

WEST, MACINTYRE, AND WOJTYŁA: POPE JOHN PAUL II'S CONTRIBUTION TO THE DEVELOPMENT OF A DEPENDENCY-BASED THEORY OF JUSTICE

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In recent decades, a strand of feminist theory variously referred to as “care feminism,” “cultural feminism,” or “relational feminism” has been arguing for a social re-evaluation of what has traditionally been regarded as “women’s work”—the care of dependents, such as children and elderly or disabled family members. As part of that project, a number of feminists have suggested that the traditional liberal theory of justice, based on the ideal of autonomous, independent actors, should be rejected, or at least revised to reflect the reality of dependency in the life of every individual. Recent books offering such alternative, dependency-based theories of justice include: Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care*;¹ Eva Feder Kittay, *Love’s Labor*;² Robin L. West, *Caring for Justice*;³ Joan Williams, *Unbending Gender: Why Family and Work Conflict and What To Do About It*;⁴ and Martha Albertson

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¹ JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993) (putting women’s caregiving role into political context).

² EVA FEDER KITTAY, *LOVE’S LABOR* (1999) (describing different theories of justice and arguing that they should be based upon the requirements of dependency).

³ ROBIN L. WEST, *CARING FOR JUSTICE* (1997) (arguing for recognition of distinct experiences and perspectives of women in jurisprudence).

⁴ JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000) (urging necessary reform in the workplace to better accommodate women’s caregiving responsibilities).

Fineman, *The Autonomy Myth: A Theory of Dependency*.⁵ This theory has been developed by these feminist writers largely in the context of arguments for restructuring the work place and welfare policies to support women with primary caregiving responsibilities.⁶ A number of writers have begun to explore the application of a dependency-based theory of justice in other contexts. For example, Alasdair MacIntyre, in *Dependent, Rational Animals: Why Human Beings Need the Virtues*, after acknowledging his debt to the feminist writers, goes on to apply their insight to general systems of moral philosophy.⁷ He argues that recognition of the inevitable periods of dependency in all human lives necessitates political and social structures that protect all society members unable to advocate for themselves due to disabilities—not just women engaged in caregiving.⁸ In Robin West's recent book, *Re-Imagining Justice*,⁹ she places the dependency-based theory into a more general theory of justice with applications that extend beyond the concerns of women engaged in caregiving.¹⁰

In two prior articles, I have described how Pope John Paul II's writings on the role of women in the family and in the public sphere are compatible with much of this emerging strand of feminist theory, supporting many of their arguments for restructuring the workplace and political structures to accommodate caregivers.¹¹ In this essay, I will explore the extent to which his writings also support more general applications of a

⁵ MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) (describing the many stages of life that necessitate dependency on others).

⁶ See *supra* notes 1–5.

⁷ ALASDAIR C. MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* 3 (1999).

⁸ See *id.* at 8–9.

⁹ ROBIN L. WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW* (2003).

¹⁰ See *id.* at 1–11 (explaining various interpretations of “legal justice” and suggesting that we need to create alternative conceptions of the term).

¹¹ See Elizabeth R. Schiltz, *Should Bearing the Child Mean Bearing All the Cost? A Catholic Perspective on the Sacrifice of Motherhood and the Common Good*, 10 LOGOS: J. CATH. THOUGHT & CULTURE (forthcoming 2007) [hereinafter *Sacrifice*], available at <http://ssrn.com/abstract=814104>; Elizabeth R. Schiltz, *Motherhood and the Mission: What Catholic Law Schools Could Learn from Harvard about Women*, 56 CATH. U. L. REV. (forthcoming 2007) [hereinafter *Mothers*], available at <http://ssrn.com/abstract=894980>.

dependency-based theory of justice in other contexts, such as those suggested by MacIntyre and West.

I will first describe the dependency-based theory of justice as developed by feminist writers in support of a social re-evaluation of the caregiving work performed predominately by women. Then, I will describe the arguments developed by MacIntyre and West that generalize this dependency-based theory of justice to other contexts. Next, I will turn to the writings of John Paul the Great, first exploring the ways in which his writings on women support the application of the dependency-based theory of justice particularly to the caregiving work performed predominantly by women. After that, I will look for evidence of overall compatibility between John Paul's personalist philosophy and a more general dependency-based theory of justice. Finally, I will suggest briefly how such a theory of justice, as developed by John Paul II, might be applied to other areas of law in ways that reflect Catholic teachings.

I. APPLICATION OF THE DEPENDENCY-BASED THEORY OF JUSTICE DEVELOPED BY FEMINIST LEGAL THEORISTS TO CONTEXTS OTHER THAN MOTHERHOOD

A. *Development of a Dependency-Based Theory of Justice in the Context of Motherhood*¹²

Over the past few decades, a group of feminist legal theorists has undertaken a project of re-examining one of the central presuppositions of “the liberal theory that dominates contemporary American political thought,” namely, its “heavy reliance on the image of the autonomous individual and the societal structures built on this image”¹³ This strand of feminist thought argues that political and social structures built on this faulty notion of the paradigm of human nature are flawed because they fail to acknowledge that every human being is actually totally dependent on others at the beginning of life, as well as sometimes at the end of and throughout life.¹⁴ Failure to recognize not only the fact of this dependency for the humans

¹² This section is a summary of arguments made in *Sacrifice*, *supra* note 11.

¹³ Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman's The Autonomy Myth*, 93 CAL. L. REV. 1285, 1288–89 (2005). For examples of the arguments of these feminist legal theorists, see the articles cited *supra* note 11.

¹⁴ See Eichner, *supra* note 13, at 1288.

experiencing it, but also the fact that other human beings must care for the humans experiencing the dependency, has resulted in flawed political and social structures.¹⁵ Most particularly, these feminist theorists point out that the failure to recognize this dependency has resulted in injustice toward women who have traditionally done most of the work of caring for dependent human beings.¹⁶ Because our political theories fail to even acknowledge this aspect of the human condition, they fail to accord any value to the work of caring for dependent human beings. As a result, neither the need for care nor the provision of care has been seen as an aspect of the human condition deserving of the same sorts of legal protections afforded those aspects of the human condition representing our autonomy.

The dependency theorists reject arguments by some feminists that women's advancement requires that men assume an equal share of this undervalued care work or that women refuse to provide undervalued care work.¹⁷ Neither of these "solutions" would require any re-evaluation of justice. A concept of justice emerging from the traditional liberal theory based on the autonomous individual would adequately support the commitment to formal equality of men and women that would suffice to ensure that men and women engaging in an equal amount of care work, or no care work, have an equal opportunity to advance professionally and financially.

Instead, the dependency theorists contend that either women do not *want* to give up this work,¹⁸ or that it is practically

¹⁵ *See id.*

¹⁶ There is significant documentation of the manifestation of this injustice with respect to both wages and career advancement of women with children, as opposed to women without children or men with children. *See Sacrifice, supra* note 11, at 1–3 & nn.2–6; *Mothers, supra* note 11, at 10–18 nn.9–49 and accompanying text.

¹⁷ For examples of these arguments see Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1761–62 (2001), Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 197 (2001), and Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1903–05 (2000).

¹⁸ *See, e.g.,* KITTAY, *supra* note 2, at 188.

Radical visions in which dependency work is taken out of the family have left many women cold—largely, I suggest, because they have failed to respect the importance of the dependency relationship. A view of society as consisting of nested dependencies, so constituted as to provide all with the means to achieve functioning that respects the freedom and relatedness of all citizens, is a view that can only emerge now, as women taste the fruits

unlikely that the “socially constructed role of mother” will ever change to the extent that women will not continue to perform significantly more care work than men.¹⁹ Given this reality, women will not be able to achieve “justice” within the structures created on the foundations of traditional liberal theory. For this reason, the dependency theorists find it necessary to construct a new theory of justice, one that recognizes the value of the care work being performed by women and that prevents them from being disadvantaged by their performance of such work.²⁰

At this point, it is worth spending some time considering what these feminist theorists mean when they talk about “justice.” I do not think they are thinking about justice in terms as broad as the classical categories of ‘distributive,’ ‘commutative,’ or ‘retributive’ justice.²¹ In the writings with which I am concerned, these theorists are writing as “feminists,” rather than political philosophers in the abstract. Although the content of this term is notoriously amorphous,²² I think it is fair to say that, fundamentally, feminism consists of “an organized way of thought and action that gives special attention to

of an equality fashioned by men—and find it wanting.

Id.; see also Mary Becker, *Care and Feminists*, 17 WIS. WOMEN’S L.J. 57, 71 & n.72 (2002) (citing studies emphasizing the rewarding nature of motherhood).

¹⁹ See FINEMAN, *supra* note 5, at 171. Fineman states the following:

There is no known society in all of human history in which care work went from being women’s work to equally divided between the sexes. . . . Perhaps an equal division of care work might be possible in the future. Who can say? Even if it is, however, we need alternative strategies for the short term, ways in which women’s well being can be improved and inequality lessened even though women continue to do most caretaking work.

Id.; see also Joan Williams, “*It’s Snowing Down South*”: *How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 828 (2002); Becker, *supra* note 18, at 93.

²⁰ See Schultz, *supra* note 17, at 1902–03 (describing ways in which women can create value in the care work that they provide).

²¹ See generally JOSEF PIEPER, *THE FOUR CARDINAL VIRTUES* 43–113 (1966) (explaining justice, one of the four Cardinal virtues).

²² For two examples of the many possible ways in which feminists can disagree about the meaning of the term, I recommend the collection of essays in *WOMEN IN CHRIST: TOWARD A NEW FEMINISM* (Michele M. Schumacher ed., 2003) [hereinafter *WOMEN IN CHRIST*], and the exchange in the following three articles: Elizabeth Fox-Genovese, *Catholic and Feminist: Can One Be Both?*, 2 LOGOS: J. CATH. THOUGHT & CULTURE 11 (1999); Corrine Patton, *Catholic and Feminist: We Are Called to Be Both*, 2 LOGOS: J. CATH. THOUGHT & CULTURE 27 (1999); and Elizabeth Fox-Genovese, *Response to Corrine Patton*, 2 LOGOS: J. CATH. THOUGHT & CULTURE 39 (1999).

removing obstacles to the full development of women.”²³ Disagreements within feminism stem from differing convictions about what the obstacles are or how to overcome them. Given that the primary agenda for the dependency theorists is the advancement of women, when they talk about reforming the theory of justice, they are typically talking about addressing those aspects of our social or political systems that represent unfairness toward women, as opposed to men.

There are two steps to the project of the dependency feminists. First, they must argue that caregiving is a good that should be accorded a higher social value than is currently the case. Second, they must consider the specific ways in which society should recognize that higher value. With respect to the first argument, the dependency theorists generally argue that raising children benefits the whole of society by ensuring new generations of healthy, capable citizens and workers.²⁴ In developing this argument, some stress its economic aspects in claiming that the current situation, in which mothers pay the disproportionate cost of this benefit, allows our market institutions, as well as men in general and even childless women, to be “‘free-riders’ appropriating the labor of the caretaker for their own purposes.”²⁵ Others focus more on the argument’s philosophical aspects, for example arguing that “‘facilitating . . . care is a core component of a governmental ‘formative project’ to foster persons’ capacities for democratic and personal self-government, to secure free and equal citizenship, and, thereby, to help them live good lives.”²⁶ Still others focus on the effect of caregiving on the development of healthy and morally sound members of society.²⁷

²³ Prudence Allen, *Can Feminism Be a Humanism?*, in *WOMEN IN CHRIST*, *supra* note 22, at 251, 284.

²⁴ See Eichner, *supra* note 13, at 1312–13.

²⁵ *Id.* at 1312.

²⁶ Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 *CHI.-KENT L. REV.* 1673, 1688 (2001).

