WOMEN IN WESTERN POLITICAL THOUGHT

JPP 343

Course Materials
Winter 2005

Professor Jennifer Nedelsky

Faculty of Law
University of Toronto

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The "self" and its capacity for autonomy, agency\(^1\), action, or creation are inherently elusive phenomena. The problem I want to address is what kind of language, what kinds of verbal images best convey the self and its capacity for autonomy. In particular, what kind of language, what sort of conceptual framework, directs our attention in the ways that are optimal for thinking about rights—that is, for all the inevitable debates over what should be called a right, how it should be interpreted, and how it should be implemented?

The language we use for the self and for autonomy is a kind of metaphor for something that cannot be fully captured. And metaphors inevitably direct our attention to some things and obscure others\(^2\). Nevertheless, some metaphors, some conceptual structures more easily or fruitfully direct our attention than others. The choice of language for the self and its autonomy is important both theoretically and practically. It has a major impact on the understanding of rights and on the kinds of social context that are attended to in debates about rights. And, as we shall see in the example of women accused of murdering their battering partners, dominant frameworks of thought have real consequences for people's lives.

My particular argument here is that the prevailing stripped down image of the "rational agent" of both law and political theory is unnecessarily and destructively narrow. In particular, it neglects or obscures the affective, embodied and relational nature of human self-hood. We need a language for legal and political discourse that directs our attention to these dimensions of our humanness.

It is important to develop such a language because an underlying conception of the self to which these dimensions are central is most likely to yield an optimal conception of rights. In making this argument, I shall turn to the concept of autonomy that, in the Anglo-American liberal tradition\(^3\), is treated as one of the core values that legal rights are to express, foster and protect. Conceptions of rights are thus based on particular understandings of autonomy, which, in turn,

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1. Sometimes the terms agency and autonomy are used interchangeably. Susan Sherwin offers a helpful distinction, which she summarizes as: agency (the making of a choice) and autonomy (self-governance). She argues that we need a relational conception of autonomy in order to distinguish genuinely autonomous behavior from acts of merely rational agency. "A Relational Approach to Autonomy in Health Care" from the Feminist Health Care Ethics Research Network, The Politics of Women's Health 1998. at ***
2. Move metaphor cite to here.
3. It is not my intention to make claims about all variants of liberalism. Hereafter, my references to liberalism and liberal legalism should be read to refer to Anglo-American liberalism.
reflect and presuppose an underlying conception of the self. Autonomy is thus, within liberal-legalism, the key mediating concept between conceptions of the self and rights. The “rational agent” is an agent capable of autonomy. I thus focus on autonomy not because I think it is the highest value or should always be the foundation of legal or political thought, but because autonomy holds that place within Anglo-American legal and political thought. A distorted picture of the self is likely to generate a distorted understanding of autonomy, and a system of rights designed to promote and protect that vision of self and autonomy cannot optimally foster and protect human capacities, needs and entitlements.

Here, building on my earlier work, I shall argue that the best language for autonomy is not independence, self-determination or control, but the capacity for creative interaction, which includes the capacity for self-creation. I will show how this approach makes the embodied, affective and relational nature of human beings central rather than peripheral. We shall also see that attention to these dimensions leads to attention to difference. I will then try to show how this different conception can make a difference, including sketching some examples of legal issues that we can understand better with this perspective.

Let me begin with a counter-argument: Of course, the “rational agent” is a stripped down conception of the self. The self that underpins contemporary liberal legalism is intentionally abstracted to capture the essence of “rights holders.” As such it is perfectly suited to its task, even if other domains of inquiry—such as psychology, literary narrative, theology, or even epistemology—may wish to explore and invoke a fuller, richer conception of humanity. Even if human beings are most fully described as embodied, affective and relational, why are these dimensions crucial to political and legal theory, and to conceptions of rights in particular? [A somewhat different, but related and very helpful formulation of the question is Hill’s use at end.] My effort to answer these questions runs throughout the paper and I will return to it specifically in my discussion of the difference that I think my approach can make. I begin with what I think of as the best justification for the abstracted self of liberal legalism.

The core (benign or defensible\(^4\)) purpose of a highly abstracted conception of the self is equality. We require some way of conceptualizing the vast array of humanity in a way that gives effect to the belief in the equal moral worth we share in common. If that equal moral worth is to translate into concrete legal and political rights, it may seem that we need a way to see each other not in terms of the obvious multitude of differences among us, but as equal rights-bearers, and in that sense identical to and interchangeable with one another. If, for example, law professors want to use examples of the liability “A” incurs to “B,” they must have the confidence that such shorthand will make sense, i.e., for the purposes of legal

\(^4\) I will not try to address the question of whether the exclusion generated by the dominant picture of the abstracted self has been part of its “purpose.” Nor will I try to account for the actual history of abstraction of the liberal self.
rights people can reasonably be depicted as the interchangeable units of "A" and "B." If we could only know their mutual rights and obligations if we knew the full details of the context of their lives and relationship to one another, it would hardly seem that we were talking about something that could be recognized as a legal right. The abstracted self thus captures the core equality and identity of people as rights bearers.

The problem is that to achieve this equal interchangeability crucial dimensions of human beings are stripped away, without which we cannot optimally conceptualize the rights that can best protect us and allow us to thrive. The language of rights is also a vehicle for articulating and institutionalizing core values of a society. Neither objective can be optimally pursued if the stripped down picture of the individual is actually misleading in ways directly related to those values, such as the nature of autonomy and the conditions under which it can flourish.

The trick is to find a way of capturing the core belief in the basic equal moral worth of all people (a basic tenet not only of liberalism, but of many wisdom traditions) without distorting the picture of humanity in order to articulate the equality. In the end, two different components are needed for an adequate framework for rights. First, is a purely formal claim of equal moral worth that serves as an underlying principle and a challenge to all claims of equal but different treatment: can they be persuasively justified as consistent with equal moral worth? In its purely formal quality it makes no substantive claims; it asserts nothing about the actual characteristics of human beings. Then must come a recognition of the need to attend both to those actual characteristics and to particular contexts in order to know what it would take to give effect to equal moral worth, to actually treat people as moral equals. (Of course equal moral worth does not mean equally morally worthy in the sense of the morality of any individual.)

I think a central part of the problem in the tradition of liberal legalism has been the move to an intermediate step: the assertion of rational agency as that which constitutes our identity as equals and thus forms the foundation for our claims as rights-bearer. Perhaps historically and philosophically, there was an unease with the way in which a purely formal claim of equal moral worth seemed a mere article of faith, something which by its nature could not be demonstrated or disproved. Perhaps some more substantive claim about why people are inherently equal to one another and deserving of rights seemed required – especially once the grounding in the soul became unavailable in legal and political discourse. At least since Kant, rational agency has been offered as this ground, with the further alleged virtue of providing a means for deducing the rights to which rational agents are entitled. But the treatment of rational agency as the core of equality and the foundation for rights claims has caused problems precisely because it is not a purely formal claim; it asserts certain properties as the ones relevant to rights, and denies

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the significance of others. In particular, as many feminists have argued, it denies
the relevance of our embodied nature, of emotion or affect, and the differences that
both our bodies and our feelings make manifest⁶. The problem lies both with the
conception of reason, as radically disconnected from the body and affect, and with
the conception of agency or autonomy.

I do not propose to rehearse all the arguments that have been made about the
limitations of the abstracted, stripped down individual that is the presumed subject
of liberal legalism. Rather I will note the issues that seem particularly important for
my affirmative claim that an optimal approach to rights requires a full picture of
the embodied creative beings that humans are. Let me begin with the image of the
rational agent as the disembodied reasoner.

Of course, when I say that the dominant conception of rights presupposes an
image of the rational agent as disembodied, it does not mean that the concept of
rights literally cannot take account of bodies. From ordinary tort law to
international human rights prohibitions against torture, the need to protect people’s
bodies from harm is one of the things legal rights are concerned with. The claim,
common in feminist critiques of liberalism, is that the image of the subject in legal
and political theory is one stripped of its bodily nature. The “A”s and “B”s of law
school examples have none of the characteristic ways bodies are experienced and
interpreted as part of identity: no gender, no race, no particular physical strengths
and weaknesses. The nature of a subject’s body is a specific detail that might have
to brought in for a particular purpose. But the core subject of the dominant legal
and political theory is the rational agent — whose rationality and agency alone are
what really matter, what entitle him to rights. And neither rationality nor agency
are conceptualized as integrally connected to the body or to affect. Later I will
discuss the work of a neurologist who argues that we cannot understand human
reasoning and judgment without understanding the role of affect and the body.
Here let me note some of the ways in which this image of the disembodied rational
agent can be found in what I take to be notions about the body that are
commonplace for most able bodied people.⁷

I think the demands of the body are very often experienced as an affront to
autonomy. In my own case, I find it particularly distressing when it seems that my
body’s chemistry or hormonal changes affect my state of mind, my mood, my clarity
of thought. Similarly, stories of environmental pollution causing depression,
irritability or lack of concentration seem particularly frightening to me. In both
cases, I think the distress arises from the sense that something very close to who I

⁶ See particularly Iris Marion Young, “Impartiality and the Civic Public,” Benhabib
⁷ I think people whose bodily abilities (and sometimes appearance) do not conform to the norm of ‘able
bodiedness” have a much more constant sense of their embodiedness. In a recent conversation I had, a
person with asthma identified with the examples below of feeling the “otherness” of the asthma, reflected
in language of “battling” her asthma and winning or losing. A woman who has been legally blind from
birth said that she experiences her limited sight as a much more integrated part of her, and experiences the
problems it causes as the result of society’s failures of accommodation.
think I am, how I experience myself as an agent in the world is or could be controlled, or at least significantly influenced by, something “else,” something not essentially “me.” In the case of the environmental pollution it may seem clearer that the cause is really something external, something heteronomous interfering with my autonomous control of my self, my state of mind. But in both cases it is actually the relation of the body to states of mind that is at stake. The tacit image of rational agency as disembodied casts the body as something other than self, something heteronomous.

