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Book Note

Feminism or Humanism?

Caring for Justice. By Robin West.* New York & London: New York University Press, 1997. Pp. ix, 356. \$35.00.

In *Jurisprudence and Gender*,¹ her foundational article of a decade ago, Robin West provocatively claimed that women are inherently “connected” while men are “separate” and that women and men are thus fundamentally and essentially different. Nevertheless, West ended her article with a call for a humanist jurisprudence that would transcend the disagreements between masculine² and feminist legal theory.³ In *Caring for Justice*, West significantly advances the development of a humanist jurisprudence by pursuing a synthesis of justice (which she identifies with masculinity) and care (which she associates with femininity).⁴ Unfortunately, *Caring for Justice* is a compendium of West’s previous works, some of which seem out of place in a book titled *Caring for Justice* and contribute little to either West’s specific goal of synthesizing justice and care or her more general continuing goal of establishing a humanist jurisprudence.⁵ Because of West’s failure to consider the hard cases for her projects, loopholes remain in the synthesis of female and male moralities and in the foundations for a humanist jurisprudence.

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1. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

2. See *id.* at 2 (“[B]y virtue of their shared embrace of the separation thesis, all of our modern legal theory—by which I mean ‘liberal legalism’ and ‘critical legal theory’ collectively—is essentially and irretrievably masculine.”).

3. See *id.* at 72 (“Feminism must envision a post-patriarchal world.”). Although West did not define “humanist jurisprudence,” I believe that she would accept Susan Moller Okin’s understanding of “a fully human moral or political theory” as one that “can be developed only with the full participation of both sexes.” SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 107 (1989).

4. It is noteworthy that nowhere in *Caring for Justice* does West claim to be seeking a humanist jurisprudence. The book does contribute to this project, however, by seeking to reconcile seeming contradictions between the sexes.

5. Specifically, chapters three to five are, at best, tangential to these goals. Chapter three is titled “Law, Literature, and Feminism”; chapter four is “Invisible Victims: Herman Melville’s *Bartleby the Scrivener* and Susan Glaspell’s *Jury of Her Peers*”; and chapter five is “Feminism, Postmodernism, and Law.”

I

The theoretical introduction of *Caring for Justice* presents the purpose of this otherwise potentially unruly collection. West's fundamental point is that the historic exclusion of women from the legal system has damaged "our law, our understanding of the nature of harm and sense of justice" (p. 8) (emphasis omitted). Because of this exclusion, she argues, the current legal system and its underlying theoretical justifications are masculine. To incorporate women's reality into the law, West suggests two fundamental changes to the existing legal system. First, she urges that the private ethic of care, which arises from the traditional female role of caring for intimate relationships, be synthesized with the public ethic of justice in order to sustain both virtues (pp. 22-93). Second, she contends that the idea of "harm" must be reformed to include those harms that women disproportionately and distinctively suffer; although women have achieved formal equality with men in obtaining protection from harms, she argues, the harms that both sexes are protected from today are generally most relevant to men (pp. 94-178).

West explains that most people in our culture, scholars and lay people alike, understand justice and care to be contradictory concepts (p. 23). Justice is associated with the public realm, universality, reason, and rights; care, on the other hand, is associated with the private sphere, particularity, relationships, and affect (p. 23). West argues that this opposition is flawed because care and justice are actually interdependent: Each is a "necessary condition" of the other (pp. 20, 24-25). In fact, West contends that when justice and care are severed, the results are tragic. In the judicial realm, "[s]ome of our most horrendous judicial decisions—decisions easily now recognized as both unjust and uncaring—are so precisely because they fail to respect, in the social relationships they envision, protect, or delimit, the interdependency of these two virtues" (p. 25).

Judges employ an ethic of care, West argues, by being sensitive to the particular litigants and their unique circumstances rather than to the universalizable aspects of cases (pp. 51-52). West points to *Hawkins v. McGee*⁶ and *Peevyhouse v. Garland Coal & Mining Co.*⁷ as two famous cases in which judges breached the ethic of care by wrongly overgeneralizing (pp. 52-55). Because justice cannot exist without care, she contends, such uncaring decisions are necessarily unjust: "The judge in each case essentially compared apples and oranges—treated unlikes as though they were likes—and thus breached the ethic of justice no less than the ethic of care" (p. 55).

