors de la normalisation de relations amoureuses, telles qu'elles sont régies par les lois en Europe, les lois de l'Etat-Nation. Mais les relations sentimentales et sexuelles sont bien régies par le Droit qui conçoit et gère l'amour notamment dans les relations familiales et les relations du travail de sa propre façon et en tout cas en tant qu'«édenté»: sans tenir compte du désir et des émotions, comme cela n'était pas son affaire.

Malgré cette apparente opposition entre Droit et Amour, -- ou la non conscience de leur relation étroite -- on aperçoit pendant les dernières décennies un grand nombre de publications juridiques qui font référence, dans leur titre même, à l'amour. Paraît-il qu'une nouvelle et moderne problématique commence à se développer, liée sans doute de façon directe ou indirecte à ce qu'on appelle théorie juridique féministe, ou au mouvement de *Critical Legal Studies*, qui ont voulu mettre au centre de leur recherche les émotions, le désir, les sentiments, les rapports sociaux de sexe, la question de la sexualité. Ainsi on a pu constater que le terme "amour", dans un sens assez large et assez imprécis, se trouve dans une série de publications qui sont liées, par exemple, au droit de la famille, surtout, au droit du travail, aussi au droit de guerre récemment, pour ne pas citer celles qui traitent du droit et de la psychanalyse – qui se multiplient -- ou de la philosophie du droit. Le mot d'ailleurs «amour» - love, amore - dans son acceptation large et imprécise, est plus utilisé dans les publications juridiques de

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<sup>4</sup> Francis Rousin, *Le contrat sentimental*, débat sur le mariage, l'amour, le divorce, de l'Ancien Régime à la Restauration, Aubier, 1990. *Le contrat sentimental*.

C.L. James, *The Law of Marriage; an exposition of its welessness and injustice*, Saint Louis, Times printing house, 1871, R.D. Chapman, *Freelove a law of nature. A essay for the liberation of the sexes. An essay wherein are set forth the demerits of prostitution, polygamy and monogamy*, New York, 1881.



langue anglaise et beaucoup moins dans celles du continent européen. En effet dans les pays du continent, la langue juridique semble être plus précise et neutre en même temps, même quand elles traitent de la même question, telle par exemple du harcèlement sexuel ou de la violence au sein de la famille. Le langage juridique européen continental paraît plus pudique et réservé pour utiliser et souligner le mot “amour” dans les cas précités ou celui de la famille alternatives et similaires. C’est le contraire dans la littérature juridique anglophone qui est certes plus rhétorique, colorée et imaginative et, en même temps, moins précise. On peut se demander par ailleurs si l’une des raisons de la fréquence de l’emploi du mot amour dans les textes juridiques n’est, entre autres, la façon même qu’on entend l’amour de deux côtés telle qu’elle est inscrite dans son inconscient collectif, et pas seulement la diversité du style de langage juridique dans les deux grandes familles juridiques du Common Law et du Civil Law. Diversité du langage juridique qui est lié à l’évolution et au rôle historique différent des codifications ou de la jurisprudence.

On parle de toute façon d’amour dans le cadre de la famille: du mariage et des relations familiales. Or le mariage est le lieu par excellence de droits et obligations entre époux où l’éros n’y est pas, dans le sens qu’il n’est pas pris en considération: le désir réciproque n’est point une condition – ce qui pourtant était réclamé par Olympe de Gouges dans sa *Déclaration universelle pour les droits des femmes et des citoyennes*, à savoir que l’amour érotique soit l’unique condition et cause du mariage: sa durée devrait être absolument liée à son existence. Si l’amour sied à la femme, Fichte a bien décrit que celui-ci n’a rien à faire avec son désir sexuel puisque, affirme-t-il, elle ne l’a pas à cause de la constitution même de son propre corps, qui est très différent de celui de l’homme lequel est fait pour jouir.<sup>6</sup> La place de la femme dans le mariage est bien décrite – et déjà analysée – par le père du Contrat Social dans son *Emile* et autres textes qui ont inspiré les rédacteurs – il est banal de rappeler qu’ils appartiennent tous au sexe masculin – du code civil et en général du statut moderne du mariage. Le rôle des deux époux est différent: elle, la femme, reste

5 Denis de Rougemont fait une remarque suivant laquelle aux USA on vit l’amour dans le mariage et si une autre relation amoureuse apparaît, on divorce pour se remarier immédiatement.

6 Comme Fichte parle de l’inexistence du désir sexuel au sein du mariage, il est comme si il incluerait toutes les épouses dans la catégorie évoquée par des textes médiévaux de la «femina frigida» «que non libenter coit» (v. Michele Scoto, *De procreatione et Hominis phisionomia*, Venetiis 1477 cité par Gabriella Bonacchi, *Corpi di donna e scrittura dell'uomo: spunti storici*, Democrazia e Diritto, *La Legge e il Corpo*, 1, 1996 p. 17). Ce qu’il évoque comme amour ne peut être que l’amour - dévotion pour son mari et l’amour maternel pour ses enfants. Comme le mariage devient la règle – l’institution qui garantit aussi la respectabilité des personnes – l’autre catégorie des femmes, «la femina calida» «que coit libenter» va être rétréci et obtiendra un autre statut juridique, celui de la prostituée.

à l'intérieur – clouée – à ladite sphère privée, elle doit être dévouée à son mari, procréer et s'occuper du «vivant parlant». Il est intéressant de noter qu'il n'y a pas de "progress", mais plutôt le contraire. 7

La façon que notre droit moderne structure la féminité est plus restrictive et limitative qu'auparavant. Les rôles sexuels sont bien définis, clairs et bipolaires. La masculinité et la féminité sont bien tranchés, tous et toutes qui n'entendent pas dans l'un ou dans l'autre sont d'ailleurs des marginaux, des exclu(e)s. La nouvelle classe dominante, la bourgeoisie, exige outre le contrôle des passions sexuelles, leur oppression, aussi un comportement sexuel respectable – la respectabilité est une valeur qui traverse toute la société – qui se réalise explicitement dans le mariage. Celui-ci représente la seule relation sexuelle normale et respectable.<sup>8</sup> La législation de l'Etat-Nation construit de rôles dans cette relation d'amour bien précis, nets et complémentaires. C'est sous l'empreinte de la masculinité que tout s'orchestre, les femmes se trouvent à un échelon hiérarchique certes inférieur: elles en disposent moins de droits, pas de pouvoir institutionnalisé. Elles doivent offrir leur amour, leur travail d'amour – ou plutôt travail tout court<sup>9</sup>, mais il y a peu encore, invisible. Travail invisible et, en même temps, confondu avec leur capacités naturelles qui favoriseraient leur enfermement à domicile, leurs occupations domestiques, le manque de liberté de libre circulation dans les rues de la ville, les lieux publics, l'expérience de droits politiques, la participation à la vie publique et à la citoyenneté.

La masculinité dans le cadre de la famille se construit par opposition pas seulement à la féminité mais par rapport aussi à l'homosexualité et, dans ce sens, elle représente comparativement l'«amour sans peur».<sup>10</sup> L'image toutefois construite par la loi du bon père de la famille (breadwinner) se trouve souvent loin du lieu d'amour – à savoir des liens et vécus affectifs qui se nouent à l'intérieur de la famille entre notamment les parents et les enfants – mais au nom de l'amour, dans le cadre de responsabilités familiales différentes.

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7 L'espace public était en effet auparavant plus ouvert aux femmes – pendant la révolution française par exemple, les femmes avaient bien participé à la vie publique – il en était de même quant au marché du travail. Voir à cet effet quant au Royaume-Uni: Deborah Valenze *The First Industrial Woman*, New York, Oxford University Press, 1995, où elle démontre, à l'appui de textes, comment change complètement la représentation de l'ouvrière du 18ème au 19ème siècle: pendant le 18ème siècle, on faisait les louanges de ses capacités de travail (lauded for her industriousness) et, au siècle suivant, on avait pitié d'elle et la condamnait.

8 Georges Mosse, *Nationalism and Sexuality: Respectability and Abnormal Sexuality in Modern Europe*, New York, 1985

9 Katharine Silbaugh, Turning labor into love: housework and the law, *Northwestern University Law Review*, Fall 1996, p. 1-86; Ann Laquer Estin, Love and Obligation: family law and the romance of economics, *William and Mary Law Review*, March 1995, p.989 - 1087.

10 V. Collier Richard, *Masculinists, law and the family*, London, Routledge, 1995.



Dans le cadre de la famille, si l'amour quant à la femme se traduit notamment par son travail d'amour, qu'il soit travail domestique, reproduction, services sexuels, soutien psychologique, celle-ci est récompensée par le Droit qui, d'une certaine façon, le lui reconnaît. Par l'attribution notamment de certains droits sociaux dont les femmes ont joui avant même qu'elles aient obtenu les droits politiques. Ces droits s'inscrivent dans la politique sociale de l'Etat-Nation qui, assez tôt, a commencé à élaborer les stratégies de sa biopolitique.

De façon générale, le droit favorise le dévouement de la femme à la famille, peut-on dire encore plus: son "absorption", son identification avec la famille qui, selon lui, détermine sa propre identité – et aussi responsabilité. Ainsi plusieurs législations nationales prévoyaient par leurs dispositions de droit international privé – souvent incluses dans le Code Civil – que, du moment que la femme se marie à un étranger, elle perd automatiquement sa propre nationalité – les attachements juridiques qui lui confèrent la citoyenneté de son propre pays – pour obtenir celle de son mari. Elle devrait ainsi devenir étrangère, quant à certains traits fondamentaux de son identité juridique, étrangère donc à elle-même au nom de l'amour (considéré allant de soi et naturel) pour la famille du Code Civil.

En même temps, ces règles juridiques exigent que l'étrangère qui se marie à un de ces nationaux devienne aussi "nationale", citoyenne du pays de son mari. Elle est "absorbée" par l'état-nation de son mari: c'est par l'homme qu'une famille obtient sa nationalité, c'est-à-dire sa patrie. Dans ce contexte la femme, aussi indispensable qu'elle soit à la reproduction de la Nation, est d'une certaine façon apatride: son lien amoureux – conjugal devient plus fort que celui qui la lie avec sa propre patrie, sa langue, c'est-à-dire le lien avec sa propre identité nationale. L'objectif de ces règles juridiques ne vise certes pas à la rendre apatride ou cosmopolite mais, par contre, de l'incorporer aux forces de la Nation de son mari. Une logique juridique contraire à ce que le mari ou les enfants du couple obtiennent la nationalité de l'épouse n'existe pas: la hiérarchie imposée par le Droit aux deux sexes et la façon que celui-ci "pense" et lie famille et Nation ne pourrait pas le permettre. Ce qui a fait Virginia Woolf écrire, en réfléchissant sur la relation entre la Femme et son pays dans *Les trois guinéés*: "Notre" pays encore n'est plus le mien si je me marie à un étranger... "Pour cela", l'excluse dira, "en réalité en tant que femme je n'ai pas de patrie."

Si la Loi prescrit le destin des corps, veut saisir l'âme et la lier à l'institution de la famille, elle ne peut pas – encore – garantir l'harmonie au sein de la famille ou les conditions effectives d'"amour". En effet, un grand nombre de publications qui font référence à l'amour démontrent que la façon dont le droit construit la famille fait d'elle un site de conflits, de haine et de violences. Ces études dénoncent les liens de dépendance économique – les règles juridiques – qu'ils font subir aux membres de la famille. Elles dénoncent aussi ses présupposés avant tout "naturalistes", liés au sexe biologique, à la "nature" des

femmes. Il est vrai, l'économie du mariage est au service, entre autres, des objectifs généraux de l'Etat-Nation, d'une certaine gestion productive et discipline des corps; l'horizon – et le hasard – des émotions, du désir de l'affectivité, ne coïncident pas toujours avec le périgramme de cette construction juridique.

C'est surtout aux Etats-Unis, et en général dans les pays anglophones, où on constate cette explosion de littérature juridique concernant la violence au sein de la famille.<sup>11, 12</sup> Les services sexuels ne coïncident pas à l'amour, si il n'y a pas le consentement pour l'acte d'amour dans le cadre du mariage, cela frôle le viol, il peut constituer un viol. Le droit de la recherche juridique entre dans la sphère d'intimité, là où auparavant son accès était interdit: le domaine du personnel relève du politique et aussi du juridique.

Les violences physiques et psychologiques subies dans le cadre de la vie de couple n'ont que trop peu à faire avec l'amour – la tendresse, la tolérance ou la solidarité, tout ce que ce mot peut signifier.

Si la majorité de ces études sur "amour" -violence paraissent notamment aux Etats-Unis, on pourrait émettre l'hypothèse que cela est en partie – mais seulement en partie – lié à la culture qui prévaut quant aux relations entre les deux sexes. Cette relation paraît être plus conflictuelle et oppositionnelle aux Etats-Unis qu'en France, par exemple, où paraît-il existe un certain degré de complicité entre les deux sexes qu'on ne trouve pas outre atlantique.<sup>13</sup> Il y a aussi un certain esprit puritain quant au mariage qui prévaut aux Etats-Unis, introuvable en Europe continentale tout au moins<sup>14</sup> : même s'il y a une sorte de tendance à l'évolution "globalisante" quant aux questions d'amour tout au moins

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11 Reva B. Siegel, *The Rule of Love: wife beating, prerogative and privacy*, The Yale Law Journal, June 1996, p. 2117- 207, A.M. Grosman, *The battered woman's syndrome*, New Jersey Lawyer, July-August 1991, p. 19 et suiv;

Twila Perry, *What's love got to do with it? : emotional distress, feminism, and tort law*, Feminism and law workshop series, Faculty of Law, Toronto, 1995, Ruth Busch, Neville Robertson "What's love got to do with it? " An analysis of an intervention approach to domestic violences, *Waikato Law Review*, 1993, p. 109 - 140.

12 Il est caractéristique que des publications analogues en France n'utilisent pas le mot "amour" v. par exemple Michèle Dayras (sous la direction), *Femmes et violences contre les femmes dans le monde*, Paris, L'Harmantant, 1995, et en plus certaines études historiques aussi de la violence féminine, v. Cecile Daufin et Arlette Farge (sous la direction) *De la violence et des Femmes*, Paris, Albin Michel, 1997.

13 Françoise Collin -- *La loi, les moeurs, l'agir ou le triangle du divers*, Conférence organisée à l'IUE sur Feminist approaches to Law and Cultural diversity, 26-27 Novembre 1993.

14 Les obsèques du Président F. Mitterand avec la présence officielle de sa femme à côté de sa fille naturelle et de sa mère donne déjà l'image de l'acceptation des relations authentiques plus compliquées que celles prévues par le "puritanisme" des règles juridiques du droit de la famille quant à la famille et à l'amour.



entre l'Europe et les Etats-Unis<sup>15</sup>, la conception d'amour et de la façon dont il est vécu au sein du mariage ne paraît pas être exactement la même ici et de l'autre côté de l'Atlantique.

Quant aux différences concernant la fréquence et l'intensité de violences inscrites au sein de la famille qui ont un caractère contextuel et aussi "conjoncturel" prononcé -- elles sont nombreuses dans les milieux économiquement défavorisés et dans les familles touchées par exemple par le licenciement ou le chômage ou une autre cause d'insécurité -- on pourrait émettre l'hypothèse qu'elles dépendent aussi de l'amour "institutionnalisé" de l'Etat. Ce souci affectif de l'Etat a été exprimé de façon très différente aux Etats membres de l'Union européenne -- où l'Etat providence a fait sa première apparition par ses "Lois sur les pauvres" pour créer, par la suite, lui-même, à travers le système de la sécurité sociale, l'immunité contre les risques, sans ignorer point les besoins des membres dépendant de la famille en cas de risque -- et aux Etats-Unis. Il semble que la couverture des risques par ce système de sécurité sociale et d'assurance sociale pour le chef de famille et ses membres était plus étendu et dense en Europe et, en même temps, enveloppé dans l'enceinte de la solidarité nationale. L'insécurité, ou le sentiment de soutien ou d'abandon par son Etat, s'inscrivait dans un contexte très différent que celui du Nouveau Monde où l'individu paraît être plus fort, moins lié à sa Nation, et en même temps plus solitaire.

Violence, haines, contraintes, malheurs au sein de la famille, sont démontrés à plein jour, dénoncés et attribués en grande partie à sa construction juridique actuelle. Un grand nombre de conflits et impasses sont dûs au fait qu'elle est construite sur -- et maintient -- des liens de dépendance qui peuvent aller à l'encontre de l'authenticité des sentiments (d'amour) -- qu'elle les opprime et crée des situations conflictuelles. Ses présupposés ne correspondent pas aux réalités des relations d'amour, celles-ci étant un concept et une réalité qui évoluent.

La nécessité de changer radicalement les règles juridiques d'amour et de souligner et revendiquer avec force les propositions pour un nouveau concept de la famille apparaît, notamment aux Etats-Unis, dans la presse et dans les mouvements homosexuels (lesbiennes, gays), où leur présence est très dynamique. Ils fondent la famille alternative sur l'existence justement de l'amour vécu et authentique qui crée des relations et émotions que le Droit ne devrait pas méconnaître.<sup>16</sup> Ces nouvelles situations "familiales" créent d'ailleurs des problèmes juridiques inconnus auparavant, non pas parce qu'elles

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<sup>15</sup> Hanne Petersen, intervention au séminaire de Luisa Passerini. *The Role of Love in Western Tradition*, IUE, 25-26 Oct. 1995.

<sup>16</sup> Cynthia M. Reed, when Love, Comity, and Justice conquer borders : INS recognition of same-sex marriage, *Columbia Human Rights Law Review*, Autumn 1996, p. 97-134.

n'existaient pas, mais parce qu'elles étaient interdites, cachées, couvertes et condamnées.

Des changements forts s'inscrivent quant au concept d'amour qui est lié à la sexualité, lesquels certes évoluent et diffèrent d'une époque à l'autre, et même d'un pays à l'autre, et aussi quant à celui de la famille: le Droit de la famille est invité à donner de nouvelles réponses<sup>17</sup>, reconnaître de nouvelles réalités «amoureuses». On peut se demander pour autant si la reconnaissance par analogie de droits et devoirs de la famille "classique" à savoir hétérosexuelle à la famille alternative - homosexuelle - peut garantir l'authenticité des sentiments et des émotions, s'il serait effectivement un pas en avant: la répétition d'un schéma qui reproduit les contraintes familiales à savoir les dépendances hiérarchisées ne semble pas être libérateur et garant des sentiments amoureux. Si on utilise le terme "amour" aussi pour évoquer les services sexuels payants, la prostitution<sup>18</sup> et la pornographie<sup>19</sup>, qui couvrent "demandes" à être satisfaites dans une logique de marché – et de consommation – lesquels n'ont rien de "spirituel", on trouve de l'autre côté une pléthore de publications qui traite de l'amour dans l'esprit traditionnel de la religion<sup>20</sup> et de l'éthique notamment chrétienne (catholique et protestante notamment).

Dans leur majorité écrasante quand ces études s'occupent de relations d'amour sentimentales et charnelles, elles sous-estiment le corps: la dignité se rétablit par d'autres voies, les dépendances et souffrances matérielles, corporelles, sont esquivées, corps et "âme" sont perçues de façon dichotomique. L'amour a ici une connotation religieuse et en même temps dépassée quant aux réponses juridiques à donner à l'homme moderne.

Il en est autrement quant à l'approche "amour et psychanalyse", malgré l'élément immatériel et psychique qui est présent – mais "traité" de façon

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17 Nicol P. Juratovac, *The right to marry is a right to love: a commentary on homosexuality and marriage in America*, San Francisco Law Review, 1995, p. 145-154, David A.J. Richards, *Constitutional privacy and homosexual love*, New York University Review of Law and Social Change, 1986, p. 895-905, et aussi les autres articles: *Lesbians and Gays men tax the offensive: a symposium*.

Ferdinand Mount, *The subversive Family; an alternative history of love and marriage*, The Modern Law Review, 1983, p. 293-316.

18 *V. Love v. Superior Court* (276 Cal. R ptr. 66): *Mandatory AIDS testing and prostitution*, Golden, Gate University Law Review, Printemps 1992, p. 795-819.

19 Jeffrey Sherman, *Love speech: the Social utility of pornography*, Stanford Law Review, 1995, p. 661-705, Jeffrey Husisian, *Feminists and pronography: the other viewpoint*, Cornell Journal of Law and Public Policy, Automne 1996, p. 164-9.

20 Michael Perry, *Love and Power; the role of religion and morality in American Politics*. Harlan R. Beckley, *Love, human dignity, and justice: some legacies from Protestant and Catholic ethics*, v 66 The Notre Dame Law Review, 1991, p. 1053-73. Anthony Cook, *The death of God in American pragmatism and realism: resurrecting the value of love in contemporary jurisprudence*, v 82 The Georgetown Law Journal, Avril 1994, p. 1431-517.



différente par rapport aux approches religieuses. De façon très sommaire quant au droit et à la psychanalyse:

Les quelques études sur les relations entre amour et droit dans le cadre des relations homme-femme nous viennent notamment des Etats-Unis et généralement des pays anglophones.<sup>21</sup> Il n'y a pas, d'après notre connaissance, de juristes féministes du Continent qui se soient occupées de la question, bien qu'il y ait des non-juristes (Luce Irigaray, par exemple) qui l'aient fait. Certes, sur la question de l'amour notamment entre l'Etat et ses citoyens, il y a l'énorme travail de Pierre Legendre, qui n'a pas pour autant approfondi la question du corps féminin dans sa "fonction" unique de reproduction, de ce corps exclu de l'écriture de textes juridiques et de l'exercice du pouvoir par cette voie de textes. Certes, il n'y a pas là un regard féministe, or l'écriture juridique féministe qui s'aventure dans la psychanalyse de l'amour a ses références de base aux travaux et auteurs européens tels, par exemple, Lacan ou Derrida. Prise peut-être, à l'intérieur d'un système juridique ayant ses propres caractéristiques qui le distinguent bien d'autres systèmes, la question de l'amour, des relations affectives, sentimentales et sexuelles est -- dans une certaine mesure -- comprise de façon différente. Elle pose des problèmes juridiques différents, par exemple aux Etats-Unis, en Inde ou dans l'Union européenne.

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<sup>21</sup> On pense notamment aux travaux de Drucilla Cornell, Martha Nussbaum, Renata Saleci, Jeanne Schroeder, par exemple.

Martha Nussbaum- Jonathan Glover Women, *Culture and Development, a Study of Human Capabilities*, Clarendon Press Oxford 1995, p. 360-403.

Drucilla Cornell, *Rethinking the Beyond of the Real*, *Cardoso Law Review*, 1995, p. 729 et suiv., même *The doubly-prized World: myster, allegory and feminism*.

Renata Saleci, *Rights in psychoanalytic and feminist perspective*, *Cardoso Law Review*, loc. cit. P. 1121 et suiv.

Mais, de façon générale, dans quelle mesure le Droit possède les mots pour se dire et refléter la richesse des relations affectives de nos jours dans les exigences inédites en “autonomie”, “démocratie” et “amour”, notamment dans l’espace et la civilisation juridique de l’Union européenne?



# *Law and Libido in the European Union*

Peter Fitzpatrick

## Introduction

The libidinal energy manifested by the European Union ('EU') combines narcissistic self-love with hatred for others opposed or negated in the constituting of its identity. One such other is the nation - the atavistic nation of blood and soil which the EU constitutively rejects and encompasses. But in so doing, the EU also extends in a responsive, loving identification with the very form and dynamic of this same rejected nation. The EU itself becomes, that is, a nation writ somewhat large. The resulting fracture in that libidinally charged identity of the EU inhabits its law as well. But this law is an active principle mediating between the determining rejection and the responsive identification constituting the EU. Law then is critical for the quality of the love which impels the EU.

The EU in its self-presentation and in the usual perception of it transcends nation. Obviously, it does involve giving significant sovereign power to an international body. But the argument here will be that the EU achieves this seeming transcendence, not by becoming different to its member nations but, rather, by containing them in a replication of the dimensions of nation. It is true that the EU does elevate a law made in large part 'directly applicable' without the mediation of the member state. And this law is further elevated to an ultimate ascendancy through the expansionist jurisprudence of the European Court of Justice. That jurisprudence and the Treaties of Maastricht and Amsterdam would transform nationals of the member states into citizens of the EU - into the subjects of its own distinct and complete law. However, in all this the EU takes on and vigorously promotes the attributes of the nation. What is especially ironic here is that the EU and its law are formed and exalted as epitomes of the universal and progressive in opposition to the particular and reactionary realms of the nation. In such opposition what is emphasized, of course, is the 'badness' of nation - the savage nation of warlike and divisive assertion. Yet nation, as we shall see, also partakes of the universal and progressive. Nation is an indistinguishable sharing of these contrary dimensions. What this indicates is not so much a deadly opposition between the constricted nationalism of the member-states and the expansive internationalism of the EU but, rather, a compatibility between these things. We could say that such an outcome is not so much a matter of the EU outflanking the nation, as one of nation outflanking the EU - or outflanking the standard, supranational version of the EU. Such a conclusion is not, however, without its

challenging consequences for the viability of the national idea, as we shall also see.

The similarity between nation and the EU may suggest that here we have some stable essence of nation which manifests itself in these varying locations. Whilst similarity is there, it does not import stability. Nation exists in-between the universal and the particular. And this 'space' in-between can never be settled or resolved. What would putatively secure the identity of nation in that space is a mythology of becoming within the national or (Western) European project, a mythology tied to the exclusion of others from that project. This exclusion has to be somewhat paradoxical. It cannot be fully effective or complete since the excluded - whether in the figure of the immigrant, the refugee, the brooding terrorist, the resurgent ethnic, and so on - must remain proximate and constantly challenging for the identity based on it to be sustained. Because of the necessity of this challenge for identity to subsist, the resolution derived from exclusion is never achieved. Resolution remains tied to irresolution, the stability of identity to its instability. Furthermore, the effectiveness of a mythic resolution can be neither invariant nor eternal. Given the limit of mythic efficacy and the ambivalence of exclusion, there is a persistence of irresolution. Law, then, becomes that which is 'in place of' irresolution and operatively compensates for it.

Those lines of argument cover most of this paper but first I will set this scene of European identity, myth and law in the limit which confronted an archaic mythology, a limit which can be aptly traced in the libinal genealogy of Europa.

### **The Origin Myth**

There is a fondness for starting accounts of Europe with the story of Europa and her abduction by Zeus.<sup>1</sup> In this myth of origin, Europa is usually described as a Greek goddess and thereby endowed with European credentials and a useful transcendence. She was, however, more interestingly mixed, being neither simply Greek nor, apart from some local reputation, a goddess.

So, let us borrow a more precise beginning from Calasso's *The Marriage of Cadmus and Harmony*, an account whose immense popularity lends it a certain telling quality (Calasso 1994). He begins:

On a beach in Sidon a bull was aping a lover's coo. It was Zeus. He shuddered, the way he did when a gladfly got him. But this time it was a sweet shuddering. Eros was lifting a girl onto his back: Europa. Then the white beast dived into the sea, his majestic body rising just far enough above the water to keep the girl from getting wet. ... Trembling, Europa hung on to one of the bull's long horns.

(Calasso 1994 p. 5)

And so on in much the way one would readily expect.<sup>2</sup>



Thereafter, in a series of explorations around that scene, Calasso incessantly poses the question 'But how did it all begin?' and, respecting the elusiveness of origins, each answer is immediately rendered incomplete by a re-posing of the question - 'But how did it all begin?'. The second search for an answer is set earlier that same day:

Shortly before dawn, asleep in her room on the first floor of the royal palace, Europa had had a strange dream: she was caught between two women; one was Asia, the other was the land facing her, and she had no name. The two women were fighting over her, violently. Each wanted her for herself. Asia looked like a woman from Europa's own country, whereas the other was a total stranger. And in the end it was the stranger whose powerful hands dragged her off. It was the will of Zeus, she said: Europa was to be an Asian girl carried off by a stranger.

(Calasso 1994 pp. 4-5)

On waking, she walked down to the mouth of the river and the story is much the same as before. But the description of Europa as 'an Asian girl' is soon complicated. In his next posing of the question, 'But how did it all begin?', Calasso focusses immediately on 'a shining gold basket' in the hand of Europa as she walks in Asia towards its shore - and 'what Europa was carrying .... was her destiny' (Calasso 1994 p.5). The basket, we are told,

... was the family talisman. On the side, embossed in gold, was a stray heifer apparently swimming in an enamel sea. ... And there was a golden Zeus too, his hand just skimming the bronze-coloured animal. In the back-ground, a silver Nile. The heifer was Io, Europa's great-great-grandmother.

(Calasso 1994 p. 5)

This same Io was loved by Zeus. Hera out of jealousy had transformed her into a heifer forced to leave Greece and to roam the world until the intervention of the god - 'the light touch of Zeus's hand' - allowed her to settle in Egypt, Asia's African connection (cf. Hegel 1956 p. 91).

The exchanges, correspondences, inversions, transformations involved in Io's journey from a putative Europe and the return journey, as it were, of Europa being carried by Zeus to Europe, the exquisitely small linking of all these things in the golden basket, these are what the structural study of myth is made of, but Calasso resists the temptation and resorts finally to a nineteenth century mode of rendering myth, one which would see myth as an attenuated form of history. So, the last two instances of Calasso's posing the question 'But how did it all being?' reveal, in abrupt summary, the abduction by the Phoenicians of an Io equivalent and the counter-abduction by the Cretans of an Europa-equivalent. 'Out of these events',

concludes Calasso, 'history itself was born', since which 'the war between Europe and Asia has never ceased' (Calasso 1994 pp. 7-8).

Calasso is invoking here the idea of history as impelled by the abduction of women but what he may also have had in mind is something taken up in his interpretation of these stories:

At the time of Europa and Io, the veil of epiphany was still operating. The bellowing bull, the crazed cow, would once again appear as god and girl. But as generation followed generation, metamorphosis became more difficult, and the fatal nature of reality, its irreversibility, all the more evident.

(Calasso 1994 pp. 11-12)

Metamorphosis comes to a sad and shameful terminus in the monstrous Minotaur, the child of Europa's daughter-in-law, Pasiphaë. Thereafter, Calasso concludes:

Humans could no longer gain access to other forms and return from them. The veil of epiphany was rent and tattered now. If the power of metamorphosis was to be maintained, there was no alternative but to invent objects and generate monsters.

(Calasso 1994 p. 12)

Extravagant as it may seem, we can see the story of Europa in terms that Žižek once used to describe a certain Freudian myth, see it as something 'that should be presupposed (reconstructed retroactively) if one is to account for the existing social order' (Žižek 1991 p. 208). The myth becomes much like Europa's talismanic basket in its concentrated accounting for how 'we' came to be where and what we are. So, there is point, and more point than is usually allowed, to the invocation of Europa at the beginning of books on Europe since Europa mythically settles questions of Europe's border and of its libinal 'objectness' - questions of its identity. Well-rehearsed as questions about borders and identity may be in the academic literature, they retain yet an exigent complexity.

To start with the border. Borders divide. They separate distinctly. But if the border were completely effective in this separation, it could not be a border between the separated objects - using 'objects' as I think Calasso does. Objects completely separated would not bear any relation to each other at all. They may, at best, exist in parallel universes, but there would be no call for a border between them. For the border to exist there must be a relation, and thence some commonality, between the objects. Relation, in turn, imports a mutual extension and giving way of one object to another. But obviously the border cannot be purely relational either. In a pure relation, the objects would simply disappear in each other or in some combination different to either, and there could be no border between them. The border, then, exists in-between putative conditions that the existence of the object makes impossible - the condition of complete separation, of



pure narcissism, and the condition of complete, or purely responsive, relation. Europe becomes, then, no longer the standard and simple source of an integral European identity but the figure of inexorable irresolution within that identity.

Europa's claim to be of a distinct European origin is far from comprehensive. Her great-great-grandmother was the Grecian Io. And if she were comprehensively European, she could hardly provide the origin for a Europe that would have to exist already to make her European. She is somewhat more compendiously described as 'an Asian girl' but one who is, in terms of her dream, 'caught between two women'. One of these women is called Asia and she 'looked like a woman from Europa's own country'. The other woman 'had no name'. The name 'Europe' could not be acquired until there was an originating connection, a relation, with Asia. This is established in the myth through Europa's being carried off to what can then become Europe. But as we have seen, the object, Europe in this case, cannot simply 'be' in relation. It has to have an identity which precedes the relation and precedes its own origin in the relation. So, Europa has to be already in part European in a descent from Io.