Our bodies pose a tacit threat to the dominant image of autonomy as independence, as being unilaterally in control of our lives. It is in part our embodiment that makes us inevitably and obviously dependent on others. In sickness and death we are forced to recognize both our need for others and our ultimate lack of control. I think it is this dependency and inherent lack of control that, in North American culture, breeds a fear, distaste and hostility to all things bodily. The visions of freedom from necessity, the ultimate image of autonomy, falter in the face of the sick or dying body.

Seeing the ways in which the body is routinely seen and experienced as an interference (with “its” fatigue or illness), a threat, or an affront to autonomy helps to make sense of the way in which dominant conceptions of self and agency are disembodied, even though, at another level no one denies that people have bodies and particular areas of rights are directed to protecting those bodies. Similarly, no one denies that people have feelings. But the affective component of ourselves is not only treated as sharply distinct from reason, but in a sense as heteronomous. When affect is treated as distinct from cognition, feelings become a sort of raw data of nature, to be controlled by reason. When reason fails to control emotion, then we are not in control of ourselves; we are not acting autonomously.

There are many ways of addressing what is wrong with this image of the rational, disembodied self/agent. I will return later to the ways in which it has served to exclude women and other subordinated groups who are associated with affect and the body. Here I want to point to a particular way of seeing this image as entailing a misunderstanding of reason, which, in turn, distorts the understanding of autonomy. Since the value of autonomy is so central to rights, and the rational agent is treated as the subject of rights, if we misunderstand the nature of reason and autonomy, we are unlikely to develop an adequate conception of rights.

Many feminist philosophers have written on the ways in which affect is part of reason. A very different kind of research supports the feminist challenge to the reason/emotion split. In Descartes’ Error: Emotion, Reason, and the Human Brain, neurologist Antonio Damasio offers a fascinating theory of how emotions are an essential part of reasoning.

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8 Hannah Arendt also makes the important argument that our cognitive capacity for judgment also requires our social nature, we depend on our interactions with others for it to function.
Much of Damasio’s research is based on patients with severe but highly particular brain damage. These subjects retained their intelligence, memory and perceptual abilities, but seemed completely unable to exercise the judgment necessary either to plan for their future or to interact socially in ways that respected the feelings of those around them. Through a series of experiments and studies of case histories of such patients, Damasio concludes that the damaged area of the brain is one that processes information about somatic states, especially those associated with emotion. The patients showed a startling flatness of affect in relating past events of (what would ordinarily be) a highly emotional nature. And although they displayed normal skin-conductive responses (like in lie-detector tests) to immediate stimuli that startle (e.g., an unexpected sound or glare of light), they showed none of the normal responses when shown pictures of scary, horrific or disturbing events. They could describe the pictures precisely later, and even identify the kinds of emotions that are associated with such events, but they seemed not to feel the emotion. Damasio describes one patient who commented in a debriefing session that although he knew that the content of the pictures ought to be disturbing, he himself was not disturbed. Damasio concludes that

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

Damasio’s theory (in compressed terms) is that effective reasoning requires what he calls “somatic markers”. Somatic markers are emotional responses that (for the most part) we have learned, through experience, to associate with certain images. When, in deciding what to do, one imagines a certain action, one associates with it an outcome, which triggers an emotional reaction. “When the bad outcome connected with a given response option comes into mind, however fleetingly, you experience an unpleasant gut feeling.”\(^9\) The crucial function of these markers is to help sort through the otherwise overwhelming array of possible actions. “Somatic markers do not deliberate for us. They assist the deliberation by highlighting some options (either dangerous or favorable), and eliminating them rapidly from subsequent consideration.”\(^{11}\) Patients whose brains do not allow them to use somatic markers fail to learn from bad experiences and become lost in the details of even routine decision-making.

Damasio comments that “[i]n the end, if purely rational calculation is how your mind normally operates, you might choose incorrectly and live to regret your error, or simply give up trying, in frustration.” In one of the great lines in the book, he relates his findings to the image of reasoning that I have been discussing: “What

\[^9\text{Ibid. at 211 [emphasis in original].}\]
\[^{10}\text{Ibid. at 173.}\]
\[^{11}\text{Ibid. at 172}\]
the experience with patients ... suggests is that the cool strategy advocated by Kant, among others, has far more to do with the way patients with prefrontal damage go about deciding than with how normals usually operate." Damasio also links the cognitive failures that arise from the inability to use the information provided by affect to a loss of autonomy. He describes patients who must rely on their unaided, and otherwise unimpaired, intellect as having lost their free will.

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

Damasio’s work has intriguing implications for the feminist project of making the body an integral part of our conception of the self, rather than a source of contingency, particularity and difference -- to be set aside when identifying the human essence that founds the contemporary commitment to equality and rights. After all, if the core capacities for reason and autonomous decision-making cannot be well understood without their connection to affect and the body, it hardly seems appropriate that our conception of the self should exclude these components.

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

In a previous essay I discussed the ways in which understanding the role of affect in judgment directs our attention to the need to educate our affective responses, as well as to transcend them through reflection. I comment on the implication this has for legal education and argue that diversity throughout the legal profession is essential if we are to hope for optimal capacities for judgment in our judges – because this diversity will facilitate both the education and reflective transcendence of affect in judges. This argument is, of course, linked to my claim here that the conception of rights must be based on a full conception of humanness.

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12 Ibid. at 172.
13 Ibid., p.38.
14 Ibid. at 175.
15 Interestingly, Damasio describes patients who can no longer use their somatic markers and must rely upon their unaided – and otherwise unimpaired – intellect as having lost their free will (see ibid. at 38).
rather than the abstraction of rational agency. If the very nature of reason, and in particular its capacity to allow us to be autonomous, to formulate life plans and act in accordance with our values and our goals, entails a basic connection to the body and to affect, then an image of the rational agent that leaves out these dimensions must be inadequate. We will not be able to think intelligently about what fosters this key capacity, if we misunderstand its nature. And if rights are to be conceptual and institutional means of fostering and protecting autonomy, then they must not be based on misunderstandings of this capacity. And, at an instrumental level, if the judges to whom we entrust the ongoing definition and enforcement of rights misunderstand the role of affect in judgment, they will not be able to do an optimal job.

I have not tried here to present a full account of what a conception of reason integrally connected to the body and affect would look like, but only to insist that we must have one as part of the picture of the human being who is entitled to rights. Thus the rationality of the “rational agent” must be understood in embodied and affective terms. I now turn to the conception of agency or autonomy that is implicit in the “rational agent” and argue that we must re-conceptualize autonomy as well as reason.

In an earlier article I argued that thinking of autonomy as independence distorts our understanding of what actually makes autonomy possible, namely constructive relationships. Of course “independence” captures something about what we value in autonomy; it suggests that one can make one’s life choices for oneself, free of the constraint or control that dependence on another can bring. The problem is that this vision of freedom misses the reality that the capacity for autonomy can only develop and thrive when fostered by constructive relationships such as those with parents, teachers, friends and agents of the state. And this is not simply a matter of child-development. The capacity for autonomy can wither or thrive through one’s life, and those who value autonomy must not simply posit it as a human characteristic, but inquire into the conditions for its flourishing. And we can only understand those conditions when we understand how relationships shape the development of our core capacities in ways that make interdependence a basic fact of life—throughout our lives. As a result, our understanding of rights, and the institutional mechanisms for implementing them, must be conceived with this core relational nature of humans in mind.\(^{17}\)

In a subsequent article on “embodied autonomy”\(^{18}\) I use the relationship to the body as a means of exploring more broadly some of the puzzles of the meaning of autonomy. In particular I reflect on the meaning of autonomy with respect to a world and a body which we did not create and cannot control. I propose the concept

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\(^{17}\) “Reconceiving Autonomy,” 1 The Yale Journal of Law and Feminism 7-36 (1989). In this article I use examples of practices of administrative agencies which can either foster or undermine the autonomy of the people dependent on their decisions.

of a capacity for creative interaction to describe the autonomous power we do have, which carries with it responsibility, but not control. This is the concept I want to develop further here.

Just as earlier I contrasted my notion of relational autonomy to the notion of independence, here I want to contrast my notion of creative interaction with the common phrase “self-determination.” In particular I suggest that it is more helpful to refer to an ongoing capacity for interactive “self-creation” than to “self-determination.” Once again, it is not that “self-determination” has nothing to do with autonomy. Rather I think the shift in emphasis from “self-determination” to interactive self-creation offers a more helpful way of thinking about a wide variety of problems posed by the realities of our interdependence. At the heart of many contemporary debates is the question of how to conceptualize self-hood or autonomy such that it acknowledges both the ways in which we are profoundly shaped by, indeed significantly constituted by, the relationships of which we are a part (whether personal, cultural, national or global) and at the same time captures the way in which we genuinely are autonomous beings who are not determined by these relationships. The problem with the term self-determination (and many conceptions of autonomy that deny or ignore its relational nature) is that it presumes or implies that the nature of our “selves” is entirely a matter of our choice. And, conversely, a common objection to “communitarian” thought is that it so overstates the constitutive nature of human embeddedness in community, that it leaves no room for choice, for genuine autonomy. For both theoretical and practical reasons we need a fully adequate way of understanding how people come to be who they are. Whether for purposes of conceptualizing groups and cultural rights in constitution-making or for the broad theoretical purposes I pose here, we need something better than a kind of bifurcation between our “sociological” understanding of the ways in which we are shaped by the contexts in which we are born and raised on the one hand and, on the other, a philosophical assertion of choice and autonomy as the only legally or politically relevant dimension of self-hood or identity.

