

## Opening the Eyes of Justice

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*Caring for Justice*, by Robin West. New York: New York University Press, 1997, 337 pp, \$35.00 hardcover.

*Beyond Portia: Women, Law and Literature in the United States*, edited by Jacqueline St. Joan and Annette Bennington McElhiney. Boston: Northeastern University Press, 1997, 391 pp., \$50.00 hardcover, \$20.00 paper.

IN 1908 THE US SUPREME COURT decided that a woman's freedom of contract was more circumscribed than a man's, because "her physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil." The special legislation at issue was an Oregon law prohibiting women from working more than ten hours a day, whether they wanted to or not. Because "healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race" (*Muller v. Oregon*, 208 US 412, 421 [1908]). Such starkly essentialist reasoning sounds almost quaint by today's standards of gender equality. So it is with some surprise that general readers will encounter an intense and carefully reasoned defense of essentialism from the pen of one of America's best-known feminist legal theorists.

Robin West's new book, *Caring for Justice*, argues that experience, rather than biology, accounts for essential differences between the sexes. The important point is not that women have the equipment for bearing children, but that because they bear and nurture children, women's lives are more relational and more focused on human connections than are men's lives. These connections supply both a moral potential and a potential for harm that law, with its emphasis on gender-blind justice, fails to recognize.

West uses the concept of moral potential to power her vision of what law might look like if women played a more prominent role in legal jurisprudence. The classical view sees justice as formal, rational, duty-bound and public – in other words, male. Opposed to this version of the rule of law is an ethic of care that is experiential, affective, inclination-oriented and private: in other words, female. West's project is not to deconstruct these opposing visions, but to realign them. Justice and caring, she argues, are not in an oppositional or hierarchical relationship to one another, but in a mutually dependent one: there can be no authentic justice without compassion, nor any legitimate ethic of care that is not also just. A true feminist jurisprudence will incorporate an ethic of care into an appropriately gendered justice. Justice need not, and should not, be blind to gender.

The jurisprudence West imagines would validate caring as an ethical response to the demands of community. For example, law would view domestic work as an activity to be protected and compensated. It would elevate all care-giving services, public and private, to a position of importance in community life. And it would require compassion as part of the judicial decision-making process. This is the moral potential of the "connectedness" that defines women's lives. In order to realize this potential, judges would have to attend more closely to the details of individual lives and rely less on the formal application of supposedly neutral rules to whoever happened to approach the bench.

To some extent, this is happening as more women are appointed to judgeships. But law is among the most conservative of our institutions. Despite the talk about judicial activism that fills the press each time the Supreme Court does something that offends one constituency or another, the fact is that law rarely makes social policy. For the most part, courts only reflect or legitimate what is already happening outside their doors.

More interesting is West's analysis of the way current jurisprudence realizes the potential for harm to women. Few would dispute that just as criminal law is a means of punishing the guilty, civil law is an instrumentality for compensating people who have been injured. West argues that "harm" means "harm that men suffer" and that women will be compensated only when their injuries approximate those that a man might suffer. For example, the law does a better job of protecting women from violent rape than from street harassment because violence isn't highly gendered. Men as well as women can be the victims of violent crime, but are unlikely to be called "prick" while they are walking down the street minding their own business. A woman harassed on the street may feel dirty, humiliated, exposed, afraid – may be harmed, in short. But the First Amendment will thwart any attempt to control the speech that does the harm. Because street harassment is a highly gendered injury, the law fails to redress the grievance.

AT THE CORE OF WEST'S taxonomy of harm is patriarchy itself, a system that guarantees men access to women's bodies and to the sexual pleasure that women's bodies provide, that promotes women's fidelity in the interests of paternity and private property, and that secures women's presence for domestic services from which men benefit. The harms that patriarchy causes are often not cognizable by law. Look at the way that rape is only partly regulated: marital rape is still permissible under many circumstances in many states; "date rape" (the term itself is problematical) is prosecuted differently from violent rape by a stranger. To the woman harmed, rape is rape. The law doesn't see it that way. Or consider the harm of enforced altruism imposed by a system of employment and entitlement laws that do not compensate women for domestic work. Any woman who for twenty years has run a household and raised a family and enabled her husband's career has worked. The law doesn't see it that way.

