

# LEGAL FEMINISM AND THE EMOTIONS: THREE MOMENTS IN AN EVOLVING RELATIONSHIP

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## I. INTRODUCTION

The constructivist turn in feminist theorizing has sparked difficult yet illuminating debates among feminist legal theorists. Theories of complex social formation have permitted legal feminists to analyze with more nuance and contextuality the interplay of factors that contribute to women's disempowerment. These theories have pressed feminists to address not only sex inequality but the bipolar understanding of gender that constrains and normalizes perceived differences between women and men. Yet the premises of more thoroughgoing versions of constructivism have also come into frank conflict with some of the liberal premises underpinning much of feminist legal theory. Legal feminists may welcome the increased complexity and mobility of such theorizing, its challenge to the easy, often essentialist characterizations of earlier feminist efforts. Some may also be disconcerted by its displacement of a modernist focus on the individual by analyses of the circulation of power through varied, intersecting discourses: discourses which not only configure social relations, but "produce" human subjectivity as we know it. Questions about the distance between such constructivist theorizing and material indicia of women's continuing inequality,<sup>1</sup> and claims that the "death of the subject" coincides with women's recent achievement of fuller subjectivity,<sup>2</sup> are but two expressions of this ambivalence.

One rich, but underanalyzed, site for exploring the contributions and difficulties of constructivist feminisms is the relationship between feminist legal theory and scholarship on the emotions. Historically, feminist theorizing and scholarly work on the emotions have enjoyed an illuminating

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<sup>1</sup> See Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 706 (2000).

<sup>2</sup> See Nancy Fraser & Linda Nicholson, *Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism*, in *FEMINISM/POSTMODERNISM* 19, 19-38 (Linda Nicholson ed., 1990).

and generative alliance.<sup>3</sup> Sustained analysis of the emotional lives of women helped feminists to expose the dynamics of oppression and explore the terrain of gendered identity; a focus on the emotions has also sparked valuable critiques of objectivist epistemology, both inside and outside the legal academy. But the recent constructivist turn in feminist theorizing raises the question whether these productive confluences were specific to a particular analytic and temporal frame. Work using emotion as an analytic tool may be premised on a foregrounding or prioritization of individual subjectivity, and an insistence on self-transparency, as well as on static, unitary understandings of women's circumstances, identities, and ways of knowing. What is to become of the fruitful feminist emphasis on the emotions as feminist theorists, in law as elsewhere, increasingly espouse a form of theory that brackets identity, that characterizes human subjectivity as the product or "effect" of discourse? Are there forms of work on the emotions that might succeed more essentialist inquiries? Are there explorations of the emotions that hold the promise of elaborating upon constructivist feminism, or even of reconciling it with the emphasis on individual subjectivity that has been critical both in mobilizing women and in educating others?

In this Essay, I will answer these questions, at least tentatively, in the affirmative. Feminist inquiry into the emotions, both in law and elsewhere, was once deployed more explicitly and instrumentally to reach pathbreaking substantive and methodological conclusions. This work, which regarded the emotions as providing unique insight into women's circumstances or identities, or as reflecting forms of knowledge that were distinctive to women, was underpinned by unitary, static conceptions of women's identities or ways of knowing. But when constructivist theories challenged those conceptions, they transformed, rather than terminated, the relation between feminist (legal) analysis and scholarship on the emotions. These newer bodies of work, which have run more recently on parallel rather than confluent tracks, reflect a subtler relation of mutual influence and elaboration. In addition, a nascent, and perhaps growing, interest in both the social construction of the emotions, and the emotional experience of the complex, constructed human subject, have brought these lines of work together again, in what may prove to be an illuminating confluence. To make this argument I will examine three moments, or aspects, of the relationship between legal feminism and the emotions: an identitarian moment, an epistemological moment, and a constructivist moment. Although these conceptions emerged in a kind of temporal progression, none of these conceptions has wholly displaced its predecessor: rather, strands of earlier moments remain, infusing and informing current theoretical developments.

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<sup>3</sup> See *infra* text accompanying notes 4–34.

## II. THE IDENTITARIAN MOMENT

In what I will refer to as the identitarian moment, popular and scholarly attention to the emotions was regarded as a crucial vehicle for revealing salient features of sex- and gender-based experience that helped to create one's "identity" as a woman. The moment, which emerged first in chronological sequence, was strongly associated with second-wave feminism and its emphasis on consciousness-raising and the "personal" as "political."<sup>4</sup> Just as, for Betty Friedan, a focus on middle-class women's malaise in the midst of material plenty was the key to highlighting their characteristic predicament of domestication and containment, a focus on the powerful emotional responses of women in a range of contexts served to clarify the meaning of "being a woman" in contemporary American society.<sup>5</sup>

In feminist legal theory, the focus on emotions was associated with efforts to confront women's exclusion, both from formal institutions and from traditional understandings that shaped legal doctrine. Emotion told a story that had not previously been heard, or acknowledged, by the legal system. Whether it was the emotions of women excluded from the professions or blue-collar trades,<sup>6</sup> or the emotions of women subjected to sexualized violence,<sup>7</sup> the revelation of these responses leveled a broad indictment against a society and a legal system that constrained and oppressed women. Moreover, inasmuch as women's perceptions and responses could be used to conceptualize new claims and reformulate existing doctrine, a focus on emotion sometimes directed audiences to routes for normative change. In both its popular and its legal (academic) incarnations, emotion was regarded as largely transparent and as revelatory of a substantially unitary identity: readers were directed to investigate emotion to find out "who women were."

In legal scholarship, experiential narratives—often first-person accounts—were the vehicles for bringing women's emotions to bear upon the law. In a departure from the detached quasi-judicial tone of mainstream legal scholarship,<sup>8</sup> feminist legal theorists foregrounded women's rendition of their own emotional experience, at the hands of the law, or in those institutions or settings the law sought to regulate. In an early essay on the regulation of reproduction, for example, Marie Ashe used narratives to evoke the experience of women giving birth and to create the kind of

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<sup>4</sup> See Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2482 (1994) (defining "second wave feminism").

