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OF FALSE TEETH AND BITING CRITIQUES: *JONES v. FISHER* IN CONTEXT

*Regina Austin**

A working knowledge of the critiques and resistance tactics of ordinary workers can provide a powerful tool for challenging the conventional wisdom that is at the core of the legal analysis supporting their economic subordination. An analysis of *Jones v. Fisher*,¹ a 1969 Wisconsin Supreme Court decision that I found in the first-year torts book I once used,² provides an excellent illustration of the point. It demonstrates the usefulness of the technique of critically placing legal conflicts in socio-economic context with an eye toward discerning the various and competing cultural perspectives of the litigants.

Contextual analysis of opinions is a variant of cultural studies. Culture is a mechanism through which a community of people organize and make sense of their lives against a backdrop of material circumstances. Cultures with their socially derived and therefore arbitrary conventions and habits are constantly in a state of flux, responding to both internal and external forces. Cultural studies explore the competition among and within cultures, with particular attention being paid to the ways in which certain ideas come to be accepted by some communities as common sense and rejected by others as utter nonsense. Contextual/cultural studies, then, would suggest that the reader of an opinion consider the social, political, and economic status of the parties; the power dynamic that exists among them; the identities of any parties whose interests are being adjudicated without their participation or representation; the impact of cultural and material conditions in shaping the dispute; the role of individual agency, including

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¹ 42 Wis. 2d 209, 166 N.W.2d 175 (1969).

² PAGE KEETON, ROBERT KEETON, LEWIS D. SARGENTICH & HENRY J. STEINER, *CASES AND MATERIALS ON TORT & ACCIDENT LAW* 36 (2d ed. 1989).

organized political activism, in producing the conflict or possibly resolving it; the sources of knowledge and information underlying the parties' positions; the narrative and rhetorical tools each party possesses; the way in which each party's position is constructed as common sense or otherwise legitimated; and the impact of the outcome on the social, economic, or political subordination or domination of the competing parties.

The basis of the cause of action in *Jones v. Fisher* was assault and battery. The contours of assault and battery vary with the social context. An assault and battery arises when one makes contact with the person of another with the intent to harm or the intent to offend and/or without the other's consent.³ Offense is gauged by the appropriateness of the touching given the time and place. Consent may be implied from the circumstances as well. Acts, silence, or inaction will suffice if such behavior would be understood by a reasonable person as intended to indicate permission. Moreover, "[i]n determining whether conduct would be understood by a reasonable person as indicating consent, the customs of the community are to be taken into account."⁴ The potential for cultural conflict, for dual readings of an interaction, for alternative sightings of the operative norm are apparent in this simple statement of doctrinal rules.

The social complexities of the tort of assault and battery are revealed in an unusual way in *Jones v. Fisher*. Jerome and Clara Belle Fisher, the defendants, were the owners of a nursing home.⁵ The plaintiff was Aleta Jones, a 26-year old woman who entered the defendants' employ as a nurse's aid in December of 1966.⁶ Plaintiff's chores were somewhat domestic in nature.

³ RESTATEMENT (SECOND) OF TORTS § 892 (1983). This section provides: (1) Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor. (2) If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.

Id.

⁴ *Id.* at cmt. 9.

⁵ *Jones*, 42 Wis. 2d at 212, 166 N.W.2d at 177.

⁶ *Id.*

“She cared for the home residents during the night hours, set up and gave medication, prepared and served breakfast and had some clean-up duties in the kitchen.”⁷ The plaintiff and defendants had a cordial and friendly relationship. The Fishers regarded Mrs. Jones “as a good employee and were personally fond of her.”⁸

In September of 1967, plaintiff was told by her dentist that she needed dentures.⁹ The Fishers voluntarily loaned her \$200 to apply toward her dental expenses.¹⁰ Shortly after obtaining the dentures, plaintiff quit.¹¹ When she went to collect her last pay check, Mrs. Fisher attempted to convince her to return to work for the Fishers, but plaintiff refused.¹² Then plaintiff and Mr. Fisher discussed repayment of the loan. Plaintiff’s offer to pay off the debt at the rate of \$20 per month was rejected by Mr. Fisher who demanded that the loan be repaid in three days or that the upper plate be left as security.¹³ Plaintiff rejected these terms and an argument ensued. When plaintiff attempted to run from the room, Mr. Fisher grabbed her about the arms, grasped her about the face, and extracted the false teeth from her mouth.¹⁴ “The affray [lasted] less than 15 minutes.”¹⁵ Mrs. Fisher went to the police station and reported the incident. An officer went to the nursing home, obtained the dentures, and returned them to Mrs. Jones at the station.¹⁶

Mr. Fisher’s forcible removal of the dentures caused Mrs. Jones some pain to her arms and back and to her mouth which was sensitive because the plate did not fit properly.¹⁷ The harm Mrs. Jones suffered was largely psychological – the humiliation,

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 213, 166 N.W.2d at 177.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 214, 166 N.W.2d at 177.