²⁷ MONA HARRINGTON, *CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS* 49 (1999) (citing TRONTO, *supra* note 2, at 167). Mona Harrington writes:

We need to elevate care to this level of importance for the basic reason that it is essential to human health and balanced development. It is also crucial to developing human moral potential, to instilling and reinforcing in an individual a sense of positive connection to others. And it is this sense of connection that makes possible the whole range of mutual responsibilities that allow the people of a society to respect and work toward common goals.

It is in the second step of the argument that the dependency theorists find it necessary to confront the notion of “justice.” A society based on traditional liberal theories of justice could effectuate this re-valuation of dependency care simply by subsidizing women while they are caring for their children in the home. Employers could demonstrate respect for the social value of childcare, for example, by making it easy for women who become pregnant to quit their jobs to pursue the socially valuable work of childcare, and providing bonuses to men who have children. Governments could demonstrate respect for the social value of childcare by increasing direct and indirect subsidies for women who quit their jobs to engage in childcare. Such an outcome would be entirely consistent with a notion of justice that rests on a commitment to formal equality. Women without significant dependency-care obligations could be treated just like men without significant dependency-care obligations. Both employers and the government could support structures and laws that protected the equal treatment of these equals. Women (or men) with significant dependency-care obligations would be accorded respect, in the form of financial subsidy for their dependency-care work, but need not be treated like either men or women without any such obligations, since they are not “equal” in terms of their ability to provide uninterrupted labor.

Recognizing this possibility, the dependency theorists argue that the traditional equality-based notion of justice should be replaced by a dependency-based notion of justice.²⁸ This new notion of justice begins with the conviction that society should properly value the services of caregivers. Instead of harnessing that notion with the demand of strict equality of treatment, it attempts to place that idea into a construct that accommodates generosity in treatment of people based on the needs of their dependents. As Mary Becker argues:

An abstract commitment to equality, understood as treating similarly those similarly situated, will do little to help eliminate real social inequalities, since those who are unequal (the rich

As political theorist Joan Tronto puts it, thinking about care seriously, recognizing that everyone at different times is both a giver and a receiver of care, underscores for people the *fact* of their personal and social interdependence. And, she says, this insight can enhance a commitment to the responsibilities of democratic citizenship.

Id.

²⁸ See, e.g., KITTAY, *supra* note 2, at 1.

and the poor, the able and the disabled, women who are caretakers as well as workers and men who are primarily workers) will not be similarly situated. On the other hand, a commitment to help those in need can translate into an obligation of those who are best off to help those in far different circumstances because of “shared fellow feeling.” To the extent that such empathy actually exists, there will be a commitment to doing something despite, indeed because of, differences.²⁹

The dependency-based theory of justice advocates more than just subsidizing female caregivers; it also supports the much more difficult work of restructuring workplaces and social structures to accommodate child raising and other forms of dependency care to allow mothers to continue to participate in the public sphere. The rationale behind such support would be our social consensus about two things: first, that child raising is a public good; and second, that we are justified in making accommodations for caregivers that we would *not* make for other workers. Such a rationale recognizes the reality that “children [and some of the elderly and disabled] are human beings in need who are not capable of supporting themselves.”³⁰ It is precisely in order to create such a social consensus that the dependency theorists have embarked on their critique of the dominant liberal political theory, exalting only the values of autonomy. In the words of Mona Harrington, we need to “add care to the pantheon of national social values . . . to assure good care to all members of the society should become a primary principle of our common life, along with the assurance of liberty, equality, and justice.”³¹

The dependency theorists translate these general principles into specific calls for changes to various social structures that would enable mothers to engage in care work without undue penalties to career or financial security. These proposals include changes to welfare and tax policies to directly subsidize unpaid childcare work by mothers,³² paid maternity leave and guarantees of job protection while on maternity leave,³³ and more

²⁹ Becker, *supra* note 18, at 60.

³⁰ *Id.* at 83.

³¹ HARRINGTON, *supra* note 27, at 48.

³² See Becker, *supra* note 18, at 59–60, 105, 108–09 (proposing family allowances, as offered in France); ANN CRITTENDEN, THE PRICE OF MOTHERHOOD 186, 201, 265–66 (2001) (criticizing the United States’ tax policy).

³³ See CRITTENDEN, *supra* note 32, at 259; KITTAY, *supra* note 2, at 134; WILLIAMS, *supra* note 4, at 112.

radical proposals to restructure the workplace itself to permit mothers (and, incidentally, also fathers) to spend significant time caring for their families without undue penalties in career advancement.³⁴

The dependency-based theory of justice was developed in this particular context of feminist theory, with the agenda of enabling full participation of women in all social structures. Some writers, however, have begun attempting to apply the notion to more general contexts. I will now turn to a discussion of two of these writers: first, the dependency feminist Robin West; and second, the philosopher Alisdair MacIntyre.

B. *Generalizing the Dependency-Based Theory of Justice*

1. Robin West

West begins her project of “re-imagining justice”³⁵ generally with what I find to be an eminently pragmatic and useful conception of “justice” for our particular purposes as lawyers. She asks, “What do we mean by *legal* justice; the justice we hope law promotes? What is the justice that lawyers and judges, peculiarly, are professionally committed to pursue, the virtue around which, arguably, the legal profession and the individuals within it have defined their public lives?”³⁶ This notion of justice does not correspond precisely to the classical categories of “distributive,” “social,” and “retributive” justice; rather, it is a more pragmatic concept, the ideal “to which we urge our students to dedicate themselves.”³⁷ After bemoaning the lack of legal scholarship fleshing out this concept, she offers the proposition that “legal justice,” as practically understood by lawyers in the United States today, encompasses a commitment to three notions: the rule of law, a regime of rights, and formal equality.³⁸

³⁴ Examples include instituting mandatory thirty-hour work weeks for all workers, amending the Fair Labor Standards Act to eliminate the exemption from overtime pay requirements for managerial workers for all work over thirty to thirty-five hours per week, creating non-marginalized alternative work schedules, and instituting flextime or shorter work hours without career advancement penalties for persons with caregiving responsibilities. Becker, *supra* note 18, at 81; CRITTENDEN, *supra* note 32, at 260–61; WILLIAMS, *supra* note 4, at 92, 111.

³⁵ WEST, *supra* note 9, at 1.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1–2.

West argues that, over the past thirty years, one particular conception of each of these three notions has come to dominate legal theory.³⁹ In each case, this dominant conception is flawed, giving rise to an inadequate interpretation of the virtue of legal justice. She proposes an alternative interpretation of each of these three notions, leading, she argues, to a more progressive notion of “legal justice.”⁴⁰

The idea of dependency is only relevant to West’s discussion of the second and third notions.⁴¹ Let us first examine how she incorporates the dependency concept in her discussion of the contemporary liberal rights theory. She describes the contemporary American “liberal-constitutional understanding of rights” as relying on the state’s constitution to enumerate certain rights upon which the state may not impinge; these enumerated rights secure various aspects of our shared human nature as autonomous, rational individuals, and give each of us an equal right to things such as free speech, free exercise of religion, privacy, property, and equal protection of the law.⁴² West agrees with much of the “rights critique” emerging in the past twenty-five years in the legal academies of the United States, England, Canada, and Australia.⁴³ Because she sees value in retaining the rhetoric of rights, however, she proposes to address the flaws by re-conceptualizing “rights,” rather than rejecting them.⁴⁴

West identifies three contemporary critiques of the dominant rights theory, with which she largely agrees.⁴⁵ First, the

³⁹ *See id.* at 2–3.

⁴⁰ *Id.* at 3–4.

⁴¹ Briefly, West describes the contemporary American conception of the rule of law to consist of “fidelity to the existing rules of law, and of consistency regarding their application,” by the judges called upon to apply those rules. *Id.* at 13. It is the rule of law that constrains judges to finding, interpreting, and applying the law, rather than creating the law. *Id.* Courts are required to resolve cases on the basis of agreed-upon rules, applied in a neutral, apolitical manner. West criticizes both the contemporary critics and advocates of this notion of rule of law, at least those in the legal academy, for sharing the conviction that judicial fidelity to law is the *only* relevant aspect of the rule of law. *See id.* at 15. She argues for a wider understanding of rule of law concept. *See id.* at 16. She recaptures two important elements that have been ignored by the legal academy in recent years: Thomas Hobbes’ notion that it represents “a commitment to the political process and its legal fruits over natural warfare,” and Thomas Paine’s notion that it represents a commitment to representative democracy. *Id.* at 55.

⁴² *Id.* at 71–72.

⁴³ *See id.* at 73.

⁴⁴ *See id.* at 74 (“We need to mend it, not end it.”).

⁴⁵ *See id.* at 74–75 (stating the reasons critics feel that rights theory frustrates

dominant theory is entirely negative with respect to the obligations of states in that it only limits states, rather than imposing any affirmative obligations upon them. Thus, it is “fundamentally at odds with any purported state obligation to ensure the natural preconditions of a good society.”⁴⁶ Second, the negativity of the dominant rights theory also “limits the states’ power to fight the damaging consequences of private sphere subordination,” leaving the powerful free to exploit the powerless in the private sphere.⁴⁷ Third, the dominant rights theory is based on a fundamentally false conception of human nature as “self-sufficient, idiosyncratic, autonomous, free-thinking, rational, insular and atomistic.”⁴⁸

This disregard for the relational, social aspect of human nature has a number of negative consequences.⁴⁹ It undermines peoples’ sense of communal solidarity and responsibility for others’ welfare.⁵⁰ It ignores the human capability for relationships as being as worthy an object of protection through rights as the human capability for autonomy.⁵¹ Further, it prevents the state from supporting any particular conception of a “good society,” since each individual’s conception of a “good life” is protected from state interference. Finally, by resting on a fundamentally false understanding of human nature,⁵² it negatively affects society’s moral sense.⁵³ West writes:

We are not insular atoms, sufficient unto ourselves wanting nothing but to be left alone. Rather, for substantial parts of our lives, we are dependent on the caregiving of others for our very survival, and throughout our lives, we remain interdependent social beings. These basic social and biological facts of life, furthermore, inform not just our self-understanding, but our moral sense as well: we have moral obligations to the weak and to those dependent on us, and we know we have those moral obligations, because we know we have been, and will be, weak and dependent ourselves. We sympathize with others in crisis or in need, and we depend on their sympathetic response when

the goals of society).

⁴⁶ *Id.* at 76–77.

⁴⁷ *See id.* at 77.

⁴⁸ *Id.* at 81.

⁴⁹ *See id.*

⁵⁰ *See id.* at 79.

⁵¹ *See id.* at 80.

⁵² *See id.*

⁵³ *See id.* at 81.

we are in need ourselves. We build community because we are communal creatures who depend on it. It is, therefore, not surprising that the liberal world, justified by a false understanding of who we are, is so apparently morally barren. It is at war with [our] moral intuitions about the way in which we ought to live, because it is at war with the true conception of our nature that informs our moral sense.⁵⁴

Rather than entirely discard rights theory, however, West urges a correction of the flaws noted above.⁵⁵ She argues that there is no logical reason that rights *must* be viewed only as constraints on state action; rights could be seen as compelling state action.⁵⁶ Furthermore, she argues that there is no logical reason that rights *must* be based on this falsely atomistic conception of human nature; rights could be recognized that respect both our individuality and our social nature.⁵⁷ She argues that there are many reasons to attempt these corrections to rights theory.⁵⁸ She claims that there is a rhetorical value to the language of rights, in that it prompts the state to think in terms of morality.⁵⁹ More pragmatically, she argues that abandoning rights talk in legal scholarship would prevent development of a scholarship of positive rights in areas that could benefit from this jurisprudence, such as welfare, education, labor, environmental protection, and caregiving.⁶⁰

This lack of scholarship could also have doctrinal costs if practicing lawyers are left with nothing but policy arguments to counter the already well-developed *negative* rights arguments in courts of law; specific rights will always trump general policies.⁶¹ Finally, West worries that the lack of positive rights jurisprudence has left the field open for the current dominance in legal analysis in general, not just in rights discourse, of the economic cost-benefit analysis.⁶²

⁵⁴ *Id.*

⁵⁵ *See id.* at 82–83 (“[T]he rights critics’ conclusion—that we should abandon, rather than reform, rights—is overbroad . . .”).