Let me offer an example of a debate within feminist theory that I think turns on these issues of autonomy. In the illuminating and often impassioned debate between Seyla Benhabib and Judith Butler in *Feminist Contentions: A Philosophical Exchange* one can see the way each sees the other’s theoretical approach as threatening a conception of agency that is defensible philosophically and that can empower women politically. This is clearest in their discussions of women’s historiography. Benhabib refers to a “clash between the social history from below paradigm . . . , the task of which is to illuminate the gender, class and race struggles through which power is negotiated, subverted, as well as resisted by the so-called ‘victims’ of history, and the paradigm of historiography, influenced by Foucault’s

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19 When the subject is not individual autonomy, but the rights of peoples under international law, I think the phrase self-determination works better.

work, in which the emphasis is on the `construction’ of the agency of victims through mechanisms of social and discursive control from the top (p113). Butler replies that the issue is “how one accounts for the agency that exists. . . . In one view agency is an attribute of persons, presupposed as prior to power and language, inferred from the structure of the self; in the second, agency is the effect of discursive conditions which do not for that reason control its use; it is not a transcendental category, but a contingent and fragile possibility opened in the midst of constituting relations. . . . [the point] is to ascertain what constitutes agency within the very relations of power that constitute women as active beings.”(p. 137).

I have taken the time to reproduce these parts of the debate here because I find them a compelling example of the passionate sense that it matters deeply whether we find an optimal way of capturing both the realities of the relationships, including power relations, that shape our lives and the equally real, but elusive capacity to interact with these forces in a genuinely creative, that is, autonomous, way. I think that part of what fuels the historiography debate is the sense on one side that if the focus is all on the “constitutive” power wielded from the top, that the genuine agency, the creative, sometimes heroic efforts of those on the bottom is erased in their presentation as victims. The point of finally giving women their proper place in history was not to present them as passive victims. But for the other side, if the constitutive context of power relations is not given appropriate attention, then at best we will fail to understand the true magnitude of women’s achievements in, say, acts of resistance, and, at worst, we will hold them inappropriately responsible for a failure to do more. And, most importantly, we will fail to understand the dynamics of how agency, genuine creative interaction with constitutive structures of power, is possible. I think this drama of constructing agency in the face of unequal power relations is played out over and over again – and often with the same passions engaged, since women’s power, autonomy, victimization and “responsibility” in the face of circumstances beyond their control are at stake. The contemporary debates over the “battered women’s syndrome” and prostitution are concrete legal examples of these same issues.  

I think the focus on autonomy as a capacity for creative interaction offers a path for working through both the theoretical and practical debates. At the theoretical level, this concept focuses both on the genuinely creative and inevitably interactive dimensions of all our exercises of autonomy. It thus directs our attention to both the constraining and enabling dimensions of circumstance, without underplaying the core capacity for creation. In hundreds of ways we are presented with dimensions of our world and our selves that we did not “choose.” And what we are presented with -- whether the personalities and child-rearing practices of our parents, or our citizenship (or absence thereof), or how our gender or race is constructed in the society in which we were raised – makes a huge difference to who we become. At the same time, people interact with, and thus may shift and shape all the dimensions of their lives.

21 See for example, Kathryn Abrams, ***
I mean to use the term “creation” in a strong sense: human beings have the
capacity to create something new, something which did not exist before, something
which was not simply determined by what preceded it, something which could not
have come into being but for the act of creation, the exercise of autonomy that
transformed what had previously existed into something new. But this genuine
creative capacity is itself shaped, in the form and scope of its development, by the
kinds of relationships that foster or impede it. And, of course, we neither choose
nor control many of these relationships—though we always retain the capacity to
interact with, and thus change (or reinforce), them.

Thus I hope I have offered a language that is true both to the miraculous
human capacity for creation and to its inherently relational and thus contingent
qualities. Conceptualized in these terms, as the capacity for creative interaction,
agency or autonomy is shaped by the structures of relations, including power
relations with which any individual interacts, but it cannot be reduced to or deduced
from those relations. I do end up asserting an underlying innate capacity, but the
form it takes is not “presupposed as prior to power and language,” and it is only
“inferred from the structure of the self” in the sense that the relational nature of the
self informs the relational nature of the capacity. The form, although not the root
capacity, is a “contingent and fragile possibility opened in the midst of constituting
relations.” Or perhaps I should say that the root capacity itself is not contingent,
but its nature is a possibility that is both fragile and tenacious. Finally, the root
capacity for creative interaction is not a transcendental category, but a phenomenon
that can be observed, in varying degrees, in all life forms (and perhaps in elemental
particles and other forms of matter\(^\text{22}\)).

Just as the “capacity for creative interaction” seems a more helpful concept
than self-determination, it also stands in contrast to the common association of
autonomy with control. Despite the popularity and allure of the idea of “being in
control of one’s life,” we never are. Nor should we be. Much of our life is formed
by interaction with other autonomous beings, and control is not a respectful stance
toward them (even if they are children). (A non-trivial, if also non-legal, benefit of
my approach to autonomy might be to erode the deadly “management” culture of
control of much of North America.) Of course, as with the term self-determination,
it is not that there is nothing to the aspiration to “be in control of one’s life”, or that
the sense of “things being out of control” is not a common way of experiencing
periods when one is not functioning autonomously. Clearly if someone else is in
control of one’s life, one cannot be autonomous. (Hence the common struggle
between teenagers and their parents.) And if the daily course of one’s life seems to
be an ongoing struggle to respond to one external demand after the other, one’s

\(^{22}\) All these capacities are also relational in nature.
autonomy is probably not thriving. But the language of control is a poor guide to establishing the kinds of relations that could actually foster autonomy for everyone.24

The same issues apply to self-creation, the ongoing creative interaction with oneself -- a process Catherine Keller calls "selving."25 Indeed, "creative selving" might be a better term than self-creation, because of its focus on process and because it does not inadvertently imply that we can create ourselves out of whole cloth, however we wish. (But even as I type my spell check program reminds me that "selving" is not yet a recognized word.) And in any case, the potential hubristic danger of the term self-creation seems matched on the positive side by its expression of the extraordinary nature of this human ability.

As with everything else, our ongoing creative interaction with our selves is shaped by a great deal that we did not choose, that we cannot control, and for which we are not responsible. What matters is understanding the conditions that foster or undermine that creative capacity. As I said earlier, autonomy, our actual capacity for creative interaction -- even with ourselves -- is not simply a characteristic that can be posited about human beings. It cannot simply be a presupposition of theory. Rather it poses a problem: how can the underlying root capacity be optimally developed? What social, legal and political structures allow it to flourish? What forms of language, what kinds of conceptual tools, help us explore this problem?

Although at its core what I am offering is an alternative metaphor for autonomy, metaphors are important in shaping how we see problems and their solutions.26 So far I have argued that the concept of creative interaction can capture both the astonishing human capacity for genuine creation and the complex ways in which that capacity is always interacting with forces beyond its control. As such it avoids what Seyla Benhabib refers to as the Promethean self that privileges mastery,27 while not denying the central importance of autonomy. Now I want to note some of its other advantages: how this concept helps us think about responsibility, and, briefly, how it accommodates a non-secular framework, its embodied quality, and its capacity to address difference. I will then return the issue of grounding rights in a formal vs substantive claims about human capacities for rational agency, to explore where the capacity for creative interaction fits on this

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23 Indeed, if it is a daily struggle to respond to one internalized demand after the next, one's autonomy may equally be impaired. This raises the issue of the link between consciousness and autonomy, which is another topic.
24 There are also interesting suggestions that letting go of the effort to control actually makes it more likely that the sense of being out of control will recede. Again, the struggle for control is not autonomy enhancing.
26 See George Lakoff and Mark Johnson, Metaphors We Live By (Chicago: University of Chicago Press, 1980).
formal vs. substantive divide. In closing, I will sketch some additional legal issues that are best analyzed in terms of a relational, embodied, affective self.

A relational conception of autonomy complicates the concept. And this leads to complications in the conception of responsibility as well. Just as the relational approach offers better conceptual tools for understanding and fostering autonomy, it offers a better way of thinking about difficult problems of how to assign responsibility. But it does make the analysis more complex and places new demands on institutions like the judiciary which are accustomed to relying on conventional liberal understanding of autonomy and responsibility. In this section I will use the legal issue of women who kill their battering partners to show the ways the dominant conception of autonomy has hindered the capacity of the legal system to adequately respond to this issue and the promise and challenges of using a relational approach.

Once one conceptualizes autonomy in relational terms, it becomes clear that autonomy is not something one can simply assume as a characteristic of human beings. The actual capacity for autonomy that any individual person has will depend on her circumstances, as well as the way she interacts with those circumstances. Thus people’s capacities for autonomy will vary enormously both across individuals and within a given person across time and circumstance. Autonomy is thus not a given on the basis of which we can assign responsibility for action. Moreover, autonomy is not something that has an on/off quality: either a person has it and is responsible, or she doesn’t (e.g. she is insane) and is not. Autonomy will be experienced on a continuum. Thus it is important to inquire carefully not only prospectively into what will foster it, but retrospectively into the kind of autonomy, say, a particular accused woman had and why. The difficult reality for everyone is that we cannot control all the circumstances that foster or undermine our creative capacities, even though we have a responsibility to optimize them.

To those sympathetic to a relational approach this picture of autonomy as contingent, shifting and variable may look self-evident. But when we turn to the law, we can see a logic behind treating autonomy as a presumption, something to be ordinarily presumed as a characteristic of human actors. The law has to assume autonomy, because it is necessary for all forms of legal responsibility. This is so for the obvious reason that no just system of law would hold people accountable for actions that were not really "their own." But, again for obvious reasons, the common law does not require that judges or juries inquire into all the nuances of what it might mean for an action to be "one’s own." Autonomy is presumed unless one of a quite limited set of exceptions is met. If there is to be a more complicated, nuanced, contingent and spectrum-like quality to autonomy

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28 As Neil MacCormick said in Legal Theory Workshop in response to comment that he was assuming autonomy.
based on a relational approach, then the law will be faced with vastly more complicated question of assigning responsibility.