¹⁷ *Id.* at 213, 166 N.W.2d at 177.

embarrassment, and shame of being attacked in the way in which she was, of appearing in public without her teeth and having to go to the police to get them retrieved.¹⁸ Mrs. Jones, however, did not go to the doctor or take any prescription medicines for her upset.¹⁹

A jury awarded Mrs. Jones \$1,000 compensatory damages and \$5,000 punitive damages.²⁰ The issue on appeal was not the merits of the judgment in favor of Mrs. Jones but the amount of the recovery.²¹ The Supreme Court of Wisconsin concluded that Mrs. Jones had been given too much. It reduced the compensatory damages to \$500²² and the punitive damages to \$2,000,²³ and ordered her to pay the costs of the appeal.²⁴

The majority of the Supreme Court concluded that the compensatory damages were excessive. The assault took only a few minutes and Mrs. Jones “was without her teeth for, at most, an hour.”²⁵ Moreover, “[h]er symptoms were all subjective and not supported by any medical testimony nor any other corroborating evidence.”²⁶ (This conclusion, it should be noted, may merely reflect the widely prevalent suspicion of claims for emotional trauma not accompanied by physical injury or manifested in overt physical suffering.) The majority had no doubt that the Fishers’ behavior was sufficiently “illegal, outrageous and grossly unreasonable” to warrant the punishment of an award of punitive damages.²⁷ That the defendants were operating under the erroneous assumption that they were entitled to take the teeth as security or collateral for their loan did not excuse their conduct. The \$5,000 punitive damages award, however, represented a fifth of their yearly earnings and a

¹⁸ *Id.* at 214, 166 N.W.2d at 177-78.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 215, 166 N.W.2d at 178.

²² *Id.* at 218, 166 N.W.2d at 180.

²³ *Id.* at 220, 166 N.W.2d at 181.

²⁴ *Id.* at 222, 166 N.W.2d at 182.

²⁵ *Id.* at 216, 166 N.W.2d at 180.

²⁶ *Id.*

²⁷ *Id.* at 219, 166 N.W.2d at 180.

seventh of their net worth. Considering “the wealth of the defendants, the character and extent of their acts, and the probable motivation, and then applying the standard of punishment and deterrence,” \$2,000 was a reasonable assessment.²⁸

The dissenting judge, who would have denied Mrs. Jones punitive damages altogether was both blunt and sarcastic in categorizing the altercation between Mrs. Jones and the Fishers. In the view of the dissenter, the case involved an isolated incident of a petty sort, “the most trivial of altercations and the mildest of scuffles.”²⁹ He likened the assault on Mrs. Jones to a “toupee-snatching” and equated “the unpleasantness of an hour spent without newly acquired dentures . . . [to] an hour spent without the adornment of a substitute headpiece.”³⁰ Compensatory damages were therefore sufficient to deter the Fishers and others from seizing dentures as security for an unpaid loan unless the court was “dealing here with a propensity to grab, and hold upper plates that is marked either by a high rate of recidivism or contagion.”³¹ Mrs. Jones, for her part, was an ungrateful employee who left the service of the Fishers with a \$200 debt undischarged. “The bicuspid corpus delicti [was] present only because of an interest-free loan made by defendants to plaintiff” on the expectation that she would remain in their employ.³² The loan thus bespoke “goodwill, not illwill.”³³ “It was the lady’s decision, loan unpaid, to go to work for someone else that precipitated a change in the relationship.”³⁴ The “flareup of emotions, this shift in mood, this disappointment of expectations on the part of the employing couple” which lead to the fracas were neither wanton nor reckless and could not be the foundation for an award of punitive damages.³⁵

²⁸ *Id.* at 220, 166 N.W.2d at 181.

²⁹ *Id.* at 225, 166 N.W.2d at 184 (Hansen, J. dissenting).

³⁰ *Id.* at 222, 166 N.W.2d at 182 (Hansen, J. dissenting).

³¹ *Id.* at 223-24, 166 N.W.2d at 183 (Hansen, J. dissenting).

³² *Id.* at 225, 166 N.W.2d at 183 (Hansen, J. dissenting).

³³ *Id.* (Hansen, J. dissenting).

³⁴ *Id.* (Hansen, J. dissenting).

³⁵ *Id.* (Hansen, J. dissenting).

Today, we might see the opinion in *Jones v. Fisher* as presenting another example of gender and possibly race bias in the courts; the undervaluation of the pain and suffering experienced by female and/or minority plaintiffs has been documented and explained. Apart from any role that gender and race may have played in the case, the judges' myopia almost certainly had a basis in the widespread assumptions about the proper roles of employers of domestic help and their servants.