⁵⁶ *See id.* at 83.

⁵⁷ *See id.*

⁵⁸ *See id.* at 88–89 (stating that there are many costs associated with abandoning rights as opposed to just correcting them).

⁵⁹ *See id.* at 88.

⁶⁰ *See id.* at 88–89.

⁶¹ *See id.* at 89–91.

⁶² *See id.* at 91–92.

For these reasons, she proposes a reconstruction of the rights tradition which would embrace positive and relational rights, as well as negative and individualist rights; the liberal state employing this full panoply of rights could conceive of them as protecting *both* human autonomy and human capabilities.⁶³ The major substantive difference in West's reconceived rights theory would be the addition of a number of fundamental rights to the "core" rights that a state would have the duty to protect. In addition to the current liberal core rights to autonomy, contract, and property, she would add welfare rights, rights to work, a right to security against private violence, and—most interestingly for our purposes—the "right to provide care."⁶⁴

This new rights theory would be based on a recognition that human nature inevitably involves periods of dependency (always at the beginning and often near the end of life), and that most human lives also involve even longer periods in which others (children or aged parents) are dependent on them.⁶⁵ Thus, this new rights regime would need to offer rights that protect us not only as autonomous individuals, but also when we are in the dependent state, and protect those caring for us when we are in that dependent state.⁶⁶ West writes:

[W]hen we are acting as caregivers, we need not rights that falsely presuppose our autonomy and independence, but rights that frankly acknowledge our relational reality: when infants, children, or aging parents are dependent upon us, we are dependent upon others for support and sustenance. People who are providing care to dependants are themselves in need of assistance from others, and caregivers will eventually become, again, dependents in need of care themselves. That circle of mutual need, caregiving, dependency, and assistance, is as much a part of our social contract, as is the individual's relinquishment of rights to self-defense in exchange for a right to protection against violence. A rights tradition that forthrightly acknowledged the natural reality of our inescapable dependence on each other—to say nothing of our social nature—

⁶³ See *id.* at 92. West adopts Martha Nussbaum and Amartya Sen's conception of the "good society" that would support such a rights theory as one in which "citizens possess those fundamental capabilities which are themselves essential to the enjoyment of a fully human life." *Id.*

⁶⁴ *Id.* at 92–94.

⁶⁵ *Id.* at 94.

⁶⁶ *Id.* at 95.

would give pride of place to “relational rights” that would protect the caregiver, and hence the care bestowed in dependency relationships.⁶⁷

West argues that a right to care should be recognized for the same reasons that have traditionally justified recognition or construction of rights in liberal, democratic societies: first, a recognition that whatever is protected by the right is likely to be systematically undervalued by the standard political or economic process; second, a belief that failure to recognize the right will lead to a severe adverse effect on some historically subordinated group; and third, to underscore our most fundamental and shared inter-generational values.⁶⁸ All three apply with respect to the right to care.⁶⁹

Caregiving will always be undervalued in the market, because the motivation to engage in caregiving stems from an ethical, emotional commitment, rather than any sort of rational decision.⁷⁰ Neither the market nor the political process has any incentive to properly value caregiving, since caregivers will not abandon that work, no matter what the cost to the caregiver.⁷¹ Moreover, women constitute the group that has historically assumed the work of caregiving, and they continue to suffer the inegalitarian adverse consequences of the state’s failure to protect them in doing so.⁷² Finally, the right of care is necessary to “better express our self-understanding as a species for whom caregiving is a central life activity We flourish both individually and communally when decent care is provided, and we suffer when it is not.”⁷³

West thinks that the practical consequences of the recognition of such a right could be significant.⁷⁴ It could provide judicial protection against state actions that endanger caregiving (such as welfare legislation that penalizes parents who do not work full time), and provide positive rights to state support of caregiving labor (such as expanding the support provided by the

⁶⁷ *Id.* (footnote omitted).

⁶⁸ *See id.*

⁶⁹ *Id.* at 97.

⁷⁰ *Id.* at 95–96.

⁷¹ *Id.*

⁷² *Id.* at 96.

⁷³ *Id.*

⁷⁴ *See id.* at 97.

Family Medical Leave Act).⁷⁵ West also thinks that a constitutional basis for such a right might be found in the substantive due process clause, which, she argues, prominently included a “right to parent” until the more restrictive reading following *Eisenstadt v. Baird*.⁷⁶

To summarize, West uses the notion of dependency in two places in her critique of the dominant theory of rights. First, her recognition that human nature inevitably involves extended periods of dependency and of the care of dependents⁷⁷ is the basis for a critique of the flawed conception of human nature upon which the dominant rights theory is based.⁷⁸ Second, it is the justification for adding a “right to provide care” to the panoply of “core rights” that ought to be recognized by a new rights theory.⁷⁹

Let us now turn to West’s discussion of the third aspect of legal justice—commitment to formal equality. West describes this commitment on the part of contemporary legal theorists as a commitment to a fundamental form of legal reasoning—the analogical reasoning that we sometimes refer to as “thinking like a lawyer.”⁸⁰ This type of reasoning forms the basis of the primary distinction between the role of judges (and the law)—to make decisions based on categorizing new situations as being like or not like past situations settled by law—and the role of legislatures (and politics)—to shape laws based on policy judgments about the goals to be attained in the future.⁸¹ The idea that it is possible or desirable to engage in this sort of reasoning has been criticized by legal realists, critical legal scholars, and identity theorists.⁸² They argue that this is not possible to do in a genuinely neutral manner; some preconceived “yardstick” is always applied to the categorization of any new situation as being “like” or “not like” a past situation.⁸³

⁷⁵ *Id.*

⁷⁶ 405 U.S. 438 (1972), cited in WEST, *supra* note 9, at 97 & n.59; see also WEST, *supra* note 9, at 97 & n.60 (collecting early cases defining “right to parent” from its inception).

⁷⁷ See WEST, *supra* note 9, at 94–97.

⁷⁸ See *id.* at 92.

⁷⁹ *Id.* at 94.

⁸⁰ *Id.* at 116.

⁸¹ *Id.*

⁸² *Id.* at 109.

⁸³ *Id.* at 124.

Again, West argues that while there is some validity to this criticism, it would be wiser to reform the notion of formal equality than to discard it altogether.⁸⁴ She argues that the notion of formal equality rests on a sound moral intuition about the law, regardless of how imperfectly that intuition has been applied.⁸⁵ She does not think that either of the two dominant contemporary defenses of formal equality adequately captures that moral intuition because, again, each is based on a flawed understanding of human nature.⁸⁶

One of these contemporary defenses of formal equality that West identifies and critiques is “traditionalism.”⁸⁷ This school sees formal equality as playing a significant role in preserving culture, “the rules, traditions and relations that structure social life.”⁸⁸ Formal equality respects the nature of the human being as having an identity that is “an amalgam of his social and cultural identities” by respecting and preserving traditional social arrangements and relationships.⁸⁹ West rejects the idea that our identity is so tightly tied to our traditional social roles; she does not think that this conception of “formal equality” provides the necessary tools to break free of the constraints of such roles.⁹⁰

It is in her critique of the alternative contemporary defense of “formal equality” that West sees, again, a role for dependency theory.⁹¹ This is the utilitarian or economic argument for a commitment to formal equality.⁹² This defense rests on the notion that human nature shares only one trait—we are all self-aware, self-interested individuals capable of maximizing our own self interest.⁹³ Since the only thing we all share is this self-interest, maximizing our ability to make the choices we need to serve this self interest is the primary goal of law.⁹⁴ Formal

⁸⁴ *Id.* at 129–30.

⁸⁵ *See id.*

⁸⁶ *See id.* at 130 (discussing an example of the flawed understanding of human nature through a passage in Huck Finn).

⁸⁷ *Id.* at 139 (citing Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1041 (1990)).

⁸⁸ *Id.* at 139.

⁸⁹ *Id.* at 140.

⁹⁰ *See id.* at 146.

⁹¹ *See id.* at 145.

⁹² *See id.* at 144.

⁹³ *See id.* at 135.

⁹⁴ *Id.*

equality serves this same end; it maximizes our freedom by increasing law's predictability.⁹⁵ West asserts that this conception of human nature, like the conception of human nature underlying the contemporary rights theory, is flawed because it ignores the fact that humans do share something in addition to the desire to maximize self interest.⁹⁶ All humans share "a lengthy period of infantile dependency, a primal desire to form powerful human attachments to meet the needs created by that dependency, as well as vulnerabilities that result from those attachments and from the longing for them."⁹⁷

West proposes what she calls a humanistic account of formal equality. She describes such a proposition as follows:

By "treating likes alike" through law, we recognize and reaffirm a universal and complex human nature, and the equal moral worth of all who fall within the same legal regime. When we recognize someone as "like us," and therefore entitled to like treatment by law, we acknowledge that shared humanity, and acknowledge the inclusion of all in a circle constituted by mutual recognition and sympathy.⁹⁸

In this account, our

[s]hared, universal traits . . . are not limited to a capacity for choice, our desire to individuate ourselves through the exercise of our individual will, and an ability to bargain and profit through unfettered markets. We share our mortality, vulnerability to sickness and pain, needs for nurturance, a lengthy period of infantile total dependency, and a capacity for sympathetic engagement with the wellbeing of others, to name a few. We share social as well as individual needs, a capacity for communal life as well as for self-assertion.⁹⁹

West argues that the moral externalities identified by the other two defenses of formal equality—tradition and liberty—are not sufficient to withstand the critiques of formal equality.¹⁰⁰ She therefore proposes a humanistic account of formal equality, which supplements tradition and liberty with: (1) the moral principle of an "egalitarian regard for all, regardless of status," and (2) the moral principle she terms "ethical cosmopolitanism,"

⁹⁵ *Id.* at 135–36.

⁹⁶ *See id.* at 145.

⁹⁷ *Id.*

⁹⁸ *Id.* at 149–50.

⁹⁹ *Id.* at 152.

¹⁰⁰ *See id.* at 156.

consisting in a recognition of the worth of all, regardless of their nationality.¹⁰¹

To summarize, just as she did in her account of the rights theory, West uses the notion of dependency in two places in her critique of the dominant theory of formal equality.¹⁰² First, she uses it as the basis for a critique of the flawed conception of human nature upon which one of the dominant contemporary defenses of the concept of formal equality is based.¹⁰³ Second, she builds recognition of the shared dependency of all humans into her new humanistic account of formal equality: All humans are of equal moral worth by virtue of their shared experiences of dependency, as well as their shared experiences of autonomy.¹⁰⁴

2. Alasdair MacIntyre

In *Dependent Rational Animals*, MacIntyre is not concerned with West's pragmatic concept of "legal justice," or even with a theory of "justice" at all. Rather, he is interested in the following question: "[W]hat difference to moral philosophy would it make, if we were to treat the facts of vulnerability and affliction and the related facts of dependence as central to the human condition?"¹⁰⁵ Although MacIntyre does not discuss conceptions of justice, his account of a dependency-based theory of moral philosophy includes a discussion of the types of political and social structures necessary to achieve the common good which such a moral philosophy would ultimately serve.¹⁰⁶ The role of dependency in MacIntyre's discussion demonstrates some striking similarities and equally interesting differences from its role in West's theory of justice.¹⁰⁷ A comparison of these roles provides another useful framework for considering how the concept of dependency can be generalized beyond the context of motherhood.

