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## DEMISESQUICENTENNIAL

### **Robin West, *Jurisprudence and Gender*: Defending a Radical Liberalism**

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Robin West's *Jurisprudence and Gender*<sup>1</sup> has justly had considerable influence. West argues persuasively that people concerned with achieving sex equality need to do both practical, political work and theoretical, conceptual work. If the concepts and normative theories remain incompletely developed, they will offer defective guidance to practical work. Therefore, "[f]eminism must envision a post-patriarchal world, for without such a vision we have little direction."<sup>2</sup> This contention is both true and important.

West then argues that the vision of feminist jurisprudence must be of a world in which

all forms of life will be recognized, respected and honored. A perfect legal system will protect against harms sustained by all forms of life, and will recognize life affirming values generated by all forms of being. . . . Masculine jurisprudence must become humanist jurisprudence, and humanist jurisprudence must become a jurisprudence unmodified.<sup>3</sup>

I find this conclusion a bit underdeveloped: surely a "humanist" jurisprudence is far from being a jurisprudence in which "all forms of life"

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<sup>1</sup> Robin West, *Jurisprudence and Gender*, 55 U Chi L Rev 1 (1988).

<sup>2</sup> *Id.* at 72.

<sup>3</sup> *Id.*

are respected and valued. I would like to know what sorts of respect and recognition animal lives are due in West's conception, and also what forms of respect she would support for nonsentient beings such as plants and ecosystems. The fact that these questions are simply not on West's agenda—so little so that she can smoothly equate “humanist” law with “life affirming” law, not thinking about what she is omitting—makes the Article seem a bit out of date to me and partial in its moral vision.

Let me, however, assess West's Article as a normative proposal in the area of human sex equality, as it was intended and received. West claims that the two forms of normative theory most influential in American law—one deriving from the tradition of Western liberal political philosophy, the other deriving from the radical philosophical ideas underlying the critical legal studies movement—are ultimately imperfect guides for feminist normative work. She argues that philosophical liberalism and the allied legal tradition are defective on account of their reliance on a thesis she calls the “separation thesis,” and that critical legal studies is defective because of the particular way in which it articulates and relies on what she calls the “connection thesis.”<sup>4</sup> She then examines work in both radical feminism and “cultural” feminism to argue that though these forms of feminist argument often are profoundly at odds, they share a dissatisfaction with the normative categories made available by male jurisprudence. At this point, West is ready to redraw the map so that the most powerful concepts and contentions of these feminist movements are available for legal use.

There is much in the Article to admire, not least its sweep and ambition but also its close attention to the varieties of feminism and its determination to rethink legal frameworks with the concerns of feminism in mind. Because I believe that the most unsatisfactory part of her Article is its critique of liberalism, I shall focus on that in what follows. I shall first argue that feminism needs to begin from a broader account of the problems to be solved, in such a way as to include not only the problems that are West's focus but also the problems that are most salient in the lives of poor women, prominently including women who live in poor and developing countries. I shall then argue that the separation thesis is both true and important and that feminists should endorse it. Next, I shall examine the way in which liberal thinkers actually build normative claims out of the (factual) separation thesis, defending the core ideas of the tradition. Finally, I shall mention what is really worth criticizing in the liberal jurisprudence to which West objects, arguing

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<sup>4</sup> *Id.* at 3.

that these criticisms can be made, and indeed have been made, without surrendering the key claims of normative liberal political theory.<sup>5</sup>

### I. GETTING THE RIGHT QUESTIONS ON THE TABLE

West focuses on the problems that were then the primary focus of US feminism: sexual violence, sexual harassment, inadequate support for pregnancy and maternity, and unequal employment opportunities. She also alludes to the vexed issue of access to abortion, although with a brevity that does not give insight into the detail of her own position. These are all immensely serious problems for both law and public policy, and they continue, unfortunately, to be so. Moreover, they are problems for women all over the world (although the abortion question takes a markedly different form in nations where sex-selective abortion has become a popular way of expressing disdain for females and a desire not to raise a female child—nations of which there are all too many today<sup>6</sup>).