It is possible to assess Mrs. Jones' claim from the perspective of domestic workers, much like herself, who were engaged in struggles, at roughly the same time, with *their* employers over the right to greater respect and remuneration. In 1985, sociologist Judith Rollins published a wonderful ethnographic study of the relationship between black domestics and their white employers that provides useful insights into the assault on Mrs. Jones. The analysis that follows draws heavily on Rollins' book, *Between Woman: Domestics and Their Employers*.³⁶

The personal kindness and generosity the Fishers showed Mrs. Jones were at least as instrumental and manipulative as they may have been selfless and philanthropic. The Fishers were not atypical employers of low-status help in that respect. The psychological and emotional bond that existed between the Fishers and Mrs. Jones reinforced the Fishers' superiority and facilitated their economic exploitation of Mrs. Jones. This was a relationship between people of unequal status. Given the nature of the work, its situs, the prevalence of females as the principal supervisor, and the significance women attach to personal feelings and the quality of their relationships, it is not surprising that domestics consider the treatment they receive from their employers a significant aspect of the job. Female employers in turn understand the power of emotional rewards and punishments and use it as a mechanism for controlling domestic workers. In extending themselves, the Fishers were attempting to solidify their power over Mrs. Jones. They tried to capitalize on the female bonding and to pull the emotional strings by having Mrs.

³⁶ JUDITH ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* (1985).

Fisher attempt to persuade Mrs. Jones to return to work.³⁷ When that effort failed, the male partner took control, the topic turned to money, and the coercion became overt, physical, and violent.³⁸

The Fishers' use of force and violence should not have been viewed as a response to acts of provocation and betrayal on the part of Mrs. Jones, but to the frustration of the Fishers' sense of mastery and domination over her person and their use of prerogatives employers of domestics have long appropriated for themselves. For example, under normal circumstances, there are rules of spatial deference that keep the domestic employee at a physical distance while privileging the employer to initiate bodily contact with the employee.

The loan to Mrs. Jones was supposed to reinforce her economic inequality and dependence on the Fishers and her subordinate status. Of course, the court found nothing wrong with this and gave the Fishers credit for being magnanimous and benevolent. Instead of looking at the loan as charity, however, the court might have considered it as being in lieu of a raise. There was no reason to assume that Mrs. Jones did not earn what she got from her employers. Mrs. Jones was perhaps too poor to pay for her dentures without a loan from her employers because she was not being paid enough; that she found employment elsewhere may evidence that fact. The failure to seek medical attention and the consequent absence of medical testimony to substantiate her claims of distress may also be attributed to her limited income.

The loan was supposed to represent the Fishers' concern for Mrs. Jones, and if Mrs. Jones was not really grateful she was supposed to *act* that way by remaining in the Fishers' employ. The court refused to recognize that Mrs. Jones' departure and the subsequent assault on her person exposed these role expectations to be pure fantasy. If the Fishers were truly concerned about her, they would have been happy that she obtained a better job. It must have been galling for the Fishers to have realized that their loan made Mrs. Jones more nearly their equal. It gave her leverage with which to bargain with them. Mrs. Jones turned her

³⁷ *Jones*, 42 Wis. 2d at 213, 166 N.W.2d at 177.

³⁸ *Id.*

loan that was supposed to solidify the Fishers' power over her into a device for her own liberation. The Fishers' possessiveness of Mrs. Jones extended beyond any ownership interest they thought they had in her false teeth. They could not forcibly reclaim the worker, so they did the next best thing; they forcibly reclaimed her dentures.

The Fishers' behavior, then, was all too familiar to minority women who performed domestic service work in homes of various sorts. The court should have saved its pieties for more deserving defendants and dealt with the systematic social and economic realities that underlay the defendants' conduct.

The court gave no hint that Mrs. Jones' claim fit into a larger context. There was no suggestion that her suit related to any systematic wrong that should have triggered the common law's concern with general deterrence. Unable or refusing to identify a pattern of abuse or a category of claimants whose widely experienced distress ought to be seen as possessing an aura of objectivity, the court diminished and belittled plaintiff's suffering as idiosyncratic, subjective, and inconsequential.

