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Symposium

The Works of Martha C. Nussbaum

ATALANTA'S APPLES: THE VALUES OF MULTIPLICITY¹

By Mary Anne Case

In this paper, I shall enlist both examples and arguments from the work of Martha Nussbaum in a campaign I have long been waging for what, with some trepidation, I have been calling multiple orgasm scholarship. I began this campaign after one too many experiences of being asked by other scholars, "What is your claim?" and having my response that I had several treated as tantamount to an acknowledgement of failure. Good scholarship is often expected to be,

1. I have been waging the campaign described herein in cocktail party conversation among legal academics for many years. Among the many who listened to me prattle on, I am particularly grateful to Amy Adler, Barry Adler, Ian Ayres, Jack Balkin, Janet Halley, John Harrison, Laurie Hollander, Alan Hyde, John Jeffries, Jody Kraus, Julia Mahoney, Linda McClain, Denise Morgan, Todd Preuss, Bill Stuntz, and Kenji Yoshino for their critical engagement in helping me develop these ideas. I am also most grateful to Martha Nussbaum for her encouragement and patience, and to the organizers and participants in the Third Conference on Law and Philosophy at Quinnipiac Law School, on the Work of Martha Nussbaum, particularly Brian Bix, Jennifer Brown, Linda Meyer, Joel Paul, Cass Sunstein, and Robin West.

not only focused and direct, but singular in its aim. Its trajectory should be simply to rise, climax, fall and be done. Anything more polyvalent risks being viewed as too diffuse—as scholarship that, to continue the sexual metaphor, may just want to be held.² The desired objective all too often seems to be to roll the universe into a ball and lead it to give one overwhelming answer, whether that answer is efficiency or equal concern and respect or utility maximization. The emphasis on multiplicity in the work of Martha Nussbaum is a refreshing change. Consider, for example, in Nussbaum's work on quality of life, the claim that humans should attain, not just one, but at least ten basic functional capabilities, each of which is itself multiplicitous and none of which can fruitfully be reduced to another. This emphasis on substantive multiplicity is complemented by an appreciation for methodological multiplicity. For example, in her work on form and content in philosophy and literature, Nussbaum argues in favor of embracing complexity and variety and resisting single, simple reductive theories.

From the time of Greeks on down, the association of the one with males and the many with females may have caused the many to be undervalued. This tendency is one both Nussbaum and I consider it important to resist. At the beginning of *The Fragility of Goodness*, Nussbaum sets forth two gendered “normative conceptions of practical rationality,” each of which, she argues, finds articulation in tragedy. Similarly, I shall argue that both single and multiple orgasm scholarship have long had their place in law, but that the virtues of multiplicity could use greater recognition. I shall conclude with some feminist readings of the myth of Atalanta's apples.

2. In resorting to this imagery, I do not wish to elevate orgasms categorically over being held, either literally or metaphorically. Simply being held has its pleasures. Cf. Ann Landers, *Cuddling Or 'The Act'? This Time Men Respond*, S. BEND TRIB., Nov. 26, 1995, at F3; Ann Landers, *Overwhelming Response to Survey*, CHATTANOOGA FREE PRESS, Nov. 26, 1995, at L6 (reporting that more than 70% of females surveyed but fewer than 10% of male respondents preferred just being held to sexual intercourse). And certain fine works of scholarship, for example some forms of thick description, may be difficult to reduce to one or even several discrete claims without therefore being less valuable. One reason for the skewed proportions reported by Landers may be the comparatively small percentage of women who achieve orgasm from intercourse. For survey data on female orgasm, see SHERE HITE, *THE HITE REPORT: A NATIONWIDE STUDY ON FEMALE SEXUALITY* (1976) (reporting that 26% of females surveyed said they “ha[d] orgasm regularly from intercourse” and 24% said “d[id] not orgasm from intercourse” at all); EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 116-17 tbl. 3.7 (1994) (reporting that 75% of male respondents, but only 28.6% of female respondents said that they “always had an orgasm” during sex with their primary partner over the past year).

Before exploring further the values of multiplicity in the work of Martha Nussbaum and in the law and scholarship more generally, let me, at the risk of multiplying metaphors past the point of usefulness, try another set of images for what I have in mind that may be less distracting than the sexual ones. Imagine scholarship to be like a road.³ Consider first a broad highway, plowing through the landscape without taking any account of its contours,⁴ a highway shielded from anything going on in the surrounding countryside by concrete dividers that prevent noise from penetrating and the eye from being distracted, whose broad grassy median strip is broken up only by a series of billboards announcing the distance to some advertised attraction—200 miles to Peanut Museum, 10 miles to Peanut Museum, Peanut Museum Next Right, You've Just Missed the Peanut Museum . . .⁵ This sort of highway follows the scholarly model of focusing on a single "minimum publishable unit," saying what you're going to say about it, saying it, then saying what you've said. Now consider a more or less parallel road, with the same beginning and end points, but this road winds its way through the countryside, taking into account the natural contours of the landscape, with nothing to screen the traveler from whatever he or she may pass along the way. On this latter road, the Peanut Museum will be just one of many sights at which the traveler may choose to

3. In his review of Posner's *Economic Analysis of Law*, Arthur Leff pursued yet another, related set of metaphors, centered on the traveler rather than the road. Leff described Posner's book as a picaresque novel, in which the "the eponymous hero sets out into a world of complexity," which he subdues through the force of his unchanging, single vision. Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974). If economic analysis is a picaresque novel, perhaps feminist theory is a Bildungsroman, in which the central character does indeed grow in self-awareness, develop and change as she encounters the world around her.