What does it mean that a system which exists to redress harm refuses to recognize many of the harms that women suffer? The problem, of course, is that law is an instrumentality for sustaining patriarchy as much as it is an instrumentality for redressing harm. Just what is being protected when the state claims it is powerless to silence the man who yells, "Hey, cunt!"?

Robin West belongs to the general theoretical school within law known as Critical Legal Studies, a movement that has drawn heavily from poststructuralist theories in other disciplines. The CLS argument that law is not neutral and that it privileges the privileged was made long ago by the legal realists whose ideas influenced legal thinking between the wars. Realists made the empirical observation that a few people made lots of money and owned lots of property and that most people worked for the few people who owned the property; yet when these people had disputes with one another, the judicial system treated them as if they were equal. The basis of contract, Morris Cohen argued, is not an enforceable agreement between two free agents but rather a system that confers sovereignty on one party over another. Similarly, the foundation of private property is not simply that something is "mine," but that it is also, and pointedly, "not yours." Not only that, but private property is really a public relationship because what is "mine" is allowed to me by the state, without whose authority it wouldn't be "mine" for very long.

Realists were the first theorists to see law as a set of power relationships held intact by formal rules that only gave the appearance of principled decision-making. The neutral rule really works to exacerbate the differences between the rich and the poor, the powerful and the powerless. Karl Llewellyn and others understood that law was "outcome determined" (that is, there was a legal precedent for any result a judge wished to ordain) and they thought that, in the interests of justice, judges should be more flexible in applying the rules. Instead of looking first at the law and then applying it to the dispute, judges were exhorted to decide what a just outcome would look like, and then to search the precedents until they found a legal rule that would justify the outcome.

Critical Legal Studies is the inheritor of the realist tradition, except that it expresses a profound unease with the old "truths" of liberalism and humanism that the realist movement embraced. Instead, CLS has relied for guidance on a postmodern critique. The realists asked questions like "What actually happens to women or blacks?" CLS asks questions like "How does law work to create such cultural constructions as gender and color, constructions whose effect is to advantage some persons at the expense of others?" and "Do gender and color have any meaning apart from their utility in advantaging some at the expense of others?" Everything in this postmodern view of the world is indeterminate, including the legal subject. "I" am merely the intersection of race, age, class, gender and sexual orientation.

Feminist lawyers and theorists have used these ideas in important ways, and the bench is beginning to respond to their legal arguments. The law now recognizes that battered women who kill are not identical to others who kill, and that self-defense means different things to different people in different contexts. No longer is a woman required to show that she had no retreat, that at the moment she pulled the trigger her batterer was coming towards her with a knife, that she feared that if she did not kill him in that moment she would surely die in the next. The self is contingent. Defense is contingent. Guilt is contingent. To the extent that the law can be made permeable to such cultural understandings, all groups benefit.

But West thinks that CLS's reliance on postmodern social theory does not serve feminism well, and *Caring for Justice* articulates the uneasy relationship between feminism and postmodernism. The power that women experience, West argues, is not the dynamic, free-floating, positive force that Foucault describes (for the purposes of this part of her argument, West often considers postmodernism and Foucault to be roughly equivalent terms). For women, power is hierarchical, non-discursive, negating, and violent. What knowledge and discourse are to men, violence and silence are to women. Deconstructing social constructs will not eliminate sexual violence against women or the misogyny that produces it.

West rejects postmodernism's notions of indeterminacy. She grants prominence to the determinative physical facts of women's existence: breast-feeding and nurturing children, protecting the sick and the weak and making them healthy and strong. Hers is not the crude form of essentialism that drove the *Muller* court but rather the reliance on characteristically female experiences that has also shaped the work of Carol Gilligan, Nancy Chodorow, Catharine MacKinnon and other feminist theorists who have focused on gender differences rather than on gender equality, and to whom West acknowledges a heavy debt.

