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## Caring for Justice, Reviewing Robin West

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CARING FOR JUSTICE. By *Robin West*. New York: New York University Press. 1997. Pp. ix, 356. \$35.

If the sexes are indeed from different planets, as the title of a recent bestseller informs us,<sup>1</sup> one wonders what those planets were like before their inhabitants made the trek to Earth. Did the citizens of the all-female Venus structure their lives, work, moral commitments, and political systems differently from the males over on Mars? If so, what happened when these cultural worlds collided to form our own? Does our culture represent a synthesis of these two separate systems into a new and better, or perhaps worse, one, or is it the result of one planet's wholesale conquest of the other?

Fanciful as these questions may seem, they raise serious issues relating to the most fundamental aspects of our personal interactions and political institutions. In her latest book, *Caring for Justice*, Robin West<sup>2</sup> sets herself the task of asking and answering a version of these questions, and exploring the implications of the answers she adopts. Or rather, such is her task in *part* of the book, for *Caring for Justice* is not truly a book — in the sense of a single work devoted to a central thesis — but a collection of essays whose relation to one another frequently seems tangential. Only the first two chapters explore the work's stated themes in depth.<sup>3</sup> Later chapters sometimes suggest peripheral elements of prior discussions, but they generally fail to establish explicit connections or to build on the earlier material.<sup>4</sup> The totality of *Caring for Justice* ultimately is precisely equal to the sum of its parts, as those parts do not interact meaningfully in a way that would enhance their collective impact.

That being said, the parts themselves are excellent. *Caring for Justice* is the rare work that offers a clear map of the current academic landscape as well as a provocative foray into new territory. If the book steps lightly and moves quickly, at least it manages to cover a lot of ground. West describes and critiques entire schools of jurisprudence — law and economics, law and literature, postmodernism and, of course, various strains of thought falling under the clumsy catchall term *feminism* — both concisely and precisely.

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1. See JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS: A PRACTICAL GUIDE FOR IMPROVING COMMUNICATION AND GETTING WHAT YOU WANT IN YOUR RELATIONSHIPS* (1992).

2. Professor of Law, Georgetown University Law Center.

3. West herself admits that “[t]he first two chapters . . . present the book's core jurisprudential arguments.” P. 9.

4. Where possible, this Notice attempts to make the implicit relationships among the book's chapters more overt.

## ASSUMPTIONS AND FOUNDATIONS

Before starting her journey, West packs — and also unpacks — some fairly weighty intellectual baggage. The book starts from the premise that our society, and more particularly our legal system, reflects and represents the unfortunate triumph of “male” over “female” morality. The former perspective, which has come to dominate Western political philosophy, posits “a society and state the *raison d’être* of which is the satisfaction of the interests, preferences, wishes, desires, and whims of . . . atomized individuals” (pp. 4-5). West, following Carol Gilligan and others, calls this moral view the *ethic of justice* (p. 23). “Female” morality, or the *ethic of care* (p. 6), is grounded in “connections to others” (p. 1) rather than in the pursuit of individual interests. This ethic is “embedded in the female labor of attending to intimate relations” (p. 6).

Although “more than any other experience we share” (p. 1), the relationships to which the ethic of care devotes itself “inform and constitute our ‘moral sense’” (p. 1), our legal system frequently operates to undermine rather than to support them.<sup>5</sup> This institutional neglect of, and opposition to, the ethic of care “is all a function of our sorry history of sexist exclusion” (p. 7). These statements reflect the two overtly expressed premises that underlie the remainder of West’s discussion. The first premise states that there *is* an ethic of care — that is, “that the work, disproportionately done by women, of caring for the relationships that sustain us, is *moral* work, rather than emotional affect” (p. 7). Relationships of care fall within the category of moral activity as squarely as autonomous, rational ethical choices do. They should not be dismissed as merely natural or intuitive female behavior without regard to this moral component. The second premise is “that women, as a group, have been *subordinated* in this culture, rather than simply ‘discriminated against’ by the state” (p. 7).