4. Cf. C. DAY LEWIS, *Sheepdog Trials in Hyde Park*, in *SELECTED POEMS* 108, 108-09 (1967) ("An abstract game. What can the sheepdog make of such simplified terrain?—no hills, dales, bogs, walls, tracks, only a quarter-mile plain of grass, dumb crowds like crowds on hoardings around it . . . Well, the dog is no landscape-fancier: his whole concern is with his master's whistle, and of course with the flock—sheep are sheep anywhere for him. . . . What's needfully done in the solitude of sheep-runs—Those tough, real tasks—become this stylised game, a demonstration of intuitive wit kept natural by the saving grace of error.").

5. I have in mind, quite concretely, the stretch of I-64 through Virginia and the Carolinas, where the dull vegetation of the median strip is broken up only by intermittent billboards announcing the number of miles (initially measured in the hundreds) to an establishment called South of the Border. I should note, that, notwithstanding this preparation, I drove past South of the Border the first time without stopping or even being seriously tempted to stop.

pause; the journey may be slower, but it may also be more interesting.⁶ The former is the sort of highway on which armies march best, the latter may suit pilgrims. There is, undeniably, a use for both sorts of roads,⁷ and a scheme of urban renewal that seeks to replace all of the latter with the former⁸ is, in my view, misguided. Nussbaum has made much the same point when it comes to scholarship. The gravamen of *Love's Knowledge* is that different styles of writing are suited to different subjects. Nussbaum's praise of multiplicity goes far beyond the stylistic, however.

Nussbaum's commitment to the values of multiplicity dates back to her earliest scholarly writing. On the very first page of the book that grew from her dissertation, *Aristotle's De Motu Animalium*,⁹ she notes approvingly that, "One of the greatest virtues that distinguishes [Aristotle] from his philosophical predecessors is his reluctance to press for a single answer when the evidence points to several, or to apply incautiously in one area a solution that had been found promising in another." Later in the same work,¹⁰ Nussbaum has Democritus take issue with Aristotle's claim that, "Since there are four kinds of explanations, the natural scientist ought to know about all of them." Instead, Democritus insists,

a single account is evidently better, and more scientific than a plurality. . . . Can't you see that a simple pruning out of all that otiose material would put your really scientific work in a better light? . . . Or are you determined to remain attached to your methodological principle that we should not have just one simple account where we can have a plurality?

The voice of Democritus is the familiar voice of the critic of what I have called multiple orgasm scholarship, urging the scholar to cut back to a single claim. It is clear at this early stage, and will become clearer in

6. Scholarship following this latter path is often dismissed as "nonlinear," although, beyond Euclidean geometry, not all lines are straight.

7. Cf. Leff, *supra* note 3, at 468 ("It is not going to help matters much if I attempt to substitute for Posner's extremely careful version of what I take to be the essentialist fallacy ('the *real* explanation of this social practice is') my own less careful avatar of the holistic fallacy ('this practice can only be explained in the context of all the dynamics of the entire society'). If the first is overly arid, the second is a swamp."); Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776, 1795 (1998) ("There are many different ways to write philosophy well . . .").

8. Consider, for example, Haussman's construction of the boulevards of Paris.

9. MARTHA CRAVEN NUSSBAUM, *ARISTOTLE'S DE MOTU ANIMALIUM* ch. XV (1978).

10. *See id.* at 67ff.

works like *Poetic Justice*, discussed below, that Nussbaum stands with Aristotle in refusing to “equate ‘scientific’ with ‘reductionist.’”

Also there from the beginning, and also Aristotelian, is a commitment to substantive as well as methodological multiplicity. Long before her capabilities theory was a glimmer on the horizon, Nussbaum insisted, with Aristotle, that, “[w]e want a life that uses all our capacities,” both those we share with beasts and those uniquely human, and thus in “the account of the virtues the ascetic is as defective as the excessively sensual.”¹¹

By the time of the *Fragility of Goodness*, Nussbaum had more explicitly linked methodological and substantive multiplicity, more clearly endorsed them, and begun to discuss them in gendered terms. Both the association of the many with females and its devaluing in comparison to the one are of ancient origin. The Pythagorean table of opposites, set out in *Aristotle's Metaphysics*, opposes, inter alia, One/Male/Straight/Light/Good to Many/Female/Curved/Dark/Bad.¹² In a similar table at the outset of *Fragility*, Nussbaum retains the gendered associations, but tries to complicate, if not reverse, the valence, and to break down the simplicity of the dichotomy.¹³ She there describes “two normative conceptions of human practical rationality.” The first conceptualizes the “agent as hunter, trapper, male, . . . active,” the soul as hard; trust in only the stable and immutable, intellect as sunlight and

11. *Id.* at 106.

