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AMATORY JURISPRUDENCE AND THE *QUERELLE DES LOIS*

PETER GOODRICH*

INTRODUCTION

In an unremarked passage towards the end of *Truth and Method*, Gadamer observes, in the course of a discussion of the Platonic theory of the good, that "The path of love that is taught by Diotima leads beyond beautiful bodies to beautiful souls, and from there to beautiful institutions, customs and laws"¹ This elliptical and seemingly incidental reference to a feministic tradition or gender of law provides the occasion for an interrogation of what such beautiful customs or just laws might mean in practice. Using the historical example of laws and judgments of love, of women's courts as also of the widespread medieval local institution of lovedays (*dies amoris*), it will be argued that the dismissal of such gynecocratic and affective institutions to the extralegal domains of the literary or aesthetic reflects a *querelle des lois* or legal form of the *querelle des femmes*. Borrowing again from Gadamer a sense of the significance of tradition in the understanding of law, this article argues that legal historiography needs to come to terms with the diversity of traditions and, more specifically, with the repressed tradition of amatory laws. The denial of alternative juristic traditions or knowledges of law not only severely limits the value of legal hermeneutics but also further estranges law from the cultural and corporeal contexts of governance.

I will begin inappropriately with a personal anecdote. There are two reasons for this: The first is polemical—I wish to 'get medieval' with the question of legal historiography and to address it in terms of a long middle ages to which we still belong. The second is therapeutic—the texts I will address are part of the genre of the *iudicia amoris* (judgment of love) which one eminent literary historian with whom I often agree has described as "flounder[ing] on

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1. HANS-GEORG GADAMER, *TRUTH AND METHOD* 435 (Garrett Barden & John Cumming eds., Sheed & Ward Ltd. trans., 1975) (1960).

a tedious no-man's land between pseudo-document and literary text."² Amatory jurisprudence, in this now conventional dismissal, is quintessentially marked by failure; it is the "least successful of courtly forms."³ If I am bound towards a reading of deficient texts and torpid laws that have neither referent nor being, then it would be impolite not to cushion this threat with the contrary narrative of their spectral force and present engagements.

Funded some years ago by the British Academy, I was engaged upon a study of the doctrine of the *fin' amors* and the literature of courtly or, depending upon one's position, discourteous love. It was February 14, Valentine's Day, 1994. In those days one could only obtain a seat in the *Bibliothèque Nationale* if one arrived and queued for some half an hour before the doors opened at 9 A.M. I worked all day, and, as is always the case when I work in libraries, particularly in the discomfort and surveillance of manuscript rooms, I became prone to the soft hallucinations engendered by lack of sleep and the gentle yet real narcotic given off by texts. It was in such an atmosphere that I called up a manuscript detailing the establishment by royal decree, on February 14, 1400, of a *cour amoureuse*, or "High Court of Love" in Paris.⁴ For a disenchanted lawyer, this was an intoxicating notion, and with the fragile lead of a propelling pencil I scribbled down the intricate details of constitution, procedure, and judgment in this court of appeal in the jurisdiction of amatory law.

I worked until the library closed around 7 P.M. and then took the metro to the Left Bank where I was staying near the Pantheon. Leaving the subway station as the sun was setting, I slowly became aware that the streets were strewn with broken eggs. Still embalmed in the euphoria of medieval texts, I excitedly imagined that these raw and shattered carapaces were the signs of an obscure or esoteric Valentine's Day rite. In this reverie, I reasoned that the eggs must mark some Amazonian ovulatory ritual in which the power of procreation and the French tradition of *femmes fortes* was reenacted momentarily and festively in the public sphere by the smashing of eggs.

The possibilities were endless. Admittedly one of them, as I later

2. R. HOWARD BLOCH, *MEDIEVAL FRENCH LITERATURE AND LAW* 214 (1977).

3. *Id.*

4. See *LA COUR AMOUREUSE DITE DE CHARLES VI* (Carla Bozzolo & Hélène Loyau eds., 1982) (explicating the procedures of the High Court of Love and the statute of 1400 that established them). For a brief description, see PETER GOODRICH, *LAW IN THE COURTS OF LOVE: LITERATURE AND OTHER MINOR JURISPRUDENCES* 1-3 (1996).

discovered, was that the eggs had been left from a student demonstration against cuts in education. On reflection, however, even that explanation fits well with the thesis I wish to elaborate. It suggests a certain autonomy from the past and a complex semiosis to the images that mark the theater and polemic of the contemporary public sphere. In this instance, the conjunctions of intimacy and publicity, of apparent and real, of medieval and modern, and of love and law were positively uncanny. In short, the fragments of shell and broken yokes marked for me a reversal of the juristic order of historical causes and of the quotidian norms of municipal rule. Let me be explicit: It was Valentine's Day and at twilight the streets of Paris were strewn with broken eggs. It does not take any great feat of lateral thinking to read this sign in structural terms: the visible order of the city had been disrupted by the sudden staging of a more intimate public sphere, the order of genders had been disturbed, and the public domain of appearances had clearly been marked by the intrusion of a lust or law, cupidity or *caritas* according to one's hermeneutic preference, too powerful and subversive to be directly addressed or staged. The latter significance, marked by the destruction or shattering of eggs, is indicative also of the trauma of origins, and consequently their recollection through the repetitive invocation of rites, through indirect or displaced forms.

The notion of a Valentine's Day rite in which Parisian lovers stage an enigmatic and invisible law, in which an alternative and intimate public sphere is enacted in visible forms on the city streets, is one which does not in fact divagate far from the historiographical norm that treats the laws of love—the laws of the first Venus—as the other, the “backface,” or underside of a positive and implicitly virile governance. Undeterred, I wish to devote this paper to sketching the face of that evanescent history of an intimate and amorous public sphere. In a more formal idiom, I will make two arguments. The first is simply that it is possible to reconstruct from literary and legal sources a coherent body of doctrine and law that together comprises what I will term “amatory jurisprudence,” the historical and continuing jurisdiction of the laws of love. The second and stronger argument relates to the question of the epistemological and ontological status of these laws. It should be obvious already that I believe that what was at various times explicitly designated as a “gay science” of law should be treated—read, acted upon—if not seriously,

then at least with humor and imagination.⁵ It is my view, and no doubt I am now preempting my conclusion, that what literary and feminist historicism recognizes as the *querelle des femmes* (the debate as to the status and political role of women) was in fact underpinned and motivated by a much less explicit, yet nonetheless portentous, *querelle des lois*. The *querelle des femmes*, in other words, was always a polemic as to the legal status of women, as to their definition and role in theology and jurisprudence, canon and civil law. It has also been argued persuasively that much of the *querelle des femmes* was presented—pleaded—by means of legal rhetoric. More than that, however, what the recovery of amatory jurisprudence can help to show is that the *querelle des femmes* was predicated upon a conflict of jurisdictions and, at base, addressed the primary political question of which law was to govern: masculine or feminine, that of amity or fraternity, of Venus or polity, of love or regality.

I. LAWDAYS AND LOVEDAYS

Legal historiography is not entirely ignorant of the jurisdiction of love. Christian theology passed on the maxim associated most often with Boethius that love is the greater law (*maior lex amor est*), and the glossatorial tradition included works such as Forcadel's *Cupido Iurisperitus*,⁶ Boncompagnus's *Rota Veneris*,⁷ Benoit de Court's *Commentaires Juridiques et Joyeux*,⁸ and also Selden's *Jani Anglorum Facies Altera*, which looked explicitly to the "other" or feminine "face" of secular law.⁹ As Selden's seldom mentioned work makes clear even in its title, the tradition of amatory jurisprudence was eccentric to legal doctrine and of only antiquarian interest to the emergent national law. Within the common-law tradition, the early modern growth of law entailed the absorption of all other

5. See Peter Goodrich, *Gay Science and Law*, in *RHETORIC AND LAW IN EARLY MODERN EUROPE* (Vicky Kahn & Lorna Hutson eds., forthcoming 2001).

