THE LAWS OF LOVE: LITERATURE, HISTORY AND THE GOVERNANCE OF KISSING

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A seven year old boy bestows an uninvited kiss upon the cheek of a girl and is suspended from school for disciplinary reasons.[1] A senior female professor, and Director of a Program in Women's Studies, kisses a female graduate student at a party held during a conference on gay and lesbian studies. After a thirteen month ordeal for all concerned, the university determines that the professor was in breach of the university code governing consensual amorous relationships. In another case, this time heard in England, two gay men who "kissed and cuddled" late at night, in public, in the center of London, are arrested and subsequently found guilty of a public order offense.

In these, and in numerous other cases that do not explicitly involve kissing, the law is called upon to address the appropriateness of intimate erotic acts occurring in public and quasi-public spaces.[2] Under even the most generous of interpretations, contemporary lawyers cannot be said, either by training or profession, to be well versed in addressing questions of intimacy and eroticism in the construction of the public world.[3] It is perhaps for this reason that the legal response to such acts of intimacy has

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1. The case of the six year old boy is that of Johnathan Prevette. The formal charge was that of sexual harassment. *See* Adam Nossiter, *6-Year-Old's Sex Crime: Innocent Peck on Cheek*, N.Y. TIMES, Sept. 27, 1996, at A14; *see also* Robert Coles, *Pint-Sized Sexual Politics*, N.Y. TIMES, Oct. 10, 1996, at A33 (discussing the case as an illustration of dilemmas facing parents and teachers). For legal commentary, see Dawn A. Ellison, *Sexual Harassment in Education: A Review of Standards for Institutional Liability under Title IX*, 75 N.C. L. REV. 2049 (1997).

2. For a general discussion of the cultural issues raised, see Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547 (1998).

3. For a recent survey of the empirical literature on the emotional make up and competence of lawyers, see Susan Daicoff, *Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997). For further discussion, see BENJAMIN SELLS, THE SOUL OF THE LAW: UNDERSTANDING LAWYERS AND THE LAW 138-139 (1994) (discussing the propensity of lawyers to act as professionals even when dealing with private and intimate situations); Peter Goodrich, *Maladies*

generally been couched in negative terms. Whether phrased as questions of public order, of zoning requirements, obscenity, civil rights, or University or American Association of Law Schools Statements of Good Practices, the classic legal response to intimate erotic acts in the public sphere has been to define a class of prohibited or offensive and hence illegitimate acts. The trajectory of this response is that of a logic of exclusion. Certain classes of erotic acts, caresses or kisses for instance, are banned from certain parts of the institution and the public sphere. Intimacy and eroticism are thereby consigned to the private domain. By this I mean that traditionally the law has not sought to understand the place or role of eros and intimacy in the institutional and other relationships that make up our public world, but rather has endeavored simply to repress those acts that it deems either offensive or best confined to a legally defined private sphere.

Using the example of cases concerned with kissing, I will argue in this Essay that we need to know more rather than less about the role of intimacy and of the expression of desire in the public realm. There are two reasons for this. The first is loosely Freudian. To deny or ban what are deemed to be extreme expressions of intimacy, or passionate erotic acts, is repressive in a dual sense. In Freudian terms, prohibition not only excludes but also denies. To deny is to refuse to acknowledge the existence of an act or emotion that will likely thereafter reappear in distorted or perverse forms. According to this logic, the law governing the intimacies of the public world would be more relevant and effective in relation to those that it regulated if it addressed the emotional substance of the behaviors governed. The second reason is more scholarly than practical. A number of movements within contemporary legal scholarship, ranging from feminist jurisprudence and queer theory to law and literature and therapeutic jurisprudence, have attempted to challenge the arbitrary character of the archaic division between public and private realms. Drawing upon a wide range of disciplines external to law, an attempt has been made to address the inevitable interlacing of the public and private, the affective and rational, the emotional and legal domains. In this Essay I will draw upon aspects of that interdisciplinary literature and try to evidence the role that it might play in reformulating the procedures and the rules by means of which law exercises its jurisdiction over the amorous passions.

In Part 1, using transcripts from the case, as well as published accounts, I will rehearse the arguments made in *Beckelman v. Gallop*.[4] In

of the Legal Soul: Psychoanalysis and Interpretation in Law, 54 WASH. & LEE L. REV. 1035 (1997). It is noteworthy that even a satirical effort at addressing relational problems by reference to the laws of love, Gretchen Craft Rubin & Jamie G. Heller, *Restatement of Love (Tentative Draft)*, 104 YALE L.J. 707 (1994), is concerned primarily with the procedural rules that should govern the beginning and ending of relationships, and steers well clear of any discussion of the substance or expression of desire within or without relationship.

4. Beckelman v. Gallop, E.O.P. Case No. 044 (determination by the Office of Equal Opportunity Programs, Univ. of Wisc., Madison, Dec. 16, 1993) (on file with the author, also

Part 2, I will subject both the outcome of that case and the method of determination to criticism. Comparing the decision in that case to the English case of *Masterson v. Holden*,[5] I will argue that there are serious flaws in the concept of law and the practice of adjudication at play in those decisions. Drawing upon the traditions of religious or spiritual law, and also upon the literary institution of laws of love, in Part 3 of the Essay I will show that there is ample material within the history of law from which to devise and develop a more coherent and positive account of the affective dimension of public relationships, and even a law of kissing. Most importantly the western tradition of love was founded precisely upon codes of *amour lointain* or distant love whose object was that of recognizing the power of illicit attraction or impossible desires, and of endeavoring both to honor and to regulate their public expression.

I will argue in conclusion that the protocols and passions associated with kissing are integral to public life. They are the visible surface of a libidinal economy that law ignores or denies at its peril. At the same time, however, the history of legal cultures can provide a more positive project, that of acknowledging and mapping the domains of desire, or sites of erotic intimacy, within contemporary institutions. By this I mean no more than that the plural history of law, the history of other jurisdictions and of comparative legal institutions, can offer important insights into the possibilities that are raised by the recognition and acknowledgment of the erotic dimensions of institutional relationships and of their crucial role in the construction of the public world. Drawing again upon the history of the western erotic tradition, the *carte de tendre* or map of the heart, the seventeenth century attempt to codify the place of love within the public world, offers a valuable model for the recognition of attraction and desire within institutional spaces.

I.
BECKELMAN V. GALLOP

On its facts, the case of *Beckelman v. Gallop* is not an uncommon one. Dana Beckelman was a graduate student who filed a charge of sexual harassment against her supervisor, Jane Gallop, after being kissed by her at a work-related dance held at a lesbian bar. Both the parties to the case agreed that the kiss was consensual and that it marked the culmination of a lengthy and explicitly flirtatious relationship between them. All concerned with the case also agreed that the kiss was transgressive. It was between

available at a nominal charge from the Office of the Chancellor, Univ. of Wisc., Madison); *see also* JANE GALLOP, FEMINIST ACCUSED OF SEXUAL HARASSMENT (1997) [hereinafter GALLOP, FEMINIST ACCUSED] (describing and analyzing her own perspectives on the case); Margaret Talbot, *A Most Dangerous Method*, 4 LINGUA FRANCA 1 (1994) (discussing Gallop and the case of sexual harassment against her).

5. Masterson v. Holden, 3 All E.R. 39 (1986).

teacher and student, between woman and woman, between youth and middle age. Despite such expansive areas of factual agreement, the meaning, and specifically the institutional significance of the kiss in question, are complex and interpreted very differently—though equally plausibly—by all of the actors in the case.

1.1 The Charge

The charge was brought by Dana Beckelman and details a sense of serious emotional as well as institutional injury. On her own account, Beckelman had been attracted to Jane Gallop initially by virtue of reading her work. Beckelman had sought Gallop out and persuaded her into admitting her to a course and subsequently supervising her work. The relationship that developed between Beckelman and Gallop was erotically charged, at times explicitly personal, and intensely focused both upon Gallop the person and upon Gallop as author and teacher. With regard to the latter, though no such distinction can be drawn exactly, Beckelman's academic project interweaves themes of seduction and teaching, love letters and essay writing, that are both derived from and written into Gallop's published works. The relationship, in short, was for Beckelman both exciting and increasingly confused. She describes it variously as flirtatious, bantering, playful, ambiguous, and phantasmatic.

The complaint as to emotional injury can be reconstructed in terms of three principal moments. These all revolve around, and are interpreted through, the participation of the parties in the inaugural Graduate Student Gay and Lesbian Studies Conference held at the University of Wisconsin-Milwaukee. First, at a panel moderated by Beckelman, Gallop made a statement from the floor that she is "excited about the conference because it is about graduate students and sexual preference and her sexual preference is graduate students."[6] In her own account, this statement stuns Beckelman and she feels "betrayed because in that moment she is equating her sexual preference with those in the audience, which is not just a theoretical act, but a lifestyle."[7] The nature of this betrayal is complex but can be formulated in terms of inauthenticity. At various junctures during their relationship, Jane Gallop had explicitly denied any sexual interest in Beckelman or in students, but had at the same time straightforwardly admitted to believing in flirtation as being "theoretically" a way of seducing students to learn.[8] Now, in public, at a session which one of her students was moderating, Gallop chose to express loudly a sexual interest in graduate students.

The second moment of emotional harm occurred at an impromptu party held towards the end of the conference. Beckelman claims first that

6. Compl. at 3, *Beckelman*, E.O.P. Case No. 044.
7. *Id.*
8. *Id.* at 1.

during the party she had confronted Jane Gallop at the bar, and had asked her what she had meant by her earlier announcement about her sexual preferences. She also asked whether it was simply power that Gallop was really interested in.[9] Whatever the precise content of the conversations that took place during the party—and these were contested by the parties and never finally determined—the expression of power or of intent that became the basis of the formal complaint was a kiss.

Towards the end of the party, Beckelman decided to leave. Just before she left, Gallop asked her "[a]ren't you going to kiss me goodnight?"[10] What follows is crucial and ambiguous both in aesthetic and political terms:

> She mashed her lips against mine and shoved her tongue in my mouth and just sat there. So I kissed her until she responded, more as a vindictive act than a reciprocally sexual one. I was angry and hurt and saw kissing her as a form of revenge, a way to manipulate her desire knowing I would never go any further.[11]

The kiss thus acted out a sense of betrayal, of anger and of hurt. In that the kiss, at least initially, was thrust upon the student and, however badly or statically performed, was sexual in intention, it was a paradigmatic betrayal of trust.

The third moment of complaint is another kiss, a month later, this time after the teacher and student have had dinner together. In Beckelman's words: "When I drop her off, she leans over to hug me and kisses me in the process and then leans back and looks at me and says something like, Mmm, that was nice."[12] This last embrace could be said to mark a final dissonance. It was also the occasion in relation to which Beckelman is first told that she may have been sexually harassed. At any event, accompanying this history of emotional wounds, occasioned both by words and by kisses, is a parallel narrative of intellectual betrayal and a complaint best summarized as an abuse of pedagogic power. A relationship that began as a flirtation between student and teacher had deteriorated, in Beckelman's view, into the teacher threatening or importuning for sex.

As Adam Philips has beautifully elaborated it, flirtation is an intrinsically dangerous and so also exciting activity. In his analysis, "people tend to flirt only with serious things," with death, disaster, other people, madness, love, and so on.[13] Flirting is pleasurable to be sure, but it is also transgressive in that it implies a relationship that is predicated upon uncertainty, and whose boundaries are not yet defined. The danger of flirtation

9. According to Beckelman's account Gallop responded to this questioning by saying "Yes . . . I thought you wanted to fuck the teacher out of me." She then "strokes my shoulders and breasts." At the same time, according to Beckelman, "she pulls me between her legs." *Id.* at 3.

10. *Id.*

11. *Id.*

12. *Id.* at 4.

13. ADAM PHILLIPS, ON FLIRTATION at xvii (1994).

is that it is always likely to fall into excess or misunderstanding. Thus the indeterminacy of the relationship always allows for the possibility that, respectively, in flirting with death we die, in flirting with love we end up married, or in flirting with a teacher, we actually end up in a sexual relationship. The charge invested in flirting is thus predicated upon the possibility of flirtation exceeding the bounds of play or pretense, and becoming something other, whether that other is absolute or simply an inappropriate expression of seriousness, obsession or alternate species of captivation.

The flirtation of teacher with student is doubly charged. It gains an intensity both from the inequality of power between the participants, one knows and the other seeks that knowledge, and from the illicit character of the projected or threatened relationship. In Beckelman's account, as soon as she understood that Jane Gallop in fact wanted her sexually and so had been forced to reject her advances, their intellectual relationship deteriorated. From the time of the Conference to the time the complaint was filed some eighteen months later, Gallop moved rapidly from expressions of enthusiasm for Beckelman's work, to increasingly vigorous criticism and rejection of it. To summarize a long and detailed set of facts, Beckelman sensed that Gallop had retaliated professionally and that this had serious implications for her prospects of an academic career. Beckelman is forced to change her supervisor and to change departments and concludes more broadly and poignantly that "Perhaps the damage I am just beginning to discover, however, is the trauma to both my intellectual confidence and attitude toward intellectual inquiry. I believe I was made to feel intellectually inferior because I did not reciprocate Jane's sexual advances."[14]

The complaint suggests a persistent trajectory of betrayal that was marked most directly and dramatically by a kiss that moved from the socially recognized and casual sign of greeting or departure, to a fully sexualized embrace. Similarly, in this argument, the relationship between student and teacher moved from flirtation to exploitation, and from pedagogy to the abuse of power. The pretense of flirtation was exploded by the reassertion of institutional hierarchy, just as the play of desire was displaced by the bitter rhetoric of judgment. In short, a kiss that might have expressed mutual recognition and a species of community became, suddenly and without premeditation, the performance of a double betrayal, that of a lifestyle and lesbian identification, and that of the trust and mutuality whereby student and teacher would share a jointly governed pursuit of knowledge.

1.2 The Response

Again in the spirit of depicting the wounds or the justifications of the parties' behaviors in their own words, Jane Gallop's response to the charge

14. Compl. at 8, *Beckelman*, E.O.P. Case No. 044.

of sexual harassment is best pursued not only by reference to her defense, but also through her work, and most specifically her book and other articles on this subject.[15] Initially, however, Gallop focuses upon the kiss as the source of the charge against her. This kiss had a history and a context that was both pedagogic and phantasmatic. In Gallop's reconstruction, it enacted momentarily and with self-conscious performativity the radical conjunction of feminism, desire, and knowledge.[16]

The response begins where it should, with the teaching relation. Returning momentarily to Dana Beckelman's complaint, she begins her account of their relationship by noting that the summer before the events complained of, she had seen Jane Gallop lecture and had sent immediately for a syllabus for the feminist theory course that Gallop would be teaching in the fall.[17] She continues to say that "I read her work all summer, especially *Thinking Trough the Body*, in which she confesses an "erotic attraction to women of another class . . . I am intrigued by her outrageousness . . . ."[18] Beckelman joined Gallop's class and insisted that Gallop supervise her research. In Gallop's words:

> [r]ight from the start the relationship was not just professional, not even just social, but intensely personal and personally intense. She was, by her own admission, enamored of my work before she even met me . . . she identified me and thought I'd be the ideal teacher for her. I responded strongly to her desire for a career like mine.[19]

What follows from this, in Gallop's account, is a story of an uninvited yet pedagogically useful infatuation.

The first argument that Gallop makes develops directly out of her own theory of the erotics of pedagogy. In an argument that dates back to Socrates, and indeed—and ironically—to one much ignored connotation of the

15. *See* GALLOP, FEMINIST ACCUSED, *supra* note 4 (telling her side of the factual situations that lead to her being accused of sexual harassment by two of her students and discussing surrounding issues); *see also* Jane Gallop, *Feminism and Harassment Policy*, ACADEME, Sept.-Oct. 1994, at 16 (discussing the conflicts between feminism and sexual harassment policies on campuses); Jane Gallop, *The Lecherous Professor: A Reading*, 7 DIFFERENCES 1 (1995) (analyzing a book on sexual harassment on campuses). Of her other works, the most relevant are: JANE GALLOP, THE DAUGHTER'S SEDUCTION: FEMINISM AND PSYCHOANALYSIS (1982); JANE GALLOP, READING LACAN (1985); JANE GALLOP, THINKING THROUGH THE BODY (1988); PEDAGOGY: THE QUESTION OF IMPERSONATION (Jane Gallop ed., 1995). Gallop's contribution to the latter discusses, among other things, another pedagogic kiss. *See* Jane Gallop, *The Teacher's Breasts, in* PEDAGOGY: THE QUESTION OF IMPERSONATION, *supra*. Jane Gallop's appeal against the University determination against her is also available from the Chancellor's Office, Univ. of Wisc., Madison.

16. For discussion of this aspect of the case, or specifically this conjunction, see *Ticket to Bundeena: An Interview with Meaghan Morris, in* BODYJAMMING 243, 262-266 (Jenna Mead ed., 1997).