12. See ARISTOTLE'S METAPHYSICS bk. I, ch. 5 (Richard Hope trans., Columbia University Press 1952). The remaining cognates are limit/odd/right/resting/square and unlimited/even/left/moving/oblong. See Sabina Lovibond, *An Ancient Theory of Gender: Plato and the Pythagorean Table*, in WOMEN IN ANCIENT SOCIETIES: AN ILLUSION OF THE NIGHT 88 (Leonie Archer et al. eds., 1994) (discussing Plato's valuing of “haplotes” (singleness) over plurality and indeterminacy, even the “attractive” multiplicity of democracy, a “form of government like an embroidered garment . . . spangled with every different way of life”).

13. The retention of complexity as well as the breaking down of dichotomies are more generally themes of *Fragility*. Thus, for example, Nussbaum criticizes the tendency to treat cases involving the categories “moral” and “non-moral” as “fall[ing] into two neatly demarcated and opposed categories.”

Our intuitive sketch, by contrast, suggests that in everyday life we find, instead, a complex spectrum of cases, interrelated and overlapping in ways not captured by any dichotomous taxonomy. If eight features are all of possible relevance to the description and assessment of conflicts, we could well discover that one case exhibits (the second member of) my first, third and sixth contrasts; another (the second member of) the second, seventh and eighth; and so on. We do not want to rule out or obscure this possibility.

MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 29 (1986).

the good life as solitary. In the second, the agent is “plant, child, female (or with elements of both male and female),” both active and passive/receptive, with a soft, porous, though definitely structured soul; trust is reposed in the mutable and unstable, intellect is like flowing water and the good life is lived along with friends, loved ones and the community. Nussbaum seeks to add to the Platonic self-sufficiency she criticizes “a kind of human worth that is inseparable from vulnerability, an excellence that is in its nature other-related and social, a rationality whose nature is *not* to attempt to seize, hold, trap, control, in whose values openness, receptivity, and wonder play an important part.”¹⁴ She deliberately seeks to accommodate her writing style to the substance she is discussing, eschewing a “‘plain,’ ‘hard’ style” and resisting Locke’s view that “the rhetorical and emotive elements of style are rather like a woman: amusing and delightful when kept in their place, dangerous and corrupting when permitted to take control.”¹⁵

For the tragic heroes of *Fragility*, single-mindedness, a denial of the multiplicity of their commitments, is the problem, not the solution. Of Creon, Nussbaum says,

He likes things to look straight, and not (as he will finally see them) crooked or turning, fixed and not fluid, single and not plural, commensurate and not incommensurable. By making all values commensurable in terms of a single

14. *Id.* at 20. In later work, Nussbaum borrows from Aristophanes’s *Clouds* the gendered contrast between a “tough military,” hard, manly style of reasoning and learning and the alternative style represented in ancient times by that “seductive softie” Socrates and in the modern academy by “the subversive, the wet, the dangerous woman.” See Martha C. Nussbaum, *The Softness of Reason: A Classical Case for Gay Studies*, NEW REPUBLIC, July 13, 1992, at 26 [hereinafter Nussbaum, *The Softness of Reason*]. She deplores overemphasis on manly style in the evaluation of potential legal academics. See Martha Nussbaum, *Cooking for a Job: The Law School Hiring Process*, 1 GREEN BAG 2D 253, 262 (1998) (criticizing tendency of law school job candidates and those who hire them to “think that quickness, glibness, and aggressiveness are virtues, and that reflectiveness, quietness, and uncertainty are vices,” with the result that too many are “hired for being ‘brave and manly souls, bold and clever in approaching people’ [and consequently] put these same qualities into their work”); cf. NUSSBAUM, *supra* note 13, at 216 (“Things that at first naturally strike us as ridiculous—for example the name ‘Hyacinth Robinson,’ which would not get many votes in an election (‘Muniment’ perhaps would, suggesting a tough defense policy)—are, at the novel’s end, to strike us as not only finer, but also braver than the tough things, just as it is braver to be plant, as a man, than a fortification. For a real man *not* to dare to be a flower: *that*, as we must see, is the cowardly thing.”).