<sup>5</sup> See generally BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963) (exploring women's domestic confinement in American society).

<sup>6</sup> MARY WALSHOK, *BLUE COLLAR WOMEN: PIONEERS ON THE MALE FRONTIER* 140 (1981).

<sup>7</sup> Sharon Marcus, *Fighting Bodies, Fighting Words: Toward a Politics of Rape Prevention*, in *FEMINISTS THEORIZE THE POLITICAL* 385, 398 (Judith Butler & Joan Scott eds., 1992).

<sup>8</sup> See Edward Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1850 (1988).

“voice” that she argued ought to guide regulation in this area.<sup>9</sup> Her accounts of her own births, miscarriages, and abortion highlighted the kinds of circumstances and relations, and communicated the kinds of emotions, that she saw as constitutive and paradigmatic of women’s experience. She showed readers, for example, one woman’s fury at the hands of a distant, insensitive medical establishment: “I pushed again and uttered a long, low moan, lasting the duration of the contraction. There is no need for that kind of noise, [the doctor] said. I felt humiliation and fury. Damn it, he said, she’s not pushing hard enough. Get me a forceps.”<sup>10</sup> Her narratives also evoked a range of more affirmative emotions: support in the “confident, intelligent, patient waiting” of home birth attendants;<sup>11</sup> a spontaneous lyrical capacity for communication with children born (“*I cried and laughed, I could not take my eyes off you, Anna*”)<sup>12</sup> and miscarried (“*Purple as sun-done plums, your fine remains*”).<sup>13</sup> But the experiences and emotions evoked by these narratives extended beyond Ashe’s own, to illuminate a shared terrain of “maternal knowledge—a particular local knowledge . . . characterized not by the sentimentality expected of . . . mothers, but by a cold-eyed, unflinching strength, a clear recognition of the impossibility of finally avoiding death.”<sup>14</sup> This kind of maternal knowledge reflected the under-attended aspects of women’s lives: their strength and capability in the face of life’s extremity. It also had articulable, if general, implications for the legal system. Respect for this form of knowledge militated in favor of substantial deregulation of the reproductive lives of women and reflected the kind of perspective that ought to guide decisionmaking by both medical and legal authorities.

Another rendition of emotional experience that served to map larger dimensions of identity was offered by Patricia Williams. Williams’s narratives illustrated in concrete, affective terms the pain and the perplexities of being a member of a particular marginalized group. In her essay *The Obliging Shell*, for example, she narrated the moment when she realized that she was black:

I remember with great clarity the moment I discovered that I was “colored.” I was three. I already knew I was a “negro”; my parents had told me to be proud of that. But “colored” was something else; it was the totemic evil I had heard my little white friends talking about for several weeks before I finally realized that I was one of *them*. I still remember the crash of the devastating moment of

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<sup>9</sup> See Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on “Reproduction” and the Law*, 13 NOVA L. REV. 355, 358 (1989).

<sup>10</sup> *Id.* at 360.

<sup>11</sup> *Id.* at 370.

<sup>12</sup> *Id.* at 360.

<sup>13</sup> *Id.* at 377.

<sup>14</sup> *Id.* at 380–81.

union, the union of my joyful body and the terrible power-life of that devouring symbol of negritude. I have spent the rest of my life recovering from the degradation of being divided against my self.<sup>15</sup>

But where narratives such as Ashe's evoked the clarity of certain perspectives presumed to emanate from women's shared experiences, Williams's narratives dwelt, with vertiginous and precarious illumination, on the ambiguity of that experience. Her persistent questioning or revising of her own perceptions highlighted internal aspects of that ambiguity.<sup>16</sup> External or relational ambiguities in Williams's experience were underscored by her provocative juxtaposition of her experience with that of members of other oppressed groups: how was her experience of marginality as a black female law professor similar to or dissimilar from that of a preoperative transgendered student who turned to her for guidance?<sup>17</sup> What light did her experience of pained complicity with a group of teenagers engaging in bland, jocular forms of antisemitism reflect about the complicity of many well-meaning whites in various forms of racism?<sup>18</sup> These complex, introspective narrations did not translate directly into programmatic legal proposals; however, they helped to illustrate broader legal insights about the emptiness of formal equal opportunity or the potential of affirmative action to represent more fully, in educational institutions or public life, the tangible varieties of human experience.

At the same time, other narrative accounts connected women's emotional experiences more explicitly with the operation of the law. In the opening of her article *Rape*,<sup>19</sup> Susan Estrich narrated her own rape, in harrowing and emotionally resonant terms: "No one had ever told me that if you're raped, you should not shut your eyes and cry for fear that this is really happening. You should keep your eyes open focusing on this man who is raping you so you can identify him when you survive."<sup>20</sup> Her narrative also related her baffling, and ultimately unproductive, encounter with the criminal justice system: "Did I realize what prosecuting a rape complaint was all about? They tried to tell me that 'the law' was against me. But they didn't explain exactly how. And I didn't understand why. I believed in 'the law,' not knowing what it was."<sup>21</sup>

Estrich's account created a rupture with dominant understandings of rape, not only by challenging the shame that surrounds the crime, and ex-

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<sup>15</sup> Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2140 (1989) [hereinafter Williams, *Obliging Shell*].

<sup>16</sup> Cf. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 150-51 (1987) [hereinafter Williams, *Spirit-Murdering*].

<sup>17</sup> See Williams, *Obliging Shell*, *supra* note 15, at 2144-46.

<sup>18</sup> See *id.* at 2149-50.

<sup>19</sup> Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1087-88 (1986).

<sup>20</sup> *Id.* at 1088.

