Embodied Diversity and the Challenges to Law

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The author provokes a re-evaluation of the notion of diversity, critically examining its conceptual implications for such traditional notions of Western political and legal thought as impartiality, neutrality and the rule of law.

The author begins with a discussion of three feminist theorists, namely, Iris Young, Elizabeth Spelman and Carol Gilligan, each of whom presents a challenge to traditional legal concepts by calling into question the soundness of certain assumptions underlying them. The author then explores the work of Antonio Damasio, a neurologist who demonstrates the importance of body and emotion in the process of reason and judgment; the author uses his findings to support the feminist call for an "embodied diversity" that embraces the often excluded characteristics of desire, affectivity and the body.

This introductory framework provides a basis from which the author explores ways in which embodied diversity can help us rethink judgment and impartiality. Beginning with the premise that certain failures of judicial judgment can be linked to failures of affective response, the author argues that exposure to diversity facilitates not only the acceptance of different perspectives and experiences, that is, the "enlargement of the mind", but also the transformation of one's own affective responses. It is through diversity that we can influence the process of judicial deliberation, and begin to develop a new conception of impartiality that is based on a commitment to equality. The author ends this piece by revisiting the notion of universalism, articulating the need for a universal claim of equal moral worth as a necessary starting point from which we must procced to the context of our diverse embodied selves.

L'auteure propose une réévaluation de la notion de diversité, examinant de façon critique ses implications conceptuelles en ce qui concerne les notions traditionnelles de la pensée politique et légale de l'occident telles que l'impartialité, la neutralité et la règle de droit.

L'auteure débute par l'analyse des travaux de trois théoriciennes féministes: Iris Young, Elizabeth Spelman et Carol Gilligan, qui toutes trois remettent en question les concepts juridiques traditionnels en questionnant le bien-fondé de certaines prémisses. L'auteure explore ensuite les travaux d'Antonio Damasio, un neurologue qui tente de démontrer l'importance du corps et des émotions dans le processus de raisonnement et de jugement; l'auteure s'appuie sur ces recherches pour supporter les revendications des féministes pour une «diversité *incarnée*» qui embrasse les caractéristiques trop souvent exclues du désir, de l'affectivité et du corps.

Le cadre introductif sert de fondation à l'exploration des différentes façons par lesquelles la diversité *incarnée* peut nous aider à repenser notre jugement et notre impartialité. En partant de la prémisse voulant que certaines failles du jugement juridique peuvent être liées à des manquements de la réponse affective, l'auteure soutient que l'exposition à la diversité facilite non seulement l'acceptation de différentes expériences et perspectives, c'est-à-dire «l'ouverture d'esprit», mais aussi la transformations des réponses affectives de l'individu. C'est par la diversité que nous pouvons influencer le processus de délibération judiciaire et engager le développement d'une nouvelle conception de l'impartialité fondée sur un engagement à la promotion de l'égalité. L'auteure termine son article par une révision de la notion d'universalité, formulant le besoin d'affirmation universelle d'une morale de l'égalité considérée comme un point de départ nécessaire à partir duquel il nous sera possible d'évoluer dans le contexte de notre diversité *incarnée*.

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Introduction

People who think of themselves as sympathetic to feminism and other emancipatory movements are familiar with the arguments that we must pay attention to "difference". While many accept this imperative at a general level, they often do so without thinking through its implications. In this essay, I focus on how disruptive the claims on behalf of difference and diversity are if we take them seriously.[1] I argue that while we must embrace the demands to attend to difference, we must recognize how deeply they challenge concepts such as impartiality and neutrality, which have been central to the rule of law. It is essential to see with equal clarity and conviction both the impossibility of proceeding with conventional understandings of these concepts *and* the difficulty of generating new understandings.

I will begin by looking at three kinds of challenges implicit in the work of feminist theorists who focus on difference. Iris Young analyzes the conception of impartiality that she sees as central to Western political thought, and shows how it rests on an image of unity among people. This image is achieved by excluding "desire, affectivity and the body" from impartial reason, coupled with a corresponding exclusion from the public realm of those people identified with the excluded characteristics. Elizabeth Spelman offers a different perspective on how our categories of analysis assume an underlying unity that again results in exclusion, hierarchy and dominance. She argues that if we take seriously the social construction of gender, we discover that it is constructed differently for different races and classes. The interactions of gender, race and class are ultimately so complex that they threaten not only the category of "woman": the insistence on context and specificity in the construction of gender implicitly threatens the very idea of unitary categories on which the impartial application of rules normally depends. The challenge of context and specificity is then elaborated in the third example of feminist theory, Carol Gilligan's concept of an "ethic of care" as an alternative to the dominant "ethic of justice". I discuss the depth of the challenge this alternative poses and its significance for how difference is integrated into the definition of rights.

These interlocking challenges are then connected to the work of Antonio Damasio, a neurologist who explores how both body and emotion are essential to reason and judgment. The need to see human beings as fully "embodied" in order to understand their reasoning supports the feminist claim that the diversity of embodiment must be central, not peripheral, to the concepts underlying law. I use Damasio's framework to show how certain failures of judicial judgment can be seen as based on affective failure. This leads to a discussion of affect in judgment and more broadly to the project of rethinking impartiality and judgment. Drawing on Hannah Arendt's work, I develop a conception of judgment that aspires both to embrace and to transcend affective re-

[1] I will be focusing on conceptual implications of the promotion of diversity, not on the equally important institutional implications (*i.e.*, what it would take to make fully inclusive such current bastions of privilege and power as law school faculties and the judiciary). In "Judgement, Diversity, and Relational Autonomy" ((J.A. Corry Lecture, Queens University, October 1995) [unpublished]), I link the conceptual and the institutional issues.

sponses. I argue for the importance of diversity in educating judges and future judges to exercise such judgment. I then offer three examples of judgment in the face of diversity to begin the project of developing a conception of impartiality suitable both to adjudication and to the judgments of everyday life. I close by noting that a notion of equality underlies my effort to reconstruct a conception of impartiality. I offer a brief indication of how the challenge of reconstruction requires a purely formal claim of equal moral worth combined with the attention to embodied diversity necessary to determine the meaning of equality in any given context.

I. Diversity: Feminist Challenges to Conventional Legal Concepts

A. *Iris Young*

Iris Young's essay, "Impartiality and the Civic Public",[2] shows how the conventional notion of impartiality entails a denial of difference. Young's essay is an excellent example of both an effective dismantling of "impartiality", and a failure to acknowledge the implications of that dismantling for law. Young asserts that "[n]o contemporary emancipatory politics wishes to reject the rule of law as opposed to whim or custom, or fails to embrace a commitment to preserving and deepening civil liberties."[3] But she does not explain what the rule of law would mean without the concept of impartiality, which she has so thoroughly discredited. Young's work is particularly important nevertheless, because it identifies the issue which is at the heart of the challenge and the disruption posed by difference:

> [T]he ideal of impartiality expresses what Theodor Adorno calls a logic of identity that denies and represses difference. The will to unity expressed by this ideal of impartial and universal reason generates an oppressive opposition between reason and desire or affectivity.[4]

Young explains the links between impartiality and universality, and the latter's need to exclude difference. The conception of impartiality, she explains, entails a requirement of universality: "The impartial reasoner treats all situations according to the same rules, and the more rules can be reduced to the unity of one rule or principle, the more this impartiality and universality will be guaranteed."[5] But universality assumes some core identity, shared by all, that makes such application of rules reasonable. Universal rules only make sense if there is something universally identical about the ruled.

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[2] I.M. Young, "Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory" in S. Benhabib & D. Cornell, eds., *Feminisim as Critique: On the Politics of Gender* (Minneapolis: University of Minnesota Press, 1987) 57. Young's interest in the reason/affect split and in the exclusion of the body from the dominant view of the reasoning subject is part of a vast literature (see generally A.M. Jaggar & S.R. Bordo, eds., *Gender/Body/Knowledge: Feminist Reconstructions of Being and Knowing* (New Brunswick, N.J.: Rutgers University Press, 1989); L. Alcoff & E. Potter, eds., *Feminist Epistemologies* (New York: Routledge, 1993)).

[3] Young, *ibid.* at 57.