West is already well known to other legal theorists; indeed, four of the book's five chapters have appeared in various law reviews, most as recently as last year. The book would have benefited from additional editing to focus its argument more sharply and to reduce the repetition that necessarily accompanies a series of reprinted articles on similar topics. However, assembling these pieces in a single volume gains West a broader readership and tests the coherence of the feminist jurisprudence she is proposing.

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THE ARGUMENT THAT the resolution of legal disputes that alter the condition of women's lives should occur in the context of those lives is gaining broad currency among legal thinkers, which is one of the reasons for the increasing interest in law and literature. Once upon a time, law was interested in the way lawyers and the justice they thwarted or pursued were depicted in imaginative works. Today, law's interest in literature goes beyond Mr. Chaffanbrass and Billy Budd. Legal theorists have learned how to deconstruct judicial opinions with the same flair that literary critics have been developing since Derrida came ashore.

Literature has now made it into the law-school curriculum and is raising the same sorts of canon problems that have long plagued literature curricula. When I was in law school a few years ago, the "law and literature" course available to me began with the Bible and eventually worked its way through central Western humanist texts to a couple of pieces by Stein and Wittig. Jacqueline St. Joan and Annette Bennington McElhiney are out to change all that.

*Beyond Portia: Women, Law, and Literature in the United States* is an anthology of women's imaginative and critical writing on law and literature, designed for classroom use. The pieces it collects are assembled here under four headings: feminist theory in law and literature; law and literature on families; law and literature on the abuse of women; moving from alienation to community in the classroom. It is a sad testament to the state of women's lives in America today that the editors have devoted an entire section of the anthology to the literature of abuse.

The virtue of this, as of any, anthology is convenience. Almost all of the thirty pieces gathered here have appeared elsewhere. The law-review articles were chosen with an eye towards their individual accessibility and their collective contribution to a coherent volume, while the literary pieces were selected because they give voice to experiences about which the law also has something to say.

The first section introduces feminist legal theory and the law-literature project with articles by Martha Albertson Fineman, Donna Perry, Linda Martin Alcoff and Angela Harris. Subsequent sections combine legal analysis of women's stories – and imagined – with the stories themselves. For example, in the section entitled "Law and Literature on Families," Elizabeth Tobin reviews what the law has to say about mothers in the context of an analysis of *Beloved*, while "Family Fictions/Legal Failures" describes Kim Dayton's attempt to teach feminist theory through literature. Then follow eight pieces, in prose and verse, of imaginative writing about mothers and children, including one each from Audre Lorde and Sharon Olds.

The section on domestic abuse is organized in the same way: analytical pieces on the law of rape and sexual assault followed by imaginative accounts drawing on the experience of being female in a culture that valorizes violence against women. The final section, "Moving from Alienation to Community in the Classroom," focuses on political and pedagogical issues stemming from the use of literature to teach law.

*Beyond Portia* is suitable for use not only in law-school classrooms, but in any program – graduate or undergraduate – where the topic is patriarchy or legal rules. The volume includes bibliographies on women, law and literature, feminist legal theory and feminist literary criticism. The bibliographies are extensive without being exhaustive, providing ample material without threatening to overwhelm the student, and are augmented by the extensive notes that are the hallmark of legal scholarship. But this collaboration between literature and law offers only the most rudimentary instruction on doing research in both fields and would have been enhanced by a more detailed explanation of how basic materials are organized. The literature student who relies on this description of legal materials is likely to get lost, and the law student will not come away with any real sense of what it means to do research in literature.

If the feminist legal project is to find ways to use law affirmatively to address the social inequities women suffer as a result of being wives and mothers, then law must listen to the stories women tell about their lives. Literature gives a voice to victims of otherwise invisible harms legitimated by law. This anthology will help to make those voices heard and attended to, at least in the classroom. On the question of whether any of this will have an effect in the courtroom . . . the jury will be out for a while.