15. NUSSBAUM, *supra* note 13, at 16.

coin—he is preoccupied with the image of coinage and profit in ethical matters—Creon achieves singleness, straightness and an apparent stability.¹⁶

But, “Creon’s single-ended conception has prevented him from having an adequate conception of the city—which in the wholeness of its relationships, does not appear to have a single good. Nor does Creon himself manage to sustain the simple view; it does not do justice even to all of his own surviving concerns.”¹⁷ The conflicts Agamemnon and Creon try to subdue—those between the claims of family and state—are solved differently by the women in their plays; and even though some of these women, too, attempt an impossible single-mindedness, it may be that in the end they are redeemed, less by the particular choices they make, than by their continuing awareness of the conflict inherent in choosing.¹⁸

The images Nussbaum uses to describe reasoning styles in such situations of moral conflict resemble those found in Carol Gilligan’s discussion of boys’ and girls’ approaches to moral dilemmas. Although Gilligan’s Jake describes such dilemmas as “like math problems with humans,”¹⁹ Nussbaum is insistent that to be in such a situation of conflict “does not feel like solving a puzzle, where all that is needed is to find the right answer.”²⁰ Rather it is to be, as Gilligan describes it, in the center of a “web of connection”:

We reflect on an incident not by subsuming it under a general rule, not by assimilating its features to the terms of an elegant scientific procedure, but by burrowing down into the depths of the particular, . . . combining this burrowing with a horizontal drawing of connections. . . . The Platonic soul will be directed, in its singleness and purity, to ethical objects that are single-natured and unmixed. . . . The Sophoclean soul is more like Heraclitus’s image of psyche: a spider sitting in the midst of its web, able to feel and respond to any tug in any part of complicated structure. . . . The image of

16. *Id.* at 58 (citations omitted).

17. *Id.* at 61.

18. *See, e.g.,* NUSSBAUM, *supra* note 13, at 66, 67 (“Antigone remains ready to risk and to sacrifice her ends in a way that is not possible for Creon, given the singleness of his conception of value. There is a complexity in Antigone’s virtue. . . . She dies recanting nothing, but still she is torn by a conflict. . . . From within her single-minded devotion to the dead, she recognizes the power of these contingent circumstances and yields to them. . . . This vulnerability in virtue, this ability to acknowledge the world of nature by mourning the constraints that it imposes on virtue, surely contributes to making her the more humanly rational and the richer of the two protagonists: both active and receptive, neither exploiter nor simply victim.”).

19. CAROL GILLIGAN, *IN A DIFFERENT VOICE* 26 (1982).

20. NUSSBAUM, *supra* note 13, at 32.

learning expressed in this style, like the picture of reading required by it, stresses responsiveness and an attention to complexity; it discourages the search for the simple and, above all, for the reductive.²¹

When she turns her attention to legal scholarship, Nussbaum is quite right to find in the tradition, although not in some contemporary instantiations of it, the multiplicity she values. *Poetic Justice* is her “principled defense of a humanistic and multivalued conception of public rationality that is powerfully exemplified in the common-law tradition” from attack by “the more ‘scientific’ conceptions of the law-and-economics movement.” Nussbaum begins *Poetic Justice* with another rejection of mathematical imagery for moral issues, this one Oliver Wendell Holmes’s observation that Aristotle teaches that “life is painting a picture not doing a sum.”²² The gravamen of *Poetic Justice* is that, contrary to the assumptions of this world’s Gradgrinds, there is more than “one thing needful.”

In addition to criticizing those, like Posner and Plato, who, in her view mistakenly, seek (or worse, claim to have found) a single metric, Nussbaum praises those, from Aristotle on down, whose writing acknowledges complexity and values multiplicity.²³ Very often, the writing that does this to Nussbaum’s satisfaction is literature or commentary thereon. Thus, she praises Wayne Booth for “sensibly insist[ing] that there are many good things for literature to do and be—just as there are many good things in human lives.”²⁴ But she does not endorse wholesale all praise of multiplicity; characteristically, she distinguishes among them. “Complex” is a word she uses often, usually, though not always, with approbation.²⁵ Nussbaum strongly

21. NUSSBAUM, *supra* note 13, at 69; Cf. GILLIGAN, *supra* note 19, at 37-38 (“Again, Jake constructs the dilemma as a mathematical equation, deriving a formula that guides the solution: one-fourth to others, three-fourths to yourself. . . . To [Amy], responsibility signifies response, an extension rather than a limitation of action.”).

22. THE ESSENTIAL HOLMES 58 (Richard A. Posner ed., 1992).

23. See, e.g., Nussbaum, *The Softness of Reason*, *supra* note 14, at 26 (describing liberal education as committed to the idea that “we live in a world that is complex and various, that has a history of still greater complexity—and that in order to be good citizens in such a world, we must take [sic] ourselves competent in that complexity, able to grapple with that variety and historical many-sidedness”).