To extract this impossibility of European identity from the myth is, of course, to strip it of its transcendent charge and to deny it the ability to mediate the contradictions of an all too solid world. Without the transports and transformation of Europa's story, there remains no 'alternative but to invent objects and generate monsters' (Calasso 1994 p. 12). Objects then took identity not through a positive transcendence but in a negative, bellicose rejection of what the object was not. In terms of one of Malraux's musings: 'There is no Europe. There never was one. ... What is understood today by European can only be defined negatively: Europe is what Asia is not.' (see Heldring 1987 p. 93). Such assertions import, as we have seen, an inexorable relation, a recognition of commonality and comparability. Asia is similar as well as different to Europe. A barbarian Asia is constitutively and chasmically different to a civilized Europe. Yet Europe is also the same as Asia and this in two mythic ways. For one, civilized Europe is the product of a universalist progression from a barbarism to which it may at any time revert. For another, barbarian Asia may also respond to the call of the universal and advance in the ranks of human civilization. In this 'logic' of identity, Asia provides both the point of constant difference to Europe yet is also able to become the same as Europe. This impossibly mixed entity is the modern equivalent of Calasso's monster. Out of 'monster's' wide range of meanings, what I am emphasizing here, of course, is the monster as an impossible combination of disparate elements, as with the poor Minotaur. Asia is one of the modern monsters which carries the dissonance, the irresolution of European identity itself.

Modern nation is a neo-mythic reflection of this monstrous combination. Nation is a distinct and specific place. It occupies a particularity of blood and soil which is always close to barbarism. Yet modern nation is also a carrier of the universal. This is not only a matter of nation's now 'universal' or global coverage.

It is also a matter of some nations and collections of nations exemplifying universal qualities - qualities of civilization and development, of rationality and an orientation towards the general. Being universal, these qualities should be found everywhere, and where they are merely incipient they can be fomented. So, Europe 'has always given itself the representation or figure of a spiritual heading, at once as project, task, or infinite - that is to say universal - idea' (Derrida 1992 p. 24). To assert the claim to the universal is to create a fraught relation with all that is thereby set outside of and opposed to the universal. This expansive universal identity must also be turned inwards and particularly located. Hence it also becomes 'the memory of itself that gathers and accumulates itself, capitalizes upon itself, in and for itself' (Derrida 1992 p. 24). Certain particular nations and collections of nations become exemplary of a virtuous universalism. The world of nations thence becomes classified and organized along a spectrum ranging from the most 'advanced' liberal democracies, to nations still afflicted by an evil and atavistic particularity. 'There is always,' says Balibar, 'a "good" and a "bad nationalism": this is 'the dilemma within the very concept of nationalism itself' (Balibar 1991 p. 47).

### **Europe and the European Union**

Europe shares with nation an intriguing inability to be rendered as anything palpable at all. Either it is a universalized project and thus incapable of assuming any limited or particular identity, or when given specific characteristics, these fail to match its universal dimension and turn out to be not exclusive to it in any case. There is, then, and has to be a persistent vacuity in efforts to say what Europe decidedly is. In a piece plangently, not to say plaintively, titled 'What is Europe? Where is Europe?', Seton-Watson found that:

The word 'Europe' has been used and misused, interpreted and misinterpreted, in as many different meanings as almost any word of any language. There have been and are many Europes.

(Seton-Watson 1985 p. 9)

He considers several contenders - the bounds of Charlemagne's Empire or the bounds of Christendom, for example - but is convinced by none. Europe's bounds have remained chronically uncertain, especially in their eastern definition. The usual effort at positive definition takes the form of the list. Duroselle's miscellany provides a not unusual example:

... we have been influenced by ancient Greece, by Judaism, and by Christianity, Megaliths, Roman roads and monuments, local autonomy, Romanesque art, the cathedrals, the universities, the explorers, the Industrial Revolution, human rights: these and many more elements are of the essence of Europe.

(Duroselle 1990 p. 413)



The lists can be more economical if hardly any less concerted. Faced with such dissipation of positive description, Malraux's resort to a negative coherence - 'there is no Europe. ... Europe is what Asia is not...' - seems inevitable (see Heldring 1987 p.93). Such an outcome is also consistent with Europe's universalist claims since the universal would no longer be universal if it were positively delimited.

The arrogation of what it is to be 'European' by the EU seems to relieve it of any necessity to identify itself. The main Treaty, although establishing a 'European Economic Community', betrays no interest in the nature of this Europe. And although the preamble to the Maastricht Treaty on European Union is replete with the by now standard invocation of 'liberty, democracy, and respect for human rights and fundamental freedoms and the rule of law', nowhere is the explicit nature of the union confronted. This list is added to variously in different settings. The 'Declaration on the European Identity', agreed to by the members of the Community in 1973, revealed that they were distinguished by 'the same attitude to life' and a commitment to the 'individual'. To take one more example, the putative preludes to membership of the EU which have now been extended to almost all countries of 'Central and Eastern Europe', whilst listing most of those qualities, put additional emphasis on the prerequisite abilities to protect minorities and to operate a market economy. All of these characteristics are hardly exclusive to the EU and its members. They can even be notoriously absent. Democracy, for instance, is hardly a convincing characteristic of the EU itself.

If the EU does not differ from nation in the failure of its effort at positive self-definition, it is no more distinguished in its resort to negative affirmation. This is an affirmation in opposition to what is 'non-European'. And that which is 'non-European' is, as Cris Shore says, 'being defined with increasing precision and thus, as if by default, an "official" definition of Europe is being constructed'; and as he also says, 'the new European order ... is coming to mean a sharper boundary between "European" and "non-European"' (Shore 1993 pp. 786, 793).

The story of how this boundary came to be put in place has already been told, and well told (e.g. Paliwala 1995). It is a story of the erection of a 'Fortress Europe' enclosing a distinct European identity. It unfolds in the joining of two momentous effects: the progressive elimination of internal or national boundaries within the EU and the increasingly draconic enunciation of an 'external' boundary around the EU, setting it against certain excluded 'others'. This scene has been consolidated in the Maastricht Treaty and its accompanying proliferation of shadowy but potent EU and peri-EU regimes identified obliquely by place or official numbering - Dublin, Shengen, Trevi, K.4, and so on - all 'harmonizing', refining and heightening the exclusion of challenge of the refugee and the would-be immigrant. The Maastricht Treaty itself predisposes 'asylum', 'immigration', and 'nationals of third countries' to distinctly negative connotations by dealing



with all these in conjunction with 'combating unauthorised immigration, residence and work ... terrorism, unlawful drug trafficking and other serious forms of international crime' (Article K.1).

These modes of exclusion do not simply operate at some supposed external border of the EU; the excluded are also within. Treaties of Maastricht and Amsterdam thrust a thin citizenship on nationals of the EU's member states, and even if this so far adds only a little to rights those nationals already had under the original Treaty, it is in conjunction with those rights a significant and full citizenship based on 'natural' affiliation and not entirely confined to its capacity to participate in a 'common market'. It serves to focus the rights of nationals into a distinct identity which is privileged above the identity of resident non-nationals. These are variously estimated to number between 10 and 15 million - the range presumably being related to the impossibility of calculating the number of 'illegal immigrants'. So, that sense of proximate threat conducive to the negative formation of an identity does not simply impinge on some frontier region but can also be intimately invoked as an ominous internal presence. This danger within then requires, of course, greater inter-governmental co-operation between member states of the EU in the cause of more controls, surveillance and gathering of information. Again, there is little that is original in these EU and peri-EU regimes. They adopt and give effect to the same obsessions as those of many member states - the victimization of the refugee being a prominent recent example (see Tuit 1996).

### **The European Union and the European Nation**

In sum, recent realizations of the 'European Union' would seem to incline it definitively towards classic attributes of nation. We can discern this in its assertion of set bounds and in the creation of a citizen-unit to which a central authority can relate, by-passing all 'intermediate' entities. But of course in its self-presentation, and for its apologists, the EU is more, much more:

The [EU] is typically portrayed as a logical development of the Enlightenment: a force for progress inspired by science, reason, rationality and humanism ... . These discourses also tend to portray the European Parliament and Commission as heroic agents of change, on the side of history, leading Europe forward in search of its supposed 'federal destiny'.

(Shore 1996 pp.102-3).

Even more extravagantly, but still not untypically, Delors would have it that 'the European identity is a sense of the universal, the world started out from *chez nous*' (in Grant 1994 p. 163).

This surpassing quality of the EU's identity, together with its specifically supranational character, would seem to be confirmed conclusively in the rejection

by the EU of a nationalism typified by its member-states. Bergeron has located the EU's quality of the universal in its 'negation of the national' (Bergeron 1998). This is the nation whose barely suppressed primordial urges constantly attend the precarious achievements of a civilization which is universally oriented. Those who persist in summoning this nationalism against the EU, 'those who awaken phantoms', were for Delors quite beyond the pale (see Grant 1994 p. 223). More positively, the information booklet issued by the Commission, 'A Citizen's Europe', sees the EU as 'an attempt to establish between States, the same rules and codes of behaviour that enabled primitive societies to become peaceful and civilized' - the member-states, in other words, are the new primitives (see Shore 1993 p. 793). To illustrate this fundamental attitude, we could take Schepel and Wesseling's close and cogent observation of 'the mindset' of lawyers involved with EU law, whether in legal practice or in the academy (Schepel and Wesseling 1996). In this mindset, there is a constellation of malign attributes associated with the nation-state and national sovereignty - such as war, decay, nationalism, politics - and these are arraigned against a benign EU intrinsically associated with contrary attributes such as integration, peace, cosmopolitanism, progress and law.<sup>4</sup>

If, however, we move beyond this convenient confinement of nation to a primordial specificity, the EU begins to appear more like than unlike the nation. Nationalism was also a child of Enlightenment. It makes claims, as we saw, to an expansive project and a universal dimension - claims which seem in their content and their history indistinguishable from those associated with the EU. But the same claims had, somewhat paradoxically, to be tied to nation as particular. The achievement of the universal would dissolve all particularity, and hence any situated existence at all. And so universal assertion 'needs its Other; if it could ever actualize itself in the real world as the truly universal, it would in fact destroy itself' (Chatterjee 1986 p. 17). The EU's formative rejection of the 'badness' of member nations as 'other' is a rejection of qualities which it exhibits in assuming a situated identity. To try and overcome this 'fracturing' of its identity, there is an extraversion of these rejected qualities. This is affirmed, as we have seen, through regimes marking and supposedly rejecting an other which is 'without'. Those who are without are physically beyond the bounds of the EU or they have only a provisional or illegitimate existence within its territory. In all these combined ways - the assertion of a particular and prerogative claim, the arrogation of the universal and of an expansive project, and the affirmation of elevated being in opposition to an other without - the EU takes on an identity that seems indistinguishable from that of nation. As with the formation of modern nation, the EU now seeks to create and convert citizens who will be allied to the EU and in this alliance all that is particular or local will be overcome. It would be tempting to see this in Marx's terms as tragedy the first time around and farce the second, if the elements of tragedy and farce were not so well-mixed for both. This is not an alliance forged from a pre-existence of proto-citizens. It is more a matter of, as



d'Azeglio put it in another setting, 'we have made Italy, now we have to make Italians' (see Hobsbawm 1992 p. 44). In seeking to form a compliant citizenry the means adopted have usually been as calculating and tawdry as those used by national elites with the creation of traditions, rituals, public symbols and ancestor figures (see Shore 1993; Shore and Black 1994).<sup>5</sup>

It may at first seem surprising to claim that this citizenry is one of a national kind. The commitment to a 'common market' should involve some affirmation of a universal, or another type of 'universal', which would counter the confinement of citizenship in the particularity of a national place. And the huge historical and practical force of the EU's intrinsic assertion of the market operates not just beyond but in opposition to nationally based claims of its member states. But this assertion of the market is not one made in the setting of a purely international treaty which is itself confined only in terms of the market. Assertion takes place in national terms and it occupies the same 'space' of irresolution in-between the universal and the particular which characterizes nation. Citizenship itself also matches this irresolution. It combines membership of the particular national community with what is expansively and universally 'civil'. Citizenship of the EU is, in short, a 'true' citizenship, conceived and operative in nationalistic terms. It is neither confined nor extended in terms of market functions - in terms of a 'market citizenship'.<sup>6</sup> It is also a 'true' citizenship in its potent discrimination against non-citizens.

This creation of a 'natural' affiliation does, however, signal some qualification of my analysis so far. That analysis sought to show that the EU both contains and is contained by nation, and furthermore that it is 'like' nation precisely in that ambivalence. Nation does, however, involve a singularity of attachment, cleaving to the particularity of a place and of a people. Europe has had its enduring collectivities of nations, the Great Powers and the comity of nations, or Voltaire's 'kind of great republic' that is Europe (see Gong 1984 p. 46). But these were manifestations of nation's universal orientation. They remained compatible with a singularity of attachment to each member state. Indeed, with the EU itself there is a persistent and plausible line of argument, which would not only affirm the exuberant survival of nations and their law, but would also see the EU as merely an extension of the member nations which retain their predominant force (see especially Milward 1992). Be that as it may, the EU is now a disturbing scene of conflicting nationalisms. The EU as a nation writ somewhat large and the member-nations occupy the same terrain, the same place, not only as a matter of formal legal and constitutional allocation but also in terms of the existential commitment of their citizens.<sup>7</sup> To an extent, this conflict is muted in the universal orientation of nation. One can be both distinctly French and a cosmopolitan European for example, usually without great discomfort. But the dissonances are there. Moreover, the specific challenge of the EU to the nations of the member-states consist not only in the explicit and trumpeted conflict between them.

Rather, the EU's challenge to its members in their particularity comes also from the similarity which it foments between them. The EU increasingly enters into the particularity of the member states in ways that would absorb them into equivalence. It calls on them to become the same as each other not only by demanding adherence to its uniform prescriptions but also by shaping the commonality, or potential for it, that supposedly exists within each of them.<sup>8</sup> The European Court stands, as ever, ready to hasten the process with its location of Community-wide fundamental rights extracted from national locations, or with its imposition of general requirements for the interpretation of national laws. The overall scene is, however, not one of a supranational or intrinsically anti-national EU set against its antithesis in the nation-state. Both the EU and its members conform to the characters of nation and it is the resulting duality of national sites that is antithetical to a nationalism which must be instanced in singularity.

To an extent, this conflict is mediated by the similar constitution of the EU and the European nation in exclusion and in their exclusion of a broadly similar 'other'. Perhaps we can see now a heightening, and exacerbation of exclusion by both the EU and its member nations so as to make these nationalisms more the same, more indistinguishable - to help them revert, as far as may be, to their primal singularity. But there does remain a disruptive duality of nationalisms in Europe, and here law comes to the fore in providing a locus of singularity.

### **The European Nation and European Law**

The concluding strand of the argument involves an apposition between the duality of European nationalism and the quality of law in the EU. In most modernities of a European kind, law has been well positioned to compensate for the ambivalence of nation - for the irresolution in-between its particular and universal orientations. This irresolution has been putatively resolved in a rule of law which combines particular determination and universal comprehension. Law, as the rule of law, bounds and sets limits, yet it also extends to all possibility. Law and nation have thence subsisted in a long, isomorphic relation. It is this positioning of law which enables its resolving quality to encompass the duality of nationalisms within the EU. I will now outline some obvious characteristics of EU law in a way which, hopefully, supports this contention.

Perhaps it may not be entirely obvious to say that EU law comprises a modern legal system in that many of the EU's more indulgent observers would see it otherwise. In the words of one of them, 'the institutional, juridical, and spatial complexes associated with the Community ... constitute nothing less than the emergence of the first truly postmodern international political form' (Ruggie 1993 pp. 140, 169; and cf. Ward 1996 p. 194). To the contrary, Bergeron sees the European Court of Justice engaging successfully in a modernist mission of state formation (Bergeron 1998). Although the European Court is often perceived as being excessively creative in this, the original Treaty was not set against the



Court's construction of a modern statist constitution for the EU. As Perry Anderson has indicated, it is hardly necessary to have the panoply of an executive authority, a legislature and a supreme court to run a customs union (Anderson 1996 p. 14). To this list of the unnecessary, we could add the presence of a singular, modernist legal system of the universally encompassing variety. EU law is not, in its pervasive scale and tentacular reach, confined to some residual role - confined to supplementing or working through other systems and holding them together solely for a specific purpose established in an international treaty. EU law is in large measure 'directly effective' and it increasingly operates in a direct relation to its distinct, individual legal subjects, now recognized as its own citizens. And, as is notorious, the European Court has been pre-eminently successful in fashioning a coherent constitution for the EU based on the judges having 'une certaine idée de l'Europe' as an encompassing totality.

All of which is not to deny that there are other legal systems involved within the EU - including, but certainly not limited to, those of the member states. As Schepel so richly reveals, legal pluralism does well in the EU (Schepel 1998). Nonetheless, EU law, especially in its elevation by the European Court, is oriented towards a universal consummation. It is to be secured against the dissipated and decadent arena of the particular and local, including, as we saw, the diversity of the member nations. The EU and its legality do not, of course, merely seek to suppress these things. And complete suppression would in any case deny the EU its dynamic of identity and coherence in opposition to them. The EU and its law treat with their proximate and constantly challenging others. They accommodate and incorporate dimensions of them. EU law does this, however, not in a supposedly postmodernist responsiveness to and regard for such things in their quivering specificity but in a monadic orientation of them in terms of its own determinative work, its own particular *telos*.

So, my assertion of the encompassing and universalist quality of EU law is, in a seeming paradox, tied to a necessary recognition of its limits. EU law is confined and incomplete in both its formal range and its actual efficacy, and this not least in its continuing dependence on nation for much of its effect. But this deficit is readily resolved in the mythology of Europeanism where such shortcomings are seen as both an obstacle and an expansive spur to a progress which is overcoming them. Much of the diversity or plurality of law within the EU can be subordinated in a unitary frame by viewing it as something which is being countered in this progress. Again, the parallels with the formation of modern European nations are hardly remote.

So, despite, and because of these transcendent and universalist dimensions, the law we have been considering is specifically located. It is the law of a member nation of the EU or the specific 'national' law of the EU. Since this division in the location of law is formally set within EU law itself, and since there is no sovereign authority overarching the division, the EU does seem to take on a postmodern

colour. Furthermore, and as Darian-Smith indicates so graphically, people within the EU seem to engage successfully with a plurality of legal systems, and they do so in ways which do not look to some ultimate and singular resolution (Darian-Smith 1995). But just when we seem to have a unitary and modern law on the retreat, it comes into its own. Law can be readily located now in different but overlaid national settings as the law of the EU or the law of a member nation. But in a significant sense, law in both these locations is also the same. This sameness subsists in national terms since nation and a national law are not just of a particular place. They are also, as we saw, universalist extraversions. Where this capacity for extraversion was given some operative recognition, such as in the comity of nations, then the various included nations were seen as having the same quality of law (see e.g. Gong 1984 p. 46). Even though the legal system of the EU is distinct from the legal system of a member state, they both exhibit a shared quality of law. They are both plenitudinous, 'advanced' legal systems of a modern kind, 'supreme' in the coverage of their respective spheres. This similarity is both illustrated and heightened in those efforts of the European Court which, as we saw earlier, would combine elements of the various member states into something of a common law of the EU. In short, nation gives a place to law, and the similarity of law in different national places retroacts on and unites these primal locations of law. This subsuming similarity of law is made palpable in its 'Europeanness'. The universal, whether inhering in law or nation, must be instanced and 'Europe' has provided a cohering combination of particular place and universal exemplarity. Law in its 'Europeanness', whether the law of the EU or of a member state, provides then an equable and singular place accommodating the duality of nationalisms in the EU.

If this line of argument were to hold, we would expect law and its 'Europeanness' to be accorded a central part in the EU scheme of things and, *mirabile dictu*, such would seem to be the case.<sup>9</sup> So, we discover in Schepel and Wesseling's depiction of the mindset of 'European' lawyers that a transcendent and unifying 'law' is associated integrally with the EU and, they find that the identification of the EU's legal community with the aspirations and ethos of the Union is close to complete (Schepel and Wesseling 1996). If we were to focus on the most potent members of that legal community, we would find that 'European integration', the constitutional coherence of the EU, and the pervasion of its dictates and ideals are all causes accorded a distinct and large place in the jurisprudence of the European Court of Justice. Indeed, the project of union has found a more constant support in 'l'Europe des juges' than in the political arena of the EU.

In sum, those easy assertions of yet another terminal decline in nation and its law miss a target which is more difficult and more elusive than they would allow. Such assertions would confine nation to a particularity, a libinal narcissism of blood and soil and set it against a numinous and universalist 'Europe' of the EU.



But, as we have seen, the libido of nation is more complex and this supposed opposition is with-in nation itself. So constituted, nation extends its protean range to the EU as well. The contest between the EU and the member states becomes, not a contest between nationalism and something else, but rather one between competing nationalisms, and in the competition nationalism is heightened rather than diminished. It was law, and law in its 'Europeanness', which, so the argument finally ran, compensated for or, in a way, unified this now manifestly plural location of nation.

### Acknowledgements

Thanks to Colin Perrin, yet again, for salutary comments. I am also most grateful to Eve Darian-Smith, Maria Drakopoulou, John Fitzpatrick and Joanne Scott for invaluable references.

### Notes

1. For examples of the ridiculous and the sublime see, respectively, Duroselle (1990) and Hay (1968). Greek origins, if perhaps the most prevalent, are not the only ones bestowed on Europe. As befits the irresolution of origins sketched in this paper, there is a persistent inability to establish an origin for Europe (cf. Kristiansen 1996). And, of course, the themes of exclusion and inclusion which I extract from the myth of Europa have been much debated in relation to Europe (see Bernal 1988).
2. Graves, however, endows Zeus only with 'small, gem-like horns' (1955 p. 194 - vol. 1).
3. For the equivalent failure to identify nation see, respectively, Gellner (1983) and Smith (1986). The line of argument in the text does not deny that Europe can be identified in material terms. Bartlett (1993), for example, does so identify Europe magnificently. But to recognise such a material limit as definitive would counter a claim to the universal. Furthermore, it is the lack of a set or resolved divide between particular location and the universal 'in' nation or 'in' Europe which makes nation or Europe possible as the combination of these antithetical elements. This irresolution also enables an illimitable project associated with Europe to be maintained without the constraints of a specific history.
4. It could be telling to observe how apologists for the EU as supranational deal with its rampantly nationalistic assertions. Weiler, for example, would indulgently accommodate them as rhetorical excess and add the uneasy prescription that they 'should' not be there (Weiler 1996 pp. 253-4).

5. To take a recent example of some advertisements placed by the Commission:

One of the adverts features a passenger firmly telling an airline steward that if her flight is overbooked, EU regulations entitle her to a seat on the next flight or compensation of at least £130. The background music is Beethoven's Ode to Joy, the EU anthem, and the inescapable message is that the union is a very good thing for the citizen (*Guardian*, 27 December 1995).

6. There may, however, be some confinement in terms of the market of the rights of citizens to freedom of movement under Article 48 of the Treaty (see Kingston 1996 pp. 152-4).
7. Federal systems present an obvious parallel but one that cannot be taken very far because with federated nations a predominant and singular national identity is widely engendered, not least through powers typically concentrated in the central government. There cannot be said to be anything like an equivalent concentration within the EU at present.
8. This may seem to be contradicted by various moves to absorb the EU into national and even more localized scenes - subsidiarity being the most talked of. But these moves put and to keep power in question 'within' these scenes and the 'European dimension' is always there providing the form and some of the force of any answer.
9. There are other reasons for law's centrality in the EU, but all I am concerned to extract here is some supportive compatibility between this centrality and the argument about the duplexity of nationalism. In a milieu where things are constitutively unresolved, it is obviously difficult to talk of precise connection and of distinct causes and effects.



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# *Modernity, love and hidden inequality*

by

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Recent feminist thought seems to be in agreement on one fundamental point that summarizes its critique of liberalism: the liberal affirmation of the principles of liberty and equality that as from the 17<sup>th</sup> century marks the actual transition to modernity, in fact proves on more thorough analysis to be full of inconsistencies and contradictions that call its very theoretical foundations into question. The formal equality theorized by such philosophers as Hobbes, Locke, Rousseau or Kant, still pointed to as the conquest par excellence of the modern individual, could not correspond to a substantive equality, especially regarding the relation between the sexes. Modern thought, in other words, is seen as ending by repropounding a *more hidden, subtle form of inequality* than the kind that explicitly founded the ancient *polis* on traditional, patriarchal societies. It does so through a reformulation of the public/private separation aimed at justifying on new bases the exclusion of women from the public sphere and their naturally pertaining to the private, family area.

I wish to show that *this process has been rendered possible by the construction of a special form of feminine subjectivity, of which love is the basic instrument.*

Liberalism, then, is founded on revolutionary premises in both anthropological terms and those of the origin of society and the political order: through the metaphor of the “state of nature” it upholds the universal equality of all men and their freedom to decide by common agreement the forms of association that best respect their inviolable natural rights. It thus assumes, first, what one might define as the *sovereignty of the individual*, no longer trammelled by hierarchical rules nor a priori restricted by a cosmic order and by metaphysical imperatives; but henceforth endowed in intrinsic ineffability with a capacity for self-

determination or, as H. Blumenberg might say<sup>1</sup>, self-affirmation, constructing its own life rationally with an acute sense of responsibilities.

One can already find in Hobbes's model, though it ends in a coercive, absolutist solution in political terms, the premise of a radical equality among individuals, implying that all men are originally equal in rights, passions and functions. It is because of their passions and the conflicts these engender, and on the basis of their natural rights, that men decide to conclude a reciprocal pact and put themselves under a political authority; which guarantees security and the social order in exchange for partial renunciation of their rights and wishes. The transition from the state of nature to civil and political society is founded upon the consensual decision of free, equal individuals. Natural equality is reflected in civil and political equality. In this process there is no *a priori* difference between the sexes; no one is apparently excluded from *citizenship*.

We are thus faced with a radical move beyond the Aristotelian model that theorizes inequality between the sexes and bases the exclusion of women from the life of the *polis* on their "natural" inferiority, in the name of a metaphysical distinction between "form" (masculine) and "matter" (feminine). Identified with the body, nature and matter, women, excluded from the free, national sphere of the *polis*, are confined in the separated area of the *oikos*, the pure realm of necessity where they carry out the inferior functions of reproductive life.

Recent studies have well shown how the Aristotelian dichotomy and the resulting image of woman were transmitted through the Middle Ages down to modernity<sup>2</sup>. It is true that Christianity brought a first break in the Aristotelian model, by giving unprecedented value to the private sphere of necessity and of the *domus*, and elevating the dignity of women<sup>3</sup>. But its plea for the universal equality of individuals essentially concerned its spiritual life, the individual "outside the world", as Louis Dumont might say, and does not touch worldly life. The turn that appears with modern liberalism, starting with Hobbes, consists instead in maintaining the equality of all individuals "in the world": that is, an equality that becomes the regulatory principle of social relationships and of political society.

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1 H.Blumenberg, *Die Legitimität der Neuzeit*, Suhrkamp, Frankfurt a.M. 1966

2 Cf. D.Coole, *Women in Political Theory*, Harvester Wheatsheaf, London 1993, ch.I

3 Cf. J.B.Elshtain, *Public Man, Private Woman*, Princeton 1981



However, as has repeatedly been stressed, it did not stay faithful to its premises. This is confirmed in Hobbes, who despite his individualism sees the family, not the individual, as the elementary cell of the state of nature<sup>4</sup>; and the family, defined as “a little monarchy where the father is sovereign”<sup>5</sup>, presents an obviously patriarchal structure. Hobbes seems aware of this inconsistency, which sparks off his critique of traditional patriarchy. He thus seeks to base the family itself and paternal authority on contractual, consensual relations: viz. the consent of the children and of the wife, who voluntarily renounces the power she has in the family in the state of nature (over children) in favour of the husband<sup>6</sup>. But the renunciation of family power implies that women do not take part in the compact and consequently in the constitution of political society<sup>7</sup>. Paternal authority would, then, be sanctioned by the State<sup>8</sup>, and with it the subordination and the exclusion of women. There is, then, in Hobbes an ambiguous co-existence of liberalism and patriarchy that is in contradiction with the original premises of equality.

The question I now wish to put is the following: *why do women waive their power and their chances of citizenship?*

It has rightly been noted that Hobbes does not answer this question<sup>9</sup>. In fact, he lets it be understood that this is because of the physical inferiority of women<sup>10</sup>; which, one might add, compels her to seek the sovereign good for Hobbes of security, by putting herself under male strength and authority. We thus see the validity of Aristotle’s naturalist assertion persisting; but this time with the difference that women freely and voluntarily accept, because of their natural shortcomings, submission to male authority. However, the position of women remains enigmatic, and the role of the family obscure; for in Hobbes, interested in particular in an absolutist foundation of the State, the family appears as a

4 TH. Hobbes, *Leviathan*, in *The English Works of Thomas Hobbes of Malmesbury*, Scientia Verlag Aalen, 1966, vol.III, ch.XVII, XIII

5 *Ibidem*, ch. XX

6 Hobbes, *Leviathan*, cit., ch.XX

7 The pact is manifestly mediated by men, “since for the most part States have been erected by the fathers, not the mothers, of families”, *ibidem*, ch.XX

8 *Ibidem*, ch.XXX

9 Cf. C.Pateman, *The Sexual Contract*, Polity Press, Cambridge 1988

10 Hobbes, *Leviathan*, cit., ch.XIX; cf. D. Coole, *op. cit.*, p.62



structure without real identity, a microcosm founded on the same relations of subordination and protection that are in force in the State.

Emergence from this vagueness begins with Locke, where the separation between public and private takes on more consistency, the family configuration becomes more precise and complex, and with it the function and status of women.

Locke ends by falling into the same ambiguity. Despite his premises of universal equality and the contractualist foundation of civil society, he recognizes the legitimate and natural existence of “paternal” and “conjugal” power. Even if he takes away the absolute nature that traditional patriarchalism assigned to it to make it the basis of political power, he sees in this power a sort of tutelary authority emerging especially from the function the husband has of transmitting and conserving property, which in Locke becomes the natural right par excellence<sup>11</sup>. This authority thus is not coercive in nature since it requires the woman’s consent<sup>12</sup>, and she also has rights (to property and in life) and powers (the power over children given by her participation in reproduction)<sup>13</sup>. It finds its basis and legitimation, however, in the *natural and biological weakness of woman*<sup>14</sup>.

Here too one might, then, suppose that women, to use C. Pateman’s words<sup>15</sup> stipulate a “sexual contract” whereby they voluntarily agree to be subordinate to men in the private sphere, and in particular to be confined to it and excluded from active participation in the social contract that is at the origin of political society.

However, one can in Locke glimpse a more complex answer to the reason why women agree to conclude this contract: because through it women secure the *administration of the family and private sphere*; which is no longer, as in the ancient *polis*, the obscure, inferior domain of necessity and of the body; nor, as in Hobbes, that indistinct microcosm without laws of its own. The family

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11 J. Locke, *Two Treatises of Government*, Cambridge University Press 1967 (2nd edn), II, §48

12 *Ibidem*, § 78, §74

13 *Ibidem*, § 52

14. *Ibidem*, § 82

15 C.Pateman, *The Sexual Contract*, cit.

maintains its primary functions of procreation and reproduction, but also becomes the place where *the (natural) law of affection and care*, of tenderness and mutual complicity, is enforced: "La société conjugale - writes Locke - est instituée par un pacte volontaire entre l'homme et la femme, et, bien qu'elle consiste en premier lieu en cette communion et en ce droit réciproque sur les corps qui sert à son primaire, la procréation, elle implique toutefois une aide et une assistance réciproques, et un communion d'intérêts que n'est pas seulement nécessaire pour assurer le soin et l'affection entre les époux, mais qui est aussi indispensable à leurs enfants..."<sup>16</sup>.

With Locke there thus appears a new *valuation of the private* where one may, according to Hannah Arendt, recognize one of the distinctive features of modernity: namely the private sphere no longer conceived of in the negative, Aristotelian sense of "deprivation", but as a privileged sphere of intimate relations and of affectivity.

The valuation of the private thus primarily assumes a radical transformation of the family; which, to be sure, especially in a first stage, conserves its traditional functions as reproductive unit, as institution serving to transmit property, but also becomes the privileged sphere of feeling and of reciprocity. With Locke we are obviously only in the initial stage of this transformation which, as historians of mentality have brilliantly reconstructed in recent years<sup>17</sup>, comes about through a slow, gradual process lasting till our days; leading in the 18th and 19th centuries to the model of the sentimental family still dominant today. This enables us at any rate to see that the enclosure of women in the private sphere in the early modern period cannot be interpreted simply in terms of exclusion; and that the modern separation of public and private also coincides with a division of spheres of influence and power between the sexes: the power men have to act rationally in the social, political and economic sphere has its counterpart in the power women have to govern the intimate sphere of feelings. In other words, the "sexual contract" that women freely conclude makes them depositories of what I shall call *the power of love, the power of relationship*. It thus becomes

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<sup>16</sup> Locke, *Two Treatises of Government*, cit, II, § 78; cf. also § 63, §67.

<sup>17</sup> Cf. Ph.Ariès, *L'enfant et la vie familiale sous l'ancien régime*, Paris, Plon 1960; E.Shorter, *The Making of the Modern Family*, Basic Books, New York 1975; L.Stone, *The Family, Sex and Marriage in England 1500-1800*, Weidenfield and Nicolson, London 1977 etc.



fundamental to discover and analyse its forms, since it is just this power that becomes *the screen for inequality*.