<sup>21</sup> *Id.*

ploring the anguished and confusing emotions that women experience as a result of rape. Her vivid account also underscored how legal institutions and actors have neglected or misheard the emotions rape tends to produce, and proposed ways that law might be changed to take these emotional truths into account. She argued, for example, that the element of force that must be established in a rape charge should rest less exclusively on defining force “as most schoolboys do on the playground,” but should draw on understandings that “recognize[ ] that bodily integrity means more than freedom from the force of fists.”<sup>22</sup> She also proposed that the element of nonconsent be provable not simply by physical resistance, or even a verbal “no,” but by tears or silence on the part of the victim.<sup>23</sup>

### III. THE EPISTEMOLOGICAL MOMENT

These emotion-based critiques of particular substantive laws ultimately pointed to a larger critique of legal knowing and argumentation. This shift was prompted in part by the way that these accounts of emotion were received. Estrich’s revelation was criticized in many circles, including some receptive to her substantive conclusion, as an illegitimate conversation-stopper: her technique prevented other contributors from claiming authority to challenge her analysis.<sup>24</sup> Williams’s story was criticized as being too literary to comprise legal scholarship, too ardent and imagistic to stand as professional argumentation, and too particularistic to lend itself to proposals for change.<sup>25</sup> Each of these charges was undergirded by a set of assumptions about the inappropriateness of personal narrative—freighted by emotion and marked by the particularities of individual or group subjectivity—to the objective, impersonal project of legal analysis.<sup>26</sup>

Legal feminists were particularly alert to these criticisms because they had direct parallels to the critique of emotion-based argumentation that women experienced in another legal venue: the law school classroom.<sup>27</sup> The

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<sup>22</sup> *Id.* at 1105.

<sup>23</sup> *Id.* at 1180–82 (arguing that where the law does not yet recognize alternative forms of nonconsent (such as silence), it can at least recognize that “no means no”).

<sup>24</sup> See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 980 (1991) (discussing this conversation-stopping critique). In this early article on feminist narratives, I noted that these kinds of critiques had, at that time, rarely been articulated in print, making particularly urgent the need to discuss these issues in published scholarship. *Id.* at 976–80.

<sup>25</sup> See generally DAN A. FARBER & SUSANNAH SHERRY, *BEYOND ALL REASON* (1997) (critiquing Williams’s work); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (analyzing scholarship on racial difference as based on the author’s emotional and intellectual experiences).

<sup>26</sup> For an early discussion of the relation of these critiques to epistemological struggles over objectivity, see Abrams, *supra* note 24, at 1012–20.

<sup>27</sup> See generally Lani Guinier et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994) (analyzing findings suggesting women experience law school differently than men).

emotions that many women, and some less conventionally gendered men, experienced in the classroom in response to painful fact situations or unjust legal outcomes are often dismissed as inappropriate to the issue at hand. Or these responses are prevented even from coming into being by systematic, concerted modeling by faculty and successful students of a sharply divergent response: abstraction from human facts and insistence on linear logic and on the unassailable objectivity of the judicial or professorial perspective. Women students often experience stark confrontations between this modeling and their own emotionally charged responses. My colleague Angela Harris has described what this tension produced in her in law school:

I vividly remember my Welfare Law class when I was a law student. I loved the material and adored the teacher, yet there was a strange sense of constriction in the classroom discussion. No one ever got to speak for more than a few sentences as the professor whirled around the seating chart. He would set us up to explore the arguments on one side, then the other, but if any of us strayed from the invisible script, we would be cut off and it was on to the next student. . . . Even though we all got a chance to talk, there was a sense in which we were absent from the conversation. Miserably, every morning before class, I would go in the bathroom and throw up, anticipating that I would be called on. Partly it was performance anxiety; I was painfully shy and the class was large. Partly too . . . it was me literally divesting myself of my insides before going into the classroom.<sup>28</sup>

These encounters formed a bridge between what I have referred to as the identitarian moment in the relationship between the emotions and legal feminism and the second such moment. Legal feminists began to ask how we come to know (about gender and everything else) and which forms of knowledge tend to be validated by the norms and practices of particular disciplines. This questioning, and its explicit or implicit validation of emotionally infused forms of knowing, comprised what I will refer to as the second “epistemological” moment.

In this moment, feminist scholars in philosophy, history of science, and a variety of other fields,<sup>29</sup> began to challenge the relentless tendency to

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<sup>28</sup> Angela P. Harris & Marjorie M. Shultz, “*A(nother) Critique of Pure Reason*”: *Toward Civic Virtue in Legal Education*, 45 *STAN. L. REV.* 1773, 1779 (1993).

<sup>29</sup> See generally *FEMINISM AND METHODOLOGY* (Sandra Harding ed., 1987) (presenting classic essays that explore gender issues and research techniques in science, society, and politics); MARY BELENKY ET AL., *WOMEN’S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND* 3 (1986) (examining how women interviewed “view reality and draw conclusions about truth, knowledge, and authority”); *A MIND OF ONE’S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY* (Louise M. Antony & Charlotte E. Witt eds., 2d ed. 2002) (critiquing conceptions of objectivity and reason in academic philosophy).

hierarchize abstract, linear reasoning, on the one hand, and responses shaped or inflected by emotion, on the other. Feminist legal theorists initiated similar projects, many of which were quite distinct from the focus on narrative that characterized feminist legal work on emotion in the identitarian moment. Legal feminists began to challenge both the possibility and the desirability of a wholly objective position, whether as expressed by a law professor or by a judge on whom such professors consciously modeled their forms of argument. Scholars started to ask what argument abstracted from any emotional resonance occluded, and what emotional knowledge might bring to the fore. Some feminist scholars began to question how objectivity understood as distance might militate against responsibility for one's decisions, and how objectivity understood as disentanglement from particularity might simply shield the pervasiveness of one's own perspective.<sup>30</sup> Feminists not only associated with narrative scholarship or the critique of objectivity, but feminists such as Leslie Bender<sup>31</sup> and Carrie Menkel-Meadow,<sup>32</sup> who wrote in a cultural feminist vein, began to endorse forms of reasoning that built on or were structured around more emotional or affective modes of perception. In some contexts, feminist scholars linked these with forms of cognition specific to women: Menkel-Meadow, for example, pointed to the practice, in law offices dominated by women, of working more collaboratively on the generation of legal briefs or arguments.<sup>33</sup> Bender saw "care-based" argumentation, with its lean toward affective connection, as emanating from "women's cultures" and having the potential to enhance the quality of legal reasoning or decisionmaking more broadly.<sup>34</sup>