[4] *Ibid.* at 59 (see T.W. Adorno, *Negative Dialectics*, trans. E.B. Ashton (New York: Continuum, 1973)).

[5] Young, *ibid.* at 61.

Both the particularity of subjects and the specificity of context must be eliminated or side-stepped, making them irrelevant to impartial reason. Reason is impartial when it is not "distorted" by extraneous considerations, when it applies universal rules to a universal essence. If, however, rational decision-making is confronted with an infinite array of differences among subjects and contexts, there is no universality to provide the basis for impartiality.

Young argues that in the Western tradition, this drive to unity has had particular implications for the attitude toward affect and the body:

> Why does the idea of impartiality require the separation of moral reason from desire, affectivity and a bodily sensuous relation with things, people and situations? Because only by expelling desire, affectivity and the body from reason can impartiality achieve its unity.
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> ...
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> This reason thus stands opposed to desire and affectivity as what differentiates and particularizes persons.[6]

If we attend to affect and the body, we are immediately confronted with the vast multiplicity of humanity. The differences central to individual identity move to the foreground, and it becomes difficult to presume universality. In the Western tradition, reason is categorically protected from these distractions, differences and contingencies, thus providing a foundation for the impartial application of universal rules. Among the costs of this conception of deontological reason is that "it renders itself unable rationally to understand and evaluate particular moral contexts in their particularity."[7] Another cost is its consequence for the evaluation and education of affect: "Since all desiring is equally suspect, we have no way of distinguishing which desires are good and which bad, which will expand the person's capacities and relations with others, and which stunt the person and foster violence."[8]

Young is particularly concerned with the political implications of this drive to unity. Since important dimensions of human nature have been excluded from this model of impartial reason, they must reside somewhere. Women (and other subordinated groups) turn out to be repositories of the affective and bodily realms, and must therefore be excluded from the public realm. In the republican tradition Young sketches, the civic public is to be characterized by impartial reason. Thus, not only affect, but those people associated with affect, must be excluded from public debate. More generally, she concludes that

> [m]odern normative reason and its political expression in the idea of the civic public, then, has unity and coherence by its expulsion and confinement of everything that would threaten to invade the polity with differentiation: the speci-

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[6] *Ibid.* at 62-63.

[7] *Ibid.* at 61 [footnote omitted]. Contemporary Kant scholars are pursuing interesting investigations into the role of the particular in practical reasoning (see *e.g.* O. O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge: Cambridge University Press, 1990), especially c. 9 ("The Power of Example")).

[8] Young, *ibid.* at 63.

> ficity of women's bodies and desire, the difference of race and culture, the variability of heterogeneity of the needs, the goals and desires of each individual, the ambiguity and changeability of feeling.[9]

There are, of course, other strains of political thought in the Western tradition that focus on negotiation of competing interests rather than on a unitary public good discerned by impartial reason.[10] But Young's insight into the exclusionary quality of impartiality is most important in legal thought, where the ideals of impartiality and (at least some form of) universality are foundational and largely unmitigated by competing norms of interest negotiation. We are left with the challenge of either conceptualizing law and adjudication without the concept of impartiality, or finding a new conceptualization that can embrace, rather than suppress, diversity. But if we accept the core of Young's argument — that impartiality is premised on exclusionary conceptions of reason and universality — then the new conception of impartiality would differ so fundamentally from the conventional, that it could hardly be understood as trying to capture the same value.

B. Elizabeth Spelman

In *Inessential Woman*, Elizabeth Spelman offers another feminist challenge.[11] Her project is to show how race and class are integral to gender. The implication of her analysis for law is that the unitary rights-bearing subject threatens to shatter into unmanageable specificity.

Spelman argues that if we take seriously the social construction of gender, we discover that gender is constructed differently for different races and classes.[12] For example, while hierarchy is part of the meaning of gender, the meaning of masculinity in a racist society cannot be that "all men are superior to all women". This would be an unthinkably dangerous message for a black mother to impart to her son. The meaning

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[9] *Ibid.* at 67.

[10] See *e.g.* my discussion of the political thought of the men who wrote the U.S. Constitution, in *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago: University of Chieago Press, 1990). I argue that the Constitution reflects both a vision of the public good as described by Young and a very different vision that emerges from properly managed interest-group conflict and negotiation (*ibid.*, c. 5, s. iv).

[11] See E.V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon Press, 1988).

[12] Spelman's argument is an extremely careful and sophisticated one to which I cannot do justice here. A summary especially runs the risk of reducing her insights to either obvious platitudes or implausible claims. I have developed my responses to her book more fully in "The Challenges of Multiplicity" (1991) 89 Mich. L. Rev. 1591. See also K. Crenshaw, "Demarginalization of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics" (1989) U. Chi. Legal Forum 139; K. Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color" (1991) 43 Stan. L. Rev. 1214; N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25; N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1994) 19 Queen's L.J. 179; T. Morrison, ed., *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality* (New York: Pantheon Books, 1992).

of gender is as different for black and white men as it is for black and white women, all of whom are "gendered" differently in terms of sexuality and femininity. In North America at least, when we "racialize" people, we also sexualize them in distinct ways. Our gendering thus reflects these distinctions. As a result, just as we learned that "man" is an unsuitable term for the whole human race, we discover that "woman" is also inappropriately narrow: unqualified, it tacitly means "white woman".

Attention to race is, however, insufficient. Even the specification "white woman" is inadequate since white women's gendering will depend on class, and perhaps on factors such as religion, sexual orientation, and able-bodiedness. And each factor, or category of hierarchy, will have a different role in the construction of gender depending on which other factors it interacts with. The multiplicity of these combinations becomes overwhelming when imagining what it would take to properly describe the gender of any given person. For example, can you only understand my gender if you know the "race" of my parents, their educational and occupational backgrounds, my own education and occupation, my age, my able-bodiedness and appearance as a youth and now my marital and parental status, the religious milieu of my upbringing and the fact of coming of age in the sixties? This infinite regress of specificity threatens ultimately to disrupt the very idea of category. The problem, of course, is that categories are necessary for both political theory and legal reasoning as we know it.

We thus encounter, again, the importance of a presumption of identity among people. For example, the conventional structures of rights, which define and regulate the claims and obligations among people, presuppose that we can conceive of individuals as interchangeable units. In making arguments about rights we routinely make statements such as "If A does this to B, then B has these claims against A." Of course we define some of the context, but we must be able to exclude sufficiently large parts of it so that "A" and "B" have meaning as references to all (interchangeable) individuals. For such statements to make sense, we must be able to presume a high level of generality — of identity among people — so that we can immediately conclude, when Sue hits Harry, that this is an instance of the rule "When A hits B ..." But if the meaning of the encounter between Sue and Harry is discernible only by attending to the full particularity of the context, including the nuances of the relationship between Sue and Harry, then it is hard to see how there can be any rule using "A" and "B" that would be useful.[13]

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[13] Many readers will recognize the parallel with Carol Gilligan's description of the differences between the responses given by eleven-year-olds Jake and Amy to the question of whether Heinz should steal a drug which he cannot afford but without which his wife will die. Jake immediately sees that the interviewer intends this as a problem solvable by general categories: life is worth more than property, so Heinz should steal the drug. Amy will not see it that way, insisting on exploring the relation among the actors to see if an accommodation can be found. Gilligan perceives the significance of the abstractions Jake uses: "Transposing a hierarchy of power into a hierarchy of values, he defuses a potentially explosive conflict between people by casting it as an impersonal conflict of claims" (C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982) at 32).

The full implications of the infinite regress of specificity should be apparent. In the face of disintegrating categories of identity, legal and political theorists must ask what provides the common ground for their characterization of all individuals as bearers of rights. Do these characterizations in fact presuppose some essence (such as rational agency) as the foundation for shared rights? We begin to see (again and in new ways)[14] how the prevailing concept of rights requires a core identity that makes interchangeability possible.