This process reaches its apogee in Rousseau, who proposes a very clear, exact idea of female power.

The theory of the difference between the sexes and the separation between public and private takes on still more extreme tones in Rousseau: not just because he bases it on the “natural law”, which in him has downright sacred value, but also because he locates it in a functionalist conception that quite clearly has Aristotelian influences<sup>18</sup>.

The different nature of woman, both physically and intellectually, destines her for functions, occupations and even spaces that differ from those of men; while the latter are, as *Emile*'s course well shows, made for action in the world, civic and political involvement, and the construction of a just society based on the democratic contract and the “general will”, women are for their part made to govern the private sphere.

But – and here there is a capital transition – this difference and division of roles is not, as in Aristotle, based on a devaluation of the feminine, but on the contrary on an unprecedented *valuation of woman*, endowed for Rousseau with innate, essentially psychological and moral, qualities. Though she is indeed physically weak, she nonetheless has great persuasive talent; though she has no disposition for principles and general rules, she possesses “practical reason” which gives her a taste for details and an intuition for the appropriate ways to attain certain ends; though not capable of abstract, speculative knowledge, she is distinguished for a fineness and penetration of mind that make her an active promoter of an “experimental morality”<sup>19</sup>.

Female qualities take on a value they did not previously have; in particular, for the first time they become the object of explicit reflection. In other words, we see with Rousseau appear the features of a feminine subjectivity differing from the male one, but just as important and valuable.

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<sup>18</sup> On Rousseau's functionalism and aristotelianism, cf. D.Coole, *cit.*, pp. 84ff.; S.M.Okin, *Women in Western Political Thought*, Princeton University Press, 1979  
<sup>19</sup> J.J.Rousseau, *Emile*, in *Oeuvres Complètes*, Gallimard, Paris 1959-69, vol.IV, I.V



At the same time we see a valuation of the private and family sphere which, as we have seen, was still embryonic in Locke; and has its fundamental core in what we shall, in general terms, call *feelings*.

The family has in fact fully taken on the nature as sphere of affectivity that emancipates it from any other premise, tie or condition. Even in anthropological terms, in the description Rousseau gives of the state of nature, the family owes its force of cohesion to the "sweet feelings" born gradually of life in common, after being born of natural necessity<sup>20</sup>. Paternal authority itself, to which Rousseau also give a "natural" character, is based on the "laws of the heart"<sup>21</sup>. Rousseau becomes the interpreter of a social change of which he is at the same time a lively promoter. The family has become the locus par excellence of feeling and emotivity, detached from productive purposes or community and lineage imperatives, and founded upon the free choice of individuals that are increasingly autonomous in their decisions. As historical analyses have recently shown, the "love marriage" became a socially accepted, widespread reality, testifying to the voluntary nature of the conjugal union, the primary goal of which was henceforth to ensure the happiness of its members. It should be noted that this presupposes a substantive equality between the sexes, since both are entitled to free choice of partner, as Rousseau himself maintained in *Emile*<sup>22</sup>. Both contribute to the birth of this "family spirit" based on the solidarity, complicity and intimacy of its members. Be it in the relation between man and woman, or between parents and children, marked in the traditional family by authority and obedience in the lower classes and indifference and formalism in the upper classes, feeling becomes the real basis<sup>23</sup>.

Even if it is true that all the members of the family are linked by feeling, it is also true that the *woman alone is identified with it*. It is through feeling, as shown particularly by the image of Julie in *La Nouvelle Héloïse*, that she rules the complex fabric of family relations as a sovereign.

This image of woman is, in Rousseau, upheld by two basic arguments.

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20 J.J.Rousseau, *Discours sur l'origine de l'inégalité*, in *Oeuvres Complètes*, cit., vol.III, p.168

21 *Ibidem*

22 Rousseau, *Emile*, cit., I.V

23 Cf. Ph. Ariès, cit.; E.Shorter, cit.; L.Stone, cit.

First, there is exaltation of the maternal function, whereby woman accomplishes her destiny and, by conforming to the law of nature, achieves her greatest happiness. "...Is there in the world so touching a spectacle," writes Rousseau in the *Letter to d'Alembert*, "so respectable, as that between a mother and family surrounded by her children, regulating the work of her servants, bringing her husband a happy life and wisely governing the household?"<sup>24</sup>. This also means, if we recall the archetypal, symbolic value of mother love as the highest expression of devotion and self-giving<sup>25</sup>, that woman lives and constructs her identity through her being *in relation with* others (be they children, the husband or the community). Perhaps no-one has contributed more than Rousseau to the spread of the image of the wife-and-mother and of mother love as a social value, or in other words, to the process that has recently been called "the invention of mother love", which as from the 18th century becomes the core of the family, in the place of paternal authority<sup>26</sup>. Attentive and sensitive to the happiness of those surrounding her in virtue of her motherly nature, woman is the one who animates and directs the intimate world of feelings through her devotion and the care she takes of others. Her very education should take account of the fact that the female identity is "by nature" relational, dependent on others and on their expectations<sup>27</sup>.

Second, woman is destined for private, separate spaces because of her modesty, her reserve, her innate timidity qualities that Rousseau brings together under the concept of "pudeur"<sup>28</sup>. Pudeur, modesty and shame, is a feeling whose instinctive, natural character he claims, in opposition to the *philosophes*<sup>29</sup>; it may be regarded as symbolic of his conception of woman. A weapon of seduction and at the same time an instrument of control of sexuality and passion

24 J.J.Rousseau, *Lettre à d'Alembert sur les spectacles*, Flammarion, Paris 1967, p.175

25 Cf. E.Pulcini, *Il potere di unire. Femminile e potere tra modernità e mito*, in AA.VV., *Il femminile tra potenza e potere*, Arlem, Roma 1995

26 Cf. E.Badinter, *L'amour en plus*, Flammarion, Paris 1980; A. Giddens, *The Transformation of Intimacy*, Polity Press, Cambridge 1992, ch.3

27 This is in obvious contrast with the basis in Rousseau for the education of men.

28 J.J.Rousseau, *Julie ou La Nouvelle Héloïse*, in *Oeuvres Complètes*, vol. III, 4, XIII. As Claire says: "What separates us from men is nature itself, which prescribes different occupations for us; it is that soft and timid modesty which, without exactly thinking of chastity, is its surest guardian; it is that attentive piquant reserve which, feeding in men's hearts both desires and respect, serves as it were as the coquetry of virtue"

29 Rousseau, *Lettre à d'Alembert*, cit.



pudeur is the expression par excellence of the feminine, allowing it sovereignly to rule the conjugal relationship with a wise technique of promises and delays, concessions and refusals, through which woman administers sexuality and love and bends the other to her authority and her power<sup>30</sup>. In close connection with all this is the fundamental function of pudeur, to ensure the lastingness of love, perhaps the central value of modernity. Woman thus becomes the guarantor - as testified by the figures of Julie and Sophie - of what one might call a *strategy of the lastingness of love*, which must be preserved from the excesses and the transitory fire of passion, and cleansed of the illusions of the imagination, in order to suit the family institution with its daily needs, its duties and responsibilities. We shall see the importance of the birth of this new code of love for the image of woman and inequality between the sexes.

But at least for Rousseau, the difference between the sexes and the separation of the spheres of action give rise to a complementarity that confers equal importance on the members of the couple, regarding both as essential to the joint happiness<sup>31</sup>. It might then be said that if woman agrees to conclude a "sexual contract", this is because, as in any contract, she gets something in return, something that enables her to realize herself ideally in the fullest form: the *power of love*<sup>32</sup>.

One might speak, in Rousseau, of an actual *construction*, in the Foucault sense, of the *female subjectivity*, which henceforth takes on the force of a veritable paradigm, able to count on the complicity of women themselves. For it would be too simple to treat women as pure passive objects of a model imposed from outside; on the contrary, they contribute actively to constructing or "producing" their own identity by themselves adopting the codes, techniques and strategies that correspond to the new image of "gender" brought by modernity.

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<sup>30</sup> As emerges from the figure of Sophie, it limits, and in the first instance contains, woman's sexuality. Cf. E.Pulcini, *J.J.Rousseau: l'immaginario e la morale*, introduzione a J.J.Rousseau, *Giulia o La Nuova Eloisa*, Rizzoli, Milano 1992

<sup>31</sup> Rousseau, *La Nouvelle Heloïse*, cit., 4, X: "According to her (Julie), wife and husband are indeed destined to live together, but not in the same way; ... in a word, both concur in the common happiness by different paths; and this sharing of work and care is their union's strongest bond".

<sup>32</sup> That this image is destined to become a paradigm of modernity is confirmed by an 1839 article quoted by Giddens, *The Transformation of Intimacy*, cit.



The problem is that despite Rousseau's aspirations to complementarity, this construction of a female subject by valuing the qualities and power of women makes the separation between public and private still deeper, and with it inequality between the sexes.

Shut in the cloister of family feelings, women, wives and mothers, take part in administering the public sphere, but only in indirect fashion; for on them depend the education of men and their virtue, and also their emotional and mental well-being<sup>33</sup>. They thus enable the cleavage between man on the one hand and the citizen and bourgeois on the other on which modern bourgeois society is founded. As guarantors of an atmosphere of humanity and emotionality in the family, they ensure the co-existence of these two aspects, in such a way that the needs of the man do not interfere with the action of the citizen. It is, then, woman that makes possible what has been defined as the liberal and bourgeois "illusion" of the autonomous individual, of the "disengaged self", free from all ties and all dependency<sup>34</sup>.

Second, and this is the aspect I wish particularly to stress, *she becomes identified with a special form of love*, which participates closely in the new family model: mother love and conjugal love, both belonging, as I have already noted, to the code of *feeling*. This is a code that arises and spreads in the 18th century, setting itself up, so to speak, at an equal distance from the coldness of *reason* and the excesses of *passion*<sup>35</sup>. It responds to the twofold requirement to satisfy an individual's need for affection without falling into the destructive effects of love-as-passion, with its inheritance of death, loss of self and social disorder: think of the early modern novel of Richardson and Fielding in Britain, or the rise and spread of the intimate epistolary novel in France; or the numerous treatises on friendship, happiness etc. Charles Taylor speaks in this connection of a

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33 "How could I forget that precious half of the republic that makes the happiness of the other, and with its mildness and wisdom maintains peace and good customs in it? As kindly and virtuous citizens, it will always be the destiny of your sex to govern ours. O happy we when your chaste power, exercised exclusively in conjugal union, makes itself felt for the glory of the State and for the public happiness!", Rousseau, *Discours sur l'origine de l'inégalité*, cit.

34 Cf. S. Benhabib, D. Cornell (eds.), *Feminism as Critique. On the Politics of Gender*, Univ. of Minnesota Press, Minneapolis 1987

35 Cf. E. Pulcini, *Amour-passion e amore coniugale. Rousseau e l'origine di un conflitto moderno*, Marsilio, Venezia 1990

“culture of modernity”<sup>36</sup>. Rousseau fully reflects the birth of this new code of love, becoming its fundamental promoter. For mother love implies the values of devotion, care, attention to the other and relationship; conjugal love, as I have already noted, is a moderate, durable feeling based not on desire, merger, total abandonment of self, but on a sort of intimate alliance, of complicity, of fraternity: all aspects aimed at the same time at safeguarding the ego and the lastingness of love<sup>37</sup>. One might perhaps speak of the secular rebirth of *agape* by contrast with *eros*. But what most counts for us is that woman is identified with this form of feeling, and in consequence sees herself *deprived of the right to passion*.

It is in the modern culture of *feeling* that, as from the late 18th century, this model of love that contemporary historians and sociologists have called “romantic love” arises. It represents a form of feeling that has, using Niklas Luhmann’s words, become entirely “self-referential”, that is, detached from conditions and premises other than those of free emotional choice. If, then, on the one hand, because of this growing liberty, romantic love comes to embrace aspects of love-as-passion, on the other it is raised up in opposition to it, especially as regards the lastingness of love, its capacity to stand up to time and establish a project of life in common.

It is enough to think of the great novels of the 19th century, Balzac or Tolstoy, where there is both the clear opposition between love as passion and conjugal love (*Anna Karenina*), and the idea of a necessary “transformation” of passion once it has led to marriage (*Wedded Bliss*). Once again, it is for the woman to accomplish this task, namely to transform herself from woman as mistress into woman as wife and mother.

It is, then, true, as Giddens maintains, that romantic love ends by tying women still more to the intimate sphere of the family, by reinforcing her image as a guardian of sentiments and of privacy<sup>38</sup>. The same is not true of men; not just because they can allow themselves to practise a “double morality” and live the passion of love outside marriage, but also because their very participation in the public sphere is not exempt from passions: the “cold” passion of interest, the

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36 Ch. Taylor, *Sources of the Self*, Harvard U.P., Cambridge (Mass.) 1989, ch.17

37 Cfr. Pulcini, *Amour-passion e amore coniugale*, cit.

38 Giddens, *The Transformation of Intimacy*, cit.



passion for money and for power, etc. This also means that the public sphere is shot through with conflicts, and exposed to change and transformation. While passions, conflict, change, form the very humus of the construction of the male identity, woman does not have this opportunity since she stays confined in the passionless space of the family. It is true that she retains a sort of power, that of love; but this is very much a *hidden power* limited to the closed space of family ties, devoid of the conflictual vitality of passion; and often ends by taking on the psychologically regressive traits of a redemptive power.

It is in this sense, then, that *love becomes a screen for inequality*: devoid not just of the *logos* and of the possibility of acting autonomously on the world stage, but also of *eros* and passion, women are constrained to a form of emotionally flattened identity, shorn of the disturbing but vital truths of passion. They have no right to everything that is strictly associated with passion and represents the necessary condition of an unamputated identity: conflict, ambivalence, disorder, the negative.

Setting ourselves on the normative plane, we might then suggest that the problem for women is not just fully and substantially to regain the liberal ideal of *autonomy* that gives them access to the public sphere and to society, but once more to find a deeper, more inward dimension perhaps left in the shade by the very rise of modern individualism: the ideal of *authenticity*<sup>39</sup>, that is, the fullness, even if contradictory and conflictual, of their emotional life, a fidelity to themselves that enables them to express and legitimate the most disturbing, inadmissible sides of their nature. For it is only with the recognition of our own desires, impulses and ambivalences that is it possible to confront ourselves on an equal footing with the other and to face the exhausting but fruitful alternation of confrontations and negotiations that is the ineliminable condition of an unmutilated identity.

This does not mean giving up one's own difference, but on the contrary succeeding in giving voice and symbolic expression to its emotional roots, to rediscover and elaborate the forms of passion "female style".

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39 Cf. M.Berman, *The Politics of Authenticity*, Atheneum, New York 1972; Ch. Taylor, *The Malaise of Modernity*, Canadian Broadcasting Corporation, 1991; A.Ferrara, *Modernità e autenticità*, Armando, Roma 1989

If it is true that democracy between the sexes is the necessary condition of democracy in the public sphere<sup>40</sup>, it cannot be achieved without a thorough, patient transformation in the codes of feeling, and hence without a re-appropriation by women of repressed forms of emotionality able to enhance *difference* without producing *inequality*.

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40 L.Irigaray, *Essere due*, Bollati Boringhieri, Torino 1994





# *The Vestal and the Fasces: Hegel, Lacan, Property and the Feminine*

by

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## I. Introduction.

### A. The Vestal and the Fasces.

The fasces symbolized the majesty of Roman law. It was an axe attached to a bundle of sticks. Consuls, emperors and other high ranking officials were escorted in public by *lictors* bearing the fasces as the visible representation of the enforcement powers of the state.<sup>1</sup> Offenders could be mercifully flogged with one of the sticks or justly executed with the blade.

The Vestals symbolized the sanctity of the Roman family.<sup>2</sup> These priestesses of the goddess Vesta guarded the sacred hearth of Rome,<sup>3</sup> insuring the continuing warmth, intimacy, fertility and order of the families of individual Romans.<sup>4</sup>

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1 Mary Beard, *The Sexual Status of Vestal Virgins*, 70 J. Roman Stud. 12, 17 (1980). SARAH B. POMEROY, *GODDESSES, WHORES, WIVES AND SLAVES: WOMEN IN CLASSICAL ANTIQUITY* 213 (1975).

2 There were six Vestals at any given time, at least in historical times. (According to legend, in the earlier periods there were fewer Vestals.) POMEROY, *supra* note 1, at 211. J. P. V. D. BALDSON, *ROMAN WOMEN: THEIR HISTORY AND HABITS* 235 (1962).

3 "The hearth with its undying flame symbolized the continuity of both family and community. . ." POMEROY, *supra* note 1 at 210. "The Vestal Virgins were the emblem of the State's morality and guarantee of its economic well being." BALDSON, *supra* note 2, at 14.

4 As well as that of the state. When public calamities occurred, such as the loss of an important battle, suspicion of the Vestals' chastity was raised. POMEROY, *supra* note 1, at 210-11. BALDSON, *supra* note 2, at 239.



The sexual status of the Vestals was ambiguous. During their 30 years of service,<sup>5</sup> the Vestals were required to maintain the strictest chastity. Yet, they officiated at fertility rights.<sup>6</sup> They guarded a ritual phallus which may have symbolized the ineffable goddess herself.<sup>7</sup>

The Vestals may have been symbolically married to the state. The Vestal did not dress as a maiden but wore the headdress of a Roman bride, and the *stola*, or dress, of a Roman matron. The Vestal's investiture ceremony -- the *captio* or "capture" -- was reminiscent of a Roman wedding. The state's high priest, the Pontifex Maximus, roughly seized the initiate from her father in a mock abduction in memory of the legendary rape of the Sabine women by the followers of Romulus.<sup>8</sup> He called her *Amata*, a mysterious name that implied she was both captured matron and invincible maiden.<sup>9</sup>

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5 POMEROY, *supra* note 1, at 211. See also Beard, *supra* note 1, at 14 n. 19; BALDSON, *supra* note 2, at 236.

6 BALDSON, *supra* note 2, at 237-38. See also Beard, *supra* note 1, at 13; POMEROY, *supra* note 1, at 211.

7 Unlike other classic deities, Vesta was rarely represented by a cult image. There were few statues of her, although her visage occasionally appeared on coins. THE NEW LAROUSSE DICTIONARY OF MYTHOLOGY 205 (Felix Giraud ed., Richard Aldington & Dellano Amer trans., 1968). Instead of the customary cult image, Vesta's temple housed a sacred fire and phallus called the *fascinus*. Vesta was the flame itself. The phallus might relate to Vesta's function in fertility cults (in which a sacred, phallic ass played a noted role), but it might also have invoked the goddess herself because it was related to the fire stick used to start the holy fire. The goddess of the hearth was sometimes considered a personification of this fire stick which was inserted in a hollow in a piece of wood and rotated, in an obviously phallic matter to light her flame. Vesta was also associated with the worship of such phallic masculine gods as Mars and Bacchus. In many of the myths surrounding the vestal cult, a penis appeared within her flame and impregnated a virgin. The first Roman king, and perhaps Romulus himself, were believed to have been conceived by a union between such a vestal phallus and a vestal virgin. Beard, *supra* note 1, 12, 19, and 24-25. See also, NEW LAROUSSE ENCYCLOPEDIA OF MYTHOLOGY, at 214.

8 The symbolism of the *captio* (like everything else regarding the Vestals) is ambiguous. Scholars debate whether or not the Vestal's seizure was intended as a mock abduction representing the more ancient form of marriage by rape. It was similar, but not identical, to a Roman wedding. In a wedding, the bridegroom seized the bride from the arms of her mother. The Vestal was snatched from her father. The cut of the Vestal's vestments was that of the traditional bridal veil, but the Vestal wore the pure white of a priest rather than the passionate flame red of the bride. By historical times, Roman marriage had become consensual and rape was no longer a legal way of entering into a marriage. Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1165 (1990). See also JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 129 (1987).

9 It is unclear what this title means. *Amata* might have been an archaic form of "Beloved" (from *amare*, to love) reflecting her status as wife. On the other hand, it may have meant "unconquered" in the sense of virgin and forever unmarried. Beard, *supra* note 1, at 13-15. See also, BALDSON, *supra* note 2, at 182-84.

The Vestals were guardians of the private yet lived a paradoxically public existence. Unlike other priests, they lived at the temple they served.<sup>10</sup> The temple of the goddess was built to look like an ancient Roman house, yet it was located in the center of the market place.<sup>11</sup> It was every Roman's right freely to enter this temple by day, although men were strictly barred from the house of the virgins at night. The Vestals attended and blessed most important government functions.<sup>12</sup> They were the repositories of the Sybelline books containing the prophesies of Rome's future, periodically consulted by the consuls and emperors.<sup>13</sup> They had reserved boxes at the arenas and theaters.<sup>14</sup>

Most mysteriously, upon their investiture these priestesses, who were paradoxically both symbolically raped virgins and unviolated wives, were also elevated to the legal status of men.<sup>15</sup> The Vestals, alone of all women, were escorted by the fasces.<sup>16</sup>

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10 The other major priests, such as the Pontifex Maximus had "official" residences in the forum, but actually lived in private homes like other citizens. The Vestals actually lived in a house next to the temple during their entire tenure. BALDSON, *supra* note 2, at 235.

11 Properly speaking, this building was referred to as "*aedes Vestae*" and was not augurated as a temple in the strict sense. Beard, *supra* note 1, at 13 n.9.

12 BALDSON, *supra* note 2, at 238. The sacredness of the Vestals was so great that it was thought that no one would dare invade their house. Accordingly, they served as holy repositories of state treasures.

13 They also guarded other treasures such as the Palladium, believed to have been brought by Aeneas from Troy as well as official documents, such as the wills of the Emperors and other important officials. *Id.*

14 Augustus gave the Vestals the privilege of sitting in the imperial box. Other women were relegated to less prestigious seats. POMEROY, *supra* note 1, at 214; Beard, *supra* note 1, at 13. They also had other unique privileges denied to other women such as the right to travel through the streets of Rome in two horse carriages (other women being confined to litters and sedan chairs). BALDSON, *supra* note 2, at 238; POMEROY, *supra* note 1, at 213.

15 The Vestals had many attributes of Roman men. Upon her investiture, the initiate's father lost his dominion (*manus*) over her, in the same way a father loses his dominion over his daughter upon marriage. But unlike a married woman, her *manus* did not vest in their symbolic spouse (the state, or the Pontifex Maximus). Rather, unlike daughters or wives, but like a *pater familias*, the vestal held her own *manus*. She could write wills, and give testimony, like male citizens but unlike wives (at least in the earlier period; women were apparently granted similar testamentary rights later in the empire). See POMEROY, *supra* note 1, at 213.

16 *Id.* at 213; BALDSON, *supra* note 2, at 238.

Beard notes that although in the later empire the wives of consuls or emperors were on rare occasion escorted by lictors, this was a late development. Once again, Beard argues that this masculine moment symbolized the intentionally ambiguous sexual status of Roman priestesses which enabled them to act as the point where human and divine meet. Beard, *supra* note 1, at 17 n. 46. As I discuss in my book, this ambiguous transition between man and God is, in Hegelian philosophy, the moment of sublation, and, in Lacanian psychoanalysis, the impossible feminine.



Both the seeming paradox posed by the juxtaposition of the symbolizations of the private and the public as well as its eventual explanation are suggested by true and folk etymologies of the terms the Romans used to describe them. The virgin is *virgo*. The rod bound to form the *fasces* is *virga*. *Vir* is man. A woman who has the virtue of a man -- like a Vestal -- is a *virago*. *Fasces* means "bound". *Fas* is divine law -- that which binds man to god? The Vestal's ritual phallus is *fascinus* which does not merely mean the male organ, but also enchantment and the evil eye. It is the source of the English "fascination" and is obviously related to the *fasces*, but how? Clearly, we are fascinated with the phallus. When we are fascinated, are we spellbound?

From the standpoint of the political philosophy of G.W.F. Hegel and the psychoanalytic theory of Jacques Lacan, the public and the private -- law and love -- serve complementary functions and mutually constitute each other. Both the law and the virgin served as the representation of the Other, the external object by which the Roman man was able to define himself as an acting subject - a Roman citizen. The Vestal and the *fasces*, love and law, cannot be separated because they are one and the same:<sup>17</sup> *virgo* is *virga* is *vir*; Vesta is *fascinus* is *fasces* is *fas*.

## B. Property and the Feminine.

My work is an encounter with Hegelian and Lacanian theory. It must be distinguished from most American feminist jurisprudence of "law and love." Most theorists deal with the law of love -- the legislation or eroticism in the sense of the law of marriage, rape, reproduction, etc. In contrast, I explore the love of law -- the inherent, fundamental eroticism of market relations and the repressed sexual content of law.

I posit that property -- the law of the market place -- and the feminine are both *phallic*. They serve parallel functions in the creation of subjectivity *i.e.* the capability of being a legal actor who can bear rights and assume duties as well as a sexed being who can speak and engage in social relations. In both theories, subjectivity is intersubjectivity mediated by objectivity. That is, in both theories subjectivity is not a pre-existing natural state as it is in classical liberal theories. Rather, it is artificial in the sense of a work of art. We can become subjects only if we are recognized as subjects by others. Subjectivity is created through relations with others in a regime involving the possession, enjoyment and exchange of an object of desire. The regime discussed by Hegel is abstract right

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17 "Law and desire . . . are born together, joined and necessitated by each other . . ." Jacques Lacan, *Introduction to the Names-of-the-Father Seminar*, in JACQUES LACAN, TELEVISION: A CHALLENGE TO THE PSYCHOANALYTIC ESTABLISHMENT 81, 89 (Joan Copjec ed. & Dennis Hollier et al. trans., 1990).



(i.e. property and contract, the capitalist market). The regime discussed by Lacan is sexuality.<sup>18</sup>

Property, according to Hegelian philosophy, and the feminine, according to Lacanian psychoanalysis, are fictions we write to serve as the defining external objects which enable us to make ourselves into acting subjects. By serving as objects of possession, enjoyment and exchange between subjects, property and the feminine simultaneously enable subjects to recognize other humans as individual subjects -- as the mediators of relationship they enable us to desire and be desired. In Hegel, the creation of subjectivity is simultaneously the creation of the regime of abstract right: property, contract and the market. In Lacan, the creation of subjectivity is simultaneously the creation of the realm which Lacan called the symbolic: law, language and sexuality.

Lacan interests me as a feminist because he simultaneously divorced sexuality from anatomy while explaining how sexuality is not only confused with, but figured by, anatomy. That is, although sexuality is a purely symbolic (i.e. legal and linguistic) category, we conflate it with seemingly real or anatomic counterparts. Unlike Freud as his most biological, Lacan did not believe that we attained our psychological subjectivity and sexuality because of certain biological experiences. Rather, sexuality is a result of the process of learning to speak and become a subject which results in a universal feeling of loss and alienation. We only retroactively associate this process with our biology.

For example, to present a crude caricature of Freudian theory, during the Oedipal stage children literally want to sleep with their mothers and murder their fathers. Lacan reminds us, however, that if we go back and read the myth we will see that even Oedipus did not have an Oedipus complex.<sup>19</sup> Oedipus thought he killed and married strangers and only retroactively learned that they were his biological parents. So, for example, the penis is a symbol or metaphor for the phallus, rather than the other way around.

Similarly, Hegel's theory of property is not an empirical, historical account of the development of property law. Moreover, in contradistinction to the critique most familiar to American legal scholars -- that of Margaret Jane

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<sup>18</sup> In English we use the word "property" both to designate the legal and economic regime as well as the objects that are subject to this regime. That is, as a lawyer I would say that, technically, I have property rights with respect to specific objects (such as my apartment), but, like everyone else, when I talk colloquially I say that my apartment is my property. And so today, sometimes when I use the word "property" I mean the regime of abstract right but sometimes I mean the objects of the regime. When speaking of Lacanian theory however, the regime and the objects have different names. The regime is sexuality and the object of desire is the phallus -- which in one of its forms is the feminine.

<sup>19</sup> JACQUES LACAN, THE SEMINAR OF JACQUES LACAN. BOOK VII: THE ETHICS OF PSYCHOANALYSIS 1959-60 304 (Jacques-Alain Miller ed. & Dennis Porter trans. 1992).

Radin<sup>20</sup> -- Hegel's theory has *nothing* to do with or say about the empirical process by which actual human beings become mature adults or about the empirical fact that individual human beings form sentimental attachments to things. Rather, Hegel attempts a retroactive theoretical analysis of the citizen and state in a modern, free market, representative democracy. When Hegel says that abstract right (*i.e.* property and the market economy) is the "first" form of human relations, he is not making a temporal claim. He means that it is the most primitive, simplest form as a logical matter, despite the fact that it was late to develop as an empirical matter.

Reading Lacan together with Hegelian property jurisprudence. I show how property and markets are erotic and, therefore, also figured in legal discourse by bodily metaphors. That is, property scholarship and doctrine describe the symbolic and legal regime of property in terms of real analogs by adopting the implicit imagery of the human body. Specifically, property is described through masculine and feminine phallic metaphors. In the former which is dominant, property is figured by the male organ and is thought of in terms of possession and exchange. Interferences with property rights are described in terms of castration -- mutilation and takings. In the latter feminine form, property is figured by the female body. It is that with which one identifies, enters and enjoys. Interferences with property rights are described in terms of rape, violation and loss of virginity and loss of self.

A Lacanian analysis shows how both the masculine and feminine imagery of property are necessarily incomplete and inadequate for precisely the same reason that both sexuated positions are inadequate. The masculine and feminine are not opposites or complements like yin and yang. Each is itself a failed attempt to form a complete whole. This means that any attempt to combine them together will not achieve a single satisfying subjectivity. Rather, one is left simultaneously with redundant overlaps, uncovered gaps and impossible sexual relationships. All human relations are mediated. Nevertheless we are driven by the desire for satisfying and immediate relations with the other imagined as simultaneously being, having, enjoying and mutually exchanging the lost object of desire. It is precisely this negativity -- this lack -- which creates not only desire but the space necessary for freedom as that term is understood by Hegel.

My theory seeks to be a thorough-going reconstruction of both feminist and property theory. I believe it gives a more complex and faithful account of sexual difference than do either the two dominant schools of legal feminism -- different voice or cultural feminism and so-called radical feminism -- which I believe merely adopt traditional gender stereotypes and react to them.

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<sup>20</sup> I critique Radin's analysis extensively in Jeanne L. Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body*, 79 MINN. L. REV. 55 (1994) [hereinafter, Schroeder, *Virgin Territory*],



It also helps to explain why we, as a society, tenaciously cling to certain property law doctrines despite their disutility, and to certain theories, despite empirical evidence to the contrary. In my book, after I explain my theory generally, I demonstrate this by applying it to critique the work of a number of prominent legal scholars and property doctrines. But elsewhere, I have personally found that my approach (stripped of its post-modern terminology and translated into standard legalese) has been extremely useful not only in my teaching, but also in my doctrinal scholarship and in my legal practice.

Lacan is frequently vilified as misogynist because he is mis-interpreted as holding that the masculine is the position of the speaking subject -- as the wielder of the phallus. The feminine is not merely the position of silent objectivity. She is positioned as lack -- as the symbol of castration itself. But to condemn Lacan is to kill the messenger for accurately delivering the message of the crushing misogyny of the status quo. That is, in my reading, whether or not the historical individual named Jacques Lacan was personally a misogynist, Lacanianism is not a misogynistic theory, but a theory of misogyny. I reinterpret Lacan as being (perhaps unintentionally) subversive, undermining masculinism from within.

To Lacan, the masculine is not superior to the feminine. The two sexes are two different ways of confronting the sense of loss that Lacan called "castration" -- the universal initiation rite of subjectivity. The masculine is, therefore, every bit as castrated as the feminine. The masculine is cowardly. He tries to deny castration by lying. The feminine, in contrast, is honest and brave in accepting the fact of castration. Moreover, although it is often thought that Lacan thought that the masculine is the position of subjectivity and the feminine is that of objectivity, in fact men only claim subjectivity. It is only the Lacanian feminine, in her radical negativity, which can constitute the subjective position of potentiality and freedom which has not yet been achieved. It is, therefore, only through the impossible, and therefore necessary and ethically mandated, creation of feminine subjectivity that human freedom can be actualized.

## **II. Hegelian Property and Lacanian Sexuality.**

### **A. Hegel.**

From a Hegelian-Lacanian perspective, property and the law are desperately erotic -- indeed, hysterically so in the technical sense of the word. Hegelian theory is often misunderstood by Americans because it parts company with the political and jurisprudential tradition predominant in our country -- *i.e.* the various Enlightenment philosophies generally grouped under the umbrella "classical liberalism" -- which takes as its starting place some concept of the state of nature as the free, autonomous individual endowed with natural rights.

In contradistinction, to both Hegel and Lacan, "subjectivity" -- the capacity to speak and bear legal rights -- is not a pre-existing, natural status. To say it is "artificial", however, in no way implies that it is not "actual" or that it is unauthentic. If subjectivity is a fiction, it is the fiction in which we live.