24. Martha C. Nussbaum, *Reading for Life*, 1 YALE J.L. & HUMAN. 158, 169 (1988).

25. Consider, for example, the Booth review, which uses variants of the word 5 times in 4 pages (168-71) and again 3 times in a single page (175), together with numerous variants of “richer” and “fuller” contrasted with “limited,” “narrow,” “minimal,” “abstract,” “schematic,” “rigid” and “overly simple.” *Id.* at 169.

defends universalism against cultural relativism, which one might initially suppose reduces to a defense of the one over the many. But, to the contrary, according to Nussbaum, "One crucial step in defending a universalist project is to point to the variety within groups, cultures and traditions. . . . [T]raditions are not monoliths. Any living culture contains plurality and argument."²⁶

I do not mean to suggest either that Nussbaum's work categorically privileges the many over the one, or that anyone else should do so. To do so would be to engage in the paradox of making of the many the one. But what Nussbaum does and what we all should do more often is to resist an artificial singleness when matters are multiple and complex.²⁷

Nor do I mean to suggest all of Nussbaum's multiple specifications are of a piece. Sometimes, Nussbaum is giving multiple examples of the same phenomenon, sometimes distinguishing the items specified, sometimes listing multiple characteristics of a single thing, sometimes offering a non-exhaustive list of related things. Part of what is remarkable in each case, however, is the comparatively high number she chooses—five or seven more often than two or three.²⁸ Moreover,

26. MARTHA CRAVEN NUSSBAUM, *SEX AND SOCIAL JUSTICE* 12 (1999) [hereinafter *NUSSBAUM, SEX*]; see *id.* at 14 ("[N]orms are plural and people are devious. Even in societies that nourish problematic roles for men and women, real men and women can also find spaces to subvert those conventions, resourcefully finding possibilities for love and joy."); *id.* at 15 ("[O]ne dividend of thinking about feminism internationally is that one comes to see the many different ways in which children have been cared for with good results."); Martha C. Nussbaum, *Aristotle, Feminism, and Needs for Functioning*, 70 *TEX. L. REV.* 1019, 1024 (1992) [hereinafter *Nussbaum, Aristotle*] (urging greater attention to Aristotle's emphasis on being "particularistic without being in the least relativistic").

27. See, e.g., MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE* 207 (1990) ("For if you are going to see life as it is, you have to be willing to be perplexed, to see its mystery and complexity; consoling simplification brings dullness of vision."); Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 *STAN. L. REV.* 1627, 1640 (1993) [hereinafter *Nussbaum, Use and Abuse*] (connecting philosopher Judith Jarvis Thomson's frustration with her Yale Law students' resistance to recognizing "how complicated and messy the issues really are" with "what is most aggravating about Socrates to the busy professionals he encounters [—] that he will not let things reach a neat conclusion.").

28. See, e.g., NUSSBAUM, *SEX*, *supra* note 26, at 216 ("I suggest that at least the following seven notions are involved in that idea [of treating as an object]: 1. Instrumentality . . . 2. Denial of autonomy . . . 3. Inertness . . . 4. Fungibility . . . 5. Violability . . . 6. Ownership . . . 7. Denial of subjectivity [T]hinking for a bit . . . will help us see that these seven features are commonly present and distinct from one another."); NUSSBAUM, *SEX*, *supra* note 26, at 6 ("The feminism defended here has five salient features: It is internationalist, humanist, liberal, concerned with the social shaping of preferences and desire and, finally, concerned with sympathetic understanding."); Nussbaum, *Aristotle*, *supra* note 26, at 1020 ("I shall offer a brief

though this sort of parsing, of fine distinctions, is not foreign to the analytic tradition, in Nussbaum's hands it is far more likely to take the form both/and than either/or.²⁹

Legal scholarship has been polyvalent in a different sort of way—polyphonic rather than symphonic or harmonic.³⁰ Text does not dominate the gloss, but is in a more complex relationship with it—more than one thing is going on at a time. Footnotes in legal scholarship and judicial opinions are not just the handmaids to the text, as they tend to be in philosophic or economic scholarship, but establish an independent dialogue with it, as they have done since at least the days of the medieval glossators. Some of the best points in opinion writing and scholarship emerge from footnotes, such as the notorious footnote four of *Carolene Products*, from which much of modern equal protection law can be built. Numerous writers on feminist jurisprudence have asked “Is the Law Male?”³¹ Given its embrace of multiplicity, not only in the

account of five ways in which Aristotle seems to make a potential contribution to feminist thought.”); Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1198 (1997) (“Let me now, however, turn to seven issues less frequently discussed where the same problem, I believe, obtains: powerful philosophical arguments that cast doubt on current foundations are being ignored”); Martha C. Nussbaum, “*Only Grey Matter*”? *Richard Posner's Cost Benefit Analysis of Sex*, 59 U. CHI. L. REV. 1689, 1698-99 (1992) (“Accounts of sexual activity take, it seems, at least four different forms. First descriptive accounts. . . . Second explanatory accounts. . . . Third normative accounts. . . . Finally, . . . legal accounts. . . .”); Martha C. Nussbaum, *Religion and Women's Human Rights*, in RELIGION AND CONTEMPORARY LIBERALISM 93, 94 (Paul Weithman ed., 1997) (“Apart from law, influential religious discourse in many parts of the world threatens the bodily integrity and equal dignity of persons—and sometimes, even, their equal liberty of worship. Consider the following seven examples.”). The point is not so much that eight is enough, but that sometimes no fewer than eight will be enough.