This discussion raises two questions. First, is the claim of a fractured legal subject an unjustified leap from the specific problems of the multiplicity of factors that construct gender? The real issue here is the way Spelman's picture of the "inessential woman" challenges us to examine the assumptions about essence that underlie our conception of rights and law. Feminists have already identified dozens of ways in which an underlying male norm in law has worked to the disadvantage of women.[15] They have effectively argued that we have to pay attention to the differences between men and women, and not simply posit a sameness that turns out to have its contours defined by white, middle-class (and maybe also Protestant, anglophone) men. But if we extend the analysis, looking at the dangers of a tacit presumption of sameness in terms of gender and race, and these categories themselves turn out not to be unitary, then we must scrutinize any posited essence. And we must attend to the ways in which the categories used in law (*e.g.*, as prohibited grounds of discrimination) are based on unjustified assumptions of common essence.

Spelman, like Young, reveals that posited essence has historically been both a product of domination and a means of perpetuating it: those in power have been able to define the essential norm and treat divergence from it as deviant and inferior. This lies at the heart of the answer to the second question: Why should anyone without a predilection for arcane theoretical issues worry about essence and the fracturing of the legal subject? The reason is that the present conceptual structures and their institutionalization in law keep domination in place. The posited sameness, the tacit assertion of the

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[14] Of course, arguments about the atomist, rights-bearing individuals of liberal legalism have been around for a long time (see *e.g.* C. Taylor, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985) (*Philosophical Papers*, vol. 2), especially c. 7 ("Atomism")).

[15] See *e.g.* C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987) at 147: "[American] [o]bscenity law is concerned with morality, specifically morals from the male point of view, meaning the standpoint of male dominance." See also R. West, "Jurisprudence and Gender" (1988) 55 U. Chic. L. Rev. 1, on the conception of self underlying the law and the way it fails to respond to the threats women experience. See generally M. Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, N.Y.: Cornell University Press, 1990); M. Minow, "The Supreme Court, 1986 Term — Foreword: Justice Engendered" (1987) 101 Harv. L. Rev. 10; D.G. Reaume, "What's Feminist About a Feminist Analysis of Law: A Conceptual Analysis of Women's Exclusion from Law" (1996) 2 Legal Theory 265; C. Menkel-Meadow, "Mainstreaming Feminist Legal Theory" (1992) 23 Pac. L.J. 1493; L.M. Finley, "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning" (1989) 64 Notre Dame L. Rev. 886; L. Bender, "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 J. Legal Educ. 3; L.M. Finley, "Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate" (1986) 86 Colum. L. Rev. 1118; K.A. Lahey, "'... Until Women Themselves Have Told All That They Have to Tell ...'" (1985) 23 Osgoode Hall L.J. 519.

norm, reinforces hierarchy. Unless legal academics, judges and lawyers do the hard work of thinking about gender and law in the face of the profound disruption of diversity, we are parties to the perpetuation of dominance. To embrace diversity is also to open the possibility of finding or forging a commonality that is not premised on hierarchy and exclusion. But that project can only work if the participants to it include traditionally marginalized groups — and not just as subjects of inquiry, but as producers of knowledge. We must learn to welcome not only the disruption of our concepts, but the reconfiguration of the norms of discourse in journals, classrooms and faculty meetings that will come with full diversity.

C. Carol Gilligan

The "ethic of care" is my final example of the challenges posed by feminists concerned with difference. Carol Gilligan coined this term to describe a mode of moral reasoning that is distinct from the "ethic of justice", the mode conventionally recognized as "reason".[16] She found that men tended to use the ethic of justice exclusively, while women tended either to use the ethic of care, or to use both. Other studies have suggested that there may be a broader contrast: Western, white, middle-class men tending to use the ethic of justice, but many other groups reasoning by means of something similar to the ethic of care.[17]

Many central features of the ethic of care relate to issues raised by Young. The ethic of care gives precedence to context and to the particulars of a moral problem rather than to universal rules. It focuses on issues of relationship, rather than on abstract rights that are assumed to belong to every individual. And, as in Young's argument, the conceptualization of reason in a particular way has implications for access to power and privilege: the hierarchical ranking of kinds of reasoning (if the ethic of care is even recognized as reason) relegates to a lower status those whose preferred mode is not dominant, and erects barriers for them to education and to the professions.

A great deal of the debate around Gilligan's work has focused on her claim that the use of the ethics of justice and care is correlated with gender.[18] But an equally important part of Gilligan's contribution is the finding that there exists a mode of reasoning — not intuition or gut feeling, but a form of genuine reasoning — that is significantly different

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[16] See Gilligan, *supra* note 13, *passim*. I should perhaps note an irony here. While Gilligan drew attention to the way different modes of reasoning correlated with gender difference, she has often been criticized for basing her conclusions largely on white, middle-class subjects. For an early suggestion that the source of the difference is subordination and not gender, see J.C. Tronto, "Beyond Gender Difference to a Theory of Care" (1987) 12 Signs 644. Tronto develops this argument further in *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993) c. 3 [hereinafter *Moral Boundaries*].

[17] In addition to Tronto's works, *ibid.*, see S. Harding, "The Curious Coincidence of Feminine and African Moralities: Challenges for Feminist Theory" in E.F. Kittay & D.T. Meyers, eds., *Women and Moral Theory* (Totowa, N.J.: Rowman & Littlefield, 1987) 296.

[18] Some of the debate stems from claims that, I think, Gilligan does not make, namely that these differences are inherent, or biological. One of the best sources for early debates is (1986) 11:2 Signs. In addition to several critical articles, it contains a reply by Gilligan (*ibid.* at 324-33).

from the dominant one. Feminist theorists have followed with work that Gilligan, a psychologist, did not undertake: fleshing out the ethic of care as an ethical theory that could replace the dominant "justice"-based theory.[19] Gilligan did us a tremendous service in providing the research that shows that we do not have to create an alternative from sheer imagination, or from historical or ethnographic sources; one already exists in practice within our own culture.[20]

Can the ethic of care be comfortably accommodated as an addition or complement to the ethic of justice? While I think we may ultimately need a sophisticated way of combining the key advantages of each approach, merely "adding on" the ethic of care misses the depth of the challenge it poses. This is true at many levels, but I want to focus on one example of how the ethic of care is not easily assimilable to the ethic of justice.

Diana Meyers offers a thoughtful defense of the ethic of care as a form of moral reasoning capable of guiding and checking our judgments and actions.[21] While she states that she will not examine the "question of whether the care perspective can be successfully grafted onto the rights perspective",[22] she tacitly presents a relation between the two which at first glance suggests that it is possible to accept the ethic of justice as a kind of baseline to which the ethic of care is added. She states:

> If the ethic of rights tells us how we must act in order to respect people's fundamental human dignity, it is left to the ethie of care (or some other ethical theory) to tell us how we must act to respect people's individuality. People can have atypical interest profiles, and I see no reason why a conscientious agent should not take solid information about such idiosyncrasies into account, *provided that no one's rights are violated.*[23]

But this obscures how difference is to be dealt with in the determination of rights. If we concede that the protection of rights is an appropriate baseline whose definition requires no attention to the particularity of difference, we foreclose many of the practices advocated by those who argue that an optimal approach to justice and morality requires attention to difference.

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[19] See *e.g. Moral Boundaries*, *supra* note 16.

[20] Perhaps it will turn out in the end that this contribution had the impact it did for unsavoury reasons of hierarchy. It may be that the only people who routinely use the ethic of justice are a small subset of the world's population, both currently and over the course of history. But however aberrant we may ultimately come to see the particular constellation of individualism and abstract, universal rights associated with the ethic of justice, it will have been important to show that some members of the contemporary, Western, white middle-class also use an alternative form of reasoning. Gilligan's sample of women has provided just that evidence.

[21] See D.T. Meyers, "The Socialized Individual and Individual Autonomy: An Intersection Between Philosophy and Psychology" in Kittay & Meyers, eds., *supra* note 17, 139.

[22] *Ibid.* at 148.

[23] *Ibid.* at 146-47 [emphasis added].

Consider, for example, the debates over affirmative action.[24] If we agree that formal equality should determine whether someone's rights have been violated — in other words, whether all applicants have been treated alike without regard to characteristics (such as race and gender) that are irrelevant to their equality as rights-bearers — it will hardly help later, in some second step, to be able to pay attention to "individuality". Once the consideration of race or gender is in itself deemed a violation of rights, the necessary attention to difference is foreclosed.