In my reading, Hegelian thought is not, however, *anti* liberal, but *extra* liberal. Hegel agreed with liberalism that freedom is the essence of human nature and no state could be called just which did not preserve individual liberty. Hegel thought, however, that the liberal individual is too empty and fragile a concept to be a "subject" (*i.e.* to be capable of legal rights or language).

Classical liberal thought is, according to Hegel, internally inconsistent with respect to the concepts of individuality and rights. As Wesley Newcomb Hohfeld, that most mainstream of classical liberal jurisprudes, reminds us, rights can only be understood as relationships between and among people.<sup>21</sup> Similarly, language can only be understood in terms of society. Consequently, the autonomous individual in the state of nature can neither speak nor bear legal rights as liberalism claims. Freedom remains abstract and potential in the state of nature. It can only become actual through social relationships.<sup>22</sup>

Specifically, Hegel believed that a person can attain subjectivity only by being recognized as a worthy human being by another worthy human being.<sup>23</sup> Hegel's theory is, famously, a PHILOSOPHY OF RIGHT. Subjectivity is created through legal rights. But we neither claim rights for ourselves nor do we recognize rights of others out of duties imposed upon us. Rather, we are engaged in an ongoing process of legal creation. We grant rights to others out of love.<sup>24</sup> A claim to a right -- a relationship between and among legal subjects -- can only be actualized if recognized and respected by other subjects. Consequently, to become a subject, an abstract person (*i.e.* the individual posited by liberalism) must first seek to make another abstract person into a subject. This is an act of creation; love is alchemy. Love is the desire to be desired (to be

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21 WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN LEGAL REASONING* (W. Cook ed. 1919).

22 *See e.g.* [T]he system of right [*i.e.* property, contract, law] is the realm of actualized freedom." G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 35 (Allen W. Wood ed. & H.B. Nisbet trans. 1991) [hereinafter, HEGEL, *PHILOSOPHY OF RIGHT*]. This is one of the meanings of Hegel's (wrongly) notorious assertion that [w]hat is rational is actual; and what is actual is rational." *Id.* at 20. I discuss the Hegelian concepts of potentiality and actuality in Jeanne L. Schroeder, *Never Jam To-day: On the Impossibility of Takings Jurisprudence* 85 *GEO. L. J.* 1531, 1559-61 (1996).

23 *See* Michel Rosenfeld, *Hegel and the Dialectics of Contract*, 10 *CARDOZO L. REV.* 1199, 1220-21. "Property is . . . for Hegel a moment in man's struggle for recognition." SHLOMO AVINERI, *HEGEL'S THEORY OF THE MODERN STATE* 89 (1984).

24 Arthur J. Jacobson, *Hegel's Legal Plenum*, in *HEGEL AND LEGAL THEORY* 97, 110 (Drucilla Cornell, Michel Rosenfeld & David Gray Carlson eds. 1991).



recognized).<sup>25</sup> To love someone is to see in the beloved more than she is. This can have the magic effect of enabling her to give back more than she had.<sup>26</sup> That is, the lover requires the beloved to become more than she is in the hope that she might love him back and make him her equal. The Hegelian legal universe, like the heart, has the capacity for infinite expansion as we lavish our love, and grant more and more rights, to others.

Hegel's concept of the abstract person is based on Kant's. The abstract person in the state of nature has only her potential freedom -- her negativity -- and therefore, has no distinguishing or "pathological" characteristics which would make her recognizable. To be recognized by other subjects and have interrelationships, therefore, persons must form object relations (*i.e.* take on specific recognizable characteristics).

Property is the most primitive form of interrelationship from a *logical* matter. Note, I did not say historical or biographical -- modern property rights and capitalistic markets are relatively modern inventions.<sup>27</sup> Although the market is the logically simplest and most primitive form of erotic relationship, it was one of the last to develop as an empirical matter. Consequently, Hegel can be seen to be the converse of American law and economics theory of sexuality which also claims to see a similarity between sexuality and market relations. The utilitarian believes that sexuality can be reduced to economics,<sup>28</sup> whereas the Hegelian believes that markets are inherently erotic.

In property, subjects mutually recognize each other through a regime of possession, enjoyment and alienation of a desired mediating object.<sup>29</sup> Consequently, I have defined the Hegelian conception of subjectivity as intersubjectivity mediated by objectivity.<sup>30</sup> Property is a necessary moment in man's unquenchable search for recognition by others. Property is, therefore, desperately erotic and symbolic. We seek to acquire property not for its own sake, but derivatively, in order to achieve our true desire, the desire of the Other.

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25 "To love is, essentially, the wish to be loved." JACQUES LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS 253 (J. Miller, ed. A. Sheridan trans. 1981).

26 Miran Bozovic, *The Bond of Love: Lacan and Spinoza*, in LACAN AND LOVE, 23 FORMATIONS 69 (1994).

27 Consequently, the dialectic of property constitutes the first part of the PHILOSOPHY OF RIGHT and precedes Hegel's discussion of the family, civil society and the state. By primitive, Hegel is making a logical, not an empirical point. The reason why the development of the liberal state (which is necessary for the actualization of freedom) did not even begin until the late seventeenth century is precisely because the *logically* first requirement of subjectivity (private property) was *empirically* late to develop.

28 See *e.g.* RICHARD POSNER, SEX AND REASON (1992).

29 HEGEL, THE PHILOSOPHY OF RIGHT, *supra* note 22, at 84-103. Schroeder, *Virgin Territory*, *supra* note 20, at 133-40.

30 *Id.* at 58.

The three elements of property are to be understood not as an immediate relationship of the subject to an object, or an immediate relationship between two subjects, but as relationships between two subjects mediated by an object. The property right of possession is not the empirical fact that I hold a physical thing or otherwise claim an object. It is, rather, my recognition that the other has the right to possess and to exclude me from objects so that she can attain unique distinguishing characteristics. Similarly, the property of enjoyment is not my empirical expression of my freedom in enjoying objects. It is my recognition that the other has the right to actualize her freedom by enjoying the objects, even when her enjoyment necessarily impinges on mine. Finally the right to alienation is not the empirical fact that I can abandon an object, or give it to the other. Rather, alienation only truly becomes actualized when I exchange an object with another in contract. It is only at this juncture of the market that I finally meet the other as an equal and obtain legal subjectivity. In contract I not only recognize the other's rights of possession, enjoyment and alienation, but, by agreeing to contract with me, she (the other) in turn grants me the same rights. Paradoxically, it is only at this moment when we are joined in a common shared act of will, that we can now recognize each other as unique. This is yet another example of the doctrine of the identity of identity and difference which underlies the entire Hegelian dialectic.

### **B. From Hegel to Lacan.**

Lacan, who was deeply influenced by Hegel, thought that psychic subjectivity -- the ability to become a speaking actor capable of love -- is artificial. Like legal subjectivity, psychic subjectivity is intersubjectivity mediated by objectivity. It is created through a regime of possession, enjoyment and alienation of the object of desire among subjects. The technical term for this object is the "phallus."

Lacan explained how sexuality is created by the imaginary identification of the symbolic concept of the phallus with seemingly real biological analogs -- the male organ and the female body. A parallel conflation occurs in jurisprudence and legal doctrine -- the symbolic or legal concept of property is described through elaborate metaphors of the male organ and the virgin female body -- the fasces and the Vestal. This is an intuition or "abduction" which comes to us so easily as to seem natural. Indeed as a psychoanalytic matter, we may not be capable of speaking about property without resorting to phallic concepts.

### **C. Lacan: Sexuality as the Response to Loss.**



Lacan's terminology reflects the fact that sexuality is our response to the sense of loss called castration. Sexuality is, therefore, essential to subjectivity.

Lacan said that subjects are split.<sup>31</sup> As in Hegel, the proposition that subjectivity can only be achieved through the social (*i.e.* through law and language) creates a paradox. That which is most ourselves -- our subjectivity, our sexuality -- is simultaneously that which comes from the outside. It is that which is not ourselves. As we mature and are initiated into language and law and achieve sexuality, we first experience the sense of that we have lost something which we can no longer explain in words or images. This sense that our wholeness is lost, and that this loss has been imposed upon us by something outside of us is what Lacan calls "castration." That is, we can only achieve subjectivity -- be a speaking person or legal actor -- through others. We feel that we must have once been whole and unviolated, there was once an object which is now lost because "someone" has taken it away. Lacan calls the object which we feel has been lost in castration, the phallus. (This intentionally confusing and apparently masculinist terminology is designed to reflect the connotations of anatomy and psyche made in our misogynist society. If the masculine terminology is troublesome, it can easily be translated into the feminine metaphors of virginity and defloration, integrity and violation.)

We are "masculine" when we try to deny castration and "feminine" when we accept castration. The masculine pretends that he has and exchanges the lost phallus. In contradistinction, by recognizing that loss, emptiness and negativity is at the center of human experience, the feminine identifies with the lost phallus and is positioned as lack. By doing so the feminine becomes identified with radical negativity which is necessary for Hegelian freedom.

Sexuality is not anatomy. All humans take on both positions from time to time. Nevertheless, this purely "symbolic" concept of sexuality -- like the purely symbolic concept of property -- becomes mapped upon or "figured" by anatomy.<sup>32</sup> We will confuse (symbolic) sexuality with biology and use

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31 See *e.g.* ELIZABETH GROSZ, A FEMINIST INTRODUCTION TO LACAN 137 (1990).

32 "[A]natomy is what figures in the account: for me "anatomy is not destiny", but that does not mean that anatomy does not "figure" . . . , but it only figures (*it is a sham*)." Jacqueline Rose, *Introduction II* in JACQUES LACAN AND THE ECOLE FREUDIENNE, FEMININE SEXUALITY (Juliet Mitchell & Jacqueline Rose eds. Jacqueline Rose trans. 1985) 27, 44 (quoting M. Safouan) [hereinafter, LACAN, FEMININE SEXUALITY].

This account of sexual desire led Lacan, as it led Freud, to his adamant rejection of any theory of the difference between the sexes in terms of pre-given male or female entities which complete and satisfy each other. . . . But it must exist because no human being can become a subject outside the division into sexes. One must take up a position as either a man or a woman. Such a position is by no means identical with one's biological sexual characteristics, . . . .

biological imagery to describe sexuality. As a result, biological male persons are more likely to take on the masculine position and biologically female persons, the feminine.

For unexplained historical reasons, anatomical males are dominant in our society. As a result, we conflate what at first blush seems to be the more powerful position of sexuality -- having and exchanging the phallus -- with maleness. This is why Lacan calls this position the masculine. Because the masculine pretends to possess the phallus; we conflate the phallus with some part of the anatomy that men have, but women do not -- the penis.

The feminine position is that of being and enjoying the phallus. The feminine is that which the masculine exchanges. Consequently, the feminine is conflated with that which women anatomically have -- the female body.

Note, this is not a denial of the physical world nor of biological sexuality. It is an acknowledgement that conscious beings can never have direct access to our biology. The instant that we speak of, or envision, our sexuality, we are already interpreting it through the realms of the imaginary and the symbolic. Consequently, to Lacan, we cannot distinguish biological "sexuality" from social "gender." "Sexuality" is always already socialized -- symbolic.

**1. The Three Orders of Subjectivity.** According to Lacan, there are three psychic orders of consciousness which he called the real, the imaginary and the symbolic.<sup>33</sup> The imaginary is the realm of imagery, fantasy, meaning and complementarity. The symbolic is the cultural order of law and language, of signification and sexuality. The real is our sense that there is something beyond or prior to, the other two. The real is not the same as the natural world. Yet for

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Juliet Mitchell, *Introduction I* in LACAN, FEMININE SEXUALITY I, 6. That is:

For Lacan, men and women are only ever in language . . . . All speaking beings must line themselves up on one side or the other of this division, but anyone can cross over and inscribe themselves on the opposite side from that to which they are anatomically destined.

Rose at 49.

<sup>33</sup> See Rose, *supra* note 32, at 31. JACQUES LACAN, THE SEMINAR OF JACQUES LACAN. BOOK I: FREUD'S PAPERS ON TECHNIQUE 80 (J-A. Miller ed. J. Forrester trans. 1988); See also generally, GROSZ, *supra* note 31, at 10. In one of Lacan's last seminars, he uses the metaphor of a "Borromean Knot" to describe the relationships between these three orders. STUART SCHNEIDERMAN, JACQUES LACAN: THE DEATH OF AN INTELLECTUAL HERO 33 (1983); SLAVOJ ZIZEK, LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE 143 (1992).

Lacan constantly revised his complex and paradoxical concept of the three orders throughout his career. My discussion in this paper is not intended to be comprehensive but reflects a simplified account of late Lacanian theory.



many purposes it functions as though it were the natural world because the real includes our sense that there is a natural world. Consequently, for the limited purposes of this paper, I sometimes oversimplify and use the word "real" as though it meant the natural or anatomical. The real, however, also includes such concepts as God and death and everything else which is beyond ourselves. It includes the common frustration that one can not express one's feeling in words (the symbolic order) or in pictures (the imaginary order).

The real is, therefore, impossible<sup>34</sup> -- we experience the real as though it is something we have lost. It includes that which we feel we have lost in castration -- the false memory of completeness, of, for instance, a oneness with Mother which we feel we must have experienced as an infant. This is not really true because the real is necessarily created with the symbolic and the real.

By this I mean that any system of law (signification, the symbolic) and imagery (meaning, the imaginary) require boundaries. The real is the sense that there is something on the other side of the boundaries. The realm of the real is, therefore, only established by the erection of the boundaries at the moment of the creation of the imaginary and the symbolic.<sup>35</sup> Castration is the term for this process because we feel that it has deprived us of the real. In fact, however, the real was only created by castration.

**2. The Masculine.** The masculine position is the vain attempt to deny the castration which has already occurred. The masculine is not an attempt to *achieve* a sense of wholeness, but a false claim to have "it", whatever "it" is that will fill up the hole. This is done through simultaneously adopting two mutually inconsistent stories. On the one hand, the masculine subject tells himself: "Castration has occurred, but (thank God) it was not me who was castrated but someone else. I still possess the phallus. It must be the feminine who lost it." This position is untenable because deep in our hearts we all feel the reality of castration. Consequently, when confronted with castration the masculine must adopt a second strategy. The masculine now tells himself "True, I no longer have the original phallus, but it was not taken from me. Rather, I (retroactively) agreed to give it up to the symbolic order in exchange for a new

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34 The Real cannot be experienced as such: it is capable of representation or conceptualization only through the reconstructive or inferential work of the imaginary and symbolic orders. Lacan himself refers to the Real as 'the lack of a 'lack.'

GROSZ, *supra* note 31, at 34.

35 SLAVOJ ZIZEK, TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY 35-39 (1994).

object of desire."36 The masculine in this second mode is, therefore, the claim that no one object of desire is significant because it can always be replaced in exchange. In economic terms, the masculine claims to be indifferent between two objects. This, of course, is also untenable. If the masculine were indifferent to the object of desire, he would not desire it, he would not be so anxious to engage in exchange. As Hegel insisted, exchange is the actualization of desire, not indifference. As in Hegel, it is the moment of recognition in this imaginary exchange which constitutes subjectivity.

Of course, the masculine strategy can never be entirely successful. The phallus never really existed -- it is a retroactive invention to account for our sense of loss. The masculine claims to trade something it never had (immediate unity with the feminine as the phallic mother) in exchange for something that does not exist (immediate relations) in order to achieve something with no content (subjectivity).37 Men lie to themselves when they claim to possess the phallus when they merely have the penis. Every man in his depth knows he is castrated and that the object of desire is not within his grasp. Men lie to themselves and others when they claim to be indifferent to the phallic woman as the object of exchange. Exchange, only occurs because the masculine cares about nothing else.

Masculinity is, therefore, a type of failure (as is, of course, femininity). Each of the two masculine strategies are untenable when taken alone, but they are mutually inconsistent when taken together. Lacan, therefore, rewrites Sigmund Freud's concept of castration anxiety not as the fear of being physically mutilated, but the fear of having to confront one's own castration, or even worse, the fear that one will not be able to keep up appearances so that other men will learn that he is castrated.

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36 That is, the infant entering the symbolic world of language and law feels castrated by the function known as the Father. Masculine society allows the male child to adopt the fantasy that he is making a bargain with the Father. He will "consent" to his castration from the Phallic Mother (the Feminine) in exchange for access to empirical women's bodies in the future in physical sexual relations and marriage. In Lacan, men attempt to achieve recognition as subjects, speaking members of society, through the possession and exchange of the object of desire with other subjects, in the same way that, in Hegel, persons achieve recognition as legal subjects through the possession, enjoyment and exchange of property with other legal subjects.

37 I give *something in exchange for nothing* -- or (and therein consists its fundamental paradox) in so far as the incestuous object is in itself impossible, I give *nothing in exchange for something* (the 'permitted' non-incestuous object).



And so, subjectivity is a fiction. Specifically, it is the tale of the Emperor's New Clothes<sup>38</sup> -- a universal adult conspiracy that that which doesn't exist does exist and that the king (the masculine subject) has "it". But being fictional, or artificial, does not imply that subjectivity doesn't exist. The creation of subjectivity is the alchemy by which we make that which doesn't exist function.

At first blush Lacan's pessimistic account of exchange seems at odds to Hegel's optimistic one. Hegel's abstract person eagerly seeks a future exchange as the means of achieving a satisfactory subjectivity and the relationship of abstract right. Lacan's subject reluctant accepts an imaginary past exchange as an explanation for an unsatisfactorily hollow subjectivity and lack of immediate sexual relations. At further consideration, however, we can see that they represent the negative and affirmative moments of the same dialectic of subjectivity. Hegel emphasizes the fact that relationship occurs, while Lacan emphasizes the fact that relationships are always mediated and imperfect. But, this is necessitated by the Hegelian dialectic. If the subjectivity achieved by contract is a sublation of abstract personhood, then a moment of separation, and therefore, loneliness, must be preserved even within relationship.

**3. The Feminine.** The phallic object of desire exchanged by masculine subjects in the symbolic order is the feminine. The masculine is the fantasy that one can regain the whole lost in castration by finding the perfect mate who will fill the hole left by castration. The masculine form of desire is, therefore, eros. The feminine is, therefore, the mediatrix of subjectivity -- the third which men use to make themselves into subjects.

And so what is the feminine? First a caveat. The feminine as radical negativity has no positive content. *All* attempts to give positive content to the feminine -- such as cultural feminism -- are masculine fantasies, *i.e.* the imaginary. Nevertheless, there are certain things we can say about it. The Lacanian feminine is a different way of confronting the universal experience of castration -- it is another mode of failure. If we are masculine when we try to deny castration, we are feminine when we accept castration, loss and negativity.

It is a common error to assume that the proposition that the feminine is the acceptance of castration is a judgement that the feminine is inferior to the masculine. Instead, the feminine can be seen as superior in that it is more honest<sup>39</sup> and, therefore, stronger than the cowardly masculine which runs from

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<sup>38</sup> *Id.* at 11-12; Jeanne L. Schroeder & David Gray Carlson, *The Subject is Nothing*, 5 LAW AND CRITIQUE 93, 100-01 (1994).

<sup>39</sup> By identifying castration with the feminine, the masculine tries to pretend that women are incomplete men. But, as Ellie Ragland-Sullivan explains, the Lacanian interpretation is that it is men that are failed women. Ellie Ragland-Sullivan, *The Sexual Masquerade: A Lacanian*

the truth. The feminine must be repressed precisely because she is a reminder that the masculine is a lie.

The feminine acceptance of castration is the understanding that we are no longer and can never again be self-sufficient, complete and whole by ourselves. The phallic object of desire is our former integrity which we feel has been lost in castration but which, in fact, has never existed. No "thing" which we ever had, or could hold or exchange in the future could take its place. The feminine position can be, however, deeply depressing. Consequently, Lacan rewrote Freud's concept of penis envy not as desire to have the male organ, but as a nostalgic mourning for an imagined lost integrity.<sup>40</sup>

And so we can see, Lacan is not a restatement of the traditional misogynist imagery of the masculine as the active subject and the feminine as passive object. Rather, it is both an account of how this stereotypical imagery arises, as well as a subversive rewriting of this imagery. First, as I have already mentioned that although the masculine claims to be the position of the free acting subject, in fact, it is only the feminine which can actualize the negativity which is the essence of freedom and subjectivity. The masculine *claims to have* subjectivity, but the subject *is* the Woman.

Second, although the masculine's claim to have "it" enables him to speak and act as a legal subject, the masculine is, in fact, trapped in the symbolic order of law. The masculine only seems to act, but actually travels around in a circle. The masculine is totally caught up in the symbolic order. The masculine subject is not merely the subject of law and language, he is *subject to* law and language. The feminine, in contrast, is *subjected by* the symbolic order. The symbolic order tries to abject the feminine object by exiling her.

But by being located at least partly to the real, the feminine opens up the possibility of escape from the symbolic order (*i.e.* freedom). Accordingly Lacan argued that the feminine has a special access to the real which he called "jouissance". This is the ecstatic identification with, and enjoyment of the phallus, merger with the phallic mother and regression into the real. Consequently, if the masculine form of desire is eros, the feminine form is thanatos. Consequently, although it is true that the feminine, as the acceptance of castration, can be the position of inertia or depression, as Freud taught, it is the acceptance of loss which enables us to mourn. And it is only mourning which allows us to bury the dead, and move on. The impossible feminine is, therefore, simultaneously the possibility of freedom.

#### D. Sexuality and Anatomy.

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*Theory of Sexual Difference*, LACAN AND THE SUBJECT OF LANGUAGE 49, 62 (E. Ragland-Sullivan & M. Bracher 1991).

40 See JANE GALLOP, *READING LACAN* 148 (1985).



How does sexuality become linked to biology? We are unsatisfied with the symbolic because it is artificial, fleeting, incomplete and the cause of our castration. We desire the integrity and permanence of the real. Although the concept of the phallus is symbolic, the phallus can never be attained in the symbolic precisely because it is that which was lost in the moment of castration that created the symbolic. That is, the phallus is the real that the symbolic expels. Consequently, we need to get beyond the symbolic in order to get to the real. We try to do this in the imaginary order by identifying natural analogs (which seem "real") to stand in for the symbolic concepts. As in Hegel, our true desire is the desire of the Other -- the achievement of subjectivity through recognition. We desire the phallus derivatively as the mediatrix of subjectivity. But the phallus is unobtainable (lost) by definition. Our strategy is to pretend that it is some *obtainable* object (not the phallus) that we desire instead. We tell ourselves "if I could just possess . . . [fill in the blank: that handsome man's penis or his child, that beautiful woman's body, that fancy new car, that promotion, etc.] *then* I will be satisfied. This imaginary object, the "*objet petit a*" serves retroactively as the object cause of our desire.<sup>41</sup>

When the phallus is thought of as the signifier of subjectivity or that which the masculine has and exchanges, it is conflated with that which men anatomically have -- *i.e.* the penis -- and exchange -- *i.e.* women. When the phallus is thought of as the feminine, it is conflated with that which women anatomically are -- the female body.

### III. Applications in Law and Jurisprudence.

From a Lacanian standpoint, property is phallic. It is the creation of subjectivity with respect to the possession, enjoyment and exchange of an object of desire. Property, being legal, is of course symbolic. However, as with subjectivity, our desire to achieve the wholeness we call the real leads us to try to identify the symbolic with natural analogs. We are drawn, therefore, to identify property with the physical. Since property is sexual, we are drawn to apply the same anatomic metaphors to describe property that we use to describe sexuality. When we stand in the masculine position, we concentrate on the masculine elements of possessing and alienating and we confuse possessing and alienating with holding, exchanging and taking tangible things that remind us of the penis and the female body. Further, when we stand in the masculine position,

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<sup>41</sup> This idea of the imaginary object which takes a place in the real in order to serve as the cause of desire is called the "Object petit a". This is probably the most difficult and contradictory idea in all of Lacan's infuriatingly difficult system. For the very limited purposes of this paper, one can think of the *objet petit a* as the place where the three psychic orders overlap.

we tend to repress the feminine element of enjoyment. Under the masculine metaphor, losses of property are seen as castrations -- the taking of possession. We try to deny castration by preventing takings through equitable remedies, or by pretending that it can be cured through exchange (*i.e.* legal remedies).

But, whatever is repressed in the symbolic returns in the real. And so, a feminine phallic metaphor for property is also implicit, but usually hidden, in property discourse. (These metaphors are, perhaps most commonly heard in discussions of the environment. Indeed, the "word" pollution means violation and defilement in the sexual and ritual senses and was only extended to industrial waste in the nineteenth century.) The feminine metaphor for property concentrates on the subject's identification with, and ecstatic enjoyment of, property. It is that which we enter and enjoy and protect from invasion by others. Loss of property is seen as permanent, as loss of self, rape, violation, pollution. These are losses that can't be cured, only mourned.

Because the law and judging are psychoanalytically masculine, law tends to privilege the masculine metaphors and to repress feminine metaphors. Specifically, there is a strong tendency to describe property disputes in terms of one of the two masculine elements (possession and exchange) even when they involve the feminine elements (identification and enjoyment). Because the masculine position is the denial of castration (and the resulting necessity that all relations be mediated), there is also a tendency to try to reduce the trilateral mediated (symbolic) relationship of property (*i.e.* a legal relationship between two subjects mediated by an object) to an immediate (real) bilateral relationship.

Accordingly, when property is reduced to possession, it is not described in the Hegelian, symbolic concept of the right of one subject to exclude other subjects from his object of desire. Rather, it is described in terms of the seemingly real binary relationship by which one subject physically holds a tangible object in the way a man "possesses" his organ. Other subjects are irrelevant to this immediate physical relation.

This is obviously untenable because for something to be a legal right it must, by definition, be enforceable *against others*. Consequently, the masculine position alternately and inconsistently describes property in terms of the single element of exchange. But once again, in this discourse, exchange is not described in terms of the trilateral symbolic relationship of intersubjectivity mediated by objectivity. Rather, the significance of the object is minimized so that exchange can be described as an immediate binary relationship between two subjects. Probably the most obvious example of this is Hohfeld's insistence that property does not necessarily relate to objects at all -- a position widely accepted in contemporary property scholarship. A variant of this is the cliché (or more accurately, canard) that the Uniform Commercial Code has not merely eliminated the object from property, but has disaggregated property entirely into



an arbitrary "bundle of sticks."<sup>42</sup> Another variation of this is the concept of indifference prevalent in the American law and economics movement which reduces property to its "exchange" value. That is, in the perfect market, objects lose all independent significance because exchange continues until everybody is indifferent between owning the object itself or its exchange value embodied in its market price. In its most extreme form this approach mimics the second masculine strategy for confronting castration, *i.e.* the assertion that one has not been castrated because one has (retroactively) given up the phallus in exchange for some promised future object of desire. And so, Judge Richard Posner analyzes all awards of damages in terms of contract. This implies, in the case of tort, that the consent of the victim requisite to contract is deemed to be given retroactively and constructively when he is awarded damages in an amount which makes her indifferent to his loss.<sup>43</sup>

Masculine law further tries to deny castration and the feminine necessity of mediation by repressing the feminine elements of property. It does this in several ways. First, there is a strong tendency to ignore or downplay the feminine element of enjoyment. Property disputes do not always involve the right of possession of a single object (*i.e.* which of two claimants is entitled to the object of desire, who can exclude whom?) or alienation/exchange (has one party agreed to transfer her property to the other, what are the terms or extent of such a transfer?). Sometimes, the dispute concerns defining the borders of inconsistent uses of different objects as in, for example, environmental nuisance.<sup>44</sup>

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42 See Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994) and Jeanne L. Schroeder, *Death and Transfiguration: The Myth That the U.C.C. Disaggregated Property*, 69 TEMPLE L. REV. 1281 (1996).

43 See Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L. J. 1335, 1356-61 (1986). Coleman and Kraus recognize that Judge Posner does not state this view expressly, but argue that it is implicit in and required by the internal logic of his argument.

44 For example, imagine that a consumer has a spring on her land. A widget factory is located next door. When the widget producer enjoys his factory by making widgets, industrial waste flows into the aquifer making it impossible for the consumer to enjoy her property (*i.e.* the spring) by drinking her water. The consumer's enjoyment also reciprocally (but not symmetrically) affects the producer's enjoyment in the sense that insofar as she has an enforceable legal right to clean water, the producer is hindered in his ability to enjoy his factory. We, as a society, must decide the respective borders of these two parties competing but necessarily inconsistent rights to enjoy their respective objects of property. And yet, the predominant tradition for analyzing just such environmental issues--founded by Guido Calabresi and Douglas Melamed -- insists that the parties are disputing the possession, or terms of exchange, of a single object of property which they call an entitlement. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). I discuss this extensively in Jeanne L.

Second, property jurisprudence tends to repress the feminine element of identification with the object of desire. Interference with property rights are analogized to castration -- in the language of the U.S. Constitution, the "taking" of a thing. In the masculine denial of castration, castration can be cured by giving back the thing taken (or an identical substitute) and restoring possession, or claiming to be indifferent to the object taken and to be satisfied with its monetary value in exchange. Traditional American notions of damages and takings do not take into account the sense of loss of self in addition to loss of property. Who has not heard a victim of theft who has described the crime in terms of feeling violated?

Third, the law has a tendency to represses the feminine as the silent or absent third. I have already discussed how the identification of property with possession or exchange tries to reduce the trilateral mediated aspect of property into a simple binary immediate relation. Property law also ignores the fact that property disputes can never be limited to the two litigants. Rather, property always implicates other silent and absent third parties, such as, at the minimum, the respective creditors and heirs of the parties.

#### IV. The Phallic Woman as the Not Yet.

Lacan's theory of human nature -- with its castrated masculine split subjects and its non-existent women -- is often seen as tragic, or pathetic. In a traditional reading of Lacan, the phallus -- in the sense of unmediated relationship -- is forever lost in the process known as castration.

But there is an alternate, heroic, way of reading Lacan. Lacan's notion of castration as the law of prohibition turns the impossible into the forbidden, and therefore, the theoretically possible. Law presupposes its own transgression. This is Hegel's theory that limitation necessarily requires "the ought" -- the transcendence of the limit. It is precisely the negativity at the heart of subjectivity which causes us to desire, enables us to love, frees us from necessity and constitutes human nature as pure potentiality.

It is only the feminine acceptance of castration that enables us to confront and understand castration. From the feminine perspective we learn that the term "castration" is a misnomer. It is not a loss, but the very condition precedent of freedom. Perfect immediate relationships are not a condition which we once had but have lost. We only became subjects with the capability to imagine and desire relationship when we entered the symbolic order of law and language -- that is, when we were castrated. That is, castration is not the barrier that keeps us from love and desire. Rather, it is the separation of castration that causes us to desire.

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Schroeder, *Three's a Crowd: Calabresi and Melamed's Repression of the Feminine* [unpublished manuscript 1997].



The search for immediate human relations is, therefore, not the tragedy of the forever lost, but the hope of the not yet.

Only the feminine in her radical negativity can truly stand in for the freedom that is the heart and sole of human nature. This is why men only claim the position of subjectivity. The Lacanian subject is a woman.<sup>45</sup> True human freedom can, therefore, only be actualized through the creation and recognition of legal rights for women in their sexual specificity *as women*.

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<sup>45</sup> See SLAVOJ ZIZEK, *THE INDIVISIBLE REMAINDER: ESSAYS ON SCHELLING AND RELATED MATTERS* 114 (1996).





**Unspeakable Subjects, Impossible Rights:**  
**Sexuality, Integrity and Criminal Law**

**Nicola Lacey\***

As Michel Foucault famously observed, the Nineteenth Century's construction of sexuality as an unspeakable subject paradoxically generated an extraordinary amount of talk about sex. This paper engages with another paradox in the same field: for my main thesis will be that criminal law - in particular the criminal law which purports to regulate sexual behaviour - has, in an important sense, very little to do with sex at all.

It is the relationship between sexual offences and the sexed body which is going to form the main object of my analysis. My choice of topic is premised on a number of changes in the cultural and intellectual environment over the last twenty years which have altered the potential contribution to be made in this field. Unfortunately, sexual abuse of various kinds, and the denigrating attitudes towards heterosexual women, gay men and others which feed and legitimise those abuses, still constitute a major social phenomenon. Nonetheless, there has been a genuine change in the cultural climate in Britain towards the acknowledgement and critique of a number of such abuses which were invisible and even nameless a generation ago. Child abuse, marital rape, 'date' rape, homosexual rape, domestic violence and sexual harassment, notwithstanding the many problems which remain, are all instances of the kind of change to which I am alluding. In the legal sphere, the new American tort of sexual deceit is reconstructing sexual power not so much as an offer which can't be refused as one which can be very expensive if it isn't fulfilled... In each these has areas, questions formerly thought of as matters of private responsibility have begun to be recognised as matters of public concern. It is therefore appropriate to think about why, notwithstanding significant legal reforms, criminal law still falls so far short of an adequate response to these phenomena.

