

# WHAT'S GENDER GOT TO DO WITH IT?: THE POLITICS AND MORALITY OF AN ETHIC OF CARE

MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE.

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I. Introduction: The Gender Issues Implicated in an Ethic of Care .....	266
II. Toward An Ethic of Care: The Basic Argument .....	268
A. Moral Boundaries—Detaching Gender from Care.....	268
B. Early Sources of an Ethic of Care—The Scottish Enlightenment .....	270
C. Modern Sources of an Ethic of Care: Carol Gilligan and Her Critics.....	275
D. Tronto's Ethic of Care .....	279
III. Critique: Can Gender Be Detached From Care? .....	284
IV. What's Law Got to Do with It? Care and the Law .....	289
V. Conclusion .....	293

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\* Professor of Law, UCLA, Visiting Professor of Law, Georgetown Law Center, 1994. A.B. Barnard College, 1971; J.D. University of Pennsylvania Law School, 1974. During the time in which I wrote this review, I watched and participated in the care of my ill father. After thinking and writing about care for many years, it is hard for me to separate my "intellectual" conclusions from my sociological observations and from my very emotional reactions to the care that I observed. As I watched both genders provide care or avoid it in different ways I found myself being pulled in and out of moral, ethical, emotional and intellectual commitments to various positions. Epistemologically speaking, this is consistent with what I have argued for many years—we cannot separate what we know from what we experience. Yet our experiences may be somewhat idiosyncratic. Thus, we depend on the more scientific, quantitative and "rigorous" study of such matters to correct for our individual "biases."

I report all of this because I think the subjects addressed in Joan Tronto's book and in this review are very important and unlikely to be resolved definitively by science, ethics, philosophy or experience for a long time to come. I offer this review as my current thinking on this important subject, recognizing that both care and the larger political world in which it is delivered is changing. Much of what we say about it is contested and changing everyday.

This review is dedicated to my brother, Dr. Robert Menkel, who cares with great technical expertise and to my mother, Mrs. Margot Menkel, who cares so much in the most traditional ways of nursing, feeding, washing, doing and just being there.

I thank Mitt Regan for helpful comments and conversations.

## I.

INTRODUCTION: THE GENDER ISSUES IMPLICATED IN AN  
ETHIC OF CARE

In her important argument for an ethic of care, Joan Tronto attempts to detach gender from a morality of care. She begins by reviewing the historical and philosophical basis for an ethic of care, derived from the Scottish Enlightenment, which she claims originally knew no gender basis. Then, she chronicles how social, economic, and political developments in the eighteenth century began to limit the development of a universal ethic of care to a more specific ethic situated in women. This effort is significant because the morality of an ethic of care is, or should be, a universal political and philosophical subject for our fellow human beings. In addition, recent feminist work in philosophy,<sup>1</sup> psychology,<sup>2</sup> sociology,<sup>3</sup> education,<sup>4</sup> and law<sup>5</sup> has claimed a particular explanatory role for gender in its development. Tronto also attempts to describe and define the contents of an ethic of care, thus making a very valuable contribution to both of these inquiries.

I write this review as someone who has associated the ethic of care in both legal practice and in legal ethics with gender,<sup>6</sup> and, therefore, I want to explore more fully the relationship of gender to those issues which engage Tronto — care, morality, ethics, politics, and epistemology. Unlike

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1. See, e.g., AN ETHIC OF CARE: FEMINIST AND INTERDISCIPLINARY PERSPECTIVES (Mary Jeanne Larrabee ed., 1993); MARILYN FRIEDMAN, WHAT ARE FRIENDS FOR? FEMINIST PERSPECTIVES ON PERSONAL RELATIONSHIPS AND MORAL THEORY (1993); VIRGINIA HELD, FEMINIST MORALITY: TRANSFORMING CULTURE, SOCIETY AND POLITICS (1993); SCIENCE, MORALITY AND FEMINISM, (Kai Neilsen ed., 1994); WOMEN AND MORAL THEORY (Eva F. Kittay and Diana T. Meyers eds., 1987).

2. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); see also OWEN J. FLANAGAN, VARIETIES OF MORAL PERSONALITY: ETHICS AND PSYCHOLOGICAL REALISM 172-75, 196-252 (1991); MAPPING THE MORAL DOMAIN (Carol Gilligan, Janie V. Ward, Jill M. Taylor eds., 1988); JEAN B. MILLER, TOWARD A NEW PSYCHOLOGY OF WOMEN (1976).

3. See, e.g., EMILY K. ABEL, WHO CARES FOR THE ELDERLY?: PUBLIC POLICY AND THE EXPERIENCES OF ADULT DAUGHTERS (1991); CIRCLES OF CARE: WORK AND IDENTITY IN WOMEN'S LIVES (Emily K. Abel and Margaret K. Nelson eds., 1990).

4. See, e.g., NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1984); see also MARY F. BELENKY, BLYTHE M. CLINCHY, NANCY R. GOLDBERGER & JILL M. TARULE, WOMEN'S WAY OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND 190-238 (1986).

5. See, e.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) [hereinafter Menkel-Meadow, *Portia*]; Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994) [hereinafter Menkel-Meadow, *Portia Redux*]; see also Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1 (1990); Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (1984) Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL ED. 243 (1988).

6. See Menkel-Meadow, *Portia*, *supra* note 5, at 39-43, 55-58.

Tronto, however, I am reluctant to detach gender from an ethic of care. While I understand that this detachment is politically and strategically motivated in order to make care a universal, moral imperative, I think that an ethic of care's gendered aspects must be addressed before it can emerge as a fully humanist and political philosophy.

In writing this important book, Joan Tronto has raised several significant questions for political and moral philosophy, which apply to both legal theory and practice. The questions<sup>7</sup> that I will address in this review are:

1) What are the moral and political bases for an ethic of care? How is an ethic of care articulated as a moral value in political, legal, and philosophical debate? In short, do we, should we, and, if so, why do we care about care?

2) Is an ethic of care gendered? Is caring itself gendered? How is the actual practice of care related to how we might articulate a morality or ethic of care? In short, what are the gendered aspects of the theory and practice of care, and does gender have different influences in each sphere?

3) Why does Tronto seek to detach gender from care in her "political argument for an ethic of care."<sup>8</sup> Does she succeed? How is Tronto's work situated in the context of feminist theorists who, on the one hand, share her goal of degendering some feminist arguments,<sup>9</sup> and on the other, who are explicitly using gender as a theoretical wedge with which to dislodge conventional categories?<sup>10</sup>

7. As more fully described below, the questions which I address are not necessarily the same issues that most interest Tronto. Thus, her work can be appreciated both for the issues she sets forth and for the evocation or provocation of other issues for those of us who labor in other, but related, fields.