17. Compl. at 1, *Beckelman*, E.O.P. Case No. 044.

18. *Id.*

19. GALLOP, FEMINIST ACCUSED, *supra* note 4, at 54.

'Socratic method,' teaching is inevitably a process of attraction and seduction. Passion and engagement, emulation and identification, are all parts of a radical and charged pedagogy, or in Gallop's terms, of "thinking through the body." In an argument that has been well formulated by bell hooks, the traditional notion of a "disembodied teaching," of a pedagogy that occurs through the purely verbal theatrics of the mind, smacks both of "repression and denial."[20] To restore passion, and excitement, "eros and the erotic" to the teaching process, is not simply a precondition to creative learning, to a self-revelatory and so open epistemology, it is also the precondition to a responsible and accountable relation between teacher and student.[21] The care, trust and desire for knowledge that characterize the best teaching cannot, in this view, be honestly or successfully generated if the eros and excitement of the teacher-student relation is repressed or denied.[22]

It is clear from all the accounts of the case that Beckelman and Gallop had grappled both directly and indirectly with the erotics of the teacher-student relationship. Beckelman's first paper for Gallop "interwove love letters to an unnamed woman with an analysis of [Gallop's] most recent scholarly book, which contains a discussion of love letters between women."[23] It is also significant that it was this paper that Beckelman was due to give at the Graduate Student Gay and Lesbian Conference. In Gallop's response to the complaint, she also relates the story of another love letter from Beckelman to her in which "Ms. Beckelman described herself sweeping the floor in the nude and having sexual fantasies about Professor Gallop."[24] While it is important in theory not to confuse eros, meaning desire or Platonic love, with sexuality, it is clear that testing the boundaries between erotic attraction and a sexualized love was a distinctive theme in the relationship between the parties.[25] Again drawing on Gallop's extensive account of the case, in a conversation at the bar earlier in the evening the

20. BELL HOOKS, TEACHING TO TRANSGRESS 191 (1994).

21. *Id.* at 193.

22. This argument can be found in a number of analyses of education. *See, e.g.,* Shoshana Felman, *Psychoanalysis and Education: Teaching Terminable and Interminable,* 63 YALE FRENCH STUD. 21 (1982); Constance Penley, *Teaching in Your Sleep: Feminism and Psychoanalysis, in* THEORY IN THE CLASSROOM 129 (Cary Nelson ed., 1986); SUSAN KRIEGER, SOCIAL SCIENCE AND THE SELF: PERSONAL ESSAYS ON AN ART FORM (1991). In relation to legal education, see Duncan Kennedy, *Psycho-social CLS: A Comment on the Cardozo Symposium,* 6 CARDOZO L. REV. 1013 (1984-85); Peter Goodrich, *Of Blackstone's Tower: Metaphors of Distance and Histories of the English Law School, in* WHAT ARE LAW SCHOOLS FOR? 59 (Peter Birks ed., 1996); PIERRE SCHLAG, LAYING DOWN THE LAW 3-13 (1996) (analyzing the psychic costs of acquiring a legal mind); PAUL CAMPOS, PIERRE SCHLAG & STEVEN D. SMITH, AGAINST THE LAW (1996).

23. GALLOP, FEMINIST ACCUSED, *supra* note 4, at 89.

24. *Beckelman,* E.O.P. Case No. 044 at 5.

25. *See* Sigmund Freud, *The Resistance to Psychoanalysis, in* 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 213-222 (James Strachey ed. & trans., 1953, Hogarth Press) (1925). "[W]hat psycho-analysis called sexuality was by no means identical with the impulsion towards a union of the two sexes or towards

parties had a heated conversation about the erotic dynamics of our pedagogical relation.

> I did research on the erotics of pedagogy, and it was also a topic she wanted to pursue, hence the paper she was presenting. But these conversations were also very personal. We were not discussing sex, power, and pedagogy in the abstract; we were inevitably thinking of our own highly charged relationship.[26]

In Gallop's argument, "confessional honesty, exploration of sexual ambiguity, and provocative performativity,"[27] were key aspects of her teaching strategy and were central to her relationship with Dana Beckelman, precisely because of the nature of the work that the latter wished to pursue. The second argument that Gallop uses, develops out of the first. The Gay and Lesbian Studies Conference, and specifically its epistemological project of mapping the links between sexual identity and forms of knowledge, provided a peculiar and specific context for the kiss that occurred. In Gallop's words:

> Once I said I was staying, Dana and I embraced as had become customary upon our partings. This time we kissed on the lips and, to my surprise, Dana's kiss felt not like a peck but like a kiss. When Dana started putting her tongue in my mouth, I understood this as some sort of performance for the sake of the assembled conference participants . . . . I wished to support her attempt at provocative performance and so I went along with this performance kiss. We kissed for a minute or so (clearly too long for a goodbye peck).[28]

The kiss, in this interpretation, was as much a staging of desire as it was an actual expression of it. For Gallop, the performance was flirtatious rather than serious, and was epistemic rather than sexual in its significance.

In her widely publicized and lengthy reconstruction of the case, Gallop adds some further context and argument to her response. As this later discussion bears directly upon her conception of the teacher-student relationship and specifically the erotic tenor or intensity of lesbian knowledge, it deserves brief summary. Again the argument is in two parts and self-consciously transgresses the arbitrary divisions that social convention has habitually constructed between the sexual and the intellectual, the personal and the professional.

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producing a pleasurable sensation in the genitals; it had far more resemblance to the all-inclusive and all-preserving Eros of Plato's *Symposium*." *Id.* at 218.

26. GALLOP, FEMINIST ACCUSED, *supra* note 4, at 89.

27. *Beckelman,* E.O.P. Case No. 044 at 4 (quoting Gallop's response to Beckelman's complaint).

28. *Id.* at 5 (quoting Gallop's response).

Gallop's first appeal, in what is essentially an apologia or defense of her acts, is to her own experience and history. Her conception of feminism dates back to her college years in the early seventies and to a simultaneous awakening to politics and sexual pleasure. In those formative years, Gallop learned the power of desire, "[a]nd the space where I learned desire—where it filled me with energy and drive—I call feminism."[29] In another striking passage, Gallop also describes a formative experience of an all women dance on campus where, after successfully excluding men, the women danced bare-breasted, and Gallop realized that "[o]ur breasts were political."[30] It was also on that evening that Gallop witnessed the much admired teacher of her first course in women's studies arrive at the dance in the company of a beautiful student: "their carefully staged entrance publicly declared their affair."[31]

Pursuant to the theme of the originary power and apparent truth of early feminism, much of the rest of Gallop's personal genealogy is concerned with the repetition of those early experiences. The link between feminism and desire constantly returns the senescent professor to her youth, and the related themes of the erotics of dancing, of touching breasts, of breasts as political objects of desire, and also of teacher-student sex, recur insistently in her later life and in her work. In a style that mixes nostalgia with confession, the halcyon atmosphere of a retro mood with the work of counter-transference or admission of what she brought to her relationship with her student, Gallop ends the account of her personal odyssey by linking the kiss to her institutional past. When discussing how on the night of April 19, 1991, at the age of 39, she kissed Dana Beckelman, Gallop remarks: "I thought I was back in 1971 . . . . I thought I was back in a space where feminist professors and students, joined by a common pursuit of liberation, could play with our institutional roles rather than be limited by them."[32]

In this account, the kiss expressed a conjunction of feminism, desire and knowledge. It acted out or performed a lesbian epistemic, it was the sign not simply of transmission of knowledge but also of a lesbian community and form of knowing. In the intoxicating atmosphere of a party and in direct relation to the delirium of dance, the kiss was a wild attempt to escape, if only momentarily, from the constraints of institutional roles, convention and even the temporal laws or process of aging itself. The immediate phantasmatic context of the kiss was, for Gallop, that of a hallucination of recaptured youth. The hallucination, whether viewed as good or bad, is best addressed by reference to the fact that Gallop was no longer twenty and no longer a student, she was older than her partner and in a

29. GALLOP, FEMINIST ACCUSED, *supra* note 4, at 5.
30. *Id.* at 13.
31. *Id.* at 14.
32. *Id.* at 92.

position of authority over her. Equally importantly, it should also be added that Gallop was no longer single, she was now married and if not heterosexual at least no more than bisexual. It is arguable, in other words, that on her own account, her connection to the utopia of her youth, and specifically to the feminism of the lesbian caucus with which she identified, was at best attenuated and at worst delusional.

The pain or the glory of the performance of the kiss is not however appropriately judged by criteria of truth or falsity. The issue is as much what was felt as what was enacted in any political, historical or putatively objective sense. In these terms the principal question relates to the space of desire within which the kiss was enacted. Before leaving Gallop's defense of her actions, notice should be taken of her principal (retrospective) justificatory argument, namely that the teaching relationship is intrinsically and necessarily a charged one.

In its simplest form, the theoretical argument that underpins Jane Gallop's account of the teaching relation is classically psychoanalytical. To be successful the teaching relation must actively engage the student and in its ideal form it will allow the student to develop a relationship with the teacher. The student will come variously to emulate, desire, resist or otherwise identify with the teacher as someone "who knows." In more directly therapeutic terms, the student attaches to the teacher a memory of someone who knows, and the teacher thus comes to represent or emblematize an unresolved past and the possibility of working through the emotions that remain attached, unfinished or unresolved, to that past life or those earlier experiences. In psychoanalytic parlance, the resulting relation of positive or negative desire for the teacher is a relation with classical transference features. The concept of transference is modeled on the relation of the analyst to the analysand. The successful therapeutic relationship entails the displacement of primary affections of the analysand's onto the analyst. The analyst then comes to play the role of the earlier or childhood object of anger or affection.[33] Here the analysand relives and understands or works through a relationship that cannot otherwise be experienced directly.

Transference is not only essential to therapeutic method but is also intrinsic to the structure of the therapeutic relation.[34] The work of psychoanalytic interpretation is that of understanding and interrupting, if not dissolving, the transference that places the analyst in the position of the one who knows. In a similar manner, the teaching relation can be thought of in terms of this structure, and so can be analyzed in terms of a hierarchical structure or a relationship of 'knowing' that the student has to interpret

33. *See* Freud, *supra* note 25, at 99-108. For discussion, see Jacques Lacan, *The Transference and the Drive, in* THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS 123-35 (Jacques-Alain Miller ed. & Alan Sheridan trans., 1978).

34. For an analysis of this sense of transference, see JANE GALLOP, READING LACAN (1985), especially at 25-30, 42-44, 60-65.

and overcome or simply work through: "Interpretation is always the exercise of power, while transference is the structuring of that authority. To analyze transference is to unmask that structuring, interrupt its efficient operation."[35] In less technical terms, the erotics of pedagogy refers to the capacity of the teacher to accommodate and respond to the student's displaced affections. The reference to transference in the depiction of the teacher-student relation necessarily implies that the relation is emotionally charged. To the extent that transference usually manifests in the expression of a displacement of our feelings towards our parents, it is not simply a charged relation but more precisely an amorous or erotic one.

The implication of Jane Gallop's defense of her kiss is that the successful teaching relation is inevitably erotically charged and this transference of emotion or displaced intensity should not only be recognized but also welcomed. In its strongest formulation one could adduce that this affective charge 'is' the teaching relation, that eros is the means of successful learning, of classroom transmission as such. Understood in these terms, the kiss forged a new level of pedagogic relation and of intellectual community. The kiss was the elaborate and extended expression, or corporeal acting out, of the desire that founds knowledge. In Gallop's depiction, the kiss was an inscription of an amorous epistemic, of a desire to learn. It was this conception of knowledge that the University, in its determination of the case, was most unwilling to directly address.

1.3 The Determination

The investigation of the charge made against Jane Gallop confirmed that the kiss had taken place and that those who had witnessed it had interpreted it in diverse ways. The kiss was seen as humorous, provocative, and performative.[36] Investigation into the background context of the kiss and specifically into perceptions of the relationship between Beckelman and Gallop suggested both that at least for a while, Beckelman was infatuated with Gallop, and that there was no indication of any sexual relationship between them. Their relationship was characterized as flirtatious, possibly "intimate,"[37] and even "out of hand,"[38] but not physical and certainly not that of lovers.

The investigation and determination were conducted under the supervision of lawyers, and the hearing and decision were also the work of lawyers. Reading very much like a standard form of judgment, the determination looks to the two legally designated forms of sexual harassment under Title IX, and decides the principal issues in Gallop's favor.[39]

35. *Id.* at 27.
36. *Beckelman,* E.O.P. Case No. 044 at 6.
37. *Id.* at 7.
38. *Id.* at 6.
39. *Id.* at 7.

Under Title IX two forms of sexual harassment are proscribed, namely, *quid pro quo* harassment and hostile environment harassment. As regards the former, the finding was that there was no evidence of professional retaliation. With respect to the latter form of discrimination, it is necessary to prove "an *objectively* hostile or abusive work environment—an environment that *a reasonable person* would find hostile or abusive . . .", and "[l]ikewise, if the victim does not *subjectively* perceive the environment to be abusive, the conduct has not actually altered the victim's [environment], and there is no . . . violation."[40]

The specific findings of the determination were that

> (1) Ms. Beckelman was a willing participant in the sexual banter; (2) Professor Gallop did not condition Ms. Beckelman's grades or participation in an academic program on Ms. Beckelman's submission to sexual advances or sexual acts; (3) Ms. Beckelman was not and did not feel physically threatened, psychologically harmed or humiliated by any of Professor Gallop's conduct or words; and (4) but for the sexual act, they had an amorous relationship."[41]

The determination, however, continues to find that Gallop was in breach of University of Wisconsin at Madison's Policy on Sexual Harassment regarding consensual amorous relationships. By section 5(a)-(d) of that Policy, the person in the more powerful position is required to report, "in addition to other acts, the relationship to their Dean or Division Head and to take steps to disassociate from positions where a conflict of interest could arise."[42] Finally, the determination rules that in the future Gallop "remove herself from evaluating the academic performance of . . . . any student with whom she has developed an amorous relationship."[43]

II.
Law and Emotion

One of the most striking features of the determination in *Beckelman v. Gallop* is how extraordinarily ineffective it was in even addressing, let alone resolving, the emotional conflict that produced the charge. Both parties to the dispute were infuriated by the determination and both appealed the holding. I will suggest that their outrage, irrespective of its specific content, should be read as a symptom of the procedural and substantive failures of the legal process of determination adopted. More than that, the tribunal had no language within which adequately to address the subjective inequities and emotional harms that were the object of judgment.

40. *Id.* at 8 (quoting Harris v. Forklift Syst., Inc., 510 U.S. 17 (1993)).
41. *Id.* at 12-13.
42. *Id.* at 13.
43. *Id.*

Beckelman, in her appeal, describes herself as feeling as though she had been mislead, misinterpreted, ignored, and dismissed by the process and by the determination. Her appeal openly states that the determination itself was "hurtful, humiliating, and psychologically harmful."[44] She states further that she had suffered depression almost as much by virtue of the ordeal of making the charge as by virtue of the acts of which she complained. She concludes that the findings are variously incomplete, inaccurate, erroneous, and hostile to the tenor and purpose of the charge. In her own words, she had been "branded a heretic" by a department that "cower[s] to Ms. Gallop as God,"[45] she had been "humiliated on numerous occasions" by Gallop, who had used "her position of power revengefully,"[46] and she had suffered depression as a result of her teacher's malice, manipulation, and betrayal of her trust. The determination had in her view failed to hear or adequately respond to any of those complaints, it had compounded the disparity in power between her and her teacher, and most hurtful and glaring of all its errors, had asserted that the parties had previously had an amorous relationship, "which I find to be the equivalent of saying a rape victim secretly enjoys it."[47]

Gallop also appealed and expressed a comparable anger at the determination. She describes herself as "seriously troubled" by the interpretation of "amorous relationships." After noting the agonistic and extremely painful consequences of the investigation and determination of the charge, Gallop proceeds to depict the substantive positive holding of the tribunal as being dangerous and troubling in its implications.[48] The determination made a dangerously loose use of the concept of transference, taking it to mean something as undifferentiated as a "crush," and constructed "a whole new meaning for the phrase 'amorous relationship.'"[49] More importantly, in her view, the decision to remove her from any pedagogic relationship in which the student had a transference onto her, "means that I would not work with any student who really believed that I had something important to teach her. I would be forced to turn away precisely those students most eager to work with me . . . ." She concludes that "if schools decide to prohibit not only sex but 'amorous relations' between teacher and student, the 'consensual amorous relation' that will be banned from our campuses might just be teaching itself."[50]

The determination would seem merely to have served to add further harm to the injuries charged or suffered already. It had neither the language to address the psychological pain that was complained of, nor the

44. Beckelman Appeal at 11, *Beckelman,* E.O.P. Case No. 044.
45. *Id.* at 11.
46. *Id.* at 12.
47. *Id.* at 11-12.
48. Gallop Appeal at 1, *Beckelman,* E.O.P. Case No. 044.
49. *Id.* at 2.
50. GALLOP, FEMINIST ACCUSED, *supra* note 4, at 56-57.

emotional acuity necessary to perceive and address the political question of the roles of eros and of power in the teaching relationship. The single positive recommendation of the determination, that Gallop in future be removed from all teaching relationships that exhibit some (undefined) degree of transference, would seem simply to compound the problem of the tribunal's inability to understand the emotional character of the charge. The teaching relationship, in other words, always involves some elements of affection, some desire or charge, and simply to prohibit any teaching relationship that manifests an emotional intensity, attraction, or wonder, would be to suppress successful pedagogy or just possibly the teaching relationship as such.