¹⁰¹ *Id.* at 156.

¹⁰² *See supra* notes 96–101 and accompanying text.

¹⁰³ *See supra* notes 96–97 and accompanying text.

¹⁰⁴ *See supra* notes 98–101 and accompanying text.

¹⁰⁵ MACINTYRE, *supra* note 7, at 4.

¹⁰⁶ *See id.* at 129–30, 144–46 (setting forth three conditions that must be satisfied before political and social structures can effectively realize the potential for common good in relationships of dependence, and exploring the possibility for the realization of this common good in the context of local communities).

¹⁰⁷ *See id.*; *see also infra* notes 149–67 and accompanying text.

MacIntyre begins his book with the idea that a correct understanding of human nature requires a “reassertion of human animality.”¹⁰⁸ He draws on both Aristotle and Aquinas to support his claim that human nature is primarily an embodied, and therefore animal, nature.¹⁰⁹ Quoting Aquinas, he reminds us: “Since the soul is part of the body of a human being, the soul is not the whole human being and my soul is not I.”¹¹⁰ MacIntyre critiques a host of philosophical arguments suggesting bright-line distinctions between humans and other animals, all focusing on aspects of human language as being indicative of the ability to hold beliefs, and thus marks of “human” as opposed to animal natures.¹¹¹ MacIntyre thinks it is important to address these arguments in order to “undermine the cultural influence of a picture of human nature according to which we are animals and in addition something else. We have, on this view, a first animal nature and *in addition* a second distinctively human nature.”¹¹² MacIntyre argues that the distinction between animals and humans should be viewed not as a bright line, but rather as a spectrum, with the “tipping point” on the spectrum into “human” nature being the development of the ability to reflect on and pass judgment on the reason that guides one’s actions—the capacity for independent practical reasoning.¹¹³

MacIntyre argues that human flourishing consists of the full development of this capacity for independent practical reasoning.¹¹⁴ The concept of human dependency becomes significant for MacIntyre when he considers the process by which a human matures into an independent practical reasoner.¹¹⁵ One

¹⁰⁸ MACINTYRE, *supra* note 7, at 5.

¹⁰⁹ *See id.* at 5–8.

¹¹⁰ *Id.* at 6 (quoting ST. THOMAS AQUINAS, *COMMENTARY ON PAUL’S FIRST LETTER TO THE CORINTHIANS*, pt. XV, Q, art. 1, at 11).

¹¹¹ *See id.* at 35–39 (arguing that animals have perception-based, indeterminate beliefs that arise from prelinguistic and nonlinguistic distinctions, and that similar indeterminate beliefs are also observable in humans, particularly in prelinguistic children).

¹¹² *Id.* at 49–50.

¹¹³ *Id.* at 57–58.

¹¹⁴ *See id.* at 67, 71 (stating that humans must be able to make independent, rationally justifiable judgments about what is best for them in order to flourish as human beings).

¹¹⁵ *See id.* at 73 (“The history of any self making this transition is of course not only a history of that particular self, but also a history of those particular others whose presence or absence, intervention or lack of intervention, are of crucial importance in determining how far the transition is successfully completed.”).

of the significant steps in this process is acquiring the ability to distance oneself from one's present desires and the subsequent ability to evaluate those desires objectively.¹¹⁶ This capacity cannot be acquired, MacIntyre argues, without the help of others.¹¹⁷ For one thing, being an independent practical reasoner requires mastery of social relationships: "[T]o learn how to become an independent practical reasoner is to learn how to cooperate with others in forming and sustaining those same relationships that make possible the achievement of common goods by independent practical reasoners."¹¹⁸

Further, during the process of this maturation, we will inevitably experience periods during which we will be dependent on others for practical support, such as for "nursing, feeding, clothing, nurturing, teaching, restraining, and advising."¹¹⁹ This is certainly true during childhood, and MacIntyre argues that it will also be true at many other times during a person's life.¹²⁰ He writes:

We need others to help us avoid encountering and falling victim to disabling conditions, but when, often inescapably, we do fall victim, either temporarily or permanently, to such conditions as those of blindness, deafness, crippling injury, debilitating disease, or psychological disorder, we need others to sustain us, to help us in obtaining needed, often scarce, resources, to help us discover what new ways forward there may be, and to stand in our place from time to time, doing on our behalf what we cannot do for ourselves Disability is a matter of more or less, both in respect of degree of disability and in respect of the time periods in which we are disabled. And at different periods of our lives we find ourselves, often unpredictably, at very different points on that scale. When we pass from one such point to another we need others to recognize that we remain the same individuals that we were before making this or that transition.¹²¹

¹¹⁶ See *id.* at 69 (explaining that in order to be practical reasoners, humans must be able to question whether a contemplated action is in their best interest, and that this questioning in turn requires that humans be able to distance themselves from primitive and infantile desires).

¹¹⁷ See *supra* note 115.

¹¹⁸ MACINTYRE, *supra* note 7, at 74.

¹¹⁹ *Id.* at 73.

¹²⁰ See *id.* at 73–74.

¹²¹ *Id.*

After concluding that human flourishing consists of developing the capacity for independent practical reasoning, MacIntyre then turns to the question of what kind of social relationships are necessary to sustain this flourishing, and what the virtues are that will be necessary to sustain these sorts of relationships.¹²² At this point, his critique of moral philosophy sounds much like West's critique of liberal rights theory and formal equality. Like West, he argues that most moral philosophy begins with an incomplete notion of human nature.¹²³ MacIntyre argues that most moral philosophy presupposes mature, independent, practical reasoners with adult relationships, and ignores childhood, old age, disability, and dependence.¹²⁴ Since practical reasoning is, however, by its nature, reasoning *with* others in the context of the specific social relationships in which one finds oneself, it cannot be learned and perfected except from within the network of those social relationships.¹²⁵ MacIntyre argues:

The making and sustaining of those relationships is inseparable from the development of those dispositions and activities through which each is directed towards becoming an independent practical reasoner. *So the good of each cannot be pursued without also pursuing the good of all those who participate in those relationships.* For we cannot have a practically adequate understanding of our own good, of our own flourishing, apart from and independently of the flourishing of that whole set of social relationships in which we have found our place.¹²⁶

This community, this network, cannot flourish as a whole if it does not recognize the need to support those who are *not* capable of independent practical reasoning—those who are dependent, “the very young and the very old, the sick, the injured, and the otherwise disabled.”¹²⁷ He writes:

Each of us achieves our good only if and insofar as others make our good their good by helping us through periods of disability

¹²² *Id.* at 81.

¹²³ *See id.* (explaining that the starting point should be taking a “detailed account of the dimensions of a child’s development” as opposed to “relationships of the adult world”).

¹²⁴ *See id.* at 81–82.

¹²⁵ *Id.* at 107–08

¹²⁶ *Id.* (emphasis added).

¹²⁷ *Id.* at 108–09.

to become ourselves the kind of human being—through acquisition and exercise of the virtues—who makes the good of others her or his good, and this not because we have calculated that, only if we help others, will they help us, in some trading of advantage for advantage.¹²⁸

For MacIntyre, though, the notion of dependency is not significant only because of the fact that it makes the support of others so essential.¹²⁹ The experience of dependency is also crucial to the lessons one has to learn to develop independent practical reasoning.¹³⁰ The development of independent practical reasoning is partially the development of the capacity to navigate relationships. Thus, the process by which one learns independent practical reasoning is, in fact, the same process by which one learns about human flourishing and what kinds of relationships structure a flourishing communal life.¹³¹ For both of these lessons, it is crucial to draw on what one has learned in stages of dependence, as well as in stages of independence.¹³²

MacIntyre argues that the traditional conceptions of what virtues are necessary to support the development of independent practical reasoners are too narrow.¹³³ The traditional virtues of justice, temperance, truthfulness, and courage are all virtues in support of our independence.¹³⁴ MacIntyre proposes that we also recognize a set of virtues that support our dependence, what he calls “the virtues of acknowledged dependence.”¹³⁵ He does not think that conventional understandings of virtues accurately capture this category of virtues.¹³⁶ He characterizes them generally as a “just generosity,” both in giving and in receiving.¹³⁷ He says that the concept is captured closely by the Lakota expression “wancantognaka,”

¹²⁸ *See id.* at 108.

¹²⁹ *Id.*

¹³⁰ *Id.* at 108–09.

¹³¹ *Id.* at 113.

¹³² *Id.* (“[S]ince for a human being to flourish unqualifiedly *qua* human being, it is her or his life as a whole that must flourish, the individual has to learn through experience about the places both of independence and of dependence on others in the different stages of a flourishing life.”).

¹³³ *See id.* at 119–20.

¹³⁴ *Id.*

¹³⁵ *Id.* at 120.

¹³⁶ *See id.*

¹³⁷ *Id.* at 122.

the virtue of individuals who recognize responsibilities to immediate family, extended family, and tribe and who express that recognition by their participation in ceremonial acts of uncalculated giving, ceremonies of thanksgiving, of remembrance, and of the conferring of honor Because I owe it, to fail to exhibit it is to fail in respect of justice; because what I owe is uncalculated giving, to fail to exhibit it is also to fail in respect of generosity.¹³⁸

It is important that the virtue of receiving, as well as giving, in this spirit, is acknowledged.¹³⁹ He argues that these virtues must include the following:

knowing how to exhibit gratitude, without allowing that gratitude to be a burden, courtesy towards the graceless giver, and forbearance towards the inadequate giver. The exercise of these latter virtues always involves a truthful acknowledgment of dependence. And they are therefore virtues bound to be lacking in those whose forgetfulness of their dependence is expressed in an unwillingness to remember benefits conferred by others For like virtues of giving, those of receiving are needed in order to sustain just those types of communal relationship through which the exercise of these virtues first has to be learned.¹⁴⁰

MacIntyre then turns to a discussion of the types of political and social societies that could embody these virtues and support his concept of human flourishing.¹⁴¹ He argues that such a society would have to satisfy three conditions.¹⁴² First, it would have to have political institutions for deliberation and decision-making by all independent reasoners on matters requiring communal consensus.¹⁴³ Second, its norms of justice would have to be consistent with the exercise of the virtues of just

¹³⁸ *Id.* at 120–21. He also cites Aquinas: “[W]hat the virtues require from us are characteristically types of action that are at once just, generous, beneficent, and done from pity.” *Id.* at 121. However, he prefers Aquinas’s term *miser cordia* to the English term “pity,” “to avoid the association . . . with condescension.” *Id.* at 123–24.

¹³⁹ *See id.* at 126–27 (“[T]o these virtues of giving must be added virtues of receiving . . .”).

¹⁴⁰ *Id.* at 126–27.

¹⁴¹ *See generally id.* at 129–46 (discussing the three necessary conditions in order to achieve the “types of political and social society that can embody those relationships of giving and receiving through which our individual common goods can be achieved”).

¹⁴² *See id.* at 129.

¹⁴³ *Id.*

generosity.¹⁴⁴ Finally, its political structures would have to make it possible for the concerns of those who have no or limited ability to engage in practical reasoning to be heard through proxies.¹⁴⁵ He writes:

What I am trying to envisage then is a form of political society in which it is taken for granted that disability and dependence on others are something that all of us experience at certain times in our lives and this to unpredictable degrees, and that consequently our interest in how the needs of the disabled are adequately voiced and met is not a special interest, the interest of one particular group rather than of others, but rather the interest of the whole political society, an interest that is integral to their conception of their common good.¹⁴⁶

MacIntyre does not think that any recent social or political philosophy helps us imagine that kind of a society, since it all focuses on either the nation-state or the family.¹⁴⁷ Neither has the capacity to recognize the conception of common good that is necessary to practice the virtue of just generosity.¹⁴⁸

3. Comparing West and MacIntyre

Both MacIntyre and West critique existing political theories for being based on false conceptions of human nature positing only fully rational, autonomous individuals; both insist that a correct account of human nature demands the acknowledgment of the reality of dependency as an inevitable condition of humanity.¹⁴⁹ MacIntyre, however, spends much more time than

¹⁴⁴ *Id.* at 129–130. Although [n]o . . . simple formulation will be capable of capturing the different kinds of norms that will be necessary for different kinds of just relationships . . . [b]etween independent practical reasoners the norms will have to satisfy Marx's formula for justice in a socialist society, according to which what each receives is proportionate to what each contributes.