The law has largely assumed autonomy and thus responsibility, unless a clear case for the lack of autonomy can be made\textsuperscript{29}. Thus insanity and cases of immediate physical coercion (someone else moving your limbs for you) are exceptions to the presumption of responsible agency. The common law also recognizes exceptional extenuating circumstances, such as provocation. The test traditionally has been words or actions that would cause an ordinary person to lose control, so that they cannot properly be understood as acting autonomously. They are under the control of the heat of passion or anger (a heat of passion no normal persons could resist), and thus not fully responsible for their actions\textsuperscript{30}.

If the issue of legal responsibility reveals a kind of logic to the presumption of autonomy, it also reveals the problems both with assuming autonomy and with trying to apply a more nuanced, relational approach. The contemporary problem of the kinds of responsibility that should be assigned to “battered women” who kill their batterers is a compelling example of both problems. Most of the defendants in these cases are women who have been in long standing relationships characterized by physical and psychological abuse by their male partners. The cases usually arise when the partner threatens to kill the woman and she decides she has to kill him before he kills her. In many of the cases, she is able to kill her partner because he is asleep or otherwise unaware of her attack. Thus part of what makes the cases difficult to fit within ordinary self-defense claims is that she does not kill him at the exact moment he is threatening her, but at a time [shortly thereafter] when she has the opportunity to do so relatively safely. This pattern does not fit the legal definition of insanity\textsuperscript{31} and provocation is, as already noted, not a full defense but a mitigating factor\textsuperscript{32}.

Feminist defense lawyers have spent many years trying to assist lawyers, judges and juries to analyze these cases in ways that will allow a fair trial for the

\textsuperscript{29} If one uses Sherwin’s distinction between agency and autonomy (see footnote 1), I think it is fair to say that it is actually autonomy and not just agency that the law is usually presuming for the purposes of assigning responsibility. The (rare) care of someone actually moving the actor’s limbs for her would be a case where there is not even agency. Of course that is the clearest case. But duress, provocation and even necessity speak to the issue of autonomy. An example outside criminal law is constructive dismissal, where the agency is clear, but the claim is that the action was effectively forced, not autonomous. (My thanks to Diane Pottier for this example.) Employment regulation such as minimum wage and maximum hours reflect a judgment that, absent such legislation, the unequal bargaining power of employers will in many cases yield contracts in which the employees exercise agency, but not true autonomy.

\textsuperscript{30} Different jurisdictions handle the issue of provocation differently. It can be a partial defense, it can be an extenuating circumstance that goes to the issue of the sentence to be imposed. Similarly the notions of necessity and duress can play complex mitigating roles, handled differently in different jurisdictions.

\textsuperscript{31} Martha: not understand the nature of the act or that it is wrong, eg acting under a delusion that she is killing a demon rather than a human being. US, Canada, UK. Provocation used to be full defense in Texas. Still? Anywhere in common law countries. ?honour killings different, not a diminution of autonomy. Hartogs cases sort of like that. It’s the appropriate, responsible thing to do.

\textsuperscript{32} In Canada, it can reduce the charge from murder to manslaughter.
accused women. As Elizabeth Schneider so clearly states, she and other advocates working in this area have never tried to create a “battered woman defense” that would simply apply to any woman who kills her batterer. The particular facts of each case are crucial. What they have tried to do is to overcome the some of the conceptual barriers to understanding the cases that exist in both the popular understanding and in the minds of legal professionals. One of those barriers is the presumption of the rational agent and an on/off conception of autonomy. This general conception is exacerbated by long standing stereotypes about women’s autonomy. Thus, as Schneider puts it, there is a victim/agent dichotomy that must be overcome in order for courts to assess these women’s situation fairly. They are neither simply agents or victims; they are both.

Feminist lawyers have, often successfully, worked to have expert testimony admitted about the kind of abuse the accused has suffered from and the kinds of damage this long term abuse can cause. The patterns of damage that have been recognized have often been called the “battered women syndrome,” that is characterized by “learned helplessness,” a feeling of being trapped in the relationship, low self-esteem, and great dependence on the battering partner. This “syndrome” is said to help account for why women who are in abusive relationships do not leave them, thus allowing judges and juries not to discount the stories of abuse as unbelievable since she stayed in the relationship.

While it seems to be the case that this expert testimony has made a difference in courts’ capacities to understand why a woman might stay in an abusive relationship, the danger has been that the accused woman then comes to be seen simply as a victim. Her agency disappears, even if the facts are that she had made prior efforts to leave and had employed many strategies to protect herself and her children. The passive, helpless victim is a stereotype available to cast the woman in, thus allowing courts not to see her as responsible for her situation or for her actions. Indeed there are interesting arguments that even the psychological experts who testify in court end up drawing on these stereotypes. Thus the stereotypes and the on/off conception of autonomy collude to provide an apparent solution to the problem of assigning responsibility to a woman in a desperate situation.

But there are a variety of problems with this “solution.” First, as noted above, it is often factually inaccurate and demeaning to the accused woman. Second it helps the law perpetuate stereotypes that do not advance the real project of providing equally fair trials to all men and women. And, third, it is often unavailable to women who do not seem to fit the stereotype. Women who have been physically aggressive, women subject to countervailing stereotypes like some women of colour, or women who just don’t come across as helpless victims may be unfairly found guilty of murder because they don’t fit the categories that judges and juries have come to understand as “the battered woman syndrome.”

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33 White Mair and others
34 explicitly recognized as a problem in Malot, par 39, 40
In addition, the depiction of the accused woman as so damaged as not really to be an agent runs at cross purposes to the actual structure of the legal argument for self-defense on a murder charge. Although the exact terms of the defense vary by jurisdiction, the basic structure is the same. It is very clear in the Canadian Criminal Code. There must have been an illegal assault (which can include a threat). The accused must have a reasonable belief that there is a threat to life or serious bodily harm AND she must have a reasonable belief that she had to use deadly force to protect herself, that there were no other options. Demonstrating the reasonableness of her beliefs and actions is in tension with depicting her as immobilized by learned helplessness. I think some of the confusion or unpersuasiveness of what are seen as some of the best opinions on these cases comes from this tension. What is needed is a nuanced, relational conception of autonomy that can make sense of a picture of a woman whose capacity for autonomy has indeed been seriously damaged by an abusive relationship, but who is nonetheless capable of reasonable judgments about the nature of the threat she faces and the options she has to protect herself. And, as we shall see, what is needed is a relational approach that looks at not just how personal relationships shape autonomy, but how societal institutions, practices and beliefs structure relationships in ways that can damage the capacity for autonomy.

As I read the cases and commentary, it seems to me that the best opinions are characterized by two steps. First, they take seriously the abuse the woman has suffered and the harm it has done her, and they make it clear that the fact that she stayed in the relationship is neither evidence against the seriousness of her abuse nor to be seen as “her fault” that she found herself in this life threatening situation. This part of the opinion often seems an appropriate discussion of the ways abusive relationships can be destructive of the capacity for autonomy. Second, the courts accept the argument that the woman had acquired a kind of expertise over her long experience with violence and threats at the hands of her partner. Based on this experience, she was able to make a reasonable judgment about the seriousness of the threat. Thus, to this point in the argument, they are at least tacitly acknowledging both impaired autonomy and a capacity for the kind of reasonableness the law requires for self-defense.

I think the problem arises for judges, and probably for the lay persons hearing about these cases, with the reasonableness of killing the batterer during a moment of relative safety – when asleep in some of the best known American cases and in the back of the head as he was leaving the room in Lavallee, the leading Canadian case. It is clear that the legal standard is reasonableness of belief that lethal action was necessary to protect herself. But in Lavallee, as we shall see shortly, the argument seems to slide in and out of a claim of impairment of autonomy. And I think some of the feminist legal commentary blurs the issue as well. This raises the question of how best to think about the kind of responsibility to assign in these cases, remembering, of course, that each case will turn on its particular facts.
What is the underlying reason for thinking that in many cases it is not appropriate to impose criminal sanctions on a woman who takes advantage of a moment of safety to kill her battering partner who has threatened her life? Is it because her autonomy and perhaps her judgment is so impaired that she cannot see the alternatives – leaving the scene, calling the police, going to live someplace else? Is it that at that moment it looks to her, given her long experience of abuse, that the only way to save her life is to kill, even though others without that experience might see alternatives? These seem to me to be arguments that she is not responsible because she did not have the kind of autonomy upon which one can base criminal responsibility. She may well retain partial autonomy, a capacity to protect herself, but not the kind necessary for criminal sanctions. This is an impairment argument, even if does not portray the woman simply as a helpless victim.

An alternative account is a true reasonableness argument. The argument would be that in the facts of the case she made a reasonable assessment that if she didn’t take advantage of this opportunity to kill her partner, he would come after her and kill her. In many cases, there is past evidence of her partner coming after her, sometimes even after she has moved a long distance away. Often beatings follow. In addition to the evidence of a particular pattern within the relationship, there is more general evidence of what has been called “separation assault.” Both the particular and the general evidence suggest an inability of the police or anyone else to protect the woman against violent assault. Thus if she has correctly (or reasonably) assessed the seriousness of the death threat, then it is reasonable for her to believe that the only way to save her life is to take advantage of the opportunity to kill him. Some of the commentators making this argument point out that (at least in many jurisdictions) self-defense does not require one to leave one’s home to avoid the threat posed by an illegal intruder. In the case of a woman in a battering relationship, she would often have to not just leave her house, but her province or state. And as we have seen, there is evidence that even that would not be sufficient. She would have to go into hiding – without the aid of something like witness protection program. Is that a reasonable alternative? Would it be possible at all if she had children? Are women in this situation being held to standard of reasonableness that is more demanding than that required of others?