8. This is the subtitle of her book— an explicit statement that her argument is political in at least two senses. First, it makes a contribution to political theory in its objective form and it is a political and strategic argument to make care a universal human value. Second, Tronto suggests that an ethic of care will be taken more seriously if it is not associated only with women. See JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* 25-97, 112-22 (1993) [hereinafter TRONTO].

9. See, e.g., Cynthia V. Ward, *A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 929 (1994) (arguing that imaginative empathy, which respects the context of gender and is promoted by feminists, is incompatible with equality).

10. See, e.g., JUDITH BUTLER, *GENDER TROUBLE* (1990) (arguing that gender categories are upset when evaluated beyond the binary frame, including compulsory heterosexuality); FRIEDMAN, *supra* note 1; HELD, *supra* note 1 (explaining how morality has been transformed by feminist culture); SARA RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* (1989) (analyzing maternal ways of thinking as a basis to re-construct peace politics); Anne C. Dailey, *Feminism's Return to Liberalism*, 102 YALE L.J. 1265 (1993) (examining how narratives have challenged and illustrated the category "woman"); Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992) (challenging the feminist characterization of liberalism as atomistic); Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493 (1992) [hereinafter Menkel-Meadow, *Mainstreaming*] (examining how feminist theory has been mainstreamed into legal doctrine); Carrie Menkel-Meadow and Shari Seidman Diamond, *The Content, Method and Epistemology of Gender in Sociolegal Studies*, 25 LAW &

4) What does it take to reconstruct the values we take seriously in order to make a persuasive argument that they should be redirected or reconceived? Can ethics, morality, or values be reconfigured by argument and theory or are events, experiences, and physical and emotional states required to alter our personal, social, political, and ethical ordering? How do arguments and experiences work at individual, social, and societal levels?

5) How might our behavior in the world be affected by a value system that takes an ethic of care seriously? In relation to Tronto's reconstruction of liberalism, what are Tronto's contributions, not only to political and moral theory,<sup>11</sup> but also to social organization and the practice of being a good and moral person?

6) What is the significance of Tronto's description of an ethic of care for the legal system? How does Tronto's description of care illuminate how the law and legal practice should be structured?

## II.

### TOWARD AN ETHIC OF CARE: THE BASIC ARGUMENT

#### A. *Moral Boundaries—Detaching Gender from Care*

Joan Tronto's argument is motivated by her belief that an ethic of care is an important aspect of our humanity and, therefore, should be a part of our political morality. She is concerned about the recent trend that constructs arguments for an ethic of care out of a gendered conception of a "women's morality." Like others before her, Tronto questions the notion that politics, or the world in general, becomes more moral simply by virtue of women's involvement or control. She maintains that claims of "women's morality based on notions of care, nurturance, mother-love, peace, and connection" are not grounded in a consistent source, such as being a female, a mother, a potential mother, or an individual from particular social or cultural settings.<sup>12</sup> Thus, she believes that linking the ethic of care with the unique morality of women is not strategically wise.

Tronto argues that the morality of care has been cabined by three intellectual, and often specifically gendered, boundaries that must be transcended in order for an ethic of care to function as a universal moral and political philosophy.

First, she argues that moral philosophy has been falsely separated from politics. She states that Aristotle's conception of the pursuit of the good

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SOC. REV. 221 (1991)(illustrating how an explicit focus on gender reveals new understandings about sociological phenomena and theoretical frameworks).

11. See generally, SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 110-133, 170-186 (1989); CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY* (1989); Jennifer Nedelsky, *Reconceiving Autonomy*, 1 YALE J.L. & FEMINISM 7 (1989); Robin L. West, *Reconstructing Liberty*, 59 TENN. L. REV. 441 (1992).

12. TRONTO, *supra* note 8, at 1.

life, whether or not one agrees with it, illustrates the manner in which political and moral values inform each other. In her opinion, politics inevitably shapes the context of moral judgments. Morality should, in a normative sense, affect the politics of public allocation of goods and values.

Second, like many feminist moral philosophers and epistemologists,<sup>13</sup> she seeks to challenge the separation of moral philosophy as a branch of distant, abstract reasoning from affective, emotive, and feeling insights. In this claim for the recognition of the affective aspects of morality, Tronto and others have argued for contextualized, behavioral, and local, as opposed to universal, sources of moral insight.

Finally, like other feminist theorists, Tronto suggests that to engage in moral philosophy one must transverse the boundary of public and private life. Women's insights and experiences of the moral life have been restricted to the private sphere that moral and political philosophers do not take as seriously as public life. If a morality of care is to be taken seriously, these boundaries of thought must be redrawn, even as Tronto pays self-conscious attention to them.

One of Tronto's intellectual goals is a construct of an ethic of morality or care that accounts for the moral obligations we owe to our fellow human beings who may be distant or dissimilar from ourselves. Thereby, she seeks to expand the conception of care beyond the private, kinship, and familial locus of its most common expression. As explored more fully below, this is the central challenge of any successful theory of care. That is, both its theoretic expression and its practical implementation present enormous difficulties for those who seek to require care of everyone.

In attempting to excavate the historical and less gendered sources of an ethic of care, Tronto seeks to appeal to more universal needs and requirements for an ethic of care. This is a worthwhile historical and intellectual enterprise. Unfortunately, because Tronto sees her work as part of a feminist theoretical enterprise, political issues of womanhood and feminism make their way into the theory, contradicting her strategic purpose. Thus, although I fully applaud her effort to explicate an ethic of care, relishing the dialogue Tronto has opened up to flesh out its dimensions, problems and descriptions, I find that she fails to detach her proposal from gender-based notions of an ethic of care. As she attempts to locate the argument in feminist theory, Tronto inevitably reconnects an ethic of care to women's experiences and the theories of feminist philosophers and strategists. Thus, her descriptive project must be evaluated separately from her strategic project. We may attempt to examine her ethic of care on its own merits, yet we are inevitably drawn to the question of what gender has to do with it,

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13. See, e.g., SANDRA G. HARDING, *WHOSE KNOWLEDGE? WHOSE SCIENCE?* 105-38 (1991)(differentiating feminist epistemology and its traditional counterpart); SANDRA G. HARDING, *THE SCIENCE QUESTION IN FEMINISM* 24 (1986)(same).

largely because of the boundaries Tronto sets on her own arguments.<sup>14</sup> At the end of the day, one cannot simply use language to divorce an ethic of care from the actual locus of care in our society.

Tronto's strategy to detach gender from the ethic of care consists of three parts. First, she locates the sources of an ethic of care historically in male moral philosophers. Second, she critiques the essentialist development of an ethic of care in recent feminist work, particularly the work of Carol Gilligan. Third, she develops her own definitional boundaries for a degendered conception of an ethic of care. In the remainder of this article, I will briefly summarize these arguments, more fully probe my sympathetic critique, and explore the significance of this work for legal theory and practice.