The other questionable implication of the determination would seem to be that any expression of emotion, or display of affect, between student and teacher would potentially constitute amorous conduct and be subject to prohibition either under the specific policies in force at University of Wisconsin, or under the broader heading of sexual harassment. Thus the American Association of Law Schools Statement of Good Practices dictates that "[l]aw professors should not sexually harass students and should not use their role or position to induce a student to enter into a sexual relationship, or subject a student to a hostile academic environment based on any form of sexual harassment."[51] While it remains to be seen how this code will be interpreted, or indeed whether it will survive,[52] it is clearly broad enough and vague enough to be read as including a bar to kisses or other expressions of desire that might seduce, or that would in any event necessarily involve the role or position of the teacher in creating a charged or potentially hostile environment. The determination in *Beckelman v. Gallop* defined the kiss as a sexual act and so it could, on the facts of the case, have been harassment if Beckelman had reacted to it in such a way as to indicate that she felt humiliated by it within a reasonable period of time. On this account, any form of kissing or overt embrace would be the potential object of a charge of harassment and consequently be forbidden. In that the specific forms of expression of amorous desire or indeed of hostility, of seduction or abuse, are left undefined by the codes of teacher student practice, we are left simply with a prohibition, or negative a priori, that offers no positive guidance as to the substantive forms that the pedagogic relationship should take.

51. EXECUTIVE COMMITTEE, AMERICAN ASSOCIATION OF LAW SCHOOLS, STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES (1989), *reprinted in* ASSOCIATION OF AMERICAN LAW SCHOOLS, 1995 HANDBOOK 89, 91 (1995).

52. *See generally* Caroline Forell, *What's Wrong with Faculty-Student Sex? The Law School Context* 47 J. OF LEGAL EDUC. 47 (1997) (arguing that the Statement has come under attack and is likely to be further impugned. In Forell's view the Statement should be defended).

The broadly drawn and vaguely defined parameters of the decision in *Beckelman v. Gallop*, as well as the unwillingness of the legally trained adjudicator to address the emotional substance of the dispute can be taken in large part to reflect a training that does not address questions of emotion and so does not equip the modern lawyer with any language or method that is competent to address the complex affective issues that arise from intense and intimate emotional relationships. The first and most important criticism to be made of the determination in *Beckelman v. Gallop* is thus a somewhat bizarre one to contemporary ears. It is that the legally adjudicated determination of the charge, as also the legal procedure adopted for trial of the case, were inappropriate both in form and in substance to the complaint made. The legal form of dispute resolution, derived ultimately from the agonistic practices of Christian trial, but given a modern appearance in the objective language of legal science, is not, and indeed never was, the appropriate jurisdiction or forum for the judgment of erotic acts, or spiritual or emotional claims of harm.[53] The historical jurisdiction of positive or municipal law was that of exterior acts and not of interior or affective states. It is thus to the limits of law and the limitations of legal reason that attention should initially be directed.

2.1 Regnant Lawyers

The modern history of common law has been that of the inexorable expansion of the jurisdiction of law, and most specifically of the legal form of adjudication. This process of juridification or of the persistence and growth of the jural model of social relationship and administrative decision-making has been roundly criticized by numerous sociologists and theorists of law. The legal model of social relationship has been criticized variously as a "colonization of the life world,"[54] as leading to an "uninformed" and so ethically irresponsible form of decision making,[55] and as a species of "statolatry" or failure of the social imagination.[56] Whatever the particular make-up or vocabulary of criticism, it is predicated in essence upon a critical appreciation both of the expansion of law into all areas of

53. The argument as to the other jurisdictions that did have competence over interiority, over what used to be termed the ghostly powers, will be addressed in Part III of this Essay. For a general discussion, see PETER GOODRICH, OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW, 223-47 (1995) [hereinafter GOODRICH, OEDIPUS LEX].

54. JURGEN HABERMAS, THEORY OF COMMUNICATIVE ACTION 2: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON 356-57 (Thomas McCarthy trans., Beacon Press 1987). For an incisive commentary upon the concept of juridification, see Gunther Teubner, *Juridification—Concepts, Aspect, Limits, Solutions*, *in* JURIDIFICATION OF SOCIAL SPHERES 3, 6 (Gunther Teubner ed., 1987).

55. *See* TIM MURPHY, THE OLDEST SOCIAL SCIENCE? CONFIGURATIONS OF LAW AND MODERNITY 202-10 (1997) (discussing the decontextualized nature of judicial proceedings that leads to an irresponsible adherence to the rule of law). For a discussion of that work, see Peter Goodrich, *Social Science and the Displacement of Law* 32 L. & SOC'Y REV. 343 (1998).

56. ROBERTO UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 182-84 (1996).

social and institutional life, and of the increasing density or opacity of legal regulation, such that law becomes ever further removed from the everyday affairs that it ever more pervasively seeks to regulate.

The regnancy of law,[57] the survival and success of the legal model or ideology of governance and decision making, and most specifically its replication in the numerous arenas of administrative and institutional decision making, is open to distinct critiques. The notion that a single and by and large unitary concept of adversarial professional practice and agonistic process of trial and judgment is equally appropriate to all domains of social life no longer stands up to scholarly scrutiny. While some attempts have been made to alleviate the rigors of the legal process, as, for example, in small claims courts, in juvenile jurisdictions, and in the legally governed development of alternative dispute resolution, the juristic model of decision making, and the regnancy of legal reason, has largely survived these marginal and incremental incursions upon its method. Law is still taught as a unified professional discipline, it still maintains the public presence of a disembodied, technically governed, professional practice, and a masculine penchant for advocacy and antagonism are still the predominant tenor of its corporate life.[58]

Whatever the generic criticisms that can be marshaled against the traditional form of legal training, and the correlative style of legal practice, it should also be admitted that no one model of legal identity or legal subjectivity can adequately capture the myriad roles that the profession plays in the postmodern polity. The ideology or myth of the rule of law, and of a uniform and unitary rationality of legal practice, remains a significant and almost obsessive concern of the media and of the political order, but these images or fictions must inevitably be broken down and linked to specific domains of practice. To continue to talk, whether in laudatory or critical terms, of an undifferentiated concept of 'the law' or of the identity of the lawyer, probably simply serves to compound the fiction of unity and to

57. It is appropriate to note that I take the notion of the regnant lawyer from GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 23 (1992).

58. Of the many feminist inspired studies of the gendered character of legal practice, see MARGARET THORNTON, DISSONANCE AND DISTRUST: WOMEN IN THE LEGAL PROFESSION (1996); LANI GUINIER, MICHELLE FINE & JANE BALIN, BECOMING GENTLEMEN: WOMEN, LAW SCHOOL AND INSTITUTIONAL CHANGE (1997) (depicting the adversarial and masculine quality of law school training and evaluation); FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW (Anne Bottomley ed., 1996); Hilary Sommerlad, *The Myth of Feminisation: Women and Cultural Change in the Legal Profession*, 1 INT'L J. LEGAL PROF. 31 (1994); LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION (Maureen Cain & Christine B. Harrington eds., 1994); and for an overview, see Richard Collier, *"Nutty Professors", "Men in Suits", "New Entrepreneurs": Corporeality, Subjectivity and Change in the Law School and Legal Practice*, 6 SOC. LEGAL STUD. 27 (1998) (analyzing the masculine norm encoded within law); Fiona Cowney, *Women Legal Academics: A New Research Agenda?* 25 J.L. & SOC'Y 102 (1998) (arguing for the importance of researching women legal academics).

further the undisturbed myth of an unimpugnable professional expertise. If the historically inaccurate, politically coercive, and existentially painful model of the singular reason and all-encompassing or imperialistic jurisdiction of law is the object of critique, then it hardly furthers that critical or reformatory project simply to reiterate that model of unity and of empire in negative terms.

It is precisely so as to escape the regnancy or imperialism of the unitary concept of law—of a law divorced from corporeality, subjectivity, and ethics—that legal scholarship has increasingly turned to other disciplines in the search for models and methods for analyzing the diversity of legal cultures and the plurality of social networks or systems of communication within which law operates. The unitary model of law has increasingly been displaced, at least in contemporary legal scholarship, by more disparate and localized conceptions of specific domains of practice, and their 'minor' jurisdictions and laws.[59] And it has been displaced with good reason, in that different races, different sexes, different gender identities, indeed different subjectivities, need a place within law and a representation within the profession.

If we return to the question of what forum, method, and law ideally would be appropriate for the discussion and resolution of a dispute as to the erotic dynamic at work in a teacher student relationship, the initial answer is probably a negative one. By training and experience the typical legal professional, Ezra Pound's everyday erotomaniac, a dull white legal face with one less thought each year, is probably not the best solution. In a less poetic vein, even the briefest rehearsal of the training of lawyers, and of the collective experience of law school and practice, would suggest immediately that the arena of legal professional competence does not extend to the subtle and fragile negotiation of affective questions such as those of emotional abuse, erotic expression, or the subjectivity of sexual identity. Law, and the lawyers who sustain and apply it, are indeed here more likely to be culprit than resolution. This is so for two reasons.

First, and somewhat counter-intuitively, the negative character of the legal regulation of sexuality, that eros and sex appear in law almost exclusively as the objects of prohibition, of criminal sanction, injunction, property restraints or fines, leads to the eroticisation and hence also the perverse desirability of an illicit sexuality.[60] A repressed sexuality, in other words, leads to the expression of sexual identity in displaced and often violent forms. Second, and correlatively, the inability of lawyers to address sexuality in positive or direct terms is also itself expressive of a repressed

59. I have addressed this issue in PETER GOODRICH, LAW IN THE COURTS OF LOVE: LITERATURE AND OTHER MINOR JURISPRUDENCES 1-8, 29-71 (1996) [hereinafter GOODRICH, LAW IN THE COURTS OF LOVE]. For another recent example of this approach to legal analysis, see the essays collected in LOVE AND LAW IN EUROPE (Hanne Petersen ed., 1998).

60. This argument is made in accessible and entertaining terms in Renata Salecl, *Love: Providence or Despair*, 23 NEW FORMATIONS 13 (1994).

and generically homosocial gender identity. In other words, the privatization of the affective and of the erotic, of the relational as such, has the effect of imposing and perpetuating an unthought and certainly unacknowledged gender identity, that of the professional man. "There is, it would seem, a convergence between the construction of both masculinity and law in that both are enmeshed within notions of hierarchy, authority, rationality and abstraction, and involve a distancing of the personal, the emotional and the sexual in the constitution of a univocal authoritative voice."[61] Both issues can be taken up by way of an example from contemporary English case law.[62]

2.2 Of Denial, Negation and the Return of the Repressed

The case I will examine is that of *Masterson v. Holden*[63] It is not in political terms a particularly surprising case, but it can provide a dramatic and substantively relevant example of the method used by common lawyers in the judgment of affective questions. The apparent logic of the case can be stated succinctly. Decided in 1986, the case concerned two men, Simon Thomas Masterson and Robert Matthew Cooper who, on June 11, 1984, at 1.55 A.M. on a Sunday morning, at a bus stop in the center of London, were "kissing each other on the lips"[64] and cuddling.

In more detail, the justices found that

> Cooper rubbed the back of Masterson with his right hand and later Cooper moved his hand from Masterson's back and placed it on Masterson's bottom and squeezed his buttocks. Cooper then placed his hand on Masterson's genital area and rubbed his hand around this area. The defendants continued kissing and cuddling.[65]

The couple were charged and found guilty of a breach of the peace under § 54 of the Metropolitan Police Act 1839, a statute approximately one hundred and fifty years old. The relevant section states that an offense is committed by "Every Person who shall use any threatening, abusive or

61. Richard Collier, *Masculinism, Law and Law Teaching*, 19 INT'L J. SOC. L. 427, 431-32 (1991).

62. Where the analysis of *Beckelman v. Gallop* concentrated upon the juridification implicit in the institution's response to the complaint, my analysis of *Masterson v. Holden*, 3 All E.R. 39 (1986), will concentrate rather upon the language of judgment for the simple reason that the justification of judgment constitutes the parameter within which subsequent law is decided. Little information is available as to the specific interactive context of the *Masterson* decision, indeed, the only witnesses "although asked to wait by the police, in fact did not, perhaps not wholly surprisingly, and when the police turned round to turn their attention to them they had gone." *Id.* at 41.

63. Masterson v. Holden, 3 All E.R. 39 (1986). For an extended analysis of this case, see PETER GOODRICH, LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS 230-59 (1990).

64. *Masterson*, 3 All E.R. at 40(g).

65. *Id.* at 40(g)-(h).

insulting Words or Behavior with intent to provoke a Breach of the Peace, or whereby a Breach of the Peace may be occasioned." On appeal, the decision at first instance was upheld on the basis that the magistrates' interpretation of the statute was correct and that the behavior in question, the extended embrace or heavy homosexual kiss, was capable of being and indeed was insulting. More dramatically and surprisingly, and yet also most emblematically, the Court expressly stated that the fact that the couple kissing were gay was irrelevant to the decision.

A reconstruction of the justificatory argument of Lord Justice Glidewell in the Court of Appeal will attend to a number of incidental features, or more properly figures, in the judgment. The first is a grammatical slip—in rhetorical terms a solecism, legally a misprision—in the legislation itself. Lord Glidewell remarks: "I note in passing that the wording of the offense in the 1839 Act uses the word 'may' have been occasioned in relation to the question of breach of the peace. Grammatically it should be 'might' though nothing turns on that . . . ." Note first that it is highly curious that a judge trained in a common law tradition in which, to borrow from Sir Edward Coke, each "syllable is significant and known to the law," and in which the 'infinite particulars' of the text constitute the law, should deny the relevance of a grammatical slip.[66] The figure, it will be argued, reveals a hidden sense. In psychoanalytic terms the denial of the relevance of this slip is even more significant: why draw attention to a grammatical defect if its only significance is that it is of no relevance? The conscious disavowal of the relevance of the use of the wrong tense may be argued to be a clue or symptom of a deeper investment or unconscious meaning to the slip. In Freudian terms, the disavowal is a negation, "a way of taking cognizance of what is repressed" while simultaneously defending oneself against it.[67]

One reading of the change of tense would thus be to suggest that it is significant of the emotional charge of the case. The judge is determined, at any cost, to represent the decision as one which is clear in law and unrelated to any feelings, experiences or phantasms that might, for him or for others, be occasioned by homosexuality or homosexual behavior. The negation, in other words, is defensive, it disowns the repressed thought, namely that the decision clearly discriminates against homosexuals and refuses to address the rights or permissible forms of representation and of osculation of a victimized group. In short, the use of the present tense 'may' is of much wider semantic ambit than would be the past tense 'might.' Anything 'may' be insulting, whereas a smaller category of behaviors or here of kisses 'might' be deemed insults. May connotes possibility,

66. *See* Sir Edward Coke, 10 THE REPORTS OF SIR EDWARD COKE 130 (1427) (discussing "words significant and known to the sages of the law, but not allowed by the Grammarians, nor having countenance of Latin" from James Osborne's Case).

67. Sigmund Freud, *Negation, in* 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, *supra* note 25, at 235-239.

might suggests a domain of probability. That Glidewell deems this distinction irrelevant, consciously indicates that he sees the decision as remarkably unproblematic. In unconscious terms the opposite is true, the assertion of irrelevance masks a powerful latent significance.

The argument can be strengthened by turning to a second striking figure in the judgment, this time one of comparison or in technical terms *syncrisis*, the comparison of contrary things in the same sentence.[68] The sentence in question comes as part of a discussion of the meaning of 'insulting behavior' and reads as follows: "Overt homosexual conduct in a public street, indeed overt heterosexual conduct in a public street, may well be considered by many persons to be objectionable, to be conduct which ought to be confined to a private place."[69] The most obvious and probably intended implication of the comparison is that there is no difference between homosexual and heterosexual kissing in public and that in consequence the law in its majesty will treat each the same and with equal severity. Again the judge is engaged in a surprising denial, one which arguably is signaled lexically by the use of the word 'indeed,' here an expression of disbelief or surprise rather than simple acknowledgment. In any event, the case concerns overt homosexual kissing in a public space and the charge is that this behavior was insulting to unspecified members of the public, and particularly to women. To claim that the homosexual nature of the kiss is immaterial either to the charge or to the law is not simply a denial of the cultural meaning of the kiss but is also a direct refusal to address the facts of the case and the questions of sexuality that they raise.

