

The Politics of Injury:  
A Review of Robin West’s *Caring for Justice*

By Janet Halley\*

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In *Caring for Justice*,<sup>1</sup> Robin West argues that patriarchy operates by harming women on every conceivable dimension but especially in sexuality and reproduction; that women nevertheless gain access in both domains to an ethic of care that is redemptive for the world; and that bringing that ethic fully to bear as the sublime mode of justice will turn law to the remedy of harm and the promotion of care. West’s aim is to redeploy women’s experience of harm into an ethic of care that will—through law—“heal[] the world” (280).

In many ways West’s argument is highly distinctive. But it shares many features with other left-multicultural identity-political subordination-theory (LMIPST) projects, and therefore has considerable exemplary value as well. You can find in some critical race theory, gay identity politics, disability rights projects, indigenous-nationalist projects and human rights projects not only a firm and admirable resolve to work for emancipation, but a tendency to see emancipation in the following terms:

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<sup>1</sup> Robin West, *Caring for Justice* (New York: New York University Press, 1997).

- an imagery of subordination that replaces domination, exploitation, expropriation, oppression, etc., with harm and injury
- a natural or infantile default of “no injury” so that injury is imagined as an intervening event—a “trauma”
- a subordination binary, with a superordinate and a subordinate group imagined as diametrical opposites
- a strong experiential divide between these groups, with an identity practice making shared injury or harm a marker of subordinated group membership and the predicate for authority to speak for the group
- a framing of harm and injury as ethical wrongs, and a substitution of power by ethics as the keyword in the vocabulary of emancipatory transformation
- a insistence that harm has a redemptive dimension that produces distinctive access to ethical insight
- in ethics, therefore, a strong form of subordinated-group exceptionalism and supremacy
- a requirement that emancipation will be achieved only by a transformation of the superordinated-group-members’ “hearts and minds”
- a view of law both as a tool of injury on the one hand, and on the other as the super-legitimate site for “sending the message” that injury is unethical, and as a pivotal device for addressing injury and for changing hearts and minds
- a vision of the ideal rule structure as a transparent representation of the ethics to which the subordinated group has distinctive access.

Not everyone doing a LMIPST project thinks this way, but many do. West is surely among them. So I offer the following close reading of substantial parts of West’s argument to show the internal coherence of *one* version of the emancipatory *imaginaire* which I’m calling, for shorthand, the politics of injury. I also suggest some reasons why one might want to bring some skepticism to the social theory embedded in these politics. And finally, I will suggest that two of the chief, if not *the* chief modes of legal argumentation in the US today—rights argumentation and policy balancing—may ratify and intensify social and cultural tendencies to see the politics of injury as true and just. If such constitutive forces are indeed in play, and if as critically inclined leftists we are prepared to regard injury politics with skepticism, then we might well want to bring some skepticism, as well, to those elements of legal argumentation.

### Harm and Virtue

The historical cause of women's harm, according to West, is "patriarchy." Patriarchy is "the social system in which men's interests trump women's whenever they conflict" (132). West's patriarchy varies in intensity through time and space but "no society is utterly free of it, including this one" (132). When it de-intensifies, when feminism (also, apparently, an irrepressible human reality) and that aspect of legalism which is autonomous of patriarchy can exert themselves, we have the opportunity to learn how patriarchy might be further curtailed, even ended (138-9 and *passim*).

West nevertheless figures patriarchy in staggeringly structural terms: it is "a very general power matrix ... which exists across time and culture": the "masculine self" which it produces is not a liberal but a "patriarchal construct, the origin of which transcends and predates particular social forms" (282).

From this point in their thinking forward, feminist legal theorists seeking strong subordination theories have a stark choice. On one hand stands Catharine A. MacKinnon with her articulation of male domination in terms of power. On the other stands "cultural" feminism, which sees it in ethical terms.

In MacKinnon's early classics in feminist legal theory,<sup>2</sup> the male domination of women is not only a social but also an epistemological and ontological event: it ranks orders society, but it also permeates our very modes of knowledge and of being. Women *are* their domination by men; men *are* the subordination of women. This domination is most fully manifested in sexuality, in our almost seamless eroticization of its terms: to be a woman, feminine, and a female subject is to eroticize male domination; to be a man, masculine and the objective human is to eroticize female subordination. Feminism must be radical because finding women's point of view in this vertiginous reality is profoundly difficult: if we inhabit a world in which "Man fucks woman. Subject verb object,"<sup>3</sup> only the most profound rearrangement of the very terms in which we know and are could really count as emancipation.

MacKinnon's subordination theory is a power theory; male domination, for her, is "not a moral issue."<sup>4</sup> West poses an alternative, which for various reasons has come to be designated "cultural feminism." This kind of feminism—equally important in feminist legal theory—understands both patriarchy and feminism in pervasively *moral* terms.

The general cultural feminist idea is that, in "culture," female values have been de-

<sup>2</sup> MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory," 7:3 *Signs* 515 (1982), and "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence," 8:4 *Signs* 635 (1983).

<sup>3</sup> MacKinnon, "An Agenda for Theory" at 541.

<sup>4</sup> Thus pornography poses a question not of morality but of power. MacKinnon, "Not a Moral Issue," 2 *Yale L. & Policy Rev.* 321 (1984); see also MacKinnon, "Toward Feminist Jurisprudence," at 654 n. 41 ("In feminist analysis, a rape is not an isolated or individual or moral transgression but a terrorist act within a systematic context of group subjection, like lynching.").

pressed and male values elevated in a profound moral error that can be corrected only by feminism. Perhaps the *locus classicus* for this idea is Virginia Woolf's *A Room of One's Own*: "It is obvious that the values of women differ very often from the values which have been made by the other sex .... Yet it is the masculine values that prevail."<sup>5</sup> Fully within this tradition, West takes it as axiomatic that

... women, as a group, have been *subordinated* in this culture, rather than simply 'discriminated against' by the state. One (but not the only) consequence of that subordination, is that *all* women's work, distinctive attributes, experiences, perspectives and sensibilities have been **undervalued**: such attributes, experiences, perspectives, and sensibilities must be, in order to sustain the **moral justification** for women's lesser status and lesser lives" (7-8; italics in original; bold emphases added).

The emphasis on an "ethic of care" as the crucial source of feminist emancipatory insight is the "positive" phase of this moral framing.

In another argumentative characteristic that West shares with many LMIPST projects, she is clearly happiest when she can say that what is true for women is true also, exactly but in reverse, for men. I will call this her drive to diametricality. It manifests itself at the most general level when she argues that the very sites of women's most acute harms are *also* the wellsprings of their most authentic and indigenous generation of an *ethic of care*, which, if joined legally and culturally to an ethic of justice, would "heal[] the world." Thus there are two diametric sexes—men and women—and they produce two diametric moral effects *in women*: women have been *harmed* by men in the very aspects of their lives which they infuse with their *superior values*. Sex and reproduction (domesticity, motherhood, etc.) are the domains in which this harm happens and this superior ethical style develops.

West argues that "the concept of harm" is central both to the feminist understanding of women's experience in patriarchy, and to the optimal approach of feminism to law. She sets out a four-part catalogue of the "gendered harms" which women suffer at the hands of men: the "harms of invasion," the harms of "private altruism," the "harms of separation" and the "patriarchal harms" (100-138). These pages offer an elaborated taxonomy of the "gendered harms" that women suffer *and men don't* (diametricality), each element of which manifests itself both in women's experience of sex and domestic life in two forms: the vast phenomenology of patriarchy's spirit-murdering violence on one hand, and the generation of women's moral virtue on the other (diametricality again).

In two parts of this section I consider how, according to West, women's harms produce their mirror: women's capacity to generate superior values. I'll limit my survey to the "harms of invasion" and the "harms of private altruism."

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<sup>5</sup> Virginia Woolf, *A Room of One's Own* (New York: Harcourt, Brace & World 1957), at 128.

*The “harms of invasion” and women’s sexual virtue*

Let’s follow the “harms of invasion”—rape, unwanted impregnation, sexual harassment, street harassment, incest (100-103)—through West’s argument. Violent rape produces a “shattering of selfhood so profound and traumatic as to echo throughout a lifetime” (107); “in extreme cases” these harms result in “the death of subjectivity” (109). The threat of violent rape can do the same; and so can the individual and collected array of other harms of invasion, whether actual or threatened. The most devastating consequences of these harms, for West, are not the physical and material injury they cause but the breakdown of selfhood that they produce. Unlike generic assaults, these harms occupy a woman’s interior body and turn her sexuality against herself. They cut women off from themselves; make it impossible for them to align desire, pleasure and action; unmoor them in liberal individualism. For all women, who suffer a “much larger number” of invasive harms than men, the liberal self is consequently more foreign. And when the invasive harms *do* happen to men, those men are (here West tracks MacKinnon<sup>6</sup>) *feminized*: “*Feminine* men are also subordinated *along gender lines*” (18; emphasis added).