### *B. Early Sources of an Ethic of Care—The Scottish Enlightenment*

Tronto locates the ethic of care in the work of the Scottish Enlightenment.<sup>15</sup> Tronto juxtaposes the universal, abstract, and reason based principles of Kantian ethics with the ethics of philosophers Francis Hutcheson, David Hume and Adam Smith, which are based on moral sentiments and sympathy, employing an emotional basis for ethics that was as much masculine as feminine. She argues that the Scottish philosophers represent the losing side of moral thinking in the eighteenth century.<sup>16</sup>

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14. For example, in her introduction, Tronto seeks to situate her argument in the context of feminist theory, difference theory, the contributions of lesbians and women of color to "white women's feminism," and to post-modern feminism. Thus, she exposes her own contextualization of an ethic of care in feminist theory that must account for the role of gender in the philosophical project she sets for herself. See TRONTO, *supra* note 8, at 12-19.

15. Other feminist theorists have located an ethic of care even earlier in the philosophical canon. See Marilyn Friedman, in WOMEN AND MORAL THEORY, *supra* note 1, at 196 (examining personal and family relationships through the abstract principles in Socrates). Plato and Aristotle, on the other hand, are most often credited or blamed for having created the powerful boundaries and hierarchies of reason/emotion, polity/household, and universalism/contextualism. See HELD, *supra* note 1, at 44-45.

16. Tronto suggests that they "lost" for political and social reasons, not because their theories were philosophically wrong. TRONTO, *supra* note 8, at 36. Indeed, as many feminist theorists have noted, Tronto places the development of moral theory in the context of social and intellectual history.

Theories, she argues, are developed to answer particular and contextualized questions at specific moments in time. For example, Kantian universalism can be understood as a response to the need for a more "cosmopolitan" theory that would transcend cultural and political differences at a time when economic and political commerce became more international and would explain and facilitate relationships with others who were different. *Id.* at 37. Thus, as societies and nationalistic groupings became more democratic and required mercantile interactions of diverse peoples, a need developed for an assessment of what responsibilities people owed to those outside their own social groups. This is a story of historical relativity in that clearly there were enormous class, gender, race and ethnic hierarchies and differences in the eighteenth century, where Tronto locates the beginning of her story.

In this sense, Tronto applies the feminist and postmodern epistemological critique of knowledge to ethical theory. According to this critique, all theories are shaped by the political, social, and economic conditions and contexts in which they were developed; there is no

Rather than describing a Hobbesian world of individualistic selfishness tamed by political and economic contracts of distance, necessity, and tolerance, Hutcheson, Hume, and Smith<sup>17</sup> explored why and when human beings act benevolently, thus emphasizing the "brighter side of human nature."<sup>18</sup>

Tronto informs us that Francis Hutcheson championed a natural moral sense<sup>19</sup> which was neither innate nor rational. Rather, it was based on a perception of "moral connection over distances of time and space" related to a virtue given to us by God as a capacity, like reason, that we might or might not activate.<sup>20</sup> Hutcheson should remain important to us today as we

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"universal theory." See JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 4-5 (1984) (arguing that in the age of modern technology, knowledge is only useful for the revenue it would generate when sold); Nancy Fraser & Linda Nicholson, *Social Criticism Without Philosophy: An Encounter Between Feminism & Postmodernism*, in *UNIVERSAL ABANDON?: THE POLITICS OF POSTMODERNISM* 101 (Andrew Ross ed., 1988) (stating that postmodern feminism is nonuniversalist).

Like Tronto, I do not believe that this reduces to a postmodern nihilism in which no ethical theory is possible. Some theories are still better than others. It should, however, require the modern and feminist ethicist to be self-reflective and to question our own questions. Tronto, Held, and Friedman are all quite clear that they are doing so. But to acknowledge that an ethic of care is important and that we must develop a theory for how and when we bear responsibility for others is a feminist question. See TRONTO, *supra* note 8; HELD, *supra* note 1, and FRIEDMAN, *supra* note 1. Whether or not the male Scottish Enlightenment philosophers originally raised the issue, it has, nevertheless, become a current issue of philosophical inquiry because women who are explicitly urging an ethic of care based on gendered concepts—mothering, birth, connection—have raised the issue. See HELD, *supra* note 1, FRIEDMAN, *supra* note 1, and GILLIGAN, *supra* note 2. Tronto explicitly acknowledges that she is interested in an ethic of care because the political and material conditions of women remain comparatively worse than that of men (at least some of them) and an "ethic of care" moral philosophy may be more strategic to effectuate political change than other moral and political philosophies.

This observation, of course, requires Tronto to consider why theories of care develop at particular points of human history as well. She does so by asking why anti-slavery theory emerged in the eighteenth century, why theories of citizenship become particularly salient again in the eighteenth century (consider our own concern with citizenship and the Greeks use of citizenship as a defining subject—when is it used to exclude and when to include?), and why we become more concerned with "others" not like ourselves at particular moments in human and intellectual history. See TRONTO, *supra* note 8, at 35.

17. Better known to most modernists as the author of the *Wealth of Nations*, Adam Smith's *Theory of Moral Sentiments* provides a rich exploration of the concern for others that coexists with self-interested action and may continue to help us in effecting the "partnership" of self and other and care and justice that informs so much of recent feminist and humanist theory. ADAM SMITH, *THEORY OF MORAL SENTIMENTS* (New York, A.M. Kelley 1966)(1st ed. 1759).

18. ALFIE KOHN, *THE BRIGHTER SIDE OF HUMAN NATURE: ALTRUISM AND EMPATHY IN EVERYDAY LIFE* 5 (1990).

19. See JAMES Q. WILSON, *THE MORAL SENSE* xiii, 216 (1993).

20. TRONTO, *supra* note 8, at 39 (citing FRANCIS HUTCHESON, *Inquiry Into the Original of Our Ideas of Beauty and Virtue*; in 1 *COLLECTED WORKS OF FRANCIS HUTCHESON* 24 (George Olms Verlagsbuchhandlung ed., 1971). See also FRANCIS HUTCHESON, *A SYSTEM OF MORAL PHILOSOPHY* (New York, A.M. Kelley 1968)(1st ed. 1755); HENNING JENSEN, *MOTIVATION AND THE MORAL SENSE IN FRANCIS HUTCHESON'S ETHICAL THEORY* (1971); WILLIAM ROBERT SCOTT, *FRANCIS HUTCHESON: HIS LIFE, TEACHING AND POSITION IN THE HISTORY OF PHILOSOPHY* (1966).

attempt to define an ethic of care by grappling with the problematic area of the morality of caring most for those closest to or most like us. As theoreticians and empiricists have explained, our feelings and capacities to care are most activated by those nearest us and are predominately based in kinship altruism, fellow-feeling, and patriotic nationalism, including the darker sides of racism and personal identification needed for caring.