West later advocates greater incorporation of the ethic of care into our legal decisionmaking processes. Before addressing the merits of the ethic of care, however, West must acknowledge, and attempt to defuse, the potential controversy surrounding her mere declaration of its existence. Other scholars — many, perhaps most, of them feminists — have vigorously contested the proposition that there are *essential* differences between men and women.<sup>6</sup> Yet both of West’s premises are grounded in the assertion of such categorical differences: “They both seek to express something generally true of all women and hence of each woman” (p. 10). West notes four ba-

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5. “[T]he *good* connections — such as the sustaining and nurturing connections in a healthy parent-child relationship — are not sufficiently protected, and at times are actually threatened, by our public and legal institutions . . .” P. 2.

6. P. 10. West does not identify particular scholars who have made such objections.

sic categories of objection to her essentialist claims: first, an *empirical* denial that anything meaningful can be said of a sex generally; second, a *strategic* objection, grounded in the postmodern sensibility, that finds the truth or falsity of West's claims irrelevant but contends that such claims are politically unhelpful — if not downright dangerous — for women;<sup>7</sup> third, a *political* opposition to an oversimplified focus on sexism that ignores or downplays the complex matrix of types of discrimination simultaneously faced by, for example, African-American women or lesbians; and finally, the potential *backlash* from the male counterargument that men's essential biological differences from women may drive their misogynist behavior (pp. 11-13).

West answers these objections in reverse order. Responding to the backlash concern, she basically claims that biology is not destiny, so men get nowhere by cloaking their immoral behavior in the inevitability of genetics. To the political argument, which she considers the most serious, West replies that even if some women confront subordination along several axes at once — such as racism, sexism, and heterosexism — sexism is certainly *one* of these axes, and *all* women face discrimination along that axis. It is therefore not meaningless or inaccurate to describe sexism as a universal, however complicated, female experience. For her rejection of postmodernism, West summons some bile. She labels it “constitutively anti-Darwinian, anti-naturalist and anti-scientific” (p. 16), an “at bottom inhuman” philosophy that transforms priceless ideas into fungible commodities and that “will surely diminish us” (p. 17).

The empirical objection to essentialism, though not considered the most significant by West, causes her the most trouble. First, she backpedals a little to concede that there is “no ironclad correspondence between women and ‘an orientation toward an ethic of care’” (p. 18). Then she claims, albeit not unconvincingly, that the anti-essentialists should bear the “burden of proof” on this empirical question.<sup>8</sup> Finally, and most persuasively, she attacks the moral intuition that gives the empirical objection force: the visceral unease one feels at the prospect of stereotyping morality, or anything else, by sex. Her attack upholds the standard of free intellectual discourse, arguing that “[t]here is a real danger of cutting off fruitful inquiry if we cut off inquiry into sex and gender differences solely out of worries over stereotyping” (p. 19). West points out

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7. West raises and confronts a similar objection in Chapter 1. Pp. 36-37.

8. Pp. 18-19. West relies on Carol Gilligan in making this claim. “It truly would be extremely odd, as [Gilligan] argued, if it turned out that the vastly greater amount of child raising and homekeeping, the world over and throughout history, in which women engage — a fact apparently conceded by all — has *no impact whatsoever* on the moral orientations of the two sexes.” P. 18 (citing Carol Gilligan, *Reply to Critics*, in *AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES* 207 (Mary Jeanne Larrabee ed., 1993)).

that whatever philosophical legitimacy the ethic of care possesses exists independently of its biological or historical provenance. Yet even if it is not theoretically necessary, she somewhat tentatively asserts, linking the ethic of care to the experiences of women may have strategic utility. West seems to be doing little more here than requesting an opportunity to state her case.

#### THE INTERDEPENDENCE OF JUSTICE AND CARE

That case begins with the argument, in Chapter One, that our system of justice undervalues the dictates of the nurturing, connected ethic of care. The erection of such an opposition between particularized care and universalized justice, and the rejection of the former in favor of the latter, is of course hardly new to Western political philosophy. After all, Plato's *Republic*, our first extended treatment of the subject, envisions an ideally just society that not only condones but demands the separation of parents from their children.<sup>9</sup>

West is not so bold as to say that care is more important than justice or should supplant it as a basis for legal decisionmaking. Instead, she claims that the ethics of justice and care are both necessary conditions of any desirable legal regime and, perhaps more intriguingly, "are each *necessary conditions of the other*. . . . '[J]ustice must be caring if it is to be just, and . . . caring must be just if it is to be caring'" (p. 24). West presents this argument in a negative fashion by indicating the unsatisfactory results that occur when either ethic is pursued independently of the other.

