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A BAD SUBJECT

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I have long had my doubts about identity politics as a useful source of political struggle, particularly in the wake of the critique against feminism mounted by women of color. On the political level, I have wondered whether we are better off mobilizing a strategic coalition of fellow travelers who share our particular political commitments rather than our decentered and intersectional identities (to the extent they can share them). If I buy into identity politics, I buy into it as a strategic matter, as a way of advancing the political commitments I care about.

I do so because I acknowledge that the rest of the world thinks strategically about identity as well, and privileged players often use status and identity to justify the distribution of resources, opportunity, and legal protection. Perhaps playing identity politics is a war of position, in which we are forced to resist on the oppressor's terms by mobilizing identity politics on behalf of our political commitments, to counteract the ways in which identity is used against us. Thus, to play identity politics well, we must come to understand how it is that our identities are partly constructed for us, and not by us.

In the Afterword for this symposium, Angela Harris writes that "[t]he first step in the transformative project of identity politics is a critical attention to the process by which some groups are defined as bad subjects and denied full access to the resources of self-fashioning."[1] As Harris notes, certain groups of people traditionally have been defined as "incapable of being proper political and economic subjects" and thus undeserving of law's protection or facilitation.

I want to focus for a moment on the bad subject. Maybe the idea of the bad subject has captured my attention because I suspect that I have been a very bad subject indeed, as far as the law is concerned.

What makes a "bad subject," and what does it take to be a (good) subject? How does the concept of subjectivity link up with that of agency and

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[1] Angela Harris, *Afterword: Bad Subject: The Practice of Theory and the Constitution of Identity and Legal Culture*, 9 CARDOZO WOMEN'S L.J. 515 (2003).

autonomy? Kathryn Abrams has written that women are bad subjects in the eyes of the law because they do not easily fit into the simple version of the subject described by law: someone capable of "uncompromised agentic self-determination, to whom legal authorities ascribe full responsibility for actions taken . . ."[2] Under this definition of the legal subject, the law defines subjects in terms of their ability to undertake self-direction. Law holds these subjects accountable for their actions.

On the other side of the equation, law offers protection to subjects who have been wrongfully deprived of their agency. Law offers relief or compensation to those subjects who have been deprived—because of harassment, discrimination, or all manner of torts or criminal injuries—of their ability to direct their own lives. Indeed, to merit relief or compensation, often plaintiffs must prove that their agency, their subjectivity, has been significantly diminished.

Thus, to be a good subject, women must fit into one of these two binary categories. As Abrams explains, "subjects are expected to be unambivalently assertive or thoroughgoingly submissive, fully resilient or wholly compromised; courts may respond with confusion or resistance when subjects manifest . . . greater context-based variability.[3]

Women are confusing.[4] Women do not neatly fit into either of those two categories—we are at once too autonomous and not autonomous enough. With regard to the latter, Abrams writes about the way in which women exercise "partial agency" as subjects "whose agency emerges against the backdrop of, and co-exists in tension with, systematic gender-based oppression." Thus, we are bad subjects because we will never be able to claim a pure and wholly uncompromised self-determination. Patriarchy, racism, and feminine poverty make that impossible.

Similarly, to the extent that we act in some way that demonstrates self-direction, even if it is in the face of significant oppression, we are also "bad subjects." If we manage to find a way to resist our injuries, to act in spite of systematic gender oppression, we may not qualify for the law's protection. As Abrams notes, aggressive victims are a problem for the law. "A woman who suffers a sexualized injury but is nonetheless self-possessed or even assertive, may evoke perplexity or disbelief from a liberal judiciary."[5]

The women described in this symposium seem to me to all be bad subjects. Perhaps we can say that they fall into three categories. First, there

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[2] Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 Colum. L. Rev. 304, 351 (1995)

[3] Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self Direction*, 40 Wm. & Mary Law Rev. 805, 845 (1999).

[4] Harris, *supra* note 1.

[5] *Id.* at 845-46.

are those women who are bad subjects because systematic gender oppression contaminates their legal status as autonomous subjects. These are people whom the law sees as having full and uncompromised self-direction, even though they might well also be objects of gender oppression. This category includes women like Andrea Yates, the mother of five who had accepted responsibility for as many children as the Lord would send, who then drowned the children she had home schooled and cared for full-time. Although the jury decided that Andrea Yates was a legal subject, and had exercised uncompromised self-determination, Marie Galanti notes that her self-determination may have been compromised by the rigid gender roles within which Yates constructed her life.[6]

Similarly, the law held Yvonne Wanrow fully accountable for her decision to stop a white child-molester in his tracks before he had a chance to hurt her children. As Jacqueline Mertz notes, the law did not recognize the way in which Wanrow's decision inevitably reflected an agency that was partially "compromised" by the sexism and racism that characterized her world.[7] I do not mean to suggest that Wanrow was not capable of acting autonomously; I only argue that her choices for self-direction were exercised in resistance to power, constrained in advance by a world in which it takes a gun to finally stop a drunk white male child-molester who has come uninvited to your home.

We are confused by Ally McBeal because her apparent agency as a lawyer is contaminated by her quite ambivalent wish to conform to the traditional gender roles. Victoria Alexeeva objects to the media's choice to present those roles as constitutive of the modern woman lawyer.[8] The women who suffer from non-sexualized forms of gender oppression fall into the first category as well. As Diane Gentry notes, the law constructs them as fully autonomous subjects whose agency is not affected by cartoons about them in the men's room or "earthy humor" in newsletters, and as not autonomous if the behavior complained of related to sexual activity or conduct.[9]

The second category includes those women who are bad subjects because their exercise of partial agency contaminates their official legal or social status as victims of oppression. The woman who chooses not to press

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[6] *See* Marie Galanti, *The Andrea Yates Trial: What is Wrong with this Picture?*, 9 CARDOZO WOMEN'S L.J. 345 (2003).