Id.

¹⁴⁵ *Id.* at 130.

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* at 130–31.

If at this point we turn for assistance to recent social and political philosophy, we will be for the most part disappointed, since with rare exceptions work in that area ignores questions about the common goods of association and relationships that are intermediate between on the one hand the nation-state and on the other the individual and the nuclear family.

Id.

¹⁴⁸ *Id.* at 131.

¹⁴⁹ *See id.* at 119–28 (noting that “[t]he limitations and blindness of merely self-

West addressing the impact of conditions of dependency other than the temporary dependency of childhood. His critique is richer with respect to the experience of life-long dependency of those with congenital mental and physical disabilities, and the experience of temporary disability during the lifetime. In essence, he has been more successful at truly generalizing his critique, by envisioning a fuller panoply of human experiences to be acknowledged by a comprehensive political theory.

MacIntyre, like West, argues that our notion of “justice” needs to be reconsidered to incorporate some notion that arises out of our shared human condition of dependency.¹⁵⁰ Rather than characterizing this contribution as a right, or a gloss on our understanding of formal equality, though, MacIntyre suggests that it is an additional set of “virtues” that ought to be embedded in our norms of justice—the “virtues of acknowledged dependence.”¹⁵¹ He understands “just generosity” to include a recognition of the responsibility each of us has to support others in times of dependency and an attitude of gratitude for the support that others give us in our times of dependency.¹⁵²

More significant than the characterization of this missing component of justice as a right, an aspect of justice, or a virtue, are some other differences between West’s and MacIntyre’s theories. First, West constructs her theory from the perspective of the person giving the care,¹⁵³ while MacIntyre constructs his theory from the perspective of the person receiving the care.¹⁵⁴

interested desire have been catalogued often enough” and highlighting “the virtues of acknowledged dependence”); WEST, *supra* note 9, at 7 (discussing “rights of care” and “our mutual dependency”).

¹⁵⁰ See, e.g., MACINTYRE, *supra* note 7, at 119–28 (cataloguing the “three salient characteristics of the relationships that are informed by the virtue of just generosity”).

¹⁵¹ *Id.* at 120.

But if we are to understand the virtues as enabling us to become independent practical reasoners, just because they also enable us to participate in relationships of giving and receiving through which our ends as practical reasoners are to be achieved, we need to extend our enquiries a good deal further, by recognizing that any adequate education into the virtues will be one that enables us to give their due to a set of virtues that are the necessary counterpart to the virtues of independence, the virtues of acknowledged dependence.

Id.

¹⁵² See *supra* notes 126–40 and accompanying text.

¹⁵³ See *supra* notes 63–69 and accompanying text.

¹⁵⁴ See MACINTYRE, *supra* note 7, at 1–4.

For West, the notion of our shared human dependency is presented as an argument for all of humanity to recognize the *value* of caregiving work and to support the caregiver doing this work.¹⁵⁵ For MacIntyre, the notion of our shared human dependency is presented as an argument for all of humanity to recognize the *necessity of receiving* caregiving to the flourishing of all humans, and to encourage the continued provision of care.¹⁵⁶ Second, West's theory proposes recognition of a "right to *give* care," rather than the right to *receive* care.¹⁵⁷ West does not suggest anything like the "responsibility to care" which is central to MacIntyre's notion of "just generosity," or any obligation on the recipient to react in any particular way to the receipt of care or withholding of care.¹⁵⁸ The closest she comes is including in her humanistic account of formal equality the moral principle of an egalitarian regard for all, regardless of status,¹⁵⁹ but she does not go so far as to translate this "regard" into any concrete obligation.

Third, MacIntyre's theory reflects a much more empowered notion of the caregiver than West's.¹⁶⁰ MacIntyre essentially argues that all humans, and all human societies, need caregiving

¹⁵⁵ See *supra* notes 70–73 and accompanying text.

¹⁵⁶ See, e.g., MACINTYRE, *supra* note 7, at 1.

We human beings are vulnerable to many kinds of affliction and most of us are at some time afflicted by serious ills. How we cope is only in small part up to us. It is most often to others that we owe our survival, let alone our flourishing, as we encounter bodily illness and injury, inadequate nutrition, mental defect and disturbance, and human aggression and neglect. This dependence on particular others for protection and sustenance is most obvious in early childhood and in old age. But between these first and last stages our lives are characteristically marked by longer or shorter periods of injury, illness or other disablement and some among us are disabled for their entire lives.

Id.

¹⁵⁷ WEST, *supra* note 9, at 95 (emphasis added). She does, however, acknowledge that caregivers themselves are dependent and in need of care. See *id.* ("People who are providing care to dependents are themselves in need of assistance from others . . .").

¹⁵⁸ See *id.* Interestingly, she does argue that humans sense "moral obligations to the weak and to those dependent on us," *id.* at 81, and she uses these moral intuitions as the basis for part of her critique of the dominant rights theories, see *supra* text accompanying notes 84–97. She does not, however, attempt to translate this into any right to receive care.

¹⁵⁹ See WEST, *supra* note 9, at 19.

¹⁶⁰ See MACINTYRE, *supra* note 7, at 128 (arguing that humans' caring for each other is a means "through which our common good can be achieved").

to flourish.¹⁶¹ At times each of us will be the caregiver, and at times each of us will be the cared for.¹⁶² A just society will recognize that reality and support caregiving because it enables each one of us to flourish.¹⁶³ The recognition that we are all at times in need of care gives rise not only to the responsibility to *provide* care, but also the responsibility to be *grateful* for care.¹⁶⁴

While West does say at one point that recognizing a “right to care” would reflect a social consensus that individual and community flourishing requires care,¹⁶⁵ she focuses much more on how the besieged caregiver needs the protection of the “right to care” just to participate fully in society.¹⁶⁶ When arguing for this recognition of the “right to care,” she stresses the need to protect women from the inegalitarian effects of engaging in systematically undervalued care work.¹⁶⁷

These differences between MacIntyre and West might simply reflect their respective levels of engagement with the realities of caregiving,¹⁶⁸ or the influence of their respective “socially constructed” traditional gender roles, or even their different academic roles. West as a law professor might be more inclined to confront the realities of how existing legal structures affect actual women; MacIntyre as a philosophy professor might be more inclined to focus on abstract ideals.¹⁶⁹ The dissimilarities

¹⁶¹ See *id.* at 74 (“[T]o learn how to become an independent practical reasoner is to learn how to cooperate with others in forming and sustaining those same relationships that make possible the achievement of common goods . . .”).

¹⁶² See *id.* at 73 (stating that when we invariably become afflicted by “disabling conditions” we have no choice but to rely on others).

¹⁶³ See, e.g., *id.* at 1 (“It is most often to others that we owe our survival, let alone our flourishing . . .”).

¹⁶⁴ See *id.* at 126–27 (labeling gratitude one of the “virtues of receiving” care).

¹⁶⁵ See WEST, *supra* note 9, at 96.

¹⁶⁶ See *id.* at 95 (“[S]uch relational rights are nowhere mentioned in various constitutional documents . . . [b]ut they ought to be.”).

¹⁶⁷ See *id.* at 96 (“[F]amilial and economic institutions, if unchecked, will continue to undercompensate caregiving labor, and . . . women will be adversely impacted, as a group, by that practice.”).

¹⁶⁸ I know little about the personal life of either author, so I have no evidence to support this speculation.

¹⁶⁹ The philosopher Elizabeth Fox-Genovese articulated this idea in her criticism of the ways in which philosophers have taken up the challenge of Pope John Paul II to create a “new feminism.” Elizabeth Fox-Genovese, *Equality, Difference, and the Practical Problems of a New Feminism*, in WOMEN IN CHRIST, *supra* note 22, at 297. She writes:

Catholic and other Christian women have been taking up the challenge, although most have focused more upon the theory—philosophy and

might reflect a more significant difference in their theories, however. Let us turn now to the writings of Pope John Paul II in support of the dependency-based theory of justice, to see if they shed any light on this question.

II. POPE JOHN PAUL II'S WRITINGS IN SUPPORT OF A DEPENDENCY-BASED THEORY OF JUSTICE

A. *John Paul II's Support of Care Feminism*

Despite ongoing attempts by many to depict John Paul the Great as being opposed to feminism,¹⁷⁰ his writings throughout his pontificate demonstrate a profound respect and robust intellectual support for many of the arguments in support of caregivers on the agenda of dependency feminists.¹⁷¹ It is true that John Paul profoundly disagreed with many aspects of what is generally considered to be the predominant feminist agenda, at least in the United States, such as its insistence that the right to abortion is fundamental to the advancement of women,¹⁷² and its denial of anything but socially-constructed differences between men and women.¹⁷³ If you examine John Paul II's writings addressing the issues raised in the arguments developed by the dependency feminists, however, you will find not only support for most of their specific policy recommendations, but also support for their major arguments.¹⁷⁴ Indeed, in one significant respect, he makes a major contribution to their argument that could in fact advance their agenda.¹⁷⁵

theology—of the problem than practical programs. What I shall, with no disrespect intended, call the retreat to theory testifies to the daunting complexity of the cultural, political and practical problems.

Id.

¹⁷⁰ See Jean Bethke Elshtain, *Ethical Equality in a New Feminism*, in *WOMEN IN CHRIST*, *supra* note 22, at 285, 292 (noting that Pope John Paul II was the target of feminist protest since the beginning of his papacy).

¹⁷¹ See *infra* notes 176–99 and accompanying text.

¹⁷² See, e.g., Theresa Stanton Collett, *Independence or Interdependence? A Christian Response to Liberal Feminists*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 178, 188 (Michael W. McConnell et al. eds., 2001).

¹⁷³ See Letter from Cardinal Joseph Ratzinger & Archbishop Angelo Amato to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World ¶ 6 (May 31, 2004).

¹⁷⁴ See, e.g., JOHN PAUL II, ENCYCLICAL LETTER *LABOREM EXERCENS* ¶ 19 (1981) [hereinafter *LABOREM EXERCENS*] (advocating higher respect for women's dual roles as workers and caretakers).

¹⁷⁵ For a fuller account of the arguments in this section, see *Sacrifice*, *supra*

From the very beginning of his pontificate, John Paul II advocated changes to the workplace and social structures to enable women who are caregivers to participate fully in the workplace.¹⁷⁶ For example, in *Laborem Exercens*, written in 1981, he argues:

It is a fact that in many societies women work in nearly every sector of life. But it is fitting that they should be able to fulfill their tasks *in accordance with their own nature*, without being discriminated against and without being excluded from jobs for which they are capable, but also without lack of respect for their family aspirations and for their specific role in contributing, together with men, to the good of society. The *true advancement of women* requires that labour should be structured in such a way that women do not have to pay for their advancement by abandoning what is specific to them and at the expense of the family, in which women as mothers have an irreplaceable role.¹⁷⁷

In *Familiaris Consortio*, written the same year, he claims:

There is no doubt that the equal dignity and responsibility of men and women fully justifies women's access to public functions. On the other hand the true advancement of women requires that clear recognition be given to the value of their maternal and family role, by comparison with all other public roles and all other professions. Furthermore, these roles and professions should be harmoniously combined, if we wish the evolution of society and culture to be truly and fully human.¹⁷⁸

And in *Evangelium Vitae*, fourteen years later, he writes:

There need to be set in place social and political initiatives capable of guaranteeing conditions of true freedom of choice in matters of parenthood. It is also necessary to rethink labor, urban, residential and social service policies so as to harmonize working schedules with time available for the family, so that it becomes effectively possible to take care of children and the elderly.¹⁷⁹

note 11, at 7–12.