For all that—and here West departs from MacKinnon and also from many other cultural feminists—her cultural feminism does not see (hetero)sexuality as a wall-to-wall domain of male superordination—but that’s because (unlike MacKinnon) she knows a difference between morally good and morally bad sex. Virtuous sexuality is *feminine* sexuality, and it has a decidedly infantile, lesbian, and caring shape.

West relies on Adrienne Rich’s decisive 1980 article “Compulsory Heterosexuality and Lesbian Existence”<sup>7</sup> to derive a redemptive feminist, intrinsically lesbian, sexuality from the “woman-to-woman bond” of a girl with her mother and other girls. As West puts it, “a young girl’s natural, early, fierce, loving, erotic and caring identification with women and girls is shattered by the pervasive patriarchal institution of compulsory heterosexuality” (286). It is nevertheless there to be recovered through feminism, and West renders it as infinitely redemptive. Embodied childhood innocence—female variety—is the reference point for adult sexual morality.

The details are beautifully embedded in West’s example. It comes from the autobiographical reflections of Ellen Bass, the co-editor of a feminist anthology on incest who relates that she had become a stripper (for men) in her effort to grapple with the way in which “our pornographic, incestuous, and sexually abusive culture shatters women’s natural, playful and affective eroticism” (287). West traces the breaking points in Bass’s infantile development to a moment when she eagerly disrobed for a trusted doctor, only to face her mother’s and doctor’s collusive joke objectifying her *as a* destined stripper. Equally decisive was her subsequent encounter (child’s eye perspective) with a calendar

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<sup>6</sup> See esp. Brief of National Organization on Male Victimization, Inc., et al. In *Oncale v. Sunderland Offshore Services, Inc.*, No 96-568 (U.S.S.C.) (11 Aug. 1997); rpt. at 8 *U.C.L.A. Women’s Law Journal* 9 (1997). MacKinnon was a principal author of the brief.

<sup>7</sup> Adrienne Rich, “Compulsory Heterosexuality and Lesbian Existence,” 5:4 *Signs* 631 (1980).

showing a housewife struggling with grocery bags as her shirt was blown upwards and her panties fell to her ankles, “her rosy buttocks exposed”: “Notice,” admonishes Bass, “next time you are shopping, the covers of magazines at children’s eye level” (*Caring* at 288, quoting Ellen Bass and L. Thornton, eds., *I Never Told Anyone* (1983), at 51). Feminist consciousness raising, implies West, enabled Bass to discover, or rather *recover*, a redeemed sexuality: “*the original desire*, that of sharing who I truly am with my lover, both as a gift and as an affirmation of myself.” (*Caring* at 288; Bass and Thornton at 53; emphasis added) That is the sexuality which West’s cultural feminism validates, and diametrically opposes to the harms of invasion: it is original, innocent, mutual, sharing, giving, affirming.

This is a highly distinctive formulation of the authenticity of feminine sexuality. Many, perhaps most, producers of feminist legal theory, given the chance, would say something else. But West’s formulation has a feature that I regard as widely characteristic of feminist legal theory today and highly puzzling if not downright inexplicable: a pervasive lack of interest in women’s erotic yearning for men and a foreclosure of theoretic space for an affirmation of men’s erotic yearning *for them*. Though many of the chief producers of Unitedstatesean feminism are women with husbands, women with boyfriends, women who have sex with men, and women with sons, some of whom will have sex with women and some of whom, whatever they do with their alloeroticism, will want to be *masculine* in it—West herself may be no exception—there seems to be no urgent need in their feminism to understand *women’s* version of what Leo Bersani, writing on behalf of *gay men*, has called “gay male love of the cock.”<sup>8</sup> I have encountered thick theories and thick descriptions of lesbian love (butch/femme, femme/femme, butch/butch), gay male erotic genders of all kinds, and transsexual crossings back and through all of that: but I have not found *anyone* determined to produce an affirmative theory or politics of *women’s heterosexual desire for masculinity in men*. It’s just missing. Inside feminism I’ve found affirmations of female femininity, female masculinity, and male femininity—but no affirmations of *male masculinity*. That, too, is just missing. I think West’s redemptive sexuality provides the pattern for this gap, so strongly so that I would also argue that the gap shows the trace of cultural feminism’s oft-denied power in left sexuality theory and politics today—even in those feminisms, gay identity formulations, queer theories and trans politics which purport to have departed from it.

However that may be, it is clear that the erect penis circulates in West’s book as a paradigm image of the acquisitive, self-interested, monadic liberal self—the agent of the invasive harms—which feminism must not so much resist as *replace*: the “ejaculatory, self-imposing, world-conquering, nature-taming, capitalistic, commodificationist ... masculine self” is decidedly part of the problem, not part of the solution (108). By contrast, West’s peroration includes a long quotation from Luce Irigaray’s *This Sex Which Is Not One*, in which the French thinker describes what West reveres as “women’s internal, prelingual, and even presymbolic sense of ourselves” (289):

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<sup>8</sup> Leo Bersani, *Homos* (Cambridge, MA: Harvard University Press, 1995), at 103.

What claim to raise ourselves up in a worthier discourse? Erection is no business of ours: we are at home on the flatlands. ... Stretching upwards, reaching higher, you pull yourself away from the limitless realm of your body. Don't make yourself erect, you'll leave us. The sky isn't up there: it's between us.

Our bodies are nourished by our mutual pleasures ... our exchanges are without terms, without end (289-90; quoting Irigaray, *This Sex which is Not One* (C. Porter, trans.), at 214-14).

This is a *lesbian* sensibility, and an entirely *feminine* sexual ethics. Perhaps I can diametrically calibrate a little myself: just as West's theory of sexual harm deletes women's capacity to injure men, so her theory of sexual virtue deletes women's desire for phallic masculinity in men; just as her theory of sexual harm deletes men's masculine capacity to nurture women, so her redemptive sexuality deletes the possibly vital and life-affirming dimensions of men's bodily immediacy, phallic drive, and aggression. It's virtually a mandate to men who want to sleep with feminists: become lesbians. Not that there's anything wrong with being a lesbian, I hasten to add—I've been doing that too, joyfully, for many many years, and don't intend to let up—it's been so great that I hope I would be doing it in one way or the other even if I were a man. But it's just odd, striking, puzzling, that cultural feminism (and all the liberal feminisms, postmodern feminisms, queer theories, gay and lesbian sexual theories, and trans theories that hew to its limits) have not been asked to explain how they can excuse or affirm precisely the male desire which they do desire, and why so many feminists who interdict it ethically seem to keep going back for more of it.

OK. So the bottom line is that West's cultural feminism *has* a sexual ethics for everybody, derived from women's vital, infantile and generative sexual experience. The naive expressiveness of the aboriginal self, the erotic disposition to give and receive in mutuality, the happy embodiedness of the unshamed female form and of the idyllic symbiosis originally experienced by mother and daughter—this is the stuff of ethically good sex. It's got everything that the invasive harms would erase. And if everyone had sex this way, the invasive harms would disappear from the face of the earth.

### *The "harms of private altruism" and women's maternal virtue*

West produces a diametrical relationship as well between the second kind of harm—that of "*private altruism*"—and its cancellation in women's *maternal* being. She argues that the invasive harms deeply construct the lives even of the very few women who are never personally subject to them: rape, street harassment, incest are lurking out there, threatening all women all the time, and producing fear. In their fear, in their desperate but mostly covert quest for security, women decide on altruism. They are not forced to do this; instead, they *consent to it*. They do it in sex, and in the domestic sphere of nurturance, and especially in reproduction (114).

Almost better, West laments, that they were outright *forced* to have sex with men, to become pregnant, and to mother their children: at least then they would not suffer this distortion of the very capacity to consent, that definitive feature of selfhood. But instead

the “harms of private altruism”—all the sex a woman will have, the children she will bear, the nurturing she will do, the sacrifice of market-earning power she will make—out of *fear*—cumulate, cutting her off from liberal individualism yet again, and subjecting her to dependency on the very people she serves, dependency that then ratifies her fears of abandonment and produces another round of voluntary servility (109-127). “It is indeed possible for an entire adulthood to be spent in such a state of duress” (120).

Women performing altruistically in the shadow of fear—and that is all women—suffer intense, invisible, silent misery, misery that constitutes a moral injury to their very selfhood:

The altruistic acts [of domesticity] are exhausting and not particularly pleasurable—menial domestic labor, and a good deal of child care as well, is repetitive, understimulating, physically demanding work. It is boring. It is also, of course, enraging to know that one is doing considerably more than one’s fair share and to know that the consequence of insisting on domestic justice for oneself will very likely be child neglect and an unacceptable degree of filth. Rage, particularly impotent rage, is not carried lightly. And it is exhausting to live with the knowledge, even if buried, of dependency—that disaster is around the corner should one’s life partner choose to desert. But most important, the damaged “giving self” that is constituted so as to ward off the boredom of the work, the rage at the injustice, and the fear of abandonment also sustains distinctive *moral* wounds—wounds to self-possession, integrity, autonomy, and self-assertiveness ... (126, emphasis added).