#### IV. THE CONSTRUCTIVIST MOMENT

At their most paradigmatic, these first two moments seemed to suggest a vision of identity as unitary or stable, of emotion as a brute fact, and of women and men as distinct species whose differences led to highly disparate ways of knowing. However, subtler or more ambivalent strands of the identitarian and epistemological literature, as well as other developments in feminist and critical theory, began to unsettle some of these premises, in legal scholarship and elsewhere. One influence was a focus on how emotion is constructed and on the identities and contexts from which it emerged. The constructivist insight sometimes emerged directly from emotionally inflected narratives: complex renditions of experience, such as those of

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<sup>30</sup> See Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 75–76 (1988).

<sup>31</sup> See Leslie Bender, *From Difference to Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 19–20 (1990).

<sup>32</sup> Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

<sup>33</sup> *Id.* at 56.

<sup>34</sup> See Bender, *supra* note 31, at 40–45.

Patricia Williams, exposed the processes of influence or interpretation through which emotion emerged. Williams's self-questioning narratives and her accounts of struggles over the rendition of particular emotionally grounded stories suggested that emotion—how it was understood and experienced by the subject, and later by her audiences—was not a re-flexive, transparent surge of affect.<sup>35</sup> It was shaped by many variable features of the subject's context, and those of her audiences, and by the process of telling itself. The same could be said of identity: Williams's description of herself as the descendant of a lawyer and a woman who was his slave framed her identity as a complex and unstable affair whose meaning could be made coherent to the subject herself or others differently in different circumstances.<sup>36</sup>

This turn toward constructivism was also informed by aspects of the "epistemological" moment. The feminist critical insight that the privileging of objectivism, whether scientific or legal, reflected not the unchanging laws of nature but contestable frameworks created by human beings, revealed the constructedness, not simply of *how* we know, but of *what* we come to know through those methods.

This questioning was also informed and facilitated by the emergence of antiessentialism in feminist thought. The "truths" that particular emotional responses revealed about women's lives, like the dominant views they critiqued, came to be understood as partial, and ultimately became a ground for contestation among women and among feminists. This variability and partiality was acknowledged in narrative, which had sometimes been treated as the unequivocal touchstone of shared emotional experience. Notwithstanding the controversy over Susan Estrich's account of her rape, feminists realized how much differently a rape narrative offered by Patricia Williams, or by an African American woman without her class or educational privilege, would have been received than a rape narrative offered by Susan Estrich.<sup>37</sup> "Woman" was not simply a unitary identity, but a range of shifting and contested possibilities. Moreover, the effort to impose a single or dominant frame on these varied possibilities could produce the same kind of exclusion, erasure, or alienation perpetrated by traditional

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<sup>35</sup> Williams, *Obliging Shell*, *supra* note 15, at 2135.

<sup>36</sup> See generally PATRICIA WILLIAMS, *OPEN HOUSE: OF FAMILY, FRIENDS, FOOD, PIANO LESSONS, AND THE SEARCH FOR A ROOM OF MY OWN* (2005) (relating life narrative).

<sup>37</sup> Estrich anticipated some of this criticism in reflecting on how society's opinion changes depending on what the rape was like. She noted:

I learned, much later, that I had "really" been raped. Unlike, say, the woman who claimed she'd been raped by a man she actually knew and was with voluntarily. Unlike, say, women who are "asking for it" and get what they deserve . . . It is bad enough to be a real rape victim. How terrible to be—what to call it—a "not real" rape victim.

Estrich, *supra* note 19, at 1088.

legal rules or masculine social practices.<sup>38</sup> Sometimes these anti-essentialist insights were communicated through the vehicle of emotion: the classic collection, *This Bridge Called My Back*, included many pieces by feminist theorists and activists of color that protested such exclusion through the revelation of intimate emotional terrain.<sup>39</sup> But this move toward greater variability and complexity in identity also seemed to call into question the kind of unitary revelations that had been featured in many accounts of emotion. Emotion was neither unitary (or reliably unifying), nor the “native tongue” of the many distinct and overlapping groups that constituted the category “women.”

Moreover, if the truth revealed by emotion was not so simply truth, and the identity it communicated was not unitary but plural and complex, the woman (or even women) whose subjectivity it mapped was no longer the singular focus of feminist theory. Inquiries into women’s oppression were gradually supplemented or displaced by inquiries into processes of gendering. Feminist investigations were not only limited to exploring what women suffered and why, but began to focus on how gender—masculinity, femininity, or more ambivalent combinations of the two—were produced in women and men in different contexts. A good example of this transition may be seen in the literature on sexual harassment, where Catharine MacKinnon’s analysis of harassment as a practice perpetuating sexualized domination of women by men was supplemented, and in some senses challenged, by Katherine Franke’s analysis of sexual harassment as an instrumentality for producing masculine men and feminine women.<sup>40</sup> The constructivist emphasis of this focus on gendering threatened to make earlier dichotomous characterizations of reason and emotion, which suggested that one was the province of men and one of women, seem reductive and outdated.

Finally, feminist and critical analyses of power have begun to call into question the forms of legal normativity that often flowed from the revelation of emotion. Central to this analysis has been the feminist encounter with Foucauldian analyses of power.<sup>41</sup> Foucault’s work stresses the diffusion of power across innumerable sites, which both include and exceed the official organs of the state, and highlights the productive, as well as

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<sup>38</sup> See, e.g., Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584 (1990) (stating “[i]f a unitary ‘women’s experience’ or ‘feminism’ must be distilled, feminists must ignore many women’s voices”). See generally ELIZABETH V. SPELMAN, *IN ESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST LEGAL THEORY* (1989) (arguing that useful feminist legal theory will avoid traditional categorization of “woman” or women’s experience).