Absent from West's Article, however, are some problems that I find central to my own international development work, such as how to address unequal nutrition and health care, unequal access to education, unequal ability to move freely in public space, the economic problems of widows, and the health difficulties of aging women.<sup>7</sup> When we put such questions on the table, our theoretical angle is altered, I believe, for we are more likely to focus closely on the career of each particular body in the world from its birth to its death. I believe that this shift of perspective very much strengthens the case for the liberal separation thesis.

### II. DEFENDING THE SEPARATION THESIS

Here is West's account of the separation thesis:

[A] "human being," whatever else he is, is physically separate from all other human beings. I am one human being and you are another.

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<sup>5</sup> Many of these points have already been made in my article, Martha C. Nussbaum, *The Feminist Critique of Liberalism*, in Martha C. Nussbaum, ed., *Sex and Social Justice* 29 (Oxford 1999) (describing several feminist critiques of liberalism, including that liberalism is too "individualistic," that its "vision of persons is too abstract," and that it is "far too rationalist"). I hope that I can articulate them in a fresh and nonrepetitive way here. Certainly, the challenge of responding to West's insightful formulations (as I did not previously do) will add to what I have done before.

<sup>6</sup> For some data on the skewed natality ratios in quite a few nations, which is indicative of the rise of sex-selective abortion, see Jean Drèze and Amartya Sen, *India: Development and Participation* 257–62 (Oxford 2d ed 2002).

<sup>7</sup> For a discussion of these questions, see Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* 1–4 (Cambridge 2000) (arguing that "all too often women are not treated as ends in their own right, persons with a dignity that deserves respect from laws and institutions," but rather as "mere instruments of the ends of others").

er, and that distinction between you and me is central to the meaning of the phrase “human being.” Individuals are, in the words of one commentator, “distinct and not essentially connected with one another.” We are each physically “boundaried”—this is the trivially true meaning of the claim that we are all individuals.<sup>8</sup>

West’s initial account of the thesis focuses on physical separateness; but she then goes right on to consider versions of separateness according to which our lack of mental union with one another is also important.<sup>9</sup> Thus I think we should include as part of the thesis the claim that each human being has a mental life that is his or her own, not merged with that of any other human being, and to a great extent inaccessible to every other human being.

According to West, the physical element of the separation thesis is both false and pernicious because it ignores, and thus marginalizes, a woman’s experience of connection with her fetus during pregnancy and the related close physical connection with her child after birth through breast feeding.<sup>10</sup> The mental version is false because it ignores, and thus sidelines, the deep intuitive connection of a mother with her child, which West takes to be a paradigmatic instance of a general female capacity for empathetic connection.

The physical separateness thesis is both true and important. We have bodies whose essential organs are bounded by a wall of skin that is our own and nobody else’s. Our blood flows inside (as well as within) that wall, and any breaching of that wall is occasion for concern. Let Person *B* love Person *A* so much and hold her so closely; the food that goes into Person *B*’s mouth does not arrive in Person *A*’s stomach. When Person *B* is taught to read and write, that education does not improve the skills of Person *A*, unless the separate body of Person *A* has also moved into the classroom and become an addressee of the education process. When Person *B* goes out to play, Person *A* does not automatically follow; she may remain shut up in a dark room. When Person *B* is taken to the doctor, Person *A*’s health does not automatically receive care.

It is of course true that all human beings have apertures in their bodies into which the organs of another human being may enter: the mouth, the anus, and the vagina. (I find West’s assumption that the

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<sup>8</sup> West, 55 *U Chi L Rev* at 1 (cited in note 1).

<sup>9</sup> See *id.* at 1–2 (describing views of Nozick and Unger that seem best interpreted this way).

<sup>10</sup> See *id.* at 2–3. West also includes intercourse, which I shall discuss below, and the experience of menstruation, which, in her view, is a reminder of potential connection since it “represents the potential for pregnancy,” *id.* at 3—something that is actually false because many infertile women still menstruate, as do most women who are using reliable contraception. So I ignore that example in what follows.

mouth and anus are irrelevant in the context of sexual penetration to be one of the most dated aspects of the Article.) But the possibility of penetration does not alter the reality of separation: the intimate contact involved in sexual intercourse of whatever type never brings about a physical merger of bodies, a fact that has frequently been regretted by lovers—for example, the two men imagined by Aristophanes in Plato's *Symposium*, who say that their most cherished dream is that the god of welding, Hephaestus, would make their bodies into one body while they are in a sexually intimate position.<sup>11</sup>