6. STEPHANO FORCATULO BLITERENSI, *CUPIDO IURISPERITUS* [THE JURISPRUDENCE OF LOVE] (1553).

7. BONCOMPAGNO DA SIGNA, *ROTA VENERIS* [THE WHEEL OF LOVE] (Josef Purkart trans., *Scholars' Facsimiles & Reprints* 1975) (1185).

8. Benoit de Court, *Commentaires Juridiques et Joyeux* [*Juridical and Joyful Commentaries (on the Judgments of Love)*], reprinted in MARTIAL D'Auvergne, *LES ARRÊTS D'AMOURS, AVEC L'AMANT RENDU CORDELIER, À L'OBSERVANCE D'AMOURS* (1731).

9. See JOHN SELDEN, *JANI ANGLORUM FACIES ALTERA* [THE OTHER FACE OF THE ENGLISH JANUS] (London, T. Bassett 1683) (1610). For discussion of this tradition, see *LAW AND THE UNCONSCIOUS: A LEGENDRE READER* 72-94 (Peter Goodrich ed., Peter Goodrich et al. trans., 1997). On the *querelle des femmes* in common law, see PETER GOODRICH, *OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW* 108-80 (1995).

jurisdictions, whether spiritual, local, regional, or based upon some profession, trade, or other expertise. The question of the status of women was treated as resolved by a combination of divine and Salic law. In England, Chief Justice Fortescue's exhaustive mid-fifteenth-century treatise on the topic of women's rule, *De Natura Legis Naturae*,¹⁰ had seemingly already judged the issue comprehensively in favor of the exclusion of women from the public sphere.¹¹

If lawyers treated the *querelle des femmes* as being at best a polemic within the domain of political philosophy and as generative at most of considerations of policy and not of principle or law, it is perhaps unsurprising that legal historians did not expend their time, or at least not until very recently, upon what was in juristic epistemology the pseudo-reality of courts and laws of love. While philosophers might from time to time discuss the perennial *quaestio quid iuris* (question of which law), the notion of a higher law—of a first law or law of law—was not of any practical significance either to lawyers or to legal doctrine. What could be said, but there was really no need to say it, not even in the relatively esoteric realm of legal history, was that laws of love were antique examples of what the science of jurisprudence had historically to sever from its purview so as to become a science. Put simply, the aspiration of modern legal scholarship has been that of writing, or at least of influencing the writing of, law. To influence the writing of law meant to stick closely to the establishment or institution of law and, most particularly, to accept the pragmatic definition of legality implicit within the official profession and practice of law.

If law is conceived as a unitary system of municipal norms and is expounded dogmatically in terms of sources and definite authorities extant within a momentary system of rules, there is neither room nor reason to look at the question of other jurisdictions or alternative and disparate sources of rule. Legal historiography has suffered from that unitary drive or systemic belief in what are in essence nationalistic systems of governance and their territorial competencies. My point, however, is not to play overlong on the trope of an absence, this aposiopesis which marks the historical and juristic place of the

10. See SIR JOHN FORTESCUE, *DE NATURA LEGIS NATURAE* [ON THE NATURE OF NATURAL LAW] (Chichester Fortescue trans., Garland Publishing 1980) (1462).

11. By the time that Sir Thomas Smith's *De Republica Anglorum* was published in 1584, it was possible simply to assume the inferiority of women and the rectitude of their consignment to the *gynaecium*. See SIR THOMAS SMITH, *DE REPUBLICA ANGLORUM* 58-59 (Mary Dewar ed., 1982) (1584).

feminine. Rather, I want to indicate the epistemic site from which the judgments and laws of love appear as belonging to a tedious no-man's land, to the domain of failure, ludic pretence, or even the intellectual deceit that is sometimes deemed to accompany the aspersion of reality or attribution of value to an ontological nothing, nihil, or nonbeing.

Lest these remarks seem somewhat caustic, glib, or loaded, it is worth observing that the apparent trajectory of amatory jurisprudence, and now I will begin to group together certain of the texts to which this peculiar jurisdiction refers, has been from law to farce. It is necessary, of course, to suspend our philosophical prejudices as to what is meant by law for it even to be worth initially tracing the trajectory of the *querelle des lois*. That said, the long term of amatory jurisprudence has been that of an ineluctable movement from heresy to conformity, from polemic to parody, from gaiety to ridicule. In nominate form, the trajectory takes us from Andreas Capellanus to Francois Callières, from Christine de Pisan to the *Précieuses Ridicules*, from Mahieu le Poirier to Jean Donneau de Visé, and from the trobairitz to Martial d'Auvergne and thence to Guillaume Coquillart and the theater of the Basoche.¹² The trajectory reflects a consistent change in the genre of the laws of love. The passage from law to farce is also a transfer from one status and discipline to another, namely, from politics to theater, from legal practice to literary fiction, and from jurisprudence to aesthetics.

My suggestion is that this trajectory and these changes of epistemic and rhetorical scene reflect hermeneutic changes; shifts in the way we read the tradition and texts that comprise this minor jurisdiction, its judgments and its laws. It is necessary, first, to liberalize somewhat the definition of legality and the modality in which we think of law. Borrowing from contemporary social theory,

12. Respectively, and with no attempt at being comprehensive, see ANDREAS CAPELLANUS, *ANDREAS CAPELLANUS ON LOVE* (P.G. Walsh ed. & trans., Duckworth 1982) (1176); FRANCOIS CALLIÈRES, *NOUVELLES AMOUREUSES ET GALANTES* (Paris, Gabriel 1679); CHRISTINE DE PISAN, *Le Livre de Trois Jugemens*, in *THE LOVE DEBATE POEMS OF CHRISTINE DE PISAN* 155 (Barbara K. Altman ed., 1998) (1400) [hereinafter DE PISAN, *Trois Jugemens*]; MOLIÈRE, *LES PRÉCIEUSES RIDICULES* (Denis Canal ed., Larousse 1990) (1659); MAHIEU LE POIRIER, *LE COURT D'AMOURS DE MAHIEU LE POIRIER ET LA SUITE ANONYME DE LA "COURT D'AMOURS"* (Terence Scully ed., 1976) (1731); JEAN DONNEAU DE VISÉ, *LES NOUVELLES GALANTES, COMIQUES, ET TRAGIQUES* (Slatkine Reprints 1979) (1680). On the trobairitz, see *CHANTS D'AMOUR DES FEMMES-TROUBADOURS: TROBAIRITZ ET "CHANSONS DE FEMME"* (Pierre Bec ed., 1995); MARTIAL D'Auvergne, *supra* note 8. On the Basoche, see Stephanie Lysyk, *Love of the Censor: Legendre, Censorship, and the Theatre of the Basoche*, 11 CARDOZO STUD. L. & LITERATURE 113 (1999).

law refers not to a unity of behavior or empirical practices but to a series of systems of communication and, in an epistemic idiom, a variety of modes of thought.¹³ In these terms, it can also be noted that a legal jurisdiction refers neither to a territorial competence nor to a power or practice of enforcement but rather to a right to speak, a site of enunciation, and therefore ultimately to an oratorical or scriptural destiny. Remaining at this modest and perhaps mundane level of definition, it cannot escape notice that law, or more properly laws, are intrinsically bound to questions of language and utterance, narrative and performance, force and persuasion. No amount of rationalization nor myriad quantities of dulling custom or common sense can excise law from the monkey on its coattails; its artistic mirror, its twin, its rhetoric.

