2000

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Georgetown Public Law and Legal Theory Research Paper No. 11-109

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Imagining Justice

By Robin West

As we approach the new century and the new millennium, those of us who are legal professionals in liberal capitalist democracies need to drastically improve our practices of law if we are to bring those practices in line with our professed ideals. The commodification and marketing of legal services, for example, combined with a nearly blind commitment to overly combative advocacy, puts legal assistance beyond the means of large segments of the public, severely undercutting our commitment to equality before the law. A different and perhaps harder question, however, is whether the ideals against which we judge our practices are themselves in need of rethinking. What are our aspirations, for law, and for the rule of law, in a liberal society at the turn of the millennium?

There are at least three salient legal arenas in which some idea of justice informs our understanding of the rule of law, and in all three, not only our legal practices but the dream of justice itself stand in need of improvement. The first concerns the vision of "legal justice" that informs and guides the work of courts. Judges in Western liberal rule-of-law cultures labor to achieve what is often called "formal" or "horizontal" justice, which means that judges must decide cases according to a general rule or principle, and not according to their personal reaction to the particular case. Judges must don the proverbial blindfold, ignore differentiating features, and "treat like cases alike." But why?

Perhaps the best and most generous account of the requirement of formal justice is this: judges ought to strive to decide cases according to rule because by doing so they recognize, respect, and treat with dignity our shared humanity and our mutual inclusion in a common community. To do otherwise--to treat differently those who are in effect the same--would be to banish the one marked as different from the community. As they distill the similarities of our dilemmas and decide cases accordingly, judges recognize and honor that which we share, and that which binds us together. To the degree that the quest for legal justice is moved by that humanistic and communitarian impulse, it is a noble one, and something we ought to cherish.

Nevertheless, at this point in our history the particular understanding of our universal shared human nature that has emerged from the judicial practice of legal justice is cramped and ungenerous; it needs reimagining. Who is the human being whom courts protect when they decide cases according to a general rule of law? For the most part, our courts routinely protect what might be called our essential "heroic selves": our individualistic capacity for exerting our will, for effectuating our powers, for leaving our mark on the world, for profiting from our actions, and for cooperating with others, primarily so as to better compete. Hence modern courts aggressively protect our contracts, our will to profit, and our near absolute freedom to exploit our cocitizens. They will treat my decision to profit, to contract, to bargain, to leave a mark, to alter the world's surface, just like your decision to labor, to seek shelter, or to marry, which are in turn treated just like Exxon's or IBM's decision to merge, or expand, or move a plant. Likes, after all, must be treated alike--and what is alike in these cases is a willed, voluntary choice. By recognizing the heroic essence behind the individual choice and by honoring it, courts articulate the "human" who is in their view in need of and deserving of law's equal justice. The "human essence," as drawn and then protected by our courts' legal imagining over the past two centuries, is the human being...
who desires, chooses, and acts so as to profit.

We ought to reimagine this shared essence. Courts, judges, and all the rest of us involved in the enterprise of law need to recognize, honor, and protect not only the heroic, individuating self acting in and upon the world, but also the dependent and interdependent self who is in need, and the self responsive to the needs of others: the infant in utter dependency; the child in need of nurturance; the aging, sick, and dying parent in need of compassionate care; the parent with an infant so in need of the support of others in part because the weakest is so dependent upon her.

Were we to reimagine the human essence protected through legal justice as sometimes heroic but sometimes in need, our legal practices would change, and dramatically--we would honor, rather than disparage, dependency and the labor dependency exacts upon us; we would protect rather than dismiss or trivialize sickness, injury, and weakness; we would seek, through law, to nurture connections and interconnections between peoples, rather than foster relentless competition. Likewise, our sense of judicial virtue might change as well: we would require of judges, and of the legal profession quite generally, that they be compassionate as well as upright, that they be caring as well as possessed of integrity, that they be generous as well as consistent. We would hope for them, and of them, that they create not only a free world for strong and profiting individuals, but a caring world for interdependent communities. We would trust them to preserve and change our legal traditions in order to do so.

A dream of legal justice also informs our currently recognized constellation of constitutional rights, no less than the day-to-day workings of our courts. Here as well, a noble and liberal ideal--to protect the deepest and most cherished aspects of our individualistic essence against unwise or undue state encroachment--has been stunted by a cramped conception of the nature so protected. At millennium and century's end, we protect our right to think, act, contract, express ourselves, own property, maintain our privacy, amass wealth, and enjoy our possessions against both state infringement and irrational treatment. We are so protected because of a judicially conceived understanding of who we are: we are individuals whose essential being is best realized through unencumbered and counter-communitarian acts of individualistic will.

Here again, we need to rethink this understanding of who we are, and what parts of ourselves should be regarded as so inviolable as to be protected by rights beyond community reach. We are not only beings whose essence is realized through heroic acts of independent will. We are also parents and grandparents and children of parents and grandparents whose essence is realized through acts of care that protect us in our dependency. Those caring acts not only are necessary for our individual and collective survival, but they also are the soil in which our moral and most human selves are rooted. They are also, developmentally, essential conditions for the flowering of the individualist spirit so celebrated by liberal jurists and protected by liberal rights.

Perhaps we do need rights to protect our individuality. No less vitally, however, we need rights that we currently lack: we need rights that protect our ability and will to care for the weak among us and to nurture them to health, and to care for the young and to bring them up to adulthood. We need such rights of care not only to protect those activities against an overweening state. We need such rights so as to goad to action community and state support for those essential and essentially interdependent spheres of social life.

Finally, a dream of justice informs our understanding of our cherished rule of law, and our understanding of what purpose is served by a rule of law in liberal societies. Liberal societies have taken to heart the lessons to be learned from states that assume too much power: overbearing states, like Freud's overbearing fathers, must be reined in and we freely deploy the rhetoric and protections of law to do so. The rule of law exists, at least in this liberal dream, to protect individuals from state terror.
However, there is another understanding of the rule of law, also central to the liberal tradition, to which we have not so carefully attended. The rule of law should guard us against the danger posed to individuals by states that either are or pretend to be emasculated: the state that, through neglect, complicity, or simply bad faith, allows the strong to terrorize the weak. Individuals can be crushed by private parties or entities no less than by states and state agents. The state that does nothing in the face of glaring and harmful private-sphere subordination—whether that subordination takes the form of violence against women within families; violence, taunting, or threats of violence against ethnic, sexual, or racial minorities; or violence extracted by exploitative work—is as much of a threat to human and community flourishing as the state that oppressively does too much.

In our end-of-the-millennium liberal dreams, law respects and honors our universal humanity, protects our rights, and guards us against our worst political nightmares. These imaginings of justice are noble ideals all, and we ought to cherish them even as we acknowledge how our practices belie them. We also need, though, to revitalize the liberal dreams themselves. We share, universally, not only a will to power, but a need for nurturance, for sustenance, and for assistance: law in a liberal state should dignify and protect our needful no less than our willful selves. We seek, universally, not just to assert and express ourselves, but to connect and care for others, and our cherished liberal rights should at least aim to protect us when we do so. And we are in need of law, not just to protect ourselves against political dictators, but also to protect against the ravages of economic, familial, racial, and patriarchal terror. A law that aspired to protect us against private as well as public oppression; to create and guard rights of care no less than rights of individualism; and to recognize and dignify human need as well as human freedom would not lose its liberality by so doing. Indeed, law might better serve not just individuals, but communities were it to forthrightly strive to do so.

Robin West is professor of law at Georgetown University Law Center. She is the author of Caring for Justice (NYU Press) and Narrative, Authority and Law (Michigan University Press).

Source Citation
