Introduction

Love Resists Injustice

This is a book of love stories. It is a book that I never, ever expected to write. I have been writing about the workings of the law for well over forty years. Love is not something that I write about, certainly not in the way I do here. And yet this is a book about love, because there was no other way to tell this story.

Much to my surprise, the more I write about the law, the more I realize how incomplete the methods of the law are in and of themselves. Instead, this book argues for a deep connection between two subjects usually disconnected: our ability to love and our ability to resist injustice. I use methods of argument, and thus whole disciplines, that are usually sealed off from one another: normative political theory, psychology, history, and biography. But why love, and why love stories, in an argument by a law professor of all people? One of the abiding interests of my life is about the boundaries of our world – the restrictions that both shape our lives and constrict our lives – and the ways that we overcome those boundaries. It is now clear to me that nothing enables us to get across those boundaries like love. And an argument about love across the boundaries has required me to break interdisciplinary boundaries, not least the boundary between law and love, the topic of a wonderful poem, "Law Like Love," by one of the artists at the center of this book, Wystan Auden.[1] Auden's poem was written in the year he met – disastrously, as it turned out – the love of his life, Chester Kallman. Written to his lover, it is an urgent description of the law. He argues that law – both scientific and normative – is:

> Like love I say.
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> Like love we don't know where or why,
> Like love we can't compel or fly,
> Like love we often weep,
> Like love we seldom keep.[2]

[1] W. H. Auden, "Law Like Love," in W. H. Auden, *Collected Poems*, edited by Edward Mendelson (New York: Vintage International, 1991), pp. 262–64.

[2] See *id.*, p. 264.

Auden's visceral experience of love led him to make connections not usually made, precisely because love – as he and the other lovers I study in this book came to experience it – enabled him to resist societal restrictions and embrace new creative possibilities.

What marks the love at the heart of this book is precisely that it crosses boundaries, and thus is condemned by the social norms that are so effective at setting up boundaries in the first place. Here we find love involving adultery; love between people of different castes or religions or ethnicities or races; love between men and love between women. Such love has not only been traditionally condemned, but has often been incendiary, giving rise to sometimes extraordinary forms of violence against the partners to such relationships. The question, which has absorbed me for some time, is why – in light of all this condemnation and violence – people continue to engage in and often flourish in such relationships. And what are the consequences of these relationships, not only for those involved but for the wider cultural world that we share.

It is these questions that led me to see that this kind of boundary-crossing love has often been central to human resistance – central to humanity's ongoing fight against the structural injustices that have afflicted and continue to afflict humankind – extreme religious intolerance (for example, anti-Semitism), racism, sexism, and homophobia, all of whom condemn, unjustly, loves across the boundaries – whether adultery or loves of different castes or religions or ethnicities or races, or of the same genders. Love's daring, its insistence on resistance to injustice, has been followed – very slowly – by cultural and legal shifts. The injustices that love has for so long resisted are now condemned by basic principles of constitutional law in a growing number of constitutional democracies. So, love and law are, as it were, bedfellows; any concern with law and the justice of law, then, must take seriously an approach that combines political theory, psychology, history, and, as I have come to see, love.

My approach to these matters in several recent books has integrated a political theory of liberalism (including a theory of basic human rights and of forms of structural injustice that arise from abridgment of those rights) with a political psychology that explains how irrational prejudices arise from and support such structural injustices. At the center of my interests is the question of how, historically, such deeply rooted injustices have been resisted by social movements, such as the civil rights, antiwar, feminist, and gay rights movements, a resistance that led, in turn, to greater justice in our political and constitutional arrangements both in the United States and abroad. As I explain more fully in Chapter 1 of this book, my understanding of both structural injustice and the psychology of prejudice has been deepened by connecting both to a patriarchal understanding of authority in both public and private life that has flourished for a very long time. Starting in the Neolithic period, it dominated the high cultures of Babylonia, Egypt, India, and China.

It flourished in the Roman Empire and the forms of later political and religious authority influenced, often uncritically, by its example. Resistance to such structural injustice arises from a democratic and egalitarian resistance to patriarchy, as Carol Gilligan and I have argued at length elsewhere.[3] Whereas patriarchy rests on enforcement of the gender binary and a hierarchy that places one gender over another, democratic equality challenges both the gender binary and its hierarchy, calling for a free and equal voice and relationships that resist both. One important form of such resistance is to what we call the Love Laws, which condemn precisely the loving relationships across the barriers patriarchy imposes and violently enforces.