29. To complicate Cass Sunstein's assertion in his paper for this conference, *On Philosophy and Economics*, that philosophers complicate, it is important to distinguish between splitting and clumping complication, drawing ever finer lines in identifying the single end is different from adding further components.

30. As Dorothy Sayers points up when she has her fictional detectives Peter Wimsey and Harriet Vane discuss their budding romantic relationship as a question of musical style, this musical metaphor is also gendered and also has sexual overtones. See DOROTHY SAYERS, *GAUDY NIGHT* (1936) (“Peter, what did you mean when you said that anybody could have the harmony if they would leave us the counterpoint?” “Why, . . . that I like my music polyphonic. If you think I meant anything else, you know what I meant.” “Polyphonic music takes a lot of playing. You've got to be more than a fiddler. It needs a musician.” “In this case, two fiddlers, both musicians.” “I'm not much of a musician, Peter.” “As they used to say in my youth, ‘All girls should learn a little music—enough to play a simple accompaniment.’ I admit that Bach isn't a matter of an autocratic virtuoso and a meek accompanist. But do you want to be either?”).

31. Title of Symposium in 69 CHI.-KENT L. REV. (1993).

relation of footnotes to text, but also of majority to dissenting opinions,³² its attention to complexity and rich detail, perhaps one should also ask, "Is the (common) law female?"

And, although valuing multiplicity may be a methodological hallmark of the common law, attention to a multiplicity of ends is part of the civil law as well. Consider, for example, the notion that the corporation should not be single-mindedly devoted to maximizing the interests of its stockholders, but should rather be responsive to the interests of a multiplicity of constituencies, including its employees, its customers and the inhabitants of the places in which it does business. One could see this notion as deriving from a feminine ethic of care, or from a European communitarian ethic, given that this is what German corporations already are required to do.

The association of the one with males and the many with females has long been a feature of analysis in a variety of disciplines. For example, art historian Kenneth Clark borrows a line from H.G. Wells in distinguishing those religions, like Roman Catholicism and the religions of ancient Egypt, Mesopotamia, and India—"stabilizing, comprehensive religions . . . [that] gave the female principle of creation at least as much importance as the male, and wouldn't have taken seriously a philosophy that failed to include them both"—from "the more aggressive, nomadic," more rigorously monotheistic, abstract and iconoclastic religions of "Israel, Islam, the protestant North [which] conceived their gods as male."³³ Distinguishing masculine from feminine elements in music, at least in part based on affinity for the one or the many, has become a cottage industry in musicology.³⁴

I am deeply suspicious of any reductionist effort to attribute to sex styles of thought. Although in recent years feminist epistemologists have been among those investigating gendered reasoning styles,³⁵ it is

32. Compare, for example, the unanimous, anonymous opinions of the European Court of Justice.

33. KENNETH CLARK, *CIVILISATION* 177 (1969).

34. See, e.g., SUSAN McCLARY, *FEMININE ENDINGS: MUSIC, GENDER AND SEXUALITY* (1991); Leo Treitler, *Gender and Other Dualities in Music History*, in *MUSICOLOGY AND DIFFERENCE: GENDER AND SEXUALITY IN MUSIC SCHOLARSHIP* 23 (Ruth A. Solie ed., 1993); cf. HENRY JAMES, *THE PRINCESS CASSAMASSIMA* (1968), quoted in Nussbaum, *Use and Abuse*, *supra* note 27, at 208 ("Humanity, in his scheme, was classified and divided with a truly German thoroughness and altogether of course from the point of view of the revolution. . . . He treated all things, persons, institutions, and ideas as so many notes in his great symphonic massacre.").

35. See, for example, Lorraine Code's discussion of analyses of the reasoning styles of three female scientists in LORRAINE CODE, *WHAT CAN SHE KNOW?: FEMINIST*

important to bear in mind that it is not generally in the first instance feminists or proponents of these alternative styles of thought or work who have identified them with women and the feminine. From at least the days of the Pythagorean table, denigrators of women and opponents of methods they called feminine associated these methods with women or gendered them. This puts me on far more comfortable and familiar ground—defending the conventionally feminine³⁶ from deprecation without conceding that it need be linked to biological sex.³⁷

Isn't this disaggregating of gender from sex particularly difficult to do when I begin with the metaphor of multiple orgasms, a metaphor with its roots in biology? Am I not at risk of approaching the sort of vulgar sociobiology I ordinarily deplore?³⁸ Such sociobiology sometimes traces women's affinity for multiplicity to the savannah, where their work of gathering and childcare was always multiplicitous, as contrasted with males' more single-minded focus in hunting. Sometimes it traces this affinity to the brain, where the two hemispheres are said to be more closely connected in women than in men.³⁹ Am I not also coming dangerously close to suggesting that the one and the many are essentially written on the male and female body?⁴⁰

THEORY AND THE CONSTRUCTION OF KNOWLEDGE 150-60 (1991), particularly her discussion of Evelyn Keller's emphasis on Barbara McClintock's sense that "differences and idiosyncrasies in her specimens are theoretically fascinating and revealing, not frustrating." *Id.* at 151.