The comparison is charged with unconscious meaning, it is uncanny in its denial of the specific kiss that is at the heart of the case or, to borrow from Sarah Kofman: "It is in its very veiling that the text displays what it is hiding, which is to be found nowhere as a present meaning".[70] It is probable, in other words, that the conscious denial of the relevance of the homosexuality of the kissing at issue in the case is a failed form of expression of the opposite, namely that the judge is threatened by this issue, by the question of homosexuality, and that this fear silently and unconsciously determines the whole course of the decision. Put differently, why would the judge deny the essential nature of the conduct at issue in the case, if not to disassociate himself from it and so to continue to defend himself against it?[71] The innocence of the lawyer, here Glidewell's refusal to take responsibility for his decision as to the meaning of insulting behavior on the facts

68. The definition is taken from HENRY PEACHAM, THE GARDEN OF ELOQUENCE 162 (Gainesville, Fla., Scholars' Facsimiles & Reprints 1954) (1593).

69. *Masterson,* 3 All E.R. at 44 (c)-(d).

70. SARAH KOFMAN, THE CHILDHOOD OF ART: AN INTERPRETATION OF FREUD'S AESTHETICS 55 (Winfred Woodhull trans., Columbia Univ. Press 1988) (1970).

71. For this interpretation of negation, see JEAN LAPLANCHE & J.-B PONTALIS, VOCABULAIRE DE LA PSYCHOANALYSE 112-14 (2d ed. 1968).

of the case, is further evidenced through the use of determinedly hypothetical reconstructions of that behavior. In this instance the rhetorical figure is that of *mimesis* or mimicking of another's speech.[72]

Immediately after likening homosexual to heterosexual behavior in public, Lord Glidewell continues to argue that "the display of such objectionable conduct in a public street may well be regarded by another person, particularly by a young woman, as conduct which insults her by suggesting that she is somebody who would find such conduct in public acceptable herself."[73] The legal basis for this hypothesis is stated to be a precedent decision, *Parkin v. Norman*, in which the Court of Appeal had defined homosexual behavior capable of being insulting by asking whether the behavior was "tantamount to a statement, 'I believe you are another homosexual', which the average heterosexual would surely regard as insulting."[74] The explicit homophobia of this imaginary statement is striking not least because it precisely distinguishes homosexual from heterosexual behavior. A woman, in other words, would not by this logic be insulted by erotic behavior, by public kissing, that was tantamount to the statement "I believe you are a heterosexual": however much he may deny or endeavor to veil it, what is objectionable to the judge is precisely the homosexual character, the specific sexuality and erotic charge of a specific and extended kiss.

It would be possible to carry the analysis further and speculate at length upon why the judges, in a jurisdiction where fellow members of the bench are still referred to as brothers and the community as a whole are termed the brethren, are possessed of this fear that dare not speak its name, but the dramatic affective incompetence of the decision should by now be apparent. It is possible to offer some preliminary observations. The genuinely striking feature of the decision in *Masterson* is the inability of the judge to address the subject of judgment, a gay kiss, and its accompanying and erotically charged behavior. At the level of doctrine, the judge is bereft of support from precedent. The common law does not have an archive of decisions relating to kissing, only the spiritual courts had traditionally been competent to judge the lasciviousness or ethical danger of a kiss and those courts and their doctrine have long disappeared. One might therefore suppose that the judge should either have taken time to research the jurisprudence of kissing or should have remanded the case for trial elsewhere or by other means. As it was he succumbed to the irrational pressure for secular judges to decide anything and everything irrespective of competence or qualification, and this led him to determine the value and legality of the kiss by way of analogy to a case involving a solitary male

72. PEACHAM, *supra* note 68, at 138.

73. *Masterson,* 3 All E.R. at 44(d).

74. Parkin v. Norman, 2 All E.R. 533, 588 (1982); *discussed in Masterson,* 3 All E.R at 42(f) - 43(b).

masturbating in a public toilet.[75] This situation, it could be argued, was not directly relevant nor a helpful guide in characterizing or evaluating the affective behavior that the judge sought rather to generalize and obscure.

If precedent cannot determine the circumstances or outcome of a cause of action, then in common law as much as in civilian legal systems, the decision falls to the operation of reason alone. It is here that the judgment in *Masterson* was weakest. As a preliminary hypothesis I would suggest that by education, training and experience the judge was incompetent to address let alone understand the erotic character of the kissing at issue in the case. To understand and judge the aesthetic, cultural and sexual questions raised by homosexual kissing in public the judge would have to have access to or experience of a process of judgment that facilitated engagement rather than distance, self-reflection rather than denial, and ethical responsibility rather than formalism or indifference to value. Put differently, an agonistic and objectivizing model of judgment based historically upon a fiction of the judge as delegate of an absolute sovereign does not equip the lawyer who by happenstance has become a judge to adjudicate upon such culturally charged affective issues as that of homosexual kissing in a public place. Bereft of training in emotions, deprived by education and jurisprudence alike of the tools of (emotional) self-reflection, unable by virtue of experience to relate to or understand the eros of the occasion, the judge had no means of giving judgment except through an overwhelming silence as to the actual behavior, the specific kiss at issue in the case.[76]

At the level of the theory of judgment it would seem plausible to assert not only the affective incompetence of the common law judge in relation to this public delimitation of the homosexual *carte de tendre*, but also to reiterate that there is a certain injustice in this mode of judgment. The silence of the judge, his failure to speak to the homosexuality of the kiss and of the eros that was being judged illicit, is not a neutral or ethically indifferent act. In that the reason for judging attained neither expression nor any other textual representation, it is judgment in the form of pure prejudice, in the form of unwitting predilection or predisposition. What I mean to suggest by this is that the judge was confronted by emotive and emotional behavior yet had neither the tools nor the training to reflect upon or evaluate the emotional responses that this behavior evoked in him. Where the judge, either by disposition or by professional requirement, cannot engage in self-reflection as the means by which to address the emotions—the traumas, stereotypes, or prejudices—which the behavior being judged engenders in (in this case) him, then those emotions remain unconscious, unanalyzed and unchanged. The likelihood is that judgment will

75. *Masterson*, 3 All E.R. at 42(d)-(e) (citing *Parkin*, 2 All E.R. at 583).

76. On the silence that underlies the extraordinary techniques of policing homosexuality in Britain, see LESLIE J. MORAN, THE HOMOSEXUAL(ITY) OF LAW 134-68 (1996).

therefore remain at the level of prejudice and far from addressing the 'face of the other' or listening to and understanding the cause to be determined, the judge will do little more than project his own unconscious phantasms of 'homosexuality,' kissing, or public displays of affection, onto the parties to the case.

2.3 Literature, Poetics, Scholarship, and other Unacknowledged Legislators of the Social World

The emotional incompetence of lawyers is a popular *topos* throughout the social history of western law. The judge who, as delegate of the sovereign, sits at the pinnacle of the legal institution is simply the antique and sometimes desiccated exemplar of a 'brotherhood,' a priestly or 'sacerdotal' community that ideally eschews the passions and the prejudices of the world.[77] The blindness of justice within this tradition is a facet of a priestly function, of a Christian conception of community, in which both judge and judgment are ideally untainted by the venal or fallen ligatures, the affectivities, of the secular world. The judge, classically and to a great degree contemporarily, is to look away from the human towards the divine or simply phantasmatic source of law, he is to judge with "downcast eyes,"[78] he is to develop a "filial fear" of god and of "the law,"[79] he is, particularly in judging, to embrace and repeat law and only law.

In popular and particularly in literary tradition, this model or theistic ideal of judgment is regularly satirized as the expression of a personal lack and as a professional deformation. In place of an emotional life, the lawyer is possessed by the sedentary abstractions and linguistic abuses of a reclusive and isolated textual vocation.[80] The lawyer is depicted satirically or critically as an addict of law who cannot go a single day without recourse to his legalisms. The formbooks and other guides to legal study insisted on a recipe of regular and devout reading of legal texts, no day without its

77. On the monastic origins of the legal profession, see DONALD R. KELLEY, THE BEGINNING OF IDEOLOGY: CONSCIOUSNESS AND SOCIETY IN THE FRENCH REVOLUTION (1981). Specifically on the English legal profession, see JOHN H. BAKER, THE ORDER OF SERJEANTS AT LAW (1984); PAUL BRAND, THE ORIGINS OF THE ENGLISH LEGAL PROFESSION (1992) (elaborating on the mixed character of the early professions of law). For a critical examination of the interior and melancholic attributes of the profession, see GOODRICH, OEDIPUS LEX, *supra* note 53, at 1-15. For a further critique, see Pierre Schlag, *Clerks in the Maze*, *in* CAMPOS, SCHLAG & SMITH, *supra* note 22, at 218. It is also tempting to pursue the theme of friendship and brotherhood in relation to the homosociality of the profession. In that regard, see JACQUES DERRIDA, POLITICS OF FRIENDSHIP (George Collins trans., 1997).

78. SIR JOHN FORTESCUE, DE NATURA LEGIS NATURAE 321 (1869), *reprinted in* CLASSICS OF ENGLISH LEGAL HISTORY IN THE MODERN ERA No.1 (Chichester Fortescue trans., 1980).

79. SIR JOHN FORTESCUE, ON THE LAWS AND GOVERNANCE OF ENGLAND 5 (Shelly Lockwood ed., Cambridge University Press 1997).

80. The *sedentariam vitam* of the lawyer comes from SIR EDWARD COKE, A BOOK OF ENTRIES (1610).

lines—*nulla die sine linea*—being a much repeated aphorism.[81] The result of such formulae, at least in popular imagination, was an impatient, sour, morose individual, one incapable of conversation.[82] In a like fashion, Virginia Woolf is later reputed to have taken a comparable view and argued that nothing is more greatly to be feared than being seated next to a lawyer at dinner.[83] This is arguably because they have no conversation, they have no mind or interest outside their possession by law. Again calling upon a classical imagination of legalism, the jurist "counts for nothing in the epiphany of law,"[84] his is the mindless or imbecilic task of putting texts into social circulation,[85] a peculiar species of thoughtlessness or stupidity, an instrumentality that in one striking Renaissance account devours his soul: lawyers are

> so full of law-points, that when they sweat it is nothing but law; when they breath it is nothing but law, when they sneeze it is perfect law, when they dream it is profound law. The book of Littleton's *Tenures* is their breakfast, their dinner, their boier [tea], their supper and their rare banquet.[86]

While it is not appropriate to generalize from disparate and historically distinct critiques of law, it is arguably possible at least to derive certain questions from so persistent a theme within the literary and scholarly legal traditions. One might first and most bluntly propose that if the company of a lawyer at dinner is to be dreaded or shunned, if lawyers cannot even maintain a conversation with non-lawyers, then what possible ground can there be for allowing them to judge affectively charged disputes or questions of relationship, of desire or of love? Could it be argued rather that legal training, by virtue of its history and also by virtue of its substance, disqualifies lawyers from addressing intimate disputes or questions of amorous justice? Does not ethics require that a profession that can neither understand quotidian relationships nor engage with emotional lives be removed from the position of judging that which they cannot comprehend? To borrow from the poet Paul Valéry, the modernist profession of law, in failing to recognize any limits to legal judgment, has become what he terms a "delirious profession," an institutional enterprise whose practitioners are

81. For the aphorism that no day can pass without recourse to legal texts, see generally SIR ROGER NORTH, A DISCOURSE ON THE STUDY OF THE LAWS 7 (London, Baldwyn 1824).

82. JUDITH DRAKE, AN ESSAY IN DEFENCE OF THE FEMALE SEX 140 (Source Book Press 1970) (1696).

83. One source for this anecdote is PIERRE LEGENDRE, L'EMPIRE DE LA VÉRITÉ (1984). For an interesting discussion of this theme, see Robert Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 379 CAL. L. REV. 75 (1987).

84. PIERRE LEGENDRE, L'AMOUR DU CENSEUR 96 (1974); PIERRE LEGENDRE, JOUIR DU POUVOIR (1976). For a translation of parts of this corpus, see LAW AND THE UNCONSCIOUS: A LEGENDRE READER (Peter Goodrich ed. & trans., 1997).

85. PIERRE LEGENDRE, L'EMPIRE DE LA VÉRITÉ 160 (1984).

86. WILLIAM FULBECKE, A PARALLELE OR CONFERENCE OF THE CIVIL LAW, THE CANON LAW AND THE COMMON LAW OF THIS REALME OF ENGLANDE folio B 2 a-b (1602).

sustained by no reality recognizable to any but themselves. Legalism attracts

> brilliant failures summoned by their destinies to the delirious professions . . . . By this I mean . . . occupations in which the principal instrument is one's opinion of oneself, and the raw material is the opinion of you held by others . . . . They live for nothing else but to achieve the last illusion of being alone.[87]

The homosocial and closed world of an esoteric profession, the community of those "who are addicted to law,"[88] the pack and "pact of the withdrawn selves,"[89] are arguably the last place that one would choose to look for a competent judge of affective states or of intimate acts.

The popular intuition that lawyers make poor companions and worse judges of intimate relational disputes is not amenable to any very direct form of verification or disproof. The existence of the *topos* is, however, sufficiently consistent to allow for some degree of normalization by returning to the normative schemata of legal training and comparing that to the alternative models of training, practice and judgment that history and imagination have suggested. In other words, the poetic, literary, and scholarly criticism of lawyers has considerable historical significance as well as satirical import, and it will be my argument that historical scholarship and literary tradition provide numerous possibilities for rethinking both the form and the substance of the discipline and practice of law. As has been pointed out by numerous contemporary critics of legal education, the estrangement or emotional alienation of lawyers begins in the process of learning the law.[90] While much of that process of existential reformation is accomplished by indirect means of emulation and modeling, obedience to epistemic criteria, and particularly the examination grade, there are also certain structural features of legal education that deserve brief mention.

The first indicator can be traced to the beginning of law school and takes the simple and exemplary form of the grammatical deletion of the

87. Paul Valéry, *Monsieur Teste*, 6 THE COLLECTED WORKS OF PAUL VALÉRY 50 (Jackson Matthews trans., Princeton University Press 1973). For analysis of this passage, see JEAN CLAUDE MILNER, FOR THE LOVE OF LANGUAGE 79-80 n.5 (Ann Banfield trans., St. Martin's Press 1990) (1978).

88. WILLIAM FULBECKE, DIRECTION OR PREPARATIVE TO THE STUDY OF LAW (1599).

89. Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1985). For a recent revision of psychoanalytic theories of law, see DAVID CAUDILL, LACAN AND THE SUBJECT OF LAW (1997).

90. In contemporary terms, the most famous examples are: Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE CRITICAL LAWYERS' HANDBOOK 51 (Ian Grigg-Spall & Paddy Ireland eds., 1992); THE CRITICAL LEGAL STUDIES MOVEMENT (Roberto Mangabeira Unger ed., 1986); Lani Guinier, Michelle Fine, Jane Balin, Anne Bartow & Deborah Lee Stachel, *Becoming Gentlemen: Women's Experience at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994). In addition, see Scott N. Ihrig, *Sexual Orientation in Law School: Experiences of Gay, Lesbian and Bisexual Law Students*, 14 LAW AND INEQUALITY 555 (1996); Anthony Bradney, *Law as a Parasitic Discipline* 25 J.L. & SOC'Y 71 (1998).

first person singular. The student cannot write "I" and cannot offer subjective opinion or personal experience in arguing a point or applying a norm. This near universal rule of legal education is so familiar as to pass generally unnoticed and yet its effects in terms of suppression of identity and negation of experience—of who the student is—are striking and far-reaching. If lawyers have been trained from their very earliest encounter with law to deny who they are, to erase their past and their opinions, then it would seem legitimate to ask who is it that judges? Bereft of identity and disallowed any recourse to experience or to affective competences, the lawyer is forced by indirection to judge unconsciously. One consequence of such lack of self-reflection or exteriorisation of the grounds of decision is that legal judgment is more likely to take the unthinking form of a projection of the judge's own emotive responses or ideology than it is to be a genuine encounter with or hearing of the relationships or persons that come to be judged.[91]

Accompanying the deletion of identity is an equally immediate and vigorous denial of the juristic soul. More than anything else, modern legal consciousness is predicated upon the denial of any necessary relation between law and ethics, between the practice of virtue and the application of law.[92] The student is taught rigorously to separate legal questions from ethical questions, moral evaluation from the logic of norm application. In such a context it is again difficult to imagine who it is, what consciousness or soul, that judges when a lawyer pronounces a decision. In reality, the supreme irony of legal training probably lies in the disjunction between a jurisprudence that is concerned obsessively with decided cases, an education that teaches the student to mimic the discourse of the judge, and a

91. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 191-212 (1997) (analyzing denial and projection in judging). *See generally* COSTAS DOUZINAS & RONNIE WARRINGTON, JUSTICE MISCARRIED: ETHICS AND AESTHETICS IN LAW (1994) (focusing on the return of ethics in law); LINDA MILLS, A PENCHANT FOR PREJUDICE: UNRAVELLING BIAS IN JUDICIAL DECISIONS (1999) (arguing on the strength of statistical and qualitative evidence of bias in social security disability hearings that stereotyping operates through refusal to attend to the particular circumstances of the individual litigant. The mandate of impartiality should be interpreted, amongst other things, as requiring judges to reflect upon their own knowledge or ignorance of the specific characteristics of the litigant and thereby acknowledge their predispositions. Impartiality is in this sense a positive, constructive outcome of self-reflection).