Changes in the relationship between rhetoric and law have marked all the major moments of recovery, reform, or growth of legal systems: the reception, humanism, vernacularization, codification, realism, and criticism, to name but a few disparate events, were all driven by changes in the scholarly conception of the rhetorical and interpretative disciplines that should be applied to law. It is perhaps not too radical a suggestion (in a contemporary context that is marked scholastically and politically by diversity and pluralization of identities) to propose a reconsideration of legal identity both in terms of the differing forms and disciplines through which law is communicated and in terms of the diverse jurisdictions or sites through which governance is effected. A shift, in other words, towards a more rhetorically rigorous concept of legal studies suggests both a diversification and a mediation of law through other disciplines. Such mediation opens up the possibility of once again addressing the history of the jurisdictions that the nationalist systems of law absorbed, annexed, concealed, or destroyed in the epistemic and political process of the modern expansion and unification of legal jurisdictions.

It is important to acknowledge in passing that legal or quasi-legal scholarship has not entirely ignored the possibilities exposed by reclassification of juristic orders of governance. There have recently and not so recently been studies that have endeavored to localize and rethink the historical order of legal disciplines. There is Hunt's

13. See, e.g., TIM MURPHY, *THE OLDEST SOCIAL SCIENCE?: CONFIGURATIONS OF LAW AND MODERNITY* (1997); see also Peter Goodrich, *Anti-Teubner: Autopoiesis, Paradox, and the Theory of Law*, 13 SOC. EPISTEMOLOGY 197 (1999).

materialist history of sumptuary law,¹⁴ Hartog's vignette of the law of pigs in nineteenth-century New York,¹⁵ Ariela Gross's account of the litigation of whiteness,¹⁶ and John Baker's wonderful discourse on whether lawyers were able to hear the judges in the Inns of Court and so accurately record their dicta.¹⁷ At the level of theory, Donald Kelley has mapped the role of law in social thought,¹⁸ and Tim Murphy has expansively accounted the growing chasm that separates the classical model of law as judgment from the communicative networks and actuarially based logics that inform contemporary regimes of knowledge and, consequently, the administrative exercise of power.¹⁹ There is, of course, extensive work in social anthropology and in law and society that attests to expanding concern with autonomous and local regimes of truth and with the norms of community or of relationship that such regimes or modes of governance employ. My point is simply that amatory jurisprudence conceived as a jurisdiction and, more radically, as a mode of thought can be approached best through that history of juristic diaspora or plural legal regimes.

It is only recently that the laws of the intimate public sphere have begun to escape the taboo of privacy and the confinement of the private sphere. Let me be clear: I do not wish to suggest that amatory jurisprudence is somehow to be understood as the law of the private domain or even that *las leyes d'amor*—the laws of love—are somehow competitors with or a law prior to that of the municipal orders of the secular polity. My arguments are more modest. Amatory jurisprudence constituted one historical jurisdiction of rule, and, more specifically, it provided a site for the enunciation of a language, a set of norms and space of dialogue within which the parameters of intimacy and the duties of amorous relationships, the intensities and durations of desire, could be elaborated, debated, and judged. My first question, then, with respect to this jurisdiction must be that of its relation to the legal proprium: is it anything more than historiography

14. See ALAN HUNT, *GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW* (1996).

15. See Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899.

16. See Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

17. See J.H. Baker, *Introduction to 1 THE REPORTS OF SIR JOHN SPELMAN*, at ix, xviii (J.H. Baker ed., 1977).

18. See DONALD KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* (1990).

19. See MURPHY, *supra* note 13.

assumes, namely, the momentary subversion or decomposition of legal rule?

The *querelle des femmes* was in form a polemic. The accompanying *querelle des lois*, therefore, has to be read initially in light of that antithetical or combative discursive form. The laws of love existed historically in the occluded domain of the motives for the polemic. A first reading of references to the laws of love is thus already caught up in the negative or defensive depiction of an inverted space outside of royal or municipal law. This space of mirroring was referred to by some in terms of the laws of the first Venus and also in a more christian idiom as *lex caritatis*, or *lex amatoria*. Such law already belonged, however, to the spiritual rather than the temporal, to the soul rather than the body, to the *gynaeceum* rather than the polity, to literature rather than the real. As a result, such references have a negative if powerful resonance and are depicted as a species of beyond of law; as the exception rather than the rule. They are seen thus as belonging to a temporality outside of Spelman's law terms and, more explicitly still, as part of the inverted world of the *dies nefastes* (days when the praetor could not speak) or, latterly, the days of festival (*dies feriales*) when the law did not obtain.²⁰

There were of course many forms of law appropriate to leisure or to what was conceived by the time of the Renaissance as the vacation or "intermission" associated with non-law days. The court of pipowders, for example, followed the fairs and would adjudicate disputes that occurred in that context. Meanwhile, the rule of the Church—*dies pacis Ecclesiae*—more generally governed those times when royal law was suspended. The conflict of jurisdictions was already, in other words, filtered through an opposition between law days (*dies juridicos*) and the difference or exception that marked their abeyance or suspension. The most common historical reference to laws of love indeed occurs in this context: *dies amoris* or in the Anglo-Saxon, a loveday, was a day when parties would reconcile outside of court. Such compromise or compact was waged in love (*per amorem*) and most usually without formal judgment. It was witnessed by friendship (*per amicitia*), by friends and kin, and was sealed or marked by a kiss, the *osculum pacis* of faith or of christian love.²¹

20. See SIR HENRY SPELMAN, OF THE LAW TERMS: A DISCOURSE 3-4 (London, Gillyflower 1684) (1614), *microformed on Wing*: Early English Books 1641-1700, Reel 825 (Univ. Microforms Int'l 1978).

21. For a general and excellent overview of the institution, see Josephine Waters Bennett,

That lovedays were a common feature of local law from Saxon times onwards cannot be disputed. The thane, according to the laws of Aethelred, had a choice between *lufu* (love) and *lagu* (law) and was bound to the jurisdiction he chose.²² If chosen, in other words, the law of love would override or conquer secular legal procedures. The choice in favor of love would lead to a resolution that did not need formal judgment or record and so it left few traces. It has even been suggested, and the suggestion is a good one, that when Bracton says at the beginning of *De Legibus* that "law comes from nothing written,"²³ his remark not only opposes custom or *ius non scriptum* to the tradition of codification but also refers to a spirit of concord, of amity and peace, that did not depend upon the harsh arbitrium of formal legal rule.²⁴ That love leaves few traces, that it is hard to follow the spirit of amity or the rule of affection, does not mean that there are no signs to follow. Those that have been recovered indeed indicate not only that love prevailed over law but also that recourse to love and to the resources of friendship was extremely common. Glanvill notes that agreement—amity—generally supersedes law,²⁵ and the much cited text of the Anglo-Norman *Leges Henrici Primi* explicitly legislates that "agreement prevails over law and love over judgment."²⁶ The *Leges* also instructs that love brings disputants together while judgment separates them. Friendship, continuing relationship, requires agreement, and hence the pervasiveness of lovedays or days of accord within the rolls and, more generally, within the margins of royal law.

The *Leges* make it clear that the law of love was not simply respected and binding but also in most respects superior to the antagonism and absolutism of formal judgments. By chapter 54 of the *Leges*, it is explicitly stated that where agreement was reached through love (*ex amore*), it could not be appealed to any other court

The Medieval Loveday, 23 SPECULUM 351 (1958).

22. See THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I 70 (A.J. Robertson ed. & trans., Cambridge Univ. Press 1925).

23. See 2 BRACTON, BRACTON DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE [BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND] 19 (George E. Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1968).

24. See Michael T. Clanchy, *Law and Love in the Middle Ages*, in DISPUTES AND SETTLEMENTS: LAW AND HUMAN RELATIONS IN THE WEST 51 (John Bossy ed., 1983).