<sup>39</sup> *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* (Cherrie Moraga & Gloria Anzaldua eds., 1981).

<sup>40</sup> Compare CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 18 (1987), with Katherine Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 693 (1997).

<sup>41</sup> See, e.g., Fraser & Nicholson, *supra* note 2, at 34 (arguing that feminists must examine institutions such as the nuclear family to understand women’s subordination in social relations).

the repressive capacity of power.<sup>42</sup> Law is only one among many vectors in the production of social relations, and regulation—as a paradigmatic legal assertion of power—does not simply repress but rather inaugurates new forms of behavior and subjectivity in often unpredictable trajectories. When one begins from a view of law’s power which is both more limited and more contingent, then carefully revising a legal rule or claim to take account of an emotionally infused perspective may seem a less decisive or compelling normative move.

This evolution of thought returns us to the tension with which this Essay began. When “woman” becomes a site of contestation rather than a singular description; when this identity ceases to be a primary focus and becomes part of a broader analysis of gender; when emotion is no longer the touchstone of singular truth, and the narratives through which it is embodied do not simply reflect but rather represent it; when the law that bears its mark offers a limited and unpredictable vehicle for normative transformation, we may suspect that we have reached a point where the analysis of emotion has no privileged or central role in relation to feminism. In what follows, I will not directly address the question of privilege or centrality, because it may be that the ostensible identity or substantial confluence between feminist legal thought and work on the emotions was in part a product of essentialist ontology or epistemology in these bodies of work. But I argue that a valuable relation between feminist legal theory and scholarship on the emotions is by no means at an end, and that these bodies of work can continue to illuminate each other, though perhaps on different terms than have prevailed in the past. The method for glimpsing this relation may differ in the third constructivist moment: while much of the leading work on the emotions in the law took place within feminist legal theory in the first two moments, in the constructivist moment, these bodies of work have more palpably diverged. Feminists have not theorized the relation between emotion and women’s lives, or emotion and the production of gender in this third moment. Moreover, much of the illuminating work that has recently been done on the role of emotion in law has emerged outside of feminist literature. A brief review of that work will offer some sense of its features and direction. I will then return to the question of how this work sheds light on feminist argumentation in the constructivist moment and whether we could also glimpse the emergence of feminist constructivist work on the emotions in law. I will conclude by suggesting how such work might continue to coexist with insights derived from the first two moments of feminist legal work addressing the emotions.

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<sup>42</sup> See MICHEL FOUCAULT, *HISTORY OF SEXUALITY: AN INTRODUCTION 1* (1976); Brenda Cossman et al., *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 *COLUM. J. GENDER & L.* 601, 615–17 (2003).

*A. Scholarship on the Emotions in the Constructivist Moment*

Recent work on the emotions and law has continued to proliferate in the legal academy, as well as in the fields of philosophy and political theory. It has pressed in new directions, some of which, interestingly, reflect feminist and related critiques of enlightenment epistemology. Recent work, for example, is less focused on challenging the dichotomous hierarchical understanding of reason and the emotions, or the inappropriateness of emotion to the law.<sup>43</sup> Reason and emotion are more often described as interpenetrating in effective thought or sound legal argumentation.<sup>44</sup> More notably, emotion itself is sometimes characterized as having a cognitive element or cognitive structure. Martha Nussbaum has argued, for example, that disgust is an expression of revulsion toward those attributes that reveal our animality.<sup>45</sup> William Miller, comparing disgust and contempt, notes the different ways that the lips curl in the physical expression of each; but he also distinguishes contempt and disgust on the ground that contempt connotes a superior hierarchical relation to its objects, while disgust demands their exile or abjection.<sup>46</sup>

Second, recent scholarship reflects the view that emotions (be they visceral or cognitive) are not the expression of purely interior states. They are shaped and conditioned—in their form and in the objects to which they respond—by social understandings and practices. Cheshire Calhoun has argued, for example, that romantic love—an emotion our culture has often regarded as the last outpost of the natural—is powerfully structured, or even produced, by elaborate social scripts.<sup>47</sup>

Similarly, recent scholarship does not characterize emotion simply as being expressed, or repressed, by law. Although contemporary scholarship on the emotions still reflects accounts in which law plays an expressive role with respect to particular emotions—Dan Kahan’s work on the expressive functions of the criminal law is a good example of that tendency<sup>48</sup>—more recent accounts describe emotion as acted on, modified,

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<sup>43</sup> A collection edited by Susan Bandes, *The Passions of Law* (1999), does a particularly good job of showcasing some of these new directions, and includes a number of the works I will refer to here. For a discussion of the ways in which Bandes’s collection heralds a new approach to law and the emotions, see Kathryn Abrams, *The Progress of Passion*, 100 MICH. L. REV. 1602, 1608–09 (2002) [hereinafter Abrams, *Progress of Passion*].

<sup>44</sup> Abrams, *Progress of Passion*, *supra* note 43, at 1602.

<sup>45</sup> See MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW 93 (2004) (stating “[d]isgust, then, begins with a group of core objects, which are seen as contaminants because they are seen as reminders of our mortality and animal vulnerability”).

<sup>46</sup> See WILLIAM IAN MILLER, THE ANATOMY OF DISGUST 31–33 (1997) (arguing that while contempt and disgust may arise from the same origins, the felt experience and the ultimate result of each is quite different).

<sup>47</sup> See Cheshire Calhoun, *Making Up Emotional People*, in THE PASSIONS OF LAW, *supra* note 43, at 217, 220; cf. CATHARINE MACKINNON, FEMINISM UNMODIFIED 218 (1987) (claiming that sex is often considered the last outpost of the natural).