On the other hand, as a general matter, the law does not allow one to kill in self-defense on the basis of future risk assessment. Even if one has good reason to believe that another may intend to carry out a threat to his life at some future time, ordinarily that is not grounds for shooting him in the back of the head as he leaves. Why? Presumably because the legal system is structured to require people to seek the help of police rather than to undertake their own protection by killing. The problem, of course, is that in the case of women in battering relationships, the police and others have already failed, usually over many years, to be able to protect her from violence. She has excellent grounds, both particular and general, to believe that they will fail again if she misses this opportunity to protect herself.

35 Wilson also makes this point in Lavallee
So how do judges handle this problem? In *Lavallee* the Supreme Court of Canada explicitly said that the threat does not have to be imminent in the case of a woman accused of killing her battering partner. This was reaffirmed in *Malott* and follows a variety of feminist arguments that one has to use an expanded time frame to understand the nature of the threat from a battering partner. How do judges explain why they allow what looks like a kind of future risk assessment, why they don’t require the woman to seize any alternative to killing? (Of course there are many cases in American literature where judges do in effect say that fleeing was the reasonable alternative.) Martha Mahoney offers a succinct distinction between two different kinds of accounts I noted above: “Learned helplessness is in essence a theory of deficiency at perceiving exit. Separation assault confirms the difficulties of exit.” I think both commentators and judges often blur the two.

I reproduce below an extended excerpt from Wilson’s judgment in *Lavallee*. In many ways this is an exemplary judgment that makes a strong case for the reasonableness approach and shows a fine sense of the broader social context. But the part on the reasonableness of the accused’s perception of her options illustrates, I think, the shifting terms of the argument I have just noted:

The same psychological factors that account for a woman's inability to leave a battering relationship may also help to explain why she did not attempt to escape at the moment she perceived her life to be in danger. The following extract from Dr. Shane's testimony on direct examination elucidates this point:

Q. Now, we understand from the evidence that on this night she went -- I think you've already described it in your evidence -- and hid in the closet?

A. Yes.

Q. Can you tell the jury why she, for instance, would stay in that house if she had this fear? Why wouldn't she so [sic] someplace else? Why would she have to hide in the closet in the same house?

A. Well, I think this is a reflection of what I've been talking about, this ongoing psychological process, her own psychology and the relationship, that she felt trapped. There was no out for her, this learned helplessness, if you will, the fact that she felt paralyzed, she felt tyrannized. She felt, although there were obviously no steel fences around, keeping her in, there were steel fences in her mind which created for her an incredible barrier psychologically that prevented her from moving out. Although she had attempted on occasion, she came back in a magnetic sort of a way. And she felt also that she couldn't expect anything more. Not only this learned helplessness about being beaten, beaten, where her motivation is taken away, but her whole sense of herself. She felt this victim mentality, this

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36 See Mahoney
concentration camp mentality if you will, where she could not see herself be
in any other situation except being tyrannized, punished and crucified
physically and psychologically.

I emphasize at this juncture that it is not for the jury to pass judgment on
the fact that an accused battered woman stayed in the relationship. Still less
is it entitled to conclude that she forfeited her right to self-defence for having
done so. I would also point out that traditional self-defence doctrine does not
require a person to retreat from her home instead of defending herself: R. v.
Antley (1963), 42 C.R. 384 (Ont. C.A.) A man's home may be his castle but it
is also the woman's home even if it seems to her more like a prison in the
circumstances.

If, after hearing the evidence (including the expert testimony), the jury is
satisfied that the accused had a reasonable apprehension of death or grievous
bodily harm and felt incapable of escape, it must ask itself what the
"reasonable person" would do in such a situation. The situation of the
battered woman as described by Dr. Shane strikes me as somewhat
analogous to that of a hostage. If the captor tells her that he will kill her in
three days time, is it potentially reasonable for her to seize an opportunity
presented on the first day to kill the captor or must she wait until he makes
the attempt on the third day? I think the question the jury must ask itself is
whether, given the history, circumstances and perceptions of the appellant,
her belief that she could not preserve herself from being killed by Rust that
night except by killing him first was reasonable. To the extent that expert
evidence can assist the jury in making that determination, I would find such
testimony to be both relevant and necessary.

Thus we see back to back a clear "impairment" argument from the expert
witness and the hostage analogy, which seems to be making a reasonableness
argument. The hostage analogy does serve to show the complexities of "immanent"
danger and why it should not be understood as "immediate" in the context of
"battered women." But I find it troubling as a way of accounting for why the
accused saw no alternative but to seize the moment and kill. The problem for the
hostage is not that if she escapes no one will help her if the hostage takers try to
track her down. The problem for the hostage is that she is alone with an armed
assailant and the ordinary observer can understand why she should seize a moment
to attack her captor. In Lavallee there were other people in the house. (FACTS) Is
the suggestion that she felt as trapped as a hostage and thus saw no alternative? If
so, is the experience of feeling trapped because of "learned helplessness" or an
objective reality of the absence of any reliable help? Does the phenomenon of
"learned helplessness" that experts identify only come into being because of the
sustained reality of the absence of reliable protection against violence? 37

37 Mahoney, p80 comments on one judicial opinion: "This court received a sophisticated explanation of the
impact battering has on women. Yet, as the court in turn explains the woman's situation, the objective
difficulties of leaving and subjective fear and helplessness are both present, but seem unrelated."
The Canadian Supreme Court has made it clear that in assessing the reasonableness of the accused's belief (in the threat and that the only option was lethal force), judges and juries should consider what was reasonable from her perspective, given her experiences. I am persuaded that this is a good thing in that it fosters the capacities of judges and juries to understand the situation these accused women were in, and thus to assess the reasonableness of their actions. But I think it is also part of what leads to an odd blurring of arguments about incapacity and reasonableness at the same time that it fails to direct attention to the relation between impaired autonomy and the objective failure of society to provide basic protection against violence. It allows judges to make reference to the wider context that might limit a woman's ability to leave an abusive relationship quote Malott***.

And even to comment as a dissenting American judge did on the accused's experience of institutions failing to protect her38.

But the focus on the woman's perspective also allows them to stop short of saying that battered women often find themselves in situations where the only objectively reasonable way to protect their lives against a future threat is to kill. The reason this future threat has to be treated differently from most future threats is because of a systematic failure to protect these women against violence by all the institutions whose job it is to do so. Thus the hostage analogy seems to help to understand why sometimes a future threat requires immediate defensive action (which is the key hurdle for many judges and juries). But I doubt whether it actually directs our attention to why this is so.

Martha Mahoney, however, thinks that the analogy is useful because it can serve to emphasize how coercive force holds battered women in the relationships, making exit not only unavailable in the past, but in the face of the death threat (which is the link Wilson was making). I think this link is often not made as clearly as it could be, either in the commentary or the cases. And sometimes not in the expert testimony. The fact that the woman's autonomy has been impaired by the relationship slides into a picture of a woman so victimized that she cannot see the alternatives either to the relationship or to violence. This is not surprising since this picture is supported not only by the agent-victim dichotomy (as Schneider calls it, or the on-off conception of autonomy as a presumed human characteristic), but by the radical challenge of recognizing the extent of the failure of institutions from police to family to prevent the violence.

Mahoney comments that "the persuasive power of the hostage analogy depends on the recognition that the woman in the abusive relationship is not free to

38 "Mrs. Norman didn't leave because she believed, fully believed that escape was impossible. There was no place to go . . . [S]he had left before; he had come and gotten her. She had gone to the Department of Social Services. He had come and gotten her. The law, she believed the law could not protect her, no one could protect her, and I must admit, looking over the records, that there was nothing done that would contradict that belief." Martin, J. dissenting, State v. Norman, 378 S.E.2d at 17, quoted in Mahoney, "Legal Images of Battered Women: at 92.
leave. At issue is our understanding of the woman’s functional autonomy.” (p.87) In
the discussion that follows this claim her focus in almost exclusively on the realities
of external threats and the failure of protection.

It would seem that a full understanding of the impact of battering on a
woman’s autonomy requires attention both to deep psychological impairment—
feelings of worthlessness, dependence on the batterer, difficulty in seeing a way out,
profound sense of helplessness—AND the sorts of coercive force that, absent societal
protection, even a fairly conventional understanding of autonomy would see as a
serious constraint. It is the “absent societal protection” that I think is the sticking
point, and why only a broad relational approach that looks at patterns of belief,
practices and structures of institutions can fully make sense of the impact of
battering on autonomy.

As I have said, an approach to autonomy that looks both to the influence of
personal relationships and societal structures is necessary to understand the harm
battering does to autonomy and thus to the[kinds of] responsibility that should be
assigned to women who have suffered battering.{ and killed their batterers.} But in
at least two different ways, a relational approach poses a major challenge. Initially,
I thought most of the “battered women” cases were about impaired autonomy, and
that the reason the discussion of the reasonableness of the defensive attack lacked
clarity was that judges were ill-equipped to articulate such conceptions.39 I will
return to the challenge of developing such conceptions. But I now think that in most
of the leading cases the problem lies in the willingness to directly confront the
external reality, the institutional failure that makes the woman’s actions reasonable.
That is a different kind of challenge.