[7] *See* Jacqueline Mertz, *Women Of Color—What Their Voices Teach Us*, 9 CARDOZO WOMEN'S L.J. 205 (2003).

[8] *See* Victoria Alexeeva, *Images of Women Lawyers: Over-Representation of Their Femininity in Media*, 9 CARDOZO WOMEN'S L.J. 361 (2003). I actually read Ally as a parody of women's confusion about what roles they will occupy in the modern age.

[9] *See* Diane Gentry, *Title VII Limitations—Keeping the Workplace Hostile*, 9 CARDOZO WOMEN'S L.J. 393 (2003).

charges against her assailant, in an effort to exercise control over her own well-being, fits this category. As Jessica Dayton points out, the law defines her as a legal subject in need of patriarchal protection, when in fact she has moved to exercise agency and take responsibility as best she can from within a system of racial and gender oppression, although law doesn't recognize her exercise of partial agency.[10]

So too with the Christian or Latina or Muslim feminist, who seeks to define her religious and cultural connections in ways that do not involve misogyny and gender oppression. Society defines her as victim without recognizing her partial agency –witness the patronizing rhetoric around Muslim women in Afghanistan, who themselves had long been working to contest the sexism of Islam before U.S. troops showed up to "liberate" them. Similarly, Kimberly Charles points out the way in which the Christian feminist can work to transform Christianity into an institution that has rejected any affiliation with gender oppression.[11] In the same vein, Maria Victoria Castro skillfully describes the effort to transform what it means to be Latina to include feminist commitments, and how feminism might be transformed to consider the importance of Latina commitments.[12] Evita Peron certainly embodies the bad subject incarnate, in Castro's evocative description of her.[13]

The third category of bad subjects includes those women who are bad subjects simply because the law defines subject status in male terms, though it purports to offer a gender-neutral definition. Thus, as Ekee Ehrlich points out, pregnant workers are bad subjects because the idea of what it means to be a "good worker" is culturally constructed along male lines.[14] Similarly, as Autumn Mesa argues, female law students are bad subjects because the concept of what it means to be a "good law student" is constructed in ways that are consistent with male cultural practices. If to be a good subject is to be male, then women, as bad subjects, are left out.[15]

Likewise, one might take Marnie Franklin's argument to be that lesbian victims of domestic violence are bad subjects because the law constructs the relationship of domestic violence –male as active perpetrator and female as passive victim – in heterosexist ways.[16] Law is confused when both

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[10] *See* Jessica Dayton, *The Silencing of a Woman's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L.J. 281 (2003).

[11] *See* Kimberly Charles, *Sexism is a "Family Value,"* 9 CARDOZO WOMEN'S L.J. 255 (2003).

[12] *See* Maria-Victoria Castro, *La Mujer Argentina Que Soy Yo/The Argentinean Woman That I Am*, 9 CARDOZO WOMEN'S L.J. 321 (2003).

[13] *See id.*

[14] *See* Ekee Erlich, *Caution: Men at Work*, 9 CARDOZO WOMEN'S L.J. 409 (2003).

[15] *See* Autumn Mesa, *A Woman's Climb Up the Law School Ladder*, 9 CARDOZO WOMEN'S L.J. 379 (2003).

[16] *See* Marnie J. Franklin, *The Closet Becomes Dark for the Abused: A Perspective on Lesbian Partner Abuse*, 9 CARDOZO WOMEN'S L.J. 299 (2003).

perpetrator and victim are female. Law is also confused when, in the context of the legal family, both parents are female, or male,as is noted by Elisa Laird.[17]

Finally, in a category of its own, Pantea Jaridan's article on child prostitution highlights brilliantly the quandaries of the bad subject.[18] Are children exercising sufficient agency to criminalize their conduct when they engage in prostitution? Or are they simply victims of sexual oppression who should not be held responsible for what would otherwise appear to be an exercise of autonomy? In many ways, child prostitutes highlight the "fundamental contradiction" that women pose for the problem of legal subjectivity. Either we are infantilized, constructed as unable to exercise self-directed choices about our sexuality or economic choices, or we are constructed as uncompromisingly self-directed, without recognizing the way in which sexism, racism, poverty and age do in fact constrain our choices. Sometimes the law does both at the same time, in contradictory ways. But we do not fit neatly into either construction.

I want to end by making the case that we modern feminists (second, third or fourth wave, I am not sure these days) should take the bad subject as our patron saint. The "bad subject" is a complicated woman indeed. She resists easy classification. She doesn't conform to what the law expects of her, indeed, requires of her to either protect her or hold her responsible. Because she acts in resistance, she does not write her own story. Accordingly, some scholars do not characterize her conduct as the wholly "pure" agency of the intentional man. Because she resists, she is not "purely" a victim either, completely colonized by patriarchy, racism or heterosexism. (Once again, we women are condemned for our lack of purity).

In closing, I want to thank the contributors to this symposium for introducing us to these complicated women who are bad subjects. I want also to congratulate the contributors themselves for being very good "bad subjects." They have moved to resist a paradigm of publication that marginalizes the voice of the women law student, particularly when it speaks a different language or with a different voice. They have exercised agency – to call it partial agency seems to do it an injustice – in the face of sexist and racist assessments about what ought and ought not to be published. For that, they deserve our respect and applause.

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[17] *See* Elisa Laird, T*he Law is Straight and Narrow, How American Courts Define Families*,9 CARDOZO WOMEN'S L.J. 221 (2003).

[18] *See* Pantea Javidan, *Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California,* 9 CARDOZO WOMEN'S L.J. 237 (2003).