Difference must therefore be incorporated into the analysis of rights. The argument that bias, hierarchy and domination are built into most conventional conceptions of impartiality, rights and justice cannot be countered by the assurance that once these values are guaranteed, we can rely on the nuance and humane insight accompanying an attention to particularity. We have to recognize (as Young tries to show) that certain kinds of attention to particularity are incompatible with conventional concepts, and then take on the hard task of finding new understandings of the underlying values that attend to difference in a way consistent with equality.

II. Emotions and Reasoning

A very different kind of research supports the feminist challenge to the reason/emotion split and requires us to rethink what good judgment entails. This, in turn, suggests the reconceptualization of law's foundational concepts. In *Descartes' Error: Emotion, Reason, and the Human Brain*, neurologist Antonio Damasio offers a fascinating theory of how emotions are an essential part of reasoning.[25] While feminist theorists have contributed a great deal to the project of rethinking the reason/emotion split, I found this neurological approach to be an extremely helpful addition.

A. The Somatic Marker As a Site of Difference: Reason and Emotion in Neurological Perspective

Much of Damasio's research is based on patients with severe but highly particular brain damage. These subjects retained their intelligence, memory and perceptual abilities, but seemed completely unable to exercise the judgment necessary either to plan for their future or to interact socially in ways that respected the feelings of those around them. Through a series of experiments and studies of case histories of such patients, Damasio concludes that the damaged area of the brain is one that processes information about somatic states, including (especially) those associated with emotion. The patients showed a startling flatness of affect in relating past events of (what would ordinarily be) a highly emotional nature. And although they displayed normal skin-conductive responses (like in lie-detector tests) to immediate stimuli that startle (*e.g.*, an unexpected sound or glare of light), they showed none of the normal responses when shown pictures of scary, horrific or disturbing events. They could describe the

[24] For an American example of this debate, see K.W. Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1988) 101 Harv. L. Rev. 1331.

[25] See A.R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (New York: Putnam, 1994).

pictures precisely later, and even identify the kinds of emotions that are associated with such events, but they seemed not to feel the emotion. Damasio describes one patient who commented in a debriefing session that although he knew that the content of the pictures ought to be disturbing, he himself was not disturbed. Damasio concludes that

> [t]he patient was telling us, quite plainly, that his flesh no longer responded to these themes as it once had. That somehow, *to know does not necessarily mean to feel*, even when you realize that what you know ought to make you feel in a specific way but fails to do so.[26]

Damasio's theory (in compressed terms) is that effective reasoning requires what he calls "somatic markers". Somatic markers are emotional responses that (for the most part) we have learned, through experience, to associate with certain images. When, in deciding what to do, one imagines a certain action, one associates with it an outcome, which triggers an emotional reaction. "When the bad outcome connected with a given response option comes into mind, however fleetingly, you experience an unpleasant gut feeling."[27] The crucial function of these markers is to help sort through the otherwise overwhelming array of possible actions. "Somatic markers do not deliberate for us. They assist the deliberation by highlighting some options (either dangerous or favorable), and eliminating them rapidly from subsequent consideration."[28] Patients whose brains do not allow them to use somatic markers fail to learn from bad experiences and become lost in the details of even routine decision-making. Damasio comments that

> [i]n the end, if purely rational calculation is how your mind normally operates, you might choose incorrectly and live to regret your error, or simply give up trying, in frustration.
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> What the experience with patients ... suggests is that the cool strategy advocated by Kant, among others, has far more to do with the way patients with prefrontal damage go about deciding than with how normals usually operate.[29]

Of course, Damasio acknowledges that there are ways in which emotions can get in the way of good reasoning. But this should not lead us to conclude that good or optimal reasoning can do without emotion. Effective reason requires a partnership between "so-called cognitive processes and processes usually called 'emotional'".[30] And this partnership requires a responsiveness to the reasoner's body states.

Damasio's work certainly seems to support parts of Young's argument. Further, it has intriguing implications for the feminist project of making the body an integral part of our conception of the self, rather than a source of contingency, particularity and difference (to be set aside when identifying the human essence that founds the contemporary commitment to equality and rights). After all, if the core capacities for reason and autonomous decision-making cannot be well understood without their connection to

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[26] *Ibid.* at 211 [emphasis in original].
[27] *Ibid.* at 173.
[28] *Ibid.* at 174.
[29] *Ibid.* at 172.
[30] *Ibid.* at 175.

affect and the body, it hardly seems appropriate that our conception of the self should exclude these components.[31]

As noted in discussing Young, once we bring in the body, we must confront difference. The justification for leaving the body aside was to find some core commonality that was truly universal, unvaried and free of contingency. Of course, we can make generalizations about human bodies, their needs, and how they work (as, after all, Damasio does). Nevertheless, if we fully incorporate a sense of ourselves as embodied in the picture of the human beings we theorize about and design institutions for, it will be much harder to ignore bodily differences such as sex, age, and mental and physical abilities. These differences are too integral to our identities to be treated as peripheral to the core issues of justice, equality, dignity or harmony.

B. Somatic Markers and Failures of Judgment

This section offers some examples of how to think about the role of affect in judgment, and how this relates to the problem of diversity. While reading *Descartes' Error*, I realized that there are several examples of shocking failures of judgment by judges that now seem to me to rest at least in part on an affective failure. I am not, of course, suggesting that these judgments are evidence of brain damage. Rather, they seem to me to be examples of undesirable somatic markers. These judges failed to assign the appropriate affect to the events they confronted.

The first example involved the sentencing of a man convicted of "sexual interference" with a three-year-old girl he was babysitting. The male judge imposed a mere probationary term rather than a jail sentence. Central to his justification for this light sentence was his finding that "this three-year-old girl was sexually aggressive".[32] What is wrong here does not seem to be a failure of logic. One could point to precedents that should have alerted him to the seriousness of the offense, to the problematic nature of assigning the responsibility he did to the three-year-old, or to other "legal errors". But none of this seems to get to the heart of what is shocking about the story. The problem seems to me to be a failure of affect. The story is shocking because the judge is not shocked. He seems more attuned to what he sees as the child's misbehaviour than to the horror of the man's actions.

The second example involved a fifteen-year-old boy who raped a sixteen-year-old girl in a high-school stairwell. The judge in the case, again male, said, "This community [Madison, Wisconsin] is well-known to be sexually permissive. Should we punish a 15- or 16-year-old boy who reacts to it normally[?]"[33] During the trial the judge spoke

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[31] Interestingly, Damasio describes patients who can no longer use their somatic markers and must rely upon their unaided — and otherwise unimpaired — intellect as having lost their free will (see *ibid.* at 38).

[32] "Exactly What the Judge Said to the Convicted Sex Offender" *The Vancouver Sun* (1 December 1989) A17.

[33] "Judge in Wisconsin Calls Rape by Boy 'Normal' Reaction" *The New York Times* (27 May 1977) A9.

at length about Madison's commercial-sex services and nude-entertainment bars and the provocative clothes worn by women:

> Even in open court, we have people appearing — women appearing without bras, and with the nipples fully exposed, and think it is smart, and they sit here on the witness stand with their dresses up over the cheeks of their butts, and we have this type of thing in the schools. ...
>
> It really is wide open, and are we supposed to take an impressionable person 15 or 16 years of age, who can respond to something like that, and punish that person severely because they react to it normally?[34]

The judge is clearly shocked and angered not by the rape, but by the sexual permissiveness of the community. We might speculate that he was educated and acculturated, as were most of his peers, to attach a somatic marker to the rape of "bad", "loose" or "provocative" girls that was very different from that to be attached to the rape of "good" girls, who dressed properly and were from his socio-economic and racial background. The rape of one just does not "feel" at all like the rape of the other. Different levels of seriousness and punishment then follow logically. The problem seems to be that there are virtually no good girls left, and one can then hardly blame a boy for responding "normally" to the sexual "provocation" that used to signal the type of women who were not to be protected. The judge sentenced the boy (who pleaded no contest) not to a jail term, but to stay at home under court supervision.

What is a "normal" affective response which would generate an appropriate judgment? Mary Clancy, then Liberal M.P. for Halifax, commented on the first case: "It transcends the normal to have a sitting judge call a three year old girl 'sexually aggressive.' And if the Minister thinks he can't act in that situation, I think the Minister of Justice has a screw loose."[35] Part of what is complicated about these cases is that although the judges' comments sound particularly egregious, they express affective reactions that are not distant from those the culture has long fostered. The notions of "good" and "bad" girls, and of "provocation" that apparently no normal male can resist may be shifting, but they have not disappeared.