92. Of the myriad jurisprudential literature portraying and variously critiquing the separation of law and ethics, see Jacques Derrida, *Force of Law: The "Mystical Foundations of Authority," in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3 (Drucilla Cornell, Michel Rosenfeld & David Gray Carlson eds., 1992); MARGARET DAVIES, DELIMITING THE LAW: 'POSTMODERNISM' AND THE POLITICS OF LAW (1992); DOUZINAS & WARRINGTON, *supra* note 91; DESMOND MANDERSON, SONGS WITHOUT MUSIC: AESTHETIC DIMENSIONS OF LAW AND JUSTICE (forthcoming 1999). For an interesting historical account, see NIGEL SIMMONDS, THE DECLINE OF JURIDICAL REASON (1984).

curriculum that offers no guidance whatsoever on how to judge. The authoritative, mystical, performative dimension of judgment, the determination of the incalculable by reference to the calculable, in short the ethical and interior act of deciding, is not an object of study or even of comment.[93]

The reason for this failure to address directly the ethical responsibility of judging lies in a final curious and archaic feature of the legal institution. The reason that both subjectivity and ethics are formally excluded from the legal analysis of judgments lies not so much in the jurisprudence as the theology of judgment. The precise depiction of the place of the judge undoubtedly varies historically. The judge has been variously depicted in the west as the vicar of Christ (*vicarius christi*), the living voice of the law (*viva vox iuris*), a speaking law (*lex loquens*), the spirit of the law (*anima legis*), the mind of the law (*mens legis*), an interposed person (*interpositae personae*) and so on.[94] What is common to these aphoristic and elliptic depictions of the place of judgment is that they position the judge between a deity or some surrogate mystical force—nature, sovereign, time immemorial, or people—that gives the law in advance of its secular use, and a judge who receives and channels that law. The lawyer is trained to be empty of identity and of motive for the theocratic reason that she is to be made into a vessel of an exterior and pre-existent law. The structural feature of this conception or rather non-conception of judging to which I wish to draw attention here, is that all of these disparate depictions of judicial role predicate judgment upon an archaic and agonistic appeal to a divine or at least unknowable determination of litigated disputes. It is assumed, in other words, that the universally appropriate mode of judging is some version of the trial by ordeal in which combatants armed with weapons or with words agonistically invoke divine intervention through the medium of the judge.[95] It is at least arguable that this universal, instantaneous, and absolute

93. A limited exception is Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology* 36 J. LEGAL EDUC. 518 (1986); and more recently and elaborately, Kennedy, *supra* note 90, at 3-5, 39-70, 97-130 (detailing ethical and structural constraints on decision making in the law); *see also*, SCHLAG, LAYING DOWN THE LAW, *supra* note 22, at 133-163.

94. *See* W. T. MURPHY, THE OLDEST SOCIAL SCIENCE? 8-36 (1997) (exploring the relationship between the rise of Christianity and the concepts of the role and nature of adjudication). For the historical basis of these figurations of judgment, see IAN MACLEAN, INTERPRETATION AND MEANING IN THE RENAISSANCE: THE CASE OF LAW (1992); DONALD R. KELLY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION (1990); PIERRE LEGENDRE, LE DÉSIR POLITIQUE DE DIEU: ETUDE SUR LES MONTAGES DE L'ETAT ET DU DROIT 61-189 (1988).

95. On the origin of trial by ordeal or by combat, see Sir John Davies, *On the Antiquity of Lawful Combats in Britain*, *in* THE WORKS OF SIR JOHN DAVIES OF HEREFORD (Grosart ed., 1869) (1601); JOHN SELDEN, THE DUELLO OR SINGLE COMBAT: FROM ANTIQUITIE DERIVED INTO THIS KINGDOME OF ENGLAND WITH SEVERAL KINDES, AND CEREMONIOUS FORMES THEREOF FROM GOOD AUTHORITY DESCRIBED (1610). *See generally* COSTAS DOUZINAS, RONNIE WARRINGTON & SHAUN MCVEIGH, POSTMODERN JURISPRUDENCE: THE LAW OF TEXT IN THE TEXTS OF LAW 151-57 (1991) (discussing the ethics and politics of reading the law in the postmodern age).

method of judging is both outmoded historically and inappropriate ethically in many of the institutional contexts in which the modern lawyer judges. Returning to the example of a disputed kiss between professor and student, it certainly would seem possible to make a strong argument against the legal model of trial and determination and in favor of a more scholarly and literary imagination both of the relevant substantive rules and of the process and personnel engaged in making such decisions.[96]

III.
LAWS OF LOVE AND LAWS OF KISSING

For all that the determination in *Beckelman v. Gallop* and the judgment in *Masterson v. Holden* were centered upon the illicit character of a publicly bestowed kiss, neither decision made any reference to an established law, tradition of judgment, or body of doctrine gauged explicitly to the analysis and determination of public kissing. Even the tentative 'Restatement of Love,' published with ironic intent some years back, discusses the 'law of love' not as a substantive body of doctrine or historical jurisdiction, but rather as an accretion of rules and principles either deduced from established rules of positive law or inferred by way of analogy from other fields of legal doctrine.[97] Contrary, however, to the happy or humorous historical oblivion of contemporary lawyers, a more pluralistic and historically sensitive analysis can show that two legal jurisdictions, one religious and the other more literary, interesting, and feministic were frequently directly concerned with the regulation of kissing along with other public expressions of erotic desire. Church courts and Christian doctrine paid close attention to the varieties and intensities of kissing,[98] and so too the laws of love as expounded in medieval and early modern women's courts or courts of love made kissing a frequent object of analysis and determination.[99] One tradition was spiritual and the other more literary and political, but

96. *See generally* MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1995) (discussing the role of literary imagination in decision-making); RICHARD WEISBERG, POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE (1992); JAMES BOYD WHITE, JUSTICE AS TRANSLATION (1990); PETER GOODRICH, READING THE LAW (1986).

97. Rubin & Heller, *supra* note 3, at 708.

98. The most scholarly and informative works are NICHOLAS PERELLA, THE KISS: SACRED AND PROFANE (1969); CHRISTOPHER NYROP, THE KISS AND ITS HISTORY (William Frederick Harvey trans., Sands & Co. 1901). Also useful are RUTH GOOLEY, THE METAPHOR OF THE KISS IN RENAISSANCE POETRY (1993), and MARTIN INGRAM, CHURCH COURTS, SEX AND MARRIAGE IN ENGLAND, 1570-1640 (1987).

99. I have discussed the history of women's courts and the judgments of love in Peter Goodrich, *Law in the Courts of Love: Andreas Capellanus and the Judgments of Love*, 48 STAN. L. REV. 633 (1996); Peter Goodrich, *Epistolary Justice: The Love Letter as Law*, 9 YALE J.L. & HUMAN. 245 (1997); and in PETER GOODRICH, LAW IN THE COURTS OF LOVE, *supra* note 59. As to the cases of love, I have translated and collated these in a forthcoming work, PETER GOODRICH, LOVER'S LAWS (forthcoming 1999).

both elaborated and applied a variety of comparable rules in relation to the forms, the intensity and duration, of kissing.

The value of the doctrinal and literary histories to which the paradoxical question of the regulation of public intimacy, and specifically that of the various kinds of kissing, refers us, lies primarily in their connection or relevance to the present. I am not in other words concerned to prove the enormous, indeed inexhaustible detail of past doctrines, nor do I intend to elaborate upon the full panoply of substantive rules that governed the spiritual and amatory traditions, and their respective laws of love. The jurisdictional rights of the courts of conscience and courts of love have long been eclipsed and annexed by those of common law and so will be of concern only to the extent that the historical plurality of local and topically distinctive jurisdictions is a useful corrective to the often monotone and unitary jurisprudence of present day legal judgment.

Christianity was a religion of love. Fealty to that religion, from early on, meant faith in a God who loved his subjects and expected their love in return. In this sense, the law of love refers initially and most profoundly to divine will and to the priority of divine decree over any merely human law. As the medieval Christian philosopher Boethius puts it,[100] love is the greater law—*maior lex amor est*—and in consequence it is to be understood as preceding and having priority over the positive law of the state. At the very root of the western tradition, the question of love was thus tied ineluctably to that of law. The conjunction of law and love was the site of an ethics that was ideally determinative of all merely positive or human regimes of rule.[101] What was formulated in doctrine as *agape* or a pure love, also found expression in a little acknowledged secular legal tradition that distinguished the law of the first Venus, that of nature or kind, from the law of the second Venus, its temporal and merely human shadow.[102] In short, the law of love was the first law or principle of human community and its doctrines set out the ethical ideals against which the laws of the Church and their literary and often heretical variations would be measured.

The literary tradition associated with courts and judgments of love has thus to be understood in the context of laws of Venus or of love that had their origin in the spiritual order of the established Church. The erotic literary tradition and its practices of judgment, even when they were held to be heretical,[103] were concerned with the dictates of *amor purus* or pure

100. BOETHIUS, THE CONSOLATION OF PHILOSOPHY 80-82 (William Anderson ed. & trans., 1963) (524).

101. This point is well elaborated in Adam Gearey, *Finnegans Wake and the Law of Love: The Aporia of Eros and Agape*, VIII Law & Critique 245 (1997) (arguing that the Christian laws of love, of agape against eros, is crucial to understanding the culture of western law). *See generally* R. S. WHITE, NATURAL LAW IN ENGLISH RENAISSANCE LITERATURE (1996) (detailing the historical development of love, law and ethics).

102. JOHN SELDEN, JANI ANGLORUM FACIES ALTERA 14 (1683).

103. *See* ALEXANDER J. DENOMY, THE HERESY OF COURTLY LOVE (1947) (discussing the edict banning Andreas Capellanus' "De Amore" in 1277 as well as the heretical status of

love, and the correlatively spiritual code of amorous relationship. What is most striking is that both traditions were well aware that love starts with the senses, that as Bernard of Clairvaux put it "'we are carnal, and born of the concupiscence of the flesh, so is it also necessary that our love begins with the flesh.'"[104] In consequence the laws of love were always engaged with the mapping and judging of sensual and intimate expressions of desire within the community of the faithful or the domain of love. In other words, the laws of love variously recognized that pure love was also a form of sexual attraction or fascination and so required a code of licit forms of physical expression. The erotic space of community was not in other words to be denied but was rather to be focused or, in a more modern terminology, sublimated and so turned to spiritual ends. For the Christian tradition, that end was the building of Christian community and its trajectory towards a life beyond corporeality, while for the literary tradition it took the form of belief in, and codification of, the rules of *amour lointain* or distant love.

3.1 From the Kiss of Brotherhood to the Kiss of the Spider

The most general and best known of Christian doctrines in relation to sexuality limited sex to the act of reproduction.[105] The writings of the Church Fathers clearly spelled out a law which prescribed chastity as the chief virtue of femininity, and the veiling of the woman's face as the best defense against the sins of the flesh.[106] Kissing, outside of the context of reproduction, would be deemed an act of incontinence, and insofar as the Church courts recognized that it was but a short and easy path from the moist lips of an embrace to copulation, kissing was subject to sanction. The voluminous clerical literature of the early modern era, treatises on family governance, and particularly upon the moral governance and education of women, were strict in demanding both "silence" and "shamefacedness" as the best and safest adornments of femininity, and as the proper protection against abuses of the mouth.[107]

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the erotic tradition); *see also* Alexander J. Denomy, *The* De Amore of *Andreas Capellanus and the Condemnation of 1277*, 8 MEDIEVAL STUDIES 107, 107-149 (1946) (discussing this edict and the heretical status of the erotic tradition). For commentary on that point, see PIERRE LEGENDRE, PAROLES POÉTIQUE ÉCHAPPÉES DU TEXTE 90-120 (1982).

104. JEAN MARKALE, L'AMOUR COURTOIS 20 (1987) (quoting Bernard of Clairvaux).

105. I do not here intend, for reasons set out below in the text, to provide any general guide to the rules set out in the patristic writings. For useful overviews, see PETER BROWN, THE BODY AND SOCIETY: MEN, WOMEN, AND SEXUAL RENUNCIATION IN EARLY CHRISTIANITY (1998); JAMES BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE (1987).

106. Most famously, see Tertullian, *On the Veiling of Virgins, in* 4 THE ANTE-NICENE FATHERS 27-33 (Alexander Roberts & James Donaldson eds., 1980) (1885).

107. *See* JUAN LUIS VIVES, DE INSTITUTIONE FEMINAE CHRISIANAE (Charles Fantazzi, trans. & Constantinus Matheensen ed., E.J. Brill 1996) (1557) (providing a definition for "silence" and "shamefulness"). *See also* GOODRICH, OEDIPUS LEX, *supra* note 53, at 130-38 (providing a discussion of that formbook literature).

Although there has been no comprehensive study, it is clear that Church courts historically were willing to allow a fair amount of kissing in the contexts of courting, dancing and other revelries.[108] The nature and hence legitimacy of a kiss depended upon a factual determination of the motives of the parties kissing and the context in which they kissed. Most interestingly, however, in terms of the development of a coherent set of norms governing kissing, the principal legal questions raised by Christian doctrine were institutional, and related as much to conceptions of brotherhood, community and spiritual friendship, as they did to explicit questions of sexuality. The primary context in which the doctrine of kissing was elaborated was the homosocial one of the forms of public recognition of membership in the community of the Church. The significance of kissing, as also the regulation of the intensity and duration of a kiss, was a spiritual question and subject to an intricate classification of the different species of kiss.

At a very general level, the Christian religion was a religion of the 'logos' or word. Truth was associated with speech, indeed and most dramatically with the "sermo humilis" and the pentecostal speaking in tongues, and knowledge came from the lips. According to one of the most commented upon of early Christian texts, the *Song of Songs*, the kiss was the principal form of salvation in that it was through the kiss of knowledge that the word would be passed from Christ to his followers. Thus, when the *Song of Songs* famously importunes "[l]et him kiss me with the kisses of his Mouth", it is illumination of the soul, divine grace, for which the supplicant pleads.[109] In short, for the patristic tradition, the kiss was the union of the word and the soul. In the exchange of breath that takes place in kissing, two souls would intermingle and unite. The insufflation of the kiss was an inhalation of knowledge, and constituted an exchange that was spiritual rather than sexual, and institutional rather than carnal.

The end towards which the kiss was directed was not simply knowledge but also and appropriately love, the *infusio caritatis* or infusion of divine love that was the vehicle of grace. In a correspondingly amorous terminology, St. Ambrose, to take one example, evokes a lovesick soul that yearns for the beloved's kisses, for it is "[b]y just such a kiss [that] the soul cleaves to and unites with the Word."[110] In other versions of the same doctrinal argument, the mouth was the eternal word, and the kiss was the corporeal form or assumption of flesh that the spirit undertook. It can also usefully be noted that the power of the kiss within this tradition of divine love was such that to kiss a woman was to evidence betrothal and, according to Gregory of Nyssa, once kissed a woman had the rights of quasi-uxor,

108. See the excellent INGRAM, *supra* note 98, at 240-42 (discussing church court prosecutions of intimate behavior).

109. PERELLA, *supra* note 98, at 42-43.

110. *Id.* at 44.

or of a virtual wife.[111] In a similar, and equally sexual metaphor, Bernard of Clairvaux elucidates how the soul is the bride of Christ and awaiting impregnation of the spirit through the insufflation of the kiss. He continues that "[y]our evidence of having received the kiss is that you feel you have conceived."[112]

What links the various mystical and more orthodox conceptions of the kiss is not so much, or not only, the sexual metaphor of divine grace, but rather the liminal epistemic role that the kiss plays. The kiss marks the boundary between the stranger and the intimate, the distant and the proximate, and in doing so it designates the point of access to truth. The dangers of kissing are linked to the power of desire and its tendency to corporeal corruptions. The kiss marks and tests the faith of the believer and hence the transcendent quality of the true kiss, its direction towards non-physical or purely spiritual ends, is the criterion against which Church law would judge the legitimacy or illegality of specific kisses.