The precise valence of West’s move here might be clearer if we set it in the context of debates between MacKinnon and cultural feminists—roughly, between power feminism and moral feminism—in the 1980’s. West’s overall thesis depends heavily on Carol Gilligan’s 1982 cultural-feminist classic, *In a Different Voice*, in which Gilligan argued that then-prevalent theories of moral development, based as they were on psychological studies of boys and men, silenced the “different voice” in which women talk about moral problems. The field’s representation of men’s moral development—teleologically aimed towards an ethic of justice predicated on an understanding of human beings as individuated and separate, on the rule of logic and the rule of law—was diametrically opposed to the “ethic of care” (30) which Gilligan observed in the moral development of girls and women. Girls and women saw the world as made up not of separated, self-seeking individuals, but of interrelationships, connections webbing everyone together in communities of concern; they made moral decisions not through abstract reasoning from rules but by balancing the infinitesimal and acute needs of everybody concerned (25-63). The great stumbling block for women as they grow morally, Gilligan found, is learning to acknowledge *oneself* as one among the many whose needs, wants and welfare must be taken into account: the “maternal morality that seeks to ensure care for the dependent and unequal” becomes fully mature when it has “sort[ed] out the confusion between self-sacrifice and care inherent in the conventions of feminine goodness” (74).

Here we can map West and MacKinnon into an alliance *against* Gilligan, in a way that highlights the structuralist commitments of these legal feminists. MacKinnon of course objected vigorously to Gilligan’s translation of feminism into moral rather than power



terms, and in particular to her representation of women's capacity for care—in sex, in reproduction—as anything but an element in the eroticization of domination: the self-sacrifice of women is no mere stumbling block but a chronic feature of women's existence as such, an effect of male power, and the antifeminist kernel of every act of care that they perform.<sup>9</sup> West grounds her feminism precisely in women's distinctive experience of a altruistic concern and the “ethic of care” that emerges from it: this is what makes women's values so valuable; and it is redemptive, capable of profoundly interrupting male dominance. To be sure, maintaining women's maternal virtue as a ground is a move that MacKinnon would never make, but West *also* makes a large concession to MacKinnon's structural feminism when she grants the “altruistic harms” as an effect of male power in a way that Gilligan, as far as I know, never did. For West, women chronically choose altruism—the actual caring work that they really do do in sex and in the family—out of fear. And this fear—of the invasive harms, of abandonment—is their particular lot in patriarchy. Gilligan argued that women grew into an ethic of care and out of male domination. In MacKinnon's thought, you don't *outgrow* patriarchy. West agrees. When West insists that women's very voluntary altruism is a devastating harm inflicted on them by patriarchy she incorporates structuralist elements of MacKinnon's thought into Gilligan's cultural feminist framework.

Just as the invasive harms are diametrically opposed by the eroticism of innocent mutuality to which girls, in the symbiotic prehistory of maternal love, have special access, however, the altruistic harms are diametrically opposed by the care of the “powerful mother” who nurtures not out of fear but out of an almost pre-discursive love. Rejecting social theories in which hierarchical power is (supposedly) always figured as oppressive—and departing massively, once again, from MacKinnon, West says women (that is, women who are mothers) *know better*:

[I]t is simply not true—it is *emphatically* not true—as many women know ... that oppressive ‘power’ in *any* of its manifestations is the necessary consequence of inequality and hierarchy, and that the end of hierarchy is therefore the necessary root of morality. Women of *all* cultures routinely, though not always, respond to their utterly unequal and hierarchic relationships with their infants and children with nurturance, care, and love rather than power, narcissism, and the imposition for the sake of ego gratification of the stronger's will upon the weaker's fate.... The physically unequal mother *in all cultures* typically breast-feeds and protects, rather than bullies or browbeats, the vulnerable infant and child. The powerful mother nurtures so as to give life and create growth in the weak. She does not impose so as to inscribe her will (277).

Not only moral theory but legal theory should be shifted to rest on this new foundation, the ethic of care:

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<sup>9</sup> For a particularly interesting encounter making this divergence manifest, see the colloquy of MacKinnon and Gilligan with Ellen C. DuBois, Mary C. Dunlap and Carrie Menkel-Meadow, “Feminist Discourse, Moral Values, and the Law—A Conversation,” 34 *Buff. L. Rev.* 11 (1985).

For it is these straightforward but overlooked experiences—experiences of breastfeeding, nurturing, caring for, and loving the weak so as to make the weak healthy—that could ultimately form the foundation of a feminist, maternalist (and humanist) moral theory—and therefore a legal theory—which is grounded neither in the Enlightenment ideals of rationality and objectivity, nor in a post-Enlightenment glorification of power, but instead in an intersubjective sensitivity to the needs of others.... If we are right to trust our nurturant response within the natural inequality of the mother-infant relationship, then we are also right to suspect that hierarchic relationships such as parent-child, teacher-student, judge-litigant, and legislator-constituent could and should be infused *neither* with false claims of equality, objectivity, or a distanced and alienating respect, nor with levers by which the hierarchy can be smashed. Rather, those relationships can be infused, simply, with care (277-78).

This is the happy face of cultural feminism: the love shared in mutuality by mother and infant can be the model for sexual love between adults, and a redeemed adult sexuality becomes imaginable (if possibly necessarily lesbian); the altruistic care almost organically bestowed by the powerful mother on the infant and on the child can become the model of *every* hierarchical relationship throughout social life. Nothing could be less like MacKinnon's dark vision of wall-to-wall domination than West's ready access to a core of pure ethical goodness, and her optimism that modeling the rest of life upon it is an imaginable—indeed, possibly a doable—project.

To get there West has to indulge in some pretty extreme female supremacist thinking. When altruism escapes the context of patriarchally induced fear, it becomes not just one among many but a sublime human good, one capable of being “*the* foundation” of moral and legal theory. And this exceptional human good can be seen only “from a truly woman- and child-centered perspective” (277). *Only a woman* can give suck, *only a woman* can remember being the daughter of a mother, and thus *only women* can “form the foundation of a feminist, maternalist (and humanist) moral theory” (Id.) or recall the innocent mutuality of redeemed sexuality. Though West has argued that a fully complete human ethics can arise only in the “overlap” of justice with care (38, 88-93 and everything in between), the population capable of excising from justice the detritus of patriarchy is going to be the population capable of—possibly also experienced in—maternity.

West here resolves for herself an ambivalence that divides *In a Different Voice* and that caused a controversy which, to my mind at any rate, Gilligan never resolved. How does cultural feminism imagine its aim? Is the redeemed ethical universe which it envisions one in which feminine values, so long devalued, are finally allowed to take their stand on a par with masculine ones—or are they superior, destined in a fully ethical world to *rule*?

Gilligan's great synthetic passages provide one utopian vision and her great denunciatory ones another, and I just don't see anyplace in *A Different Voice* that resolves their differences. When she pulls out all the stops to play the justice organ to crescendo, Gilligan announces the dynamic integration of male with female ethics in a new fully *human* ethics: the last page envisions “a *marriage* between adult development as it is currently portrayed and women's development as it begins to be seen could lead to a changed understanding of human development and a more *generative* view of human life” (174; em-

phases added).<sup>10</sup> But it is far more characteristic of Gilligan's argument to trace horrifying social pathologies to men's vision of social reality and their ethical style<sup>11</sup>: in particular Gilligan finds "the origins of aggression"—understood always to be morally defective—in the characteristically male "failure of connection" (173). Here the ethic of care is not yin to the yang of the ethic of justice; it is its rebuke and the teleological aim of ethics itself:

The different voice ... is a relational voice: a voice that insists on staying in connection and most centrally staying in connection with women, so that psychological separations which have long been justified in the name of autonomy, selfhood, and freedom no longer appear as the *sine qua non* of human development *but as a human problem* (Gilligan, "Letter to Readers, 1993," xiii; second emphasis added).

Half of the time, that is, Gilligan returns to an integrationist stance and a centrist, humanist politics.