<sup>48</sup> See, e.g., Dan Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1634–38 (1998) (arguing that criminal sanctions must acknowledge the role played

and brought into being by law in many different ways. Recent work by Martha Minow, for example, on legal responses to genocide and related atrocities, stresses the way in which fact-finding can channel emotions away from uncontrolled hunger for vengeance toward a more moderated desire for accountability.<sup>49</sup> Robert Solomon describes the way that criminal law can temper, even as it gives effect to, the desire for retribution.<sup>50</sup> Danielle Allen, writing about ancient Athens, describes the way in which law need not simply express, but can also satisfy, anger at individual offenses against the community.<sup>51</sup>

*B. Feminist Legal Theory and the Emotions in the Constructivist Moment: Illuminating Parallels?*

Though these examples of scholarship on law and emotions are not specifically identifiable as feminist, they reflect several possible relations between scholarship on the emotions and feminist legal thought. First, as noted above, they share many of the premises of the feminist critique of epistemology. Second, they reflect important parallels to the way that gender is explored, and understood, in recent feminist scholarship: parallels that have the potential to illuminate for a broader audience some of the complexities of that scholarship.

For example, although the distinctions between the masculine and the feminine and the damaging effects of their hierarchical relationship remains a pivotal subject of discussion in feminist theory, feminists have also increasingly described gender as reflecting a shifting interpenetration, combination, or rearrangement, of characteristics they had previously characterized as dichotomous. Feminist efforts to denaturalize a bipolar gender system—or to underscore the value of transgressive forms of self presentation in contesting naturalization or normalization of gender<sup>52</sup>—reflect this theme in recent scholarship.

More broadly, feminist theorists describe gender as being socially produced in ways that parallel recent discussions of the complex process by which emotion is produced and shaped. Gender and a related concept,

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by disgust in the criminalizing of certain activities and in the level of the sanction accorded to crimes); Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 CHI. L. REV. 591, 592 (1996) (analyzing, with regard to the emotional reactions of the public, why some forms of punishment are viewed as unacceptable in comparison to imprisonment).

<sup>49</sup> See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 79–83 (1998); Martha Minow, *Institutions and Emotions: Redressing Mass Violence*, in THE PASSIONS OF LAW, *supra* note 43, at 265.

<sup>50</sup> See Robert C. Solomon, *Justice v. Vengeance: On Law and the Satisfaction of Emotion*, in THE PASSIONS OF LAW, *supra* note 43, at 128.

<sup>51</sup> See Danielle Allen, *Democratic Dis-ease: Of Anger and the Troubling Nature of Punishment*, in THE PASSIONS OF LAW, *supra* note 43, at 197.

<sup>52</sup> See generally Katherine Franke, *Cunning Stunts: From Hegemony to Desire*, N.Y.U. REV. L. & SOC. CHANGE 549, 566–67 (1993–94) (stating “[m]ale drag . . . explod[es] the notion that gender identity is the rightful property of one or another sex”).

“embodiment”—the way that we come to experience our bodies and understand them to have meanings—come into being through particularized social “scripts,” such as those described by Cheshire Calhoun, through language, and through differentiated, context-specific social practices.<sup>53</sup>

Moreover, the relation of the law to gender—and proposals for legal intervention in instances of gender oppression—are increasingly being described as plural, in many of the same ways that law’s relation to the emotions has been described as plural. Earlier feminist accounts tended to insist on a more direct prohibitory or expressive role for law: the law sought to proscribe certain practices that reflected oppressive attitudes or perpetuated oppressive effects on women. The law sometimes did this—as in the area of sexual harassment or in some rape law reform efforts—by enacting or expressing women’s perspective, or women’s emotional experience, in law.<sup>54</sup> These kinds of insights remain useful in contexts where feminist advocates seek to confront a masculinist perspective that has gone unexamined or has been unreflectively characterized as universal. But current feminist accounts also increasingly characterize the relation between law and gender as more complex. Some direct forms of legal regulation, such as the regulation of pornography, are controversial among feminists. While they might limit the objectification of women, their apparent negative judgment of sexuality might exacerbate the sexual passivity associated with conventional femininity, or prevent experimentation with potentially liberating forms of sexual or gender representation.<sup>55</sup> This recognition has not simply produced feminist debate over particular regulatory proposals. It has also produced interest in the less direct ways that law can influence social and cultural conceptions of embodiment and sexuality.<sup>56</sup> Laws affecting the funding of artistic expression or the geographical spaces that support the emergence of sexual communities<sup>57</sup> affect the vocabularies or imaginaries through which we may come to understand gender and sexuality. Law may help to produce the conceptual frames which give rise to notions of sexuality as it operates in areas ostensibly far from the sexual domain. Sharon Marcus has argued, for example, that not only laws that govern rape, but also those that address family and property, may contribute to a cultural understanding of women’s sexuality as a

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<sup>53</sup> Calhoun, *supra* note 47, at 221.

<sup>54</sup> See Rosemary Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN’S L.J. 127 (1996) (highlighting attempts at reform in rape and sexual harassment law that draw from emotional or experiential accounts).

<sup>55</sup> See Susan Etta Keller, *Viewing and Doing: Complicating Pornography’s Meaning*, 81 GEO. L.J. 2195, 2233 (1993) (viewing pornography as a multifaceted, multilayered perspective on sexuality, rather than as either an absolute good or an absolute evil).

<sup>56</sup> See Frank Valdes, *Acts of Power, Crimes of Knowledge: Some Observations on Desire, Law, and Ideology in the Politics of Expression at the End of the Twentieth Century*, 1 J. GENDER RACE & JUST. 213, 246–51 (1997).

<sup>57</sup> See MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 153–63 (1999).