The general rule within Christian doctrine, transmitted primarily through the writings of Augustine, was that the archetypal kiss was the *osculum pacis* or kiss of peace, a kiss that was the sign of Christian brotherhood and which marked the parties kissing as members of the community of the faithful. For Augustine, the kiss of peace was a great sacrament.[113] It signified both community and *ecclesia,* or spiritual calling. It worked to unite the souls of those that kissed in the holy body of the Church and so also in the knowledge of the unique and eternal truth. Consonant with the symbolic function of the *osculum pacis*, it was generally ruled that while it was permissible to kiss with intensity and for a considerable duration, it was wrong to enjoy the kiss, and wrong to kiss more than once. The kiss, in other words, was to express *caritas*, love of knowledge and of God, rather than cupidity, or love of the flesh and of the world.

The most detailed exposition of the different types and intensities of kissing comes in a work concerned with spiritual friendship which classifies the types of kiss according to a predictably trinitarian division. In a work entitled *De Spirituali Amicitia*, of spiritual friendship, Saint Aelred of Rievaulx provides a detailed classification and account of the modes of kissing.[114] The principal distinction that he draws is made between the physical, the spiritual and the intellectual kiss as the three stages of Christian friendship and community.[115] The stages or types of kiss thus belong to the trajectory or path of a love that passes from the corporeal to the ideational, and expresses first community or what Cicero defined as the

111. *Id.* at 41.

112. *Id.* at 57 (citing BERNARD, SERMONES SUPER CANTICA, IX, v, 7. In Opera, I, 46).

113. *Id.* at 25.

114. *Id.* at 58-63.

115. *Id.*

affinity and reciprocity of friendship,[116] but which ends ideally in knowledge or grace. What is most important to an understanding of this epistemic trajectory of kissing is thus an appreciation of the transitional or liminal status of the kiss in the development and intensification of community which leads the faithful eventually to a knowledge of God.

Within the antique Christian model of what was in essence a sacramental and liturgical conception of kissing, the sacred character of the kiss lent itself to elaborate doctrinal regulation. Within Saint Aelred's classification, the *osculum pacis,* or kiss of brotherhood, was a physical kiss, a kiss on the mouth, but one which was exchanged as a sign of truth and of peace. The physical kiss was already a sign, and most specifically it was the prerequisite to the opening of the mind and the heart to the community and calling of faith. The next stage of osculation was thus the spiritual kiss, a kiss that took place not by virtue of the meeting of mouth or contact of lips but by the joining of the affections of the mind. It was in the spiritual kiss that the souls of the believers would mingle and unite in the single body of the Church. The highest level of the kiss, the intellectual embrace, was in a sense the prolongation of the spiritual kiss. A spiritual kiss of sufficient intensity and duration would transcend the bodies of those that embraced and rather than being the friend or Christian brother that was kissed and being kissed it was now Christ who was kissed and being kissed through the creature or lips of the believer. The intellectual kiss was the apotheosis of kissing, it was, as it were, a labial annunciation, it was the moment when the full union of the soul with its savior, and so the absolute infusion of grace, occurred. In Aelred's words: "the mind, familiar and sated with the spiritual kiss, and knowing that this sweetness comes from Christ, thinks to itself: 'Oh, if only he himself would come'; and yearning for that intellectual kiss, it calls out with boundless desire, 'Let him kiss me with the kiss of his mouth'".[117]

Within this iconography of kissing, it is not the face of the other, but the image of Christ which is kissed. By the same logic, if the trajectory of the kiss moves from *caritas* to cupidity, from the intellectual to the physical, then it is a defiled and ultimately an idolatrous kiss. The stages of the Christian kiss, in other words, could be mimicked by the unfaithful and so lead not to salvation or knowledge but to a corporeal desire marked by ignorance and deceit. The false kiss treated the lips of the other not as the sign of, and means of access to, an invisible grace, but rather as an end in themselves, as sensual presence and the means of a purely carnal embrace.[118] Just as the sin of idolatry was depicted as being that of allowing sight to terminate upon the physical representation or plastic form of faith,

116. CICERO, DE AMICITIA 189 (G.P. Goold ed. & William Armistead Falconer trans., Harvard University Press 1992).

117. PERELLA, *supra* note 98, at 61.

118. The root of this doctrine is to be found in Tertullian, *De Idolatria, in* 3 THE ANTE-NICENE FATHERS 61-76 (Alexander Roberts & James Donaldson eds., 1986) (1869).

so too the false kiss ended its quest for satisfaction upon the body of the subject kissed. The face of the other here became a false image, an idol upon which desire in the form of the kiss both doted and fed.

What is most striking about the distinction between true and false kisses is that both forms of kiss, the iconic and the idolatrous, depend upon the place of desire within the demarcation of knowledge. Within the community of the faithful, the *osculum caritatis* or lovers' kiss would carry the believer "by [. . .] desire, not by reason" to the spiritual source of knowledge.[119] By contrast, desire was also the mode of error in the trajectory of a false kiss, one that idolized the face or stopped upon the image as if it were the substance of truth. The differing forms of kiss could well be said to be distinguished elaborately in doctrine precisely because of their proximity and similarity to each other. The kiss, whether true or false, marked the inevitable interlacing of knowledge and desire, and simultaneously threw hedonism into the path of religious epistemology. Put slightly differently, the social space or community of knowledge was already an erotised space whose relationships were characterized as much by love, and ideally by the amorous transition from body to soul, as they were by any absolute or simple exercise of reason.

In doctrinal terms, and my concern is as much with the development of a language within which to judge kisses as with the specific evaluation of kisses that we inherit from the patristic writings, the species of false kiss mirror the stages of the spiritual kiss depicted above. Thus the physical kiss that marked neither recognition nor affinity in faith, but rather betrayal or deceit, was classically the kiss of Judas. This kiss of betrayal was the antithesis of the *osculum pacis* and so opened the subject not to knowledge but to fornication, and similarly signified not love but rather cupidity or lust. In this definition, the kiss of Judas was a treacherous kiss in which the heart did not follow the lips, and so the will to knowledge was replaced by a venal or corrupt desire.[120] Following this logic, the spiritual kiss, the next stage in the path to grace through the mixing of two spirits, was replaced by fornication, the copulation of bodies rather than the mingling of souls. And finally, the intellectual kiss, the transubstantiation of the lips kissed into the body of Christ, was replaced by what was variously termed the kiss of the spider, of the hierophant, or of the mystagogue. This kiss, as the names suggest, was the mark of entry into a false knowledge, and the only transfiguration that it signaled was ultimately that of the body to dust and to ashes. The kiss of the spider, to take the example used by Clement of Alexandria, was the worst species of promiscuous osculation: "[T]here is another unholy kiss, full of poison, counterfeiting sanctity. Do you not

119. PERELLA, *supra* note 98, at 56.

120. For discussion of the kiss of Judas, a concept taken from Saint Augustine, see PERELLA, *supra* note 98, at 55-60.

know that spiders, merely by touching the mouth, afflict men with pain?"[121] The poison of an unholy kiss was that of a false and essentially idolatrous knowledge. It heralded false *latria*,[122] the pursuit of images, faith in other Gods, and so a faithless community and an unredeemed life.

In contemporary and more pluralistic doctrinal contexts, the specific resonances of impurity, heresy, or paganism, attached to false kisses is less important than the language and classificatory schemata through which the art and practice of kissing was made accessible and available to some species of judgment. This early law on kissing had a remarkable and peculiarly radical theoretical perspicuity. Specifically, it recognized and acknowledged an erotic charge, a substrate of desire or indeed libidinal economy,[123] that not simply underpinned but literally constituted community. Desire pervaded the social, and eros, as motive or as expression, was acknowledged to be present in all institutional relationships as a dimension not only of power but of speech as such. The importance of the early law of kissing thus lies primarily in its ability to acknowledge and address the role of desire in all forms of social contact or institutional intercourse. So too, rather than attempting to deny or exclude public expressions of erotic desire, the doctrine of kissing attempted rather to understand and map an art and practice of embrace that both acknowledged the pervasive value of desire and limited inappropriate forms of its expression through a code, an epistemic, of the relation of kissing to truth. Love, in other words, required expression, and this was recognized to be as true of the polity as of the domestic sphere. It remains to point out that in the literary tradition of the courts of love, this insight into the relation between desire, community and knowledge, gains further and vivid elaboration. In kissing, in tasting the other,[124] we come to know them in their difference and in their desire, and we come also to know what is possible, what lies in the future of our love.

121. Clement of Alexandria, *The Instructor, in* 2 THE ANTE-NICENE FATHERS 291 (Alexander Roberts & James Donaldson eds., 1986) (1869).

122. The distinction between *latria* and *dulia*, is that between honor that is due to God, "latria debetur Deo," and honour that also belongs to God but "is not properly belonging to his substance but to his government and lordship." *See* NICHOLAS SANDER, A TREATISE OF THE IMAGES OF CHRIST 80-81, 86 (D.M. Rogers ed., 1976) (1567).

123. *But compare* JEAN-FRANÇOIS LYOTARD, LIBIDINAL ECONOMY (1993) (providing a sustained, post-Freudian, elaboration of libidinal economy). *Compare* LUCE IRIGARAY, I LOVE TO YOU: SKETCH OF A POSSIBLE FELICITY IN HISTORY (1996) (offering a feminist counterpoint to Lyotard's phenomenology of desire); *see also* Luce Irigaray, *The Fecundity of the Caress, in* AN ETHICS OF SEXUAL DIFFERENCE 185 (1993).

124. *See* ADAM PHILLIPS, ON KISSING, TICKLING, AND BEING BORED: PSYCHOANALYTIC ESSAYS ON THE UNEXAMINED LIFE 96 (1993) (discussing the "primary sensuous experience of tasting another person").

3.2 The Libidinal Economy of Kissing and the Courts of Love

The spiritual context of the secular laws of love was predominantly that of the theological tradition depicted already. The chief end of the tradition of courtly love, of the *fin' amors* or ends of love, was also that of a pure love, a spiritual affection which Capellanus depicted in the following way:

> Pure love is that which joins the hearts of two lovers with universal feelings of affection. It embraces the contemplation of the mind and the feeling of the heart. It goes as far as kissing on the mouth, embracing with the arms, and chaste contact with the unclothed lover, but the final consolation is avoided . . . .[125]

By way of contrast, *amor mixtus* or compounded love was corporeal and hedonistic, "[it] affords an outlet to every pleasure of the flesh, ending in the final act of love."[126] Just as the definition of pure love includes a not inconsiderable element of erotic physical pleasure and indeed erotic charge, the analysis of mixed love also allows that a sensual love has a spiritual meaning and value. The distinction, in other words, is epistemological rather than moral. It concerns the trajectory or path of desire towards knowledge rather than judging sensual acts or erotic expressions as things in themselves, or as good or bad in any absolute sense.

If it is possible to divine a single principle that distinguishes the literary conception of the laws of love from that of the religious tradition, it is most probably that the courts of love not only valued mixed love or the *tendresse* of physical eroticism, but also endeavored to understand such affection and passion as a means to valuable and virtuous relationship. From Ovid's *Ars Amatoriae* to Madeleine de Scudery's *Clelie*, the secular erotic tradition and its various literary and political institutions, including particularly the courts of love, were dedicated most directly to mapping the diverse forms or arts of expression of great loves or affairs of the heart that geography or convention, law or simple circumstance had made impossible of fulfillment.[127] In an age when relationship was constantly at war with distance, and in which the claims of love were the principal tenet of all the major heresies,[128] it is perhaps unsurprising that secular society devoted serious attention to the passage of love, to its communication and maintenance over time and space, as well as to the life style and politics that love, the most radical of the passions, implied. The former concern, that of *amour lointain* or distant love, was the principal subject-matter of the early

125. CAPELLANUS, ON LOVE 181 (P.G. Walsh trans., 1982).

126. *Id.*

127. OVID, THE ART OF LOVE (J.H. Mozley trans., Harvard Unversity Press 1957); MADELEINE DE SCUDERY, CLELIE: HISTOIRE ROMAINE (1660).

128. *See* JOHN GODOLPHIN, REPERTORIUM CANONICUM OR AN ABRIDGMENT OF THE ECCLESIASTICAL LAWS OF THIS REALM CONSISTENT WITH THE TEMPORAL 559-583 (London, 1680) (offering a comprehensive listing of such heresies).

codes and judgments of love, while the latter and more directly political issue of the social expression of desire was the primary concern of the more modern tradition of worldly love, of the *carte de tendre* and its *amour mondaine.*[129]

The desire to codify the projection of love over distance and over the obstacles of convention and social class was what principally marked the tradition of distant love as an alternative depiction of the public sphere. Within what was defined as the domain of love, the affective substrate of the public realm, the art of conjuring, maintaining, and adjudicating the course, and on occasions the ending, of love affairs became a persistent object of an alternative law or minor jurisdiction. The social place and the politics of erotic relationships became an almost scientific object of inquiry, and the various codes of love and collations of judgments of love, formed the basis of an aesthetics and ethics that constituted not simply a literary tradition but a style of life.[130] And at the fold that both joined and separated stranger and intimate, distant and proximate, love and lust, was the kiss, the ultimate symbol of the transition from the servile space of quotidian practice and material things to the eros and charge of the domain love.

The kiss has an extraordinary value within the early codes of love. For Ovid, whose *Art of Love* lies at the root of much of the medieval and early modern law of love, the kiss was the quintessential sign of entry into love. It was, therefore, both dangerous and desirable, to which it is added that "[o]nce you have taken a kiss, the other things surely will follow . . . How far away is a kiss from the right true end, the completion? Failure the rest of the way proves you are clumsy, not shy."[131] In the medieval law of love, the kiss was thus endowed with an extraordinary power both to signify and

129. *See generally* JEAN-CHARLES HUCHET, L'AMOUR DISCOURTOIS 125-147 (1987) (offering an introduction to *amour lointain* or *amor de lonh)*; MOSHE LAZAR, AMOUR COURTOIS ET FIN AMORS 86-110 (1964) (also offering an introduction to *amour lointain* or *amor de lonh)*; *see also* NIKLAS LUHMANN, LOVE AS PASSION: THE CODIFICATION OF INTIMACY 18-34 (1986) (offering an analysis in a more philosophical vein). *Compare* JEAN-MICHEL PELOUS, AMOUR PRÉCIEUX AMOUR GALANT (1654-1675) (providing an excellent guide to the byzantine complexities of the different seventeenth century schools of love, and particularly the various maps of the heart). *See also* JOAN DEJEAN, TENDER GEOGRAPHIES: WOMEN AND THE ORIGIN OF THE NOVEL IN FRANCE (1991) (arguing that French feminist literature witnessed a shift from a more "worldly" dominant heroine to one which drew her strength from revolutionizing the traditional, intimate institutions of love and marriage).

130. An important and erudite history is RENÉ NELLI, L'ÉROTIQUE DES TROUBADOURS (1974). For the argument that this was, at least in part a radical and anticonformist tradition, see ECRIVAINS ANTICONFORMISTES DU MOYEN-AGE OCCITAN. VOLUME 1: LA FEMME ET L'AMOUR; VOLUME II: HÉRÉTIQUES ET POLITIQUES (René Nelli ed., 1977). For a different though equally significant study, see R. HOWARD BLOCH, MEDIEVAL MISOGYNY AND THE INVENTION OF WESTERN ROMANTIC LOVE (1991).

131. OVID, ARS AMATORIAE lns. 669-672 (Rolfe Humphries trans., Indiana University Press 1992). For discussion of the reception of that text on kissing, see GOOLEY, THE METAPHOR OF THE KISS 5-15 (1993); and for examples, see THE COMEDY OF EROS. MEDIEVAL FRENCH GUIDES TO THE ART OF LOVE 3-8 (Norman Shapiro trans., University of Illinois Press 1997).

to cure or transform. For Capellanus, the kiss was not to be lightly given nor easily denied: "what if a woman offers kisses to a stranger, or admits him to the embrace of her breast, but grants him nothing more? She should be confronted with the appropriate censure. A woman acts unethically if she grants kisses or embraces to a stranger, for these are signs of love, and are thought to betoken a love to come."[132]

To extrapolate somewhat, the laws of love understood kissing to be the visible surface or formal expression of entry into the spiritual domain of love and so also into subjection to the codes and courts of love. What might be termed the liminal epistemic of the kiss thus refers to the kiss as a sign of passage from exterior to interior, from solipsism or solitude to desire for the other, from reason to emotion, from prose to poetry.