West's radicalism is marked when she falls solidly on one side—the female supremacist side—of Gilligan's apparent ambivalence. The conclusion of her reflections on the "powerful mother" promises that the distinctive altruism of mothers can become suffused into *the human*, fully occupying its ethical space, and reaching for total governance over all the subjects of justice. It's a complex passage, warranting a close reading:

If feminist legal theorists are *to share* in healing the world, we will have to ... remember, remain true to, and draw upon the naturalism and quietness that have always been central to what has been and still is most admirable *about women's moral lives*. There is surely no way to know with any certainty whether *women* have privileged access to a way of life that is more nurturant, more connected, more natural, more loving, and thereby more moral than the principled lives which *both men and women* presently pursue in the public sphere, including the legal sphere of legal practice, theory, and pedagogy. But it does seem that whether by reason of sociological role, psychological upbringing, or biology, *women are closer to such a life*: if it is but a memory, then *for women it is a more vivid memory*; if it is a utopian dream, then *for women it is a dream we have never fully denied* and from which we routinely draw sustenance and guidance. For those of us (*men and women*) for whom principled, reasoned morality has come to seem a thinly veiled excuse for cruelty ... the suggestion that *women—and therefore the human community—can and should respond in a more nurturant, caring, and natural way to the needs of those who are weaker*, is both more and less than a "contestable, empirical claim": it is, rather, in the nature of a promise. *It is one promise, among others, that the human community can be reconstituted in a way that will salvage the planet as well as save the species* (280; bold emphasis in original; all other emphases added).

This remarkable passage begins and ends with gestures in the direction of power-sharing

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<sup>10</sup> This explicit heterosexualization of feminism (and moral theory) would, by the end of the 1980's, come in for angry criticism from many feminist quarters and from emerging gay and lesbian theories alike.

<sup>11</sup> Note that in order to do this she also had to take the story of moral development *attributed* to men by (male) moral theory, as really in fact descriptive of men's moral way of life.

(“share in healing the world”; “one promise, among others”); and indeed throughout the book West seeks in liberalism, in utilitarianism, in legalism, and in postmodernism for ideas originating outside feminism that can help her search for and build justice. But West’s basic argumentative protocol is to ensure that *not one element of any of them is left standing* if she is able to find it complicit with patriarchy or inconsistent with her feminism. These non-feminist traditions persistently draw her attention, earn her respect, and appear—castrated, however—in her agenda.

That adjudicatory position of feminism with respect to liberalism, utilitarianism, legalism and postmodernism is reduplicated inside the utopian passage just quoted. It achieves this though a persistent if incremental shift of *women* into the position of *the human community*. Here’s the logic of this shift, step by step. Feminist legal theorists—a pretty small fragment of humanity, surely—have unique access to “what ... is most admirable in women’s lives” because only their theories can place the proper—sublime—value on it. Why do *women*, in turn, have access to the ethically sublime nurturant life? West does not know: it could be biology, it could be history; all possibilities are open; West basically welcomes them all. What really matters is that (“it seems that,” a proviso that is blown away by the climax that follows) “*women are closer to such a life.*” The “we” of the operation now shifts. “We” are no longer feminist legal theorists or women but “men and women” who see through the patriarchal ruse of principled morality—that is to say, the allied feminist and critical male left. “We” men *and* women can expand the reach of “what ... is most admirable in *women’s* lives” by making “*women—and therefore the human community*” more nurturant. The origin, medium and teleological aim of this moral project is *women*: men can assist by promoting *women’s* moral authority and the scope of *women’s* values; but their gender in the utopian vision is erased under the general humanity of “the human community.” Diametricality again: *whereas* patriarchy in its liberal mode installed abstraction, logic, objectivity at the pinnacle of justice and as the image of fully realized humanity, a feminist ethic of care, fully empowered to redeem all justice, will install embodiedness, care, and women’s point of view as the panoptic decider and the full expression of human-ness.

Not only is West’s political project female-, feminine-, women-and-girls-, maternal-, and feminist-supremacist; not only is it total in its aim to “heal the world” through that supremacy; it is total as well in the intimate depth of the moral changes it seeks to achieve. “[S]ociety won’t” “take gendered harms seriously until women’s interests are weighted equally with men’s”—that is, until patriarchy ceases to happen—and “[t]hat in turn will not occur until women are viewed as of coequal importance, and that, finally, is *a political and moral, not a legal or intellectual[,] transformation of the heart*” (165, emphases added). West’s cultural feminism would *rule*, from horizon to horizon and from the pinnacles of institutional power to the deepest habits of the human heart.

*Injury and its costs*

Cultural feminists who resist West's understanding of the deeply injurious character of heterosexual sex nevertheless share with her a highly stylized framing of the relationship between men, women, and injury. Consider Sharon Thompson, who did hundreds of interviews with adolescent girls, and who marshals them to show that adolescent girls are "ruined" not by sex with adolescent boys but "by love."<sup>12</sup> Thompson is a cultural feminist<sup>13</sup> who disagrees with West's view that access to heterosexuality dooms women to an injured place in social life: rather, she argues, love does the damage. She offers a direct refutation of the sexual-dominance feminist idea that sex itself is the site of women's subordination; if accepted, this shift would have huge implications for the cultural feminist policy agenda.

It is good to see feminists differing about these matters. But it is also striking to see West and Thompson representing girls' access to adult sexuality in formally identical terms.

Thompson blithely posits that girls, in their relentless doomed search for romantic merger with boys who are relentlessly searching for separation (diametricality again), end up with a monopoly on all the harm in adolescent heterosexuality: while girls "who staked their hopes on getting love and caring fell further and further behind," the "boys with any chance to progress raced ahead exhilarated by their sexual triumphs and near escapes."<sup>14</sup> This is, as far as I can tell, the only direct representation of male affectivity in the chapter from which I quote it. (Thompson did not interview actual boys.)

The claim that adolescent boyhood is this triumphal is so implausible that it can only be an ideological projection. West reproduces Thompson's narrative of girlhood and boyhood sexuality, with a significant intensification of its diametricality and a full indictment of (hetero)sexuality. In an argument that the state's non-recognition of the harms that women distinctively suffer is a powerful but alterable element of patriarchy, West states that when boys accede to mature masculine sexuality they not only become relatively safe from harm but gain full state protection from it, whereas for girls the onset of mature female sexuality inaugurates an adulthood of acute and chronic sexual vulnerability ratified by the state's failure to protect them from it. Thus, though boys may be injured at the hands of older boys—West does not wonder whether boys are ever harmed by women or girls—"they leave the playground, and the playground bully, behind them." The humiliations of boyhood "may leave scars," but the mere act of attaining adult masculinity brings with it a diminishment in the threat of male/male harm (it seems

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<sup>12</sup> Sharon Thompson, *Going All the Way: Teenage Girls' Tales of Sex, Romance, and Pregnancy* (N.Y., Hill and Wang, 1995).

<sup>13</sup> See Thompson, pp. 42-46, where she derives some of her basic analytic commitments from Gilligan.

<sup>14</sup> Thompson, p. 43.

that female/male harm *doesn't happen*) and a guarantee of state protection from it. "His mature sexuality becomes, in a sense, the *marker* of his equality with other men ...." (146-47).

"**Women experience precisely the *opposite* transformation**" (147; bold emphasis added). For them, girlhood is a safe haven of female-female "placidity" (147), a web of mother-daughter relating and female friendship that is "intimate, warm, sentimental, affectionate, and above all *safe*" (130); for them, entry into sexual life introduces them to "sexual vulnerability and radical inequality." West laboriously ensures that the logic of diametricality orders the entire domain:

*While a boy entering manhood leaves behind the world of radical inequality that characterizes boyhood, and enters instead a world of state-created and law-created equality, a girl entering adulthood leaves behind the relative calm, placidity, and equality of young female companionship and enters a state-created world of sexual vulnerability and radical inequality. While a man's mature sexuality is therefore not only a marker of his relative equality with other men, but also a marker of his recognition as an equal by the state, so a woman's mature sexuality becomes not only a marker of her vulnerability to harm, but also of her infantilization by the state* (147; emphases deleted; all emphases in this passage added).

There is but one exception to this diametricality—harmed adult men. West is not very interested in them. This is in part because men are not really harmed. *Whereas* girlhood injury leaves *wounds*, boyhood injury leaves *scars*: access to patriarchal power allows men to *heal*. But when they *are* injured, West, like MacKinnon,<sup>15</sup> attributes *femininity* to them: in the only acknowledgment of men's suffering that I've been able to find in the entire book aside from the playground example we've just examined, West tucks it neatly into her diametrical framing of male and female lifestories: "*Feminine* men are also subordinated *along gender lines*" (18; emphasis added). Feminization reintegrates male injury within the terms of female injury. Men *as men* are unharmed.

There seem to be three descriptive commitments relating to injury here: **female injury + female innocence + male immunity**.

I'll call this the Injury Triad. I think it is exemplary of the politics of injury in other identity politics as well, but a demonstration of that claim will have to await another time. For now I'll just suggest that LMIPST projects often produce formulations so close to the Injury Triad that we might best see *Caring for Justice* as an example not of the injury politics of cultural feminism but of injury politics more generally.