West does not precisely define the terms justice and care. Instead, she describes them by appealing to three archetypal images associated with each. In explicating justice, West points to the "plumb line" of *consistency* that tests if our acts are "on the level," the "cupped hands" of *integrity* that hold one's personal oaths close,<sup>10</sup> and the scales of *impartiality* that are held by the blindfolded judge.<sup>11</sup> As icons of caring, West cites a mother's *nurturing* embrace of her infant, the *compassionate* tears of a witness to tragedy, and the *particular*, focused gaze of the caregiver on the object of her care.<sup>12</sup> In adopting this "imagistic" format, West's analysis gains a great deal of immediacy and accessibility but sacrifices intel-

9. See PLATO, *THE REPUBLIC OF PLATO* Bk. 5, at 457a-466c (Allan Bloom trans., Basic Books 2d ed. 1991).

10. This image might not spring to mind immediately when one considers the iconography of justice. West has not merely fabricated this conception of justice, however; it is drawn from literature. P. 26 (citing ROBERT BOLT, *A MAN FOR ALL SEASONS* (1962)).

11. P. 26 (referring to WILLIAM BYRON, *QUADRANGLE CONSIDERATIONS* 108-10 (1989)).

12. Again, West is borrowing the last of these images, this time from a popular motion picture. P. 31 (citing *ALIENS* (Twentieth-Century Fox 1986)).

lectual rigor. Indeed, West herself later admits that two of her images of justice, consistency and impartiality, basically blend together into the straightforward notion of treating like cases alike (p. 89).

West pairs off these images, matching consistency with nurturance, integrity with compassion, and impartiality with particularity.<sup>13</sup> Using case law, historical anecdotes, and literary examples, she then argues that none of the aspects of justice is truly just unless its caring counterpart is present, and vice versa. Integrity without compassion becomes coldhearted, and unjust, adherence to abstract principles, as when Melville's Captain Vere ruthlessly and needlessly convicts Billy Budd.<sup>14</sup> Compassion without integrity, on the other hand, devolves into a dangerously literal "selflessness" rooted "not in a genuinely empathic regard for the other, but rather in a harmful and injurious lack of regard for oneself" (p. 79). Impartiality without particularity leads courts to follow an overly formalistic sense of equality in deciding cases that, in their specific details, are very different. Particularity without impartiality defers unduly to the needs even of the undeserving — an argument West supports by reference to the Supreme Court's acceptance of reverse discrimination claims (pp. 85-87). Consistency without nurturance breeds procrustean egalitarianism; West provocatively cites Rawls's theory of justice (pp. 62-65) and what she considers a misguided justification for abortion rights (pp. 66-70) as examples. Nurturance without consistency prioritizes care toward "one's own" and "shades into racism, nationalism, tribalism, or speciesism — in short, into fascism" (p. 75).

By the end of Chapter One, the reader has begun speculating as to the extent to which the justice-care dichotomy parallels other distinctions already known to the law: for example, between legal and factual questions or between procedure and substance. In the final analysis, is care nothing more than paying close attention to the particularized facts of the case in order to achieve a robust understanding of what law to apply? West writes, "[I]f judges are to identify 'likes' and treat them 'alike[,] they must be able to understand the shared qualities of certain experiences which on their surface may appear to be quite different indeed" (p. 89). Is justice merely a formal set of rules that are a necessary adjunct to the codification of our substantive, caring values? West writes, "The work of doing legal justice — of remaining true to a judicial oath, of applying the

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13. The basis for this particular set of comparisons is unclear, as, indeed, is the basis for establishing pairwise comparisons in the first place. Presumably West does this to make the mutual reliance of justice and care more immediate and accessible.

14. Pp. 43-44 (discussing HERMAN MELVILLE, *BILLY BUDD, SAILOR* (Harrison Hayford & Merton M. Sealts, Jr. eds., University of Chicago Press 1962) (1891)).

law, of treating like cases alike, of insisting on institutional consistency, and so on — must be in the service of values which are life-affirming” (p. 49). It may be the case that neither care nor justice is absent from our jurisprudence, but that judges must struggle in close cases even to discern these ethics’ dictates, much less strike a balance between hard rule and tender mercy.