Just as care is required for true justice in the public realm, justice is necessary for true care in the private realm. Nurturance without consistency,

6. 146 A. 641 (N.H. 1929) (using a "warranty-based" rule of damages rather than an "injury-based" rule to determine recovery for a doctor's botched surgery).

7. 382 P. 109 (Okla. 1962) (choosing a market value rule of damages and ignoring a farmer's personal ruination to determine the appropriate remedy for breach of promise to restore ruined land).

West explains, leads to racism, xenophobia, and general fascism (pp. 74-88).⁸ Polarized nurturance in the law is best exemplified by *Plessy v. Ferguson*⁹ and *Dred Scott*¹⁰ (p. 75). West explains that the judges in both of these cases practiced “selective nurturance”—that is, the judges cared about particular white readers and members of society instead of humans in general, thereby “facilitat[ing] social relationships which are themselves unjust” (pp. 75-77). Although “[c]ourts and judges do not themselves enter into relationships of care, . . . they are deeply complicit in the construction of those relationships” (p. 83). The feminine ethic of care, therefore, is necessary to the public realm, just as the masculine ethic of justice is essential to the private realm.

West further argues that jurisprudence must incorporate women’s experiences. In particular, West opines that contemporary jurisprudence has failed to investigate the nature of harm as it applies to women, focusing instead on the cost-efficiency of preventing harm-causing events (pp. 94-95, 166-74). A renewed focus on “what harms us, and how much” (p. 94), West contends, would reveal that “the rights and remedies universally available to both women and men are for *those harms*” that have been historically “suffered by, recognized by, and taken seriously by, men” (p. 97). Men relate to harms such as death, theft, assault, and battery (pp. 97-98), but have difficulty comprehending “gender-specific” harms such as physical invasion, emotional separation, psychic loss of selfhood, and “patriarchal subjection” (pp. 100-38). Law not only ignores these distinctively feminine harms, it also legitimates and compounds them by inadequately compensating “women’s domestic work” (p. 138) and by directly protecting the events that cause the harm (such as pornography and marital rape) (pp. 138-64). “As a result women are doubly injured: first by the harm-causing event itself, and second by the peculiarity or nonexistence of the law’s response to those harms” (p. 96).

II

Caring for Justice is significant in its advancement of the debate over the reconciliation of justice and care. Relational feminists¹¹ had previously argued

8. As an example, West shares a memory from the civil rights era of a white woman holding her daughter tightly while yelling hateful racial epithets at “small, innocent African American children attempting the heroic and commonplace act of entering a school building” (p. 75).

9. 163 U.S. 537 (1896).

10. *Scott v. Sandford*, 60 U.S. 393 (1857).

11. Within the wide spectrum of feminist thought, liberal feminists and “different voice” feminists are traditionally considered to be on polar ends from one another. See West, *supra* note 1, at 14 (“[W]hat unifies radical and cultural feminist theory (and what distinguishes both from liberal feminism) is the discovery, or rediscovery, of the importance of women’s fundamental maternal difference from men.”). Within “different voice” feminism, there is a basic division between relational, or cultural, feminists (who focus on the benefits of feminine connectivity) and radical feminists (who emphasize the invasive, oppressive, and destructive implications of these connections). See *id.* at 15. The potential synthesis of feminist and liberal theory that I discuss is different from what is commonly called liberal feminism because it draws upon “different voice” feminism to achieve “true” equality rather than just the “formal”

that care is an ethical activity, not just an emotional—and thus “morally arbitrary”—reaction (pp. 33-36, 295 n.32). West accepts their claim as a starting point, but rejects their view¹² that justice and care are “oppositional” (p. 24). West’s argument for the synthesis of justice and care is compelling, and her applications are powerful. Nevertheless, *Caring for Justice* remains incomplete: West does not fully confront the conflicts that must inevitably arise in the pursuit of her goals, and thus fails to offer direction on how to resolve the hard cases that emanate from such conflicts.