In the remainder of this review I will offer a series of reasons to bring some skepticism

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<sup>15</sup> Male feminization has been crucial to MacKinnon's coalition with gay men seeking to include their vulnerability to other men within the theoretic and legal armature of feminism. See n.4 above. I've argued that, within the strict structuralist parameters of her version of radical feminism, male sexual victimization can matter to feminists *only* if it is feminized. Janet Halley, "Sexuality Harassment," in Wendy Brown and Halley, eds., *Left Legalism/Left Critique* (Durham, N.C.: Duke University Press, 2002), p. 84. (Why so many men go along with this, I don't know.)

to the Injury Triad. I start by claiming simply that it is beset by blind spots so large that we should wonder whether it is ultimately magic realist. So much so that we might ask: what induces people (feminists, specifically Robin West in this case) to commit themselves so strongly to it? I suggest that it may well be perfectly suited, first, to a certain mode of rights-maximizing legal thought and practice; and second, that it establishes a moral *a priori* purporting to secure identity-political claims from the vagaries of policy balancing. Both legal strategies add further downsides to the formulation, ones which might weigh heavily with the critical left invoked by the editors of this journal. I will suggest in what follows that compliance with a certain liberal logic of rights against injury may well be inducing left identity politics to produce and maximize, enrich and elaborate, the social capacity of their own constituencies to suffer. And I'll argue that recourse to a moral *a priori* for purposes of winning all balancing contests before they start is anti-political and even suggests a will to power that has acquired the totalitarian zeal of slave morality.

### *Blind spots and magic realism*

Feminists often produce the Injury Triad as if its three stakes were tied so tightly together than each required assertion of the others. That is, women's subordination has been understood as their *injury*; subordination is figured as injuredness. Questioning whether the woman was injured *in itself* is thought to be unfeminist and is sometimes even said to "reinjure her." The entire discourse of the "second rape" exemplifies this turn: if women are not believed when they say they are raped—if their testimony is challenged, if their credibility is impugned—they are not attacked and opposed; they are *raped again*. Moreover, the woman is "innocent" in the strict, minimal etymological sense that she "lack[s] the capacity to injure: [that she is] innocuous, harmless."<sup>16</sup> Attributing to her the agency, the will, the malice—even simply the capacity—to cause harm to others also sounds unfeminist, and is (oddly) often understood also to constitute a denial that *she* was injured. And the man, the subordinator, is understood to be immune from injury. He might have to give up his ill-gotten gains, make restitution, get his foot off our necks, learn to listen to a different voice, etc., but describing his suffering as a wrong done by, or even as a social cost *of*, the assertion of women's interests (and especially of feminist work on women's behalf) produces perhaps the most acute feminist resistance.

The pattern is pretty endemic in contemporary feminism. Prostitution is understood

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<sup>16</sup> See "Innocent," *Webster's Third New International Dictionary*, Philip Babcock Gove, ed., (Springfield, MA: Merriam-Webster, Inc., 2002), p. 1166. It would not be difficult, however, to show that more characterological connotations of the word often arise in politics pegged to the conjuncture of superordinated immunity, subordinated injury, and subordinated innocence. In those politics, subordinated victims are often represented as "free from guilt or sin esp. through lack of knowledge of evil; ... without evil influence or effect ... ; ... lacking or reflecting lack of sophistication, guile, or self-consciousness: artless, ingenuous, naive; foolishly ignorant or trusting; subject to being duped; ... unsuspecting, unaware." *Webster's Third* (omitting without ellipses all numerals, capitalization, and exemplary material).

to harm women *while or by* benefiting johns and pimps; pornography degrades women *to produce male sexual pleasure*; and so on. It seems more *not feminist* to suggest that *men* are injured by *women* in these practices—or even simply that they are injured—than to suggest that women may not be injured by men in them.

Of course all feminism posits that female subordination is not accidental, random, buckshot. Instead, power and cultural feminist projects insert their articulations of trauma, torture, offended dignity, pain, suffering, agony—or disempowerment, domination, deprivation, exclusion, marginalization, invisibilization, silencing, etc.—into subordination theories: the eroticization of domination and the degradation of women’s distinctive values, respectively, harm women while benefiting men.

Here would be a diagnostic test you can run on your thinking anytime (do try this at home): if someone says that we should really take into account the pleasure (some) female prostitutes take in their work; the pleasure they are able to provide for their johns; the vulnerability of pimps in the economic systems that sustain prostitution; and/or the vulnerability of johns and pimps to exploitation by prostitutes—do you have a problem with that? Are you tempted to say something like this?: “Exposing the possibility that women sometimes use a posture of suffering powerfully, thus harming others, and especially exposing the possibility that they harm men, is tantamount to a denial that women suffer and thus also a denial that they are subordinated.” If so you are probably conducting at least part of your thinking and politics on the assumptions of embedded in the Injury Triad.

These imaginings sometimes make feminist and LMIPST injury politics seem quite magic realist. Because of course we all know that some women lie, and that others are interpellated into real experience that is not in their “real” interests; some women manage to hurt other people and social interests; some men are injured by some women. What produces the intense will to deny these obvious facts about the social world?

It’s easy to understand how structuralist feminisms of the most absolute kind produce the Injury Triad: it describes the world as they actually experience it. But it appears as well in poststructuralist, postmodernizing feminist work, work that otherwise is politically opposed to most aspects of power and cultural feminism.<sup>17</sup> How do they end up producing what sounds, from outside feminism, like such a crazily and irresponsibly limited let-traset for spelling the world?

It may well be that feminist and LMIPST projects’ recourse to the Injury Triad is overdetermined, or alternatively motivated. In the remaining pages of this essay I’d like to offer two additional diagnoses, arising at the contact points between feminism and the legal and political system—broadly speaking, liberalism—within which it attempts to secure its aims. Those contact points are “rights” and “policy balancing,” each of which, theoretically at least, functions like a little engine producing the suction that could draw subordination theories that might otherwise escape them back into structuralism, and back into the Injury Triad. That is, rights and policy balancing—pretty much the com-

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<sup>17</sup> See Halley, *Split Decisions: How and Why to Take a Break from Feminism* (forthcoming).



plete set of current legal alternatives for progressive reform—provide forces outside feminism and LMIPST that might be inducing their proponents to the (I think descriptively impoverished, blindspotting and ultimately magic realist) claims entailed by the Injury Triad. That is, feminists might hew to the Injury Triad because they are structuralists; or they might become structuralists (and if they are postmodernizing feminists, incur the additional baggage of bad faith) because they see in their law reform ambitions a need for the Injury Triad. In the closing sections of this review I will suggest that, if this is the bargain being struck, it has some pretty significant costs.

### *Rights and the plasticity of injury*

There are innumerable theories of rights, and many of them are embedded somewhere in our legal system. One that turns directly on the concept of harm, and has also been widely assimilated into the thought of legal actors, is that of John Stuart Mill. Mill argued that individuals were free to act in any way that did not harm others; the state and even private normative forces should limit themselves to regulation of harmful conduct; “rights” marked the boundary between freedom and regulation.<sup>18</sup> As Bernard Harcourt explains in *Illusion of Order*,<sup>19</sup> left-of-center liberals (that is, liberals with a small l, people opposed to conservatives) spent the major part of the last century using this argument to minimize the legitimate reach of state power in the domain of sexual life: inasmuch as neither the prostitute nor the john, neither the maker nor the consumer of pornography, neither the seller nor the user of contraceptives, etc., was engaged in socially harmful conduct, each should be free to do as he or she liked. To the extent Millian liberalism needed an answer to the question, “Is certain conduct harmful?”, the progressive/left/liberal answer when dealing with matters sexual was “If it was consented to, *it was not harmful*.” The Hart/Devlin debate blew up over a different question, to wit, whether the state could regulate where there was concededly no harm but only strong *moral* grounds to justify state intervention to deter and punish. As Harcourt handily shows, amidst all the smoke and lightening of that controversy, almost nobody noticed the Millian left/liberal/libertarian project involved a *construction*, a *representation*, of various sexual outcomes as “not harmful.”

This plasticity should have become evident to everyone—it became evident to Harcourt—when, over the course of the 20<sup>th</sup> century, left/progressive/liberals “flipped” their typical deployment of Mill’s harm principle. With the rise of LMIPST came a sweeping and highly creative project of defining social disadvantage experienced by subordinated groups as *harm*. Not at all accidentally, now Mill’s harm principle could be deployed by left/liberal/progressives operating in a Millian rights framework to justify the *expansion* of legitimate uses of state power to address it. A genealogy of left multiculturalist work that

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<sup>18</sup> John Stuart Mill, *On Liberty*, Gertrude Himmelfarb, ed. (London: Penguin Books, 1985).

<sup>19</sup> Bernard Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* (Cambridge, MA: Harvard University Press, 2001), at 185-214.

achieves the discursive framing of new forms of injury would be fun to write and would occupy a long book: it would have chapters on hate speech, pornography, abortion, battered women's syndrome, recovered memory of child sexual abuse, etc., as sites for left reform work focused on pain, trauma, humiliation—in short, harm.