36. I do not mean to suggest that multiplicity is only coded feminine. In his paper for this conference, Sunstein argues that economists simplify, philosophers complicate. As Nussbaum herself argues, literature may complicate even further when compared to philosophy. At least as many of the people who asked me what my claim was and looked askance when I replied I had several were philosophers as were economists.

37. See, e.g., Mary Anne Case, *Two Cheers for Cheerleading: The Noisy Integration of VMI and the Quiet Success of Virginia Women in Leadership*, 1999 U. CHI. LEGAL F. 247 (2000); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation or the Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995).

38. See Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y 369, 374-75 (1995).

39. See, e.g., DEBORAH BLUM, SEX ON THE BRAIN: THE BIOLOGICAL DIFFERENCES BETWEEN MEN AND WOMEN 47 (1997). If the association of multiplicity with females had not predated these findings concerning brain structure, exactly the opposite construction could have been placed on them—sociobiologists might have argued that the male brain, more sharply divided into two hemispheres inclined males toward multiplicity while the more unified female brain inclined females to single-mindedness.

40. Cf. Luce Irigaray, *This Sex Which Is Not One*, in PHILOSOPHY AND SEX 549 (Robert B. Baker et. al. eds., Claudia Reeger trans., 1998) ("A woman 'touches herself' constantly without anyone being able to forbid her to do so [(Except perhaps through female genital mutilation, whose more extreme "pharaonic" forms involve, the removal,

I hope not. Even when it comes literally to sex, associating multiplicity exclusively with females unacceptably stereotypes both male and female sexuality: some males are sexually multivalent and polycentric in their centers of pleasure and some females are more focused.⁴¹ More broadly in the intellectual context, plenty of women write single orgasm scholarship and plenty of men engage in multiplicity. But, unfortunately, as is the case with so many things gendered feminine in our society, multiple orgasm scholarship, even when undeniably well done, may tend to be devalued in comparison with more “masculine” single orgasm scholarship. Consider the work of Amartya Sen, who collaborated with Martha Nussbaum in work on capabilities. Sen was awarded the 1998 Nobel prize in economics, but in a recent review of his work, Fareed Zakaria described him as “an odd choice” for this prize because Sen was “not associated with a single grand idea” but rather with “big, messy questions” across “a range of topics, even disciplines.” Zakaria is here manifesting the all too common prejudice in favor of single orgasm scholarship, which he calls the quest for a “killer theorem.” Although Zakaria praises Sen’s latest book as “rich” (a positive quality associated with multiplicity), he ends by criticizing the book’s “discursive and diffuse quality,” which “makes one long for a killer theorem.”⁴²

not only of the clitoris, but of the labia.]), for her sex is composed of two lips which embrace continually. Thus, within herself, she is already two—but not divisible into ones—who stimulate each other. . . . [H]er pleasure is denied by a civilization that privileges phallogormorphism. The value accorded the only definable form excludes the form involved in female autoeroticism. The ONE of form, the individual sex, proper name, literal meaning—supersedes, by spreading apart and dividing, this touching of AT LEAST TWO (lips) which keep woman in contact with herself. . . . Whence the mystery that she represents in a culture that claims to enumerate everything, cipher everything by units, inventory everything by individualities. . . . We could go on and on—but perhaps we should return to the repressed female imaginary. Thus woman does not have a sex. Her sexuality, always at least double, is in fact PLURAL. Plural as culture now wishes to be plural? Plural as the manner in which current texts are written, with very little knowledge of the censorship from which they arise? . . . [O]ne can say that the geography of her pleasure is much more diversified, more multiple in its differences, more complex, more subtle, than is imagined—in an imaginary centered a bit too much on one and the same.”)

41. Indeed, some forms of multiplicity may have been imposed on women, for example by Freud and other male theorists who insisted that vaginal and clitoral orgasms are fundamentally different rather than reducible to a single metric. See, e.g., Anne Koedt, *The Myth of the Vaginal Orgasm*, in *LIBERATION NOW: WRITINGS FROM THE WOMEN’S LIBERATION MOVEMENT* (1971).

42. Fareed Zakaria, *Beyond Money*, N.Y. TIMES BOOK REVIEW, Nov. 28, 1999, at 14 (reviewing Amartya Sen’s *Development as Freedom*).