But what about pregnancy? Pregnancy is, of course, a partial exception to the physical separateness thesis, since the mother's nutrition does nourish the fetus. Moreover, her emotional state may affect the well-being of the fetus, so pregnancy may be an exception to the mental separateness thesis as well. Notice, however, that the exception is a one-way exception: there is nothing the fetus is capable of doing that will improve the nutritional status or the emotional state of the mother. The fetus is in that sense a parasite. Moreover, there are many ways in which the thesis of bodily connection breaks down. It is possible for a mother to be very ill, in a coma, or even legally dead, while her fetus is doing very well. It is also possible for the fetus to be in grave danger, or even to die, while the mother's bodily health remains unaffected. The nutritional connection between mother and fetus, mediated by the placenta, can also break down: a well-nourished mother may have an undernourished fetus. All sorts of grave medical choices often have to be made between the physical interests of the mother and those of her fetus, and in such cases nobody has much doubt that there are two separate beings in question, however close and intimate their physical connection.

It seems to me that West romanticizes the state of pregnancy when she fails to observe these manifest tensions and breakdowns in physical connection. Moreover, when we consider the case of pregnancy due to rape or incest, or pregnancy as the result of inadequate opportunity to use contraception, the separateness thesis looks stronger yet: this is my body, and here I find within it an unwanted parasite, jeopardizing my plans and possibly my health and even my life. It is this picture that

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<sup>11</sup> See Plato, *Symposium* 192D–E, in John Burnet, ed., 2 *Platonis Opera* (Oxford 1901). Did the lovers *really* regret the failure of fusion? There is room for doubt, since it would extinguish the possibility of sexual pleasure. See my analysis of the passage in Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* 175–76 (Cambridge 2001) (arguing that if indeed such a fusion were to occur, even though the fused lovers would think that they were getting what “they most wanted out of their passionate movement,” this “wholeness” would ironically “put an end to all movement and all passion”).

underlies most arguments in favor of abortion rights for women, and any feminist ignores such considerations at her peril.

As for West's contention that postbirth mothers have profound physical ties to their children through lactation and also through deep instincts of nurture and care that lead them to provide for their children's physical well-being—well, sometimes. But if we ask who it is who puts less food on the plates of female children in many families around the world, the answer has to be that it is usually the mother, since it is the mother who is cooking and serving the food. If we ask who it is who is getting all those sex-selective abortions, the answer has to be, again, that it is women—sometimes with male pressure but often without it, at least in its most direct form. There may be such a thing as maternal instinct; indeed, there probably is. But it can easily be overwhelmed by the pressure of economic necessity and social stigma; such mothers simply cannot bear to have another mouth to feed, especially a female mouth, which will not bring in any income and will cost the family dearly when dowry time arrives.

Now let us turn to the mental part of the separateness thesis. A profound part of human experience is the inaccessibility of any mind to any other mind. As Proust put it, any real person (as contrasted with a mentally transparent fictional character) imposes a “dead weight that our sensitivity cannot remove.”<sup>12</sup> Empathy is a wonderful thing, but it does not defeat mental separateness because it is a fallible exercise of the imagination. All attempts to grasp the subjective experience of another are interpretations, not mergers. If a parent or lover thinks that she knows what her child or lover is thinking just by virtue of being a parent or lover, she is probably a very bad parent or lover. A good parent or lover understands that nobody understands anyone else automatically, and that the only way to come up with any understanding at all is by paying close and respectful attention to the signs given by a person's words, gestures, expressions, and movements. (For that reason, learning to read a work of literature—decoding its signs—is a training of considerable value in preparing for the tasks of life.)

As for the mental relation between mother and fetus, there is none, because the fetus has only a rudimentary mental life. Pregnant women often like to imagine that their fetus is harmonizing with their thoughts, or moving in response to their emotions, but this is fantasy—harmless at best, harmful when it suggests that the task of understanding another is automatic or easy. Think of what it is to try to understand a dog or an elephant. To do so well, one will have to resist illegitimate anthropomorphizing, instead think about the mental capacities

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<sup>12</sup> Marcel Proust, *Du côté de chez Swann* 85 (Gallimard 1962) (author's translation).

of that particular sort of creature, and try to picture how the world would look to a creature with just those mental capacities (something for which considerable study is usually needed, though long familiarity with a species can sometimes deliver the goods). Now multiply that difficulty a thousand fold: for fetuses have a far, far less developed mental life than do dogs and elephants, and they do not have any way of giving signs of what they are feeling, if indeed they feel anything. So the idea that there is any mental unity between mother and fetus, or mother and neonate, is just wrongheaded.