To date, feminist scholarship in the area of sexual offences has been primarily concerned with the inequities (or perhaps iniquities) of the prosecution and trial process, and with what these inequities reveal about the legal construction of female and male sexualities. In this paper, rather than focussing on specific

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features of the criminal process, I shall address the question of how criminal law itself constructs the wrong of rape. I shall argue that the inadequacy of the sexual offences identified by feminist critics flows at least in part from the law's impoverished conception of the value of sexuality. In making my argument, I shall draw on recent work in feminist philosophy which engages with the place of the body - or, more properly, of corporeality - in social theory. I shall suggest that the impoverished evaluative framework of the sexual offences relates to their very partial idea of the body, and to the absence of affectivity from criminal law's doctrinal scheme. This analytic argument leads, in the final section of the paper, to a set of normative questions. To the extent that criminal law replays an unsustainable mind-body dualism and a downgrading of the importance of the bodily and the affective, could this be corrected? Could corporeality be inserted within, spoken by, legal discourse? And what would be the implications of such an incorporation?

### Re-reading criminal law's construction of sexuality: sex in the body of the law?

To begin to address these questions, I now have to spend a little time introducing you to, as it were, the relevant body of criminal legal scholarship. In the arena of sexual offences, the most productive scholarship to date has read criminal law as a powerful social discourse from which much can be learnt about the social order of which it is a part. It interprets criminal law not only as an index of powerful social attitudes about the form of behaviour in question but also as a discourse which produces certain kinds of sexual subjects. How, then, does criminal law construct sexuality in its various senses? In particular, what assumptions about normal and abnormal sexuality does criminal law embody?

In the criminal law of England and Wales, a relatively clear picture emerges: criminal law produces, both explicitly and implicitly, a norm of adult heterosexual sexuality, and of penetrative heterosexual sexual intercourse as the paradigm of normal sexual behaviour. Whilst certain forms of male heterosexual behaviour have gradually gained some implicit legitimacy, this change has arrived late and is extremely partial. This is reflected by features such as differential age limits and offences specifically addressing male same-sex sexual conduct. As for lesbian sexuality, it enjoys the dubious privilege of literal legal unspeakability. We can read off a conception of abnormal sexualities - and perhaps still of sexual taboos - which are structured around the axes of bodily sex, age, relationship, and place: normal sex happens in the private sphere; it is not part of an overt commercial transaction; it happens between persons with differently sexed bodies; of certain ages, within certain kinds of relationships. Crucially, both the 'normal' and the 'deviant' sexualities of those with male and female bodies are very different: for example, the heterosexual male who stalks the sections of the Sexual Offences Acts is a creature who penetrates, who



procures, who threatens and coerces; with consummate economic rationality, he lives off the earnings of prostitution. Whilst women are occasionally allowed to step into the domain of action and control - exercising control over prostitutes and, curiously, living on the earnings of male prostitution - their predominant role is one of passivity and victimisation.

The resources for this kind of reading are as rich as they are diverse. They lie in the structure and substance of offences, with their messages about normal sexualities and the relative power and autonomy of different sexual subjects. They lie in the details of linguistic formulation - references to 'unnatural intercourse' or the construction of different subject positions in relation to sexual conduct as in incest - men have sex: women permit men to have sex with them. They lie also in what we might call the semiotics of statutory frameworks - the elision of prostitution and homosexuality in the Wolfenden Report is perhaps the most spectacular example.

Building on the insights of this scholarship, I now want to pose a further, distinctively philosophical issue. It is an incredibly obvious question, yet one which, as far as I am aware, has occupied almost no attention in criminal law theory. Reading across and between the lines of the sexual offences, what can we tell about their implicit conception of what is valuable about sexual experience, sexual expression, lived sexuality? Conversely, what is their implicit view of abuses of sexuality?

#### Lived sexuality and sexual offences

The question of what it is which is valued about sexuality as a field of human experience is one to which it would be reasonable to expect to find some clues in the structure and substance of criminal law. It is, after all, a prime tenet of criminal law in supposedly liberal societies that it exists to protect certain especially valued interests. Even granted that criminal law is primarily concerned not so much with rights as with wrongs, it would be difficult to conceive of wrongs without some initial conception of what is socially valued. In a modern liberal system, the most obviously relevant interest - and one which forms the normative framework for many academic commentaries on the sexual offences, is sexual autonomy - the freedom to determine one's own sexual experiences, to choose how and with whom one expresses oneself sexually.

This is not to say, however, that the sexual offences in fact express this liberal ideal. A reading of the diverse array of such offences, scattered across several statutes of the post-war era, suggests on the contrary that criminal law evinces only an uneven commitment to sexual autonomy. Certainly, the modest liberalisation of criminal law, particularly in the field of male homosexuality,

has been informed by the idea of autonomy and an associated (though markedly spatialised) notion of privacy. Yet in so far as it is possible to infer a commitment to any other positive values, these have to do with maintaining a rather nebulous idea of social order and upholding a set of moral conventions historically associated with Christian sexual mores. The vast majority of sexual offences amount, in short, to public order offences. What is conspicuously missing is any sense of why sexuality matters to human beings in the first place.

Leaving aside these apparently public order offences and special cases such as offences relating to children, where the normative framework of autonomy is to some extent inapt, I want now to focus on the one offence which does appear to proceed from a commitment to sexual autonomy: that of rape. The idea of autonomy is one which, it should be noted, assumes rather than explicates what is valuable about sexuality itself. Liberals, of course, value autonomy for its own sake: its discrete value lies in its centrality of self-determination to the meaningful pursuit of human life. Yet to the extent that criminal law respects or restricts autonomy, it inevitably makes judgments about the nature and content of a subject's autonomous choices: autonomy, therefore, is filled out by other values and interests. It is well known, for example, that the history of the offence of rape expresses a commitment not so much to sexual as to proprietary autonomy: its essence was damage to the proprietary value of virginity to an owning male rather than any recognition of a woman's interest in her own sexual freedom. Even modern commentators on the law of rape sometimes argue that it protects a proprietary interest in sexuality: a woman or man has a right in her or his body much like that in other property, and it is the right freely to dispose of this odd form of property which rape violates. As you will see from the definition of rape which I have circulated, the core of the legal wrong lies in the lack of the victim's consent: it is this which turns sexual intercourse into the conduct element of rape. Arguably, this definition coheres with the view that offence of rape protects an interest which the (disembodied) subject has in a rather curious object - her body. This understanding of rape, and its relationship to ideas of autonomy and property, is something to which I shall return shortly.

There is little trace in criminal law, then, of those things which social discourses of sexuality mark as its values and risks. Ideas of self-expression, connection, intimacy, relationship - those things which surely underpin contemporary understandings of what is valuable about sex - are absent. Conversely, violation of trust, infliction of shame and humiliation, objectification and exploitation find no expression in the legal framework, albeit that they surface with increasing insistence in argument at the sentencing stage. Why should it be that the criminal law dealing with sexuality has such an oblique relationship with social attitudes about what is valuable about sexual experience and what is wrong with



or abusive about certain forms of sexual behaviour? To suggest an answer to this question, I shall now take you on a small excursion into the novel and perhaps unfamiliar terrain of feminist philosophy.

### Feminist critiques of dualism: a new body of knowledge?

In a wide range of recent philosophical work, it has been argued that the Cartesian tradition in western thought has proceeded on the basis not only of a dualism between mind and body, but also of a privileging of mind over body. From a feminist point of view, there are two important arguments here. The first points to the relative absence or invisibility of the body in philosophy and social theory. It traces the implications of the primacy of the mental and the rational for women in a culture which also associates masculinity with the mind and with reason. The second, conversely (but consistently) points to the lingering relevance of the repressed body: since persons, as legal or other subjects, indeed inhabit bodies (just as we have emotions), implicit assumptions about the embodied and affective aspects of life must inform social practices. Hence the project is one of reading between the lines to discover what kinds of bodies are, to borrow the Foucaultian term, 'normalised' and inscribed in social discourses such as law. For only subjects with normal bodies can claim full legal privileges, including, on occasion, the privilege of corporeal invisibility: In other words, having a 'normal' body allows a subject to fit the culturally privileged model of the rational choosing individual.

The feminist argument, of course, is that the normal body is the male body, and that the female body is constructed as abnormal, disruptive, problematic. This visibility or intrusiveness of the female body marks the cultural association of the feminine with the corporeal, with disorderly materiality rather than with controlled form. Woman becomes the sex which bears the burden of physicality, sustaining man's position as the rational individual in just the way that women's private labour sustains man's public status. The implication of this elision of the feminine with the corporeal is rather well evoked by the concept of hysteria, which ties etymologically a condition of both pathology and irrationality to the physical possession of a womb.

Feminist philosophers like Elizabeth Grosz, Luce Irigaray and Judith Butler have thus argued that we need to reconstruct our view of the world so as properly to accommodate the inevitably corporeal aspects of human being. This reconstruction is no easy task, for it has to re-place the body in ways which escape both mind-body dualism and a materialist or idealist reduction from one pole to the other - mind to body or vice versa. Clearly, such a project cannot leave the concepts of mind and body, as it were, intact: nor can it easily rely on the language of mind and body - a language which is deeply embedded in

western categories of thought. Accordingly, these philosophers have sought distinctive linguistic terms and written styles in which to express their ideas, speaking the unspeakable by transgressing conventional borderlines as in the idea of 'body-writing'.

Accompanying this effort to rethink and write the body, feminist philosophers have also been concerned to accord the body a certain priority. There is, of course, an apparent paradox in this feminist discovery of the germ of intellectual liberation in the very body which has so often been the basis for the denigration of women. The idea that the shape of women's lives is determined by the shape of our bodies is precisely what feminism has attacked, and what the concept of gender as social construct has sought to undermine. Yet in so far as gender difference continues to be mapped rather consistently only differently sexed bodies, it has begun to appear that the issue of the body is one which feminism cannot, after all, spirit away. There are thus some persuasive strategic reasons for embracing the paradoxical feminist espousal of the sexed body. For corporeality is the dominant framework of analysis, women's bodies - indeed many different kinds of bodies - are put in the frame, and sexual (as well as other bodily lived) differences are placed at the centre of the philosophical agenda.

The trick which has to be pulled off, of course, is the reinsertion of the body without a return to an essentialist, fixed view of sexual (or other) difference. This entails that sex as much as gender must be understood as a social construct - a concern which is nicely expressed in the title of Grosz's recent book, Volatile Bodies. A yet more radically constructionist understanding of the sexed body is Judith Butler's idea of gender as performance or masquerade - a process most vividly played out in the practices of transvestism explored in her book Gender Trouble. The corporeal frame within which gender is performed is strongly emphasised in Butler's more recent book whose title - Bodies that Matter - neatly encapsulates both her analysis and its political implications. Analytically, bodies are actively materialised through iterative practices of citation within established cultural discourses such as law. This means not only that such practices give meaning to bodies but also that they shape the powers and capacities of different bodies. Politically, this process of cultural materialisation produces some bodies which matter, and some which do not. Another striking example is Luce Irigaray's lyrical mediation on the role of feminine embodiment in the generation of distinctive sensibilities and knowledges: the idea of knowledge as embodied here disrupts the terms of a conventional mind-body dualism.



Before moving on, I want to note one important danger with this stream of scholarship. It derives from the constant risk of reaffirming an untenable mind-body dualism in the attempt to reassert the importance of corporeality. To deconstruct the mind-body dichotomy and to assert the need to prioritise the body sounds, after all, like wanting to have one's cake and eat it (perhaps a reasonable enough desire for anyone concerned with the corporeal...) But the real importance of the debate lies not only in the emphasis on the sexed body as social construct but also in its relationship to the deconstruction of yet another powerful dichotomy: that between reason and emotion. The core of the argument is thus not about the body as a 'thing', but rather about about the inevitably corporeal frame through which affective and intellectual life is lived. As we shall see in relation to sexual offences, it is the positioning within social theory of the affective and intellectual as much as the physical aspects of human embodiment which is at issue.

#### Autonomy, corporeality and the criminal legal subject

I imagine that many of you are now impatiently asking yourselves what on earth the relevance of these philosophical debates is for criminal law. I hope that I can now assuage your impatience by posing a few salient questions. To what extent does mind-body dualism and the privileging of the mental over the material realise itself in criminal law doctrine and practice? In what ways, if any, is the body represented or implied in criminal law categories? The arena of sexual offences is a particularly powerful one in which to explore these questions. This is not only because sexuality is an area of human experience in which the body is implicated, but also because sexual offences are unusual in that they lift the veil of legal neutrality. They explicitly construct subject positions specific to differently sexed bodies: only men, for example, can perpetrate rape in English law. Earlier, I suggested that the inadequacy of rape law derived from its impoverished conception of sexuality. I now want to argue that this has to do with two discrete but related factors: first, the general conceptualisation of legal subjects as rational and disembodied individuals; and second, rape law's underlying notion of sexual autonomy. Each of these issues relates closely to the feminist critique of mind-body dualism just canvassed.

Let us examine first the idea of the criminal legal subject. The paradigm legal subject is defined in terms of a certain set of cognitive capacities combined with the power to control one's behaviour. What is at issue here is therefore the mind: the embodied aspects of human life are in general not acknowledged as either important or problematic. We see this reflected very clearly in the key doctrinal question in criminal law: what justifies the imposition of criminalising power on the individual? This is answered in terms of a conception of responsibility which is both rationalist and mental; criminal responsibility depends on the capacities

of understanding, reason and control. The binary division of the conceptual framework of criminal liability into conduct and fault elements, traditionally expressed in the telling labels, 'actus reus' and 'mens rea', posits a strong mind-body dualism, and the doctrinal focus on 'mens rea' places the argumentative fulcrum of many cases on questions about the cognitive or volitional capacities of the legal subject: in the normal subject, the mind is master of the body. To the extent that feminist philosophers are correct in assuming that physicality is associated with the feminine, then, we could argue that the criminal legal subject is implicitly marked as masculine.

In criminal law, the critique of mind-body dualism therefore has its most obvious applications in relation to the binary division between actus reus and mens rea. In offences such as rape, however, a 'mental' element is part of not only the mens rea but also the actus reus: whilst the defendant's lack of belief in the victim's consent is part of the mens rea requirement, victim's lack of consent itself is part of the actus reus. Hence the contemporary debate about mind-body dualism and the privileging of mind over body become relevant to the very constitution of criminal wrongs. This brings us to the second factor which explains the inadequacy of rape law: infringement of sexual autonomy as the core idea underpinning the wrong. As I have shown, feminist philosophers' entry into the mind-body dualism debate has focussed upon the sexual marking of the mind as masculine and the body as feminine, and the hierarchisation of mind over body. The body, they argue, is repressed within western metaphysics, and this repression is replayed in social institutions and categorisation systems. To the extent that this critique is applicable to the constitution of criminal wrongs therefore, we would expect to find either a predominantly mentalist construction of the wrong in question, or at least an impoverished conception of its embodied or affective aspects. If the incorporation of the corporeal aspects of human existence is attenuated even in sexual offences - where ideas of wrongdoing are most insistently inscribed upon different bodies - this would be persuasive confirmation of the feminist hypothesis about the repression of the body in western social practice.

And, as we have seen, the idea of wrongdoing communicated by the offence of rape is indeed a peculiarly mentalist, incorporeal one. Its essence lies in the violation of sexual autonomy understood as the right to determine sexual access to one's body. Thus rape amounts to something between expropriation of a commodity and violation of a will. The ultimate trespass on the liberal legal subject's sexual personhood is that his sexuality is appropriated without his consent. To date, feminist scholars have focussed their critique of the role of consent in rape law on intractable problems about the conditions under which consent is 'real' or meaningful - in particular the relevance of contextual factors



such as unequal power relations between the parties - and on its implications in centring attention at the trial on the victim's rather than the defendant's conduct and credibility. Whilst I am in broad agreement with this critique, my own argument is a different and, in some ways, more fundamental one. For it is that non-consent as the core of rape misrepresents the real wrong of rape, in that it displaces the embodied and affective aspects of the offence.

As in the best murder mysteries, however, the body is generally somewhere to be found, and it would be quite false to suggest that it finds no place in the court room or the criminal process. As the empirical studies of rape trials show all too clearly, it is very much the body which is in question: the mental legal issues of consent and belief are sought to be proven in terms of a set of inferences about bodily submission and indeed pleasure which threatens to turn many rape trials into what Carol Smart has memorably called a pornographic vignette. The discursive practices which materialise bodies in rape trials are not ones which any liberal would want to commend, and this should remind us that merely 'reprioritising or reinserting the body' is hardly a panacea from a feminist or any other politically progressive point of view.

This insight is reinforced when we consider the images of the body produced by criminal law itself. The explicit images evoke once again the murder mystery genre, consisting as they do in dismembered body parts on which I shall accordingly refrain from dwelling. The implicit picture is yet more significant. Ngaire Naffine has pointed out that the implied body of the criminal legal subject is essentially the bounded body which finds expression in Kantian philosophy: the emphasis on cognitive and volitional capacities of control in the construction of criminal responsibility cashes out in terms of an image of the self-contained and continent body - a body which is not breached, penetrated or invaded. This image of bodily normality is one which informs the construction of the bodies of gay men and all women, of small children, the disabled, the elderly, as exceptional and as marginal to legal subjectivity. It is an image of the body as territory, in the sense of both bounded space and property; divorced from both reason and emotion, bodies are boundaries which separate autonomous individuals rather than aspects of lived subjectivity within which subjects relate to one another. This atomistic vision marginalises relational values which one might hope to see criminal law seeking to protect.

What of the other aspect of the wrong of rape which I have argued to be obscured by the doctrinal framework: its affective dimensions? Certainly, the emotional damage which flows from the embodied experience of unwanted, violent or otherwise abusive sex has increasingly found its way into criminal justice practice. It operates as informal means of grading the seriousness of the

offence, albeit as often in terms of mitigation of the offender's culpability as of the recognition of the victim's experience. In other areas of law, the emotional meaning to be given to physical or indeed mental or economic experience has gradually come to be recognised for example, in the law of torts' recognition of nervous shock, and in the place of self-esteem as grounding the wrong of defamation. Yet the language of embodied existence - of pain, shame, loss of self-esteem, the sense of violation and objectification - find no place within formal legal categories: nothing in those categories invites the victim to construct her testimonial narrative in the terms which empirical research suggests would best relate her experience. At the level of doctrinal construction of criminal wrongdoing, affective experience is, if not absent, more or less invisible behind the veil of rational and abstract legal subjectivity.

Would it be advantageous, in feminist terms, to attempt to reframe criminal law so as to reflect a richer conception of the wrongs it seeks to proscribe? Specifically, should we try to reconstruct criminal law in terms which express the corporeal aspects of both criminal wrongs and criminal victimisation, and which provide a framework within which victims' narratives would be less constrained and distanced from their embodied experience than is the case at present? Some tentative responses to these two questions occupy the final section of my lecture, to which I now turn.

### Reinserting the body: from autonomy to integrity?

I have suggested that the primary good which a liberal theory of criminal law would expect the sexual offences to respect is that of sexual autonomy. This idea of what is at issue in the area of sexual wrongdoing is one which expresses precisely the elevation of mind over body to which feminist criticism has drawn our attention. But is it possible to find an analytic and normative framework within which to rethink the sexual offences - one which might allow repressed corporeality to be thought and spoken, and which accords the embodied aspects of human existence their proper place?

In her most recent work, feminist legal theorist Drucilla Cornell has argued for the importance of what she calls the imaginary domain. The imaginary domain generates the psychic and political space within which sexual equality might be realised. Taking one step back from the quasi-contractual starting point of much recent political theory, Cornell focuses on those conditions under which a human being can pursue her life project of becoming a person. These conditions, Cornell asserts, include the psychic space in which each of us can imagine ourselves as whole persons, and the core of a substantial liberalism is the political and legal guarantee that this chance will be equally open to all.



Cornell's imaginary domain consists in three elements: bodily integrity, access to symbolic forms sufficient to achieve linguistic skills permitting the differentiation of oneself from others, and the protection of the imaginary domain itself. Central to each of these elements is the fact that a crucial part of existence for all humans is our status as sexed and embodied beings: without access to the means of expressing one's sexuality, and of having that sexuality accorded such respect as is consistent with a similar respect for others, one can never have the psychic space to pursue the project of personhood. For one is barred from the identification with one's sexual imago which is central to the possibility of imagining oneself as a whole being, worthy of respect and capable of self-esteem.

Might the notion of sexual integrity which we can derive from Cornell's argument constitute a better analytic peg on which to hang our framing of sexual offences than the mentalist conception of autonomy? Might the idea of integrity, as developed by Cornell, put the bodily and affective aspects of sexual life more directly in issue? Granted, influential feminist and liberal analyses have shown that the idea of autonomy can be reconstructed in positive terms. These focus on the capability of persons to realise their life plans as well as on formal choice and the negative freedom not to be interfered with. But the emphasis here has tended to be on the provision of goods and resources external to the person. Whilst autonomy can in principle encompass the body, the history of the concept of autonomy conduces to the body's concealment. This is because of its close association with the dominant image of the abstract, choosing subject. The idea of integrity, by contrast, immediately invokes the notion of different layers and levels of existence. It is part of the project of becoming a person to bring these different layers into some workable relation to one another. Integrity embraces both physical integrity and the affective sense in which access to bodily or sexual integrity also depends on a host of social and psychic conditions. These range from adequate sustenance and medical care through to the conditions of respect for differently embodied subjects, different sexualities. It invites the incorporation of implications of sexual abuse such as shame, loss of self-esteem, objectification, dehumanisation. These are, of course, features central to the emerging social understandings of the wrong of sexual assault, and ones which have led feminist legal scholars like Robin West to equate rape with 'murder of the spirit'. When combined with the emphasis on personhood as project - as a process of becoming which has an imaginary dimension and no definite end - the idea of integrity promises to escape the dangers of essentialising a particular conception of the body. It conduces rather to reflection on the conditions under which a multiplicity of bodies and sexualities can be lived by full citizens.

The right to bodily integrity which Cornell advocates is, in one important sense, impossible: it is not something which can be realised or determined institutionally; rather, it operates as a vision which generates both individual ideals and critical standards for the assessment of existing legal and political arrangements. There is an asymmetry in the imaginary domain: it cannot be captured or realised by institutions, but it can be killed or closed off by them. The vision of sexual integrity is at once a necessary condition for the ongoing project of personhood and an impossible ideal which forms a motivating horizon in political rhetoric.

It is interesting to consider, nonetheless, what a rape law framed around the ideal of sexual integrity as opposed to sexual autonomy would look like. The most obvious change would be a move away from the emphasis on lack of consent as the central determinant of sexual abuse. Rather, it conduces to a more complex sexual assault law which specifies particular conditions under which coercive, violent or degrading sexual encounters should be prohibited. This is not to say that the value of sexual integrity would direct a very great reliance on criminalisation as a mode of protecting the imaginary domain. On the contrary, criminalisation is likely to be an effective defender of the imaginary domain at a symbolic rather than an instrumental level. Furthermore, though lawyers are inclined to lose sight of this obvious fact, the most important conditions for sexual equality and integrity lie in cultural attitudes rather than coercive legal rules.

A rethinking of the philosophical framework of criminal law in terms of a shift from autonomy to integrity might prompt some fruitful ideas, then, for reshaping the law of sexual offences. Though I have not had time to pursue the argument, I think that the same might well be true in relation to non-sexual offences of violence. I do, however, want to canvass one important reservation. I referred earlier to the bounded conception of the body which feminist scholars have argued to haunt criminal law. Might a reassertion of the value of bodily and sexual integrity serve precisely to reaffirm this insulated vision of the body, with excluding consequences for other bodies? This is of particular concern in the light of the power of another sexualised dichotomy: that between form and matter. Feminist theory has traced the association of the feminine with matter rather than determinate form, and has associated the fear of woman with images of incontinence, flow, viscosity which are connected culturally with various female bodily traits. Whilst the flows associated with the male body have been interpreted in terms of potency or, in Mary Douglas's famous term, purity, menstrual blood in particular has, in many traditions, represented danger,



disorder, contamination. In the context of this cultural history, the association of integrity with physical wholeness is therefore a dangerous one.

To evade these dangers, two aspects of Cornell's account need to be emphasised: first, the idea of integrity as project rather than as end-state; second, the link between bodily integrity and psychic and social space. The possibility of the continuing search for integrity depends precisely on the multiplicity of socially endorsed images of bodily integrity. Understood in this way, the idea of integrity might have the power to disrupt the implicit construction of the masculine, white, able-bodied, heterosexual body as norm. A move to the conceptual framework of integrity, like the feminist reassertion of corporeality, might serve productively to put sexual and other embodied differences at issue. It might open the path towards both a more inclusive sexual politics and a richer understanding of sexual harms.

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Joint custody is both the result of this gender neutral model and of the "best interest of the child" clause, which has replaced in jurisprudence the tender age clause. The best interest criterion culturally and symbolically legitimates the symmetry of parental roles and figures. Of course, being an empty clause, it can well be interpreted in favor of custody to mothers. But the emerging dominant interpretation of this criterion, both in European jurisprudence, in public debates and in legal and psychological literature, points to its being better fulfilled by joint custody. There is a convergence here between psychological theories, fathers' rights movements, the mass media extollments of the virtues of new fathers, and conservative campaigns on the fundamental importance of the role of fathers for a good society, and viceversa the disorders caused by single parent families, the single parent being the mother (the last example of this being the Promise Keepers march in Washington). This convergence leads to a redefinition of the child's interest as her right to continued relationships with her father, while fathers' rights towards their children are reinterpreted as "natural" rights. Since children usually live with mothers, and fathers do not claim otherwise, joint custody results in increased control on their part on the mothers' lives<sup>1</sup>, through control of the children. In many countries, and in Italy there are explicit requests in this sense, the adequacy of a parent is increasingly being measured by her willingness to grant ample access to children to the other parent.

What is today denounced and criminalized is not so much having children outside of marriage, but having children outside of a stable relationship with a male partner. The model of the normal family is increasingly predicated, as Fineman notes, on the heterosexual, and therefore on principle horizontal, relationship between two adults, while vertical relationships of mutual dependence are downplayed or not considered as constituting a family. The privileging of equal, contractual, relationships leads to the social, economic and cultural deprivation of vertical relationships and in an insidious symbolic deconstruction of the Maternal, as the symbolic representation of necessary dependence.

On the other hand, the Paternal is both deconstructed in its traditional sense, and reconstructed through the discovery of paternal virtues both similar and different from those of the Maternal. Similar, in the media depiction of loving fathers intent in providing care, different in the

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<sup>1</sup> I am being far too short and dismissive here. There may be many reasons why fathers tend not to ask for custody of their children (and, conversely, why mothers do). Some may, for example, feel it would be cruel to take them away from their mothers: cruel to the children and cruel to their mothers (Chiara Saraceno found many such instances in her research, as she told me in a private conversation). Clearly, in this short presentation I cannot take on this issue, which is however of paramount importance for an analysis of emerging models of motherhood and fatherhood.

Actually, of course, the construction of mother love as natural and therefore dangerous long predates the age of experts : what is new is the context in which this discourse is now articulated. A context sharply characterized by women's greater sexual freedom and their greater power in determining if, when, and with whom to have children. To have children without a stable relationship with a male partner, though economically and socially difficult, is a choice which is not stigmatized as it was until not so long ago. This may account for the renewed favor this construction is encountering nowadays, together with, so to speak, "structural" reasons, like the crisis of welfare, which, while making it more difficult to give support to single mothers, renders more attractive to rediscover, with male economic responsibilities, male paternal virtues as a check to the dangers of mothers' love. But I am convinced that it is the legalization of abortion which lies at the core of this renewed deep distrust of mothers.

I shall argue, then, that the diffidence against single mothers is indeed but the indicator of the fact that all mothers are viewed by the law as a source of disorder and danger: for their children, and for the social and symbolic order, and that this implies operating with a notion of autonomy defined as something which is achieved by setting aside relations of dependence.

Single mothers do not have rights, they have needs. They, and especially their children, need protection, assistance, vigilance. The paternal State must substitute for the absence of the biological or social father. As we know, this substitution has a price: the loss of privacy, the acceptance of control. When public resources diminish, vigilance becomes more intense and the search for paternity changes from voluntary to obligatory, as it happens in the US.

On the other hand, much sociological literature shows the perverse consequences, that is unforeseen and contrary to expectations, of the legal and jurisprudential gender neutral model of gender relationships in the family, especially when the partnership breaks up: at the economic level, an impoverishment of women; on the level of family relationships, an increase of the fathers' power of control on children and ex-partners. The arguments are well known. No fault divorce, based as it is on a model of marriage as a contract between formally equal individuals, deprives weaker partners of instruments to get from the stronger ones (on the economic and social levels) adequate economic support when the partnership ends. Fewer divorced fathers are legally obliged to pay support to their ex-wives, fewer divorced mothers are granted the family house, even when they have custody of the children. A gender neutral parental model, as it implies a greater possibility for fathers to obtain custody, gives them a powerful weapon to blackmail mothers into renouncing to the money if they want to keep the children.



## *Mother's love and the law*

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The love I am going to talk about here is mother love. Rather, I am going to talk about the law's suspicion about mothers' love. I hadn't realized the extent of this legal diffidence until I examined the debate, the proposed bills, and the European legislation on the new reproductive technologies. Then I looked at the jurisprudence and at some of the proposals of change of the Italian family law, and they all appeared to confirm a trend already pointed out by Martha Fineman (1995) in the US and, among others, by Carol Smart and Selma Sevenhuijsen (1989) in Europe. Briefly, they all describe a situation in which the legal equality between the sexes in the family and the emphasis on the rights of children conjure, perversely and paradoxically, to disempower mothers both by subtracting economic and social resources (on this, see also Barbagli, 1990) and by dismantling motherhood at the symbolic level.

How does, or does not, my proposed intervention connect with the general theme of love and law in the European Union?

On one level, the connection is quite straightforward. The regulation of mother love and, therefore, the legal construction of Proper Motherhood appear as a paramount test of the Union's vocation towards inclusion or viceversa exclusion (questions touched by Fitzpatrick's presentation): not only in the sense that such construction, by drastically curtailing all women's sovereignty over themselves, may be seen to foreclose their inclusion as full citizens in the Union itself, but also in the sense that Proper Motherhood risks becoming the way by which "different" women (immigrants, gypsies, single, lesbian, or simply poor women) and the needs, interests, cultures they bring or support are silenced.

The control of procreation, I want to argue, is justified by a discourse which constructs mother love as "natural", where "natural" stands for "unruled", a-social, thereby potentially dangerous : for children, but also, more in general, for a well organized polity.

Now, that mothers have been under suspicion and surveillance for the past --at least-- one hundred years is well known. They either love too much or too little, or not in the right way, what is right being dictated by legions of different experts. Fathers have usually been accused of only one thing, being absent: but even this accusation had to do with mothers' inadequacies. The absence of fathers was and is dangerous to children because it leaves them at the mercy of mothers.

intellectual and political emphasis on the need of the Masculine for the production of autonomous and responsible children and consequently of healthy and moral societies.

There is a paradox here, in that men claim rights on the basis of their biological contribution to procreation and at the same time invoke the moral and social importance of the Paternal. The biological relationships between mothers and children and fathers and children are extravagantly rendered equal, but to the second are attributed moral and social meanings, while the first are considered "natural", and therefore on surface socially insignificant, but implicitly socially and morally dangerous.

Nature, it appears, plays a different role in the construction of maleness and femaleness. The natural links on the basis of which many fathers today claim rights towards their biological children do not prevent fatherhood from being interpreted as a check to the naturalness of the mother's relationships with them. Mothers' love is natural, therefore chaotic, disorderly, potentially dangerous. Fathers' love, though based on natural links, is not, apparently, determined by nature, and is therefore more detached, better equipped to contrast disorder and chaos. Though, of course, we might discern another, hidden, image of the masculine, but it is, of course, the mothers' unchecked and unsupervised love that produces it. The Criminal, the Juvenile Delinquent, the Junkie, etc., are prevalently male figures, precisely the obscure side of masculinity, which, however, it appears, is unleashed primarily because of the inadequacies of mothers.

The public debate and laws and bills on the new reproductive technologies support this interpretation by looking for normative solutions which on the one hand reduce the problem to discerning and considering equal the contributions of sperm ova and uteruses and on the other hand pervaciously oppose the model of the normal family to the purported relational chaos produced by the technologies themselves.

Any normative regulation of r.t. based on equality between the sexes implies the reduction of pregnancy and birthing to biological events analogous to the production of sperm. When you add to this the best interest of the unborn child, then this equality turns into a privilege of the male contribution, since either the sperm must belong to the woman's partner or the woman may use it only if she can exhibit the consent of a man who then assumes social fatherhood. Which goes to show that what is still needed to, literally, come into the world, is a gesture of male authorization, which, today, is legitimated in the name of the psychological welfare of the child, translated into her right to two parental figures. Right whose protection goes from the women's need of



male authorization to have access to reproductive technologies to, often, the obligation to resort to family mediation services in case of separation or divorce.