In Madison, the flagrancy of the judge's remarks and sentence were sufficient to get him recalled (the first judicial recall in Wisconsin's history).[36] But despite the outcry among women's groups, the B.C. judge was not removed. This matches the disjuncture between the affective tone (*i.e.*, horror) of media reports about the sexual abuse of children and the behaviour of those in a position to prevent or punish it. We hear, in an increasing number of stories, about cover-ups that seem to indicate the collusion of a wide range of officials. Many of the stories suggest a failure to take the abuse seriously — to treat it as the horrific crime that it is. Repeatedly, there seems to be more concern for protecting the alleged perpetrator than for protecting the children. The B.C. case is a striking example of this pattern. In the transcript of his reasons for sentence, the judge

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[34] "Judge Who Suggested Boy in Rape Reacted 'Normally' Draws More Ire" *The New York Times* (26 August 1977) A14.

[35] "No Action Against B.C. Judge" *The [Toronto] Globe and Mail* (30 November 1989) A3.

[36] See "Woman Defeats Judge in Madison" *The New York Times* (8 September 1977) A18.

goes on at length about his concern for the accused, with no comment about the injury done to the child.[37]

The rational decision at each level — whether to arrest, to prosecute, to find guilty, and how to sentence — is connected to an affective response. It becomes crucial, therefore, to understand more about authorities' affective responses to charged issues such as rape, child abuse and wife-assault. We need to know more about how to shift those responses, and we need to try to find out whether the responses are correlated with gender, such that a more gender-balanced judiciary might more reliably generate optimal affective responses.

The third, and last, example of a judgment that rests on troubling affect highlights these problems and the difficulties in overcoming them:

> In a 1988 case in Dallas, [the] State District Judge ... explained why he imposed a sentence of only 30 years for the murder of two homosexuals: "I put prostitutes and gays at about the same level. And I'd be hard put to give somebody life for killing a prostitute."[38]

Some readers may think that it is precisely because of such cases that we need a notion of equality that abstracts from the particulars giving rise to such prejudice, and to which the prejudice can be held accountable. I will return to this point.[39] For now, I want to use these examples to reflect on a set of questions about affect in judgment. My purpose is not so much to provide answers, but to pose questions that may lead us down constructive paths to rethinking impartiality.

If reason and judgment are impaired without the aid of somatic markers,[40] how does one generate the appropriate affect? The problem, as Young notes, is that once affect is perceived as distinct from and interfering with reason, there is no room for reflecting on affect, for evaluating it, for educating it; feelings are simply the raw data of nature to be controlled by reason. There are, however, parts of the Western intellectual tradition that do not fall prey to that error. Aristotle, for example, discussed the need to educate affect in order to develop character. In the Aristotelian approach, we should learn what things it is appropriate to be pleased by, and displeased by. And if we do not — if the good does not please us — no amount of duty can generate good moral character.[41]

The idea that good judgment requires learning appropriate affective responses has interesting implications for the education of lawyers and judges. For example, it may be through great literature that jurists can best be exposed to individual characters who

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[37] See "Exactly What the Judge Said to the Convicted Sex Offender", *supra* note 32.

[38] M.A. Kroll, "How Much is a Victim Worth?" *The New York Times* (24 April 1991) A25.

[39] See Part V, below.

[40] The evidence for this is clearest for decisions in the realm of personal and social experience.

[41] See *Nichomachean Ethics*, trans. T. Irwin (Indianapolis: Hackett, 1985) bk. 2. Contemporary Aristotelians like Martha Nussbaum (*Love's Knowledge: Essays on Philosophy and Literature* (New York: Oxford University Press, 1990) at 78, 103-104) and Charles Taylor (*Sources of the Self: The Making of Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989) at 125, 138, 148, 283) can also provide resources for the project of educating affect in ways that foster good judgment.

exemplify and thus teach the virtues necessary for the profession: integrity, decency, compassion and wisdom. Similarly, the project of educating lawyers and judges in issues of race and gender may be best understood not simply as a process of imparting information, but as an attempt to shift affective responses. Having noted some implications for education, the question now arises how recognition of the role of affect should influence thinking about judgment and diversity in the judiciary.

III. Rethinking Judgment and Impartiality

The first two sections outlined the difficult problems posed by taking embodied diversity seriously. This section explores how embodied diversity helps us, and why it requires us, to rethink judgment and impartiality. Let me begin with a summary of the issues so far.

A feminist focus on diversity poses a set of interrelated challenges to law: Young reveals the reason/affect split to be part of a system that excludes women and other subordinated groups from the public realm; Spelman shatters the idea of gender as a unitary category, thus threatening to fracture all categories as well as the logic of identity, which underlie the concept of the rights-bearing individual; finally, Gilligan's ethic of care embraces a focus on particularity and context, which entails a different conception of reason, and requires a new conception of rights to which difference is integral, not peripheral.

Put differently, Young, Spelman and Gilligan exemplify a feminist call for a rethinking of the role of the body with all its difference and particularity. A fully embodied feminist subject comes with a new conception of reason with a different relation to affect. Damasio then offers another way of seeing the joint need for rejecting the reason/affect split, and for recognizing the embodied quality of cognition for reason, judgment, autonomy and agency.

Once we recognize affective responses as a crucial component of judgment and reason, we can see the problems caused when peoples' experience (education, acculturation) have generated inappropriate affective responses.[42] The cases were intended as examples of such failures of judgment. The problems posed by these failures set the stage for the question of what it would take to have a judiciary that could optimally use the inevitable affective component of judgment.

How can we take up this challenge of embodied diversity? To begin with Damasio's language, the sources of affective somatic markers — the gut feelings that are the starting points of decision-making — are the product of experience, education and culture. We can observe that things that seem self-evident, natural or beyond dispute to one group are perceived very differently by people from a different background. The charge "they just don't get it" expresses a sense that "they" do not have the same affective markers as the accusers. If the starting point of decision-making, or judgment, is a

[42] Damasio uses as evidence extreme cases where there is a failure of affective response. But in revealing the way in which our judgment and reason rely on affective responses as starting points, he alerts us to the issue of inappropriate starting points.

somatic marker that is not itself the product of reflection, but a sort of automatic or conditioned response, are we programmed by our past experiences? If so, how are we ever to aspire to *any* version of impartial judgment? If not, how can our response be changed? If past experience is crucial (if not conclusive), what happens to those who appear before a judge who has a very different background? If the solution is to have a judiciary that reflects the full diversity of Canadian society, how can any given person be guaranteed a judge who shares her experiences, assumptions and affective starting points? And were we to have such a judiciary, how would the judges manage to reason together and deliberate with each other given their different affective starting points? To answer these questions, we need to know more about the nature of judgment, and Hannah Arendt offers one of the best analyses of this distinctive human faculty.

Judgment, according to Hannah Arendt, is genuinely subjective.[43] It refers to matters about which no objective truth-claim can be made. But judgment is not therefore merely arbitrary or simply a matter of preference. Judgments, properly understood, are valid for the judging community. Without trying to spell out this core paradox of subjective validity, let me just indicate how the solution lies in judgment as an appeal to the agreement of other judging subjects. According to Arendt, when we are making a judgment, as opposed to simply stating our preferences, we tacitly assert that we could persuade others to agree with us.[44] For example, we judge when we say "That is a great painting"; we merely express preference when we say "I like that painting". In the process of forming judgments, therefore, we imagine trying to persuade others.

What makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective, whether through fear, anger or ignorance. It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible. And Arendt makes it clear that impartiality is not some stance above the fray, but the characteristic of judgments made by taking into account the perspectives of others in the judging community.