There is a kind of irony to the way a relational understanding of autonomy is
necessary to an appropriate assignment of responsibility in these cases. Once the
nature of the threat and the lack of protection is recognized, the constraints on the
woman’s autonomous action are easily cognizable within the conventional
understandings of autonomy. The objective threat to her life is external, and
although the ongoing failure of protection has led to impaired autonomy, the
assessment of her options to save her life is a reasonable because of the external
constraints on her actions. And yet these constraints are not easy to see, as is
obvious from many judicial opinions. Even when the constraint is an ever present
threat of physical violence, backed by the repeated use of violence, which has
escalated to a death threat, it is not easily seen as coercive constraint because the
key to the power of the coercion is not in individual action, but in social structures
that fail to protect. Thus while physical violence can easily be recognized as an
interference with conventional autonomy, the sustained violence, threat and failure
of protection can only be fully understood in relational—both personal and social
structural—terms. Once understood, the implications for criminal responsibility
are (depending on the facts, of course) relatively straight forward. If there is no

39 My gratitude to Martha Shaffer for helping me to revise my view.
reasonable alternative to save her life, she must be seen to have killed in self-defense. The exception to prohibiting future risk assessment is justifiable because of society's consistent, long-standing structural failure to provide protection against violence, both in her particular case and in the case of battered women generally.

The external threat and lack of protection are always constraints in any issue involving battered women. But in some cases, it may be that it is more the psychological damage that will account for the woman's actions, that is, it is the feeling of being trapped, the "steel fences in her mind" that make her see no alternative—rather than her reasonable assessment of the danger she faces from her partner. Perhaps this still counts as "reasonable from her perspective". But in the long run, I think cases such as these are best treated as cases where the degree of the impairment of autonomy should determine the degree of responsibility. Although I have not looked closely at the issue, I think that cases involving women's responsibility to their children also pose difficult problems. It seems likely that in many cases just assignment of responsibility would require attention both to the external realities—of threat, violence, failure of protection, financial constraints, lack of support such as housing—and to the impairment of her autonomy that these societal failures have caused.

Taking impaired (as well as constrained) autonomy seriously would, however, force judges to articulate a conception of autonomy and responsibility that has the shifting contingent quality I discussed earlier. It is easy to see why judges would want to avoid this sort of explicit analysis. As I noted earlier, once one takes a relational approach to autonomy, one sees that people's actual capacity for autonomy varies across a wide continuum. I think very few people could be described as fully autonomous most of the time. How nuanced should the law's understanding be? I have already said that the common law requires autonomy for responsibility, and so ordinarily presumes autonomy. If it not to be presumed, how close an inquiry should it make, or under what circumstances should it not presume?

The relational approach offers explicit tools for analyzing the contingent nature of autonomy and thus for inquiring into the actual degree of autonomy an accused was able to exercise. To say that judges should ultimately engage in such an inquiry does not mean that they would have to take up the task "from scratch," unaided and afresh in each case. As with all complex legal concepts, like "reasonableness" or "intention", leading cases on autonomy would come to be identified as capturing key dimensions of the problem and articulating subcategories and concepts that help sort out the nuances. For example, key cases might characterize common points along the continuum of autonomy to serve as examples of benchmarks judges could use. The "battered woman syndrome" might become just one among many terms used to capture common forms of partial autonomy. Of course, as with "intention" or "duty of care," these cases and categories would not dispense with the need for judges to attend to the particulars of
each case and exercise judgment in assessing the kind of autonomy to attribute and thus the kind of responsibility to assign.

Thus I do not mean to imply that an explicit relational analysis makes these cases easy. The assessment of the facts will often be difficult. And there remains the underlying question of what kind of responsibility, if any, one would ideally want to assign to battered women to extricate themselves from these destructive relationships. Part of the point here is that legal and personal responsibility need not be identical (as they often are not). As I said at the beginning of this section, people have a responsibility to try to optimize their response to the circumstances that affect their capacities for autonomy, even though they often cannot control those circumstances. In the case of battered women, I would suggest that there is a personal responsibility to try to leave (or transform) destructive relationships, but the exercise of that responsibility is so complex and so dependent on circumstances and support beyond the control of the individual woman, that the law should not (as Canadian law does not) try to assign any fault for being in a battering relationship. Battering is a social phenomenon (otherwise the courts would not have been able to recognize a battered women syndrome) that has been sustained by patterns of behavior by police, prosecutors, judges, neighbors, friends, and family, which together constitute a long standing failure to protect women from domestic violence (and, indeed, violence generally). It is only possible for women to become enmeshed in abusive relationships because of a wide set of institutions, behaviors, and beliefs that are beyond the control of any individual woman. The attention to the social structure of relationships keeps this larger framework in view and thus helps to make clear why for legal purposes there can be no individual responsibility for being in a battering relationship.

In the interest of full disclosure, I should note that there are some troubling historical examples of judges venturing into what one might call a relational approach to vary the presumptions of autonomy. They have often not served women’s interests well. Of course, notoriously married women were once thought not to have the kind of autonomy necessary to enter into contracts and hold property. Their relationships with their husbands essentially extinguished their legal autonomy in many areas. But there are also less obvious examples.

Until quite recently, in many common law jurisdictions men who walked in on their wives having sex with a lover could kill the lover and/or wife with legal impunity. This was treated as a classic example of losing control in the heat of the moment. But Hendrick Hartog has also documented the expansion of that doctrine in the mid 19th century United States to cases in which there was a long gap in time between a husband finding out about an affair and his deliberate killing of his wife’s lover. The judges were explicit that given the changing norms and increased freedom for women, the sanctity of the home and the honour and authority of husbands required such an extension of the doctrine. In these cases, the judges saw a need to provide what we might call a contextual or relational account of autonomy. The husband’s autonomy and thus responsibility could only be assessed
by taking into account both the circumstances of his own relations to his wife and
the man he murdered, and the broader social circumstances that required legal
immunity for revenge on “seducers”. In constructing the extension of the defense,
judges created an exculpatory impairment of the husband’s autonomy – he was
driven to do what any decent, responsible husband would do—and a corresponding
denial of the wife’s autonomous choice to engage in the affair, in order to emphasize
the nefarious role of the seducer preying upon the wife.

Ought this sort of story make one wary of invitations to judges to move
beyond a simple presumption or denial of autonomy? Once they move beyond the
on/off framework, are they likely to import stereotypes into what is supposed to be
nuance? As we have seen, this has been part of the history of the “battered woman
defense,” and it was part of what we might call the “wronged husband defense.” Are
these reasons why one would think that the path to more egalitarian law, that is
to a law that lives up to its own equality norms of the rule of law, is to see the legal
subject not as the fully human self, but as the abstracted, disembodied, rational
agent I have been criticizing? Would the move to a recognition of the fully human
self and the relational nature of autonomy just invite more latitude for judges and
thus more room for stereotypes and prejudice?

First one needs to recognize that the norm of the rational agent has not
prevented the active role of stereotypes in the law. But would a more vigorous
adherence to the norm work better than an avowed departure? Whenever judges
are called upon to be self-conscious about the kinds of contextual factors that
influence their judgment, some people worry that this will free them from
constraints that, however poorly they work, are better than an open invitation to let
personal values and ideologies guide their judgments. There is something to this
position. When long standing norms of judgment shift, there is always an opening
and not all of what fills it will advance the goals of a just and fair legal system. But
my view remains that self-consciousness about what is entailed in optimal decision¬
making is, in the long run, desirable. In the case of autonomy, in the long run
judges will do a better job of developing just law if they are able to take a more
nuanced view of the capacities of those who appear before them. And that nuance
will be assisted by understanding the relational and affective dimensions of the legal
subjects before them. In the absence of such nuance, they cannot assign
responsibility in a just and coherent way. Sometimes, when there are known
dangers of stereotypes influencing judgment, legislation can direct and structure the
discretion that judges exercise. It is possible, for example, that the issue of the
‘Battered Women’s defense” would be best handled via legislation.

40 Troubling stereotypes also in the “cultural defense” arguments
41 See Moran
42 Backhouse, Moran
43 See Moran and my discussion in the Violence chapter.
In the meantime, one can applaud the Supreme Court of Canada’s tacit recognition of relational autonomy in these cases, as well as an imperfect recognition of the reasonableness of battered women’s acts of self defense. They went beyond an on/off approach to autonomy by recognizing both impaired autonomy and a capacity for rational assessment of threat and options for self-defense. Both Wilson and L.D *** point to the broader structures of social relations that enable battering to both constrain and impair women’s autonomy—even though they are not fully explicit about how societal failure to protect can make killing in the face of future threat “reasonable.” And, finally, in Malott, L.D explicitly addresses the need to avoid stereotypes in the analysis of these cases. In these cases, the SCC takes important steps toward assigning responsibility on the basis of a relational approach to autonomy. In my view, these cases and the issue more generally, show both the advantages of a relational approach for addressing difficult issues of legal responsibility and the scope of the challenges such an approach poses.

Next I want to turn to a very different kind of advantage of using my approach to the fully human self. The “capacity for creation” is a language that responds to the issues at stake in legal and political debates and at the same time is hospitable to a conception of a self that has a soul, a self that has at its centre a spark of the divine. It has long seemed important to me to find a language that meets the requirements of the secular language of public discourse in North America, and at the same time does not tacitly deny or contradict my own sense of the divine component that is part of the full dimension of humanness. The capacity for creation, including self-creation, serves these purposes. Ultimately, I think there is a kind of irreducible mystery to our power to create, to the fact that we can create something wholly new whose existence requires the undetermined intervention of creative power. That mystery is expressed by the idea that the capacity for creation in the interaction with our world and our selves is a central part of what it means to have the divine within us. To put it another way, we can see the resonant Judeo-Christian image that we are “created in the image of God” as a way of saying that we are created as creators. We do not create something out of nothing, and we are constrained by what we are given, but we do bring forth the genuinely new.