It is given for granted that a child is better off with two parents of different sexes rather than with only one or two of the same sex or many of all sexes. Psychological and psychoanalytic theories are called to give support to this idea, while nobody asks whether the perceived bad results of single or multiple parenting are perchance due to the cultural dominance of the model of the "normal family" and to social policies pervicaciously based on it. These policies are seen to confirm the pathology of all other kinds of family, by their very failure. I wonder whether the presence of both parental figures would be deemed so fundamental if there were a lot of single fathers. But there aren't very many, whatever the reasons, and therefore any call for the maintenance of both figures points to the inadequacies of the Maternal and the risk of the Feminine.

That mothers are a danger for children is an idea which today is supported by the possibility of constructing them as separate beings since conception. It is extraordinary that this possibility rather than a potential means for the mother to better take care of that which she carries is viceversa an occasion to oppose her to it, in a contradictory process which reduces the mother to container of the fetus while at the same time makes her directly, and sometimes legally, responsible for its correct development (correct, of course, in terms dictated by doctors and other experts). Fetuses are thus constructed as potential victims of their mothers. It is through this attribution of the status of victims, that rights are asked for fetuses. We confront here two splits. The split between mother and fetus, but also the split between the mother's subjectivity and her body. Mothers' subjectivities, abstracted from their bodies, may make bodies, that is, the fetuses' environment, dangerous for them.

I believe that the hidden paradigm sustaining maternal danger is abortion. All of us, on principle, risked not to be born by a decision of our mothers. To realize this, which is nowadays made inescapable by the legalization of abortion, is probably more terrifying for men, who hold no comparable power, than for women. Thus this power is conceived as arbitrary, capricious, and immeasurable: a power which must be checked by a male measure, a norm, a law. This is why mothers without fathers are dangerous: fathers are those which make sure one's coming and remaining into the world, metaphorically and empirically. What is dangerous is the mother's relationship with the fetus. And it is dangerous because this relationship is constructed as one of utter and total dependence, a relationship in which one has a total power on the other, which in turn depends totally on her. Now, whereas it is true that the

mother has a power over the fetus, that of deciding of its birth (given certain conditions), this power does not entail a situation of total dependence. Between mother and fetus there is a situation of *interdependence*. It is the point of view of the already born, and of those who cannot imagine themselves as protagonists of a similar story, which reads it in terms of dependence, powerlessness, and therefore risk. Surely, all situations of dependence tend to be read in these terms. Dependents are weak and must be protected. That is, all relations of dependence tend to be read as zero sum power relationships. It appears much more difficult to think and regulate situations of interdependence. With good reasons: property owner and worker (or master and slave) are interdependent, but the first have a power on the other that the other does not have. The modern processes of multiplication and extensions of rights aim precisely at protecting the weaker from the discretionary power of the stronger. In order to do this, it is necessary to read interdependence through the lenses of power, and this leads to the separation of actors, their individualization, their autonomization from their relationships. None of us, I believe, wants to return to preceding times. Yet, many situations appear to require a regulation of dependence which takes interdependence into account, without the fear of leaving the weaker at the mercy of the stronger. The relationship mother-child, and, before, mother- fetus is such a situation. That it is so difficult to construct it in law in such a way as to give full recognition to the primacy of the female principle in procreation, nay, the tenacity by which this primacy is being nowadays denied for example through the European prevailing regulation of reproductive technologies -- reproductive technologies paradoxically making it evident and explicit-- shows how feared is maternal power. And it is this fear which associates mothers' and mothers' love to the unregulated, arbitrary, boundless and measureless workings of nature.

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## *Diritto, amore e conflitti*

Maria Virgilio

L'amore può essere iscritto nel diritto? Se può, deve esserlo? E come?

Raccogliendo la proposta di un approfondimento volto alla concettualizzazione dei rapporti tra amore e diritto nel quadro dell'Unione Europea, vorrei individuare alcuni collegamenti, secondo le suggestioni che mi pervengono dal testo di Yota Kravaritou.

Un dato si impone come basilare nella riflessione.

Qualunque sia il significato che si attribuisca all'amore, che potrebbe essere inteso in svariati modi, l'amore non è nominato dal diritto e tanto meno dal diritto comunitario.

Eppure - e qui emerge un contrasto - l'amore costituisce il cemento della cittadinanza e delle relazioni tra i cittadini, ne costruisce il senso e ne rappresenta il presupposto.

Siamo perciò di fronte non tanto a una inconciliabilità, quanto ad una vera e propria ambivalenza: l'amore non è nominato dal diritto, nonostante non possa non essere sotteso ai rapporti di cittadinanza. Da qui nasce il senso delle domande iniziali. Da qui la astratta plausibilità di una iscrizione dell'amore (passioni, emozioni, sentimenti, desideri) nel diritto.

“Amor non est in provincia iuris” (così la Allocuzione di Paolo VI alla Sacra Romana Rota, Acta Apostolicae Sedis, 1976, p. 204 ). L'indicazione che ci viene dal diritto canonico è che l'amore concerne il foro interno, l'intimità personale, e dunque vi è un rapporto di estraneità con il diritto.

Anche nel diritto romano troviamo un riferimento all'amore, ma per escluderlo, quando viene repressa e disciplinata nei suoi effetti la relazione *more uxorio* tra la *mulier domina* e il suo schiavo, che è definito “*amatus*” (costituzione di Costantino, in Codice Teodosiano 9.9.1)

Il diritto invece procede attraverso altre e diverse concettualizzazioni, nomina altri concetti, che paiono riconducibili a quello di amore e che attengono alla soggettività e alla sfera del privato: passioni ed emozioni sono sì nominate, ma solo al fine di dichiararle irrilevanti. Non manca anche il riferimento diretto alla sfera della morale:

alcuni motivi dell'agire vengono valorizzati se ispirati a particolari valori morali, ma incidono solo sulla entità della pena, e non sulla liceità della condotta.

Il diritto dunque utilizza, considera e nomina concetti diversi dall'amore. Verifichiamo quali sono i termini e le parole che compaiono nel diritto interno o comunitario, in materia civile e penale.

Da una parte la legge indica dei valori e delle finalità del diritto: *unione, integrazione, solidarietà* ( *spirito di fratellanza* è invece il termine che viene utilizzato all'art. 1 della Dichiarazione universale dei diritti dell'uomo del 1948).

E dall'altra indica delle funzioni, in cui si esprime la relazione amorosa: *comunione, cura, custodia, vigilanza, fedeltà, assistenza*

Sono tutti termini che rimandano ad un rapporto relazionale, intersoggettivo.

I primi - sul piano assiologico - tendono ad individuare una identità europea, che superi quella nazionale. Ma viene prospettato anche l'obiettivo di una "difesa comune" - Trattato sull'Unione Europea - , prefigurando, così, possibili conflitti con altre e diverse identità secondo lo schema della inclusione/esclusione.

Quanto ai secondi, attraverso quelle "funzioni" contemplate dal diritto si indicano come doverose talune condotte e comportamenti della cd. vita privata. Il diritto svolge qui il ruolo di imporre e pretendere ciò che affettività e sentimenti dovrebbero spontaneamente, e non coattivamente, determinare. La antinomia insita in una prescrizione di amore è palese.

Per di più l'imposizione del diritto non sempre è diretta. Più frequentemente essa è mediata e filtrata dalla individuazione di luoghi destinati e deputati allo svolgimento - considerato "naturale" - di quelle condotte estrinseche che manifestano ed esternano - o almeno così dovrebbero - rapporti amorosi.

Certo il diritto scopertamente patriarcale aveva meno problemi di quello attuale. Nominava i soggetti secondo il diritto del padre. Così nel diritto di famiglia c'erano le varie figure: il padre la madre , i figli, la moglie, il marito. E il rapporto di *protezione* e di tutela era il reale protagonista anche di fattispecie penali che, a prima vista, sembravano tutelare invece beni individuali e soggettivi. Il riferimento più agevole è alla repressione della violenza sessuale , regolata con norme penali che, ancora nel Codice Rocco del 1930, sembravano tutelare il bene



individuale della libertà sessuale, mentre in realtà disciplinavano un conflitto interno al mondo maschile, agito da una parte tra uomini, autori del reato, nei confronti, dall'altra, di uomini, vittime del reato in quanto lesi relativamente ad un bene di loro proprietà, quali sono le donne della famiglia, la moglie, la figlia, ecc...; l'altra faccia della medaglia è quello che vede incombere in capo al padre di famiglia un dovere e obbligo di protezione, che colloca le donne della famiglia nella posizione di soggetti deboli che devono essere tutelati.

Oggi il diritto moderno delle libertà individuali e della uguaglianza tra i cittadini e le cittadine ha mutato, in parte, il proprio linguaggio. Nella logica paritaria la legge espunge le terminologie ispirate alla gerarchia delle appartenenze familiari. All'esercente la patria potestà succede la potestà genitoriale; il marito e la moglie si stemperano nella neutralità del "coniuge"; l'asessuato "chiunque" è il soggetto di diritto per antonomasia, privato di ogni connotazione di genere.

E pur tuttavia, ancor oggi, i soggetti coinvolti in questi rapporti non si presentano nella loro autonoma individualità, ma vengono nominati e valorizzati solo in quanto inquadrati nell'ambito del legame di coppia eterosessuale o di quello intergenerazionale, e dunque, ancora una volta, il modello "normale" del cittadino e della cittadina, cui il diritto si riferisce, è quello dell'appartenente alla istituzione famiglia formalizzata ( o con il legame matrimoniale o - ma in un più ridotto novero di rapporti, che faticosamente tendono ad affermarsi - con la convivenza "di fatto", la quale, anch'essa, deve presentare caratteri di formalizzazione se aspira ad essere considerata dal diritto come tutelabile: coabitazione, comunanza patrimoniale, durata).

E' tale la preminenza della dimensione familiare ed è così netta la tendenza alla dissoluzione in essa della soggettività che addirittura in quei luoghi la fedeltà d'amore, se in ambito istituzionale (la famiglia), può prevalere sui doveri inerenti alla cittadinanza. Nel conflitto tra amore ( ma solo se familiare ) e cittadinanza la legge talora privilegia l'amore. Così il dovere di fedeltà all'autorità e l'interesse pubblico statale può soccombere rispetto al sentimento familiare: la falsa testimonianza e il favoreggiamento non sono punibili se commessi per salvare un prossimo congiunto o non è punibile chi dà rifugio o fornisce il vitto a un prossimo congiunto che partecipi ai delitti di cospirazione o di banda armata ( vedi casi di non punibilità dei delitti contro l'amministrazione della giustizia -

art.384 codice penale - e delitti contro la personalità dello stato - art. 307codice penale).

Oppure, in nome dell'amore, in quei luoghi e in talune situazioni la violenza viene legittimata: la violenza sessuale coniugale è legittima, l'abuso dei mezzi di correzione giustifica la violenza "educativa a fin di bene" verso familiari, e - sul versante patrimoniale - non è punibile il furto nei confronti del coniuge. Il diritto riconosce insomma una autonomia a tutto campo, fino a consentire la violazione della regola, a quell'ambito e luogo istituzionalmente destinato a fedeltà e assistenza. Vigè ed è riconosciuta normativamente una sorta di presunzione d'amore, considerata come invincibile.

Questa dimensione filtra anche in rami del diritto che apparentemente sembrerebbero distanti dal mondo delle relazioni affettive (nel diritto del lavoro all'evidenza di tutti sono le molteplici normative che favoriscono lo svolgimento dei cosiddetti doveri familiari; per riferirci al diritto comunitario, pensiamo al diritto di stabilimento che è integrato da disposizioni volte a consentire al lavoratore la facoltà di ricongiungimento del nucleo familiare)

Il modello ricorrente è quello della tutela del lavoro d'amore, ovvero del lavoro di cura che, come noto, incombe alle donne nella distribuzione dei ruoli maschili e femminili: regole particolari/eccezionali consentono e favoriscono quello svolgimento. Ma, come noto, col risultato di appiattire e schiacciare su quelle funzioni i soggetti ( id est le donne) che fruiscono della tutela normativa. Peraltro vengono identificati due poli della relazione, uno attivo ed uno passivo ( il curante e il curato, il vigilante ed il vigilato ecc.), e dunque i soggetti che si muovono in quegli ambiti si connotano come non paritari rispetto alla funzione, legati tra loro da un rapporto di dipendenza a senso unico.

La deviazione, in quegli ambiti istituzionali, dai doveri di cura inerenti alla relazione è sanzionata dal diritto: significa sottrarsi ad un dovere d'amore. Ma è sanzionata in forme indirette, sicché manca, nonostante l'aspettativa di molte/i, una misura sanzionatoria della sottrazione alla relazione amorosa.

I rimedi e le sanzioni che l'ordinamento appresta sono indirette. Abbandono, intollerabilità della convivenza, sottrazione agli obblighi familiari di assistenza vengono sanzionati nei confronti di chi si è ad essi sottratto attraverso l'intervento dello stato (del giudice) tramite



l'affidamento dei figli, tramite l'imposizione di vincoli patrimoniali, e solo in ultimo, tramite sanzioni penali.

Oppure l'accesso alle nuove risorse (per esempio le tecnologie riproduttive) è filtrato attraverso quelle appartenenze: valga l'accesso alla riproduzione artificiale che è consentito alla donna solo se in coppia eterosessuale (significativamente allo stesso modo in cui anche la nascita è "normale" solo se avviene nell'interno rassicurante della unità familiare).

In conclusione, se questa finora descritta è la mediazione del linguaggio e della parola attraverso il quale l'amore può trovare ingresso nel diritto, quale ne sarebbe il costo pagato?

Ciò comporterebbe inevitabilmente un incremento di norme impositive di quei ruoli, per il cui tramite il diritto abbiamo constatato si esprime. E questo comporta rischi e pericoli non solo - come è evidente - per la figura femminile che vede riconosciuti i "suoi" diritti solo nel rapporto di coppia eterosessuale o intergenerazionale

Non è solo la libertà femminile ad essere posta in pericolo, ma la libertà di tutti.

Passioni, emozioni, desideri, restino estranei alla regolamentazione del diritto finché le regole della convivenza disciplineranno i corpi in una logica di amore familiare e finché il diritto non si dimostrerà capace di non ridurre la ricchezza possibile delle relazioni affettive.





## *Diritto e amore: una relazione ambivalente*

Luigi Ferrajoli

1. Ho trovato molto stimolante la relazione di Yota Kravaritou e il suo invito a riflettere su di un tema così insolito e pregnante come la relazione tra "diritto e amore". Stimolante soprattutto per le diverse interpretazioni che di questa relazione possono essere offerte. Nella nostra discussione di oggi abbiamo sentito due tesi opposte: la tesi di chi, come Tamar Pitch, Luisa Boccia e Maria Virgilio, ha contrapposto i due termini come tra loro incompatibili e la tesi di chi, come Yota Kravaritou e Costas Douzinas, li ha invece connessi come tra loro correlati.

Io ho l'impressione che queste due tesi siano entrambe vere; che la relazione tra diritto e amore - inteso "amore" nel senso più lato, come sinonimo di "affettività" o più genericamente di "sentimento" - sia una relazione complessa e ambivalente, d'implicazione e, insieme, di opposizione; e che il nostro problema, filosofico-giuridico e filosofico-politico, sia appunto quello di identificare i significati diversi di queste due relazioni che li rendono logicamente compatibili.

Da una parte è certamente vero che l'amore e l'affettività, come ha mostrato nella sua relazione introduttiva e nel saggio da lei inviatici Yota Kravaritou, rappresentano una dimensione essenziale della fenomenologia giuridica, quali condizioni indispensabili dell'effettività del diritto e del suo funzionamento. Basti ricordare l'idea dell'"accettazione sociale" del diritto di Herbert Hart, quella del "patriottismo costituzionale" di Habermas, quella del "diritto preso sul serio" di Dworkin e, più in generale, la rilevanza della dimensione pragmatica della lingua giuridica in forza della quale il diritto funziona normativamente tanto quanto i suoi significati sono socialmente condivisi. "Spirito civico", "senso di appartenenza", "amor di patria" e simili designano insomma quel sentimento di solidarietà e di lealismo istituzionale senza il quale nessun ordinamento giuridico potrebbe funzionare giacché esso è alla base del ruolo di controllo primario del diritto, prima dell'intervento del controllo secondario per il tramite delle sanzioni.

Questo sentimento o senso del diritto, che forse non ha molto a che fare con l'amore ma che certo è strettamente legato alla solidarietà, forma il tessuto di base di ogni sistema giuridico. Dalle norme più alte alle norme più minuscole. "Le peuple français", afferma l'ultimo articolo della costituzione francese dell'anno III, "remet le dépôt de la présente

Constitution à la fidélité du Corps législatif, du Directoire exécutif, des administrateurs et des juges; à la vigilance des pères de famille, aux épouses et aux mères, à l'affection des jeunes citoyens. au courage de tous les français": il popolo francese, in una parola, affida la presente costituzione ai sentimenti: alla fedeltà e alla lealtà dei pubblici poteri, alla vigilanza dei padri, delle spose e dei mariti, all'affezione dei giovani, al coraggio di tutti i francesi. "Fratellanza", ossia di nuovo un sentimento, fu del resto la terza parola del motto della rivoluzione. Così come è un sentimento la "solidarietà politica, economica e sociale" che l'articolo 2 della costituzione italiana assume, insieme ai "diritti inviolabili dell'uomo", come fondamento della Repubblica. Ma anche nelle norme più minute questo sentimento di adesione è essenziale ai fini della loro effettività: rispettiamo la fila davanti a uno sportello senza bisogno di un poliziotto alle nostre spalle; osserviamo spontaneamente le norme del codice penale per il rispetto che abbiamo nei confronti degli altri, indipendentemente da ogni coercizione; per non parlare dei rapporti familiari, che come ha mostrato Elena Pulcini si reggono non certo sul diritto ma sull'amore.

Esiste insomma un'interazione tra diritto e amore, o se si preferisce tra diritto e solidarietà. Non si dà diritto senza solidarietà; non si dà solidarietà senza diritto. Il diritto suppone la solidarietà nel senso detto più sopra. Ma anche la solidarietà generata dal diritto, il quale la produce come sentimento o senso comune. Si pensi al principio di uguaglianza e ai diritti fondamentali. La rivendicazione dell'uguaglianza ha generato il principio, che certo non è caduto dall'alto ma è stato il frutto, al pari di tutti i diritti fondamentali, di lotte informate al senso e al valore dell'uguaglianza. Ma è anche vero il contrario: il principio giuridico genera il senso dell'uguaglianza. L'idea della disuguaglianza e dell'inferiorità, per esempio delle donne, era alimentata, come ha mostrato Marina Graziosi, dalla loro mancanza di diritti, ed è oggi venuta meno grazie anche alla consacrazione del principio giuridico dell'uguaglianza. Ed ancor oggi il razzismo nei confronti degli immigrati è generato o quanto meno assecondato dalla loro mancanza di diritti; laddove il riconoscimento giuridico degli altri come dotati di uguali diritti genera o quanto meno favorisce la loro percezione come uguali.

2. D'altro canto, come si è detto, il rapporto tra diritto e sentimento è un rapporto ambivalente: non solo di implicazione, ma anche di antinomia e di contrapposizione. "Amor", secondo il brocardo canonistico ricordato da Maria Virgilio, "non est in provincia iuris", tanto che non è mai nominato dal diritto. Tra diritto e amore, al contrario, possiamo identificare una relazione d'incompatibilità. In un triplice senso.



Innanzitutto, nel senso messo in luce da Tamar Pitch nel suo intervento sulle relazioni pericolose e su quelli che Elizabeth Wolgast ha chiamato i "diritti sbagliati" o "difficili". Dove c'è rapporto d'amore, o comunque affettivo, non c'è spazio per il diritto e per il linguaggio dei diritti. Esistono, è vero, norme che prescrivono sentimenti: come l'articolo 143 del codice civile italiano che impone l'"obbligo reciproco alla fedeltà" tra coniugi e l'articolo 315 dello stesso codice che impone ai figli il dovere di "rispettare i genitori". Ma si tratta di norme chiaramente irrilevanti. Giacché il diritto regola i conflitti; e non solo li regola, ma li alimenta, generando il senso dei propri diritti contro gli altrui doveri. Si può anche dire che dove c'è amore, o finché c'è amore il diritto non serve; che non c'è spazio per il diritto. Ma per la stessa ragione, quando c'è il conflitto è necessario l'intervento del diritto. Il diritto, in altre parole, si rende indispensabile come surrogato del venir meno dei legami sociali di tipo affettivo. Si pensi al reato di maltrattamenti, alle violenze domestiche, alle violazioni degli obblighi di assistenza familiare: in tutti questi casi il diritto è la legge del più debole in alternativa alla legge del più forte che in assenza di amore si affermerebbe; e il suo valore risiede non tanto e non solo nella sua capacità di risolvere i conflitti e di limitare l'arbitrio e la violenza, ma nel senso comune e condiviso dei diritti e dei doveri che esso vale a creare.

C'è poi un secondo senso nel quale diritto e sentimento sono incompatibili. Un postulato del liberalismo giuridico e del processo di secolarizzazione del diritto prodottosi con l'età moderna è che il diritto non solo non può, ma non deve imporre sentimenti. Da Thomasius e Pufendorf a Montesquieu, Voltaire e Beccaria, l'illuminismo giuridico ha escluso la sfera dei sentimenti, della coscienza e dei cosiddetti "atti interni" dal controllo del diritto. "Ama il prossimo tuo" non potrebbe essere una norma giuridica, almeno in un ordinamento liberale. Ciascuno, scrisse Anselm Feuerbach, ha diritto ad essere malvagio, ad odiare e a coltivare i sentimenti più perversi. Ed è proprio questa libertà il primo principio del liberalismo.

Infine, diritto e amore (o sentimento) sono incompatibili in un terzo ed ultimo senso, legato anch'esso, come il precedente, alla modernità giuridica e allo stato di diritto. Il diritto moderno nasce come negazione e come esclusione del paternalismo. Così come, inversamente, il paternalismo esclude il diritto. Le gerarchie sociali proprie delle società arcaiche e feudali, fondate su rapporti di fedeltà e di assistenza, erano fenomeni sociali e culturali ben prima che giuridici. E ancor oggi il paternalismo si pone in antinomia con il diritto. Ricordo che 25 anni fa, quando facevo il pretore a Prato, giudicai una causa di lavoro in applicazione dello Statuto dei diritti dei lavoratori appena emanato. Il datore di lavoro sosteneva, in assoluta buona fede, che lo Statuto dei

lavoratori non aveva alcun valore nella sua fabbrica perché egli non era un padrone ma un padre per i suoi dipendenti, molti dei quali ricambiavano a loro volta nei suoi confronti un sentimento filiale. Non tutti ovviamente: una parte degli operai pretendeva l'applicazione dello Statuto e proprio per questo il padre-padrone li aveva misconosciuti come figli e li aveva licenziati. Il rapporto di lavoro veniva insomma inteso dal datore di lavoro come una "relazione pericolosa" rispetto al diritto, nel senso di Tamar Pitch. Ma di nuovo - anche qui, e in maniera ovviamente più evidente che nelle relazioni familiari - il paternalismo è non solo antiggiuridico, ma si manifesta come oppressione nel momento stesso in cui viene contestato in nome dell'uguaglianza e dei diritti, invocati appunto contro di esso. Lo stesso si dica della sfera pubblica. Il paternalismo dei sovrani illuminati comportava la qualità di sudditi anziché di cittadini dei consociati. La legittimazione carismatica del capo negli ordinamenti totalitari si basa per l'appunto sul rapporto servo/padrone che si stabilisce tra capo e popolo. Se insomma nel secondo senso l'antinomia amore/diritto è un postulato del liberalismo, in questo terzo senso essa è un requisito indispensabile della democrazia e dello stato di diritto.

3. Come si spiega questa ambivalenza, che sembra piuttosto una contraddizione? Come si risolve questa aporia? L'amore, il sentimento, l'affezione, il legame sociale, la solidarietà non sono giuridicamente esigibili, anzi sono incompatibili con il diritto. E tuttavia sono necessari al diritto, quali condizioni della sua effettività e del suo concreto funzionamento.

Io credo che questa contraddizione si risolve se approfondiamo l'analisi delle due tesi, quella dell'implicazione e quella dell'incompatibilità tra diritto e sentimento (di solidarietà, di obbligatorietà o simili). Questi due nessi - l'uno d'implicazione, l'altro d'incompatibilità - sono tra loro compatibili perché hanno due diversi statuti, sicché diverso il significato delle relazioni da essi istituite.

La prima tesi è una tesi assertiva, essendo il nesso d'implicazione da essa istituito un nesso di "essere" e non di "dover essere". In base ad essa, il sentimento d'obbligatorietà, il legame sociale, il lealismo istituzionale e simili sono condizioni d'effettività del diritto. Un ordinamento giuridico regge se esiste il suo senso normativo socialmente condiviso. Un matrimonio e perfino un rapporto contrattuale funzionano se fondati sull'amore e sul reciproco affidamento.

La seconda tesi è invece una tesi normativa, essendo l'incompatibilità da essa espressa un nesso non di "essere" ma di "dover essere". In base ad essa il diritto non può né deve esigere sentimenti o



affetti o simili. Non può esigere giuridicamente, in altre parole, quei medesimi sentimenti dai quali dipende la sua effettività.

Il rapporto tra diritto e amore, ovvero tra diritto e sentimento è insomma analogo, logicamente, a quello tra diritto e morale e più specificamente tra diritto e obbligazione politica. Il diritto implica il sentimento di obbligatorietà quale condizione di effettività, nel senso che in sua mancanza è ineffettivo. Ma non può né deve pretenderlo. Lo implica di fatto ma non di diritto. Può pretendere l'obbedienza giuridica ma non certo l'adesione morale, anche se questa è di fatto indispensabile. Qualora richiedesse o imponesse il dovere del sentimento, incluso il sentimento della sua obbligatorietà - ossia il dovere morale di obbedire alle leggi - quel sentimento cesserebbe di essere un sentimento, giacché i sentimenti, gli affetti, al pari della morale, sono autonomi e spontanei: al cuore non si comanda, come afferma un vecchio detto. Ma proprio perché questo nesso d'incompatibilità non è ontico ma deontico, non riguarda l'essere ma il dover essere del diritto (il diritto non deve imporre sentimenti, così come non deve imporre una determinata morale), qualora il diritto imponesse sentimenti non cesserebbe di essere "diritto" ma sarebbe più semplicemente un diritto autoritario, o totalitario o paternalistico, secondo il paradigma del legalismo etico.

Mentre la tesi dell'implicazione tra diritto e legame sociale è una tesi sociologico-giuridica, la tesi dell'incompatibilità è dunque una tesi di filosofia politica che enuncia un principio dello stato liberale. Il diritto, in base alla prima tesi, suppone sempre un qualche grado di adesione morale. Ma non deve, in base alla seconda tesi, imporre nessuna adesione morale, pena la sua involuzione in diritto totalitario: giacché una simile adesione è morale solo se è spontanea, non coatta. Certamente noi aderiamo allo stato democratico di diritto. Ma la principale ragione per la quale vi aderiamo è che la nostra adesione non è imposta: il "patriottismo costituzionale" di cui parla Habermas è tale solo se non è giuridicamente dovuto. Il diritto, in breve, non può imporre giuridicamente le condizioni della sua stessa effettività.





# *Law and Love: complex interrelations*

by

**Yota Kravaritou**

## **1. Introduction**

Law is less remote from love than one might think: legal rules forge affective links, create emotional bonds (subjectivity, intersubjectivity) in the context of the nation state, at several levels. At State level, the law strengthens the social bond, generates faith and loyalty to its institutions which also serve its citizens: here we find love of country, which may even lead to death (army, war)<sup>1</sup>. The legal rules adopted at lower levels comply with the prescriptions (framework) of this love of country and follow its logic - biopolitics compels this - which diversifies the use of the body and time of men and women, in the context, and legal sphere, of family relations, work relations and others. In order for the law to succeed in its functions, it has to cover and discipline the body, capture the individual's soul and tie it to institutions: the family (social gender relations), the production system and so forth.

In the context of sentimental and carnal relations as seen and structured by legal rules, love is, to be sure, transmogrified: purified of eros - of passion - it is at the service of others, and of goals going beyond the "interested parties". Love - or the person offering it - will nonetheless receive some recompense for the services rendered: one is still always within one's own State and national solidarity. In the context of the private sphere and family law, love was for long identified with (directed towards) woman: she lives for her husband, for her children, to offer her "labour of love". This was to be recognized by the Welfare State in the European Union member countries before the latter existed: she was given some social rights, which did not assure her of economic independence. Behind these "derived" rights hides the fact of reproduction - generation - which still remains shut out, poorly illuminated, treated as a natural fact or personal matter with inevitable

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<sup>1</sup> Yota Kravaritou, Du Droit et de l'Amour dans l'Union européenne, EUI Working Paper, Law No. 97/5.

consequences. Note only the differentiation of legal status and of rights of men and of women, which even where they are the same have a different history and perhaps diversified application too - because of these relations associated with love.

The criminal law, which deals with offences against the model of love it imposes, also shows inequality, unequal consequences, according to gender. The same is true of labour law: this branch of law similarly reserved a subordinate to women wage earners, given that their priority is the family, or the "labour of love".

To be sure, this is no longer entirely the case after the legal reforms in favour of equality between men and women in recent decades. It happens that these have in Member States coincided with the development of the European Union. Now Community law fits within the body of national legal rules. It engenders their "Europeanisation". Additionally, it conceives of equality in labour relations more as the assimilation of women to the legal status of men. The same objectives and priorities, the same use of time aligned on the masculine model. What then happens to "love": who is to be responsible for the needs of love in all its dimensions in the private sphere: emotional needs, communication, support, care, labour of love? And - moving into the other sphere, known as public and a different, higher level - on what terms (legal also) would an emotional bond between the Union and its population develop? One can ask the question, but it is still very early to answer. In the context of this paper, questions relating to law and love will be considered and the attempt made to decipher the area to conceptualise them specifically in the context of the European Union. It will be understood that the question of the relation between love - or emotional bonds - and legal rules will be asked at several levels, without of course confining ourselves to love - that "gypsy child that never knew the law" (Carmen) - but without excluding it either: that would be impossible. At bottom, love as passion has many accounts to settle with the law. It is certainly not yet easy to deal with the law and love, emotions, in the national legal order or the European legal order.

This is a new field of research we are introducing, helped by the new knowledge of feminists (feminist jurisprudence) and psychoanalytic approaches to law and also to citizenship. Despite the "adumbration" of concepts that are emerging, in certain, especially transatlantic publications and hence in the different context of the old tradition, and the growing importance attached to emotional bonds in research on, for



instance, the European identity<sup>2</sup>, writing about law and love without leaving the legal sphere - especially of European law - is rather a hard job, done because we regard it as essential inter alia to European integration. In this context, and well aware of the reservations of the jurists we should like to address<sup>3</sup>. We might say, paraphrasing David Christian<sup>4</sup>, that science - and should legal science be an exception? - ought to know its limits, just as love ought ignore its.

The text below summarises and at the same time discusses the reports and interventions presented at the first conference on Love and Law at the EUI, organised on 15 December 1997, and is followed by the texts, presented in their original languages. Luigi Ferrajoli deals with *Relazioni tra diritto e amore*, Maria Virgilio with *Conflitti entre les deux*, Elena Pulcini with *L'amour, écran d'inégalité*, Tamar Pitch with *Mother's Love and the Law*, Nicola Lacey with *Sexuality, integrity and criminal law*, Marina Calloni with *Reproductive rights, images and moral sentiments*, Jean Schroeder with *Vestals and Fasces*, Costas Douzinas with *Law Love and Image*, Peter Fitzpatrick with *Love and Libido in European Union*, Marina Graziosi with *Corpo femminile e cittadinanza*, preceded by Yota Kravaritou with *L'amour s'inscrit amplement au droit*.

## 2. What relations are there between law and love?

The relation between law and love - taken in its broadest sense, including affectivity, feeling, solidarity - is a complex, ambivalent one, simultaneously of implication and opposition. Love and affectivity are, then, an essential condition for the effectiveness of law and its functioning<sup>5</sup>. There is a "sense of belonging", a "constitutional patriotism" associated with love of country, a "civic spirit" - all these expressions show at least the existence of a feeling of solidarity and an institutional loyalty without which no legal order could function<sup>6</sup>. This feeling is at the basis of the primary control of law, before the secondary control exercised through sanctions.

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<sup>2</sup> See for example Thomas Risse, *A Europeanisation of Nation-State Identities?*, EUI Working Paper, 1998.

<sup>3</sup> See Hanne Petersen (ed) *Love and Law in Europe*, Ashgate, 1998, who has a different approach: broader and perhaps less legal.

<sup>4</sup> Christian David, *L'état amoureux*, Paris, Payot, 1971.

<sup>5</sup> Luigi Ferrajoli, *Relazioni tra diritto e amore*.

<sup>6</sup> Here one has in mind particularly the collapse of the legal order in the USSR and the ex-Yugoslavia.

This feeling - or "sense of law" - closely associated with solidarity forms the basic fabric of each legal system and impregnates all its norms, from the most important to the most minor, perhaps has its modern origins in the fraternity of the French Revolution<sup>7</sup>. It is reflected in and at the same time discloses the "political, economic and social solidarity" associated with the "inviolable rights of man" provided for by the Italian Constitution (Article 2) - and similar provisions exist in the Constitutions of all Member States.