25. See THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 129 (G.D.G. Hall ed. & trans., 1965).

26. See LEGES HENRICI PRIMI 164 (L.J. Downer ed. & trans., 1972) ("Pactum enim legem vincit et amor iudicium.").

or jurisdiction.²⁷ The bonds of affection and the spaces of friendship, of communication and continuing relationship, seem to have been more profound, more pervasive, and more enduring than the *vinculum iuris* (chain of formal law). Moving outside the common law, a comparable claim can be made for much of France, where *concordiae* or *conventiae* (extra-judicial wagers of dispute mediated through friends, determined by agreement, and marked by a kiss, a meal, or some other symbol, rite, or exchange) often constituted the most common form of resolution.²⁸

It would be tempting to suggest that the affections and their governance of intimate spaces were the rule, rather than the exception; that the unwritten law was a law of the lightness of being—an amorous government to which formal law was itself the passionless exception. Such a reversal of our understanding of the order of jurisdictions, however, simply reenacts in inverted form the obsessive juristic desire to classify and tabulate a hierarchical order of precedence. My concern is different and more eccentric. The concern of the action *per amorem* to address the dictates of affection, the space of relationship and the continuance of friendships, should not merely be a pretext for denouncing formal legal rule or for berating a juristic historiography that has treated the rule as the exception. It is better by far to reopen the question of the significance of the loveday and to expand an inquiry into its jurisprudence and weightless inscriptions.

The initial point to make is that the *dies amoris*, action *per amorem*, and various species of settlement of claim (e.g., *concordiae*, *conventiae*) were not exceptions to an overriding legal norm or inversions of a normalizing practice but rather were a different jurisdiction; an alternative law within the same space and temporality as that of royal rule. In its most radical formulation, we could say that love played the law and reclaimed its antique jurisdiction. Certainly, if we take the example of the records from the abbey of Marmoutier studied by Stephen White, the action *per amorem* would settle disputes as to title and boundaries of property, inheritance, dues owed the monks, the rights of Churches, maritagium owing or passed

27. See *id.* at 173.

28. See Fredric L. Cheyette, *Suum Cuique Tribuere*, 6 FRENCH HIST. STUD. 287 (1970); Stephen White, "Pactum . . . Legem Vincit et Amor Judicium": The Settlement of Disputes in Eleventh-Century Western France, 22 AM. J. LEGAL HIST. 281 (1978). More broadly, see Bennett, *supra* note 21.

on, and the validity of sales or transfers of land.²⁹ Such grievances were equally the domain of law. In addition, because disputes were eventually settled through love does not mean that they were never violent; indeed, they often were. Thus, both in substance and in form, these disputes occupied the same terrain as the king's peace that was the substrate of secular legality. Borrowing a language and practice from older traditions of rhetorical ethos, of friendship, affect, poetic, and imagination, the loveday offered not simply a different aesthetic or style of communication but also a different theory or sense of justice and law. It is to that question of the aesthetic and justice of relationship, of the transitivity of love and of friendship, that amatory jurisprudence belongs.

The rhetoric of amicable agreement and of amorous actions is that of amity overriding enmity, of compromises and concords worked out through the mediation of friends and in the spirit of the justice of love. It is also a species of oratorical ritual in which law marks resolution through the exchange of gifts, eating common food, and sharing tears and kisses. These symbols and figures of a first or greater law, of copulation triumphing over the separation of formal law, belongs genealogically at least in part to the language of religion and a rhetoric, lyric, and poetry of love's laws. The most usual *topos*, one which bears repetition in that it exactly coincides with the Anglo-Norman code of the *Leges Henrici Primi*, can be extracted from Llull's *Rhetorica Nova* and the maxim that love (*caritatis*) will obtain what law fails to acquire.³⁰ A woman lost her husband while he was fighting to defend the king. She subsequently lost her home to invading enemies of the crown. Destitute and unable to support herself or her children she goes to the king accompanied by a friend and by a nephew who is a lawyer (*iurista*). The lawyer argues her case in a legalistic manner, proposing that the king was under an obligation to provide for the woman because her poverty was a result of her husband's service to the king. The king declined to support the woman, whereupon her friend tearfully pleaded her case in love. Though he had been unmoved by the lawyer's words, the king could not resist the persuasive power or inclination of love and so provided for the woman and her family. Love, affectual as opposed to formal legal bonds, passion, and care as the modes of communication, in this

29. See White, *supra* note 28.

30. See RAMON LLULL, RAMON LLULL'S NEW RHETORIC: TEXT AND TRANSLATION OF LLULL'S RHETORICA NOVA 50 (Mark D. Johnston ed. & trans., Hermagoras Press 1994) (1295).

common oratorical argument, will triumph over law. If we are to avoid negatively opposing love to law, we are forced again to ask what space, what jurisdiction is occupied by love, and equally, what epistemic status should be attributed to its judgments, its rhetoric, and its laws?

II. THE *QUERELLE DES LOIS*

As the example from the *Rhetorica Nova* suggests, the first jurisdiction of love is rhetorical. Whether elaborated in terms of christian doctrine—as *amor purus* or *caritas*—or in those of literature and lyric—as joy and gay science—the domain of the laws of love is that of communication. My argument, in other words, is that the jurisprudence and casuistry of love constitutes a communicative network, a language and semiotic, which opens up, elaborates, and where necessary judges—resolves, that is, but does not determine—conflicts, disputes, and on occasion acts of violence in a manner appropriate to the affectivity or emotive bonds of the intimate public sphere. In that the surviving tradition of this amatory jurisprudence is consistently, or at least at its most interesting, either heretical or pagan in its advocacy of mixed love, of both spiritual and physical affection, I will address directly those laws and questions of love that deal most directly with the physical signs as well as the rules of communicating and consummating the desire for intimacy.

The polemical claim of the *querelle des femmes*, in its masculine version, has always been that the laws of love lack reason and lack seriousness. At its strongest, the argument is that these laws are unreal—they lack records or other proof of institutional enforcement—and heretical, which means, in a more modern idiom, that they are antisocial and unethical. It is that polemic, one which consigns the space of love's laws to the enigmatic and occult domain of the body, its fluids, excitations, and other unmarked incorporations of desire, that has led to the historiographical trajectory mentioned earlier from law to farce. The substance of the laws of love could only be addressed in the form of the denial of their legality: the *querelle*, in other words, could only take these laws seriously, could only address them at all, in terms of heresy, unreason, then theater, and finally farce. The gay science of law, the erudition in "*ces propos torche-culatifs*" that Rabelais mentions as the grounds for a doctorate in gay science, even Nietzsche's recuperative concept of the

seriousness of parody, reflect a relation to "the sex of knowledge,"³¹ the intimacies of its incorporation, as much as they dispose of a substantive interpretation of an extensive corpus of literary texts and practices.

The laws of love always challenged—gently, hilariously, poetically, dramatically—the scriptural rubric of seriousness that accompanied and accompanies still the writing and the recuperation or historiography of secular laws. What, then, is written out of the ambit of the histories and jurisdictions of law? This question moves beyond theory to the substance and practice of law. In its most immediate and pressing form, law in its classical definition concerns persons, actions, and things. As formulated by Cicero, though in essence this was always the scholastic position, a person is someone who speaks, an orator, a site or 'mask' of communication; an action is a performance or staging of the real, an enactment of truth being best translated in terms of the theater of justice and law; while things are the *res* of the public sphere, the affects and bonds through and across which social interaction occurs.³² The question of law, therefore, immediately engaged with what Foucault would later discuss in terms of life-style or aesthetic of living and what we medievals then and now should recognise as the intimate public sphere, a paradoxical or liminal domain of transgressive rules, of serious pleasures and jocular or modest knowledges.