Arendt's insight shows that those who claim that a representative judiciary would destroy judicial autonomy, and create instead interest-group partiality, misunderstand the requirements of impartial judgment. To understand judicial impartiality we must ask who judges are, and with whom they imagine themselves to be in conversation as they make their judgments. Whom do they imagine persuading and on whom do they make claims of agreement? If their attention is turned to only a narrow group (white,

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[43] See especially H. Arendt, *Lectures on Kant's Political Philosophy*, R. Beiner, ed. (Chicago: University of Chicago Press, 1982) [hereinafter *Lectures*] and H. Arendt, *Between Past and Future: Six Exercises in Political Thought* (London: Faber & Faber, 1961) [hereinafter *Between Past and Future*]. See also I. Kant, *Critique of Judgment*, trans. W. Pluhar (Indianapolis: Hackett, 1987).

[44] Arendt develops this idea throughout her *Lectures*, *ibid.* See especially *ibid.* at 72: "[O]ne can never compel anyone to agree with one's judgments ... ; one can only 'woo' or 'court' the agreement of everyone else. And in this persuasive activity one actually appeals to the 'community sense'. In other words, when one judges, one judges as a member of a community."

middle-class males), then judges will surely remain imprisoned in their limited perspective. But if the faculties and student bodies of law schools, the practicing bar as well as the judiciary actually reflected the full diversity of society, then every judge would have had long experience in exercising judgment, through the process of trying to persuade (in imagination and actual dialogue) people from a variety of backgrounds and perspectives. This would better prepare judges for judging situations about which they had no first- or even second-hand knowledge. It would vastly decrease the current likelihood of a single set of very limited perspectives determining the judgment.

Let us now see how the diversity required for judgment fits with my question of how to have a judiciary well-suited to use the inevitable affective component of judgment. First, it is important to remember that, for Damasio, somatic markers do not simply predetermine our decisions.[45] We are capable of recognizing an affect (*e.g.*, it feels scarier to fly than to drive), and then persuading ourselves to act against affect on the basis of information (*e.g.*, airplanes are safer than cars). Damasio says relatively little about how the starting points themselves can be changed. Since they are the product of experience, experience can presumably shift them. We must assume though that only certain kinds of experience, not simply exposure to rational argument, can create a shift. In the fly-vs.-drive example he provides, information and rational reflection are sufficient to override the gut reaction. But for the more fundamental issues I have raised, more is required, namely the capacity to transform the affective markers themselves.

I think that an education aimed at developing appropriate affective responses, along with exposure throughout one's education to people from diverse backgrounds, can make a difference to the somatic markers one develops with respect to the harm of rape or racism, for example. Of course, this would only be the case if schools promoted a culture of mutual respect. Mere proximity of different groups does not necessarily breed equal respect, nor would it necessarily result in affective transformation. Indeed, co-educational schools can perpetuate sexism, just as racial integration in schools does not by itself eradicate racism. But where such institutions are committed to fostering mutual respect, learning and working with people of diverse backgrounds should educate affect for equality. To see the pain of friends and colleagues can, I believe, shape the development of somatic markers in ways similar to experiencing one's own pain. For example, one could learn to see, and to wince at, the often subtle forms of exclusion that racism and sexism give rise to.

In judicial deliberations, it is probably important to bring to consciousness the affective starting points influencing judgment. These starting points are not themselves judgments; they are the subjective private conditions that Arendt argues have no legitimate place in the public realm.[46] But there are at least two reasons why we have to find ways of articulating them in the semi-public realm of judicial (and other) deliberation: to facilitate their gradual transformation (by coming to appreciate and empathize with others' "gut feelings") and to facilitate their transcendence as envisioned by Ar-

[45] See Damasio, *supra* note 25 at 191-92.

[46] See *Between Past and Future*, *supra* note 43 at 220-21.

endt. I think Damasio's picture of the essential role of somatic markers must give us pause about relying solely on our capacity to transcend these affective starting points through an Arendtian reflection on the perspectives of others. We do need to avoid simply acting on our affective starting point, by examining them critically, and comparing them to others for the purpose of genuine judgment. But we also need to transform these starting points themselves. As it turns out, optimal exposure to diversity will facilitate both. Finally, we will need to reflect on the judgments that would be involved in determining which affective responses should be transformed and which would make appropriate starting points. I will return briefly to this point at the end, in my reflections on equality.[47]

IV. Impartiality in the Face of Diversity

I turn now to three quite different examples, discussed in turn, that may help begin the project of reconstructing the concept of impartiality in the face of diversity. The first is the problem of what would constitute an optimal means of adjudicating a charge of sexual harassment. It is easiest to think expansively about such means if we imagine not a formal judicial hearing, but the possibility of designing an appropriate mechanism, say, for a university. There are many interesting factors that bear on the role of affect and on the ability to fully hear and understand the experiences of those involved, including the forms of giving testimony and the nature of the "discourse" of the hearing. But here I want only to focus on what kind of experience would be optimal for those doing the adjudicating.

Sexual harassment sometimes involves cases where there is little or no disagreement as to the events that took place, but a great difference in how the parties experience those events. A joke or gesture of affection for one is a degrading, even threatening, experience for another. These cases thus pose the problem of how to adjudicate impartially between incommensurable stories. It seems that a judge must choose a framework of interpretation that will better fit one story than the other. It does not seem possible to have a framework that is "neutral" as between the two.[48]

Given how important perspective is in sexual harassment cases, whom should we want to do the adjudicating? Traditional notions of impartiality might suggest that because of the emotional nature of the issue, we would want to exclude women who had been victims of sexual harassment and perhaps men who had been accused or found

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[47] See Part V, below.

[48] Rape is another example of the problem of "neutrality" between incommensurables. Traditional rape law is notorious in feminist circles beeause the conventional interpretation of the requirements of mens rea insists that it is the accused's subjective experience that counts. The claim that this framework is neutral because it is uniformly applied in criminal law entirely misses the point that in this context it consistently favours one side, that of the more powerful over the less. It provides a kind of impunity for violence that we have good reason to believe is itself an important mechanism in the maintenance of that hierarchy of power. From this perspective, "neutral" seems an odd adjective. I elaborate this argument in "Violence Against Women: Challenges to the Liberal State and Relational Feminism" in I. Shapiro & R. Hardin, eds., *Political Order* (New York: New York University Press, 1996) (NOMOS 38) 454 [hereinafter "Violence Against Women"].

guilty of sexual harassment. But if our goal is not traditional impartiality — based on a presumed unity of selves stripped of their affective, experiential and bodily differences — then we will think about such past experiences differently. I think that a woman who has experienced sexual harassment is more likely to be attuned to the complex nuances involved in many such cases. I can also readily imagine that for some women, particularly victims of harassment that was never acknowledged as such, there may be unresolved emotional issues that could interfere with optimal judgment. The past experience would be an asset if it were processed such that affective associations were not removed, but integrated in a self-conscious way. This self-conscious integration would fit somewhere between Arendt's notion of subjective private conditions and her vision of being able to transcend them in genuine judgment by taking into account the perspectives of others: it would be internal, drawing on the different perspectives available within oneself (although the perspective of others would still be crucial to being able to make use of this internal diversity). The affective starting point of having experienced sexual harassment remains a subjective private condition which cannot alone form a proper basis for judgment. It must itself be transformed through the interual process of reflection. This is one way of using rather than trying (futilely) to eliminate affect in judgment. This "integrated" experience is not a clear-cut standard, nor one that could easily be applied in choosing adjudicators. Nevertheless, it is helpful to try to imagine the kinds of experience that would contribute to truly impartial judgment.

Because of the conflicting perspectives involved in sexual-harassment cases, I think it would be ideal to have a panel of judges with different backgrounds. I think it should include men as well as women. Preferably, at least one of the men would have had an experience with sexual harassment as well: for example, I would choose a man who had sexually harassed a woman and had come to understand why his actions constituted harassment and what kind of harm they had done. What about a man accused of sexual harassment and cleared of the charge? If I had confidence in the process that had cleared him, then he too might be a valuable addition to the panel. The objective is not a false kind of parity — one victim, one perpetrator — but sensitivity: a genuine effort should be made to consider whose past experience could be an asset in judgment.

The point of this example is that judges with direct, emotionally-laden personal experience of the type in dispute need not necessarily be disqualified. Such a background can be an asset. Getting its benefit requires a difficult investigation into how it has been integrated. I think the effort is worth it;[49] otherwise, one might end up with a panel of judges "who just don't get it". For example, if one tried to eliminate every woman who said that she had experienced unwanted sexual attention from men in positions of power over her, one would run the risk of selecting women who were blind to the problem. And even if one succeeded at selecting a panel of men and women, none of whom had any direct experience with sexual harassment, I doubt that they would be as well suited to be adjudicators as those with the kind of integrated experience contemplated above.