What was needed to do justice to this topic was an investigation of such loves in all their complexity. I knew, from an earlier study of the liberal resistance of the Bloomsbury Group, that resistance to the Love Laws led both to new forms of friendship and love-empowered political resistance to British imperialism.[4] What I found there inspired me to look more closely at both the struggles and consequences of such loves, in particular, when they led and when they did not lead to resistance.

What I found quite surprised me, and hopefully it will surprise you – namely, that at the very center of their love stories, the ones that resisted the Love Laws, was the way in which, against such odds, they sexually loved another person as a person against the grain of patriarchal stereotypes. For many of them for the first time in their lives, they loved and were loved as the persons they were precisely because such loves, on terms of freedom and equality, released them from the stereotypes that patriarchy enforces. Patriarchy rests on hierarchy, not equality, and violently represses free voice that would challenge the stereotypes. What I found in the love stories at the heart of this book's argument is that love, when it led to resistance, arose from a voice in the lovers that love freed from patriarchal controls. Sexual love, when rooted in the body and mind of two persons in love as equals, breaks patriarchy's hierarchies (including the hierarchy of mind over body) and exposes its lies and violence against voice. Freed through love from the patriarchal controls that suppress voice, the lovers find their free and equal voices, as democratic equals, through a resistance rooted in the intimate truths of love. It is this voice that expressed itself in sometimes quite remarkable resistance to structural injustices in the transformative civil rights, antiwar, feminist, and gay rights movements that have reshaped both our understanding of justice and of constitutional law. Hence, we cannot appreciate the vast changes over the last two hundred years and

[3] See Carol Gilligan and David A. J. Richards, *The Deepening Darkness: Patriarchy, Resistance, and Democracy's Future* (Cambridge: Cambridge University Press, 2009).

[4] David A. J. Richards, *The Rise of Gay Rights and the Fall of the British Empire: Liberal Resistance and the Bloomsbury Group* (Cambridge: Cambridge University Press, 2013).

earlier,[5] about the purpose of the law and the aims of justice, without reckoning with the power of love.

What guided my investigation was the relational structure of resistance to patriarchal controls. Such controls are often quite rigidly enforced by caretakers, yet sometimes the caretakers themselves resist patriarchy and impart their skepticism to their sons and daughters. We shall discover different patterns of such resistance in all of the loves this book studies in some depth – George Eliot (Marian Evans) and Henry Lewes, Harriet Taylor and John Stuart Mill, Benjamin Britten and Peter Pears, Christopher Isherwood, Wystan Auden, Bayard Rustin, James Baldwin, and Margaret Mead and Ruth Benedict (as well as Eleanor Roosevelt and Lorena Hickok). Many of them come to regard the patriarchal demands of their caretakers and the cultures they reflect as unjust, often seeking support and care in more egalitarian relationships, some of which take the form of passionate sexual relationships that break the Love Laws and flourish sometimes brilliantly for precisely that reason.

Some of these stories deeply move me, Benjamin Britten and Peter Pears, for example, perhaps because they are closest to my own continuing experience of loving relationship to the man I have loved and with whom shared my life for some forty years. Others astonished me with their restless search for a loving relationship and its empowering connection to finding an artistic voice; Christopher Isherwood, for example, truthfully spoke both of gay love in Berlin after World War I and the reactionary horrors of German fascism, which would, like a deadly snake, paralyze and destroy German political decency. Still others fascinated me as love stories that went so wrong. Wystan Auden, for example, came disastrously to accept a homophobia he once had resisted, and yet still wrote so sensitively later in life of the anxieties of patriarchal manhood in the wake of World War II, as we shall see. The interracial gay sexual relationships of Bayard Rustin and James Baldwin cast an unexpected light not only on the psychological roots and political creativity of nonviolence (which Rustin pioneered long before other more conventional black leaders), but also on Baldwin's remarkable insights into how American racism destroyed love for blacks and whites, men and women, gay and straight. And, the passionate lesbian love of Margaret Mead and Ruth Benedict revealed to me something I had not suspected, namely, that it was through such love, based on freedom and equality, that each of them found their voice to resist the gender stereotypes that unjustly afflict both women and men, straight and gay. And, through her love for Lorena Hickok, Eleanor Roosevelt found and spoke in the remarkably progressive ethical voice (speaking of and addressing poverty; resisting American anti-Semitism, racism, and sexism; and, later in her life, playing a crucial role in shaping the

[5] For a recent compelling historical argument that these developments, including respect for moral individuality and human rights, were prepared by certain radical developments within Christianity, see Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (London: Allen Unwin, 2014).