Hutcheson's claim that "the Love of Benevolence increases as Distance is diminished, and is strongest when Bodys come to touch each other"<sup>21</sup> could be expanded to encompass the notion of "touching" both in the globalized mass media connections we make, and in the development of empathic understanding through multi-cultural narrative.<sup>22</sup> Yet to the extent that the gender-linked ethic of care begins with claims associated with mothering and the family, Hutcheson's theories remind us of the dangers of such sources of care, since they may be located in insular, potentially homogeneous, and self-referential relationships. Although Hutcheson recognized the importance of how values and morals are developed in localities through convention, habit, relationship, and education, he desired to articulate a universal moral ethic of caring that could be affected by education and political order.

Several feminists have recognized that David Hume suggests a useful framework for an ethics which takes account of feminist morality.<sup>23</sup> Like Hutcheson, Hume saw morality as a function of cultivating character traits and sentiments, such as sympathy. Like Hutcheson he also recognized that we are more likely to develop sympathy, care, or passion for those nearest to us. However, Hume argued that these sympathies or sentiments could be developed through interaction with others. Being highly skeptical of a morality based on Kantian reason, Hume emphasized feelings, rather than reason, as a source of morality, and he argued that relations with others could underlie the development of moral character. Thus, feminist theorists like Annette Baier, Carol Gilligan, and Joan Tronto can find Hume's work compatible with a theory that focuses on interconnection, relationship, and specificity, as opposed to universal, abstract reason alone.

Adam Smith, according to Tronto, renders more complex the focus on feeling and sympathy as a source of moral character by asking what makes us consider the other. That is, Smith asks when and how we can imagine ourselves in the situation of another, such that we may overcome our usual

21. TRONTO, *supra* note 8, at 41.

22. Stories play an important role in enabling us to feel, care, empathize, and experience Hutcheson-like benevolence for others. See Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA WOMEN'S L.J. 287 (1992) (reviewing PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991)).

23. TRONTO, *supra* note 8, at 43-45; see also, Annette C. Baier, *Hume, The Women's Moral Theorist?*, in WOMEN AND MORAL THEORY, *supra* note 1, at 37-38 (analyzing Hume's use of women in his essays on morality and ethics).

focus on ourselves. Although Adam Smith called it sympathy, in fact he sought to explore what we would call empathy, the ability to put ourselves in the position of others with their values.<sup>24</sup> Smith saw this ability or capacity as dependent upon our sociability, the pleasure we derive from sharing in emotions, as well as a matter of propriety, our desire for acceptance from our fellow human beings.<sup>25</sup>

As Smith became more skeptical of a civic virtue based entirely on moral sentiments, he focused upon increasing trade with others as a way of building moral character by attempting to marry reason with sentiment. In a sense, Smith's ultimate morality is a kind of social contract, invisible hand, golden rule, new age sort of ethics, which preaches "do unto others as you would have done unto you since you need to be well-regarded to do more future business and it will enhance your self-esteem."

What, according to Tronto, makes these claims universal and humanist, rather than feminist, arguments for an ethic of care? With virtue being detached from religion, Kantian morality locates our ethics in our brains and our abilities to reason from first principles and rules, such as the Categorical Imperative. Tronto, however, points out that certain male philosophers of the Scottish Enlightenment saw that: (1) morality has many sources, and feelings or "sentiments" may be as formative as reason; (2) we are moved to care for and think about others, as a natural part of being human, and this is virtuous and a human good; (3) we need to analyze the ease with which we can be moral or more caring to those closer to us and have greater difficulty with those who are at a social distance;<sup>26</sup> (4) morality is a function of human activity and, thus, is susceptible to change and is based on concrete, interactional opportunities that can encourage us to utilize our caring capacities,<sup>27</sup> and (5) our morality or virtue is a function of

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24. This important distinction between sympathy and empathy is often conflated in both the philosophical literature and the more practical literature in counseling, psychology, and mediation. See Carrie Menkel-Meadow, *Measuring Both the Art and Science of Mediation*, 9 NEGOTIATION J. 321 (1993); Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GA. ST. U. L. REV. 385 (1992)[hereinafter Menkel-Meadow, *Altruism*]; see also John L. Barkai and Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U. L. REV. 505, 510-517 (1983).

25. See TRONTO, *supra* note 8, at 46. In this sense, Smith presages the work of Abraham Maslow in identifying our basic human needs, in addition to food, clothing and shelter, to include human affirmation as well. See also ABRAHAM H. MASLOW, *THE FARTHER REACHES OF HUMAN NATURE* 299 (1971).

26. I am particularly drawn to Adam Smith's formulation: "'Tis True, there is no human, and indeed no sensible, creature, whose happiness or misery does not, in some measure, affect us, when brought near to us, and represented in lively colours. . . ." TRONTO, *supra* note 8, at 45.

27. I am struck by how our current cultural beliefs require us to exercise our bodies to improve our physical health and to exercise "our little grey cells" (apologies to Hercule Poirot) to broaden our minds, yet we seldom talk about exercising our capacities for care and empathy to enhance our ability to do so (except for parents who tell their children they will feel better if they share and the increasing number of law schools that require pro bono legal service).

the socially and politically structured contexts in which we live, and, thus, the Kantian effort at universal, abstract rules is bound to fail for lack of experiential inclusiveness.

Tronto's discussion of these contributions to moral theory from earlier male theorists is an important project for those of us who seek to develop a humanist ethics. Feminists engaged in recovery of feminist texts will do well not only in recovering and revalorizing the lost or underappreciated works of female writers,<sup>28</sup> but also from mining the feminist insights of some of our most noted DWEMs.<sup>29</sup>

Tronto recognizes the historical and theoretical complexity of her desire to separate her recovery project from gender in that it tends to "degender" the ethic of care she wants to describe. First, the defeat of these theories of feelings and moral sensibilities was accomplished through an identification with women. Feelings were not always associated with women. Indeed, all of the aforementioned male philosophers considered the capacity for moral sentiments to be a male quality. Tronto argues that by the end of the eighteenth century, the separation of the household from the workplace led to the repositioning of the virtues of benevolence, which became attached to the household (women's place) as "an antidote to the vanity, corruption and self-interest of the public world."<sup>30</sup> This split of public-private attributes left women relegated to the household as creatures of the warm hearth, feelings, comfort and "the sentimental family."<sup>31</sup>

Second, Tronto makes a somewhat weaker attempt at reporting on the sexist assumptions of the Scottish philosophers. Putting aside the relation of these eighteenth century male-derived ideas to current feminist moral theory, virtually all of the male moral philosophers shared a dim view of women's capabilities in both morality and politics. Thus, whether explicitly or implicitly in their theories, these important thinkers contributed to the containment of both their own ideas and women. Tronto prefers to lay the blame for this containment project on other political philosophers; for example, reminding us that Rousseau saw the weakness of women in their

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28. Significant work is being done by feminist literary critics and those who wish to broaden the canon by refocusing us on the work of important women theorists. See VIRGINIA SAPIRO, *A VINDICATION OF POLITICAL VIRTUE: THE POLITICAL THEORY OF MARY WOLLSTONECRAFT* (1992).