At any rate, West does not offer an exhaustive account of the relationship between justice and care or of how best to harmonize the two, either in the abstract or in terms of their practical application. West’s imagistic explanations of the concepts of justice and care leave the definitions of the terms themselves ambiguous, compounding the difficulty of understanding the ways in which they interact. Depending on one’s own understanding of these terms, it is possible to see their harmonization as either automatic or impossible. For example, perhaps the basic mission of justice is to form universal precepts that categorize, and may resolve conflicts among, those caring impulses that are “very likely the root of whatever moral obligations we eventually learn to assume toward all others” (p. 71). That is to say, the project of justice may, at its crux, be nothing more than the extension of the rules that govern intimate, caring relationships from the private sphere into the social realm. Under this conception, West’s thesis that justice and care are linked needs no argument, for it follows from the very definition of justice itself.

On the other hand, it is also possible that a richer understanding of justice and care will lead to the conclusion that they are, at least sometimes, incompatible. There is no reason to suppose justice and care will *never* conflict, nor must we accept unreservedly West’s claim that they are always mutually dependent. In fact, some of West’s attempts to illustrate the horrors of justice without care indicate this. For example, despite West’s casual characterization of the act as “repugnant,” the father who places the needs of the community over the needs of his son (p. 51) has not done anything wrong — just as the boy’s mother does nothing wrong in making the opposite choice. The father has merely chosen one of two possible responses to a legitimate moral dilemma.<sup>15</sup> Indeed, it will likely be the case that care alone will sometimes place mutually exclusive, though independently desirable, demands on individuals or groups.

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15. As in this case, West sometimes assumes too readily that the moral intuitions driving her opposition to certain actions are widely shared and need no justification. For example, West appears to take it for granted that Abraham’s willingness to sacrifice his son Isaac on the altar of God was morally reprehensible. Pp. 40, 51. This may be true, but it is by no means indisputably so. Many devout believers, including one major Western philosopher, take this sign of devotion to be the defining moral act in the life of the “father of faith.” See generally SØREN KIERKEGAARD, *FEAR AND TREMBLING* (Alastair Hannay trans., 1985).

Justice and care may both be good things, but that does not mean they will always be reconcilable.<sup>16</sup>

To note that certain elements of West's conceptual framework remain undeveloped is not to slight West's contribution in Chapter One. Indeed, that the reader is left asking such questions, and curious about their answers, is an indication of the power of West's thesis to engage and stimulate. West's project in these pages is more descriptive than prescriptive: she seeks to highlight the system's improper prioritization of justice over care to the detriment of both, not to give the final word on how that system might properly synthesize the two. One is left hoping, however, that this will not prove to be her final word on the subject.

### JUSTICE AND HARM

Chapter Two contains the most intellectually and emotionally gripping material in *Caring for Justice*. In this chapter, West argues that the systematic prioritization of justice over care has affected our legal decisionmaking processes. The ethic of justice promotes a norm of "formal equality" that has led to a truncated understanding of the types of harm our legal institutions should prevent or compensate (p. 98). West contends that the law and economics school has co-opted the legal notion of *harm* and replaced it with the notion of *cost*.<sup>17</sup> This conceptual transformation has had disastrous consequences for women (p. 96). West devotes the remainder of the chapter to an elaboration of significant harms, visited disproportionately if not exclusively on women, that warrant redress but do not conform to the modern economic notion of harm as cost.

*Caring for Justice* is nowhere more eloquent or moving than here. West provides a grim depiction of the very real and immediate harm the specter of rape inflicts on all women everywhere (pp. 101-07). She portrays women's acts of personal altruism in the domestic sphere as a self-denying, harmful offshoot of female subordination to men (pp. 110-11). Women suffer *harms of separation* including not only childbirth and subsequent separations from children but also the common isolation of the married woman from female companionship.<sup>18</sup> Society imposes *patriarchal harms* that

16. The notion that moral goods are frequently incompatible animates the work of Isaiah Berlin. See JOHN GRAY, ISAIAH BERLIN 6 (1996) ("[T]he cornerstone of [Berlin's] thought is his rejection of monism in ethics — his insistence that fundamental human values are many, that they are often in conflict and rarely, if ever, necessarily harmonious, and that some at least of these conflicts are among incommensurables — conflicts among values for which there is no single, common standard of measurement or arbitration.").

17. P. 96. West devotes a later section of the chapter to an elaboration and repudiation of the assumptions underlying the law and economics view. Pp. 164-74.