There is a relation and an interaction between law and solidarity: the one does not exist without the other. The law generates solidarity, as maybe noted in the case of the principle of equality and of fundamental rights. To be sure, equality had to be demanded in order for the principle to be recognised. But this legal principle generates the sense of equality: it grants rights, right that had not existed, against inequality. From this viewpoint law and love are, in the broad sense of the term, indeed linked.

There is, however, another relationship between law and love which, according to Luigi Ferraioli, is ambivalent and even contradictory; the two notions seem incompatible.

a) Where there is a relation or love or affection, and for as long as it lasts, there is not room for the law of the language of law. There indeed exist legal norms that prescribe feelings, for instance fidelity in married couples or children's duty to respect their parents - but these are norms without meaning or consequences ("chiaramente irrilevanti"). However, once the conflict breaks out, the law is there to assist the weaker against the law of the stronger, which, in the absence of love, would assert itself: in the event of domestic violence, breach of family assistance obligations

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<sup>7</sup> Undoubtedly, the "fraternity" in the triptych of the French Revolution, together with equality and liberty, indeed points to solidarity and compliments the others. But its gender? (brother-sister) is manifest even in the images suggested by the last article of the constitution of the year II, which reads: The French people places the safeguarding of the constitution in the fidelity of the "Corps Législatif" - composed solely of members of the male sex - "to the executive directorate" - made up of men - "to the administrators and judges" - idem. The constitution needs the fidelity of all these men, and then, going down the hierarchy, the article declares trust in the vigilance of "fathers of families", then in that of "wives and mothers": here, finally, the female gender comes on stage in its "family" aspect. Finally, there is trust in "the affection of the young citizens": the feminine gender, having scarcely entered, again leave the scene, girls not being there. It is clear that the masculine does not embrace the feminine, otherwise the text would also speak of "jeunes citoyennes". Perhaps the Constitution, unconsciously or not, sought to direct their "affection" elsewhere (see [Elena Pulcini](#), *L'amour, écran de l'inegalité*). Yet they too are part of the people.



and the like. But perhaps it is not entirely so: so clear and linear, the law still looks after the stronger (who “constituted” it).

b) The law is incompatible with feeling in the context of legal liberalism. This is one of its postulates: the legal enlightenment excluded the sphere of feeling, of conscience and of so-called “internal acts” from control by the law.

This is certainly not false, and the reasoning is quite right at theoretical level: respectful intimacy, conscience and feelings. But the question that arises here is, given that the law - as we now know - creates subjectivity is the following: what did that enlightenment law think of women in relation to their bodies and their feelings, their subjectivity?

c) Law and love are again incompatible because the modern law and the State based on rule of law exclude paternalism, as the hierarchical expression of archaic, feudal society. This might be accepted as true and just. But it might be noted that if this is an essential presupposition of democracy and the rule of law, it has still not yet been realised in relation to the legal condition of women, despite the reforms in the direction of equality between the sexes accomplished in several Member States. If it is still to be realised, this exclusion of hierarchy of relations between the sexes, one should not on the other hand forget the relational conception several feminist theories form of law, even though they are not close to paternalism - which they, of course, combat - by stressing the needs of human beings to exist in society with others, while being autonomous, which means neither dependent, nor disembodied neutral individuals.

This does not prevent there being in our legal system, as it is organised, an incompatibility between love and law at several levels.

How, then, is this contradiction to be explained, whereby love, feeling, affection, the social bond and solidarity, though necessary to law for its own effectiveness, cannot be legally constituted as enforceable?

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8 See e.g. Naffine Ngaire, *Law and Subjectivity*.

9 We know that the history of the law of men is not the same as the history of the law of women, in several respects; see Michelle Perrot (ed) *Une histoire des femmes est-elle possible?* Rivages, Marseille, 1984. The writings of enlightenment philosophes ought also to be rethought from the viewpoint of the female legal subject, as is already being done: see *inter alia* Pulcini, *infra*.

Undoubtedly one should contextualise and historically locate on each occasion these demands, the object of which certainly evolved. Luigi Ferraioli, in his classic approach that goes into the analysis of the two positions, the implication between law and love and their incompatibility, replies that they have two different statuses. The first, the assertive, affirmative thesis, corresponds to a nexus of being - feelings, love and solidarity are conditions for the effectiveness of law. The second, the incompatibility thesis, corresponds to a nexus of ought. This is a normative thesis, and in this case the law cannot require feelings or affections on which its own effectiveness depends. Here the relation between law and love is analogous to that of law and ethics or political obligation.

A feminist legal viewpoint, that is, one with suspicions as to the role of legal rules in relations of love between the sexes and a belief that the law itself creates subjectivities at this level - and exclusions such as those such as those of homosexuals of both sexes - might perhaps have gone further in more radically questioning in this specific area.

Pierre Legendre, whose view is neither female nor feminist, is nevertheless right to regard the civil law as fundamental to understanding social relations, including social gender relations<sup>10</sup>. To be sure, for him the legal system institutes life, links up the biological, social and the unconscious: its importance for affective relations is primordial. But not everything is contained in the provisions of the civil law constituted by and in the framework of the State - that State which, taking the place of God, has become the reference point for modernity. In consequence, family relations go beyond established generation relations, go beyond the logic of sanctions rights and duties. As Françoise Collin notes "there is something to do with the obscure background of gift and debt that interferes with the order of contract in human relations"<sup>11</sup>.

The relations nonetheless constructed by the Civil Code are unequal power relations as far as love goes. The State regulation has structured them unidimensionally, unisexually, taking the interests of one of the sexes into account and erecting it into a "general interest". Legendre, in quasi-prophetic fashion, observes: "The West - and many other civilisations along with it - will inevitably have the greatest

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10 Pierre Legendre, *Les enfants du texte. Etude sur la fonction parentale des Etats*, Fayard, 1992; *The Other Dimension of Law*, *Cardoso Law Review*, No. 3-4, 1995, p.943 ff.; *La fabrique de l'homme occidental*.

11 Françoise Collin, *Mythe et réalité de la démocratie*, Point d'appui, Bruxelles, p.40



difficulty in desexualising issues of power...instituting the recognition of identifications on the genealogical model of power...as a matter of both sexes and not just the male sex...it is likely that because of the gap created between women and the male linearity of pure power the West has sheltered a perverse play of political reproduction”<sup>12</sup>.

This author’s psychoanalytical legal approach, even if not centred on social gender relations or the division between private and public sphere, seems to us to be founded, built on the core of love to be justified, helps us to understand, to see better the complexity of the relation between the law, love - and equality: their interweaving.

### 3. Conflict between law and love - and interlinked conflicts.

Non bene conveniunt nec una sede morantur  
Maiestas et Amor  
Ovide

Love is certainly not expressly regulated by law, still less by European law, but it is not absent from the concept of citizenship and of relations among citizens, male and female<sup>13</sup>. While according to the canon law “amor non est in provincia juris” because it is associated with personal intimacy, that does not prevent the law from employment other concepts close o and reducible to love, which concerns subjectivity and the private sphere. In this sense, the passions and emotions are regulated - in the framework of the penal law - but only in order to be declared without meaning, without importance (legal consequences).

The law indicates on the one hand values and objectives of law, through the terms union, integration or solidarity, which in the context of European law for instance are capable of affirming, of determining, the European identity superposed upon the national identity. Albeit it “thin”, restricted, the law indicates by other terms (comunione) care, guardianship, vigilance, fidelity, assistance functions within which the relation of love, or relations of love, is expressed. In this case the law prescribes how certain conduct and certain behaviour ought to be in the aforesaid private life. It takes the role of dictating what affectivity and feelings are - but here there is an obvious antimony in the prescription of love. (Clearly one cannot describe it...). Moreover, this constraint, the imposition (imposizione) of law is not always direct: it is most often filtered and mediated through the determination of places set aside for

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<sup>12</sup> Pierre Legendre, *L'inestimable objet di transmission*, Fauard, Paris, 1985.

<sup>13</sup> Maria Virgilio, *Conflitti fra diritto e amore*.

development, regarded as natural, of the behaviour that manifests and externalises love relationships. In this case it certainly also imposes its values that come from its subsoil (and bear more heavily on one category of bodies or subjects, women in this case).

In openly patriarchal law everything was simpler: the father was the head of the family and the relationship of protection and tutelage had the foremost role. This was the case in penal law too, where in the case of sexual violence the issue was not sexual freedom but a conflict within the male world between the men who had committed the crime and the men who were victims, injured in relation to property of theirs, namely the women in their family. It was on these same men that the duty and obligation to protect women as feeble, protected subjects, rested<sup>14</sup>.

But law in our times, based on individual freedom and equality but taking account also of those of women has changed (mutated) its own language and deleted the hierarchical terminology from the family in the following way: by using primarily neutral terminology, the most neutral possible: spouses, parental power (no longer paternal) and so forth. But the subject implied in these relations are so only in the context of the heterosexual or inter-generational couple - and not in relation to individual autonomy. Use of a superficial neutrality such as that of "She" or "her" in English instead of "he" or "his" changes nothing, since the analysis has to be pushed right to the bottom.

The normal model of citizen, male and female, according to the law is the one belonging to the formal family institution of social union ("de facto" cohabitation). The family dimension is so preeminent for law as to include the whole of subjectivity in these loci of fidelity to love. Subjectivity is included in it and identified with it to such a point that where there is conflict between love in the family context and duty as citizen, the law favours the former: fidelity to authority - or perhaps civility - has to yield: the paradigms in Italian law are strong and striking<sup>15</sup>.

But it is just in the name of love that in those places violence is seen as legitimate: violence between spouses or against children, if only for educational purposes. The law for its part recognises a sort of autonomy of these places intended for fidelity and assistance. As far as

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<sup>14</sup> Protection of women was also the centre of Labour Law, but its objective was more to enable them to accomplish their "role" of reproduction, the "labour of love" included. See Yota Kravaritou *Le sexe du droit du travail*, Kluwer 1996.

<sup>15</sup> See below.



permitting the existence of an “island of non-law”<sup>16</sup> or rather the violation of rules. A sort of presumption of love is recognised in it; a love regarded as unshakeable, natural, invincible.

The question is not the existence of ties of love, positive in itself; it is the fact that they are delimited, recognisable only within the family. Now, within it the labour of love is done in accordance with the distribution of male and female roles laid down by specific rules. The relations among subjects within the family are still always vertical with one passive-subject role (and one active one, creating a one-way dependence relationship. Relations are not horizontal:

Relations are not horizontal: to manage to change them in that direction one would, according to Luce Irigaray<sup>17</sup> have to have another “civil code”, to take a different one or rather to construct “stability” – which runs counter to “naturalty” – for women.

One feels that the reforms accomplished in the name of equality between the sexes are located only on the surface, the external epidermis of the rules.

Breach of the duty of love, breach of the duty of care inherent in the relationship, is punished by law. Also punished, though more or less indirectly, are abandonment, non-tolerance of life together, a “removal” of children from their mother following intervention by the judge – the criminal penalties come only last ..... But as Hannah Arent notes<sup>18</sup>, penalties are not of the essence of the laws, which are more directives than imperatives; they are imposed by their existence without one having submitted to them voluntarily or recognized their validity: they cannot be ignored.

The law rewards the “duty of love” hierarchically and unequally, making love a highly (de)limited duty in a narrow row that ignores passion, emotions or desires, but do not come into it. It fails to recognize the individual autonomy of the person to the extent that it constructs one-way dependencies, especially for the female subject, which is moved away

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<sup>16</sup> At term from Antoine Garapon, who deals with legal evolution in this area in France in *Le Gardien de Promesses*, Justice et Démocratie, Paris, Odile Jacob, 1996, p.142.

<sup>17</sup> Luce Irigaray, *Le passage du droit naturel au droit civil*, Paper for the conference “Approaches to Land and Cultural differences”, held at the EUI 23-27 November 1993.

<sup>18</sup> Hanna Arendt, *On Violence*, 1970.

from the conditions of citizenship in the modern sense of the term (Marshall)<sup>19</sup>.

Thus, from this viewpoint law is in conflict with love, as if one were on the one side and the other on the other side. But it is first the law that imposes on love – on human affective relationships, these narrow, asphyxiating rules, and its values that seem the work of a past age and of dated “?”, age-old and of recognizable gender. The fact that love and law are linked is one (other) thing, and the innovations required by a new culture and innovative conditions of some of the social protagonists, like the women (feminist movement) who have come out in this tense in Europe at least, quite another.

#### 4. Love as screen for inequality

Amor, lo statuo tuo è proprio quale è una ruota che mai sempre gira  
Gaspara Stampa (1523-1544)

Despite the liberal assertion that the principles of liberty and inequality mark the transition to our modernity by indicating the conquête par excellence by the modern individual, this did not correspond to substantive equality, especially as regards the relation between the sexes. Modern thought is instead seen as re-proposing a subtler inequality by reformulating the division between public and private, by constructing a special form of female subjectivity centred around love.<sup>20</sup>

Liberalism is founded upon the universal equality of all men (human beings) and the respect for their natural individual rights, setting up the sovereignty of the individual capable of self-assertion. We find in Hobbes the premise of a radical equality among individuals: because of their passions and conflicts, they conclude a pact that guarantees security and social order. Natural equality is reflected in civil and political equality. Gender does not count here: the Aristoculean model that bases the exclusion of women on their natural inferiority is at long last contended, and equality proclaimed as the regulatory principle for all individuals “in the world”. Yet for Hobbes himself, the elementary cell of the state of nature is the family, represented as a tiny monarchy where the father is sovereign: he has to that extent the consent of the children and his wife, who voluntarily renounces the power she has in virtue of her nature over

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19 From citizenship including social rights in the terms of T.H. Marshall, *Citizenship and Social Class*, Mückenberger et al, *Manifeste Social pour l'Europe*, p. 110 ff and passim. and Etienne Balibar, *Une citoyenneté européenne est-elle possible en Droit de Cité - Culture et politique en démocratie*, l'Aube ed. Paris, 1998, p.43 ff.

20 Elena Pulcini *La modernité, l'amour et l'inégalité cachée*.



her children, in his favour. But why should women, who initially do not take part in the pact taking up political society, freely agree to be placed out with citizenship? It is perhaps still the physical inferiority of women that needs male authority? We do not know in the case of Hobbes, but Locke gives some answers. While recognizing the different existence of the paternal and conjugal power, he sees in it a sort of .....(?) authority associated with the husband's function of conserving and transmitting property – which for him is a natural par excellence. It with the woman's consent, thought she also has rights and powers, particularly over infants because of her participation in their production, that this comes about, because of her biological weakness. If women voluntarily accepted "sexual contracts", that is because they secure the administration of the family, private sphere: but the family now becomes the locus, apart from procreation, of affectivity, care and complicity. The private is valued, no longer signifies deprivation; this is one feature of our maternity. The family thus begins to be transformed to become the privileged sphere of feeling and reciprocity – the model still in force. But the shutting up of women in the private sphere is not a mere exclusion: the separation between public and private coincides with the division spheres of power between the two sexes. Men's power is in the political, social and economic sphere; women have the power of the relationship, of love, the very power that becomes the screen for inequality.

Rousseau develops still further the theory of the difference between the sexes<sup>21</sup>, on the basis of their differing nature, both physically and intellectually, which brings men to govern the world and women to govern the private sphere. But the main thing is that this happens with unprecedented valuing of women. Her feminine qualities take on a hitherto unrecognized value: there is certainly a feminine subjectivity different from the masculine one, but just as applicable. At the same time there is a valuing of the private and family sphere. The family becomes the locus of "sweet feelings", even paternal authority is based on the "laws of the heart". It is founded on the free choice of individuals: the conjugal union is by nature voluntary, the "love marriage" comes on stage and solidarity, complicity and intimacy bind all members of the family, husband and wife, parents and children. If all are linked by feeling, only the woman is identified with it through the maternal function whereby she accomplishes her destiny – and constructs her identity through her being in relation with others – and also through her pudeur (shame and modesty), which is a weapon of seduction and at the

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<sup>21</sup> See also Joel Schwartz, *The Sexual Politics of Jean-Jacques Rousseau*, Chicago University Press, Chicago, 1984, Penny A. Weiss, *Rousseau, Antifeminism, and Woman's Nature*, Political Theory, Vol. 15 (1987), n° 1 p. 81 ff.

same time an instrument for controlling sexuality and passion. She aims also at “ensuring the duration of love, perhaps the central value of modernity”. Thus woman becomes the guarantee of a strategy of the lastingness of love, within marriage, of a love without excess or passion<sup>22</sup>, adapted to the needs of the institution.

Rousseau’s construction, based on complementarity, gives equal importance to both members of the couple, taking on the force of a paradigm that can count on the complicity of women themselves. If they have concluded the “sexual contract”, they have in exchange obtained the power of love: they use it to construct their own identity, collaborating with the new image of “gender” produced by our modernity.

This construction, however, which values the qualities and power of women, renders still more marked the separation between private and public and the inequality of the sexes. Women as wives and mothers participate indirectly in running the public sphere through education and the affective support of men. They meet (satisfy) the man’s needs so that the citizen is free to act: it is the woman that makes possible individual autonomy, free from all bonds of dependency (be he bourgeois or a worker). Moreover, within the institution, women are identified with a particular form of love, confined to paternal love and conjugal love, portrayed in the code of feeling that spreads in the 18<sup>th</sup> century and is located between the coldness of reason and the excess of passion. In this formation, love as passion is excluded. Women have to show virtue<sup>23</sup>, desire<sup>24</sup>, merger, total abandon of self are not there: woman is deprived of the right to passion.

There is to be sure, another form of love too in the 18<sup>th</sup> century, “romantic love”, derived from the premises of free emotional choice: it enables us to understand the aspects of love and passion. But to the extent that it stands up to time and establishes a project of life in common, it becomes

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22 Cf. the similar ideas of J.G. Fichte in *Fondements du droit naturel selon les principes de la Doctrine et de la Science*, Paris 1984 et *Du Droit et de l’Amour*, op. cit. p. 10-13.

23 See Dorinda Outram. On female modesty, see C.G. Métral, *La pudeur ou l’être discret*, Editions de l’Université Libre de Bruxelles, Bruxelles 1996.

24 Women’s desire is however present and taken account of by Olympe de Douges in her “*Déclaration de droits de la Femme*”: it is a condition for the foundation of the couple, far from that marriage that is “the grave of trust and of love” for both man and woman. Though there are some differences between the two, everything is perfectly equal. The couple is “united but equal in power and in virtue”: virtue concerns both of them equally.



transformed. Passion changes once it has led to marriage<sup>25</sup><sup>26</sup>, and it is the woman who accomplishes this task, by changing into wife and mother: romantic love ends by tying women still more to the family as guardian of feelings. It is different for men, who can practice a double morality – accepted, moreover, or rather constructed by law, for instance the penal law which punishes only the wife's adultery and not the husband's<sup>27</sup> – and experience amorous passion outside marriage. Men can also experience the passions and conflicts of the public sphere, since they take part in it and are exposed to change and becoming. Women, by contrast, confined in the passionless love of the family, with delimited, reduced power, imprisoned in family privacy, often end up taking on repressive psychological traits.

Love thus delimited, tamed, becomes a screen for inequality. The identity of women, devoid of logos and of the possibility of acting autonomously in the public sphere, but also of erotic passion, is amputated.

Law with its various disciplines, family law, voting law, labour law and the state with its politics – the welfare state for instance – have contributed much to these gender, hierarchicalized legal statuses, to the construction of identities, so different from Rousseau's nature and contrary to any equality or autonomy.

At normative level, a two-fold approach is necessary: not just to ensure women's access to the liberal ideal of autonomy that opens the road to the public sphere, but also allowing them the ideal of authenticity, namely the totality of their emotional lives, be it contradictory or conflictual. Only the recognition of their own desires, passions and ambivalences enables them to face the other on an equal footing.

We now know that democracy between the two sexes is a necessary condition of democracy in the public sphere, but can be realized only, as Elena Pulcini stresses, through "a thorough, patient transformation of the codes of feeling" – and of legal rules that suggest it, or rather construct it as I would put it in my capacity as a lawyer. This would enable the re-appropriation by women of repressed forms of affectivity, with the aim of expressing themselves in their own way without their difference, which is not to be expropriated, having to imply inequality.

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<sup>25</sup> Elena Pulcini, *supra*.

<sup>26</sup> *Loc. cit.*

<sup>27</sup> *Loc. cit.*

## 5. Why is law afraid of the mother?

*Une femme n'est ni nomade, ni corps mâle  
qui ne se trouve charnel que dans la passion-érotique.  
une mère est un partage  
permanent, une division de la chair même.*  
Julia Kristeva Stabatmater

In the name of equality, certainly associated with the general idea of democracy, there have over the last few decades been several reforms in Member States, particularly in the context of family law: rights and duties, divorce, custody of children. But by contrast with what one might think and with the “legitimate” expectations of some, male and female, legal equality between the sexes within the family and at the same time the stress put on children’s rights leads to an economic and social weakening of mothers. Still further, these legal reforms are in course of dismantling the symbolic level of maternity and all that implies for interdependence and relationality<sup>28</sup>.

This is shown by the sociolegal studies devoted to mother love as conceived of and constructed by the law in its great reforms of recent decades. The context within which this legislation is located is much different in the sense that for women there is much greater sexual freedom and greater power to determine whether, when and with whom they want children.

The law aims to control procreation, as Tamar Pitch emphasizes, employing a discourse that constructs mother love as natural, i.e. uncontrolled, asocial and potentially dangerous. It is dangerous both for the child and for society. It thus intervenes in the case, for instance, of the single mother, a.....(?) to renew its mistrust and control over mothers, a mistrust and control already present in the “matrix” of the Code Napoléon.

Having children in a stable relationship with a male partner outside marriage is no longer stigmatized, though in Mediterranean Member States the practice is fairly limited by comparison with the United Kingdom or the Nordic countries. It is different for single mothers, and married mothers, seen by the law as a source of disorder and danger. Instead of having rights, unmarried mothers have needs. It is the State

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<sup>28</sup> Tamar Pitch, *Mother's Love and the Law*.



that takes the place of the absent biological or social father, to give protection and assistance. The cost is the loss of intimacy (“privacy”), the obligation to undergo control. The State may even act worse – but this is one of its absolutely new features in Europe, perhaps a sign of its transformation (its weakening) in and because of the economic objectives of the European Union: it can cut off all economic assistance to unmarried mothers by telling them to go and seek employment. But that is practically a ....(?) for unmarried mothers. There is no place, no job, even for those with more time than they<sup>29</sup>, and children too have to pay the costs of this new policy<sup>30</sup>.

The unforeseen, perverse consequences of the adoption by legislation and base law of the gender-neutral model within the family are visible especially when the parental couple splits: we note the impoverishment of women at economic level, and at the same time the growing control of the father. As from a legal viewpoint he has more chance than before of securing custody of the children, he can bring pressure on the mother: if she wants to have the children, she has to accept less money. Joint custody, moreover, on the one hand redefines the child’s interest in having a continuing relationship with the father – previously the tender age was entrusted to the mother – and on the other, the latter’s rights are reinterpreted as natural rights. But at the same time the moral and social importance of paternity is raised, for both children and society. Nature here seems – still – to play a different role in constructing masculinity and femininity, especially as regards love of children: the mother’s is natural and therefore chaotic, uncontrolled and so on.

It is the beginning of a process of de-socialization that precipitates unmarried women in still greater poverty. And the possible search for a husband, a partner to take on the old role. The law obliges unmarried mothers to go in directions where there is no freedom, no free choice – which the welfare state all the same, in a way and in its own “sexist” fashion (of protecting and controlling) did. This is still the case in the Nordic welfare state, which seems rather less mistrustful of the mother – as regards her love too. The “de-socialization” imposed on unmarried mothers, the solutions one wishes to constrain them to and their old conceptions of “moralization”, not risk creating personal unhappiness –

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<sup>29</sup> The film “The Full Monty” well shows the difficulties in finding work in the late 90s in the United Kingdom, inducing a number of men to take up striptease as a profession.

<sup>30</sup> As Claude Javaud wrote in connection with another case: “The State ... has no hears, since it has not done the minimum”, cited by Viroli, op. cit. p. 275: one might as what the end of the child’s reign may signify for Europe.

very far from love – for mother, “saviour” man and child? The father’s love, though based on natural ties, is not determined by nature and can oppose chaos and disorder. We find the same logic (interpretation) of the equal contribution between sperm on the one hand and ovum and uterus on the other, and at the same time the reference to the normal family in all projects, laws and legal debates that concern new reproductive technologies. In the name of equality and of the child’s interest, the sperm must belong to the woman’s partner or have his consent: male authorization remains necessary to the law in order for someone to come into the world<sup>31</sup>.

There are, too, cases where the law conceives of the mother as a danger to the child from the very moment of conception. Instead of giving her the possibility of taking better care of what she carries within her, the law reduces her to a mere “container”. The foetus is constructed as a potential victim of its mother: and so rights are demanded for the foetus. The result is a two-fold division (detachment) between the foetus and mother, and between the mother’s subjectivity and her body.

The subjectivity of mothers separated from their bodies can make their body dangerous, “this body” with the foetus. But it may also be so for the unborn if after a certain point, towards the last months of pregnancy for instance, he or she can feel the (possibly negative) feelings of its mother towards it. What do we know, psychological sciences are still too young to answer, who can exclude an interdependency not confined to the biological sphere alone?

The hidden paradigm on which this danger coming from the mother is based, the presupposition for regulation aimed at protecting the foetus against the mother, comes from the now-recognized possibility of abortion, of its legalization. Who would grant women a power regarded as immeasurable and arbitrary, subjecting the foetus to absolute dependency on her? That is why unmarried mothers are dangerous and why this power has to be “controlled by a masculine measure, a norm, a law”. However, though the mother has power over the foetus, this power does not imply a situation of total dependency: this viewpoint belongs only to a person already born and to those who cannot imagine themselves as protagonists of a story like that: there is a de facto situation of interdependency between mother and foetus. In the relation between pregnant woman and foetus, and then mother and child, the law has to regulate the dependency that takes the interdependency into account, but

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31 Supra Pitch.



this construction, taken into account by the law, of “full primacy of the feminine principle of procreation” is not weak. Its denial by European regulation of reproductive technologies proves, as, Tamar Pitch writes, how much fear there is of mother power. One may see here too the heritage of silence that exists in the feminine voice regarding the laws that govern the maternal body – the laws on maternity are still always the work of males. They reflect their ways and modes of seeing. Just as the mother’s body is covered in philosophy by the silence of women<sup>32</sup>, for similar reasons womens’ way is not yet present in legal regulation of the maternal body.

Be that as it may, the association of mother love with uncontrollable nature takes away from women their rights to self-determination and also to full citizenship in the European Union.

## 6. Why does the penal law on sexual offences separate the physical from the emotional?

How does the penal law, whose provisions relating to sexual offences are aimed at regulating sexual behaviour, conceive of sexuality? What idea does it form of it, what value does it attach to it? There have certainly been over the last 20 years a change in cultural climate both in Britain and in all the European Union Member Countries. Awareness has grown of sexual abuses and the violences that previously were not visible, not even then<sup>33</sup>. Well hidden violence covered by the silence of personal, private life are emerging from unspeakability<sup>34</sup>: child abuse, sexual harassment, domestic violence, spousal rape<sup>35</sup>, date rape, homosexual rape. Frontiers between public and private on these questions are beginning to be redefined: questions previously regarded as belonging to private responsibility are now recognized as being public cares and

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32 See Michelle Boulous Walker, *Philosophy and the Maternal Body, reading Silence*, Routledge, 1998.

33 And also of the way a given situation, a given fact, is experienced differently by women and men: see Robin L. West, the Difference in *Women’s Hedonic lives: A Phenomenological Critique of Feminist Legal Theory*, Wisconsin Law Journal.

34 On the development of the penal code – and the “legal conscience” – on these points see Georges Vigarello, *Histoire du viol*, Seuil, 1998, especially p. 126 ff. (*Le droit moderne*), also M. Bordeaux, B. Hazo, S. Lovellec, *Qualifié viol*, Meridian Klincksieck, 1990.

35 Rape between spouses, recognized in France since 1980 and in Germany since 1997, is not yet recognized in Greece or elsewhere – but it is certain that the content of “conjugal duties” has much changed in European Union Counties. We are also still far from the idea upheld by Emmanuel Kant that the marriage contract also includes each spouse’s right to the sexual parts of the other (*Metaphysics of morals*, p. 156 ff).

concerns, of societal interest. The different construction, in the sense of being unequal and hierarchicalized, of female and male sexuality by the law has been shown by many studies devoted particularly to rape and rape trials. Nicola Lacey wants to go further in studying the crime of rape, while basing herself on feminist research and criticism, to show the impoverished conception the law has of the value of sexuality<sup>36</sup>. This impoverishment is associated both with the very partial (reductive) it (the law) has of the body, and the absence of the – notion of – affectivity in the doctrine of penal law.

A reading of the penal law's provisions on sexual offences teaches and informs us much both about social attitudes and about the form of behaviour in connection with sexual offences. At the same time it shows a certain sexual subject that legal discourse itself produces. From English-speaking criminal law – and things are by and large the same in other Member States – the paradigm of normal sexual behaviour emerges clearly: it is expressed by the norm of adult heterosexuality and penetrative sexual relations. There have been some recent changes as regards age limits and offences concerning male homosexual relations. This corresponds to an implicit legitimacy. Lesbian sexual has the doubtful privilege of still non-existent in law<sup>37</sup>. We can inform ourselves also on what “normal” and “abnormal” sexuality are: both are constructed very differently for men and for women, in the sense that the latter in particular have a passive role and are victimized. One fundamental question to ask, however, concerning sexual offences is that of sexual experience, of lived sexuality<sup>38</sup>: how do they perceive it?

If doctrine on sexual offences is associated with sexual autonomy, namely the freedom for anyone to determine their own experiences and choose with whom and how to express their own sexuality, the penal law takes account of this only unequally and in very limited fashion. It is impregnated more with moral conventions historically associated with Christian morality. The majority of sexual offences are, moreover, associated with breeches of public order. It would be a good thing,

36 Nicola Lacey, *Sexuality, Integrity and Criminal Law*.

37 The history of lesbianism shows the existence of couples excluded from legal rules in the sense that they were not taken into consideration at all, as if they were non-existent. On these “realities” see inter alia, Elisabeth Lagovsky Kennedy, *Telling tales: oral history and the construction of pre-Stonewall lesbian history in the oral history reader*, edited by Robert Perks and Ahstair Thomson Routledge, London – New York 1998 p. 344-356.

38 Theoreticians in feminist studies have written and insisted much about lived experience which, associated with self-awareness, was one of the key concepts of the feminist movement and of “feminist jurisprudence”.



therefore, to ask the question here what sexuality means in the first place for human beings. But to come back to autonomy, which is full of values and interests in our liberal legal systems, in relation to rape in English-speaking law it takes on more of a “proprietary” than a sexual dimension – a man or a woman have rights over their bodies as if over any property whatever. The fact of being constrained to undergo a sexual relation without consent is the constitutive feature of the crime of rape according to its definition in English law. It is as if on the one hand there were the consent of a legally disembodied subject, and on the other the subject’s body: one can find all too few traces in penal law of ideas associated with, for instance, self-expression, intimacy, personal relations or trust<sup>39</sup>. That means everything that gives sex in our time a value, or not; even though these ideas and approaches are indeed present at various stages of proceedings.

How can one explain those provisions of the criminal law that treat sexuality in relation to what is valuable, substantive, in sexual experience and what is false or abusive in certain forms of sexual behaviour?

Might their content be, albeit indirectly, associated with the fact that our Cartesian tradition is based upon dualism, the dichotomy between body and mind, while favouring the latter? From the feminist viewpoint the implications of the primacy of mind and of reason associated with masculinity have repeatedly been pointed out. The normal body appearing in legal discourse is the male body. The female one is the abnormal, problematic, physical body (representing nature): it acts as counterweight to the position of man as rational individual. It is the emotional, relation, even hysterical body, as bearer of a womb. Hence the need raised by feminist philosophers to reconstruct a way of seeing the world so as to adjust to the corporeal dimension (aspects) of human beings. The task is extremely hard, and cannot leave intact the concepts of body and mind (intellect) rooted in the categories of Western thought: there has therefore been the attempt to say the unsayable by transgressing conventional frontiers. By rethinking the body, these philosophers have given it a certain priority. However paradoxical it may seem, and despite “gender” analyses, the body is there and does not evaporate: or rather corporeality, both sex and gender, are social constructions. Bodies are changeable (transformable). They are materialized through repetitive practices within established cultural discourses, like that of law. These practices do not only give a meaning to the body but at the same time

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<sup>39</sup> On the “irremediable trauma” that is the consequence of rape see [Vigarello](#), op cit p. 268 ff

frame the powers and capacities of different bodies: some count, others do not (Buttler). Knowledge might thus be incorporated in, inscribed in the body (Irigaray): that would bring a break in the mind-body dichotomy. Deconstruction also takes up the dichotomy between reason and emotion. The body is not a “thing”, but more of an inevitable locus<sup>40</sup> through which both the emotional and the intellectual side are lived.