29. Dead White European Males, as referred to in the intellectual multi-cultural controversies. See, e.g., *DEBATING PC: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES* (Paul Berman ed., 1992).

30. TRONTO, *supra* note 8, at 55.

31. See *id.* at 56. Here, Tronto draws on the now familiar trope of feminist and social history to explore the material markers of separation of public and private spheres and its influence on our ideas. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1478-1501 (1983) (arguing that the split of market and family has impeded social reform aimed at improving the lives of women); see generally NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* (1987).

"constant sexuality" — "A man is a man only some of the time, but a woman is a woman all of the time."<sup>32</sup> Thus, separate spheres and separate educations were required. She acknowledges that in the end, Adam Smith believed that humanitarianism was more "naturally a women's sentiment."<sup>33</sup> And she views it as an "anti-feminist accomplishment"<sup>34</sup> that by the end of the eighteenth century an essentialist view of contextual moral sentiments had associated women with their own home-bound sentimental morality, precluding them from the act of reason and excluding them from the public domain.<sup>35</sup>

### *C. Modern Sources of an Ethic of Care: Carol Gilligan and Her Critics*

To acknowledge this history, we must understand that the current attention to an ethic of care is associated with women, including their experiences and the significant work of feminist theorists. While it is useful to explore the more humanist and male roots of some of our current ideas, it is equally clear that the current proponents of an ethic of care are predominantly women, particularly feminists.<sup>36</sup> Their arguments for an ethic of care are based on the gendered experiences derived from both our material and intellectual history. Although I do not disagree with Tronto's strategic statement that the association of contextual ethics, feeling, and care with a morality of women alone will never be politically accepted, we must acknowledge that the current elaboration of an ethic of care is situated, if somewhat problematically, in gender.

Tronto concedes that she does not mean to advocate a return to the Scottish Enlightenment thinkers to recraft an ethic of care. Indeed, she reminds us that they left us with a crucial, unanswered question in the moral philosophy of the twentieth century: how can we create an ethic that extends, if not requires, sympathy (and empathy) to others outside of our own (familial, racial, national, class) group?

Tronto, however, painstakingly argues through a critique of Carol Gilligan's association of an ethic of care with gender,<sup>37</sup> that we cannot elaborate an ethic of care on the basis of differential gendered experiences. Tronto's critique is multi-faceted. She argues that the association of an ethic of care with gender is partial and exclusionary, because it not only

32. TRONTO, *supra* note 8, at 54.

33. *Id.* at 55.

34. *Id.* at 56.

35. Tronto does acknowledge the race and class-based assumptions in this boundary. Many women were not privileged enough to retire entirely to the warmth and sentimentality of the hearth—they had to work to survive or support their families. *Id.* at 55 n.105.

36. See AN ETHIC OF CARE, *supra* note 1; HELD, *supra* note 1; NODDINGS, *supra* note 4.

37. Gilligan initially describes the ethic of care as simply another "theme" of moral reasoning, but her empirical work and later essays more clearly associate gender in fact with the ethic of care. See GILLIGAN, *supra* note 2, at 2.

maintains the containment of women in the private sphere, but also privileges certain women over others. Further, it is empirically unverified and fails to account for the historical variations in the valuation of women's morality.<sup>38</sup> Finally, it fails to account for the crucial understanding that caring behavior is often created through subordination.

Tronto contends that Carol Gilligan's work disrupted certain aspects of the hierarchy of Kohlberg's moral stages of reasoning by juxtaposing a contextual, relational ethic of care to a universal, logical ethic of justice.<sup>39</sup> Yet, it failed to disrupt other class-based aspects of his work. Here Tronto's critiques of Kohlberg's methods and theory are trenchant. For example, if advancement to higher stages of moral reasoning depends on reciprocity and taking the part of the other, then certain levels of education, world

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38. Tronto observes that women have alternately been considered repositories of moral purity and the cause of immoral downfall, depending on the political uses of gender in specific contexts. That is an important reminder of how gender itself is a manipulable concept, used for political purposes in human history. See DENISE RILEY, *FEMINISM AND THE CATEGORY OF "WOMEN" IN HISTORY* (1988) (discussing the political "volatility" of the concept "women") and Joan W. Scott, *Gender: A Useful Category of Historical Analysis*, in *GENDER AND THE POLITICS OF HISTORY* 28, 46 (1988) (describing the use of gender as alternating between evil and good).

39. Lawrence Kohlberg did a series of experiments in an attempt to explain the nature of moral reasoning. Based on this work, Kohlberg segmented moral development into six stages. LAWRENCE KOHLBERG, *The Psychology of Moral Development: Moral Stages and the Life Cycle*, in *II ESSAYS ON MORAL DEVELOPMENT* 621-639 (1984). Stage one, known as "heteronomous" morality, is the amoral stage of avoiding punishment. In stage two, one acts and expects a similar response from others ("individualistic, instrumental morality"). In stage three, "interpersonally normative morality," one's moral judgments are directed toward obtaining the approval of one's closest connections, such as family. "Social system morality" is stage four. Here, one is connected with the rules and judgments of one's entire community. Stage five, "human rights and social welfare morality" is the stage of the social contract, where individuals understand that they must obey norms because they have agreed to their creation. Finally, stage six is the stage of the "morality of universalizable, reversible, and prescriptive general ethical principle(s)" where the individual arrives at his commitment to fairness by a complete commitment to understanding moral dilemmas from a perspective of all those concerned. Kohlberg argued that (1) to progress through the stages required intellectual development, (2) one must proceed through the stages in order, and (3) the stages are hierarchical—those at higher stages have superior moral sensibilities than people at lower stages. For a more detailed background on Kohlberg's theories, see LAWRENCE KOHLBERG, *The Philosophy of Moral Development: Moral Stages and the Idea of Justice*, in *I ESSAYS ON MORAL DEVELOPMENT* (1981).