18. Pp. 127-32. One might assert that men experience such harms as well; West claims that although this may be true, women suffer these harms disproportionately. For example, with respect to separation from one's children, West writes that "[a]lthough separation from



force women to provide men sexual gratification and domestic services (pp. 134-35).

This typology — and particularly the idea of altruism as harm — brings a buried tension in West's analysis closer to the surface. At times West implies that women's caregiving functions are determined, at least in part, by biology<sup>19</sup> — a conception that explains West's need to justify her essentialist position in the Introduction. At other times, though, West hints that the assignment of those functions to women is a cultural construct,<sup>20</sup> and an undesirable one at that. Sometimes West simply hedges, as when stating that “[n]ecessity — *whether biological or cultural* — becomes, for the mother, a moral imperative” (p. 118; emphasis added).

But does it? Hardly anyone views acts undertaken of necessity as having moral heft. In fact, West herself argues that true moral agency demands autonomous choice, and she condemns patriarchy for denying women such choice by establishing subordinate female social roles that stunt their potential for individual fulfillment (p. 122). Altruistic acts born of such duress, rather than authentic care, render women “*incapable* of the self-regarding acts that are constitutive of the liberal self — and . . . that *is* the harm that these [altruistic] acts occasion” (p. 120).

Ironically, this characterization of how women's externally imposed caregiving roles harm them is rooted in an acceptance of the same atomistic, self-interested economic notion of “the liberal self” that West initially claimed to reject:

The case for both the efficiency and the morality of [female caregiving] rests, in effect, on the assumption that the women who make these decisions are what might be called “self-possessed individuals” — individuals who choose, decide, and act on a solid, static core of settled preferences and desires, which are themselves grounded in either self-regarding pleasures and pains or freely chosen moral principles. [p. 113]

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older children obviously might pain fathers as well as mothers, it seems to hurt mothers more and more often than fathers, in that the *prospect* of such a separation deters mothers more than fathers from income-producing activities which would require just such a separation.” P. 128.

19. For example, she cites women's unique, and biologically determined, role in nursing newborn children as an influence on women's caregiving roles. Pp. 117-18.

20. “It does *not* follow . . . that there is an essential or fundamental component of female altruism that is necessarily connected with fear, and necessarily harmful (*any more than that there is an essential component of female altruism necessarily connected with care*).” P. 123 (second emphasis added). This statement does not comport easily with West's extended defense of her essentialism in the Introduction. It also raises questions as to the ultimate foundation of the ethic of care. That ethic, or at least its connection to a uniquely feminine viewpoint, initially seemed to draw support from the empirical fact of female caregiving. Yet if the two are not essentially linked and female altruism might just as easily have other bases, the ethic of care seems unable to rely on that altruism as an indicium of its authenticity. See *infra* note 21 and accompanying text.

But if the ethic of care is valid only insofar as the caregiver is a rational economic agent — if, in other words, women's aspirations and moral choices must ultimately remain accountable to the male vision of *self-fulfillment* — what is the value of the ethic of care? The source of its philosophical independence from the ethic of justice was that it prioritized relations of care over personal fulfillment. Its central project was to defend the importance and desirability of sacrificing “self-regarding pleasures” for the benefit of someone else. Yet now West categorizes that sacrifice as a legally neglected *harm*, and in so doing, advocates retaining the very focus on satisfying personal wants that she earlier described (pp. 4-5) as the source of justice's carelessness. West claims that her “self-possessed individual” standard “look[s] beyond the definitional presumptions of both liberalism and of an ethic of care” (p. 113), but it looks more as if she is saying that the former is required to ratify the moral imperatives of the latter. That position tacitly prioritizes justice over care as a moral criterion.

The issue of priority is significant in the chronological as well as in the ordinal sense. Though West thoroughly describes the patriarchal origin of women's unique and inferior social status, she never adequately establishes the origin of women's unique moral perspective: the ethic of care. Later in the book, she claims that patriarchy is “a very general power matrix” that “exists across time and culture” (p. 282). She does not, however, fully respond to the crucial question of whether the *maternal* ethic similarly exists outside culture or whether it is a contingent, forced response to male dominance.