The separation thesis is true and important. All the types of connection that we seek with one another are mediated by our separateness, physical and mental. Forgetting this fact may actually harm our projects of connection.

### III. NORMATIVE LIBERALISM AND THE SEPARATION THESIS

According to West, normative theorists in the liberal tradition begin by asserting the separation thesis as a descriptive and not a normative thesis. They then, however, move quite rapidly to a normative thesis:

According to liberal legalism, the inevitability of the individual's material separation from the "other," entails, first and foremost, an existential state of highly desirable and much valued freedom: because the individual is *separate* from the other, he is *free* of the other. Because I am separate from you, *my* ends, *my* life, *my* path, *my* goals are necessarily my own. Because I am separate, I am "autonomous."<sup>13</sup>

If liberal theorists really thought this way, they would be thinking very badly.<sup>14</sup> The separation thesis does not necessarily imply anything normative one way or another. It is simply an account of a basic condition of human life. Any normative theory that wants to be relevant to human life had better assert it and keep it in view. The fact that human bodies and minds are separate in the sense I have described does not show directly that there is anything valuable about autonomy. So how, then, is the separation thesis relevant to characteristic liberal conclusions?

Liberalism begins from some factual assertions, of which the separation thesis is one. But it also begins from some normative claims,

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<sup>13</sup> West, 55 U Chi L Rev at 5 (cited in note 1).

<sup>14</sup> It is difficult to know which theorists West has in mind. She does not cite any leading liberal thinkers: John Locke, Immanuel Kant, and John Rawls are all totally absent. Instead she cites Thomas Hobbes, hardly a liberal, and Robert Nozick, a minor liberal of the extreme libertarian variety.

which are taken to be fundamental premises of the theory, not justified within it. Such normative premises can win a kind of *ex post facto* justification, in the sense that a theory drawing out their implications may look to us very attractive, and our endorsement of the whole theory will increase our confidence in its premises.<sup>15</sup> As such, however, they are assumed as starting points rather than inferred from something more fundamental.

Two of these premises, I would claim, are the assumption of the equal worth of persons and the assumption that politics ought to show equal respect to persons. The equal worth of persons is not, like the separation thesis, a factual claim. Although some liberal theorists do attempt to connect it to a factual claim about the rough equality of people's physical and mental capacities in a state of nature, I believe that derivation is a mistake (and a pernicious one because it has led to the exclusion from equal justice of people with grave physical and mental disabilities).<sup>16</sup> Liberals should not have bothered with that messy factual assertion, which is neither necessary nor sufficient for the normative moral claim that persons have *equal worth*. Such a claim cannot be demonstrated, and it may indeed be contested. It is, however, a widely shared moral belief, and liberals have found a lot of support for their endorsement of it.

The normative thesis concerning equal respect does not follow from the claim of equal worth, for one might think persons equal and also think that the things politics distributes are so unimportant that it really does not matter whether politics shows equal respect to persons. Such, I believe, was the view of the ancient Greek and Roman Stoics. However, if one believes, as seems plausible, that good treatment, material and social, matters a great deal, it will be natural for a believer in the equal worth of persons to endorse the second claim as well.

At this point, it is worth remarking that West probably endorses both of my normative theses; at least I see no signs that she does not.

Here is where separation becomes relevant. We are committed to a politics that treats all human beings with equal respect. How should politics approach the person? If we were in a sci-fi world where nutrition, education, and other goods of life flowed like a mighty river from one person to another, then their distribution would not matter very much: we could just give all the good stuff to Person A, and then the

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<sup>15</sup> Here, I am developing an idea of justification similar to that used in John Rawls, *A Theory of Justice* 46–53 (Belknap 1971).