In making her argument for an ethic of care, Tronto criticizes Kohlberg on several grounds. First, his theory is hierarchical, both in setting out the best form of moral reasoning and in establishing a moral elite in each society because so few people actually reach the final stage. Second, his theory cannot deal with the problem of "otherness." TRONTO, *supra* note 8, at 68. Kohlberg argued that at the higher levels of moral reasoning, an individual's ability to universalize, to see things from the position of everyone involved in a moral dilemma, undermined biases such as those related to race, sex, or class. *Id.* at 70. In fact, because different social contexts are an essential part of the way one views the world, Kohlberg's type of universalist reasoning tends to cover up biases. The universalizing reasoner mistakenly assumes that all others will view moral dilemmas in the same way as the reasoner, if they have reached full moral development, and that "others" who cannot engage in the higher stages of moral reasoning are inferior. *Id.* at 71-73. Gilligan attacked the gender-based aspects of Kohlberg's theory.

experience, language development, and inter-class interaction may be required.<sup>40</sup> Thus, the development of moral reasoning is class, as well as gender-based.<sup>41</sup>

Tronto refers to a number of studies that have failed to replicate Gilligan's empirical findings on gender-based moral reasoning. She situates Gilligan's work in the sameness-difference debates, which have consumed feminist studies and legal theory by pointing out that the appeal of a "woman's morality" (a difference argument) conditions women's entrance into the circles of political participation on the basis that women will make very sharply delineated contributions. That is, women will be admitted only if they are nurturing, caring, and relationship-oriented, thus limiting the basis of their contributions. On the other hand, she asserts that Gilligan's more recent work<sup>42</sup> appeals to a sameness argument, for it suggests that individuals, as well as social institutions, require a balance between an ethic of care and an ethic of justice. Tronto criticizes this new argument for its ability to be marginalized, because she views Gilligan's notion of care as supplemental or additive to justice, and, in her view, such a formulation does not sufficiently realign the relative importance of an ethic of care. Further, Tronto points out that in response to Gilligan's work, Kohlberg has argued that an ethic of care simply represents earlier or partial stages in the development of a universalistic morality—care concerns have to do with personal, family and localized morality.<sup>43</sup> Thus, an ethic of care remains a private, not public, moral issue.

In addition to these critiques, Tronto also suggests that some studies point to experiences of oppression or subordination to account for the development of an ethic of care. And, she reminds us that women and men of color in the lowest paying jobs are the people who actually do the caretaking in current American culture. She thus argues that care is not essentially located in any one social group but is politically, socially, and economically structured.<sup>44</sup> Tronto draws on the work of a number of social theorists to suggest that care is an adaption of the subordinated, and, thus, she argues that a claim for an ethic of care by the powerless can easily be avoided or contained by the powerful. She cites the important work of

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40. TRONTO, *supra* note 8, at 71-76.

41. This point is raised by several critics of Gilligan's work. See, e.g., Carol B. Stack, *The Culture of Gender: Women and Men of Color*, 11 *SIGNS* 321-23 (1986). Cf. Susan Buck-Morss, *Socio-economic Bias in Piaget's Theory and Its Implications for Cross-Culture Studies*, 18 *HUMAN DEVELOPMENT* 35 (1975) (discussing the relationship between class and human development).

42. See, e.g., MAPPING THE MORAL DOMAIN, *supra* note 2.

43. TRONTO, *supra* note 8, at 87-88.

44. An argument previously made by Catherine A. MacKinnon. See, e.g., Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catherine A. MacKinnon and Carrie J. Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *BUFF. L. REV.* 11, 27-28 (1985).

Anthony Cortese<sup>45</sup> as evidence that moralities are developed within group contexts and are bounded by what is politically possible. In other words, those who are powerful develop moral rules that both constitute and help maintain the moral boundaries that sustain particular power balances.<sup>46</sup> On the other hand, outsiders create moralities, like care, in order to validate that which is left for the less powerful to do, attaching themselves, through caring, to the powerful. Cortese argues that there cannot be a universal morality, but rather moral pluralism, derived from these different class, ethnic, and group experiences.<sup>47</sup> Tronto does not find Cortese's argument satisfactory, because it avoids the difficult issue of choice among moralities. Furthermore, it fails to account for the political power of some moralities over others.

In the end, Tronto's critiques of the arguments for separatist or more essentialist multiple moralities contributes to the ongoing debates about Gilligan's and other related work on feminist morality in three specific ways. First, she argues forcefully that a "supplementary," "complementary," or "difference" claim for morality will ultimately find itself bounded by politics. If a proposed ethical system is outside of the mainstream, the powerful will find ways to contain and discredit it. Thus, if an ethic of care is to be taken seriously, it must be recognized as essential to morality and ethics for everyone. Second, she reminds us that current debates in ethical theory have focused on hypotheticals and theory. By focusing on potential moral reasoning in abstracted settings, moreover, theorists fail to study actual moral behavior. In Tronto's opinion, to effectuate a morality of care we must be concerned with precepts for action, not only thought or reasoning. Theorizing about and measuring action or behavior in addition to thoughts, reasoning, or attitudes has long been a difficult dilemma for social science. Such a dilemma becomes particularly difficult in ethics.<sup>48</sup>

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45. ANTHONY J.P. CORTESE, *ETHNIC ETHICS: THE RESTRUCTURING OF MORAL THEORY* (1990).

46. At one level this has been the critique of the American Bar Association's Rules of Professional Conduct—rules drafted by powerful, big-firm ABA lawyers to govern the behavior of more entrepreneurial small firm lawyers. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981).

47. CORTESE, *supra* note 45, at 92.

48. In this respect I think Gilligan's work is often improperly slighted. In her abortion study, she focused on actual moral decisions made. See GILLIGAN, *supra* note 2, at 73-86. The obvious difficulty in this research is finding a moral decision for action for men and women that is sufficiently comparable to provide data for rigorous comparison. See Carol Gilligan and Jane S. Attanucci, *Two Moral Orientations*, in *MAPPING THE MORAL DOMAIN*, *supra* note 2, at 73-86. Because of this difficulty most researchers focus on hypotheticals or moral "attitudes." Researchers Dana and Rand Jack attempted to determine moral actions taken by men and women lawyers by asking them to talk about actual ethical dilemmas in their caseloads, but these are based on individual idiosyncratic caseloads and cannot be matched for comparability. See RAND JACK AND DANA CROWLEY JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* (1989).

Third, we must assess the function of moral theory. As Tronto suggests, Kohlberg's theories can explain how people reason and how they view themselves in relation to others, but his theories do not insure that there will be fewer homeless, disadvantaged people or that there will be more peace and less human cruelty. In short, an explanatory ethical theory does not insure good ethics. Tronto is strongest on this last point, as she aims to create an ethical theory that is morally and politically constituted to make a better world. Her argument for an ethic of care is, she admits, a political one. The crux of her argument is the definition and description of an ethic of care, and her goal is not just to criticize others but to create a reconstructed value system that advances human lives and care itself.