I should emphasize, however, that while it matters to me to develop language for both academic and public legal discourse that is consistent with my sense of humans as ensouled bodies and embodied souls, I believe it is equally important to respect a pluralist language of public discourse. By pluralist language I mean one that neither precludes nor requires either a secular or spiritual framework. In particular, I believe arguments about rights should be framed in ways that make sense to people with no interest or belief in the divine. They should also be framed in ways that are not inconsistent with such belief. Thus I note the consistency at the same time that I insist that no one need subscribe to this dimension of my understanding in order to accept the approach to autonomy and rights that I propose here.

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44 The relational approach is also at the heart of many spiritual traditions.
Another advantage to the language of creative interaction with one’s self is that it invites inquiry into interaction with one’s body as part of the process of self-creation. This sort of attention to the body allows a recognition that the body itself is a source of knowledge for this process. And reflection on the limitations of the body and what it means to optimally interact with them has the potential for learning the importance of a sympathetic response to the limitations of autonomy. This lesson is important since compassion in the face of limitations itself fosters autonomy. More generally, as I argued in discussing Damasio’s understanding of reason, it is important that the concept of autonomy embraces an image of the embodied self, or we will not be able to adequately explore what fosters autonomy.

One of the most important advantages of an approach to autonomy as the capacity for creative interaction of relational, embodied selves is that it can handle the central problem of difference. This issue is best understood by contrasting my conception of autonomy with the traditional rational agency. By excising the body and affect from the core of the rights-bearing self, the multiplicity of differences among people is excised as well. Conversely, when the conceptions of both reason and autonomy have the body and affect integrated into them, the differences that both make manifest become central. The realities of the differences in abilities, power, status are no longer presumed to be irrelevant to the issues of equal rights; they appear as integral to the subject of those rights. Conceptions of the core capacities that do not deny difference are crucial because figuring out the appropriate role of difference in conceptualizing and promoting equality is one of the central challenges everywhere that people take rights seriously—whether it is in South Africa where the new regime must grapple with the tensions that arise from its commitments to equality, to cultural rights, to redressing the wrongs of the Apartheid era and to non-racialism or the disputes over affirmative action in North America or the interpretations of gender equality in Lebanon.

Let me return to my claim early in this essay that we need both formal equality and attention to context and particularity in order to implement equal rights. I argued that the problem with rational agency was that it was somewhere in between the purely formal and the substantive context: it was treated as an abstraction that rendered it universal, but it made substantive claims about what was relevant to being a bearer of rights. Historically, the asserted universal abstraction in fact had a particular substance to it that was associated with middle and upper class, white men. Not only did the concept of rational agency exclude the body and affect, but the political and legal systems premised on it excluded those people associated with the rejected dimensions of humanness. Thus, at different times, the working class, women, and people of colour have been treated as so characterized by uncontrolled passions, or limited intellect, or dependency—and thus lacking in autonomous rational agency—that they cannot be treated as equal.

45 I discuss these issues in “Meditations on Embodied Autonomy.”
46 See Young, “Impartiality and the Civic Public” and Nedelsky, “Embodied Diversity”
responsible citizens entitled to the same civil and political rights as white men of property.

Of course one response to this allegation is that the mistake was only to fail to give women and other subordinated groups the status of disembodied rational agents. If we now apply that concept to the previously excluded groups, there is no need to change the concept. I think the limitations of that answer must now be clear. First there is the issue that when obvious dimensions of humanness are excluded from one part of a theory, they must go somewhere else - as indeed historically they have in their attribution to subordinated groups. Even if it were possible to imagine a kind of bifurcation in which all people were imagined to be the traditional rational agent for the purposes of, say, public deliberation, and embodied, emotional human beings in intimate relations in the privacy of the home, the problems could not be overcome. Not only does the question of how rights are to be constructed differently in the two realms arise, but the fundamental objection that my arguments above imply cannot be met in this way. If all of our basic capacities for forming our life plans and adopting values, the kinds of capacities that rational agency was intended to capture, cannot be adequately understood without a full understanding of our relational, embodied, emotional and interactively creative nature, then no amount of “inclusion” in traditional rational agency will work.

The question remains how my substantive conception of autonomy can avoid the problems caused by universalistic claims for rational agency. In trying to work through these issues, I considered the position that although the claims for rational agency did damage by departing from the pure formality of the claim of equal moral worth, that my notion of creative interaction (inherently relational and embodied) could serve the grounding function that rational agency tried to do. Because creative interaction is a fuller picture of the core human capacities, and because its relational nature always demands attention to context, it would not have the exclusionary quality of rational agency. But while I think that is true, I have come to the view that some of the same problems would still arise.

For years the claim of rational agency as the foundation for claims to human dignity, respect and rights seemed implausible to me because there are so many human beings who are not rational agents: such as, babies, the insane and senile. And yet there is no question that they are entitled to basic claims of equal moral worth, even if we differentiate which civil and political rights they can claim. The explanation that babies have the potential for rational agency or that the senile have some kind of residual claim because they were once rational agents seemed completely unpersuasive, if rational agency was supposed to be the ground for rights claims. The capacity for creative interaction is broader and more flexible. Certainly even new-borns have it, and probably any state of impaired capacity—short of being brain dead—allows for some form of creative interaction.

Nevertheless, the actual capacities for creation vary, not only with age and infirmity, but with the conditions of peoples lives. It is a basic part of my conception
of autonomy that it is not static, that it requires constructive relationships, and that throughout one’s life it can wither or thrive depending both on the kinds of initiatives one takes and on the conditions one finds oneself in. Given this variation, my conception of autonomy cannot be the core grounding of claims for rights, because the core claim of equal moral worth does not vary.

For this reason I have come to the conclusion that there is no substitute for the purely formal claim of equal moral worth of all human beings. It must be treated as a kind of starting point, an article of faith, for which one might advance arguments, but which is not really subject to proof since it is not ultimately an empirical claim about any actual characteristics of human beings. This claim of equal moral worth must be the starting point for all claims of rights. Both historically and logically (since equal moral worth is a necessary but not sufficient condition for effective rights claims), one must begin with universal claims of equal moral worth. As long as those claims are contested, the battle must be for recognition of equality in those terms.

Once equal moral worth is acknowledged, however, it is essential to move to an understanding of actual human capacities and the conditions under which they can develop. To know what it would take to actually treat someone equally, one needs not only an optimal conception of autonomy, but knowledge of the specific characteristics and circumstances of the person. That is, one must start with equal moral worth and then move to attend to specifics and context, where one will encounter the complexities of difference.

How difference is acknowledged and attended to will surely vary in different circumstances. Where the acceptance of equal moral worth is in doubt or is fragile, it may be that both legal and political rhetoric must emphasize this universal form of equality. For example, the insistence on non-racialism and suspicion of the North American rhetoric of difference by many in South Africa is surely the result of their very recent emergence from an era of Apartheid. But in their attempts to ensure both gender equality and respect for cultural tradition they will have to grapple with the problems of when attention to different circumstances requires different measures to ensure equality.

47 Perhaps other than the claim that, with marginal exceptions about when death occurs, human beings do not have difficulty recognizing what creatures count as human beings.

48 What would count as an explicit rejection of equal moral worth would be an argument that men, or members of an aristocracy, are intrinsically more valuable than women or non-aristocrats. One rarely encounters overt arguments of this kind. Historically, some forms of racism have claimed that the racialized people are not fully human. As a practical matter, arguments for inclusion in humanness or equal moral worth may have taken the form of empirical claims of sameness of relevant characteristics such as reason. But that does not mean that there is some invariant substantive essence of humanness that can ground a constant equal moral worth across all human beings. Again, in practical terms the one contemporary example I can think of that formally denies equal moral worth is the practice within some American jurisdictions of allowing as an assessment of the value of the victim to determine whether the death penalty is appropriate. For the purposes of such legal responsibility and sanction no life should be treated as more valuable than another.
Of course, one of the problems is that those who deny equal moral worth often do so in the name of salient difference. They may say they accept some basic equality, but say that it does not translate into equal civil or political rights because of some relevant difference. I do not claim that any of my proposals – neither my (relational, affective, embodied) concept of autonomy as capacity for creative interaction, nor the two step approach, from formal equal moral worth to specific, substantive context – can simply solve this problem. Rather I claim that both will help sort out these inevitable conflicts. The purpose of the substantively empty, formal claim of equal moral worth is to serve as a standard, a check, a challenge. It generates useful questions: Can a differential in rights really be reconciled with a basic equal respect? Is the situation that is being defended in fact consistent with conditions that respect and foster the development of the capacity for autonomy, understood as creative interaction, including self-creation? Posing these questions also provides an opening to the possibility that there is more than one way, say, to meet the requirements of gender equality. As long as conversation about equal moral worth is possible, one need not leap to the conclusion that every form of gender role differentiation is incompatible with equality – though, almost by definition, gender roles pose a limit to autonomy.49 When used with openness, respect and humility, the formal concept of equal moral worth allows the development of shared standards to which justifications of difference can be held, at the same time that it fosters an openness to diverse interpretations of equality and other rights.50 It is thus the embrace of the formal claim of equality and the attention to the context of social relations that, together, are necessary for an optimal approach to core human values such as equality and autonomy. My approach to the fully human self brings us both.

Finally, I should add as a point of clarification that taking formal equal moral worth as a starting point does not mean taking what has come to be called "formal equality" as a starting point. I believe that coherent, effective arguments for equality cannot do without a claim of equal moral worth that is formal, that is not empirically substantive, in its nature. But the practical meaning of equality will always have to be determined with the kind of attention to context that "formal equality" often rejects. While claims for differential access to rights or opportunities must be defended as consistent with equal moral worth, the assessment of that consistency will always be made with attention to context. The requirement to defend this consistency does not therefore mean that there is some presumption in favour of formal equality or equality as sameness.