It is in this spirit that a fifteenth century 'tenson' debating whether a lover should value beautiful eyes or a beautiful mouth more highly, concludes in favor of the mouth not just because it leads to the soul, to the *pneuma* or breath of another, more directly than the eyes, but because in kissing lovers achieve an eloquence that transcends the visual surface of mundane bodies or servile things.[133] In short, the kiss opens the path to relationship, it transmits the subject from *thanatos* to *eros*, from law to desire. Thus, when towards the end of the English poem *The Court of Love*, the theme of singing the praises of love is offered by way of peroration, the song begins with the words "*Domine labia,*" Lord open my lips, "And let my mouth thy preising now bewrye."[134] It takes little familiarity with the allegorical character of sixteenth century verse, nor even a knowledge of the more modern ambiguity or *double entendre* of lips and of kissing, of *labia* and embrace, to acknowledge that opening the lips and opening to love are one and the same.

The case law of love in large part reflects this tenson or ambiguity. The law of kissing is one of exchange and of boundaries, and in that transient and tactile world of embraces it endeavors to sketch a tentative or liminal epistemic of what the kiss can convey. In several judgments and in relation to very different disputes, the concern of the courts of love was to acknowledge and transmit the status and sanctity of the kiss as the public expression of love.

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132. CAPELLANUS, ON LOVE, *supra* note 125, at 245.

133. *See* MARTIAL D'AUVERGNE, LES ARRETS D'AMOUR AVEC L'AMANT RENDU CORDELIER À L'OBSERVANCE D'AMOURS xiii-xix (1731). For a contrary judgment, see MAHIEU LE POIRIER, LE COURT D'AMOURS DE MAHIEU LE POIRIER ET LA SUITE ANONYME DE LA "COURT D'AMOURS" 16 (Terence Scully ed., 1976) (1731).

134. Anonymous, *The Court of Love, in* 7 THE COMPLETE WORKS OF GEOFFREY CHAUCER 445 (Walter W. Skeat ed., 1897).

In a mid-fifteenth century case reported in Martial d'Auvergne, *Les Arrêts D'Amour*,[135] heard before the Court of Flowers, a woman complained that she had been amongst friends in a public garden when her lover had happened to come upon her and had joined her. According to her complaint, he had come up beside her and "pretending to want to say something private in her ear, he had lifted the hood of her cape and suddenly had kissed her."[136]

Her complaint was that this kiss had embarrassed her in front of her friends. It was, at least in her argument, to be treated as if it had been stolen in public: it was *larrecin publique* or public larceny of a kiss. Her request to the Court was that in the future her lover should be forbidden to approach her or touch her in public.[137] For his part, the impugned lover claimed that when he chanced upon his lover he took the opportunity to whisper declarations of love in her ear and while doing so had slipped. In consequence his lips had brushed against her ear and her cheek. This could hardly, in his view, be regarded as a kiss.[138]

Upon deliberation the Court held that the complaint was badly made. It could not be public theft of a kiss for a lover to surprise his beloved with so innocent and amorous a declaration and act. A lover should not be embarrassed by a public kiss but should rather welcome the attention and the honesty of the expression. It was ordered that when the couple next met in public the woman should kiss her lover openly and freely.

In his commentary on that case, Benoit de Court argues that the laws of love had always recognized the finely marked differences between different types of kiss. Thus a kiss between lovers in an open place was a legitimate and desirable expression of affection, provided that the kiss was not overlong or too salacious. It was not theft, he concluded, publicly to kiss a lover, "so long as the hands did not wander lasciviously, and so long as there was no biting of the lips."[139]

The kiss was thus held to belong quite properly within the public sphere, as also within the institution, and should not be hidden or furtive but rather declared and indulged. The domain of love, therefore, did not recognize arbitrary divisions between private and public, or between intimacy and institution. The kiss belonged to an economy of desire that both subtended and exceeded the public domain of secular or venal interaction.[140] Kissing was the usual form not only of entry into the domain of

135. MARTIAL D'AUVERGNE, LES ARRÊTS D'AMOUR 115 (Jean Rychner ed., Editions A. & J. Picard & Cie 1951) (1731).

136. *Id.* at 115.

137. *Id.* at 116.

138. *Id.* at 117.

139. BENOIT DE COURT, COMMENTAIRES JURIDIQUES ET JOYEUX, *reprinted in* D'AUVERGNE, *supra* note 133, at 259.

140. On the domain of love, in addition to the sources cited, see the depictions of it in terms of the space of amorous correspondence in the early *ars amandi et epistolandi*, as for example, in ESTIENNE DU TRONCHET, LETTRES AMOUREUSES (Lyon, Iean Didier 1608)

love but more formally of sealing the agreement of love or *alliance d'amour* whereby lovers committed themselves to each other and publically declared an undying allegiance to the cause and space of their mutual desire. The kiss was not only a liminal sign of the transition from a space of indifference to a space of commitment, from the aegis of distance to the exposure of intimacy, but it also marked the point of entry into the economy of amorous exchange.

In a further judgment from Martial d'Auvergne, the intersection of the erotic and the mercantile, of the market and desire, finds a curious expression in an action brought by a male lover for rescission of what he claimed to be an usurious amorous contract.

The facts pleaded were as follows. The aggrieved lover claimed that he had fallen in love with the defendant woman upon first meeting her. He had desired desperately to please her and in the erotic excitement (*grande chaleur*) of endeavoring to win her, he had acted without caution and had promised her many things.[141] Madly in love, he had promised and obligated himself to come, on every holiday of the year, with musicians and instruments and play outside her house from midnight to dawn. He had promised to give her a new hat and a new dress each first of May. He had promised to bring her a dress of her choosing each month of the year.

All these things he had faithfully done "for a very long time" and now complained that he was tired of performing these services and wished to be relieved of his promises. More than that, he complained that the burden of the contract had become intolerable. It had become ever harder and more expensive to find musicians, he had fallen ill several times by virtue of playing outside her house in inclement conditions, the cost of dresses and hats had also gone up. He argued finally that not only had the financial burden of the promises escalated but for all these acts of generosity and promises of material love he had received in return but a single kiss, "and that on the cheek and not even on the mouth."[142]

The woman for her part argued that she had not sought this love, nor had she requested these promises. She had agreed to her lover's pleas and promises only because this was what he appeared to desire. She stated further that she had not particularly enjoyed his fulfillment of the promises. The musicians would frequently keep her awake at night and she had little need of dresses or hats. In light of these circumstances it would be inappropriate in her view to release him from their agreement: "even half a kiss

(1569). For discussion, see Goodrich, *Epistolary Justice*, *supra* note 99, at 267 ("In later tradition the protocols of letter writing were said to constitute the virtue of love, just as the precise wording and due forms of the writ or other legal writing constituted the force of law.").

141. D'AUVERGNE, *supra* note 135, at 42.

142. *Id.* at 43 (author's translation).

(*moitié d'un baiser*), freely given and with good heart, was worth far more than all the gifts and goods and money that she had been given."[143]

The Court held that in no sense could the amorous agreement be deemed so unequal as to be excessive or usurious. In the *Code of Love* "a kiss is a singular and spiritual thing and it cannot be bought or sold" but is rather worth far more than all the gold and silver in the world.[144] The mercantile economy, in other words, not only expresses desire in symbolic or material forms but, more strongly, aspires to the libidinal.

The value of money and of things can be read quite directly as an index of their spiritual worth or, more exactly, as a sign of their amorous intent.[145] In this perspective wealth or material goods are most valuable when they serve as the means of transmitting the importunings of desire. A thing can at times achieve the status of a gift or play the part of a 'salaam,' *billet doux* or other token or sign of affection that will permit entry into the domain of love. If such is the telos or end of worldly 'possessions', if a commodity both expresses desire and also acts as a token that ideally will communicate or otherwise provide access to the harem, seraglio or house of a lover, then how much more valuable is a kiss?

Kissing lies at the threshold of an erotic economy. It is the liminal epistemic whereby lovers learn not only of their access to the affections of the beloved but also of the immediate future of their desire. The kiss is more powerful than words, it is the point of contact, the face to face, in which not only language but phantasms meet. The face to face of kissing, the meeting of image and image, is not simply an exchange or justice that exceeds language, it is also other than language.

Kissing speaks more directly than words, and for this reason the religious tradition also spoke of the kiss as a labial exchange that takes place at the level of breath or of spirit, a possession or speaking in tongues that produces no recognizable words. The gauge or measure of the kiss is not semantic but rather the criterion is passion and persistence, intensity and duration. The kiss, in secular and theological tradition had the power both to express and to effect the union of souls. In the doctrinal tradition this union was achieved through the exhaling and inhaling of the *pneuma* or spirit. In the words of Aelred of Rievaulx, in a twelfth century work, *Spiritual Friendship*: "It is precisely what has been exhaled or inhaled that has been given the name of spirit. Wherefore in the kiss two spirits meet and

143. *Id.* at 44.

144. *Id.* at 45.

145. *See* SCHROEDER, VESTAL AND THE FASCES 220-226, 244-253 (1998) (analogizing personal property to the female body). *See also* Margaret Davies, *Feminist Appropriations: Law, Property, and Personality,* 3 SOC. & LEG. STUD. 365 (1994) (analyzing the conceptual relationships between sexuality and property); Margaret Davies, *The Heterosexual Economy*, 5 AUSTRALIAN FEMINIST L.J. 27 (1995) (discussing the link between sex and capital); Ngaire Naffine, *Possession: Erotic Love and the Law of Rape*, 57 MOD. L. REV. 10 (1994) (discussing erotic love in terms of proprietary and possessory rights).

mingle and are joined. And from such kisses, there arises a certain sweetness of the mind that guides and controls the affections of those who kiss."[146]

In the erotic tradition the kiss equally would infuse the soul of the lovers and thereby unite their hearts as one: the kiss was the terminus of a pure love, it bestowed a grace, it ennobled its recipient, it cured the wound of desire by admitting the lover into the spiritual domain of love. In Bernard de Ventadorn's phrase, "I ask one gift of her: that she break the fasting of my mouth with a kiss."[147] Kisses were thus to be treasured as the highest moment of a spiritual love. The kiss, the insufflation of the other, united the souls of the lovers, it cured the wounds or sicknesses of love and marked the passage from the corporeal to the spiritual, from cupidity to *caritas*. In this regard, it is significant that the courts of love developed a doctrine of the kiss both as a cure for the sickness of love and as compensation, as reward or redress, for the pleas of love.

In a highly literary and semiotically complex case, heard on appeal to the High Court of Love from the Court of Mourning, the facts concerned the case of a lover who had gone one evening to serenade his beloved.[148] The petitioner's lover had been undergoing medical treatment which included bloodletting. She would be bled each afternoon from the foot and was then ordered to sleep. She asked her lover to find musicians to play outside her window to help her sleep.

On the day in question she had fallen asleep early and had been woken from her dreams by the sound of the minstrels. In a state of considerable confusion and agitation she had run to her window and thrown open the shutters, the better to hear the music from below. It so happened that the pail of blood that had been let from her foot and placed that afternoon on the window sill to dry, was knocked off the ledge and fell on her lover, "spoiling his shirt and soaking his doublet".[149] It being night, the lover thought little of this, and once the musicians had finished playing he set off to return home. Unfortunately his path home took him past a tavern where a brawl was in progress. The police (the watch) stopped him and while questioning him under a lantern saw that he was covered in blood and so concluded that he had been a participant in the brawl and arrested him.

The lover spent the night in prison, where he did not sleep at all. He blamed the entire experience on his lover and also claimed that she and her maid had laughed when they saw the blood fall on him. He argued that the act was intentional and requested compensation of at least six or eight

146. AELRED OF RIEVAULX, SPIRITUAL FRIENDSHIP 673 (Mark F. Williams trans., Univ. of Scranton Press 1994) (1147-57) (trans. modified).

147. BERNART DE VENTADORN, SEINE LIEDER (C. Appel ed., 1915), *cited in* PERELLA, *supra* note 98, at 113.

148. D'AUVERGNE, *supra* note 135, at 94.

149. *Id.* at 94.

kisses. After lengthy argument and some deliberation, the court took the view that the woman had been careless and ordered that "by way of compensation [she was] to give the petitioner half a dozen kisses, each one of which was to last as long as it takes to say a *De Profundis* and a *Fidelium*," two lengthy prayers.[150]

That the duration of a kiss be measured by the length of time it takes to say a prayer is a poetic form of justice. The Court does not endeavor to dictate the impossible, the substance of desire, but rather addresses the form and expression of attraction or affection. To enjoin kisses as the compensation of amorously induced harm, to determine the length of an embrace as the measure of emotional recompense, is to recognize directly that questions of justice are also questions of style and of aesthetic sensibility. A final detail can be taken from a case relating this time not to the duration but rather the intensity of a kiss.

The complaint, made by a young male, took the following form. He had received a *billet doux* (love note) from his lover suggesting that they meet near her house at dusk on a subsequent day. Come the hour, the man goes to the assigned place and there waits for his lover. A short time later, the man sees his lover beckoning to him from the shadow of a tree. Thinking that she wishes to talk with him secretly and perhaps arrange a further meeting in some other and more isolated place, he goes towards the shaded spot where she is waiting.

According to the complaint, when the young man approached, his lover "kissed him so forcefully and roughly that she caused his nose to bleed."[151] In surprise and in pain, he involuntarily pulled away from her embrace. She interpreted this as a sign of indifference or rejection and so took off her hat and started angrily beating the man on the head with it. The hat had a long and sharp hat pin in it, and as a result it both bruised and scratched his cheek and his nose. His face subsequently became inflamed, swollen, and infected. The man complained and asked for reparation. The Court heard arguments and also listened to expert testimony from "the doctors of love" as to the dangers of the wound.

The Court held that there had been no malice and that the appropriate remedy was that the woman should visit her lover every day. She was there "to moisten her lips with saliva and kiss the wound so as to make the infection go away and until he recovered."[152] She was also to provide linen for bandages and dress the wound. The woman appealed, stating amongst other things that if the Court insisted upon that part of its sentence that required her to moisten her lips with saliva and kiss the wound, she would "give him a bite which he would remember for the rest of his days."[153] The

150. *Id.* at 87.
151. *Id.* at 14.
152. *Id.* at 15.
153. *Id.* at 16.

Court in consequence commuted the sentence upon appeal and imposed a small fine.

The interest of the decision lies not only in the flexibility of the determination, but also in the poetic attempt to address the limits or wrongs of kissing by requiring further and different kisses. Here, as elsewhere, the Court is sensitive to the erotic space of relationship within the public domain, and is concerned to consider and assess the value of a kiss in terms of the expectations, the phantasms, of the participants. Underlying the judgment is thus a radical concern with the space of desire and the maintenance of affection or of love within a relational domain that does not recognize the limits or arbitrary demarcations of public and private.

Where a kiss has been too public or too passionate then it is best remedied by a more gentle kiss, by a tender and tentative *douceur*. The crucial point, both here and in other judgments, is that it is the space of relationship and the continuance of affection that the Court, in settling upon further and more tender kissing as the remedy for a bad or intrusive kiss, is seeking to foster. Amorous desire is an emotion that exists ideally in a space between or 'entre deux' and the Court has acted to try to maintain that desire or at the very least to keep the space of its possibility open. In the terms of one recent analysis of the social and political contexts of intimacy, breathing, speaking, and kissing, are all forms of communication, all are tactile and all "touch upon" the other as simultaneously carnal and spiritual forms of exchange.[154]

To consider seriously the space of relationship as a space of desire, of the exchange of both spirit and touch, is to address its possibilities in terms of the subjectivities engaged in it. Identity and personality are in these terms fragile expressions of imagination, of image and of fantasm, and to address them adequately or justly requires at the very least some training, capacity, and explicit reflection upon the experience and effects of these emotions. As the contemporary philosopher-poet Luce Irigaray formulates the dilemma: "All too often, sacramental or juridical commitment and the obligation to reproduce have compensated for this problem: how to construct a temporality between us? How to unite two temporalities, two subjects, in an enduring way?"[155] The alternative is "that our culture, supported by morality, always tends to make us lapse to the most base level of love," and, it might be added, to an equally impoverished conception of kissing.[156]

154. IRIGARAY, *supra* note 123, at 124-125. For an elaboration of this theme, and of the question "might an idiom of love be instituted in law?," see Alain Pottage, *A Unique and Different Subject of Law, in* LAW AND THE POSTMODERN MIND 13-51 (Peter Goodrich & David Gray Carlson eds., 1998) (analyzing Lévinas' philosophy in an effort to understand more fully Irigaray's theoretical association between love and law).

155. IRIGARAY, *supra* note 123, at 111 (translation modified).

156. *Id.* at 32.

IV.
BECKELMAN REDIVIVUS

One possibility raised by the analysis of religious and literary traditions of adjudication of kissing is normative, namely that both in terms of its model of judgment and in terms of its substantive doctrine or norms, common law is both ineffective and inappropriate to the determination of disputes relating to kissing. I have argued further that it is both unethical and unjust for common law to claim competence or jurisdiction over the intimacies and affectivities that disputes over institutional or public kissing imply. The two cases analyzed earlier clearly suggest that the issues raised by way of dispute over the duration, intensity, style and sexuality of a kiss are necessarily affective and aesthetic and deserve to be understood and judged according to a literary model of judgment in which it is precisely the emotional and so epistemological trajectory of the kiss, the use or abuse of the power of love, that was dissected and mapped. By way of contrast, the separation of common law from rhetoric, from the literary and poetic disciplines that historically underpinned its method and limited its jurisdiction to matters municipal and mundane, by definition precludes its judges from properly determining issues that are literary and poetic, aesthetic and spiritual, rather than venal and proprietary.