Universal Declaration of Human Rights as the ideal of the post–World War II order) that has no parallel among other American first ladies. In the case of Ruth Benedict, love also yielded astonishing insights into the injustice of homophobia, racism, and the roots of the fascist violence of Japanese imperialism. My experience of writing this book was one of continuing surprise, which suggests how much its investigations compelled me to go into places I had not previously explored.

Why these lovers, when I could have studied many others, some much more contemporary? The gay love stories I tell and investigate are of three artists (Benjamin Britten, Christopher Isherwood, and Wystan Auden), a black civil rights activist and pioneer of nonviolence (Bayard Rustin), a black gay artist and civil rights activist (James Baldwin), America's most ethically progressive first lady (Eleanor Roosevelt), and two cultural anthropologists, Margaret Mead and Ruth Benedict, whose lesbian love illuminated their lives and astonishing achievements. All of them are closer to my generation than they are to the millennial generation (whom I now teach), some of whom may read this book. Of course, remarkable achievements in the political and constitutional recognition of basic human rights have occurred since the time the gay and lesbian people I study in this book lived and wrote, not least, a black president, the constitutional decriminalization of gay sex, the removal of homophobic restrictions on military service, and an emerging right to same-sex marriage. However, there is a story still to be told about the struggles that made these developments possible. What has not been seen is the role love played across the patriarchal boundaries in the resisting voices to injustice exemplified by the lives and works of the persons I study in this book.

Patriarchy rests on a psychology of trauma, showing itself in loss of voice and memory. No one today, including millennials, would or should want to act out the psychological logic of patriarchal disassociation by not taking seriously what this study shows, namely, that a struggle for love between equals released the patriarchal controls on voice that had made deep injustice seem to be in the nature of things. Otherwise, they may misunderstand and misuse the equality and freedom they enjoy, and should struggle to deepen and extend. All of the people I study in this book not only loved across the boundaries, but, through the experience of love, found a resisting voice to tell the truth about the lies and violence that had condemned and repressed such love. Many of them are artists, whose struggles for creative voice often explore and illuminate, as artists often do, the psychology – personal and political – of resistance to injustice in ways more academic disciplines do not, or not yet. I chose to study these persons because all of them illuminate the struggles, pitfalls, and brilliant voices that their loves made possible, and their achievements touch not only on homophobia and gay rights but on the evils of racism and sexism and imperialism.

These are love stories we need to remember and value not only for their impact on the greater justice of our own law and politics, but because they tell us something about what love has been and can be, for each and every one of us, when love

flourishes on terms of equality and free voice in relationship. What such love tells us is that love is at the center of our ethical natures and democratic values, and that patriarchy, being toxic to love, is not.[6]

Many of the love stories I tell are British, or, at least I begin there because they continue and build on the love stories implicit in my study of the Bloomsbury Group. However, at least two of the Britons I study (Isherwood and Auden) settle in America, and fall in love with Americans, and both of their love stories, including their love for one another (such as it was), took them to Berlin, where Isherwood falls in love with a German. This explains his pacifism (Isherwood could not imagine killing his former lover, who, against his will, served in Hitler's army). All the rest of the love stories I study (Rustin, Baldwin, Eleanor Roosevelt, Mead, and Benedict) are of Americans, but again one of them, James Baldwin, finds his resisting voice only in Europe as an exile from an American racism that repressed his voice and finds the love of his life in Europe with a white European. Rustin, though deeply American, learned from and traveled to Gandhi's India to study the aims and strategies of Gandhi's nonviolent satyagrahas. Love across the boundaries transcends national as well as cultural boundaries, because the hunger for love and voice is universal and love sometimes finds its heart's desire only in self-conscious exile from its repressive homeland (Isherwood and Baldwin). What this shows, I believe, is that the right to love, while the most intimate of our basic human rights, is also the most universal.