<sup>16</sup> See Martha C. Nussbaum, *Frontiers of Justice* 29–32 (Belknap 2006) (arguing that social contract doctrines that assume that “parties begin the bargain in a situation of rough equality . . . require[] us to put some important issues of justice on hold,” including “justice for people with severe mental impairments”).



mighty river would carry it to each and every person, so that each could dip into that river and take whatever each needed. The separation thesis tells us, however, that the sci-fi world is not our world. If we give all political rights and material advantages to elites and not to the poor, chances are—barring acts of historically unprecedented philanthropy—that they will stay right where they are, in the hands of the elites. Prior to liberalism, people did not focus on this problem; they somehow thought that a world in which the feudal landlord was given all the goodies and left to take care of his tenants was a just world, or at least an acceptable one. Liberalism points out that, given the truth of separation, such a world is not automatically a just world; no mighty river of altruism flows from landlord to tenant. And then, given the truth of the two normative theses, liberalism asserts that a politics that does not figure out how to distribute a fair share of the goodies to everyone is an unjust politics.

What about the family? Well, many sensible people who would not dream of thinking that the world of feudalism is my sci-fi world do think that something like this is true of the family. They think that a world in which all the goodies are given to the male head of the household, for his use and control, is automatically a world in which these benefits are automatically distributed, adequately enough, to all family members.<sup>17</sup> This belief is transparently false, as much of history shows us. The strategy of giving the control over goods to the male head of the household does not lead to their adequate distribution, not even their adequate distribution among his children. The unequal access of females to nutrition and health care, to education, to employment, and to protection of their bodily integrity—so well documented in statistics from all over the world—shows exactly what patriarchal control over the family has led to. Because separation is true, the world of the family is not my sci-fi world. Because some other things are true (malice, the lust for power), it does not become similar to that world through philanthropic male choices regarding distribution.

If one believes only in the separation thesis, nothing much follows at that point. One might just sit back and say, yes, the patriarchal family is a very fine thing. Look at the interesting forms of inequality it

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<sup>17</sup> I argue in *Sex and Social Justice* that something like this idea underlies economist Gary Becker's original theory of the family, although Becker later understood the importance of attending to conflicts for resources and opportunities within the family. See Martha C. Nussbaum, *Women and Cultural Universals*, in Nussbaum, ed., *Sex and Social Justice* 29, 33 (cited in note 5) (stating that Becker's economic view of the family assumes an altruistic head of the household who will seek to maximize the family's utility); Nussbaum, *The Feminist Critique of Liberalism* at 66 (cited in note 5) (describing Becker's acknowledgement that this model needs to account for other motives).

cultivates. Or, in the mode of many apologists for it, one might say: well, it clearly has its problems, but the need for one party to be the master is so overwhelming that we had better keep it anyway. (Amazingly, many liberals who detest feudalism and monarchy, including the great Rousseau, have expressed such views.) But if one also endorses the equal worth thesis and the equal respect thesis, one will have to say that the patriarchal family is a very defective political institution. One will insist on seeking a politics that distributes all the goods of life to all in a reliable way and in a way that expresses equal respect. One will therefore want certain changes in the family organization and limitations on the powers of its male head. Much of the history of modern feminism in law has been concerned with just these changes.

So far I have said nothing about liberty, a very important part of liberalism. What I have said so far is compatible with an egalitarian politics that has little regard for liberty, and that is a position well known in the Western liberal or quasi-liberal tradition because it is, in essence, Rousseau's position. Most liberal theorists, however, add at this point an additional normative premise: one of the valuable things that politics distributes is a measure of choice in managing one's life and charting its course. So certain types of liberty, along with bodily integrity and nutrition and health care, are among the goods that must be distributed in a way that shows equal respect for persons. One might, however, have many different accounts of what sorts of liberty are valuable or how much of each sort of liberty is valuable, while still remaining within the basic liberal tradition.

I believe that West actually endorses most aspects of the liberal position as I have stated it here, including the part about liberty, because I do not see any signs that she is deeply dissatisfied with the Bill of Rights or other classic expressions of the normative significance of liberty. I believe that what she objects to is an exaggerated emphasis on autonomous choice and a deficient emphasis on care when one is thinking about what people need and what politics should distribute. Thus, she would surely object to deficient public support for child and elder care, and she would object the more strenuously if such lack of support were to be defended on the ground that each person should take care of himself or herself without any help. This is a disagreement within liberalism, however, rather than a disagreement with it.