#### *D. Tronto's Ethic of Care*

Tronto seeks to "rethink our conceptions of human nature to shift from the dilemma of autonomy or dependency to a more sophisticated sense of human interdependence."<sup>49</sup> She attempts to alter the moral and political boundaries in which our duties and values are delineated. Moreover, she seeks to disrupt the structures of thinking that contribute to inequalities of power and privilege. In her own words, Tronto fears that she "expect(s) a revised concept of care to accomplish too much."<sup>50</sup> In short, she looks to redefine our duties and responsibilities toward each other as human beings, in a culture and polity that has long privileged individualism, autonomy and independence.

Tronto defines care as an engagement and reaching out to something other than the self (including a thing, such as the environment), that involves action<sup>51</sup> and some burden to the actor, including "everything that we do to maintain, continue and repair our world so that we can live in it as well as possible."<sup>52</sup> Care, in this sense, requires an orientation or disposition to care rather than only an action. She distinguishes real caring from the job<sup>53</sup> of caring. Care, in Tronto's view, begins with taking the needs of the other as a starting point for what must be done. Then care proceeds

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49. TRONTO, *supra* note 8, at 101.

50. *Id.*

51. Tronto's definition of care here tracks the definitional issues in distinguishing sympathy, empathy and altruism. See Menkel-Meadow, *Altruism*, *supra* note 24. While one can feel sympathetic and empathetic, altruism ordinarily assumes some action is taken for another. Whether or not it requires a loss or sacrifice on the part of the actor is more contested. Note that Tronto does assume that an act of caring does involve the acceptance of some form of burden. See TRONTO, *supra* note 8, at 103.

52. *Id.*

53. This may not be as easy to determine as we might think. Many of the paid nurses I have encountered in hospital and other settings seem to be the kind of committed caretakers that would meet Tronto's definitions, even though they are paid and it is their job. Others clearly perform their tasks purely for economic gain. Thus, even within caring tasks or jobs, there will be individual variation in how caring acts are performed, as well as what motivates the caregivers.

through four phases: "caring about" (the recognition that care is necessary), "taking care of" (assuming responsibility for what needs to be done), "care-giving" (direct meeting of needs through physical work, contact and often emotional connection) and "care-receiving" (response by the care-recipient and responsiveness by the care-giver to the needs of the recipient). To care well one must engage in both thought and action, recognizing that care involves conflict either with the care-recipient or with others. One must acknowledge that care may be culturally defined and that it requires adequate resources. These constituent elements of care allow us to evaluate when care is adequate, when it has "integrity" (is integrated in all of these dimensions), and what may be necessary to improve its provision or the conditions of its provisions.

Like Tronto, I am most interested in trying to understand the relative inattention paid to the philosophical importance and political necessity of care, given its importance in our lives.<sup>54</sup> Care has been cabined by its association with the private, the emotional, the family, in short with women. Tronto wishes to elevate care to a human duty, a project which I value, but in tracing its raced, classed and gendered nature<sup>55</sup> throughout human history, she cannot ignore that it is gendered, as well as raced and classed. In human history care has been the work of slaves, servants, and women. In many cultures, care has been the work of people who are subordinated by race, conquest, class, or ethnicity and has been disproportionately received by the well-off. Thus, one explanation for its limited place within philosophical inquiry is that it was, and perhaps remains, insufficiently problematical for those who write moral philosophy. Care is assumed and received, as delivered, usually, though not always, by a female or subordinated servant.<sup>56</sup>

Tronto also reveals how we find care distasteful. To acknowledge its need is to admit our weakness, our lack of independent strength, our interdependence, and our need for others. Thus, not only those who do the

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54. Locke acknowledged that parents owed a duty of care to their children to equip them to deal with adulthood and participation in the polity. Indeed, some read Locke as using the care of parenthood as the principal justification for the institution of marriage and his one departure from contract principles. See Milton C. Regan, *The Boundaries of Care: Constructing Community After Divorce*, 31 HOUS. L. REV. 425, 433-435 (1994).

55. TRONTO, *supra* note 8, at 112-117.

56. Thus, I feel compelled to mention those who have written about care in recent years are often (not always) mothers, wives and other care-givers who have finally developed enough resources and privileges to contemplate their situations. Tronto herself thanks medical caregivers for the care she received, thus being one of the first who writes about care to acknowledge the "gift" and meaning of being cared for. *Id.* at xii.

caring but those who need care are devalued and often moved to the periphery of our society.<sup>57</sup> The need for care, in Tronto's terms, defines the boundaries for power and privilege.<sup>58</sup>

Tronto's desire to reframe our values moves us to recognize our human need for care. Indeed, the need for care is one of the few human universals, from infancy, through inevitable illness, life crises and emotional distress, aging, and certain death. Each of us has had and will have a need for care. While we aspire to individual autonomy,<sup>59</sup> we also must account for when and how we will need care and how it should be given. Whether we like it or not, care and its cost have become public issues that can no longer be cabined by assuming private (and female) provision.

Tronto calls on us to redefine the good and moral person as one who "strives to meet the demands of caring that present themselves in his or her life."<sup>60</sup> She argues that this moral precept is not intended to displace other moral tenets. Indeed, she notes that it may conflict with some moral tenets and require resolution as we resolve other moral dilemmas. But if care is advanced to a universal human desideratum and not limited to women, in her view, we can educate for it, encourage habits of mind that will inform our actions, and learn to meet the human needs of caring presented by our modern world. This, in turn, requires us to develop (in our education, socialization and political philosophy) four essential elements: attentiveness (to the needs and pain of others),<sup>61</sup> responsibility (contrasted to the formal bonds of obligation),<sup>62</sup> competence (including professional responsibility

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57. Does this explain our low resource allocation for child-care? for elder-care? Is this why the Health Reform Bill faltered? We continue to refuse to see the need to pay (collectively) for the health of us all.

58. Consider how unlikely it would be for Franklin Delano Roosevelt to be elected today due to his paralysis, which would be much more visible given expanded media exposure.

59. Not all of us do—that is why I remain attached to the gendered aspects of our values. For arguments that women do not value autonomy in quite the same way as men (which does not imply that they do not value it), see Nedelsky, *supra* note 11; Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (discussing the differences in definitions of "human being" and the experience of connection or separateness in feminist versus masculine jurisprudence); see also ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1985) (discussing the expression and understanding/communications of pain in a society).

60. TRONTO, *supra* note 8, at 126.

61. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 100-04 (1963) (addressing how we avoid and turn away from pain and evil).