¹⁷⁶ See JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶ 90 (1995) [hereinafter *EVANGELIUM VITAE*]; *LABOREM EXERCENS*, *supra* note 174, ¶ 19; JOHN PAUL II, APOSTOLIC EXHORTATION *FAMILIARIS CONSORTIO* ¶ 23 (1981) [hereinafter *FAMILIARIS CONSORTIO*].

¹⁷⁷ *LABOREM EXERCENS*, *supra* note 174, ¶ 19.

¹⁷⁸ *FAMILIARIS CONSORTIO*, *supra* note 176, ¶ 23.

¹⁷⁹ *EVANGELIUM VITAE*, *supra* note 176, ¶ 90.

These statements reflect strong support for the types of specific policy recommendations that the dependency feminists argue follow from their theories.¹⁸⁰ Indeed, in *Laborem Exercens* John Paul II offers three fairly specific suggestions echoing many of these proposals: (1) direct economic compensation for care work, in the form of a family wage sufficient to support the entire family or other forms of financial support for mothers engaging solely in childcare; (2) reform of social structures to ensure that women who work at home are not penalized for their dedication to the socially significant work of preserving families; and (3) restructuring the workplace to ensure that women are not penalized by the job market for the work they do within the family.¹⁸¹

John Paul II's writings also support the specific arguments made by the dependency feminists to support their policy recommendations.¹⁸² Recall the first argument of the dependency feminists—the need for social re-evaluation of care work. John Paul II has no equal as advocate for the social value of dependency care. His arguments echo many of the themes sounded by the dependency feminists in articulating the social value of care work. In *Familiaris Consortio*, John Paul identifies the family as having

vital and organic links with society, since it is its foundation and nourishes it continually [I]t is from the family that citizens come to birth and it is within the family that they find the first school of the social virtues that are the animating principle of the existence and the development of society itself.¹⁸³

John Paul's appreciation for the family as a "school of the social virtues" encompasses much more than just learning to be a good citizen, however. His conviction about the importance of the work of preserving the family rests on the fundamental, foundational concept of the truth about the human person—that

¹⁸⁰ See, e.g., *LABOREM EXERCENS*, *supra* note 174, ¶ 19 (suggesting remuneration for a woman's caregiving efforts, a social re-evaluation of the role mothers play inside the home, and labor reforms that would make it easier for working mothers to accomplish their dual roles as three ways to make the current socioeconomic system more just).

¹⁸¹ *Id.*

¹⁸² See, e.g., *FAMILIARIS CONSORTIO*, *supra* note 176, ¶ 42 (arguing the importance of the family as a basic societal structure).

¹⁸³ *Id.*

all humans are created in the image and likeness of God.¹⁸⁴ This profound truth is, as John Paul II writes in *Centisimus Annus*, the “main thread and . . . the guiding principle of . . . *all of the Church’s social doctrine*.”¹⁸⁵ The family must be preserved because it is the best social structure in which humans can learn this powerful truth.¹⁸⁶ He notes that

 faced with a society that is running the risk of becoming more and more depersonalized and standardized and therefore inhuman and dehumanizing, with the negative results of many forms of escapism—such as alcoholism, drugs and even terrorism—the family possesses and continues still to release formidable energies capable of taking man out of his anonymity, keeping him conscious of his personal dignity, enriching him with deep humanity and actively placing him, in his uniqueness and unrepeatability, within the fabric of society.¹⁸⁷

Let us now turn to the second step in the dependency theorists’ argument, the step in which they find it necessary to reformulate existing theories of justice. Recall that this step was where the dependency theorists responded to the possibility that a re-valuation of care work could be accomplished by simply paying women to stay home and take care of their dependents.¹⁸⁸ To justify social and legal reforms that make it possible for women with significant dependent care responsibilities to stay active in the public sphere, the dependency feminists have to find a rationale for treating women with dependent care responsibilities differently than women without such responsibilities. The required reforms are much more complicated than simply paying women to stay home to do their care work.¹⁸⁹

Traditional feminism could rely on traditional notions of justice, resting on notions of formal equality, because it was willing to accept that women should either reject dependency

¹⁸⁴ JOHN PAUL II, ENCYCLICAL LETTER *CENTISIMUS ANNUS* ¶ 11 (1991) [hereinafter *CENTISIMUS ANNUS*].

¹⁸⁵ *Id.* (citing PAUL VI, PASTORAL CONSTITUTION *GAUDIUM ET SPES* ¶ 24 (1965)) (emphasis added).

¹⁸⁶ *FAMILIARIS CONSORTIO*, *supra* note 176, ¶ 43.

¹⁸⁷ *Id.*

¹⁸⁸ See *supra* notes 32–34 and accompanying text.

¹⁸⁹ See Deborah Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 846 (2002) (describing the obstacles in the workplace, in law, and in childcare faced by women aiming to balance their lives between their responsibilities outside the home and their care work).

care or force men to do more dependency care. Under those circumstances, treating women just like men in the workplace would be sufficient to ensure progress by women. However, the dependency feminists argue that women with significant dependent care responsibilities have a right to be treated unequally from women without such responsibilities.¹⁹⁰ They argue that “justice” should be understood to embrace such unequal treatment, based on the social value of care work, as well as on a social empathy for the needs of dependents for care.¹⁹¹ Although this argument is being advanced by feminists precisely because it is predominantly women who would benefit from this broader theory of justice, the argument is gender-neutral. The same generous inequality of treatment should be extended to men with significant dependent care responsibilities.¹⁹²

Similarly, John Paul II argues that women with significant dependent care responsibilities should be treated differently in the workplace and in other social structures than women without such responsibilities.¹⁹³ As a basis for his arguments, however, he does not rely merely on a social recognition of the value of care work, or the enshrinement of empathy for dependents in need of care.¹⁹⁴ He makes an even more compelling argument that women bring something of value to the workplace and all public spheres that men do not bring—namely, the manifestations of their “feminine genius.”¹⁹⁵ What John Paul offers the dependency feminists is, to borrow the title of a popular local continuing legal education program for practicing lawyers in Minneapolis, a “business case for diversity” in the workplace.¹⁹⁶

¹⁹⁰ See KITTAY, *supra* note 2, at 14 (explaining that the concept of equality masks inequities inherent in a society where women are traditionally called on to care for dependents).

¹⁹¹ See, e.g., *supra* notes 28–31 and accompanying text.

¹⁹² Indeed, many dependency theorists note that the social changes affected by such a broader understanding of justice would most likely provide men with the support and social affirmation they need to assume greater care responsibilities. See, e.g., WILLIAMS, *supra* note 4, at 58 (explaining one goal of reconstructive feminism is to allow fathers to increase their capacity as caregivers).

¹⁹³ See JOHN PAUL II, *LETTER TO WOMEN* ¶ 4 (1995) [hereinafter *LETTER TO WOMEN*] (arguing for advances in equality for mothers in the workplace).

¹⁹⁴ For a discussion of how women are entrusted to be source of special support for human beings by virtue of their femininity, see JOHN PAUL II, *APOSTOLIC LETTER MULIERIS DIGNITATEM* ¶ 30 (1988) [hereinafter *MULIERIS DIGNITATEM*].

¹⁹⁵ *LETTER TO WOMEN*, *supra* note 193, ¶ 10.

¹⁹⁶ I have borrowed this phrase from an article entitled *A Business Case for*

He argues that society should accept accommodations for working mothers because women bring something to the workplace that men do not bring.¹⁹⁷ John Paul II has no problem whatsoever with the notion that men and women have different gifts and capacities.¹⁹⁸ He believes that both need to be present in the public sphere to effect the transformation of culture to more fully reflect the truth about the human person.¹⁹⁹

In *Mulieris Dignitatem*, his 1988 Apostolic Letter “On the Dignity and Vocation of Women,”²⁰⁰ he presents an account of this “genius” that illustrates its force.²⁰¹ John Paul II believes that women have a unique capacity for developing a special sensitivity to the fact that humans exist *to be loved*, a special awareness that each and every human is entrusted to each and every other human being.²⁰² This “feminine genius” consists of a special ability to appreciate each human being’s obligation to love every other human being,²⁰³ arising out of the truth that we are all loved by God and that we are all created in the image and likeness of God.²⁰⁴ Again, that fundamental truth is the “main thread and . . . the guiding principle of . . . *all of the Church’s*

Diversity by the Southern Minnesota Initiative Foundation, which is available at <http://www.smifoundation.org/NewGroundFEB06.pdf#search=%22%22A%20business%20case%20for%20diversity%22%20%26%20Minneapolis%22>.

¹⁹⁷ See *MULIERIS DIGNITATEM*, *supra* note 194, ¶¶ 29–31 (finding support in the Letter to the Ephesians for the proposition that women are specifically entrusted to give love, the highest of the orders, and stating that the women who have fulfilled this role “become[] an irreplaceable support and source of spiritual strength for other people” and thus “are owed much by their families, and sometimes by whole nations”).

¹⁹⁸ See *MULIERIS DIGNITATEM*, *supra* note 194, ¶ 10 (“The personal resources of femininity are certainly no less than the resources of masculinity: they are merely different.”).

¹⁹⁹ See *LETTER TO WOMEN*, *supra* note 193, ¶ 4.

²⁰⁰ *MULIERIS DIGNITATEM*, *supra* note 194.

²⁰¹ See *id.* ¶¶ 29–31.

²⁰² See *id.* ¶ 30.

The moral and spiritual strength of a woman is joined to her awareness that *God entrusts the human being to her in a special way*. Of course, God entrusts every human being to each and every other human being. But this entrusting concerns women in a special way—precisely by reason of their femininity—and this in a particular way determines their vocation.

Id.

²⁰³ See *id.* ¶¶ 30–31 (calling women’s sense of responsibility for the well-being of others the “‘genius’ which belongs to women”).

²⁰⁴ See *id.* ¶ 29 (explaining “the intimate linking of the order of love—which enters the world of human persons through a Woman—with the Holy Spirit”).

*social doctrine*²⁰⁵—the same truth that the Church maintains the family structure is so good at preserving and transmitting.²⁰⁶

In *Mulieris Dignitatem*, Pope John Paul II makes it abundantly clear that he understands this genius to be an intellectual as well as an emotional capacity, something much more advanced than the notion that women are better than men at caring for others.²⁰⁷ *Mulieris Dignitatem* includes detailed examinations of Jesus Christ's relationships with the women in his life—from his mother, Mary, to his friends and followers, Martha and her sister Mary; the women who stayed at the foot of his cross when all but one of his male Apostles fled; the women who first saw his empty tomb on Easter morning; and the women who were called to announce his resurrection to the Apostles.²⁰⁸ John Paul II emphasizes again and again that Jesus relies on these women for more than just care or nurturing.²⁰⁹ Indeed, Martha is rebuked for her “preoccupation with domestic matters,” while her sister, Mary, is listening to Jesus' teaching.²¹⁰ John Paul writes, “Christ speaks to women about the things of God, and they understand them; there is a true response of *mind and heart*, a response of faith. Jesus expresses an appreciation and admiration for this distinctly ‘feminine response’”²¹¹

What is more, John Paul II calls on women to continue to bring this special genius to bear on the pressing social issues of the day. In his 1995 Letter to Women, he writes:

Women will increasingly play a part in the solution of the serious problems of the future: . . . euthanasia, drugs, health care, the ecology, etc. In all these areas a greater presence of women in society will prove most valuable, for it will help to manifest the contradictions present when society is organized solely according to the criteria of efficiency and productivity, and it will force systems to be redesigned in a way which favors

²⁰⁵ *CENTESIMUS ANNUS*, *supra* note 184, ¶ 11 (emphasis added).