This also applies to sexual offences. In the sphere of sexual offences, on the one hand the body is present, as is the sexuality bound up with it. Moreover, another interesting point in the case of these offences is that they are not covered by the veil of legal neutrality. The position of legal subjects is constructed in accordance with the gendered, biological body: for instance, only women can commit rape in English law. If the inappropriateness of the legislation on rape is due to the impoverished conception it attaches to the value of sexuality, that is at first sight associated with the concept of non-relational, disembodied legal subject, the subject without a body. The typical legal subject in criminal law is the person having cognitive capacity and at the same time able to control their behaviour. It the mental aspect that is important, not the bodily – that is regarded as neither important nor problematic.

In criminal law responsibility is conceived of in terms of rationality. It depends on the capacity to understand, on reason and on control. The mind is the master of the body. To the extent that feminist philosophy is right in assuming that physicality is associated with women, then the legal subject in criminal law is implicitly marked as male.

The other reason that weakens law on rape is the importance attached to sexual autonomy. Feminist philosophers dealing with the mind/body dualism have stressed the designation of the mind as masculine and the body as feminine, maintaining that the body is repressed in Western philosophy (metaphysics). This repression is reflected in the social institutions and in the categorizations of systems. For the criminal law, that is seen as meaning, in the construction of offences, the predominance of the mental element and the reduction of the bodily or emotional. In the case of rape, this is perceived as expropriation of property taken together with violation of a will. The central question thus becomes the element of consent: proving whether it exists, whether it is true or meaningful in accordance with the context. Even if that is necessary, the real locus of debate is elsewhere, since “consent” displaces and renders invisible aspects of the offence associated with the body and with affect.

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<sup>40</sup> The term “locus” is used by Joan W. Scott in *La citoyenne paradoxale*, op cit p. 35



Undoubtedly, the body is not absent from rape trials: but the question is who that body belongs to, and how it is treated. Coming back to the image the criminal law itself forms (constructs) of the body, one may glimpse behind the criminal legal subject the closed (and impenetrable) body that finds its expression in Kantian philosophy. Its “normalization” by legal rules teaches us much about the construction of other bodies – of homosexuals, women, children, the elderly, the handicapped – as exceptional and marginal to legal subjectivity: a body conceived of as a closed territory cut off from emotion, prevents as seeing relational values. Emotional dimensions, emotional experience, has not yet found its place in the formal legal categories of English speaking criminal law, and there is no great difference in the other systems – despite certain divergencies of regulation and legal tradition especially in connection with penal proceedings in the Continental countries.

The need to (re)define a normative framework that allows inter alia sexual offences to be rethought so as to allow repressed corporeality to be expressed<sup>41</sup>. By according the according the corporeal aspect of human existence its appropriate place has been well shown. The work of jurists who also take psychoanalytic knowledge into account may be valuable to us<sup>42</sup>, as is the case with Drucilla Cornell who stresses the importance of the imaginative sphere<sup>43</sup>, which contains three features: bodily integrity, access to adequate symbolic forms to accomplish linguistic capacities enabling differentiation from others, and protection of the imaginative sphere itself. The latter, with its components, can generate the mental and political space within which sexual equality can be realized; it allows each person to represent it to themselves and take account of this sexual integrity. This integrity is opposed to the idea of legal autonomy as we

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41 Compare this with Pulcini’s conclusions in connection with repressed feelings: they are very close

42 As stressed by Juliet Mitchell in her lecture at the EUI on 11 December 1996 on Feminism and Psychoanalysis, knowledge of psychoanalytic theory by women taking part in what is known as the second wave of feminism – or the 60s Feminist Movement – contributed enormously to understanding women’s position, especially since the traditional Left had difficulty understanding the sexual difference. The same goes for homosexuality, previously repressed by psychoanalysis – it was long seen as a theory of adjustment to the patriarchal sexual system. The contribution of Lacan’s disciplines – placing human culture at the centre of law – and especially of feminist philosophers who influenced lawyers is of first importance. (Perhaps names of feminist philosophers, also including Le Doeuff)

43 On the imagination in philosophy, and especially the masculine imagination as “*masculine imaginary that works to silence women in quite specific way*” see Michelle Boulous Walker, *Philosophy and the Maternal Body*, op cit.

know it, which leads to the cancelling out of the body – because it is associated with the dominant image of the abstract subject. As long as the proposed integrity contains not just physical integrity – several Continental legal systems indeed know this fundamental right – but at the same time emotional aspects associated with sexuality too, as imaged by each person, the risk of essentialism in this hypothesis is absent. This bodily and at the same time emotional and sexual integrity consequently does not seem able to be realized through institutional channels. The imagination is immense and unbounded, and asymmetrical. But the imagination can be asphyxiated and killed by institutions and by legal regulations that ignore the true needs of human persons and seek to normalize them by putting them in a legal Procrastian bed.

The imagination, to be sure, remains as a project, but there is a part of it that directly concerns the organization of our society and may inspire changes and reforms in criminal law and in other legal disciplines in connection with emotional aspects – whether those of sexual ties, of family sentimental ties, or interpersonal or even intercitizen ones<sup>44</sup>.

In this last case of sentimental ties among citizens, male and female, the impression is that these types of relation are external, outside the body and its emotional component, which is not true; the laws of the polis were always there: the question is also who makes the laws, and what polis we want. How do we want our polis to be?

## 7. The vestal and the fasces: what is forbidden is possible

*He brought me to the banqueting house,  
and his banner over me was love.*

*Stay me with flagons,  
comfort me with apples:  
for I am sick of love.*

Song of Songs

The majesty of Roman law, whose words, terminology and logic have marked our Western legal tradition, is still to some extent present in the contemporary body of law. It was symbolized by the fasces (bundles of rods) born by the lictors who publicly escorted the Consul, the Emperor and other very high functionaries: they represented State power (its enforcement power). The only women escorted by the fasces were the

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<sup>44</sup> See also “*A qui peut servir l’imagination*” in connection with Olympe de Gouges in Joan W. Scott, *La citoyenne paradoxale*, op cit. p. 39.



vestals were symbolized the sanctity of the family, as priestesses of the goddess Vesta – Hestia in Greek – who protected the hearth, intimacy and fertility. As guardians of the private sphere, the vestal virgins had a public existence and function, and the legal status of men. The name of the ritual phallus they guarded was Fascinus, which as well as the male organ also means enchantment and the Evil Eye. If the word fasces is associated with the fascinus, so is fascination.

Everything is connected: the vestal and the fasces, love and law, the private and the public. It is connected and inseparable, with complementary functions mutually and reciprocally constituted.

If one looks things right through with the eyes of Lacan, we find that “Law and desire ... are born together, joined and needed by each other.”

Going further in this direction, Jeanne Schroeder<sup>45</sup> deals with the question of “law and love” in her own way, mainly by exploring not legislation on this point but the love of law, what she calls the “inherent, fundamental eroticism of the market relation and the repressed sexual content of law”. She does so by taking account of Hegel’s legal theory and Lacan’s psychoanalytical theory. She brings out the principle that property – the law of the marketplace – and the female are both phallic, both serve a parallel function in the creation of subjectivity, for instance the capacity to be a legal actor, able to have rights and duties as well as to be a gendered being who can speak and engage in sexual relations. In both theories, subjectivity is intersubjectivity mediated through objectivity. Subjectivity is not a natural preexisting state as in classical liberal theories, but more something created through relations with others in a system that “implies the possession, enjoyment and exchange of an object of desire”. The system Hegel deals with is an abstract law (for instance property and contract, the capitalist market), and Lacan’s is sexuality. Property, according to hagian philosophy, and the feminine according to Lacan’s psychoanalysis, are fictions, the writing which helps us to define the outside objects that make us capable of making ourselves into acting subjects.

Lacan, for whom the creation of subjectivity is simultaneous with the creation of the realm he calls symbolic, namely the law of language and of sexuality, is interesting for feminists because he draws a neat distinction, well separating sexuality from anatomy. He explains how

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<sup>45</sup> Jeanne L. Schroeder, *The Vestal and the Fasces, Property and the Feminine, Hegel, Lacan*.

sexuality is not confused with but shaped by anatomy, which is not the case with Freud. For Lacan, Hegel is in agreement with liberalism only in saying that freedom is the essence of human nature and that no State could be worthy of the name if it did not preserve individual freedom. But at the same time, for him the liberal individual is too empty and fragile to be able to be a “subject” – that is, to be capable of legal rights or of speech/language.

Rights can be understood only as relations among people. In the same way, language can be understood only in terms of society – it is in these conditions that liberty comes about. Subjectivity is created through legal rights that carry us towards others. To become a subject, an abstract person must first seek to make another abstract person a subject, which is an active creation and an alchemy of love, love being the desire to be desired<sup>46</sup>. Love allows the maximum to be extracted of what one can give and receive. Hegel’s legal universe has a capacity for infinite expansion, of the offer of rights to others.

Property is presented for the author as the most primitive (inter)relation from the logical viewpoint. In property subjects recognize each other through a system of ownership, enjoyment and alienation of a mediated desired object. Since at the time needed for recognizing someone by other’s property is, according to her, desperately erotic and symbolic. It represents a relation between two subjects mediated through an object. The right to property is more the (re)cognition that another, male or female, has the right to possess and to exclude me from objects. It is only on the market, when one exchanges with someone else an object with no contract, thereby acquiring its legal subjectivity, that there is mutual recognition as being equal and unique.

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46 The definition, or formula, given by Lacan of love is as follows: “Love is giving what one has not to someone who does not want it” (seminar XII, March 1965). It comes out of an analysis of Plato’s Symposium that sets six people around Socrates – including Agathon, Gorgias, Alcibiades, all of them men – for whom, though, homosexuality is an indisputable dimension of love – each of them with a different conception of love. But Socrates refers to the words (discourse) of Diotima of Mantinea, a legendary woman, to set out his own conception of love. In his commentaries Lacan “attributes to Socrates the place of the psychoanalyst teaching his disciples a truth that eludes their consciousness” (Elisabeth Roudinesco), Jacques Lacan *op. cit.* p. 334). Diotima’s voice and the absence of a “motherly body” from the symposium devoted to love has been commented on by contemporary female philosophers; see Michelle Boulous Walker, *op. cit.* ch. 7, *Colletions mothers: women at the symposium* p. 134 ff.



(It may perhaps be noted that this is a rather American approach where the object of desire is located on the market for material things in our times where the market governed by the logic of capital (profit) creates alienation in the Marxist sense of the term that limits what Hegel sought to preserve and promote, namely freedom).

Just like legal subjectivity, mental subjectivity – the capacity to be a speaking agent capable of loving – is intersubjectivity mediated through objectivity. Lacan explains how sexuality is created through imaginary identification with the desired object, the phallus, a symbolic concept, which corresponds in the biological order to the male organ and the female body. The same slip can be noted in legal doctrine in describing the legal concept of property the metaphors of the male organ (fascis) and the female body (Vestal) are used.

For Lacan sexuality is a response to the feeling of loss imposed on us from outside, that is, a response to castration. What has been taken away, lost, is the phallus. The “masculine” denies castration or pretends to have made an exchange; the “feminine” accepts it and identifies with the lost phallus, with the absence. Sexuality is not anatomy: one cannot distinguish from “gender”, because it is already socialized, already symbolic.

The acceptance of castration by the female means nothing other than the understanding that one can no longer ever be self-sufficient, entire in ourselves: the concept of penis envy is by no means the desire to have the male organ, but the nostalgic mourning for an imagined lost integrity.

Lacan’s theory accordingly does not follow the additional misogynist imagery whereby the male is presented as the active subject and the female as the passive: the latter can actualize the negativity that is the essence of freedom and subjectivity. The male may have the subjectivity, but the subject is female. The male, according to this author, is trapped, subjected to the symbolic order of the law; the female can escape this order and gain access to the real order (to enjoyment).

From the Lacanian viewpoint, according to the author’s interpretation, property is phallic – it is a creation of subjectivity through the possession, enjoyment and exchange of an object of desire. It is also a legal, symbolic notion, but a tendency is to identify the symbolic with the physical. There is also a tendency to use anatomical metaphors in relation to property, depending on the position envisaged, feminine or masculine. Since the law and the act of judgement are, from the psychoanalytic

viewpoint, law tends to favour masculine metaphors (as in the case of a property dispute: possession, exchange) and to repress feminine metaphors. There is also a tendency to reduce the bilateral symbolic relationship – among subjects mediated through an object – to a bilateral, binary one: namely the owner and the tangible object or “exchange value”. Additionally, masculine law denies castration and the female need for mediation by, for instance, ignoring the feminine factor of enjoyment. By repressing it as identification with the object of desire or as a silent or absent third party – which, it is thought, might also be society. (Note: consider the fact that property has changed so much since Hegel, something that raises as many problems as his association in our days with liberty).

Lacan’s notion of castration as a law of interdiction (prohibition) transforms the impossible into the forbidden. It thus makes it – this impossible becoming forbidden – theoretically possible. The law presupposes its own transgression. It is just the negation (negativity) at the heart of subjectivity that causes us desire, makes us capable of loving. We become subjects with the capacity to imagine and to desire the relationships only once we enter into the symbolic order of the law and of language, that is, upon our castration. This, far from being an obstacle (barrier) that takes us away from desire and from love fertilizes it: it is not the “never again” but the “not yet”. “Real human liberty can be brought out only by creating and recognizing the rights of women in their sexual specificity as women”. (This conclusion, rather abrupt as it may be, would have an essentialist air if one did not know the importance given to the symbolic order and to the imaginary: criticize it all the same).

## **8. Law and libido in the European Union: still very far from Europe’s**

*“No”, she said. “When I asked, What walks on four legs in the morning,  
Two at noon, and three in the evening, you answered,  
‘Man’. You didn’t say anything about woman.”  
“When you say Man”, said Oedipus, “you include women  
too. Everyone knows that.” She said, “That is what  
you think”.*

Muriel Rukeyser, *Myth*



Exploring the paths that link law with libido in the European Union as Peter Fitzpatrick sees them<sup>47</sup> is a very interesting way, not ignoring the teachings of psychoanalysis, to approach and locate the question of love in Europe. Mythology presents us with Europe as a young girl called Europa, holding in her hand a golden basket containing her family's talisman – and at the same time her destiny – but it has trouble with its identity because of both its historical past and its present as European nations, the Member States of the Union. Is it, on the image of nations, the European “Nation” – if one may use this term – then what will it do with the law of the European Union? “The libidinal energy displayed by the European Union brings self-love and narcissism together with hate for others that oppose or deny the constitution of his identity,” writes this author. The question is just this identity, its constitution, its genealogy, its constitutive and structural features: but also those that determine and influence it, through which the bonds of love are woven: their project. The project of life, the project of a future, not the functionaries, or clerks, of a certain category of lawyers that believe they are the heart and mind of Europe, that form part of and express the bureaucracy of the Common Market, but of those, male and female, who see themselves and in the line of those people who have demanded “the right to happiness”, paternity (solidarity), human dignity, equality, self-management, a Europe of peace and solidarity<sup>48</sup>. The Europe of peoples united by a history, a culture, a mythology, whose positive elements can be more desired than the negative ones. That is able to mirror a libido associated with the most constructive values: deep knowledge of its history, its lacerations, its blunderings, may well help in this direction. Libido – recently discovered and important – is, moreover, changing, even that of the European Union and its law might turn towards another direction, in order to reflect Europe. That would be a Europe whole in all its dimensions: past, openness to others, and a successful future (with a reworked, reoriented law).

Certainly, one should know Europe's history from its first steps, lost in myth when the gods of Olympus were still alive, gods that took the form of divine animals, at an epoch where the rape of women was in their destiny. Europa was daughter of Agenor, king of Sidon, who also had five children, Kilix, Phineus, Phoenix, Thasus and Cadmus; she was playing with other girls by the river, gathering flowers. A herd of bulls arrived, among them a pure white one, so gentle that the princess began to play with him and climb onto him, and made him a garland of flowers.

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<sup>47</sup> To take up some fundamental demands, since the French Revolution, which had a content and an impact that were legal too.

<sup>48</sup> *Law and Libido in the European Union*.

Without her noticing, they were already close to the sea, and suddenly the white bull, who was none other than Zeus, struck a little earlier by the arrows of Eros, crossed the blue sea swimming fast and carrying off the princess, who was not just anyone but the great-granddaughter of Io, who herself had a similar fate. Zeus had fallen in love with her, but her route was in the opposite direction: from Greece to Asia. The gods took the girl away from Asia and brought her to the Isle of Crete. The history of Europa is so right whether told by Hesiod or our contemporaries<sup>49</sup> that it is not possible to summarize it here. Let us merely note that one of her brothers, who had been sent by their father to find their sister and bring her back, Cadmus in his adventurous explorations in the lands of Europe had met and married Harmonia (or Harimony, daughter of Mars and Venus).

A guiding thread that runs through Europe's myths and history as distinct from others might in fact be the one of Democracy in its broadest sense of consent to and participation in decisions by those concerned, and even their self-determination – in a system of objective rules – that the existence of the unconscious in any case makes limited for the acting subject. One might find the language of democracy opposing barbarism, that is, expressing and ratifying on unquestioned submission, even if democracy disappears for periods in the places it came from. One might find it also in the history of the birth of the nation state in several countries: the democratic discourse is what spreads, the fire that devours the old structures and causes to rise from their centres those of our modernity. Democracy going hand in hand with equality is at the centre of such movements as the labour movement or the women's movement. We know well that they are the visible top of the iceberg, that even if they have given way to some "loving" legal regulations there is above them an abyss of inequality: the iceberg is plunged in a sea that cannot – any longer – have frontiers. What happens when the other side of the ocean ends by coming "home to us". So-called globalization accelerates the communication movements of workers that know no obstacles, no limits, no frontiers. This is not, though, a reason to fail to recognize the presence of democracy in Europe, and its eclipses. It is not a reason not to be surprised at the fate of the young girl Europa, who was never asked the question – nor do we ask it – what she herself wanted: did she want Zeus to be in love with her or not, might she be in love with some other young man from her town, did she want to be free, to wander all alone and get to know the world? As is the fact of being a woman, and a young woman,

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<sup>49</sup> Especially the author cited by Peter Fitzpatrick, Roberto Calasso, *Le nozze di Cadmo e Armonia*, 1991, 1<sup>st</sup> ed.



assigned her, determined for her as the fate not to have the question asked how she saw love and how she saw herself in love, how she wanted to live love – or not. The rules were then still made by the gods – who are no longer there – without taking account of feelings. They were later made by men in Athenian democracy, in the Rome of citizens, in the flourishing town of Florence: women were always there, but with no path linking them to the legal. Without being able to give their opinions, express their doubt, sometimes remoter than earlier from decisions on their fates that affected their feelings.

Even where they were able to articulate their own legal discourses as equals and as citizens to be recognized as such by the laws of modern democracy, this had paraxocially<sup>50</sup> excluded them, in order to include them later but without – yet – changing its structures, its dated democratic patterns. We can no longer forget the small basket carried by the young girl Europa when she was walking and pondering the dream she had had in the night: of being pulled at by two old women, one of them Asia and the other, who finally seized her and took her to her side, with no name, but who took that of Europe. We can no longer forget that the basket contained the genealogy of the women of Europa's family. The history of Io, which might have made the young great-granddaughter act differently if she had known it properly and pondered it carefully, might have taken her on a historical route that would not have favoured the birth of the monster Minotaur. But did young Europa know the content and meaning of the objects in her basket? If democracy is present in Europe's history as nowhere else, yet at the same time painfully absent – eclipsed – for periods from its most visible state organization structures – one cannot fail to recall Nazism and Fascism, which, moreover, fertilized the necessity of a European Democratic Project. One should agree with Peter Fitzpatrick in saying that “there is barely a single convincing feature of the European Union as such”. Despite the fact that though there are always still some minor advances, despite the fact that the EEC, with which the Union is associated, comes directly from the end of the Second World War, which was what brought it to birth. And despite the fact that democracy can only be the only universal project, the only, single universal feature of Europe, sprung from its old history and put to the test in its recent history.

In this case too there is a story of love for Europe and democracy at the same time, that Luisa Passerini calls “Europe in Love”, that of men and

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<sup>50</sup> Joan Wallace Scott, *La citoyenne paradoxale, les féministes françaises et les droits de l'homme*, Paris, Albin Michel, 1998, translated from the American *Only Paradoxes to offer*, Harvard University Press, 1996.

women who during the last World War came out in favour of United Europe and of the transcendence of nationalism in their writings, actions, projects and manifestos. In some cases, apart from the myth United Europe, law was present as an essential feature of the project, as in the “Ventotenne Manifesto”, drawn up with the participation among others of Alfiero Spinelli, who planned a constitution for the European Federation, a government, that is, the legal conditions for a European polis and demos<sup>51</sup>.

At present we do not know exactly what Europe is; there are certainly several Europes depending on the context<sup>52</sup>. It can in any case be distinguished from Asia, in its geography, in its debatable frontiers throughout its history on its East; it can also be distinguished from the United States for its age and the density of its own past and its gains, for instance on the social side: participation, enterprise councils, enterprise citizenship, social rights. Everything that is “non European” is not necessarily asiatic: the “New World” whose political weight was very strongly felt in Europe after the end of the war and the dynamism of the American multinationals since the ‘60s is also to be taken into consideration for its identity. But despite certain appearances the European Union is not Europe, we feel, or is not yet, first and foremost because of its law, which is still a law “without memory”. It is very limited and dry by comparison with the law of Member States. It is a law at bottom commercial, still meeting the rhythm of the market, even if that is a shared market common to all the Member States. This commercial legal core of the common market has become still stronger with the fall of the Berlin Wall and the collapse of the political regimes that sought to emancipate the working class without taking account of the needs of democracy. But what may perhaps be seen as the identity of the European Union began to be affirmed in the 70s, with the stress on the individual and the market economy by comparison with the “collective” of the times, of those regimes that have disappeared from the European historical stage.

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51 In Hanne Peterson, *Love and Law in Europe*, loc. cit. The participation of women in this type of political movement – in the resistance to – often has a more special feature to the extent that their participation in political action associated with love for Europe comes about through their love for a man with whom they also the political ideals. This special feature is due to the original exclusion of women from the public sphere, and their exist several cases associated with the nation state too (Greek examples are Penelope Delta and Ion Dragoumis).

52 Peter Fitzpatrick, *supra*.



There is certainly a history of the creation of a European identity for the nationals of all the Member States, but those coming from Third World countries are excluded: they still remain aliens, as before. But if frontiers have come down within the Union, other exclusions, internal ones are appearing: they can neither be neglected nor forgotten.

A “desocialization” is coming about: a weakening of the nation state that sees the number of the unemployed and poor increasing without itself being able to intervene effectively in their favour, treating them as citizens, male and female with rights, and as persons with dignity. It is as if in some sense the State’s love for its people was diminished by the weakness affecting it. There is, to be sure, European citizenship, but it is very poor in content, very slight in legal weight, “thin” as the British say. The European Union, even if the Treaties of Maastricht and Amsterdam mention human rights are the rule of law and other democratic principles, is moving away from the Europe of the welfare state: its concern is the economy, economics. Effective emotional links between the European Union and the European people(s) are too weak, not to say almost non-existent from this viewpoint.

Thus, while certain “achievements” of the Union resemble the classical attributes of the nation, they are not; or rather, it is a case of “repetitions” very remote from the magic, cruel atmosphere that created the nation state by simultaneously forging its people and the strong links there are between the two. If the European Union at the same time occupies the same space as the nation states, it cannot itself be a nation, we feel, to the extent that it does not offer European citizens, male and female, a project of life in society that is fundamentally innovative and different from that of the nation state. Paradoxically, the Union is undermining the powers of Member States without conflict breaking out: is this a double “nationalism” against the others, associated also with European law? One might draw a parallel, far off and from a certain angle, between the national legal system and the legal system of the European Union, to look at their relationship as regards the law and the nation. The law – subsists in a lone and isomorphous relationship with the nation. The two systems are similar in the sense that the law of the Union is not post-modern: its panoply of organs, including the Court, the direct effect of (certain) Community acts, the “Constitution” created by the Luxembourg judges, brings the Community system close to that of Member States. At the same time, the Court is oriented towards the universal by opposing the local and particular, including the diversity of Member States. The European Union and its law deal with their neighbours and constantly provoke others by accommodating them, incorporating them into their

dimension: the orientation of Community law is accordingly “monadic”, concerned only with its own telos. This telos is too narrow, too limited, contains neither tradition – its best features – nor the interests of the men and women of Europe: these are replaced by the objectives of competition and economic data.

The emotional bond with Europe is still to be woven – there is a need of legal (and practical) texts that do not ignore emotions: albeit invisible, it is what supports them.

## 9. Female body and citizenship

*Je n'ai provoqué personne  
Seulement je suis toujours poussée  
dans des endroits où les vocabulaires  
ont obstinément refusé mon existence*

Tjeni Mastoraki, Naissance

The asymmetry in relations to citizenship between human beings of the female and the male sex lies in the fact that being female implies a public discourse either of exclusion or of dissemination, or of protection or equalization, which is not the case with being male<sup>53</sup>.

This is associated with the fact that the female body – which has always been the object of a legal discourse but also of knowledge and of political practice – does not belong exclusively to the private sphere, is not perceived as being determined in relation to the will of a single person (singola). It belongs to the entire community; the political and legal discourse governs its physiology, and it is regulated in accordance with an interest that presents itself as the “common wheel”.

In the public sphere, this means that women have not concluded the same contract as men<sup>54</sup>. The question of women’s citizenship is bound up with the (re)appropriation of the regulatory discourse and the retracing of the limits to autonomy, as Marina Graziosi notes. To be sure, there has for some years been a regulatory discourse with a content in favour of female emancipation, but that does not change very much: the problem shifts, becoming “the fact that abstract equality before the law deriving from legal language involves a parity and neutrality of discourse that are

<sup>53</sup> Marina Graziosi, *Corpo femminile e cittadinanza*.

<sup>54</sup> See the work of Carol Pateman, Iris Young and others on the “sexual contract” they have undergone rather than signed and consented to.



manifestly artificial". The norm does not make explicit what is so clearly implicit, namely that it is the female body that is being talked about. We can see here a sort of confusion of levels: there is an attempt to reduce to one what belongs to two separate spheres, the female and the male, to institute a neutral body, that is, and artificial construction that does not exist in the conflicts or events of the above-mentioned gendered spheres. One might, to be sure, develop a norm that transcends both spheres, while taking both into consideration, but that is not the case. In reality, behind political citizenship one always discerns the male body: it is always modelled on its outlines. Despite a bit of makeup, the universality of the rights of man goes hand in hand with the universality of the sexual difference still persists: the womb of citizenship remains the same and unchangeable.

Women, though they have entered the representative institutions – the law permitting this in the name of equality – have not yet become able to write the laws, for reasons now independent of their legal capacities or their knowledge of legal science. They have for centuries been turned aside, always because of their body, their incarnate difference, and the disorder they're regarded as bearing because of their body. In the political compact, there was above all the regulation of relations among men as regards ownership, exchange and the tangibility of the female body. There is also the regulation of what women can or could not do with their own bodies (among other things, abortion).

Woman has been for centuries the citizen in the household – if one may use this term which stresses above all participation in public life and the laws of the polis for the private life. This was indispensable in order for her to be a citizen – second class – of the community set up by the contract of our modernity: the striking thing is that it has not yet changed; the lines separating two gendered categories with unequal citizen status continues to exist.

It came about that some women had love affairs with enemies during the last war among States currently members of the European Union<sup>55</sup>. Their

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<sup>55</sup> *Du Droit et de l'Amour op. cit.* It is interesting to note that in mythology and literature there are archetypal women that always betray their country in the name of their love for a man, starting with Helen, Ariadne, Medea, when she goes off with Theseus, and even Antiope, who was an Amazon. This makes Calasso say that "Woman's heroic gesture is treason". The marriage of Cadmus and Armonia (op. cit. p. 82-83). But the questions we study ought more to be a possible different relationship of women to their country (or in our times, the State) when it, having

fault is that they did not want to recognize in the other human being the enemy of the polis – which is the elementary rule for every citizen (of a nation state). But women, as we know, are not full citizens. That is perhaps why their heads are shaved to punish them: their hair will grow again, everything can be forgotten, they can be reintegrated into society by resuming their inward place in the private sphere. As for the internal damage, to their mental integrity, these consequences to their relational and emotional capacities – these types of punishment that go back to the Middle Ages – have never raised any questions<sup>56</sup>, because they belong to a past epoch even if they have still left some traces in 20<sup>th</sup> century Europe. To be sure, there much severer punishments when women engaged in resistance in their own way, as was the case with the French woman who, at the difficult period of the Occupation, helped women to abort: she was decapitated, the last woman to mount the scaffold in France<sup>57</sup>, in 1943. But it seems that this can no longer continue in the same way. In Europe, in the Member States whose history includes pages of such contents of recent date, the time of the Second World War, and many still more yellowed but just as meaningful pages, there is a growing awareness – a breaking of the silence: there are the first syllables of a new legal discourse that cannot help but create barriers to inequality as far as both citizenship and “love” are concerned.

Citizenship is associated with democracy (or with republicanism)<sup>58</sup>; but this was founded excluding women, just because of the nature of their bodies, not only in Athens but also in our own early modern times. Calling “universal suffrage” the granting of the right to vote to all men but only men was not a legislative error: it was his truth, since he could not imagine that it could also be granted to women. Their reason for being in society was different because of their bodily “composition” that destined them to love, to found a family, to devote themselves to it. The “original sin<sup>59</sup> of democracy” becomes increasingly visible after the integration of women into political citizenship following the Second World War, now in all the Member Countries of the Union. It was perhaps a sort of recompense or rather recognition of their active

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constituting its power, calls for the sacrifice of lives (bodies), something not easy to explore (but see [Virginia Woolf](#)).

56 Internalization is characteristic of our epoch (Virgarello).

57 Claude Chabrol's film “Une affaire de femmes” (1988) graphically showed this story, which closes the section “women and the Carmagnole”, which reminds us of the first one to be decapitated because she wanted to be a “political man” and thus betrayed “the virtue of her sex”.

58 Alternative term used by [Joan Scott](#), [op.cit.](#)

59 Using the expression of [Françoise Collin](#), loc. cit. p. 371.



participation in the economy and also the Resistance, while the men were engaged elsewhere. But despite recognition of this so much demanded right, their effective participation in parliament and government is still today almost derisory, corresponding neither with the number of female voters nor the interests of women. It is as if the functioning of this democracy with its current structures had engaged in experimentation with its “bisexualization”, showing that the line traced between the public and the private sphere, which associates the sexual difference with dependence on one’s own function, still remains its limit (its own obstacle) and because of the marginalization of women, despite the granting of the right to vote. Behind this line, in the realm of the private, in the service of needs, is hidden what was unduly, according to Françoise Collin, termed reproduction, namely generation<sup>60</sup>. What distinguished democracy from other political regimes since antiquity was the fact that it was at the service of all, of the (common) welfare, of the *general interest*. But this has been defined in our democracies without women, it has been structures as the “general interest of men”. A register of human, fundamental reality is thus outside the general interest, escapes the social bond, is invisible because of the social contract which is generation. Generation is shut out<sup>61</sup>.

The shadow of the enlightenment still prevents us from seeing women as forming part of the polis, with citizenship without being transformed, either into a neutral, disembodied individual or into an inferior, alien “other”. Regarding European citizenship, as provided for by the legal texts in force, things are still worse. It is still further from filiation, generation and the “general interest” in relation to women and the interests of society, European in this case, that they express. European citizenship does not seem to suspect their existence, in this sense it is absolutely alien to “love”. But to the extent that it cannot redefine

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60 *Loc. cit.* p. 40 and 41. But here we have to quote Françoise Collin’s text: “In a more immediate and simpler way, I would be ready to see that the citizenship constructed by modern democracy is the citizenship of a citizen exempt from all generation, not the son or father of anyone but another citizen. Citizenship and the organization of the polis neither could nor would incorporate recognition of the fundamental dimension of its renewal through generation, which far from being at the heart of its organization is treated as only a sub-paragraph, and through exceptional measures generally taken in favour of or against women, treated as at best providers of services, delegated to a function that democracy does not wish to incorporate and is and always will be incapable of incorporating without changing its own logic.

61 In Lacan’s terminology used by, among others, Antoinette Fouque in *From Citizenship*.

democracy<sup>62</sup> taking account of the innovations or discoveries of its time. it is nearly a pale phantom of the “thin” citizenship that cannot inspire a real love for a truly democratic Europe.

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<sup>62</sup> Or democratic citizenship “by reinscribing it in the totality of the person and not in the abstract category of the individual” according to Françoise Collin (loc. cit. p. 41) – but Joan Scott considers that women have attained the status of citizens, but not yet that of individuals (op. cit. p. 217) – yet their analyses are at bottom very close.





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