Let us look at the corpus of this law and recollect at the same time that this very notion of a body of laws suggests an attention to the physical texture, the embodiment and sexuality of such stagings of the real that were known then and opaquely still as laws. The *Tractatus de Amore* contains twelve precepts or principles of love,³³ twenty-one judgments of amorous disputes and questions of love from women's courts,³⁴ as well as a Code of Love comprised of thirty-one clauses.³⁵ The treatise itself also contains many further discussions and resolutions of questions or casuistic problems of love that range from disputations on the sorrows and pleasures of love to the grounds for choosing or rejecting a lover, ending a relationship, or

31. MICHÈLE LE DOEUF, *LE SEXE DU SAVOIR* 274-75 (1998).

32. For a technical account, see C.O. BRINK, *Quintilian's de Causis Corruptae Eloquentiae and Tacitus' Dialogus Oratoribus*, 39 *CLASSICAL Q.* 472 (1989). More broadly on theater and the rhetoric of law, see Peter Goodrich, *Law*, in *THE ENCYCLOPEDIA OF RHETORIC* (Tom Sloan ed., forthcoming 2001).

33. See CAPELLANUS, *supra* note 12, at 117.

34. See *id.* at 251-71.

35. See *id.* at 283.

consummating a passion. The *Carmina Burana* contain numerous references to courts and judgments of love as well as several substantive judgments on issues such as whether pure love was preferable to the physical pleasures of sex or whether knights or clerics made better lovers.³⁶ The poetry of the troubadours and of the trobairitz equally contain numerous tensons, judgments on questions of love and disputes between lovers. In the later and revived moments of the courtly tradition, further questions and judgments can be found in Boccaccio's *Filocolo*,³⁷ in Christine de Pisan's *Book of Three Judgments*,³⁸ in Alain Chartier,³⁹ in Mahieu le Poirier's *Cour d'Amour and Suite Anonyme*,⁴⁰ in Guillaume de Machaut's *Judgments of the Kings of Behaigne and Navare*,⁴¹ and then also in *Las Leys d'Amor* and *Las Flors del Gay Saber* that established the Gay Consistory and the mid-fourteenth-century tradition of poetic tournaments and their judgment by a judicial college or Consistory governed by the rhetorical rules that bore the name of laws of love.⁴² In the later tradition, further judgments are found in Martial d'Auvergne's *Arrêts d'Amour*, in de Visé, Callières, and more interestingly, in the writings of the *précieuses* and particularly those of Madeleine de Scudéry, Marie Catherine Desjardins (Madame Villedieu), and Madame de Montpensier.⁴³

For those who do not know or who are momentarily forgetful of the judgments of love, they are best or at least most briefly depicted as addressing the affective space, the intensity and duration of amorous affairs. A variety of judgments thus addressed the signs of passion, the occasions of physical contact and pleasure, the

36. See *CARMINA BURANA* (A. Hilka et al. eds., 1930).

37. GIOVANNI BOCCACCIO, THIRTEEN MOST PLEASANT AND DELECTABLE QUESTIONS OF LOVE, ENTITLED: A DISPORT OF DIVERSE NOBLE PERSONAGES (Harry Carter ed., C.N. Potter 1974) (1566).

38. See DE PISAN, *Trois Jugemens*, *supra* note 12; see also CHRISTINE DE PISAN, *LE DEBAT SUR LE ROMAN DE LA ROSE* (Eric Hicks ed., 1977).

39. See Alain Chartier, *La Belle Dame sans Merci*, in *THE POETICAL WORKS OF ALAIN CHARTIER* 328 (J.C. Laidlaw ed., Cambridge Univ. Press 1974) (1617).

40. See LE POIRIER, *supra* note 12.

41. See GUILLAUME DE MACHAUT, *LE JUGEMENT DU ROY DE BEHAIGNE* (n.d.), reprinted in *LE JUGEMENT DU ROY DE BEHAIGNE AND REMEDE DE FORTUNE* (James I. Wimsatt & William W. Kibler eds., 1988).

42. See *LAS FLORS DEL GAY SABER ESTIER DICHAS LAS LEYS D'AMORS* (M. Gatién-Arnoult ed., Slatkine Reprints 1977).

43. On the *précieuses*, see the general account in JEAN-MICHEL PELOUS, *AMOUR PRÉCIEUX, AMOUR GALANT* (1654-1675) (1980); for a more recent discussion, see also MYRIAM MAÎTRE, *LES PRÉCIEUSES: NAISSANCE DES FEMMES DE LETTRES EN FRANCE AU XVIIIE SIÈCLE* (1999). For an account of the *précieuses* and their laws, see Peter Goodrich, *Epistolary Justice: The Love Letter As Law*, 9 *YALE J.L. & HUMAN.* 245 (1997).

parameters of fidelity, and the place, quantification, and other roles of humor, sorrow, and violence in amorous encounters. Gauged most openly to the carnal and illicit realm of passionate love and its ludic or gay knowledges, the judgments also increasingly focussed upon the hermeneutics of the love affair: the Code of Love listed the items that could properly be gifts to a loved one, the occasions and ruses of correspondence between lovers, and the times and forms in which they could meet. In this context, the role of the confidante, of servants, friends, and other media of communication, was also much disputed and judged.

If we move from the explicit judgments, precepts, and rules to the doctrinal traditions of the laws of love, a remarkable conspectus of texts dealing not only with casuistic *quaestiones amoris* but equally with the rules of love can be traced from the reception of Ovid's *Ars Amatoriae*, to Christine de Pisan, Hélisenne de Crenne,⁴⁴ the anonymous Chaucerian *Court of Love*,⁴⁵ the *Confessio Amantis*,⁴⁶ *The Flower of Friendship*,⁴⁷ and all those later women and men who staged, disputed, or described the courts of love. This doctrine—*traditio* or *communis opinio iuris amantis*—provides, in other words, the interpretative framework through which amatory jurisprudence read and applied the laws and other rulings, principles and precedents, and maxims and dicta of lovers' laws.

The defensiveness that must at some level be associated with introducing lists of names and texts should not distract attention from the underlying issue which is that of the uneasy and at times competitive or antagonistic coexistence of differing jurisdictions. The *querelle des lois* is in this context both an assertion and, latterly, the revenge of an amorous jurisdiction and its laws of love upon the increasing closure of the formal rule of law. The embrace of the emotional geographies of the polity, the cartographies of the embodiment of desire, the rules that resolved the degrees of pleasure

44. HÉLISENNE DE CRENNÉ, *LES ÉPISTRES FAMILIÈRES ET INVECTIVES DE MADAME HÉLISENNE* (Jerry C. Nash ed., 1996) (1538). For an English translation of one of De Crenne's works, see HÉLISENNE DE CRENNÉ, *THE TORMENTS OF LOVE* (Lisa Neal ed., Lisa Neal & Steven Randall trans., Univ. of Minn. Press 1996).

45. Anonymous, *The Court of Love*, reprinted in 7 *THE COMPLETE WORKS OF GEOFFREY CHAUCER* 409 (Walter W. Skeat ed., 1897).

46. JOHN GOWER, *Confessio Amantis* (1390), reprinted in *THE COMPLETE WORKS OF JOHN GOWER: THE ENGLISH WORKS* 1 (G.C. Macaulay ed., 1901).

47. EDMUND TILNEY, *A BRIEF AND PLEASANT DISCOURSE OF DUTIES IN MARIAGE, CALLED THE FLOWER OF FRIENDSHIP* (1573). For a modern version, see EDMUND TILNEY, *THE FLOWER OF FRIENDSHIP: A RENAISSANCE DIALOGUE CONTESTING MARRIAGE* (Valerie Wayne ed., Cornell Univ. Press 1992).

or of suffering, the pains of death and the ecstasies of kiss, caress, and coitus, juxtaposed another law beside that of municipal and commercial jurisdictions. The laws of love were an assertion of an emotional polity, an intimate geography, and a corporeal and desiring reality. Where Bloch suggests that courts of love “act as a further sign of a homological rapport” between amorous and judicial institutions,⁴⁸ I would like to propose something more pleasant and less untrustworthy than a homology. The *querelle des lois*, the elaboration of a jurisdiction and corpus of laws of love, expresses a necessary and indeed urgent dimension of all law. In the end, a significant dimension of legality necessarily rests upon and intervenes in the world of embodiment and relationship. Yet it is only amatory jurisprudence that has or can address the affective bonds that are expressed in or projected by the actors in the drama of formal law.