This problem of precedence — does the ethic of care exist independently, prior to male domination, or does it result therefrom? — calls into question both the intellectual and the strategic compatibility of West's initial two premises: the principled vision of care as morality and the empirical fact of subjugation. Women's societal caregiving role is adequately explained by the existence *either* of an ethic of care rooted in women's essential difference from men *or* of male subjugation that requires women to define themselves entirely in terms of the satisfaction of others' needs.<sup>21</sup> Why, then, are both

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21. West claims that this role is actually attributable to *both* factors:

I have no doubt . . . that . . . [women's] large and small acts of self-sacrifice are emblematic of a distinctive moral voice . . . . But it is also clear that that is not the entire story. . . . [W]omen's inclination toward private or intimate altruism — particularly in the home — is also, many times and in many ways, the measure of the harms such women have distinctively sustained. They originate not in an ethic of care but in self-denigration, and reflect not a moral sensibility but a battered sense of self.

Pp. 110-11. Yet it is impossible to separate these two causes. West does not, and almost certainly cannot, estimate how large a part of altruism is the result of morality as opposed to subordination. Indeed, as the cultural existence of this altruism can be explained satisfactorily by West's analysis of male domination *standing alone*, Ockham's razor would slice away the need for an alternative ethic-of-care explanation altogether.

premises needed? The possibility that male oppression, and not a distinct a priori moral vision, determines women's caregiving role undermines the empirical basis for suspecting that an independent ethic of care exists.

Moreover, taken together, these premises may tend to undermine the *moral* force of the ethic of care. Basing the ethic of care on women's caregiving relations when those relations result, at least in part, from male subjugation impeaches the moral validity of that ethic. Indeed, its perspective threatens to take on the visage of a Nietzschean slave morality rooted not in freestanding, autonomous moral choices or priorities, but in reaction, rationalization, and even spite.<sup>22</sup>

West is not blind to these considerations. What, then, is she claiming here? There are several possibilities. Perhaps, notwithstanding her prior resistance to an abstract rather than a sex-based foundation of the ethic of care (pp. 20-21), she is arguing for care as a universalizable moral principle. Whether or not a freely chosen or legitimate ethic of care *currently* exists — and West hints that it doesn't<sup>23</sup> — such an ethic may be objectively desirable.<sup>24</sup>

It is just as likely, however, that West's vision of the ethic of care extends to the distant past rather than merely looking to a possible future. An alternative, and likely more faithful, way to read West is to reconstruct a moral or historical account that might ground her understanding of female altruism as rooted both in the ethic of care and in male subjugation. Some version of a nurturing ethic of care, this interpretation posits, does exist outside our cultural constructs. At the same time, women's role in contemporary society is the result not only of that ethic itself, but also of men's exploitation of that ethic for their own benefit. The ethic of care has been culturally transformed into a mandate to provide caregiving that subordinates women and excludes them entirely from the male project of self-directed choice and fulfillment.<sup>25</sup>

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22. See generally FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* (Douglas Smith trans., Oxford Univ. Press 1996) (1887).

23. E.g., pp. 122-23 ("I have argued thus far that the altruism so often associated with femininity is *in part*, or oftentimes, grounded in a fully legitimate *fear* of either sexual invasion, domestic abandonment, or both, and that when it is, the altruistic acts that follow should be recognized as harmful rather than ennobling for the woman who persistently engages in them.").

24. E.g., p. 118 (positing a new set of community relations that "could surely be the basis for a robust morality of care — and if it ever becomes a cornerstone of public as well as private life, it will indeed be a morality quite different from the principled morality of respect premised upon independent, autonomous adults," but arguing that dependence rather than interdependence is the current basis of women's caregiving role). *But cf.* p. 125 ("I suspect, however, that no matter how we organize our social world, some of the psychic harms sustained by the giving self would not be so easily deconstructed.").