Martha Nussbaum frequently uses mythological stories as parables—Hephaistos's golden automatons to introduce *Cloning*, Siva's detachable penis to illustrate the social construction of sexuality in *Sex, Preference, and Family*, for example. I shall end this essay with a similar parable, using the myth of Atalanta to illustrate some of the values of multiplicity.⁴³ Exposed as a child, Atalanta is brought up able to hunt, run and fight with the best of men. Of her exploits, the one on which I wish to focus is her insistence that she will marry only a man who can beat her in a footrace.⁴⁴ After many men lose such a race (and, in consequence, their heads), one suitor prays to Aphrodite for assistance. The goddess offers him three golden apples, which she advises him to drop at critical points in the race. As Aphrodite intended, Atalanta turns aside to collect the three apples, slowing down enough to lose the race.

There are many different ways to read the story of Atalanta from a feminist perspective. An early generation of sameness feminists admired a woman who could beat men at their own game quite literally, perhaps also one who gloried in her independence from men. Atalanta then became a cautionary tale—did she throw the race for love,⁴⁵ would women always compromise to please men, to make them look good or because they feared success? Does Atalanta show that women can't compete with men, or at least can't win in sustained competition? Is Atalanta the mythological version of the filly Ruffian, used by Phyllis Shlafly as an example of the cost of female hubris? Ruffian, perhaps the greatest filly of all time, was undefeated until, in a match race with 1975 Kentucky Derby winner Foolish Pleasure, she broke her leg "racing on the lead," and had to be euthanized.⁴⁶

43. I mean this imitation to be the sincerest form of flattery. I do not, however, mean to suggest that Nussbaum *is* Atalanta, notwithstanding that they both run fast.

44. For details of the myth, see, for example, Judith M. Barringer, *Atalanta as Model: The Hunter and the Hunted*, 15 *CLASSICAL ANTIQUITY* 48, 71 (1996).

45. This is the interpretation suggested by Ovid, who describes her, on first seeing her ultimately victorious suitor, torn "betwixt her desire to conquer and to be conquered." OVID, *METAMORPHOSES* bk. X, at 610, *quoted in* Reet A. Howell & Maxwell L. Howell, *The Atalanta Legend in Art and Literature*, 16 *J. SPORT HISTORY* 127, 134 (1989).

46. I should note that I regularly use the story of Ruffian as a parable with a different moral than Shlafly's, in comforting law students devastated by mediocre first semester first year grades. It has seemed to me since I was a student at the Harvard Law School that those students most severely affected by such grades have in common with Ruffian the unfamiliarity of being in the middle of the pack. Like Ruffian, they come to the race undefeated, at the top of every class they've ever been in, and, faced with the unfamiliar sensation of others running alongside, they are at risk of destroying

I've always seen quite different lessons in the story of Atalanta's apples. It did not seem to me that Atalanta intended to throw the race by pursuing these apples. It seemed instead that she thought she could take time to retrieve them and still win. At worst then, the story of Atalanta's apples can be read as a cautionary tale to the so-called superwoman—you cannot have it all; if you are not single-minded in your pursuit of victory, you cannot win; if you do not strip down your life to the minimum necessary for the primary task at hand, but allow yourself to be distracted by, and then insist on weighing yourself down with, extraneous things, however bright or appealing, you will be overtaken.⁴⁷ But at its best, the story of Atalanta's apples teaches the values of multiplicity—not only are they themselves multiple, but they contain multiplicity within them. The apple, like the pomegranate, became a symbol for fertility and desire because it had multiple seeds. Even if Atalanta was mistaken that she could gather the apples and still win the race, her choice not to let other things of value fall by the wayside in single-minded pursuit of a narrow victory is one we should also learn to honor.

themselves trying to keep up. As a student at Yale College, I had had others racing alongside and ahead of me for years before law school. It may be that coming to terms with your own mediocrity is like the measles, painful at any age, but easier to survive at a younger one.

47. I first developed this reading of Atalanta when, as a first year student at the Harvard Law School, I noticed far more of my male than my female classmates single-mindedly focused on the single metric of success in that environment—sufficiently good first year grades to secure a place on the law review. They often seemed to manifest an eagerness to be first rat without pausing to wonder where the race was heading. Meanwhile among their female classmates there were those who took time to get a tan or visit the Boston museums, collecting apples by the wayside. For these women, winning was neither everything nor the only thing. This sort of multiplicity of aims has been both licensed and required for women in our society. Education for women has rarely been education in single-mindedness. M. Carey Thomas insisted on behalf of the educators of women that “Our failures only marry.” But those who educate young men have not yet with the same intensity sought to inculcate in them the notion that, for example, “our failures only succeed in business.” Although the Cinderella Complex was a bestseller in my student days, I thought the Atalanta Syndrome would have been at least as fruitful a subject.