The emotional cartography and casuistically expounded ethics of the laws of love are intrinsic to the structuring and the transmission of intimate spaces, of the passions, of love, lust, anger, hate, jealousy, sorrow, and longing, as dimensions both of judgment and of law. The *querelle des lois*, in other words, suggests a complex embrace or enfolding of different laws; an enfolding which historically has left formal legal rule as the visible surface or apparent sovereign of the order of laws. Be that as it may, the notion of an enfolding of laws suggests both embrace and difference, appearance and occlusion.

The metaphor of the fold doubtless has a variety of sexual or gender-based connotations. However one might wish to elaborate such allusions, they also offer a final point as to the *querelle des lois*, namely, that of their relation to the *querelle des femmes* in the sense of the relation between laws of love and the historical and social definition of femininity. Genevieve Fraisse has recently and rightly warned against the danger of simply equating emotion, care, and love with femininity.⁴⁹ In this instance, and particularly in relation to women’s courts and judgments of love, her point is a persuasive one. The jurisdiction of the laws of love and the concept of an intimate public sphere within which they are elaborated and applied—the salons, alcoves, conservatories, consistories, gardens, and dreams—may well be a space of difference, but it is not a space of one or other gender. The reason is simple: Amatory jurisprudence is concerned with the intermediate domains of relationship and with the space

48. See BLOCH, *supra* note 2, at 254.

49. See GENEVIÈVE FRAISSE, *LES FEMMES ET LEUR HISTOIRE* 74 (1998).

across which desires are communicated. That "space in between" belongs to neither gender and cannot be appropriated by any single identity or genre. Precisely by virtue of its intimacy, it cannot be owned but can only be felt. Indeed it does not bear a rationalistic or proprietorial definition; it is a law that is made in the image of its very staging.

III. AMATORY JURISPRUDENCE

I suspect that covertly, secretly, I am suggesting by way of the example of the laws of love a species of training that the medievals would have termed *in utroque iuris* (in both laws). The *vinculum iuris* should in this view be offered as a choice of laws or as a partial law, and *affectio*, or indeed *gaudium iuris*, could be its counterpart in the jurisdiction of the affections or geography of intimate desires. Affects accompany all interactions, and that is as true of legal processes and judgments as it is of teaching, parenting, or hugging the road. If the *querelle des lois* at one level simply argues that rhetoric too can play the law, then indeed it does play the law and informs a jurisdiction of its own through the lengthy debate and disquisition upon the ethics of emotion and the pain and pleasure of passions.

Returning again to the historiographical path charted in this Article, the analysis of amatory jurisprudence as law can begin by reference back to the loveday (*jour d'amour*) and its various procedures of settlement or resolution through amity and love. Here the issue was initially and directly that of a choice of laws, and the question posed to historians is precisely that of why this largely unacknowledged jurisdiction was so pervasive and so popular. The answer would seem to relate to the local character of the action *per amorem* and so also to its intrinsic links to the polity of friends and neighbors, a polity explicitly defined in terms of affect, relationship, and *caritas* (care). It was the need to maintain the affective bonds of local community, together with the necessarily continuing nature of the relationship between disputants—their proximity in every sense—that made love a procedure preferable to the antinomic character of legal process and the separation imposed by formal legal judgment.

In more distinctly jurisprudential terms, the *concordiae* and *conventiae* studied by Stephen White evidenced a number of distinctive features.⁵⁰ The agreements never divided the parties into

50. See White, *supra* note 28.

winner and loser, but rather always left each party with something of what they had claimed or resisted surrendering. In addition, the compromise, rather than separating the disputants, would bring them together and forge new ties, if not of friendship or love, then at least of recognition and accommodation. Parties would forgive, pardon, pray, or even give something to the other, and the reconciliation as a whole would be marked by the performance of some symbolic act, such as a kiss, a shared meal, the placing of a knife upon the altar, or the exchange of gifts. Granted the propinquity, the intimacy of medieval communities, the advantage of love over law lay equally as much in the benefit that it provided to the collectivity as in the satisfaction that it provided to the subjects of the dispute. Moreover, White acknowledges that both adversaries and the community and friends "believed that [*conventiae*] were not only 'firmer' than judgments, but also, in some sense, more 'just.'"⁵¹

It is equally a sense of the justice of love, a sense of a different relationship between knowledge and power in the domain of affects, that seems to have governed the elaborations of amatory jurisprudence. Felicity of judgment, poethics, and an attention to appearance, to images and to bodies, seem to have been the distinctive features or combinatory logic of amatory jurisprudence. More than that, if it is interpreted as a jurisprudence, as a knowledge of a legal jurisdiction, then it should be possible to list synoptically and preliminarily how it knows, what it knows, and how it interprets and maps the emotional spaces of social life. At the risk of an appalling syncretism that mixes judgments and poems, codes and fictions, and also and perhaps worse plays havoc with the historical specificity of the emotions, I will offer a brief tabulation of some of the more significant features of amatory jurisprudence as practiced in the long term of the courts and judgments of love.

A. *An Epistemic of Amatory Law*

Like any casuistry, the judgments of love elaborated the rules of its jurisdiction from the pathology of amorous disputes. It knew love through its violence and its passion; it knew the social life of the emotions through their excess or their death. Where formal law has tended to match the extremism or pathology of cases with the purity or abstraction of norms; where, in other words, municipal law has

51. See *id.* at 303.

endeavored to distance itself from the object of judgment and so to act with cold reason and judicial detachment, the logic of amatory jurisprudence has been one of engagement and of dialogue. To engage the passions is to attempt to communicate rather than to judge; it is in essence the suspension of judgment or of knowing, aporia rather than verity. Put differently, the rhetoric of excess—of hyperbole, meiosis, ecphonesis, auxesis—is that of the transgression of the limits of communication. It seeks recognition or help as much as it seeks definition or dismissal. It is in this vein that amatory jurisprudence was most distinctive in its aporetic or even experimental attention to the corporeal signs of excess and to the deferral of judgment as the paradoxical form of judgment.

With respect to the semiotic of excess, the pathology of the emotions, the Code of Love is perhaps the most interesting example. Love was understood as marking the body, and much of the Code is thus given over to a corporeal semiotic of desire. To be in love is marked by stammering, blushes, fainting, palpitations, perspiration and other excretions as well as loss of appetite and sleeplessness. Jealousy and obsession, a constant reverie in which the image of the beloved was obsessively in mind and present in every act, was a measure of the degree of love. In that such physical excitations and colorations were the marks of the passage of desire, the laws of love were as much concerned with providing a space and legitimacy for these intensities as it was with judging their mundane effects. To love was to risk everything; to cease to love was to die. In that context of extremes, knowledge was explicitly a form of engagement, a species of intervention, even or especially when that intervention did not know or judge but rather attended to the signs of a dilemma and gave a space or structure to the expression of the agonies or ecstasies of desire.

The distinctive epistemic that runs through the judgments of love is thus one of dialogue and of doubt. With regard to the dialogic form of amatory judgment, we have already noted the principle of exchange evident even in the action *per amorem* of medieval local law and lovedays. It needs only to be added in this respect that the absence of extreme determinations in courts of love no doubt reflects the absence of violent means of enforcement. The strongest penalty imposed in the women's courts of the *iudicia amoris* was exile from the domain of love. The more usual penalty was the sanction of the disapprobation of the court, and occasionally a decision was proffered on the liberty of a lover to end a relationship or the duty to remain

faithful to an estranged or distant love. The principal feature of the judgments was thus not arbitrium but rather hermeneutic. Judgments were heuristic enterprises, exercises in dialogue and exchange that sought both to learn from and to augment the project and the space of amorous affairs. Even in the later tradition in which gay science had come to connote parody or farce, rather than lyric or poetic ethos, judgment was much less important than the dialogue between the court, the parties, and where appropriate the procurators of love, the doctors of love and other representatives of expertise in the fashions and expressions of desire.