Richard Rorty presents what may be the most difficult situation for reconciling justice with care: the war criminal.¹³ Rorty explains:

[I]f we had watched the war criminal grow up, had traveled the road he had traveled, we might have had difficulty reconciling the demands of love and of justice. But it is well for society that in most cases our ignorance permits us to avoid this dilemma. Most of the time, justice has to be enough.¹⁴

West clearly could not agree with Rorty that justice is “enough,” but presumably would want to see the war criminal held fully responsible for his crime. The closest example West considers is a Maryland case in which, she argues, a sympathetic judge gave a cuckolded criminal defendant “an extraordinarily light sentence for killing his wife” (p. 78). According to West, the judge showed a “nurturant response to the defendant . . . at the cost of a dehumanizing callousness toward the victim” (p. 78). By failing to address the seemingly contradictory requirements of justice and care in this hard case and by directing care solely toward the victim, West skirts the question of whether her synthesis requires some nurturance for even the most unsympathetic defendants.

Consideration of the hard cases thus indicates that West’s image of a Venn diagram to describe the relationship between justice and care (p. 38)¹⁵ might be inapposite. Since a Venn diagram involves precisely defined conceptual areas, West should be able to identify some criteria by which to make a principled determination regarding whether a decision fits into the region of overlap. Yet, she never does so. Her inability to establish precise boundaries suggests that, instead of a Venn diagram, justice and care lie on a continuum, oppositional at

equality sought after by liberal feminism. *Cf. id.* at 14 (“[D]uring the same decade that liberal feminist political activists and lawyers pressed for equal (meaning same) treatment by the law, feminist theorists in non-legal disciplines rediscovered women’s differences from men.”).

12. See, e.g., Sherrine M. Walker & Christopher D. Wall, Note & Comment, *Feminist Jurisprudence: Justice and Care*, 11 B.Y.U. J. PUB. L. 255 (1997) (characterizing theories of justice as rights-based, and presenting an ethic of care as a more pragmatic approach to real world problems).

13. See 1 RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS 205-06 (1991).

14. *Id.* at 205.

15. West explains that the relationship between justice and care is like that of overlapping circles, and argues that “only in the area of overlap will one find either true justice or true care” (p. 38).

the extremes but meeting at some indefinable point in the center. If the relationship between justice and care is better described as a continuum, then a spectrum, instead of a Venn diagram, is the appropriate analogy for determining how cases should be decided.

Additionally, although West ably begins the project of directing our attention to the point at which justice and care meet, a true reconciliation would call for collaboration between a number of different legal perspectives. *Caring for Justice* alludes to the possibility of an alliance with either economic or liberal legalists,¹⁶ but concludes that law and economics actually clashes with feminism because of its commodification of harms (p. 177). Liberal legalism, on the other hand, would become a natural ally to activist feminism if it adjusted its understanding of the individual.¹⁷ According to West, the problem with liberalism is that "the liberal self at best reflects the male experience of selfhood within the liberal tradition" (p. 282). Modern liberal legalists envision a "desiring, rational, egotistic self," she argues, which is "arbitrarily desirous, sated by pleasure, sovereign over one's own subjectivity, knowledgeable of the objective world through reason and of the subjective world through introspection and confession" (p. 281).

West's argument for the synthesis of justice and care reveals a competing understanding of the individual, reflecting an evolution in her own work.¹⁸ In *Jurisprudence and Gender*, West argued that women's connected nature results in a feminist tendency toward nurture and care.¹⁹ West now accepts that a capacity to care is common to both sexes, though she argues that it is more closely associated with women (p. 20).²⁰ This is the promise hinted at by

16. "[B]oth economic and liberal legalism . . . rest on a *changeable* conception of the individual [as] . . . radically individuated . . . [T]hey are asserting a descriptive and empirical—and hence falsifiable—claim, not a metaphysical or transcendent one" (p. 5).

17. Unfortunately, the term "liberalism" has developed a confused assortment of meanings and connotations in existing literature. See Mark Tushnet, *A Public Philosophy for the Professional-Managerial Class*, 106 YALE L.J. 1571, 1571 n.1 (1997) (book review) ("'Liberalism' is of course a contested term."). Bruce Ackerman explains that "[p]olitical liberalism is a revolutionary doctrine, based on a radical idea—that men and women of different beliefs can establish a fair political system that grants all participants the equal right to live their own lives in their own way." Bruce Ackerman, *Political Liberalisms*, 91 J. PHIL. 364, 377 (1994) (emphasis added). For West's thoughts about liberal theory, see Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985).