The *production* of the apprehendability and articulacy of pain, injury, and trauma—harm—is a central element of subordination theory working on race, ethnicity, gender, sex, sexual orientation, nationality, disability. In the sentimental politics<sup>20</sup> of this left multicultural effort, harm has a history, is plastic, can be and is *created, expanded and intensified*. It would be a basic suggestion of constructive theories of human subjectivity that this discursive production of pain may well also produce the subjects who experience it; that feminism may be responsible for at least some of the trauma that real women really experience in their real lives.<sup>21</sup> But you don't need to accept this "productivity" hypothesis to acknowledge that the political *representation* of harm may well be expanded or contracted, intensified or diluted, made urgent or chronic, inside justice projects. And so it could undergo all those operations in trends to mobilize Millian regulation or Millian liberty.

Rights discourse of the Millian sort smoothly endorses and may strengthen the feminist commitment to the particular articulation of harm that I've described as the Injury Triad: female injury + female innocence + male immunity. Here's how. The harm principle posits a harm/regulation, no harm/freedom grid for the framing of rights, something like this:

<b>IF</b>	<b>THEN</b>
Harm	Regulation
No Harm	Liberty

If you do harm to me *and I do no harm to you*, the state must punish you *and leave me in my freedom*. But if you do harm to me *and I also do harm to you*—well, then, the grid doesn't have a third set of boxes; the harm principle would kind of run out. Rights would become irrelevant.

The system, seen not as a normative principle but as a rhetorical opportunity, thus invites rights-asserting claims that all the harm in a certain social domain runs in one direction. And it implies that, when it doesn't—when harm is shared even a little by one's social opponents—we would have to decide what to do using some other means (strict lib-

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<sup>20</sup> I am borrowing the term "sentimental politics" from Lauren Berlant, "The Subject of True Feeling," in Wendy Brown and Janet Halley, eds., *Left Legalism/Left Critique* (Duke U.P. 2002), p. 105

<sup>21</sup> For one statement of this hypothesis, see my comments in Gender, Sexuality and Power - Is Feminist Theory Enough?, Brenda Cossman, Dan Danielsen, Janet Halley and Tracy Higgins, in *Why a Feminist Law Journal?*, a special issue of the *Columbia Journal of Gender and Law*, 12 *Colum. J. Gender & L.* 601 (2004).

ertarian restraint on state action, deontological distributive justice, scientific social policy, politics?) that would leave me vulnerable to raw social forces or regulatory impositions. And so if I am a social group arguing for rights-based state powers to regulate my opponents (oppressors), and if I (or the people I am determined to persuade) take the Millian harm principle as the rule of decision, I have a strong motive not only to intensify the imagery of my harm, but also to insist on my social innocence and on my opponents' immunity from harm caused by me.

Here are some reasons why this might be seen—even from the point of view of women—to be a costly accession to rights discourse (of the Millian sort). What if the politics of injury and of traumatized sensibility which, in West's cultural feminism, have almost completely occupied the space evacuated by MacKinnon's politics of domination and subordination, are helping to authorize and capacitate women as *sufferers*? If we are willing to see feminism as a powerfully constitutive discourse, we might also worry that it could have a shaping contribution to make *to women's suffering* when, for instance, it insists that a raped woman has suffered an injury from which she is unlikely ever to recover. What if real raped women, believing this feminist line, proceed never to recover? What if some men are "guided" by this bull's-eye to target women for rape rather than fomenting other aggressions, perhaps more manageable, perhaps directed elsewhere? When feminism insists that any effort to trace the causes of particular rapes in the woman's conduct blames the victim, revictimizes her, is a second rape, it might make rape seem more magical and random than it is, might make women more risk-averse about it than they need to be, and might induce women to concede more social power to the threat of rape than they otherwise would. So much feminist rape discourse insists on women's object-like status in the rape situation: "Man fucks woman. Subject verb object." Could feminism be contributing to, rather than resisting, the alienation of women from their own agency in narratives and events of sexual violence?

Perhaps we can imagine the question in these terms: could feminism be like the adults on the playground? Imagine: the little girl stumbles, falls, scrapes her knee. She is silent, still, composed, waiting for the kaleidoscope of dizziness, surprise and pain to subside. Up rush the adults, ululating in sympathy, urgently concerned—has she broken her leg? Is she bleeding? How did it happen? We must not let it happen again! Poor thing. The little girl's silence breaks—for the first time afraid, she cries.

While feminism is committed to affirming and identifying itself with female injury, it may thereby, unintentionally, intensify it. Oddly, representing women as endpoints of pain, imagining them as lacking the agency to cause harm to others and particularly to harm men, feminists refuse also to see women—even injured ones—as powerful actors. *Feminism* objectifies women, *feminism* erases their agency—could that be right?

If we are going to think that way, we are faced with a very profound problem about the relationship between power and resistance. If a social subordination exists and an anti-subordination discourse—while also pursuing its antisubordination goals—ratifies it, fixes it, creates the discursive capacity for its experiential uptake by the subordinated, all the while hanging a bull's-eye on it, then where does one intervene to attack it? This is a

real question, rife with real and strategic difficulties. It has fascinated me, as I have begun to learn how to ask it, to notice the strong feminist impulse (optional, not necessary to feminism as we now have it, but recurrent) to refuse it as unfeminist. But it might be that, if one really wants to be *for women*, one would need also to figure out how to be *against the injury-political intensification of injury*.<sup>22</sup>

Also, I wonder: what about the boy on the playground? What if he is bullied by the girls there, or ruined by love there? What if he suffers there for reasons that have nothing to do with the girls? What, indeed, if he thrives? What if, whether he's harmed or not, one is *for him*? The Injury Triad makes these descriptions of his existence, and feminist affiliation with him in them, inconceivable. For anyone seeking a theory for these descriptions and affiliations, the Injury Triad begins to look like a one-way ratchet, ever intensifying the torque of women's injury, ever contracting the descriptive and moral valence of "men." As a worldview and as a politics it acknowledges no "outside." I'll return to this tendency of this style of injury politics to insist on its own absolute moral priority in the next section, where West offers herself as a specific example, not in rights assertion but in policy balancing.

### *Policy balancing and moral priority*

The Injury Triad arises outside rights claiming as well. We see it again in feminist legal work that hews instead to a pragmatic, instrumentalist, "conflicting considerations," policy balancing mode of legal argumentation. In feminism, the lead voice advocating an embrace of pragmatism at the moment is certainly West, and the lead text is *Caring for Justice*. You might think that the shift from rights to balancing would bring an uptick in prudence, an encompassing social vision, a bright-eyed attention to the downsides of one's preferred upsides, and so on. And indeed, sometimes it does. But the anti-political and indeed politically paranoid character of West's feminist resort to Injury Triad becomes even clearer here than in the rights-oriented injury politics described by Harcourt.

West argues that the English utilitarians of the 19<sup>th</sup> century and the American legal realists of the early 20<sup>th</sup> century generated an instrumentalist jurisprudence which provides the optimal view of law for feminist and other social-movement reform efforts: "The distinctive virtues of both economic and noneconomic instrumentalism—its insistence on flexibility and pragmatism, its nondogmatic, anti-ideologic structure, and its responsiveness to the lived human condition—make instrumentalism the natural jurisprudential perspective for feminism as well as for any other liberation movement" (*Caring*, 173-74). Seeing law not as a system of formally deduced normative commands but as a *tool* to be understood and used in terms of its practical effects—undertaking to use it to equilibrate competing social interests and social ends, to recalibrate the rules continually in "response to the lived human condition"—and thus, as contemporary instrumentalists are wont to

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<sup>22</sup> The prior four paragraphs are revised from my contribution to "Gender, Sexuality and Power," 12 *Colum. J. Gender & L.* 601 (2004).

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say, *balancing various policy objectives*, their achievability, the costs of achieving them, the impossibility of achieving pragmatically inconsistent or utopian policy objectives, the desirability of compromises between inconsistent goals and of incremental steps towards utopian ones—all of these habits of mind, West argues, should be cultivated within feminism and in the legal decision makers to whom feminism pitches its arguments.

Above all, West argues, the value of the instrumentalist tradition which we receive from English utilitarianism and American legal realism is that it tied all legal decision making to the problem of *harm*. The harm caused by patriarchy is, as we have seen, *the* problem par excellence faced by West's feminism.

A large part of her argument is devoted to resisting the turn in legal-economic thinking away from "harm" and towards "costs"—a shift which, she argues, entails a norm of efficiency and a willingness to see all social action to express preferences *simpliciter*: together, she argues, these pathologies of contemporary legal-economic thinking commit it to taking into account only the "bad outcomes" that are *quantifiable*, and to a laissez-faire-like quiescence in the face of distributions achieved through supposedly preference-expressing behavior. It commits its users to a vision of humanity that fundamentally excludes women because it stipulates that people always make self-interested decisions (whereas women suffer the altruistic harms and have special access to maternal altruistic love), that people cannot and do not empathize (whereas women's altruistic love is fundamentally empathetic), and that the state is either helpless before the endless preference-satisfying power of the market or dangerously threatening to the satisfaction of those preferences (whereas feminism *needs* the state and law, and needs them to be seen as social goods, to undo patriarchy) (166-68).