Perhaps aware that, especially within the domain of love, identity is precarious, that love can effectuate dramatic changes of mood and personality, the courts consistently remained open to the possibilities of indecision. To take an example from Capellanus, one judgment concerned the case of a confidant who betrayed his position of trust and, rather than delivering the amorous messages of his friend, seduced the woman to whom the correspondence was directed.⁵² The Court of the Countess of Champagne deliberated at length upon the case and eventually decided that the deceitful confidant deserved the lover he had found, a woman who had not blushed while complying with his betrayal of his trust. The lovers richly merited each other and were at liberty to enjoy that love. In later case law, a comparable indeterminacy, one that both acknowledged what the court did not know and sought to learn from it, can be traced with relative ease. Christine de Pisan, for example, formulates a book of three judgments in which no judgment is ever given.⁵³ The *Suite Anonyme de la Court d'Amours* includes a final case in which six women petitioned the court to determine which of them was the best lover. After listening to their pleadings, the Bailiff concludes that each is the best "according to their desire" but that beyond that "I do not know."⁵⁴ In Boccaccio's *Filocolo*, the judge Fiammetta engages in dialogue with her petitioners and revises her judgments in response to their reactions to them.⁵⁵

Resisting the temptation to provide further examples, the distinctive epistemic feature of amatory jurisprudence thus seems to lie in the complex and historically slow process of learning through

52. See CAPELLANUS, *supra* note 12, at 265.

53. See DE PISAN, *Trois Jugemens*, *supra* note 12.

54. See LE POIRIER, *supra* note 12, at 234-36.

55. See BOCCACCIO, *supra* note 37.

the proximity of wager or trial rather than through the abstract and violent application of formal rules. The justice of love did not necessarily lend itself to logical excisions or to all-or-nothing judgments: the pathologies of desire required attention, dialogue, and pretty words, or treatment far more often than they needed or would benefit from grave and formal determinations. In a final and poetic example from de Visé, a court was petitioned by a frustrated lover who sought permission to end his life. After a lengthy and probing dialogue, the court resolved that it was not within its competence to determine this issue; it was for the plaintiff's lover to decide and he should go to her.⁵⁶

B. *Aesthetics and Justice*

The *querelle des femmes* was often a polemic over the status of women as images. Particularly in its religious moments, though certainly not only then, woman was defined as appearance and dismissed as image rather than substance, "carnal pretence" rather than spirit or referent. Painted faces, like painted words, were semblances to be avoided, lures to servitude or to the loss of truth. Several feminist historians have responded imaginatively to this polemic and have argued that the history or, more technically, the genealogy of women must be the narrative and recovery of images. This work entails both making visible the discourses and ruptures that obscured those images and theoretically elaborating the epistemic strategies of excluding the image from the domains of knowledge and, in my example, the jurisdictions of law.

Madame de Villedieu begins her *Annales Galantes* with the observation that,

[G]reat decisions and events do not take place instantaneously, they must be talked about and seen for their excess to be appreciated and their extremity loved. I, therefore, augment history with secret meetings and amorous discourses. If these are not those actually pronounced, they are those which ought to have been uttered. I have no more faithful memories than my judgment⁵⁷

More recently, Genevieve Fraisse has suggested a comparable return

56. See HONORÉ D'URFÉ, LES EPISTRES MORALES ET AMOUREUSES 547 (Paris, Gilles Robinet 1619).

57. 1 MARIE CATHERINE HORTENSE DESJARDINS, ANNALES GALANTES DIVISÉE EN HUIT PARTIES (Paris, Barbon 1670) (nonpaginated). Desjardins also published under the name Madame de Villedieu.

"to the ruptures, and beginnings which mark and resurrect the construction of a problematics interior to time. A work of anamnesis that looks to origins" and traces the aporia of identity and of sexual difference through the strategies and discourses that constitute its visible presence.⁵⁸ Michelle Perrot, as well, declaims that "the history of women is that of an unravelling of images";⁵⁹ a history, in other words, of the theoretical construction of women as images, a history of representations.

The *querelle des lois* in this regard was precisely concerned, in its masculine part, to keep images out of the formalities of law. The point is that the exclusion of images from knowledge was an exclusion of women from law. Amatory jurisprudence, in contrast, both sought to know through images and imagination and devoted a significant portion of its doctrinal energies and substantive judgments to questions of appearance. De Visé, in his *Nouvelles Galantes*, gives the example of a case of love in which a man visiting a friend's house for the first time notices a recent portrait of an exceptionally beautiful woman.⁶⁰ Granted that the portrait is recent, he assumes that the woman can be found and remains at the friend's house so as to facilitate his search. The portrait hangs in the dining room and the friend's sister sits under it. At each meal the protagonist stares longingly at the picture, sighs, goes pale, and otherwise evinces all the signs of being in love. The sister imagines that she must be the object of this passion. After the enamored man has failed to find the subject of the portrait, he asks his friend who it is and is shown a storage room packed full of paintings of this one woman. She was an exceptionally beautiful ancestor who had stipulated in her will that each generation should seek out the best artist living in their time and have him paint her portrait in the latest style using her original portrait as their model. When the sister understands the object of the visitor's affections, she bursts into tears. If he had been tricked by the portrait, she had equally been duped by his apparent desire for her. Realizing the parity of these mistakes as to uncertain identities, the couple fall in love and become lovers.

It does not require the theory of object choice to realize the extent to which love is generated by appearances, by images and by faces. It may not be the deepest love but it is probably the most

58. See FRAISSE, *supra* note 49, at 29.

59. See MICHELLE PERROT, *LES FEMMES, OU, LES SILENCES DE L'HISTOIRE* 351 (1998).

60. See DE VISÉ, *supra* note 12, at 311.

active, and hence historically the danger and the value of images. In the *querelle des lois*, amatory jurisprudence was both a play upon images—a hermeneutic interpretation of appearances in terms of images, an imagistic or simply imaginative response to problems of representation—and a governance or mapping of the domains and strategies of the image. From the Code of Love to the annals of the *précieuses*, amatory jurisprudence was directed most intensely towards the domain of appearances, the realm of communication and of representation. Thus the Code detailed the physical signs of love and stipulated that an image of the beloved should always be present in the mind of the lover. In later amatory law, the principle of recognition and response to images is elaborated not only in terms of the grounds for choosing or rejecting suitors but also with respect to the role of fashion in love and of dress as a sign of both desirability and affection.

In a case reported by Martial d'Auvergne, a man complained that his lover spent too much upon dresses and asked the court to prohibit further sumptuary extravagance. The court called tailors to give evidence as to whether the woman's clothes were exorbitant either in cost or in cut. They concluded from that evidence that the woman dressed appropriately and *à la mode*.⁶¹ In other cases ranging from the *trobairitz* to the *carte de tendre*, the laws that map the intimate public sphere attend in particular detail to the appearances and expressions of desire, while the doctrine of *amour lointain* is devoted almost exclusively to the issue of the signs, the images and mediations that structure a love at war with distance. Questions such as when it was appropriate to kiss in public, how amorous meetings were to be arranged, where they were to take place, and what dues or symbols of love were to be exchanged were constantly debated and judged. In all of these cases, amatory jurisprudence acknowledges and engages the phantasmatic structure of justice, with appearances, images, and the other weightless inscriptions of burning desires.

C. Gay Interpretation

A system of law is a system of communication. As a consequence, it is marked most distinctly by its theory of interpretation. Amatory jurisprudence has both benefited and suffered most from the levity or simple joy of its interpretative procedures. In the

61. See D'Auvergne, *supra* note 8, at 143-44.

tradition of amatory jurisprudence, the end of love is joy, either physical or spiritual ecstasies, sometimes both. A justice that could not respond appropriately to passion, that did not constitute an erudition *in eroticis*, would not be justice at all. At its simplest, gay science was an interpretation *in eroticis*, an interpretation bound not to precedent but to possibility; not to law but to love. If amatory justice at one level meant attending to and recognizing the emotional plight of litigants, of those who wished to dispute *per amorem*, then interpretation was itself an amorous act, one motivated by and responsive to the cause of opening rather than closing the sites, discourses, and images through which love passed.