The law of kissing was never a common law, nor were its dictates ever imagined by secular justices whom experience and training had subjected to the melancholic and narcissistic discipline of legal science. Understanding the law of kissing requires something of an epistemic leap, a conceptual shift away from law's unitary and sovereign frame of reference. It requires a reconceptualisation of judgment according to the dictates of a 'minor law,'[157] a specific and local jurisdiction within which a literary model of judgment replaces the absolutism and arbitrariness of judges who conceive their role to be that of surrogate sovereigns. History provides numerous instances of literature playing the law, of aesthetic models and practices of judgment, of institutional positivities or processes of adjudication. These remain largely unacknowledged because legal historiography ignores them and the dominant jurisprudential tradition silently erases their possibility. While it is not uncommon for legal theorists, critics and radicals, to exhort a return to alternative traditions or to other models of judgment, such exhortations have tended to be abstract or purely normative.[158] By turning to

157. *See generally* PETER GOODRICH, LAW IN THE COURTS OF LOVE: LITERATURE AND OTHER MINOR JURISPRUDENCES 1-8 (1996) (discussing the notion of a "minor jurisprudence," adapted from the idea of a minor literature in GILLES DELEUZE AND FÉLIX GUATTARI, KAFKA: TOWARD A MINOR LITERATURE 16-27 (Dana Polan trans., Univ. Minn. Press 1986) (1975)).

158. For the call to an alternative, feminist, institutional tradition, science, and mythology, see generally LUCE IRIGARAY, THINKING THE DIFFERENCE 99-112 (Karin Montin trans., Routledge 1994) [hereinafter, THINKING THE DIFFERENCE]; DRUCILLA CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW 19-20

the history of institutions, and particularly to that of courts of love and the case law and jurisprudence of kissing developed in those courts, I hope to lend substance to the abstract though not erroneous claim that a certain subversive legality can also exist. It is one within which literature turns back on law and through the openness or equivocality of language and of linguistic structure plays the law itself, "repeating and diverting it, turning it around . . . . In the ungraspable instant when it plays the law, a literature surpasses literature. It finds itself on both sides of the line which separates law from what is outside law . . . it is both before the law and in front of it."[159] What I have endeavored to emphasize initially, however, is not the literary quality of alternative institutions of justice or minor laws but rather their positivity and specifically the substantive doctrine and decisions that such institutions produced.

4.1 Laws of Kissing

Ironically, and perhaps poetically, the factual situations that were judged in *Beckelman* and in *Masterson* had been the explicit object of doctrinal and judicial attention within the earlier tradition of the laws of love. With regard to doctrine, both cases turned upon the relation of desire to knowledge, and in both cases the further issue of the orthodoxy or, more simply, the politics of that knowledge, and of its public expression, was also raised. The most striking contrast between the literary model of judgment that developed in tandem with the laws of love, and the modern legal form of determination set out in the cases, is precisely an opposition between repression and the pursuit of knowledge. Where the modern lawyer seeks to repress emotion and, in the substantive determinations addressed, correlatively endeavors to deny the legitimacy of unorthodox public expressions of eroticism, the laws of love offer a more nuanced and complex interpretation of the various contexts, forms, and meanings of kissing.

If we take the example of the *Beckelman* decision, the trauma and the anger which the decision generated must be placed first in the context of the failure of modern law to address the emotive and continuing relational contexts in which the dispute occurred. In all the accounts of the case, the relationship was pedagogic. It was that of student and teacher, or in more

(1992) (exemplifying a call for an alternative, feminist institutional tradition and conception). *See generally* Jacques Derrida, *Préjugés: Devant la Loi, in* LA FACULTÉ DE JUGER 87-139 (Jaques Derrida, Vincent Descombes, Garbis Kortian, Phillipe Lacoue-Labarthe, Jean-François Lyotard & Jean-Luc Nancy eds., 1985) (using literature as a source of legal philosophy); Jacques Derrida, *Force of Law: On the Mystical Foundations of Authority*, 11 CARDOZO L. REV. 919, 935-943 (1990) (using literature as a source of legal philosophy/theory of deconstruction and justice); COSTAS DOUZINAS AND RONNIE WARRINGTON, JUSTICE MISCARRIED, *supra* note 91. On the normative quality of such exhortations, *see* Pierre Schlag, *Normativity and the Politics of Form, in* PAUL F. CAMPOS, PIERRE SCHLAG & STEVEN D. SMITH, AGAINST THE LAW 29 (1996) (discussing the normative quality of "such exhortations").

159. Jacques Derrida, *Préjugés: Devant la Loi*, *supra* note 158, at 134.

analytic terms, that between pupil and "knower." In that from Socrates onwards, knowledge is always in part defined by desire, by the eros or attraction of seeking the truth, the question that the case posed was most immediately that of the appropriate forms and limits of the expression of intimacy or desire in the relationship of professor to graduate student. In that common law does not have a language within which to address the various forms of public intimacy or erotic expression, it is clearly necessary to draw upon the history and alternative jurisdictions of courts that have forged the elements of such a language and law.

While the charge can be formulated in any of a number of ways, ranging from a complaint as to an aesthetically unsatisfactory kiss—it is sometimes undesirable to have a tongue stuck in one's mouth—to the abuse of a fiduciary relation and position of power, it is clear that the most significant aspect of the case relates to a sense of trauma and betrayal. In the language developed in spiritual law, the charge was that the kiss portended false knowledge in at least two senses. First, in classical terminology, the kiss was that of the hierophant or mystagogue, a kiss that purported to offer access to knowledge and to truth, but which in fact simply drew the student or *mysticus* into the realm of a vacuous mystery or rite. The hierophant was a false prophet and in this logic, the charge was that Gallop neither genuinely offered a lesbian knowledge—she was, after all, married and a lesbian in theory rather than lifestyle—nor led the complainant into the mysteries of the academic community. The pain (or poison) of the kiss here related to the betrayal of the student's expectation and desire. She wished to learn and wished to enter the academic community as an equal. The kiss, which in this respect should have augured intellectual recognition and also membership of the scholarly community that Gallop represented, in fact subsequently transpired to have no such meaning.

The first form of the charge thus suggests that the kiss betrayed the student's epistemological aspirations. Where it should have been a scholarly and lesbian version of the kiss of peace (*osculum pacis*) and so indicative of a specifically gendered knowledge and performance, it remained uncertain in its content and uncommitted in its practice. The kiss, in pedagogic terms, failed either to open the path to new knowledge or to recognize the entry of a new initiate into the scholarly domain of gender or, more precisely, gay and lesbian studies. The second significance of the charge develops out of the first. If the kiss was at best the ironic expression of an empty rite, of an inauthentic knowledge, then it failed to attach eros to knowledge, or desire to truth. If the kiss did not express either knowledge or membership of a community, it has then to be analyzed as a physical or corporeal kiss, the expression of carnal rather than spiritual desire. In that the physical kiss does not lead, and is not intended to lead, from the body to the domain of knowledge, it has to be understood as expressing a mixed or simply lustful desire.

The second form of the charge thus leads from the spiritual to the more literary norms of the courts of love. For Capellanus and other codifiers of the rules that should govern love affairs, a physical kiss was not to be censured or condemned simply because the parties kissing were not lovers. Public expressions of affection, or even lust, were governed by a code of expressions of desire that recognized the erotic charge that frequently accompanied institutional or simply public interactions. In this context, of course, kissing could not be understood as a singular or undifferentiated act. Kissing raised questions of intention and authenticity that were to be judged by reference to the appropriate intensity and duration of the specific kiss. Where, as here, the kiss was ostensibly also between friends and in the context of a dance, a certain degree of intensity would not be judged to be wholly inappropriate. In that any kiss can intimate a desire for further sexual contact, the rule, as was adverted to above, was simply that a public kiss in this kind of context was permissible and indeed desirable, so long as it did not continue too long, and so long as there was no lascivious wandering of the hands or biting of lip or tongue.

There can be no doubt that the kiss in *Beckelman v. Gallop* was erotic and, according to the determination, it was sexual. What the laws of love suggest is that a degree of erotic charge and of sexual desire is inevitable in any kiss that transcends the most superficial of greetings between strangers or travelers. The charge, in other words, could not be merely that the parties kissed and that the kiss expressed a certain degree of desire. By Beckelman's account, it was in fact she, rather than Gallop, who initiated the explicitly sexual dimension of the kiss, as revenge or so as to torment someone whom she now suspected desired her and whose desire she did not intend ever to satisfy. Thus, where the spiritual law would judge whether the kiss augmented or betrayed the path of the subject to truth, the laws of love would determine whether the kiss was appropriate to a relationship that can best be categorized as that of *amour lointain*. In that Beckelman did not reciprocate Gallop's affections, whether these were sexually intended or not, the relationship was destined objectively to non-fulfillment. In that, by virtue of the teaching relationship, the parties could not become lovers, the relationship was also fated to the sublimation of the erotic charge that the parties had experienced, at least in the early phases of the teaching relationship.

The question to be judged is that of whether the kiss transgressed the boundary that separates love of knowledge, the erotic space between student and teacher, and the love affair. At a jurisprudential level, my concern is that the erotics and the sufferings of the impossible love affair were the very substance of the early western conception of love, and to argue this it would seem, at the very least, appropriate to draw upon the literature, and specifically the judgments, of the laws of love to endeavor to address and delimit the permissible expressions of desire in the public domain

of institutional relationships. Without seeking to determine the appropriate judgment on the facts of *Beckelman*, facts which are only briefly reported after an official investigation whose findings neither party accepted, it does seem permissible to suggest that an alternative jursidiction and process of judgment would likely have better attended to both the trauma and the substantive content of the case.

Whatever the factual determination that a more extensive judgment or appeal might have decided, the more obvious point to make concerns the basic framework of rules within which such a resolution is best accomplished. If, following the laws of love, it is recognized that educational institutions are inevitably a public site of intimacy and of the varied expressions of affection, from the touch of words to that of hands or lips, certain further conclusions can be drawn. According to the ethical norms of the laws of love, both parties in *Beckelman* had acted badly. The complainant, because she had opened her lips and kissed with her tongue, but had done so out of a spirit of revenge. Her kiss was misleading and irresponsible, it betrayed an anger that deserved a more direct or less duplicitous expression. Further, youth would not excuse that indiscretion but it would be unlikely that it would meet with any serious censure.

Although the facts are less easily reducible to any one act, the defendant would arguably also seem to have acted unethically in conflating flirtation with learning, and seduction with enlightenment. The proximity of those practices does not indicate their identity and in consequence it was most probably inappropriate to kiss lasciviously. As the kiss did not last long and was not repeated, whether it would be appropriate to censure it would be a question of fact. More importantly, however, to the extent that the teacher is also in the position of a spiritual adviser, the kiss on the lips might well fall within the category of the kiss of the hierophant. It is not clear, in other words, that in this respect the kiss was either one of recognition and community, or that it directed the student towards the epistemic or knowledge that the gay and lesbian community represented. At best it would seem to have offered a strangely nostalgic retrospect upon the 1970s origin of the feminist movement. While it is not inappropriate that Gallop recognizes that she too learned from the kiss, its staging of the conjunction of gender and knowledge would seem to have been more a projection onto the student than an expression of a process of learning through the affective charge of a gay and lesbian epistemology.

In that both charge and defense in the *Beckelman* case concerned the aspersion of trauma, of affective harm and emotional abuse, it seems appropriate also to observe that the agonistic procedure of trial and judgment is not necessarily the best or only form of resolution. The courts of love insisted that the parties be brought together and represent their claims in a discursive forum. In so far as the skills of communication are crucial to the life of the mind, it would not seem too much to expect the parties to such a

complaint at some point to address their charge or confess their errors, demand satisfaction or justify their acts, in a forum that allows such admissions and encourages and engages with their expression. To take the point further, the art of mapping the domain of affections onto the legal construction of the public world, as also the task of instituting a substantive code of *amour lointain* to regulate the expression of desire within the institution, both require a broadly therapeutic skill in the fostering and facilitation of the communication of emotions. The laws of love suggest certain of the substantive rules, as also some of the forms of discourse, within which such a justice could take place.

V.
CONCLUSION

It has been my argument that questions of love deserve to be judged according to laws of love. Simple, and indeed alliterative, though this proposition might appear, its implications for legal thought are radical. That love should have its laws means at the very least that the ailing modern concept of a single jurisdiction and uniform agonistic procedure for all legal cases should be abandoned explicitly. At its simplest, it does not make sense to litigate emotions as if they were proprietary benefits or duties. Nor does it speak well of the legal enterprise to assume that a substantive law that historically has ignored the emotions and left the sphere of intimacy to the private realm, to the law of the father, is the appropriate or only source of precedents for the development of the rules that are to govern the expressions of desire in the public world.

In a more positive vein, and in common with a number of scholars of law and literature,[160] I have argued that the plural histories and institutions of law, particularly the classical texts of spiritual law and the judgments of the courts of love, can provide a remarkable resource for developing rules and procedures relevant to the space of relationship and the role and expression of desire in the public sphere. In one sense, the texts and judgments reviewed provide elements of a language and categories within which to understand and address the diverse forms in which physical expressions of desire, and even language which touches by breath, communicate an eros or charge that in some form is likely to affect all institutional

160. It is not helpful to list the full range of literature on this issue. *See* JAMES BOYD WHITE, HERACLES' BOW (1985) (discussing literary imagination as a source of law in studying the rhetorical processes of lawyers); NUSSBAUM, *supra* note 96 (directly discussing literary imagination and emotion as a source of law); Ronnie Warrington and Costas Douzinas, *The Trials of Law and Literature,* 6 LAW AND CRITIQUE 135, 163 (1995) ("Studying law and literature raises Socrates' great question, perhaps the greatest question of all philosophical inquiry: what is the best way to organize social life? Lawyers cannot help being intimately bound to this issue . . . .").

relationships. Rather than follow the traditional common law determination to suppress and so deny extreme expressions of desire—here a galloping kiss and a gay embrace —and to ignore lesser forms of public intimacy, I have argued that history and literature alike provide a powerful antidote to this blindspot of common law.

To recognize the body and in consequence to endeavor to understand the roles and meanings of desire in the public world requires also that law recognizes the gender of the body. It is in this important sense that Irigaray has argued for sexuate rights, for the legal definition and objective protection of the rights of both genders as opposed to the reduction of sexual identity to a common and implicitly masculine norm.[161] The historicist gesture of recuperating the law of women's courts and of judgments of love provides one possible model for the reimagining of the place of gender in law, and specifically the role of alternative or plural sources of law in the development of a justice appropriate to women and to men.

In conclusion, the argument presented has addressed the question of the available sources of law, and most particularly the plural histories of distinct jurisdictions appropriate to specific activities, localities, and social practices. It is not my immediate suggestion that questions of love, and here the construction of intimacy and the role of eros in the public world, be returned directly to women's courts whose judicial personnel were chosen by poetic contest. It is my argument, however, that the history of the spiritual jurisdiction of love, and the literary tradition of laws and courts of love, can alike provide a means of legal recognition of sexual identities, of emotions, passions, and other erotic expressions, as they are acted out in the public sphere. In short, to judge affective questions of relationship, to do justice to the institutional and social importance of the public expression of desire, requires attention to a history and literature of the heart. To borrow from Nietzsche, "Hitherto all that has given color to existence has lacked a history: where would one find a history of love, of avarice, of envy, of piety, of cruelty? Even a comparative history of law . . . has hitherto been completely lacking."[162] The history of the laws of love, in other words, is a crucial element in the comparative history of law.

161. *See* THINKING THE DIFFERENCE, *supra* note 158, at 67-87 (stressing the need for gendered rights and a more civil society acknowledging different values); LUCE IRIGARAY, I LOVE TO YOU 49-56 (Alison Martin trans., 1996) (acknowledging gender differences and stressing abstract legal structure in line with such differences); Luce Irigaray, *How to Define Sexuate Rights, in* THE IRIGARAY READER 204-213, 207 (Margaret Whitford ed., 1991) ("... [T]here are different rights for each sex and . . . equality of social status can only be established when these rights have been codified by the civil powers"). For a further attempt to define such rights, see United Nations, *Proposal for a Universal Declaration of Human Rights from a gender perspective* (1991) (on file with author).

162. FRIEDRICH NIETZSCHE, THE JOYFUL WISDOM 42-43 (Thomas Common trans., Frederick Ungar Publishing Co. 1960).