It would be a mistake, I think, to exaggerate the degree to which the semantic shift from "harm" to "costs" drives all of this: most centrally it is the contemporary legal-economic commitment to *efficiency* and its family of associated ideas that West objects to. West would root out of her instrumentalism the contemporary legal-economic deference to *whatever* preferences are supposedly made manifest in the bargains people actually do strike, and she would replace it with a commitment to the "objective value" of an *ideal*—"the *ideal* of a harm-free, good, or flourishing social world" (170). "From a noneconomic instrumentalist perspective, the law is a tool toward achieving an ideal world in which the content of the ideal can either be understood positively—as a world possessed of moral value—or negatively, as a world free of harm" (171). It is at this nexus—between the elimination of harm and the institution of moral value—that West attempts to merge her instrumentalism with her moralism.

You would think that West's instrumentalism would insulate her feminism from the Injury Triad: after all, a fully pragmatic assessment of any feminist legal rule reform would want to assess not only the harm to women it seeks to minimize but the harm it might impose on men in the process; it would want to worry about the ways in which *unharm*ed women might even be able to deploy it *to harm men*; it would surely ask whether intensifying the social status of women's harm creates more of it; and so on.

West sometimes speaks as though she were prepared to go there. She advocates for an

“instrumental feminism” (174) partly by arguing that, despite its costs, it’s *worth it*. Thus she can admit that feminist legal reforms in the form of women’s rights to reproductive freedom, protection from sex discrimination, rape shield provisions, and so on, though they “have all improved the quality of women’s lives,” have *also* legitimated the reproductive unfreedom, sex discrimination and rape that fall *outside* their narrow protective umbrella. She concludes, in good policy balancing mode: “But there is simply no question that the gains ... outweigh these admittedly quite real risks of legitimation” (176). She admits that her instrumental feminism would be a paternalistic ruler, a “danger” that she counterposes to the legal-economic danger of “collaps[ing] ... harm and value with ‘that which is desired’”:

Obviously, what would best serve us is a *balance* between objective and subjective conceptions of harm, objective and subjective understandings of what we do and should value; objective and subjective conceptions of the good life. We need to check our desires against our rational understandings of our best interest, and we need to continually check our rational understandings of our best interest against our present desires, and we need to use each ‘check’ as a skeptical harness on the other (177).

Carried through as an intellectual and political practice, this skepticism about the good life, this effort to balance objective and subjective conceptions of harm, would make it impossible for anyone to get stuck on the Injury Triad: you simply could not say that women suffer harm, men inflict it on them, and women remain innocent of any harm to men in West’s categorical way if you were simultaneously wondering whether you had the balance of objective and subjective conceptions of the good life and of harm calibrated just right, in attentive “response to the lived human condition.”

West nevertheless does say it, again and again and again. The Injury Triad appears often in her diametricalized framings of male and female, feminine and masculine, relations to harm. Throughout the book, perhaps most insistently when she estimates the practical effects which patriarchy working through law brings about, West hews steadfastly to the Triad in the form we’ve already seen in her playground story of adolescent male and female sexuality.

Let’s check some examples. I offer two, but could multiply them copiously. In them the *comparative* disadvantage suffered by women is also *absolute*; while a “world possessed of moral value” will be a world “*free* of harm.” Here is her description of the harm women suffer because of street harassment:

A woman harassed on the street feels not only afraid, but also chilled, humiliated, dirty, and above all *exposed*; she’s been turned inside out. The fear engendered by walking past a whispered message—“Hey cunt, hey bitch, hey YOU, come sit on my face”—is compounded by the feel of involuntarily exposed intimacy—of invasion. A part of the invasion, of course, is simply an invasion of privacy: the private space of anonymity on a public street is shattered, the complicated or serious train of thought is lost, the comfortable gait becomes awkward, the light mood is gone, the feeling of comradery and equality with cocitizens is obliterated. Even more painful than the invasion of privacy, however, is the verbal

and visual invasion of and exposure of the sexual body—it is that invasion which renders a woman, or at least an unprepared and undefended woman, humiliated, infantilized, chilled, and exposed. The invasion renders her a sexual amusement for others—she becomes a toy. And again, that *invasion* is gender specific (103).

So: the street-harassed woman is harmed, and she does no harm. The street-harassing man, moreover, is immune from harm:

A woman who is hassled on the street knows that neither the community nor the state will come to her aid. She knows, then, that she is ‘at the mercy’ of the harasser—he can continue or cease the harassment, *with no consequence to him either way...* She is in the position of a *truly helpless infant whose well-being is at the whim of sadistic parents* (145; emphases added).

And though West introduces her chapter on the concept of harm from which these passages are quoted with the proviso that she catalogs women’s harms to describe them and not to argue that they should all be made criminal or tortious—that would violate the balancing mandate of her feminist instrumentalism (99)—it’s hard to imagine how her feminist law reform could omit criminalization of street harassment given the meaning she derives from its legal impunity:

The state’s refusal even to *attempt* to criminalize these assaultive threats underscores the degree to which *women exist on public streets for the visual and sexual consumption by men* (145; second emphasis added).

Thus the Injury Triad drives West to some pretty panicky statements about women’s subordinated reality and some pretty mandatory, not balancing, ideas about what feminism should seek from law to undo it.

Want to see how it happens one more time? Scanning the horizon for the ways in which the law *mandates* gendered harm, West observes that the foreclosure of non-marital options for sexual intimacy and of same-sex marriage harm women more than men to the extent that marriage benefits men at women’s expense (162). The extent remains to be calibrated: so far so skeptical. Then: the rule criminalizing child abandonment requires mothers of newborns—not fathers—to care for them or relinquish them formally for adoption, whereas an absent father “will be criminally liable at most for child support”; from this “stark asymmetry” West deduces “the disproportionate *mandatory* parenting required of mothers” (162). Hello? Fathers having physical custody of their children are just as liable for abandonment as mothers; fathers without it are often absent at the mother’s option and sometimes would jump to assume parental responsibility if mothers did not act to prevent them from doing so; criminal sanctions for nonpayment of child support are intrinsic to our system and increasingly enforced to a fare-thee-well, on the joint insistence of feminists and neoliberals; and a single woman who has a newborn baby and who does not want to be its parent—as long as the biodad has not manifested and even enacted a full measure of parental responsibility—*can relinquish it for adoption* into a very eager market: it might be emotionally painful but technically it’s not difficult to do.

West's omission of the powers held by women, of the vulnerabilities of men, and of the possibility that Holmes' "bad man" has a female counterpart draws her into the magic realism which the Injury Triad so repeatedly generates: "The message conveyed by this network of legal regimes is clear enough: women should marry, mother, and stay home. Intimacy outside marriage is unthinkable, mothering is inevitable, and working outside the home unprofitable" (164). Though some United Statesian women may well encounter the network of legal rules and cultural forces in such a way that this unthinkability, inevitability and unprofitability are their lot, the idea that this is the legal system's message to all women—may I say it?—paranoid. And once again, it is a symptomatic consequence of thinking gendered harms in the terms of the Injury Triad.

We've seen the *effects*, then, of West's adherence to the Injury Triad: but *why* does she do it, at the complete sacrifice of her skepticism, pragmatism, and realism? There's nothing in her apparatus like the mechanical formality of Mill's harm principle, which, as we've also seen, works quite systematically to attach distinct argumentative and justificatory advantages to the Injury Triad. It's been a puzzle to me. I think I have found the answer in the shift in West's thinking between her 1987 article "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory"<sup>23</sup> and her 1997 revision and expansion of much of that earlier text as *Caring for Justice*. Over the decade, over the revisions, West apparently made a shift in the direction of structural subordination of women in heterosexual sexuality—and with it came an understanding of women's sexuality in terms that are more susceptible to *moral* than *pragmatic* or *political* judgment. Her pragmatism *presupposes* the Injury Triad in order to remove all of its claims from the reach of balancing and *a fortiori* from the reach of politics. Instead they give body to her moralism, and fortify the absolutist trend in her thinking. It's not a pretty sight.

In "Hedonic Lives," West made an expansive acknowledgment that many, many women actually do derive intense erotic pleasure from sexual submission to men. She also acknowledged, and at length, that a text which MacKinnon would undoubtedly deem well within her definition of subordinating pornography—Pauline Reage's *Story of O*<sup>24</sup>—has genuine positive value for women who take pleasure in the scenarios of erotic domination it narrates and the fantasies of erotic domination it suggests, not only because that pleasure is genuine, but because it can become part of a redeemed heterosexual relationship in which female erotic subordination is premised not on fear but on trust (187-203).

It would be impossible to cram these affirmative understandings of women's sexual submission to men into the narrow parameters of the Injury Triad. Though many many passages from "Hedonic Lives" are revised into *Caring for Justice*, not one iota of this ar-

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<sup>23</sup> West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory," 3 *Wis. Women's L.J.* 81 (1987), rpt. 15 *Wis. Women's L.J.* 149 (2000). All my page citations are to the 2000 reprint.