At the outset I raised the question of why rights in particular need a fully adequate picture of the human subject. While I have tried to address this question

49 There may also be arguments other than those of equality that would reject gendered divisions of child care. In I argue that such divisions lead to political leadership by men who do not have the necessary knowledge and experience to make good public policy.

50 See Communities of Judgment and World Citizenship
in various ways throughout the paper, in concluding I want to return to it explicitly. The first point is that rights discourse is so important in many societies that it is not plausible that an impoverished picture of the self animating rights discourse will not spill over to more general collective misunderstandings. The second point is that although I am focusing on the concepts underlying rights discourse, I am not only concerned about conceptual change. On the contrary one of the virtues of my understanding of the relational self, is that it immediately directs our attention to the conditions that make values like autonomy possible. Autonomy stops being a theoretical presupposition and becomes an object of substantive inquiry.

One might also argue that the most important function of rights is to protect people against the worst forms of harm and that for that purpose the traditional conception is adequate, and, indeed preferable, since it doesn’t muddy the waters with a seemingly endless array of conditions and issues that might affect something as amorphous as a capacity for creative interaction. One of the important functions of rights is rhetorical, to articulate wrongs in the strongest possible terms, which can command the attention of others. At one level, standard legal concepts of bodily integrity and prohibitions such as those against torture do serve the purpose of identifying basic harms. But we have seen in the history of legal and political response to egregious bodily harm done to women by their husbands, that the capacity of a legal and political system to recognize violations of rights does not lie only with the adequacy of the legal definition of assault. The same issue of “privately” perpetrated harm continues to arise in the issue of what kinds of dangers are recognized for the purpose of refugee status. Everything turns on how rights are interpreted in context, on what enables those in power to see bodily harm and interpret it as a violation of a right. For these crucial purposes a full and relational conception of the human self will help.

When the conception of the self directs our attention to the relations in which it is embedded and the degree to which they foster key values such as autonomy, security, and bodily integrity, then the salience of “private” relations becomes obvious. Of course, one should not underestimate the power of wilfull blindness to harms done to subordinate groups. But a conceptual framework that always directs our attention to context, to the structures of relation that form the conditions for the realization of rights, is less likely to allow any set of social relations to fall beyond the purview of scrutiny for rights violations. CONNECT LATER TO NOTES ABOUT RECONCEPTUALIZING STATE ACTION. ALSO TO PROBLEM OF WHETHER THIS APPROACH CALLS FOR TOO MUCH STATE, SEE HOW THE STATE STRUCTURES THE RELATIONS, INCLUDING PRIVATE RELATIONS

Similarly, there are issues of persuasion and complex problems of interpretation in different cultural settings. If the invocation of rights is to serve its rhetorical, political purpose of getting people to stop their abuses, the nature of the claim of right must be heard to show some sensitivity to the context. And to discern the difference, for example, between child labour as part of a family enterprise that
interferes with but does not preclude education, on the one hand, and indentured servitude on the other, it will help to have a framework of rights analysis that is well suited to examining the structures of relationship that foster or undermine basic values like autonomy. In general, the puzzles or seeming dilemmas of debates surrounding human rights vs. respect for cultural autonomy are best explored in relational terms that see human beings as embodied, endowed with affect, and capable of creative interaction.

At a more particular level, one of the virtues of making embodiment central to the image of the human subject of rights is that it would generate a different stance toward physical care-taking. The disdain with which virtually all aspect of physical care-taking is held in North America is part of the general disregard of the body, and even hostility and fear toward things bodily. Not only would the full integration of embodiment into the legal subject help to shift this general destructive stance, it would help in attending to a wide variety of public policy issues. For example, I think attending to the kinds of relationships that foster autonomy and dignity for the embodied self would lead to a recognition of the irreplaceable connection created by physical care-taking. Not only nursing infants, but changing them, and changing infants and spoon-feeding a sick loved-one are examples. Such a recognition would shape how one thought about issues such as the extent of maternity leave, flexibility for nursing for working mothers, or leave for care of sick family members or even friends. Decisions about whether such policies should be legal entitlements or left to the discretion of the employer would be shaped by one’s sense of the relation such care-taking had to autonomy and dignity, of the person in need of care as well as the one doing the care-taking.

Before turning to my final point, let me just note some other examples of rights issues that a fuller conception of the human subject would help us understand. The much debated issues of citizenship and the rights and duties of membership are issues where claims of universal equality meet the special demands of the bonds that hold societies together. I do not suggest that the image of the subject I have outlined here would offer any simple solutions. But were all the deliberations on the issues based on an ongoing inquiry into how structures of relationships shape human capacities, including those we closely associate with rights, such as autonomy, I think we would be better equipped to reflect on these hard questions. If conventional rights analysis remains distant from this approach, there will always be a kind of disjuncture between rights discourse and political or sociological arguments about social cohesion.

Another example is the issue of the constitutional status of social and economic rights. I just want to suggest that the stance toward these issues might be different if the subject people had in mind really was embodied. The material conditions that make the exercise of rights possible may seem more central when the essence of the rights-holder is not disembodied rationality.
Finally, rights must be based on a full conception of the human subject because the way legal rights are defined and implemented fundamentally shapes the social relations that affect people, including their capacity for autonomy. There are several implications to this recognition of the intertwining of rights and social relations. One is that rights themselves should best be understood as structuring relationships—of power, trust, responsibility, authority. And once we recognize the way structures of relationship affect core values like autonomy, and rights structure relationships, much of the traditional division between the public and the private needs to be rethought. Of course, feminists have long argued that this division has been destructive to women for reasons related to these. Here I want to just indicate how to engage this issue in a particular legal context: the application of constitutional rights to “private” or common law.

In the United States and Canada the doctrine of “state action” and scope of the application of the Charter rest on untenable conceptual divisions between public and private, state and non-state. In South Africa, the before final adoption of the constitution, it was amended to specify that the constitutional rights would apply to the common law (after a court case that had decided that it did not). In South Africa one can see especially clearly the arbitrariness of the traditional divide between public and private law. In a country where the distribution of property is so patently the result of state policies of Apartheid, the illusions of the “private” realm of the market are harder to maintain. More generally, inequality is so deeply embedded in the social structures that one cannot expect that it would be possible to achieve the constitutional goal of equality while leaving all existing “private” rights untouched. Or, put differently, it will not be possible to achieve equality without restructuring the relations that are shaped and defined by common law.

One can see that constitutional challenges to common law rights will only arise when the exercise of those traditional rights run afoul of a constitutional value, usually equality. There will then be genuine conflicts between the values of autonomy and equality. But the decisions about how to resolve those conflicts will not be aided by invocation of the boundaries of state/non-state, or public and private. An optimal conception of constitutionalism does require appropriate boundaries both to the scope of the state and to the judicial powers of oversight; but those boundaries are best drawn based on a full understanding of the values at stake, particularly autonomy and equality. An approach such as the one I have outlined here will allow for a thoughtful inquiry into the way a particular interpretation of rights will shape social relations, which, in turn, will affect autonomy and equality. In some cases claims for autonomy, such as the right to use one’s property as one wishes, will conflict with other claims for the conditions of autonomy for many others, such as access to land or housing.

To take an example of a conflict between equality and autonomy from the North American context, one can ask whether the same rules of non-discrimination

51 I elaborate this argument in “Reconceiving Rights as Relationship,”
that apply to hotel owners or owners of apartment buildings should apply to a person who rents out a room in her house. The answer will involve issues of equality and autonomy for both the potential renters and for the owner. The way to think about it is to consider the relevance of the relationships at stake for these values. One need not fall back on traditional conceptions of autonomy to be able to articulate the differences in the relationships that might make one inclined to have different rules for the home owner (whether through legislation or scope of constitutional review).

As can be seen in the Canadian context, to say that constitutional values should guide the development of the common law is not to say that there will be direct judicial review of common law decisions on constitutional grounds. There may be particular historical reasons why attention to the ways in which relationships structured by the common law affect core constitutional values should not take the form of direct judicial review. In the United States, for example, it might be that the centrality of property rights in the history of American Constitutional jurisprudence should make one wary of authorizing the Supreme Court to review common law decisions on constitutional grounds. Whenever unequal economic power is at stake in conflicts between autonomy and equality, one might have doubts about the Supreme Court’s interpretive framework. Moreover since at the beginning of the twenty first century the American Supreme Court has still not developed an equality jurisprudence that recognizes the way historical disadvantage is sustained in systemic injustice, it shows itself particularly ill-equipped for an appropriate relational analysis. Even though the Court’s interpretive framework varies over time, there are strong historical traditions that might make one think that the Supreme Court is not a good institution for adjudicating the conflicts of core values that will arise in common law cases.

There are also broader institutional reasons why any country might want a strong use of constitutional values in the development of the common law (indeed all aspects of the law), such as the increasing Canadian use of the “lens of equality,” without direct oversight through judicial review based on claims of constitutional rights violations. It might be better to have a wider scope for the development of constitutional values, one path through their integration into common law jurisprudence and another through judicial review of constitutional violations in other spheres of law.

Thus the argument that a relational approach helps us see that the categories of public/private, state/non-state are not good tools for drawing the boundaries of the scope of judicial review, does not mean that there can be no good arguments for the existing boundaries in both Canadian and American constitutional law. It does suggest that it would be more helpful to articulate what those arguments are than to rely on categories that mislead about the ways law structures the relationships that are crucial to the core values constitutions are supposed to protect.

While I have done little more than gesture at how I would make these arguments, I hope that it is at least clear why I see a starting point of the full,
relational self as a help in taking on the challenge of finding new ways of articulating the limits to the scope of the state. The illusory categories need to be replaced with careful inquiries into the relationships that affect the core constitutional values. With a full relational self as the subject of rights, it will not seem like crossing inviolable conceptual boundaries to see the interconnection between "private" rights, structures of social relations and constitutional values of equality and autonomy.