²⁰⁶ *See id.* ¶ 13.

²⁰⁷ *See MULIERIS DIGNITATEM*, *supra* note 194, ¶ 15.

²⁰⁸ *See id.* ¶¶ 3–4, 15–16. For a more detailed discussion of this aspect of *Mulieris Dignitatem*, see *Mothers*, *supra* note 11, at 34–42.

²⁰⁹ *See MULIERIS DIGNITATEM*, *supra* note 194, ¶¶ 14–16 (explaining Christ's appreciation for the faith and fidelity of the female followers, and how they were entrusted with divine truths and responsibility for their own souls).

²¹⁰ *Id.* ¶ 15.

²¹¹ *Id.* (emphasis added).

the processes [sic] of humanization which mark the “civilization of love.”²¹²

And in *Mulieris Dignitatem*, he writes:

In our own time, the successes of science and technology make it possible to attain material well-being to a degree hitherto unknown. While this favours some, it pushes others to the edges of society. In this way, unilateral progress can also lead to a gradual *loss of sensitivity for man, that is, for what is essentially human*. In this sense, our time in particular *awaits the manifestation* of that “genius” which belongs to women, and which can ensure sensitivity for human beings in every circumstance: because they are human!—and because “the greatest of these is love”²¹³

John Paul II clearly believes that women’s gifts are equally essential both in the home, in the preservation of the family, and outside of the home, to shape a society to reflect more fully the image of God.²¹⁴ This motivates Pope John Paul II to call for restructuring the workplace and other social structures to permit the participation of women with children.²¹⁵ It also motivates his calls for reforms to ensure those women who dedicate themselves to dependency care work are not penalized for this choice.²¹⁶

In summary, John Paul II fully supports the call of dependency feminists for a social re-evaluation of care work.²¹⁷ He also agrees with their claim that this social re-evaluation should *not* be accomplished merely by paying women to stay home and perform this work, or by paying more to fathers whose wives devote themselves to doing such work.²¹⁸ Dependency theorists rely on an expanded notion of justice, based on a recognition of the social value of care work and an empathy for those needing care,²¹⁹ to support their arguments.

²¹² *LETTER TO WOMEN*, *supra* note 193, ¶ 4.

²¹³ *MULIERIS DIGNITATEM*, *supra* note 194, ¶ 30.

²¹⁴ See *LETTER TO WOMEN*, *supra* note 193, ¶ 12 (stating that “the basic plan of the Creator takes flesh in the history of humanity” through the work of women, both those whom history remembers as great and famous as well as those who “place themselves at the service of others in their everyday lives”).

²¹⁵ See *LABOREM EXERCENS*, *supra* note 174, ¶ 19.

²¹⁶ See *LETTER TO WOMEN*, *supra* note 193, ¶ 4 (describing motherhood as the gift to which humanity owes its survival and one that should be rewarded).

²¹⁷ See *id.* (noting that it behooves society to recognize the value of women and the role they fulfill).

²¹⁸ See *LABOREM EXERCENS*, *supra* note 174, ¶ 19.

²¹⁹ See *WEST*, *supra* note 9, at 95 (noting that when women are acting as caregivers they are in need of “support and sustenance,” and that society should

John Paul offers an even more compelling argument, namely that women have something to offer the workplace that is of vital importance, something that they can offer to a greater extent than men. Because John Paul believes that this unique “feminine genius” is sufficient to support the specific policy agenda of the dependency feminists,²²⁰ he does not find it necessary to articulate a reconstructed notion of justice in this context. Let us turn to other writings, then, to determine whether we can find support for a more general dependency-based theory of justice, outside of the context of issues particular to working mothers.

B. John Paul II's Support of a More General Dependency-Based Theory of Justice

John Paul clearly agrees with both West and MacIntyre that contemporary notions of justice are based on a flawed image of the human as an autonomous, independent being.²²¹ He begins *Evangelium Vitae* by observing that contemporary society is replete with declarations of human rights, but that “these noble proclamations are unfortunately contradicted by a tragic repudiation of them in practice. This denial is still more distressing . . . precisely because it is occurring in a society which makes the affirmation and protection of human rights its primary objective and its boast.”²²² The “roots of this remarkable contradiction” he attributes to

the mentality which . . . recognizes as a subject of rights only the person who enjoys full or at least incipient autonomy and who emerges from a state of total dependence on others We must also mention the mentality which tends to *equate personal dignity with the capacity for verbal and explicit, or at least perceptible, communication*. It is clear that on the basis of these presuppositions there is no place in the world for anyone who, like the unborn or the dying, is a weak element in the social structure, or for anyone who appears completely at

recognize this cycle of caregiving being provided by women and their subsequent need for “support and sustenance” as part of our social fabric).

²²⁰ See generally *LETTER TO WOMEN*, *supra* note 193, ¶¶ 9–10 (explaining that women possess the innate ability to understand the nuances in human relations and spiritual values).

²²¹ See *EVANGELIUM VITAE*, *supra* note 176, ¶ 20 (noting that today’s society is under the false impression that each human is autonomous).

²²² *Id.* ¶ 18.

the mercy of others and radically dependent on them, and can only communicate through the silent language of a profound sharing of affection.²²³

He finds another root of this contradiction in “*a notion of freedom* which exalts the isolated individual in an absolute way, and gives no place to solidarity, to openness to others and service of them.”²²⁴

John Paul, however, goes farther than either West or MacIntyre in the breadth of what he considers to be the relevant possible human dependency experiences.²²⁵ John Paul II criticizes dominant human rights theories for failing to consider the very weakest and most dependent of all humans—the unborn child.²²⁶ He argues that our current notions of justice, which consider only the autonomous, independent human as the legitimate subject of “human rights,” have given rise to political structures in which

the original and inalienable right to life is questioned or denied on the basis of a parliamentary vote or the will of one part of the people—even if it is the majority The state is no longer the “common home” where all can live together on the basis of principles of fundamental equality, but is transformed into a tyrant State, which arrogates to itself the right to dispose of the life of the weakest and most defenseless members, from the unborn child to the elderly, in the name of a public interest which is really nothing but the interest of one part “How is it still possible to speak of the dignity of every human person when the killing of the weakest and most innocent is permitted? In the name of what justice is the most unjust of discriminations practiced: some individuals are held to be deserving of defense and others are denied that dignity?”²²⁷

John Paul II and West disagree about how the current conception of “human rights” could be salvaged. According to West, the solution is to supplement the paradigm of the “human” subject to those rights by “forthrightly acknowledg[ing] the

²²³ *Id.* ¶ 19 (emphasis added).

²²⁴ *Id.*

²²⁵ *See id.*

²²⁶ *See id.* (explaining that human rights proponents should advocate for unborn children precisely because of their inability to verbally communicate, yet they do not).

²²⁷ *Id.* ¶ 20 (quoting John Paul II, Address to the Participants at the Study Conference on “The Right to Life and Europe” (Dec. 18, 1987)).

natural reality of our inescapable dependence on each other,”²²⁸ and add a “right to . . . care” to the panoply of protected rights.²²⁹ John Paul II argues for a more radical reorientation of the paradigm of the “human” subject to rights, namely a recognition that human nature is a reflection of the image of God.²³⁰ John Paul II’s writings suggest the same sort of disagreement with West’s humanistic account of formal equality.²³¹ Simply supplementing the notion of equality with a recognition of our shared humanity, dependency, and vulnerability, and adding the moral principle of egalitarian regard for all, regardless of status, to the panoply of values served by the concept of equality,²³² would not suffice.²³³ In the words of Cardinal Avery Dulles, John Paul II believes that

authentic democracy is possible only on the basis of a correct conception of the human person. Human rights cannot be secure unless they are founded in God the Creator. If all human beings are created equal, and are entitled to life, liberty, and the pursuit of happiness, this is because God has made them to his own image and likeness. Without this transcendent grounding, human rights would not be inviolable.²³⁴

Although MacIntyre’s dependency theory does not explicitly incorporate a transcendent version of human nature,²³⁵ his notion of incorporating the “virtues of acknowledged dependence” or of just generosity into the norms of justice by which a state should be governed²³⁶ is compatible with John Paul’s teachings. John Paul asserts that we do have affirmative responsibilities toward others, and, like MacIntyre, that the exercise of those

²²⁸ WEST, *supra* note 9, at 95.

²²⁹ *Id.*

²³⁰ See *LETTER TO WOMEN*, *supra* note 193, ¶ 7; see also *MULIERIS DIGNITATEM*, *supra* note 194, ¶ 7 (referring to a description in Genesis of man and woman being created in the image of God).

²³¹ Cf. WEST, *supra* note 9, at 151 (noting the author’s interpretation of formal equality that all individuals should be treated alike as an expression of “the universality of [human] nature”).

²³² See *supra* notes 100–101 and accompanying text.

²³³ See WEST, *supra* note 9, at 149–50 (noting that failing to “treat likes alike” would result in limiting one’s individual liberty and destroying social tradition).

²³⁴ AVERY DULLES, *THE SPLENDOR OF FAITH: THE THEOLOGICAL VISION OF POPE JOHN PAUL II* 148 (1999).

²³⁵ MacIntyre does, however, embrace Thomism, noting that Aquinas is “plainly right” in identifying the qualities that set humans apart from animals. MACINTYRE, *supra* note 7, at 54.

²³⁶ *Id.* at 120.

responsibilities is essential to our flourishing.²³⁷ John Paul calls these responsibilities “love.” In *Mulieris Dignitatem*, he presents an account of how this responsibility to love others relates to human flourishing²³⁸ that echoes much of MacIntyre’s account of the development of an independent practical reasoner.

Like MacIntyre, John Paul considers our embodiment to be of crucial importance.²³⁹ Indeed, he considers our particular embodiment as men or women to be significant.²⁴⁰ It is not an accident that the image of God represented in humanity consists of *both* the male and the female.²⁴¹ This aspect of the image of God that we humans all reflect gives us access to the mystery of God’s identity as the Trinity.²⁴² This model of God as a “communion of Persons,” in the Trinity, illustrates the truth that a person cannot come to know God by herself. God exists as a Trinity of beings in relationship with each other.²⁴³ We have to understand “relationship” to understand God; we cannot understand relationship except by experiencing relationship, and that can only be done with others.²⁴⁴ By creating humanity as two distinct types of humans, man and woman, God gives us access to this aspect of Himself.²⁴⁵

²³⁷ See *EVANGELIUM VITAE*, *supra* note 176, ¶ 8 (noting the “responsibility which every person has towards others”).

²³⁸ For a separate discussion of the interdependence of these two concepts, see generally KAROL WOJTYLA, *LOVE AND RESPONSIBILITY* 130–31 (H.T. Willetts trans., Ignatius Press 1993) (1981).

²³⁹ See *MULIERIS DIGNITATEM*, *supra* note 194, ¶ 1 (discussing this embodiment as the “immutable basis of all Christian anthropology”).

²⁴⁰ See *id.*

²⁴¹ See *id.* (discussing the purposeful existence of man and woman as a part of God’s plan).

²⁴² See *id.* (noting the essential relationship between the male-female unity and the Trinity).

²⁴³ *Id.*

²⁴⁴ *Id.* John Paul II writes:

The model for this interpretation of the person is God himself as Trinity, as a communion of Persons. To say that man is created in the image and likeness of God means that man is called to exist “for” others, to become a gift.

This applies to every human being, whether woman or man, who live it out in accordance with the special qualities proper to each.

Id.