<sup>24</sup> Pauline Reage, *Story of O* (New York: Ballantine Books, 1965).



gument made the cut. Instead, as we've seen, *Caring* maps female sexuality so as to omit the possibility of a woman's pleasurable, trusting erotic subordination to a man, indeed of *any* happy heterosexuality for women: instead, the two options have become women's coerced or, even if consensual, fearful engagement in heterosexual sex, an endless sojourn in heterosexuality under the ubiquitous conditions of patriarchal threat (and this is a soul-destroying harm), and their infantile, lesbian, entirely feminine sexuality—a sexuality of mutuality, reciprocity, self-affirming integrity, naive embodiment, empathy and care (and this, along with women's maternal altruism, is the fount of their redemptive moral virtue and the source of their authority to rule). That is, female harm, female innocence, and male immunity—the Injury Triad.

Not coincidentally, I'll argue, "Hedonic Lives" presented an instance of West's pragmatic, instrumental reasoning which she also omits from the intellectual style of *Caring*. For all that she insisted in 1987 that pornography can lead to genuine pleasure in eroticized subordination for women, she also insisted that it can be used to induce fear in women, fear that cause them to consent to dominated sex which—because of its contaminated motive—*cannot* be pleasurable to them. And she then argued that there is no logical inconsistency in holding the view that pornography which provides women with the genuine pleasure of fantasizing their erotic domination by men or helps them actually achieve it in conditions of trust should *not* be sanctioned for that reason; only the pornography that generates women's fear should be actionable. It's a pragmatic and social-descriptive question, calling for an instrumentalist deployment of legal rules: before deciding which pornography to render actionable, "We need to know if there is no overlap (ideal), a great deal of overlap (worst case) or some overlap (most likely)" (206).

This is the standard protocol of policy balancing. Having gotten to this point in it a legal decision maker needs to decide what to do when there *is* overlap. Typically at this point one is urged to adopt a proposed rule if its benefits outweigh its costs, relative to the existing and the realistically possible alternatives. West produced this rule of decision instead: "Whatever causes women pleasure *without causing attendant pain* is something we should celebrate, not censure." It is a no-pain rule: *any* costs to women eliminate the rule option that might produce them (207; emphasis added). And so, even if some pornography sometimes or often or almost always causes women pleasure (and surely even if it provides pleasure to men—their interests *don't count*), "[t]he pornography that should be actionable is the pornography that causes the violent expropriation of our sexuality—that is the injury. As the WAVAW women insist: NO WOMAN WANTS THAT."<sup>25</sup> That is, *if* a particular pornographic text *ever* causes *any* woman pain, it should be actionable, no matter how much pleasure it also causes:

*The Story of O*, no matter how erotic as text, might be proximately causing literally untold miseries—silenced, actual, fearful, terrifying enslavements—and *no woman wants that*. If it is,

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<sup>25</sup> West surely refers here to *Women against Violence against Women*, ed. Dusty Rhodes and Sandra McNeill (London: Onlywomen Press, 1985).

then we cannot have it both ways, and as Wendy Williams has said in a different context, where we can't have it both ways we have to think carefully about which way we want to have it. In my own mind I have no doubt—if *The Story of O* is being re-enacted in real life on some farm somewhere in the hills of Kentucky right through to the bitter end, then we can all live without *The Story of O*. For me, this is not a close question, though I know it might be for others. But again—this poses a choice, and even if it is a hard choice, that is a far cry from a disabling contradiction (207-8).<sup>26</sup>

“No woman wants” “literally untold miseries—silenced, actual fearful terrifying enslavements”: West was perfectly confident of perfect consensus among women in that case. She shouldn't have been: women as well as men are capable of wondering whether the invocation of “untold ... silenced” pain is more rhetorical than real, whether feminism's monopoly to speak for it should always be deferred to, and whether lurid feminist depictions of it might not both eroticize it for some men and produce the experiential capacity for it in women—that is to say, might *be* for feminists the very desire-constituting pornography they would deny to others. And it should be *astonishing to everyone* to see an instrumentalist policy balancer working her way to a rule choice while leaving out of the calculus the interests of half the human race: sadly, because we are inside feminism here, that omission goes without saying, so much so that noticing it takes work.

Though this particular passage does not make it into *Caring*, most of its basic moves surely do. We've already seen how *Caring* eliminates (non-feminized) male interests from her normative vision. And on silent suffering, see her Index, which provides 16 entries for silence, directing us to 15 pages of text (354); a word search through the book for “silence” would stop on almost every page discussing women's harm.<sup>27</sup>

But we also see in “Hedonic Lives” some pragmatic and political gestures that didn't survive West's rethinking over the decade of the 1990's. First, West reached her decision that *The Story of O* must go with a patent recognition that, if she gets her way, she'll eliminate a text that brings many many women intense redemptive pleasure inside heterosexual eroticism. Women's interests are divided and ruling on behalf of women may require feminists to get some blood on their hands. And so she also acknowledged that women might disagree about her “no pain” rule of decision; she revealed it to be not only an explicit judgment call, a choice, even a hard choice but also as her own political bid within feminism. Implicitly, she issued an invitation to us, her readers and possible interlocutors, to engage with her in a political struggle about what to do about pornography.

Not only did West eliminate *these* argumentative moves from *Caring*: there's nothing in the 1997 book that remotely resembles them. To be sure, West remains a pragmatic

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<sup>26</sup> West refers here to Wendy Williams, “The Equality Crisis: Some Reflections on Culture, Courts, and Feminism,” 7 *Women's Rts. L. Rep.* 175, 195 (1982).

<sup>27</sup> A fascinating cultural feminist factoid: the only index items that have as many or more entries than “silence(s)” are: altruism, feminism/feminist jurisprudence, harm(s), justice, law, law and literature movement, marital relationship(s), mother(s), patriarchy, power and women. (339-56).

feminist with an instrumentalist attitude to law. She is no longer willing to engage politically with other leftists who see things differently, however: she concludes that feminists *must reject* the antihierarchical democratic political vision of Roberto Unger precisely because (she says) its democratic openness reiterates patriarchy *when it fails to privilege maternal altruism, women's distinctive access to the natural and the pre-verbal dimensions of moral life, and women's exceptional role in bringing "the human community ... [to] respond in a more nurturant, caring, and natural way to the needs of those who are weaker"* (276-81, 280). She is no longer willing to entertain the idea that women might find redemptive pleasure in erotically submitting to men and might discover this desire *in* feminist conscious raising: indeed, now she argues that she can get around the dilemma of women's compliance with patriarchal desire—is it their false consciousness or their free decision?—because patriarchal harm to women is *objectively knowable* (174-75). She is no longer willing to risk politically engaged pragmatism all the way; indeed, she now has a moral imperative, not merely a policy preference, to guide her (and us) in feminist instrumental decision making: for Robin West has morality now—the “world free from harm” would be a “world possessed of virtue”; and any element in democracy or post-modernism which might suggest that feminism could participate in creating the discursive conditions for women's suffering is “yet another excuse for men to blind themselves to the violence of patriarchy, the destructivity of misogyny, and *the absolute moral imperative for positive legal intervention on behalf of women*” (262-63, emphasis added).

The Injury Triad has a very specific and distinct function in the context of this depoliticized, purportedly objective, morally mandated pragmatic instrumentalism, and that is to predetermine and then justify every decision within the presuppositionally narrow parameters of “hard choice.” It's not just that it ensures that the analytic has no stray bits that could lead it to wander off from mother feminism. It also places its feminism in a position to trump all players and all contesting visions before they can come into conflict. Objectively verified and morally absolute, the Injury Triad comes in as the *a priori* of politics.

West's move here not only manifests a deep fear of politics; it moralizes the feminist will to supercede them. The politics of injury in this form accomplishes something more than it might in Millian rights discourse. We're used to thinking of rights as trumps; and Mill's frame leaves open an explicitly political space in which politics (perhaps as domination) can be thought. What seems to be new in West's policy balancing is the emergence of a left anti-politics that operates through ethics *first*. If we recall at this point what those ethics are—a program seeking through legal change for a “a political and moral, not a legal or intellectual[,] transformation of the heart,” (165) guided by the ideal of “a world possessed of moral value—or ... as a world free from harm” (171) and installing as the *sine qua non* for *all* judgment calls “the absolute moral imperative for positive legal intervention on behalf of women” (263) and reading every failure so to intervene as a harmful ratification of the morally wrongful harm of women (145)—we have a pre-political moral absolute aimed at the transformation of hearts and minds and offering to prevail whenever considerations conflict. The totalitarian tendency in the feminist and

LMIPST politics of injury may well be exemplified here. Query whether this tendency is *itself* a cost of this social *imaginaire* and its political style.