The love stories I investigate are far from the love stories of your average romantic comedy. The complexity of these relationships include not only the lovers, but their early caretakers, their friends, and their creative vocations as artists and pathbreaking, ethically creative thinkers who have advanced our understanding not only of love but of justice and of ethics itself. Still, they are all very much love stories, which must be told and understood in all their struggles, often against heavy odds, to appreciate the ethical power of love, its roots in our human nature. So, love is, I have come to believe, the heart of the matter, and resistance to patriarchy is the key issue in understanding and appreciating the ethical power of sustaining love in a life well and justly lived. If we cannot see this, it is because patriarchy darkens our ethical intelligence.[7] We need to look, and look truthfully, at love as the key not only to our happiness, but also to our sense of justice. It is for this reason that this book is about both love and justice. Resistance to injustice is, very much to my surprise, at the very heart of the love stories I have tried to tell truthfully in all their astonishing human complexity, including their disappointments and their successes. The stories we will explore are like no love story I have read or seen in film or theatre, yet it is closer,

[6] On the tragic love stories that patriarchy tells, and the psychological possibility of resistance to such tragic love stories, see Carol Gilligan, *The Birth of Pleasure: A New Map of Love* (New York: Vintage, 2003).

[7] See, on this point, Carol Gilligan and David A. J. Richards, *The Deepening Darkness: Patriarchy, Resistance, and Democracy's Future* (Cambridge: Cambridge University Press, 2009).

I believe, to the role love plays in our lives and has certainly played in my own life. Why do we have such difficulty in seeing our lives as they are? Perhaps, this book's originality is that it helps us take this question seriously, and even perhaps helps us to answer it with an honesty and authenticity based in a democratic experience very much before our eyes.

I begin my argument in Chapter 1 by reviewing the concepts and work on which it builds, and then explore its explanatory fertility in exploring adultery both in Hawthorne's great novel, *The Scarlet Letter*, and in the relationships of George Henry Lewes and Marian Evans (George Eliot) and Harriet Taylor and John Stuart Mill. Following this initial exploration of love across the boundaries in heterosexual relationships, my argument focuses on gay/lesbian relationships.

I focus on the close study of gay/lesbian loving relationships precisely because the forces that condemn them have been culturally entrenched and uncontested for so long and have taken the remarkable form, not found in the same way with other prejudices such as anti-Semitism and racism, of regarding the sex acts expressive of gay love as, literally, not to be spoken or given any voice whatsoever, "a crime not fit to be named, '*peccatum illud horrible, inter christianos non nominandum*,'" as Blackstone put it.[8] The history of Christian and later forms of secular anti-Semitism, as well as forms of racism, have been ethically monstrous and ultimately genocidal (gassing Jews, lynching blacks), but there has long been cultural space for resisting voices to contest such injustices, for example, the abolitionist movement in Britain and the United States. Homosexuals have, however, long lived under a more total form of unspeakability. Homophobia not only led to and rationalized extraordinary forms of repressive violence (burning at the stake) directed against gay men and lesbians, but mandated codes of manhood and womanhood that entered and shaped the psyches of homosexuals, unleashing intrapsychic violence against a loving gay voice. It is such extraordinary cultural repression that makes so interesting and compelling – in the general study of how love matters to justice – the closer study of the circumstances in which gay men and lesbians through loving relationships find their ethical voice to resist injustice – as Britten and Pears do through music dramas, which give expression to and resist destructive homophobic forces; as Isherwood does in his novels and his late defense of gay rights; as Auden does in his poetry about the anxieties of manhood; as Rustin does in his pathbreaking development of nonviolence – long before other black leaders – as the resistance strategy for the civil rights movement; as Baldwin does in his remarkable novels and essays about how patriarchy destroys love and enforces racism; as Eleanor Roosevelt does in speaking and writing in an ethical voice that challenged deep injustices at home and abroad; as Margaret Mead does in her debunking of gender stereotypes and critique of American sexism as on a par with American racism; and as Ruth

[8] Quoted in David A. J. Richards, *Women, Gays, and the Constitution: The Grounds for Feminism and Gay Rights in Culture and Law* (Chicago: University of Chicago Press, 1998), at p. 292.