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[49] Even though there is a sort of regress problem of who should judge the suitability of potential judges — which we might see as something like jury selection.

These issues are not merely hypothetical. Madam Justice Maryka Omatsu shows that there is a sad irony to some of the recent success in creating greater diversity in adjudicatory bodies.[50] Under the heading "Backlash" in a recent paper, she canvasses a series of Canadian cases alleging discrimination, where adjudicators have themselves been accused of bias on the basis of their past involvement in activities aimed at ending discrimination.[51] In several cases, such activities were found to be grounds for a reasonable apprehension of bias, despite the fact that "[i]n the past, ... challenges have been narrowly limited to financial interest, close personal friendship or relationship, or previous partisanship on issues."[52] The fact that the sought-after impartiality is presumed from the *absence* of any past experience (that would attest to awareness of discrimination and efforts to eradicate it) is a sad testimony to the endurance of the conceptions of impartiality that Young critiques.

The final example addresses whether, in our ordinary daily activities, we can do without concepts like impartiality. I offer as an example a tacit claim of impartiality for my own decision-making, to see exactly what sort of claim it is and how it fits in with the challenge of reconceptualization.

Several years ago I explained to my legal-theory class at the University of Chicago Law School the rule by which I decide which students to call on: I call on them in the order in which they raise their hands, but if a student who rarely participates raises her hand, she gets to jump the queue. I explained to them that the "first-come—first-served" rule would perpetuate the disproportionate participation of men.

The fact that I think of the rule as having some quality of impartiality is revealed by my recognition that I would be unhappy if students thought it was really only a cover for saying I give preference to women. In fact, I also use this rule in my feminist-theory class, where most of the students are women. There, some less easily identifiable groups — often including women of colour and sometimes men — are benefitted. What notion of fairness am I claiming for my practice? Is my rule neutral? The purpose of announcing the rule in class is to enable students to see that my actions are ordered by principle, and are not arbitrary or just biased towards women or shy people or particular students. Clearly, the rule is not neutral in the sense of having the same impact on all. I generated the rule because the one I had been using worked to the disadvantage of an identifiable subordinated group (*i.e.*, women). I hoped my new rule

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[50] See M. Omatsu, "The Fiction of Judicial Impartiality" (Feminism and Law Workshop Series, Faculty of Law, University of Toronto, 19 January 1996) [unpublished; forthcoming in (1997) 9:1 C.J.W.L.].

[51] Omatsu (*ibid.* at 17-23) discusses, among others, the case of Constance Backhouse, a human-rights adjudicator whose board-of-inquiry decision in a sex discrimination case was quashed on the basis of a reasonable apprehension of bias arising from her involvement with issues of sex discrimination, particularly from her membership on a steering committee that had directed a sex discrimination case against Osgoode Hall Law School (see *Gale* v. *Miracle Food Mart* (1993), 12 Admin. L.R. (2d) 267, 93 C.L.L.C. 17017 (Ont. Div. Ct.)); and a case in which there was a finding of reasonable apprehension of bias on the part of a black adjudicator, Frederica Douglas, with respect to a complaint by a black woman about being strip searched by poliee (see *Dulmage* v. *Ontario (Police Complaints Commissioner)* (1994), 21 O.R. (3d) 356, 75 O.A.C. 305, 120 D.L.R. (4th) 590 (Div. Ct.)).

[52] *Ibid.* at 20-21.

would improve women's access to class discussion, and I understood that while some men would also benefit directly, as a group they would probably have less access. That is, the proportion of class time used by men would begin to approximate more closely their actual proportion in the class. The rule is designed to advance equality, and in a situation of non-equality, it can only do so by having a differential impact on men and women.

Nevertheless, I want the rule (and its application) not only to be, but also to be perceived as, impartial, in other words, not influenced by my personal liking for students, my agreement or disagreement with their views or my perception of their demeanour as challenging or friendly. In each of these cases, I have an affective response to students which I think should not influence my choice of who speaks and in what order. If students observing my application of the rule told me that they thought I was picking students on one of these grounds, I would be upset. And I would think they had a right to be angry if they thought I was deliberately obscuring my choices by invoking a rule whose consistency was harder to monitor (because it involves an underlying judgment about who does not usually speak) than that of the old rule. Indeed, it was primarily in reflecting on how much I would object to being accused of partiality that I realized I had been making a tacit claim to impartiality for my behaviour in class.

The puzzle is whether it makes sense to say that my use of this rule is impartial as between men and women. A concern with gender equality generated the rule, and I expected it to affect men and women differently. But this is quite different from the claim that the rule is a cover for a preference for hearing from women. The claim for impartiality is based on the argument that I have developed a nuanced rule that fosters equal participation for men and women (without having to use the cruder decision rule of "women first"). It is the norm of equality, not my personal preferences, that I claim grounds the rule. Of course, I do not pretend to have achieved perfect impartiality: my preferences may unconsciously, sometimes even consciously, influence my decisions. Sometimes my affective starting points may not be optimal, nor suffiently transformed through reflection. But keeping in mind Arendt's view of judgment, I claim that something other than mere subjective preference is at work. I believe that I could persuade others that the choices entailed in the formulation and application of my rule are right. It is in this sense, and not in the sense of an objective transcendent standpoint, that I make a claim of impartiality for my rule.

Even a very simple rule governing a relatively simple set of interactions requires, therefore, a series of substantive judgments: Who talks the most? Are there patterns to the participation rate? Who appears to be "disadvantaged" in terms of access to discussion? Is that disadvantage related to systemic disadvantage? Is such a relation necessary before trying to remedy it by rules of differential access (*i.e.*, "jumping the queue")? Is equality of access more important, for educational purposes, than rewarding quickness, self-confidence, aggressiveness or quality of contribution?[53]

Thus impartiality cannot mean neutrality in the sense of having no differential impact on different groups or in the sense of having no underlying substantive judgment.

[53] I think the greatest disagreement would arise with respect to this last issue.

The term "neutrality" obscures underlying judgments by implying that there is none. The common usage seems to be to describe rules (or at least the standard to which they should aspire) as neutral and their application as impartial. But I prefer the term "impartial" for a rule as well as its application because it lends itself more easily to a description that embraces difference.

In reconceptualizing the meaning of impartiality, I accept the core of Young's critique, but I make a strategic and semantic choice to try to capture within its meaning the fundamental values of fairness and equality, which underlie her own (casual) embrace of the rule of law. One could reject the rule of law, as some feminist theorists have done,[54] for entailing the exclusion revealed by Young and for implying an impossible stance towards the world. After all, each individual's perspective is inevitably partial in the sense of being incomplete; the irreducible affective foundation of judgment suggests that partiality in the sense of "liking" can never be fully transcended. But I have argued that the incompleteness of our perspectives can be remedied by extensive exposure to diversity, and that affect can be educated as well as transcended through reflection. We need to use these insights into the nature of judgment to redefine impartiality, because without the concept we can neither express our commitment to fairness nor make sense of law (however much we may ultimately revise our conception of law).

The story of my classroom rule is a mundane example of how an appropriate meaning of impartiality is necessary to distinguish between legitimate and illegitimate uses of power.[55] It illustrates that in order for a rule or its application to be deemed impartial, its source, purpose and standard must be a commitment to equality. The claim that the rule promotes equality must form the core of the answer to every charge of preference or partiality. Indeed, all of the reflections in this essay have equality as their

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[54] See *e.g.* A.C. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale L.J. 1373.

[55] One commentator suggested that this classroom example is not useful for the broader problems of understanding judgment and impartiality because the classroom is a context of ongoing, long-term interaction unlike the one-shot encounters of most adjudication. My own sense is that while many of the judgments entailed in the choice and application of my rule involve first-hand knowledge of those to whom it will be applied, as well as ongoing contact with them, that context does not render the example inappropriate for exploring impartiality in the more public, distant encounters of formal adjudication.