“wounded inner space” that is capable of being “taken” through coercive or nonconsensual sex.<sup>58</sup>

In the constructivist moment, insights regarding law and the emotions seem to offer feminist scholars an illuminating parallel—an example that might help audiences to think about gender, the role of social production, and the role of law—in ways that might be productive for feminist purposes. Despite the historic associations between the reason/emotion dichotomy on one hand and the masculine/feminine dichotomy on the other, it may still be easier for many people to hear constructivist messages about emotion than to assimilate parallel insights about gender. Thus, the notion that even ostensibly visceral emotions may reflect cognitive structures once perceived as their opposites may be a prelude to understanding complex interpenetrations of masculinity and femininity in particular gender characteristics or performances. And understanding emotions as evoked and structured—in many ways brought into being, as we know them—by social norms and “scripts,” may help people to glimpse the ways in which complex social and institutional processes produce gender in the configurations that we recognize.

### C. *Feminist Constructivists Engage the Emotions*

Even as we acknowledge the possibility of this illuminating, analogical relation, however, it is worth asking whether there might also be a role for specific feminist analyses of emotion in this constructivist moment. Such analyses have not been a primary focus of constructivist feminists, perhaps because the primary commitments of constructivist strains of feminism press in a different direction: toward bracketing often unitary notions of identity, and toward excavating the complicated social and structural underpinnings of responses once privileged as natural or authentic. The impulse towards decentering, destabilizing, or proclaiming the death of the subject overshadows the need to investigate that subject’s interior states. But feminist constructivists may have shied away from emotion because of its association with modes of thought that have been disrupted or complicated by subsequent feminist analysis, when in fact constructivist work on the emotions *outside* feminism has made clear that emotion need not be characterized in these unitary or naturalistic ways. Might feminists use these insights in producing accounts of the emotions that correspond to their contemporary understandings of socially produced gender and subjectivity? I would argue that such accounts are emerging at several sites within feminist scholarship; their examination and elaboration may be of use to feminist scholars both inside and outside of the law.

A first step is reflected in the efforts of scholars, such as Cheshire Calhoun, to expose the constructedness of emotion in general. Calhoun notes:

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<sup>58</sup> Marcus, *supra* note 7, at 385, 398.

Social constructionist theories of emotions are distinguished by their emphasis on the scripting of emotions. Emotional scripts specify the proper object of the emotion[,] . . . the goal directed behavior[,] . . . and the fantasies or patterns of thought . . . that typify an emotion. . . . We learn emotions by learning emotional scripts. We assess the genuineness of our own emotions by comparing our own experiences to those scripts. . . . And we interpret our own and others' emotions by appealing to those scripts.<sup>59</sup>

Calhoun's analysis moves from this constructivist position toward more specifically feminist insights in several ways. First, she describes an emotion—romantic love—whose interpretation and performance is gendered: different emotional “scripts” have been socially promulgated for men and women in love, and help to constitute men and women as we know them.<sup>60</sup> She also argues that this emotion, more broadly, is socially scripted as appropriate to some individuals and inappropriate to others, and this has implications for the way that our bifurcated system of gender is internalized and understood: “[o]ur paradigm scenarios for romantic love exceptionlessly cast heterosexuals in the leading roles.”<sup>61</sup> Calhoun observes:

The deep difference between homosexuality and heterosexuality is in part socially constructed by imputing to gays and lesbians a psychology that makes them incapable of romantic love and thus incapable of more than a simulacrum of marriage.<sup>62</sup>

Calhoun also argues that this process of emotional scripting creates “out-law emotions,” emotions which “violate emotional scripts for the proper object and context of particular emotions.”<sup>63</sup> When women project anger rather than patient acquiescence, or recipients of public assistance communicate resentment rather than gratitude, these emotions can lead to resistance or social critique, with strong feminist resonance. The emergence of such emotions in public settings can challenge dominant perceptions of women, or of those who receive public assistance, by portraying them as subjects. Additionally, such emotions can expose the elements of a nascent social critique: there are, as Calhoun observes, “enough conceptual resources to make the case that in fact resentment, anger, and fear are more appropriate responses [to receiving public assistance or being exposed to male sexual banter] than gratitude, amusement, or feeling flattered, even if the dominant cultural view is that they are inappropriate responses.”<sup>64</sup>

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<sup>59</sup> Calhoun, *supra* note 47, at 220.

<sup>60</sup> *Id.* at 222.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 218.

<sup>63</sup> *Id.* at 223.

<sup>64</sup> *Id.*

Feminist scholars have also begun to explore the emotional states of the complex, decentered constructivist subject from a more internal perspective. Although this work had an important precursor in the ambivalent, self-reflective narratives of Patricia Williams, narrative work that takes the complexity and mobility of its perspective, or emotional experience, as a specific subject of analysis has begun to emerge more frequently in the constructivist moment. An illuminating example in this respect is *This Bridge We Call Home*, a volume specifically undertaken in an effort to revisit, in a contemporary political and theoretical context, some of the themes and identities explored by women of color in *This Bridge Called My Back*. The first *Bridge* collection included some entries which reflected complex or liminal identities; its primary theme was the experiences of women of color, which had been largely erased by the mainstream women's movement. In the subsequent volume, liminality and complexity of identity are front and center, with many essays exploring complex or hybrid identities, the temporal transition of gendered, racialized, or feminist identities over time, or embodied transitions such as those of transsexuals. For example, Cheryl Clarke, reflecting on her essay *Lesbianism: An Act of Resistance*, which appeared in the earlier volume, notes:

Lesbianism has emerged at this time in my life as more of a strategy and less of a hard-and-fixed-identity-politics-that-I-am-going-to-be-no-matter-how-it-gets-deconstructed. One never knows how one may have to "live as a lesbian" trafficking in conservative-family-maniacal U.S. capitalist hegemony, do one. . . .<sup>65</sup>

The notions of identity that emerge from these narratives are more fluid and variable than those in the earlier collection. The cohesion or unity of identity that does emerge is transitory and strategic—responsive to particular challenges or circumstances—rather than innate and stable. For Max Wolf Valerio, the transsexual author of *Now That You're a White Man: Changing Sex in a Postmodern World*, his delight in the assertion of a conventional masculinity arises not only from the arduous process of his sex change, but in response to the "particular and tedious challenge" of feminists who expect him to be feminine, queer, or otherwise engaged in their "battle with the bipolar gender system."<sup>66</sup> Laura Harris, in *Notes of a Welfare Queen in the Ivory Tower*, asserts a resistant, hybrid identity that deploys the "skills and knowledge of a welfare queen, equipped with the

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<sup>65</sup> Cheryl Clarke, *Lesbianism, 2000*, in *THIS BRIDGE WE CALL HOME* 232, 234 (Gloria E. Anzaldúa & AnaLouise Keating eds., 2002).