Benedict does in her brilliant indictments of European and American racism and homophobia and her pathbreaking study of the patriarchal violence underlying Japanese fascist imperialism in World War II. In coming into loving relationships against such extraordinarily powerful external and internal forces, they all tell us something true and deep about the force of loving relationships in human life and how such relationships do matter and matter profoundly to our psychological competence, as persons, to resist justice.

There is another reason for a work of this sort to be of interest to everyone – male and female, straight or gay. All of us increasingly understand that patriarchy is and remains toxic to love, and we aspire to loving relationships of free and equal persons, unencumbered by patriarchal demands. This obviously remains a central problem in heterosexual relationships in which patriarchal conceptions of gender have long defined both men and woman. Heterosexual couples now struggle for loving relationships in which patriarchal conceptions of gender no longer play the destructive role they have in the past.[9] What should count as a just understanding of free and equal voice in love is, however, as urgent a question for homosexuals as it is for heterosexuals, perhaps more urgent. It is precisely because the idea of a human right to loving relationship is completely new for homosexuals that the relationships they form in light of this new normative understanding must be of as much interest to heterosexuals as it is to homosexuals. The fact that both parties to the relationship are men or women may be taken to render such relationships by definition equal, but this is, of course, false. Gay men of my generation, for example, were brought up under a regime of aggressive homophobia, rooted in patriarchal conceptions of what counts as a man that condemned sexual love between people of the same gender as unspeakable, incendiary because it both challenged the gender binary and its hierarchy. However, we carry these self-conceptions into our personal relationships, and patriarchy is as toxic to loving relationships here as elsewhere. Patriarchy bears particularly heavily and rigidly on men and at an early stage of boyhood when, through traumatic breaks in relationship, they have little capacity to resist its demands. Women stay in relationship much longer, and patriarchal demands impinge on their lives at a later stage when they are more able to resist them, as Carol Gilligan's developmental work clearly shows.[10] For this reason, gay

[9] See Carol Gilligan, *The Birth of Pleasure: A New Map of Love* (New York: Vintage, 2003).

[10] See Lyn Mikel Brown and Carol Gilligan, *Meeting at the Crossroads: Women's Psychology and Girls' Development* (Cambridge, MA: Harvard University Press, 1992); Carol Gilligan, "The Centrality of Relationship in Human Development: A Puzzle, Some Evidence, and a Theory," in *Development and Vulnerability in Close Relationships*, edited by K. Fisher and G. Noam (New York: Erlbaum, 1996); Carol Gilligan, "Joining the Resistance: Psychology, Politics, Girls and Women," *Michigan Quarterly Review* 24, no. 4 (1990): 501–36; Carol Gilligan, Annie G. Rogers, and Deborah Tolman, eds., *Women, Girls, and Psychotherapy: Reframing Resistance* (New York: Hayworth Press, 1991); Carol Gilligan, Nona P. Lyons, and Trudy Hanmer, eds., *Making Connections: The Relational Worlds of Adolescent Girls at Emma Willard School* (Cambridge, MA: Harvard University Press, 1990); Jill McLean Taylor, Carol Gilligan, and Amy Sullivan, *Between Voice and Silence: Women and Girls, Race and Relationship* (Cambridge, MA: Harvard University Press, 1995).

relationships may be, if anything, more burdened by patriarchy than are heterosexual relationships (in which one party is a woman) and perhaps than lesbian relationships. For this reason, the closer study of the circumstances when these relationships do resist patriarchy is of enormous general interest to our understanding of why love matters to justice. If love gives rise to resistance to injustice here against such extraordinary repressive odds, the transformative power of love should never be underestimated by those subject to less punishing odds.