The very language the dissenter used went even further. The dissent's rhetoric assured that the plaintiff's claim would not be taken seriously. He treated the altercation as a laughable affair, a bit of a lark, the stuff of bedroom comedies. What is there about ill-fitting rugs and teeth in a jar that provokes such laughter? Is it their associations with old age, or the loss of virility and sexiness, or the bad luck of ill health and substandard medical care? Of course, there is a world of difference between being deprived of one's toupee and being deprived of one's false teeth. How could the dissenter have counted on his readers failing to see the difference? Though hair, fake or otherwise, is no laughing matter to most black women who understand its relationship to self-representation and confidence, a toupee is still largely cosmetic. Though the loss of a toupee is likely to be embarrassing, the loss of one's false teeth is likely to be far worse. False teeth improve one's ability to speak and to eat. Their absence causes the face to collapse and lose its contours. In my limited experience, people without their false teeth tend to garble their words or put their hands over their mouths. I suspect

a toothless person in a struggle with her bosses is like a toothless argument, “lacking in sharpness, or bite,” “lacking the means of enforcement or coercion: futile, ineffectual.”³⁹

Jones v. Fisher was decided in 1969. Some things have changed since then but arguably not enough. Domestic workers today are less likely to be native-born blacks and more likely to be immigrants from Central and South America, the Near East, the Indian subcontinent, and the Caribbean. The Civil Rights Movement made it harder for white employers to treat black female domestics as social inferiors, while at the same time it opened up employment opportunities for black women in more remunerative occupations. Domestic work is one of the fields in which female immigrants, both legal and illegal, have secured a niche. Much domestic work still occurs largely in the informal economy where the requirements of the minimum wage law and fair labor standards act do not prevail and social security taxes are rarely paid and income taxes are rarely withheld.

Today's domestics are less politically empowered than the black domestics of Mrs. Jones' time. The success of the movie adaptations of the play “Driving Miss Daisy”⁴⁰ and the novel “Remains of the Day”⁴¹ attest to the tenacity of the myth of the generous master and the grateful/faithful servant. The knowledge with which to challenge the myth exists, but it is no more empowered than the workers themselves; they are in no position to turn employer-saints into exploiter-villains or rebellious servants into worker-heroes in the eyes of the law or the public. Many of those who might give the critique greater visibility and clout are operating under handicap. I do not think that it is unfair to suggest that where domestic service work is concerned, the cutting edge of some of the most progressive antiracist, pro-feminist counterideologies may be dulled by self-interest.

Applying Rollins' critique to the *Jones* case may strike many readers as harsh and unfair. People who have hired domestics

³⁹ WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2409 (Philip Babcock et al. ed., 1993).

⁴⁰ ALFRED UHRYS, DRIVING MISS DAISY (1988).

⁴¹ KAZOU ISHIGURO, REMAINS OF THE DAY (1989).

and people who have benefited from their paid caregiving may reject Rollins' challenge to the generosity of the gift giving that domestics' employers do or the genuineness of the heartfelt intimacy employers and domestic employees seemingly share. Those with first-hand experience of the domestic employment situation may doubt the intensity of the tensions Rollins describes and suspect that she is simply putting her own gloss on the relationship. Middle-class feminist professionals like myself who are dependent on the assistance and loyalty of domestic workers to maintain the home front while they pursue challenging, stress-filled employment like men do, may not be the most objective assessors or advocates of a pro-domestic critical world view.

Our deconstruction of doctrinal rubrics and attack on the mechanisms by which they are manipulated to maintain existing power relations may have worked too well. Our understanding of knowledge and of power has been skewed in a way that has made the insight linking the two the source of a conservative analysis. It has doubled back on us and rendered our criticism impotent.

Our own inclusion in the camp of the oppressed privileges us to employ the techniques of liberation on our own behalf. We classify ourselves among those whose ordeals should be taken account of when we advocate that the lived experience of minority peoples be accorded the respectability of "knowledge." We have lost sight of the fact that knowledge is a social product or have equated the bourgeois experience of racism with the whole. We do not always situate ourselves with reference to other races, ethnicities, gender, or classes. In addition, there is no basis for concluding that the lived experience of one person is superior to that of another. Given their instrumental quality, our claims of truth, merit, freedom, and even justice cannot help but be suspect.

"Politics" can be a substitute for knowledge rather than knowledge being a necessary tool in a program of transformative politics. "Knowledge" can be abstracted from the social practices of ordinary black people and become something that one gains by being black and living a "political" existence within the confines of one's institution or in the broader realm of the profession. There is too little curiosity about the actual lives of

subordinated minority people, let alone systematic study. Recognition that black people are not monolithic, of course, would interfere with claims that we all speak with a different "voice" or that the race or ethnicity of a scholar can make a work of scholarship on the subject of white supremacy more "authentic."

Legal scholars must return to the task of critical social inquiry. The knowledge required for the practice of transformative politics can only be acquired by an exploration of the neglected particular so as to problematize for all what is now only a predicament for some. There must be pragmatic engagement with those who know material and social insecurity first hand. Both systems that subjugate and the social and individual agents that cooperate in producing that subjugation must be studied. At the same time, the claims for the knowledge that is lived experience and narrow political activity must give way to a bit of transcendent theorizing and some immanent power accumulation.