The initial and most consistent feature of amatory hermeneutics is, therefore, that it engages directly and passionately with the cause of love. In a case law that ranges from the *iudicia amoris* to the latter-day *ars dictaminis* and its formulary handbooks on love letters, the overwhelming motive of judgment was that of holding open the social space or domain of love. The law of love was explicit that it only applied to the living. Those that did not love did not belong within the court; those that did not love were lost to life. Much case law is thus devoted to enticing or seducing individuals into love, with granting permission, legitimating feeling, and overcoming fear. The purpose of judgment and the justice of amatory interpretation was that of facilitating desire, of opening and maintaining the space of love, the nonproprietary space in between the lovers, what Irigaray terms the *entre deux*.⁶²

As to the substantive interpretations offered in the cases, two general features of amorous interpretation can be depicted. First, the form of judgment was explicitly erotic. Where a lover had stolen a kiss in public and his lover pleaded what Benoit de Court expounds as *larrecin publique* of a kiss, the court wished to support his defence of justification: the occasion had presented itself and he had acted on impulse.⁶³ The resolution offered was that his lover should kiss him freely in public, so long as her husband was not within sight. In terms of the specific cause of action, she should give him ten kisses, each lasting as long as it takes to say the *de profundis*. In other cases, the same form of interpretation and judgment is frequently found. A lover had mistaken a passionate kiss for violence and hit her lover

62. See LUCE IRIGARAY, I LOVE TO YOU: SKETCH FOR A FELICITY WITHIN HISTORY 109-11 (Alison Martin trans., 1996).

63. See DE COURT, *supra* note 8, at 259.

with her hat so fiercely that the hatpin had cut his nose. She was ordered to bandage the wound every day, morning and night, and specifically to moisten the wound with the saliva of her kisses until it was healed.⁶⁴ Where a woman had playfully surprised her lover in public by putting dirt down the back of his shirt and he had responded violently, the court listened at length to the phantasies of the outraged woman and her friends. She wanted him to be tied naked to a post in the courtyard where he had hurt her. There she and her friends would beat him with birch sticks. After debating this and other possibilities, the court opted to punish the man by having him stripped naked by three old women and then thrown into the bushes wrapped in a foul smelling blanket.⁶⁵

The second substantive feature of amorous legal hermeneutics is their hedonism. The law is read in terms of an explicit and direct attention to corporeal pleasures. While it is true that this hermeneutic is marked by lightness and even a certain ludic inversion of secular law, the object of interpretation is consistently the facilitation of amorous encounters. Social space is read according to the possibilities of desire and the problems or questions of love are elaborated as problems of transmission: How is desire to be communicated across hostile social spaces? What messengers and media best approximate encounter? How are lovers to make the transition from absence to physical presence? It is in relation to the last question that the troubadour and trobairitz most famously marked the temporal stages of consummation and mapped the moments and parts of the body that could be touched and tasted day by day, night by night.

D. *Historical Geographies of the Intimate Public Sphere*

A law that seeks to understand the affective public sphere, the emotional life of institutions; a law that engages with phantasms and judges images; a law that mixes wisdom and desire, spirit and body, is evidently a law that differs markedly from the conscious strategies of justice in the extant public sphere. I have not here had time to digress upon all the different ways that amatory jurisprudence might add to or supplement formal law or our knowledge of the causes of public acts. This other country or *carte de tendre* is known by anamnesis and

64. See D'Auvergne, *supra* note 8, at 14-15.

65. See *id.* at 213-14.

exists only to the extent that the image is valued and affect is understood. In a sense, these two prescriptions are part of the same hermeneutic. Anamnesis refers to a prior or incorporated memory, the bodily inscription of ethic or habit that constitutes the literal corpora or subjects of law. To say that the body knows or that it is necessary to map the corporeality of knowledge is simply to say that experience, affect or soul, has a place in our knowledge of law. To understand affect, charge, or repetition, whether through the cartography of past erotic erudition—as, for example, the *carte de tendre* of the *précieuses*—or through our own incorporation of knowledge, is necessarily to attempt a species of self-criticism predicated upon the need to comprehend our own past.

Reverting to my opening anecdote of Valentine's Day rites in Paris, the narrative was most immediately one of protest and of conflict of laws. It was also, however, a narrative that could be understood most productively as one of overlapping historical and legal spaces. For the mid-seventeenth-century Parisian amatory lawyers, the *précieuses*, the politics of judgment, of justice in relationship, of hedonic laws, was to be understood in terms of social spaces and of how they are marked and mapped.⁶⁶ To the extent that we now necessarily recognize the virtuality of laws—that a system of law is a system of thought—the cartography of the emotional public sphere produced by the *précieuses*, the *carte de tendre* or social map of the heart, provides an excellent example of an erotic erudition that traces an alternative law that itself dates back to Aphrodite and Diotima, to Sappho, to the *trobairitz*, to women's courts and the judgments of love. The contemporary *querelle des lois*, however, tends to preclude attribution of the status of law to such a polemical or explicitly affective mapping of relationship. That, however, is simply a *prise de position*, or in Gadamer's terms a prejudice. From the other side of the *querelle des lois*, it can equally be argued that the contemporary legal mapping or form of human relationship, that of a belligerent contractually defined public sphere and its agonistic or actuarial discourses of judgment, is both partial and emotionally numb. If affect is valued; if the intensity and duration of relationship is also a potential idiom of law, then the feminist map of the *précieuses*, the endeavor to do justice to relationships between the

66. On the *carte de tendre*, see 1 MADELEINE DE SCUDÉRY, CLÉLIE, HISTOIRE ROMAINE 399 (Paris, Augustin Courbé 1660) (1654) (currently available edition). For contemporary commentary, see JOAN DEJEAN, TENDER GEOGRAPHIES: WOMEN AND THE ORIGINS OF THE NOVEL IN FRANCE (1991).

genres and between difference, has every right to claim a place in the sphere or pantheon of laws.⁶⁷

CONCLUSION

Our past is inscribed by and known through the pattern of our relationships, through love and through friendship. The gender performances, hedonic strategies, or covert knowledges of love that we inherit and incorporate, repeat and act out, are the *camera obscura* through which we view the past of love and the possibilities of amatory law. My concluding point is thus to reiterate that in an era in which the unresolved *querelle des femmes*, or opposition of the genders, still dominates the quotidian life of the institution, the plural account of distinct and overlapping jurisdictions—what Nietzsche termed the comparative history of laws—still gets written, if at all, from positions lodged within the structure of antinomy or opposition. The *querelle des lois* is in this sense a novel concept. It refers to the affective and epistemic hierarchy through which we claim to know and order both social and historical accounts of law. Insofar as institutional custom or prejudgment still maintains a clear hierarchy of both knowledge and law, the *querelle des lois* remains an open and opaque topic. Suffice it to say that it continues and indeed that in an explicit sense it has hardly begun. In that its object is a space between genders and lovers, a gay and undefined domain of emotive transmission, of touch and caress, the laws of love open identity to doubt and mix both genres. In a contemporary idiom, there is nothing heteronormative about lover's laws. There is only the patient and long term attempt to construct a jurisprudence, a knowledge of the space and drama of love, the power of images and the bonds of affection, in the historical and political comedy of life.

67. For a reading of Irigaray in these terms, see Alain Pottage, *A Unique and Different Subject of Law*, in *LAW AND THE POSTMODERN MIND: ESSAYS ON PSYCHOANALYSIS AND JURISPRUDENCE* 13 (Peter Goodrich & David Gray Carlson eds., 1998).