#### IV. WHAT, THEN, IS WRONG WITH LIBERAL LEGALISM?

West is not mistaken, however, in thinking that few liberals have been feminists and that the varieties of liberalism most familiar in earlier legal liberalism were not very feminist. So what went wrong? How did people with such promising ideas about human equality, and the

need for politics to protect it, come up with such a defective form of legal attention to women's equality? Two factors come to mind.<sup>18</sup>

The first and most obvious factor is that most male liberals were flagrantly inconsistent. They prated on about equal worth, but they exempted women from the humanity whose equal worth they asserted. (Often, they exempted African-Americans and members of colonized nations as well.) They therefore completely exempted the patriarchal family from the scrutiny of the normative liberal principle of equal respect. (Sometimes they did this via the flagrantly self-serving claim that the family is not a political institution, but a "private" one, whatever that was supposed to mean; as has often been noted, it certainly could not have meant an institution that protects women's privacy, whether privacy means solitude, bodily integrity, or decisional autonomy.<sup>19</sup>) John Stuart Mill, in *The Subjection of Women*,<sup>20</sup> already gave such "arguments" the devastating critique they deserved, and there is little that a modern feminist needs to add.<sup>21</sup>

The other difficulty seems peculiar to legal liberalism; it does not infect the work of the great philosophical liberals. This difficulty is that of buying into the idea that treatment showing equal respect means *formally similar* treatment—nothing less and nothing more. But of course if two human beings start from very different social positions, it will often require formally different treatment to show them equal respect. The type of liberalism that finds affirmative action or any sort

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<sup>18</sup> For further discussion of these, see Nussbaum, *The Feminist Critique of Liberalism* at 63–71 (cited in note 5).

<sup>19</sup> For a particularly succinct and influential form of this critique, see generally Catharine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, in Catharine A. MacKinnon, ed, *Feminism Unmodified: Discourses on Life and Law* 93 (Harvard 1987) (arguing that the conception of the right to an abortion as a right to privacy reinforces preexisting distributions of power and resources in the private sphere). See also Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 190–94 (Harvard 1989). For my own critique of the notion of privacy, see generally Martha C. Nussbaum, *Sex Equality, Liberty, and Privacy: A Comparative Approach to the Feminist Critique*, in Zoya Hasan, E. Sridharan, and R. Sudarshan, eds, *India's Living Constitution: Ideas, Practices, Controversies* 242 (Anthem 2002) (analyzing the tension between privacy and sex equality and its manifestation in recent Indian constitutional jurisprudence). For a shortened version, see generally Martha C. Nussbaum, *What's Privacy Got to Do with It? A Comparative Approach to the Feminist Critique*, in Sibyl A. Schwarzenbach and Patricia Smith, eds, *Women and the United States Constitution: History, Interpretation, and Practice* 153 (Columbia 2003).

<sup>20</sup> John Stuart Mill, *The Subjection of Women* 33–34 (Hackett 1988) (arguing that "no slave is a slave to the same lengths, and in so full a sense, of the word, as a wife is," and that a wife's lack of rights allows her husband to make her an "instrument of an animal function").

<sup>21</sup> I discuss Mill's views in Nussbaum, *The Feminist Critique of Liberalism* at 64 (cited in note 5) (recounting Mill's arguments that liberalism is consistent with legal reform of the family structure). See generally Martha C. Nussbaum, *Mill's Feminism: Liberal, Radical, and Queer*, in Georgios Varouxakis and Paul Kelly, eds, *John Stuart Mill: Thought and Influence—A Bicentennial Reappraisal* (forthcoming 2008) (explaining how Mill's views provide insight into radical feminist thought and can respond to criticisms made by feminists against liberalism).

of differential treatment intrinsically problematic is a type that has not sufficiently reflected on equal worth and what it requires.

The errors of liberal legalism have long been recognized, ever since radical feminism exposed them. Although West is closer to difference feminism than to radical feminism, her work has played its part in that recognition. What remains intact, I believe, is a liberalism that is itself radical, for it is one of the most radical demands one can make of the social world to demand of it a politics that really expresses equal respect for each and every human being.