25. This reading of West, it must be noted, turns her statement at least partially on its head: a moral imperative becomes, for the mother, a necessity. That is to say, nurturing

## LITERATURE, POSTMODERNISM, AND FEMINISM

The final three chapters of the book, though interesting, are less ambitious than the first two. Chapter Three provides a useful primer on the law and literature movement. West identifies four separate schools within that movement and briefly comments on the relation of each to her understanding of the feminist agenda. Two of these schools undertake to connect legal and literary culture — one in a positive, the other in an oppositional, way. The *literary* project, spearheaded by Professor James Boyd White, aims to resurrect “a conception of lawyering which has at its center a literary rather than an economic sensibility” (p. 181; emphasis deleted). West objects that as a tactical matter, this school’s focus provides a poor engine for social reform (p. 187). Divorcing law from politics, as this movement suggests, is unproblematic only for those who don’t need or want law to effect political change. Moreover, as a theoretical matter, lawyers simply aren’t artists; they should strive to seek justice, not beauty (p. 188). More recent work within this school, most notably by Martha Nussbaum, contends that lawyers and legal institutions should look beyond themselves to the broad messages of culture to find insights into legal problems (pp. 188-89). West applauds this project’s intentions, but warns that Western culture might tend toward the same racist, sexist, rationalist biases as Western law (p. 190).

The *critical* project, whose exponents include Richard Weisberg and David Luban, seeks to mine the literary landscape for material with which to *oppose* the current authority of law. Though again displaying some sympathy for this project, West questions the viability of using canonical works to critique social institutions, as those works themselves, even when critical, usually — and perhaps inevitably (pp. 196-97) — are written from the viewpoint of social “insiders.”

The other two schools are not concerned with literary works themselves, but with certain literary sensibilities. The *interpretive* project uses the tools of literary *criticism* rather than literature per se. Adherents of the interpretive project assert that these tools should offer useful analytic guidance in the interpretation of legal

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relationships may originally have been — and might someday again be — rooted in autonomous female moral choice. Male oppression, however, has exploited that moral activity and institutionalized it into a social mandate, to some extent subverting its moral component.

This explanation also might run into the backlash argument anticipated by West in the Introduction. If women’s caregiving role is grounded in biology, that argument would claim, so too might male exploitation of that role arise from a natural and inevitable biological impulse. West could easily counter, though — as she did in the Introduction — that this response may be natural, but it is not inevitable. With any luck, in fact, West’s unearthing and explication of these differences and relations may serve to promote the raising of consciousness that precedes change. The important thing, at least as an initial matter, is not to identify the origins of difference but to recognize the difference itself and its harmful effects.

texts no less than in the interpretation of literary ones. As West notes, despite its overwhelming predominance over the other three schools in the legal academy generally, the interpretive school has sparked little interest among feminists (pp. 203-04). This is so mainly because, although feminists and interpretation theorists share a deep common interest in the judicial decisionmaker as legal subject, feminists shun generalized interpretive theories in favor of attention to the particular factual contexts in which judges resolve legal disputes (pp. 204-05). The *narrative* school originated within feminism and the Critical Race Theory movement. West praises the power of stories to “communicate both the nature and extent” of overlooked societal harms in ways that quantitative data cannot,<sup>26</sup> as well as to replace law’s “stock stories” with new perspectives (p. 211).

Chapter Four can be viewed as an exploration of some of the neglected harms described in Chapter Two using some of the literary tools described in Chapter Three. West finds in Herman Melville’s *Bartleby the Scrivener*<sup>27</sup> and Susan Glaspell’s *A Jury of Her Peers*<sup>28</sup> rare depictions of marginalized, mute victims who suffer indignities so pervasive that the victims become invisible. In ignoring these harms, the law “is complicit in the process by which they become ‘legitimate’” (p. 219). It is West’s claim that the two novellas seek not only to expose these oft-neglected harms, but to address “the process of legitimation *itself*” (p. 219). West finds in *Bartleby*’s employer a man who passively participates in the legitimation of exploitative labor practices, not out of malice or ignorance, but because of his sheer lack of imagination and inability to “question the deeper premises of a system which led him and *Bartleby* to their point of crisis” (p. 242). As for Glaspell’s work, West notes that “whereas *Bartleby* chronicles the system of meanings which cabin and constrain the charitable instincts of the powerful, *Jury* chronicles the system of meanings which cabin and constrain and frustrate the political consciousness of the weak” (p. 250). West’s discussion

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26. P. 208. As a matter of human psychology, West has scientific support on this score. Studies indicate that people may tend to give undue weight to anecdotal evidence relative to overall statistical likelihoods when making decisions. See, e.g., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 11-14, 190-200, 465-72 (Daniel Kahneman et al. eds., 1982) (discussing influence of “availability heuristic” according to which vivid, easily recalled specific instances of an event lead to overestimation of its frequency); *id.* at 153-60, 414-21 (discussing consistently insufficient weights people assign to base-rate statistical data).