Why these love stories? My choices here arose, of course, from my own life as a gay man who found love only through resistance to the homophobia so central to the American manhood and womanhood that was, during my early life, assumed to be axiomatic, including by the parents I loved and who loved me. These struggles were much part of my own experience, as a gay man and constitutional lawyer who was one of the first legal scholars of my generation to write about and defend gay rights. My interest in the love stories in this book arose from reflection on the trajectory of my life (I am now 71), finding love with the man I loved and who loved me and, because of this enduring and deepening love, a resisting voice as a moral philosopher and constitutional law professor. These convergent choices of love and vocation married at the same time (1973). I knew my story was more fortunate than many other gay men of my generation, but what drew me to the persons studied in this book was the deeper study of this broadly shared struggle, which was my struggle and the struggle of so many others of my generation I knew (some of whom died of AIDS[11]), showing the remarkable power of love in resisting patriarchy during a period when American homophobia was hegemonic, and resisting it publicly was subject to criminal sanctions and social contempt. So, I write from within my own public and private experience – an experience that I learned, through writing this book, was shared by so many others. What I also learned was how different such experience was, but yet how common was the role of resisting patriarchy in releasing an ethical voice long quashed by a homophobia largely unquestioned for millennia. It is, if I am right, an important discovery, because it shows close connections between love in certain contexts and the growth of an ethical voice that resists deep injustices.

Breaking the Love Laws has historically been visited with catastrophic punishments and losses. Many during the period I study – whether adulterers or others loving across forbidden patriarchal boundaries – led lives shrunken into quiet misery by homophobia; but others led rich and creatively inventive lives, and some openly resisted. It is for this reason all the more important to understand and take seriously the lives and works of the persons here studied – what it was about these people and the circumstances in which they lived that made psychologically possible for them forms of love and resistance that, against such odds of irrational hatred supported by

[11] For a remarkable recent documentary on the AIDS activists, who resisted the homophobia during the AIDS crisis, see David France, *How to Survive a Plague* (DVD, MPI Media Group, 2012).

law and culture, have been ethically transformative both for them and the wider cultures in which they lived. Why, for them, did love across the boundaries lead to ethical dignity not only for them but for others?

Only taking seriously their struggles for love – both their successes and failures – can reveal the ethical power of love in resisting the evils dividing us from our common humanity (the root of ethics) that patriarchy enforces – religious intolerance, racism, sexism, and homophobia. What drew me to the lovers I study is the role resistance to patriarchal stereotypes played in their loves, and the form the resistance took, namely, their creative *voices* as artists, or as activists, or as some of the most profound students of culture of their time, all of them challenging then-dominant stereotypes of religion or race or gender or sexual orientation. Their voices broke the silences that had supported homophobia for millennia. In breaking this silence, they broke as well the silences that had supported and sustained the evils of anti-Semitism, racism, and sexism, and its attendant evil, imperialism. Their breaking of the silence inspired me when, still a young man, I heard in the musical voices of Benjamin Britten and Peter Pears the love that made their voices possible, and I knew – from the depths of my repressed body and overdeveloped mind – that there was an alternative life for me, a love rooted in the body and the mind and the resisting voice such love made possible. Or, I heard in the indignant voice of James Baldwin and the nonviolent voice of Bayard Rustin – gay black leaders in the civil rights movements that transformed the lives of all Americans – that the resisting voices against American racism and homophobia was a voice available to me and every other person striving for ethical dignity as the person they were. No one makes such a discovery on one's own, but only in relationship to other persons. We build on the struggles of others, as I did, nourished by other resisters and the web of relationships that sustain and support us. Creativity is often much more relational and social, arising from sustaining networks of love and friendship, than our models of the lonely artist would suggest.[12] Such networks, including creative pairs, are often not rooted in sexual love, but sometimes they are.

In this book, I focus on homosexual love relationships, ones in which the sexual love itself not only broke the Love Laws, but resisted them, leading to extraordinarily creative expressions of ethical voice that exposed and resisted injustice, including a homophobia based in enforced unspeakability, and called us to resistance. I want to show here these struggles in all their relational complexity (including their risks and disappointments), so that the generation today will know what has made possible my own life and their own freer and more democratic lives, something I see all about me in the gay men, lesbians, and transgendered people who live and work in the city I love, and thrive personally and politically because they defy the gender binary and

[12] See, on this point, Joshua Wolf Shenk, "The End of 'Genius,'" *The New York Times, Sunday Review*, Sunday, July 20, 2014, pp. 6–7; Joshua Wolf Shenk, *Powers of Two: Finding the Essence of Innovation in Creative Pairs* (New York: An Eamon Dolan Book/Houghton Mifflin Harcourt, 2014).