Part of what interests me about the project of understanding the process of judgment is to examine the continuities and discontinuities between the judgments involved in daily life and those involved in the more formal setting of adjudication. I think that the lessons learned from an objective of equal access in a classroom, in the context of entrenched social inequalities, are applicable to many equality disputes. Similarly, the judgment about the appropriate level of nuance of the rule (*e.g.*, those who speak rarely, rather than women, first) is a commonly required judgment about the kind of rule that is optimal for a given context.

The greatest difference between the classroom setting and formal adjudication comes in the moment of application, where the ongoing, close contact in class allows not only for feedback, which is unusual in adjudication, but for the capacity to shift my assessments and even my rules over time—a scope few adjudicators have. While there may exist special problems of judgment in the isolated environment of the courtroom, I think the issue of how we understand impartiality is sufficiently similar to be useful.

starting point. If the reconception of impartiality requires a commitment to equality, what does equality in the face of difference mean? This is a large, and much rehearsed, question for the last few paragraphs of an essay. Nevertheless, I will identify the territory in which I believe an answer must lie.

V. Reflections on Formal Equality for the Embodied: Combining Equal Moral Worth and Embodiment

This essay began with the problem of exclusion that arises from the drive to unity, from the effort to find some core commonality free of contingency and difference that could provide the basis for equal citizenship. Having explored the hazards of universalism, can we say that none of its forms is helpful? I think not. I believe that we in fact need a universal claim of equal moral worth on which to ground our new notion of impartiality and indeed all feminist and emancipatory projects. Even a theorist like Catherine MacKinnon, who rejects the language of universalism, relies on her audience having a commitment to equality. Her revelation that dominance underlies pornography and indeed sexuality in Western culture[56] only carries the punch it does because we reject dominance on the grounds of equality.

Let me begin with a brief catalogue of what the required concept of equality cannot mean. It cannot mean that we redress the exclusionary error of the republican conception of impartiality by asserting that all people, not just white, middle-class men, are essentially rational agents who, for the purposes of public life, can proceed as if disembodied. If a conception of humanness is to be plausible at all, the excluded dimensions of affect and attachment and the pleasures and demands of embodiment have to go somewhere — as indeed they always have in their attribution to women, blacks, the working class or other subordinated groups. The self as disembodied rationality can be sustained only if there are other persons (not properly full selves or citizens) who embody the disowned dimensions. Hence, a society premised on disembodied rationality cannot be rendered "equal" by attributing it to all. No theory based only on disembodied rationality could adequately describe the subjects of a political or legal system. Too large a component of people's needs, conflicts, desires and capacities would be explained in some *other* way for such a theory to be an adequate starting point for legal or political inquiry.

Equality also cannot mean that we simply take the legal rights we have accorded to men and, finally, give them to women and other excluded groups. Too many of these rights are premised on some form of subordination. For example, we cannot guarantee women bodily security and integrity while enforcing all of the rights men have traditionally enjoyed. The change in the status of mens rea in Canadian rape law[57] is an ex-

[56] See MacKinnon, *supra* note 15.

[57] See *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s. 1, amending R.S.C. 1985, c. C-46 by adding ss. 273.1 & 273.2.

ample of how men's traditional rights have to be modified to protect women and to redress the imbalance of power sustained in part through violence.[58]

For similar reasons, equality cannot mean that all subordinated groups can finally come to enjoy the rights and privileges of the dominant group. Many of those advantages require the disadvantage of others. Part of what hierarchy means is that the privileged enjoy advantages at the expense of the subordinated. Those advantages thus cannot be sustained for the formerly dominant group when equality replaces hierarchy. For example, the advantages that white, middle-class men have long enjoyed by not having to compete with women and visible minorities for positions in professional schools and jobs cannot be maintained if the disadvantage of those subordinated groups is to be overcome. Similarly, formerly subordinated groups cannot enjoy the historical advantages of the dominant class unless the latter are disadvantaged. There are many other examples of why equality cannot mean equalizing existing rights and privileges: freedom of speech, when interpreted to include violent pornography, both silences and harms women; the sanctity of the home as an enclave, secure against the intrusion of the state, turns out to be incompatible with protecting women and children from violence and abuse; and the right to use one's assets to promote and express one's political opinions is in tension with equality of access to political participation.

The versions of "equality" I have rejected above all fail to capture the meaning of equal moral worth. They are too substantive, even the formulation based on disembodied rationality. Ironically, I think we need an even more purely formal conception of equality, one which is not grounded in any empirical claims about human nature. In a sense, we need to find the modern equivalent of the soul.

This purely formal claim of equality can provide no more than a standard for inquiry. Any rule, or application of a rule, or even any affective response (loathing of gays, discomfort around a disabled person) must be measured against it. The claim, however, cannot itself generate rules. It cannot tell us what equality actually consists in. For that, we need to attend to our full, embodied, differentiated selves. Any concrete question of equality has to be examined in its specific context. As a result, equal moral worth cannot solve the problem, raised by Spelman, of the kind of interchangeability needed for intelligible rights claims. Put differently, an underlying claim of equal moral worth contributes little — besides highlighting the need for a solution — to solving the problem of how to reconstruct our understanding of rights so that they do not presuppose an exclusionary commonality.

The purely formal claim of equal moral worth is a necessary starting point, even though to determine virtually any conflict of rights, or even the meaning of equality, we must turn to the concrete, to the context of our embodied selves with all their overwhelming multiplicity.[59] It is the pure formality of the claim and the requirement of

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[58] I elaborate this argument in "Violence Against Women", *supra* note 48.

[59] I see this approach as akin to Seyla Benhabib's invocation of the generalized and concrete other and of the need for both (see "The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Moral Theory" in Kittay & Meyers, eds., *supra* note 17, 154).

immediate progression to the concrete that prevents this disembodied version of "formal equality" from having the exclusionary quality of the "logic of identity" discredited by Young. My conception of equal moral worth thus both emphasizes this move to the concrete and insists that the concept, while purely formal, is indispensable as a standard to circle back to as one tries to work out the concrete meaning of equality in any given context.

I conclude with two suggestions about how a commitment to this notion of equal moral worth could make a difference. First (expanding the somatic marker theory beyond its original domain), an optimal culture of equality would have an important affective dimension. If members were to see a practice as a violation of someone's equality, they would not just make a purely intellectual assessment that this was a bad idea; rather, they would feel outraged, angry, upset. In other words, they would have an affective attachment to an abstract idea, learned, nonetheless, through concrete instances. This affective commitment could then be used to begin the process of shifting other affective responses. For example, if someone were to come to see their feelings about gay people as violating their commitment to equality, they would experience something more than the recognition of logical inconsistency. They would feel distress (and not just distress that they had found themselves capable of inconsistency) and would try to change their feelings. It takes affect to change affect. And since judgment cannot be simply disconnected from affect, we would need ways of evaluating and changing affect that would not simply rely on disembodied reason. A commitment to equal moral worth would facilitate this process.

Second, a commitment to equal moral worth directly implies that the loss of one life is for legal purposes equal to the loss of another. In practical terms, the issue is whether the "worth" of a murder victim should affect the sentence of the murderer. This issue arose in the United States in connection with victim-impact statements in the sentencing of capital offenses.[60] In the culture of equality that I am upholding, the legal determination that ending one person's life deserves a greater penalty than ending another's would be unacceptable. In our current culture, this differential determination reinforces existing social and economic hierarchy. Evaluating a victim's worth reinforces the sort of affective starting point that "would be hard pressed to give someone life for killing a prostitute."[61] Concretizing the notion of equal moral worth in the penalty for murder would serve as a public means of both teaching and checking affective starting points. It would demonstrate that attention to difference that reinforces hierarchy is unacceptable, even though in most instances attention to difference is essential to effectively overcoming hierarchy.

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[60] See Kroll, *supra* note 38.

[61] Statement made by the Texas judge quoted in *ibid.* (see text above, accompanying note 38).

Conclusion

A legal system capable of fostering equality among our diverse embodied selves requires several components: the guidance of a commitment to a formal notion of equal moral worth; attention to the contexts in which it is to be given effect; a conception of impartiality both grounded in this commitment and attentive to difference; and ongoing attention to education of affect and the promotion of diversity in legal education, scholarship and membership. These commitments and calls to attention will enable us to take up the challenges of embodied diversity.