27. P. 219. Melville seems precisely the type of canonical author or social “insider” whose utility as a focus of literary legal analysis West questioned in Chapter 3. West does not address any problems arising from her use of *Bartleby*, however. This might be because West is, as she notes, simply responding to and expanding on the work of Brook Thomas, a member of the critical school who wrote about *Bartleby*. P. 219.

28. P. 198. West also discusses *A Jury of Her Peers* in her examination of the shortcomings of the critical project’s focus on the literary canon. Pp. 198-99.

of subjugated and isolated women recalls her discussion of the same themes — and, briefly, Glaspell's book (p. 131) — in Chapter Two.

Chapter Five treats postmodernism in much the same way that Chapter Three deals with law and literature: it provides synopses of major movements and brief commentaries on the consequences of those movements for feminism. West investigates four central, and interrelated, concerns for postmodernists: power, knowledge, morality, and the self. Her discussions of power and knowledge focus on Michel Foucault, whose work West criticizes for characterizing power as solely positive and creative rather than potentially harmful and destructive (pp. 260-62). West seeks an exploration not of the truths or modes of knowledge power has created, but of those it "has silenced, of the selves it has not allowed to be, of the subjectivities it has denied, of what it has forbidden, and what it has destroyed."<sup>29</sup>

With respect to morality, West asserts that the anti-hierarchical agenda of Roberto Unger et al. neglects the potential — sometimes, the need — to transform unequal relationships by infusing them with care (pp. 277-78). She also criticizes Unger's emphasis on discourse and opposition to the "natural," instead exhorting feminists "to remember, remain true to, and draw upon the naturalism and quietness that have always been central to what has been and is still most admirable about women's moral lives."<sup>30</sup> Finally, West attacks postmodernism's deconstruction of the concept of the *self*. She insists that the critical task for women is to reconstruct an essential self after overcoming a socially constructed *lack* of self (p. 291).

The end of the book thus harkens back to the ideas expressed at its beginning: a declaration of the possibility of essential differences between men and women, and a defense of the exploration of that

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29. P. 262. In fairness to Foucault, his inattention to cultural silence was not necessarily the product of deliberate omission or bias, but rather a consequence of the nature of his analysis. Foucault's project was *archaeological* in that it sought to unearth socially constructed truths and explore their genealogical development and change. See, e.g., MICHEL FOUCAULT, *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS* 1977-1984, at 39, 154 (Lawrence D. Kritzman ed., Alan Sheridan et al. trans., 1988); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 23 (Alan Sheridan trans., 1979) (1975). As such, it was by its nature concerned with voiced rather than unspoken perspectives.

Put another way, Foucault's focus was on the exercise of power itself rather than those on whom it is exercised. West is right, of course, to state that such a focus could well be dangerous for women. At the same time, however, it is probably inaccurate to characterize Foucault himself as unsympathetic to concerns about the potential harmful effects of what power creates.

30. P. 280. West's description of women's behavior as natural may, of course, run into the same antiessentialist critiques she addresses in the Introduction — specifically, the argument that natural differences justify women's caregiving social roles. Cf. *supra* note 22 and accompanying text (discussing complex causal relationship between caregiving roles, patriarchy, and ethic of care).

possibility against the narrow and fundamentally negative critique of postmodernists. West's own exploration of the differences between the sexes is broad in scope, bold in ambition, and twofold in nature. First, West provides a clear depiction of the concrete dissimilarities — some intrinsic, some socially constructed — between men and women, and of the social consequences of these dissimilarities. Second, West defends the position that the sexes' fundamental moral and intellectual perspectives differ as well.

If true, the latter claim in particular has disquieting consequences for the possibility of full mutual understanding or equality between the sexes; a lasting peace between Mars and Venus may be impossible after all. For that reason, West's work is sure to stir controversy both within the feminist community and without. The profound implications of West's argument, however, make it all the more important that we take her claims seriously and explore them thoroughly, rather than dismissing them out of hand based on the casual intuition that any discussion of essential differences is dangerous or discriminatory. *Caring for Justice* does not fully resolve all the issues it raises, but it powerfully highlights the significance of those issues and offers a compelling case for the adoption of a new perspective for addressing them.

— *Michael T. Cahill*