<sup>66</sup> Max Wolf Valerio, *Now That You're A White Man: Changing Sex in a Postmodern World—Being, Becoming and Borders*, in *THIS BRIDGE WE CALL HOME*, *supra* note 65, at 239, 244.

privileges I acquired along with my PhD” to contest the homogenizing assumptions of middle-class status that pervade the academy.<sup>67</sup>

The emotions that are explored in these narratives differ in some respects from those that preceded in the identitarian and epistemological moments. The emotions of these narrators emerge in shifting, alchemical combinations: anger inflected with wry or rueful amusement, delight mixed with impatience or resentment. Prominent among them are a set of emotional responses that appear only rarely in earlier narratives: confusion, surprise, and disorientation. When an older feminist all too familiar with “hardcore, inner-city crack cocaine dependency” struggles to interpret a younger woman’s poster declaring “[a]ll I can cook is crack on a spoon,”<sup>68</sup> or when a Latina feminist theorist confronts a classroom in which her Latina students assert racial authenticity by decrying theory as an elitist luxury, their palpable sense of disorientation is the affective sign of a social world in which complex, mobile identities never lose their capacity to surprise and even apparently to firm factual or linguistic ground that is subject to plural interpretations.<sup>69</sup>

A final form of work in this vein is constructivist analysis of the production of emotional states, coupled with first- and third-person narratives exploring the consciousness of those who are subject to these productive influences. One example is Susan Bordo’s *Unbearable Weight: Feminism, Western Culture and the Body*.<sup>70</sup> Bordo’s subject is the processes through which women come to experience fear, anxiety, guilt, and loathing in connection with their bodies: an insidious brew of emotion strong enough to make anorexia, bulimia, and cosmetic surgery almost paradigmatic in our culture. She examines the philosophical assumptions about embodiedness; media representations of unmarked, waiflike women; and the deployment of feminist rhetoric of self-assertion and choice to justify women’s subjection to successive rounds of cosmetic surgery. She also offers, however, a more interior glimpse of this process, exposing the desperate energies of the young girls who goad each other to emaciation by exchanging internet photos of supermodels, or who brightly assert that “if you get rid of it through exercise rather than purging or laxatives, then you don’t have a problem.”<sup>71</sup> Perhaps most poignantly, she offers her own reflections on the emotional states produced by the cultural valuation of women’s bodies:

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<sup>67</sup> Laura Harris, *Notes of a Welfare Queen in the Ivory Tower*, in *THIS BRIDGE WE CALL HOME*, *supra* note 65, at 372, 380.

<sup>68</sup> Hill, “*All I Can Cook is Crack on a Spoon*”: A Sign for a New Generation of Feminists, in *THIS BRIDGE WE CALL HOME*, *supra* note 65, at 261.

<sup>69</sup> Cervenak et al., *Imagining Differently: The Politics of Listening in a Feminist Classroom*, in *THIS BRIDGE WE CALL HOME*, *supra* note 65, at 341–42, 348–51.

<sup>70</sup> SUSAN BORDO, *UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE AND THE BODY* (2d ed. 2003).

<sup>71</sup> *Id.* at xxvii.

They carded me until I was thirty-five. Even when I was forty-five, people were shocked to hear my age. Young men flirted with me, even at fifty. Having hated my face as a child—bushy red hair, freckles, Jewish nose—I was surprised to find myself fairly pleased with it as an adult. Then suddenly, it all changed. The women at the make-up counter no longer compliment me on my skin. Men don't catch my eye with playful promise in theirs.

I'm fifty-six. The magazines tell me that at this age, a woman can still be beautiful. But they don't mean me. They mean Cher, Goldie, Faye, Candace. Women whose jowls have disappeared as they've aged, whose eyes have become less droopy, lips grown plumper, foreheads smoother with the passing years. . . . "Aging beautifully" used to mean wearing one's years with style, confidence, and vitality. Today, it means appearing not to age at all . . . . This collusion, this myth, that Cher or Goldie or Faye Dunaway, unaltered, is "what fifty-something looks like today" has altered my face, however—and without benefit of surgery. By comparison with theirs, it has become much older than it is.<sup>72</sup>

Although Bordo's narrative reflects some modulation—socialized as a philosopher, she remains uncomfortable with self-disclosure—its interplay of conflicting emotions is striking.<sup>73</sup> Having described a system of cultural representations that spares no one in its relentless, if varied, production of bodily anxieties, Bordo is startled, rueful, resentful, and pained to find she is not quite as free of its fetters as she thought.

## V. CONCLUSION

The ambivalent or contingent assertions of identity, the confusion or disorientation in navigating the challenges of an almost illegibly plural social world, the rueful surprise that the ability to see or describe social construction does not spare one from its subject effects: these complex emotions may indeed reflect forms of interiority distinctive to the third, constructivist moment in the relationship between legal feminism and the emotions. They join more familiar emotions such as anger, fear, disgust, and hope on the terrain that has been, and is being, explored by feminist scholars. At present, only a small portion of this feminist work is being done within the discipline of law. As this body of work grows, feminist legal scholars, too, can contribute to the exploration of the conundrums posed by the constructivist turn in feminist thought. Work on the emotions may not simply help reluctant readers to understand contemporary feminism's focus on the production of gender. It may also help genera-

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<sup>72</sup> *Id.* at xxiv–xxv.

<sup>73</sup> *Id.* at 32.

tions of feminists, perplexed by the growing distance between their long-standing focus on subjectivity and their field's growing distance from a recognizable human subject, to understand constructivism as well.