²⁴⁵ See *id.* (noting that by creating the male and female roles, God gave humans access to His Triune nature).

The particular relationship to which John Paul argues God calls us is love.²⁴⁶ John Paul believes that women play a special role in illustrating to humanity both aspects of this commandment—both *being loved* and *loving*.²⁴⁷ The femininity of humanity—represented by women—reflects the truth that we are all loved by God.²⁴⁸ Although both men and women share equally in this task of loving, the Church argues that women have a special appreciation for our obligation to love each other, because of a special sensitivity to the fact humans exist *to be loved*.²⁴⁹ The Church explains:

The moral and spiritual strength of a woman is joined to her awareness that *God entrusts the human being to her in a special way*. Of course, God entrusts every human being to each and every other human being. But his entrusting concerns women in a special way *A woman is strong because of her awareness of this entrusting*, strong because of the fact that God “entrusts the human being to her,” always and in every way, even in the situations of social discrimination in which she may find herself.²⁵⁰

John Paul’s conviction that the human cannot understand herself except through relationship with others corresponds to MacIntyre’s conviction that a human cannot develop into an independent practical reasoner except through relationship with others. Further, MacIntyre’s insistence that the virtue of just generosity encompasses virtues of giving as well as receiving corresponds to John Paul’s insistence that humans are called to learn to love as well as to be loved.

Indeed, much of what MacIntyre seems to be searching for in his description of the virtue of just generosity seems to be present in John Paul’s description of what he calls the “Christian virtue”

²⁴⁶ John Paul II writes:

Love is an ontological and ethical requirement of the person. The person must be loved, since love alone corresponds to what the person is. This explains *the commandment of love*, known already in the Old Testament and placed by Christ at the very centre of the Gospel “*ethos*.” This also explains the *primacy of love* expressed by Saint Paul in the First Letter to the Corinthians: “the greatest of these is love.”

Id. ¶ 29 (quoting *Corinthians* 13:13 (New American)) (citations omitted).

²⁴⁷ *See id.*

²⁴⁸ *See id.* (noting the particular role of women in loving as expressed “by the fact of her femininity”).

²⁴⁹ *See id.* ¶ 30.

²⁵⁰ *Id.*

of solidarity.²⁵¹ John Paul describes solidarity as the virtue that is the moral and social attitude resulting from a recognition of humanity's interdependence.²⁵² He describes solidarity as:

not a feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far. On the contrary, it is a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all.²⁵³

John Paul's conception of solidarity also seems to encompass MacIntyre's conception of just generosity as something that should affect the attitude of both the giver and the recipient of aid:

The exercise of solidarity within each society is valid when its members recognize one another as persons. Those who are more influential, because they have a greater share of goods and common services, should feel responsible for the weaker and be ready to share with them all they possess. Those who are weaker, for their part, in the same spirit of solidarity, should not adopt a purely passive attitude or one that is destructive of the social fabric, but, while claiming their legitimate rights, should do what they can for the good of all.²⁵⁴

In summary, it appears that there is ample support in John Paul II's writings for a general dependency-based theory of justice. In a number of respects, he takes current attempts to develop such a theory a step further. For instance, he provides additional arguments for the dependency-based theory of justice as an alternative to an equality-based theory of justice to support restructuring the workplace to accommodate parenting. He also casts a wider net for those who such a theory would seek to protect, including not only the permanently disabled, but also the unborn. And he is clearly more aggressive than West in asserting a *duty*, as well as a *right*, to care for those who are dependent on us. At the same time, though, John Paul's writings suggest the limitations of a dependency-based theory of justice

²⁵¹ JOHN PAUL II, ENCYCLICAL LETTER *SOLLICITUDO REI SOCIALIS* ¶ 40 (1987).

²⁵² See *id.* ¶ 38 ("When interdependence becomes recognized [as a system determining relationships] the correlative response as a moral and social attitude, as a 'virtue,' is solidarity.").

²⁵³ *Id.*

²⁵⁴ *Id.* ¶ 39.

such as West's, which does not acknowledge any relation to the transcendent.

MacIntyre's theory, while not expressly acknowledging any relation to the transcendent, demonstrates that a dependency-based theory of justice expressed in purely secular terms could come closer in spirit to the Christ-centered personalism of John Paul the Great. Both theories insist that humans cannot flourish except in relationships, and that these relationships must be based on reciprocal responsibilities to care to and allow others to care for us, including a special responsibility toward those who are weaker, or more dependent. What MacIntyre struggles to define as the "virtues of acknowledged dependency," John Paul finds adequately contained in the Christian virtue of solidarity.

In the end, it appears to me that the writings of John Paul not only support, but significantly advance, the project of articulating a general dependency-based theory of justice, with applications beyond the context of supporting motherhood. Even proponents of a dependency-based theory of justice who are not comfortable with the vocabulary of faith used by John Paul might borrow from him certain concepts that could be translated into secular vocabulary that would strengthen their arguments: acceptance of gender-based distinctions in gifts and perspectives that support arguments to restructure the workplace to allow fuller participation of women; a recognition of the full spectrum of human dependency conditions entitled to protection under this theory; and acknowledgement that the human condition of dependency might justify a "right" of dependents to receive care, as well as a right of caregivers to provide care.

At the same time, proponents of a dependency-based theory of justice who are motivated by faith convictions must acknowledge the persuasive power of many of the arguments presented by dependency-based theorists in purely secular terms. Although it may be true, as John Paul argues, that human rights cannot be secured unless they are grounded in the transcendent, West's pragmatic arguments for legal scholars in particular to labor to reclaim the language of "rights," and develop a richer jurisprudence of *positive* and *relational* rights, are compelling. Indeed, without following West's suggestions in this regard, it is hard to imagine how legal scholars sympathetic to a dependency-based theory of justice might hope to affect, to use West's terminology, "legal justice"—

the justice we hope law promotes[,] . . . the justice that lawyers and judges, peculiarly, are professionally committed to pursue, the virtue around which, arguably, the legal profession and the individuals within it have defined their public lives . . . to which we urge our students to dedicate themselves²⁵⁵

Let us now turn to a preliminary exploration of some areas of the law in which a dependency-based theory of justice might make a practical difference in advocating for legal developments compatible with Catholic social teachings.

III. POSSIBLE APPLICATIONS OF A GENERAL DEPENDENCY-BASED THEORY OF JUSTICE

It would be beyond the scope of this article to fully explore any particular application of this theory to specific legal issues, but I close with some preliminary thoughts about how it might be applied to two areas of particular interest to me: disability rights and consumer protection.

The area of disability rights would seem to be a prime candidate for application of the dependency-based theory of justice, but determining how this theory would play out in this area would have to be done with great care and delicacy. The Americans with Disabilities Act²⁵⁶ (the “ADA”) is largely considered to represent the culmination of an evolution of American attitudes towards people with disabilities from objects of charity or welfare to “a minority group entitled to the same hard-won legal protections for equality that emerged from the struggles of African Americans and women.”²⁵⁷ Its passage was a hard-fought victory, won only after years of struggle by members of the disability rights movement to have their demands for equal opportunity recognized as a civil rights issue rather than a welfare issue.²⁵⁸ Essentially, the ADA prohibits discrimination against persons with disabilities in employment, in access to services, programs, or activities offered by public entities, and in access to public accommodations and facilities offered by private entities. To the extent that “reasonable accommodations” would facilitate access of people with disabilities to jobs, services,

²⁵⁵ WEST, *supra* note 9, at 1.

²⁵⁶ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12, 101–12, 213 (2000).

²⁵⁷ PETER BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY* 1–3 (2004).

²⁵⁸ See *generally* JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* (1998).

programs, activities, or accommodations, the law imposes an affirmative obligation to make such accommodations.²⁵⁹

Disability rights activists are extremely sensitive to the distinction between empowering people with disabilities to participate fully in society (which they argue is represented by the ADA's approach) and marginalizing people with disabilities by exempting them from the responsibilities of citizens participating fully in society. As Anita Silvers writes:

There is all the difference in the world between conceiving of people with disabilities as equal and thereby as deserving only such differentiated treatment as is needed to reform social practice that excludes them and thinking of them as deficient and thereby as deserving special benefits, entitlements, and exemptions to sustain them in their exclusion from the mainstream of commercial and civic life. Policies that promote the former view controvert the beliefs about people with disabilities that motivate the latter view. Policies informed by the latter view enfeeble the purpose needed to implement the former view.²⁶⁰

Indeed, this sensitivity leads Silvers to criticize MacIntyre's project, which she understands as making society's virtue depend on the neediness of the ill and disabled; she argues that this could give rise to a duty on the part of the disabled to refrain from asserting their independence from their caregivers, since that might impede the caregiver's "progressing along paths of virtue."²⁶¹

Despite this sensitivity, I believe that there are a number of issues in the disability law area for which the development of a jurisprudence shaped by a dependency-based theory of justice might help shape law more consistent with Catholic social teachings. Dependency-based theories of justice might be helpful in analyzing the increasingly restrictive interpretations of the ADA, social security, welfare, and special education laws for people with disabilities. Another emerging issue is the question of whether the formal-equality-plus-reasonable-accommodations approach established by the ADA adequately addresses the needs of people with significant mental, rather than physical,

²⁵⁹ See 42 U.S.C. § 12, 112(b)(5)(A).

²⁶⁰ Anita Silvers, *Formal Justice*, in *DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY* 13, 138 (Anita Silvers et al. eds., 1998)

²⁶¹ *Id.* at 38–39.

disabilities. Some disability rights activists are beginning to struggle with this question.²⁶² I think the broader notions of justice developed in the context of dependency care could be very relevant to this analysis.

Another area of the law that reflects this same tension between empowerment and protection is the area of consumer protection. One of the thorniest issues in consumer protection is the tension between protecting consumers from making unwise choices by denying choice to them and empowering them to make better choices. This tension is graphically played out in the area of predatory lending. Lenders claim that laws prohibiting practices identified as “predatory” force them from certain markets, leaving borrowers no choice but to go to even less scrupulous lenders. I think it is possible that a dependency-based theory of justice might provide some basis for asserting a mutual responsibility on the part of the lenders and the borrowers. A recognition of the economic “dependency” of certain borrowers, with little access to convention sources of credit, might be the basis for the assertion of some responsibility on the part of the lender to offer credit on reasonably fair terms. Such an argument could support recent calls for more responsible marketing by predatory lenders,²⁶³ or for the imposition of “suitability” standards, similar to those imposed on stock brokers, on lenders making predatory loans.²⁶⁴ At the same time, though, the dependency-based theory of justice, with its insistence on reciprocity of obligation between the powerful and the weak, might also support increased responsibility on the part

²⁶² For example, Silvers hints at this struggle when she generally rejects allocating extraordinary resources to people with disabilities, except to rectify unjust results of past discrimination. She also excepts

redistributing by broadening responsibility for the care of the subset of individuals with disabilities who are truly needy rather than merely constructed as being so . . . ; here policy is concerned not with justice for the disabled but instead with justice of those nondisabled individuals for whom the responsibility of caring for a disabled person is unfairly burdensome.

Id. at 35. I would argue that a dependency-based theory of justice might support a policy that is concerned with justice for both for the people with disabilities who are truly needy and for their caregivers.

²⁶³ See Patricia A. McCoy, *A Behavioral Analysis of Predatory Lending*, 38 AKRON L. REV. 725 (2005).

²⁶⁴ See Patricia A. McCoy & Kathleen C. Engel, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255 (2002).

of the borrower to only accept credit that is necessary and can actually be repaid.

While the exact contours of the dependency-based theory of justice in these specific contexts would require careful work, I think it would be a fruitful effort. Indeed, it might prove to be one of the most concrete ways for Catholic legal scholars to memorialize the jurisprudential legacy of Pope John Paul the Great.