18. In her prior work, West wrote: "[T]he claim that what separates us is epistemologically and morally prior to what connects us[,] while 'trivially true' of men, [is] patently untrue of women. . . . [T]he 'human being' . . . assumed by our modern legal theory contrasts in every particular with the 'woman' . . . constructed by modern feminist theory." West, *supra* note 1, at 2-3. In *Caring for Justice*, West explains that "a precondition" of the thesis that the ethics of care and justice are interdependent is "that all of us are capable of employing both these overly polarized moral voices" (p. 20).

19. See West, *supra* note 1, at 17.

20. This shift in West's thinking should not be understood as an acknowledgment of social construction of selfhood. West remains committed to a vision of individuals as moral characters, with biological differences between the sexes (pp. 10-20, 259-92), leaving her at odds with postmodernists and other anti-essentialists. West also parts ways with Okin on this argument. See OKIN, *supra* note 3, at 6 ("The rejection of biological determinism and the corresponding emphasis on gender as a social construction characterize most current feminist scholarship.").

Caring for Justice: a new vision of the individual as both "separate" in some ways and "connected" in others.²¹

Unfortunately, West's book ultimately fails to deliver on this promise. An alternative understanding of the self requires further elaboration than *Caring for Justice* provides; this elaboration could be undertaken as a joint endeavor by liberals and feminists dedicated to the development of a humanist legal theory. A cohesive understanding of the "connected" and "separate" aspects of selfhood could result in radical theoretical and legal change. To accomplish this collaboration, however, liberal and feminist theorists will need to address hard areas of modern doctrine upon which they conflict, such as First Amendment law.²² Fortunately, the polarity of debate does not eliminate the possibility of reconciliation between feminists and liberal legalists. When liberal theorists recognize the existence of harms, they are willing to support legal constraints on the production of those harms.²³ Thus, feminists and liberal theorists may indeed be able to reach agreement even in highly contested areas like the First Amendment.

West has taken the first tentative steps down the path toward a humanist jurisprudence by explaining the interdependence of justice and care and the necessity of recognizing uniquely feminine harms. Unfortunately, she leaves some of the more difficult questions unanswered. To fulfill the promise of *Caring for Justice*, West and other theorists must strive for a humanist legal theory, engaging in active debate and negotiation over how best to resolve their inevitable conflicts.

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21. Such a new description would require West to overcome fully her prior dichotomy between "separate" and "connected," and to acknowledge that men and women share both attributes, though one may be more common to each sex. For example, one might argue that women are biologically more inclined toward connections, and thus care, because of the potential to experience pregnancy and childbirth. Cf. West, *supra* note 1, at 21 ("[W]omen are ultimately more "connected"—psychically, emotionally, and morally—to other human beings because women . . . are physically and materially "connected" to those human beings when the human beings are fetuses and then infants.").

22. Whereas radical feminists such as Catharine MacKinnon and Andrea Dworkin argue that pornography silences women and violates their First Amendment rights, see CATHARINE A. MACKINNON, ONLY WORDS 1-41 (1993); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 17-20 (1985), prominent liberal theorists such as Nadine Strossen and Ronald Dworkin adamantly support the First Amendment rights of pornographers against regulation, arguing that the harms of such regulation outweigh any benefits to women, see Nadine Strossen, *Hate Speech and Pornography: Do We Have To Choose Between Freedom of Speech and Equality?*, 46 CASE W. RES. L. REV. 449 (1996); Ronald Dworkin, *Women and Pornography*, N.Y. REV. BOOKS, Oct. 21, 1993, at 36 (reviewing MACKINNON, *supra*).

23. Liberal legalists have recognized the need to regulate areas that were perceived at one time as within the realm of freedom, such as working hours, tobacco, and monopolies. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383-84. In fact, Bruce Ackerman explains that liberals differ from libertarians because they "recognize that each citizen's starting point in life is pervasively shaped by the family, the educational system, the distribution of wealth, the institution of private property, and the organization of the marketplace." Ackerman, *supra* note 17, at 367.