62. For instance, Tronto views the rescuers of the Jews as those without any formal obligations who took on responsibility. See TRONTO, *supra* note 8, at 132; see also EVA FOGELMAN, *CONSCIENCE AND COURAGE: RESCUERS OF THE JEWS DURING THE HOLOCAUST* (1994); PHILLIP P. HALLIE, *LEST INNOCENT BLOOD BE SHED* (1979) (using the deeds of the people of the Village of Le Chambon during the holocaust to understand ethics); Kristen R. Monroe, Michael Barton and Ute Klingerman, *Altruism and the Theory of Rational Action: Rescuers of the Jews in Nazi Europe*, 101 ETHICS 103 (1990) (examining thirteen rescuers of Jews in Nazi-occupied Europe whom the authors consider unusual exemplars of ethical behavior).

requirements to become competent), and responsiveness (involving alertness and attentiveness to the vulnerability of inequality imposed by caring relationships).<sup>63</sup> Tronto also asks us to consider the integrity of the caring process, defined as the relationship of these elements to each other, as well as the standards for measuring outcomes and effectiveness. Care is about more than "good intentions."<sup>64</sup>

Tronto does attempt to address the dilemmas posed by a morality of care. She acknowledges that we will need a basis both for assessing needs and meeting them, which requires both moral sensitivity and an ability to focus on otherness. Moreover, it will require difficult choices of allocation of care resources—emotional, physical and economic. How can we avoid having the more powerful and privileged define our collective needs? More disturbingly, how can we avoid having their needs met at the expense of others?

Tronto acknowledges that, like the Scottish Enlightenment philosophers, we are more likely to take seriously the particular needs closest to us. She wonders how we can make parents concerned about the global food supply, beyond its impact upon their own children? How can we deal with the inevitable inequalities and paternalism of caring relationships? What happens to the caregiver who cares too much and fails to take account of her own needs? Though she does not answer these questions satisfactorily, Tronto suggests that a moral theory that engages in these questions may be more successful in solving or dealing with contemporary harms than universal theories that require no obligation to confront them.

In attempting to locate her ethical theory of care in moral philosophy, Tronto appeals to the practical and the political. Universal Kantian rules have not made the world a better place, as evidenced by the fact that "as smart as our philosophers are, they have not been able to prescribe a moral theory that solves contemporary moral problems."<sup>65</sup> Indeed, she argues it is the very lack of a universal theory, and the corollary lack of adequate standards of intervention that enables us to remain detached and uncaring as people suffer.<sup>66</sup> Therefore, Tronto wants to make the ethic of care a political principle, separate from a morality first argument that is inevitably

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63. Tronto states that caregivers must have empathy to meet the needs of the care recipient: ". . . consider the other's [care recipient's] position as that other expresses it. Thus, one is engaged from the standpoint of the other, but not simply by presuming that the other is exactly like the self." TRONTO, *supra* note 8, at 136.

64. *Id.*

65. *Id.* at 152.

66. In elaborating and extending Tronto's work to the international sphere, one wonders how effective Tronto's standards of care would be in formulating foreign policy. For example, what should our appropriate level of care be for Bosnia? Haiti? Rwanda? How can "care" be delivered from country to country? Should "care" be delivered by the family, the workplace, the nation?

tied to women.<sup>67</sup> As a political argument, an ethic of care provides a description of human nature as dependent and autonomous, thus providing a broader, and somewhat more demanding, vision of what is required to be a good democratic citizen. We must consider needs as well as rights and interests,<sup>68</sup> recognizing that we will all be dependent at some point in our lives. Thus, we will be forced to be morally engaged with each other and struggle to achieve conditions for equality within the context of potentially unequal relationships.<sup>69</sup> Most interestingly, Tronto suggests that care, taken as a political concept, can inform the practices of democratic citizenship and, thus, provide a reorientation for political education. Where private, as well as public needs, are discussed in the public sphere, many of the difficult issues of care and resource allocation will be illuminated and subject to public discourse.<sup>70</sup> Making care a political issue, will also, in

67. See TRONTO, *supra* note 8, at 158-161. Tronto criticizes the use of care as a moral strategy in the writings of three feminists: ELIZABETH FOX-GENOVESE, *FEMINISM WITHOUT ILLUSIONS* (1991); CHARLOTTE PERKINS GILMAN, *HERLAND* (1979); NODDINGS, *supra* note 4. *Id.* In seeking to establish a "political" argument for care (on men's terms), Tronto seems a little too anxious to criticize any feminist who has made an argument for care based on women's experiences. Gilman would certainly have thought of herself as constructing a political, as well as a moral argument, for care. Women's arguments for a polity and society based on care cannot all be reduced to a "morality first" argument and thus be quickly dismissed. In subjecting these important works to overly brief critiques, Tronto rejects, as ineffective "moralists," all feminist theorists who write about care. However, Tronto may be guilty of her own charge of containing women who make moral arguments as a form of essentialism. Are women political theorists to be taken more seriously than women moral theorists?

68. Tronto's work is particularly trenchant for legal scholars who have argued that a rights-based legal system may be inadequate to meet all our human needs. See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 795 (1984) (arguing that negotiation should focus on identifying a greater number of the actual needs of the parties to create more possible solutions); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 87 (1987) (arguing that "neither liberal nor radical feminist legal critics have committed themselves to the task of determining the measure of women's happiness or suffering."); see also NANCY FRASER, *UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY* 145, 161-87 (1989) (arguing that interpretation of needs is itself a political stake); Cf. McClain, *supra* note 10, at 1183 (stating that a more informed legal system might also recognize rights to connection and care).

69. In another context, Susan Moller Okin has argued that our political values are structured by our unequal role in the family. Thus, the family, and how it is structured, is a critical site of political, as well as moral, education. It is the struggle within these complex roles that educates us about political participation and equality, as well as social and emotional roles. Okin has also argued that Rawls' justice theory can be improved by considering moral engagement, not detachment, as a reflection of a more interdependent human nature. See Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 ETHICS 229 (1989).

70. Clearly, Tronto imagines a particular context for this discussion. While our polity is currently engaged in sharp debates about caring issues like health care, education, social security, and welfare, it is not entirely clear that "caring" values of the type Tronto means to suggest are winning. If, as Tronto suggests, caring and feeling political philosophies *lost* in the eighteenth century, could it be that caring and needs-based values are losing politically in the latter half of the twentieth century?

Tronto's view, bring to the forefront important issues about justice—such as how care is valued and paid for, how otherness and subordination are constructed,<sup>71</sup> whose needs in a particular political system are met, and how far reaching our geographic and class-based care extends. Thus, for Tronto, making care a central concern of political theory, as well as practical politics, and not just a question of private morality, offers the possibility of effecting greater social and political change by requiring all humans to see and act on their mutual interdependence. In her view, to limit an ethic of care to a women's different morality is to blunt its political effectiveness. Outsiders and marginals have not been sufficiently successful at changing the world and thus, if the world is to be made a better place, care must be seen as a human, not a woman's, responsibility.

### III.

#### CRITIQUE: CAN GENDER BE DETACHED FROM CARE?

Tronto's effort to elucidate an ethic of care, with elements, phases, and conditions that can be assessed and debated within the traditional grounds of moral philosophy, is an effort that I applaud. She has initiated an important discussion of the ideal constituent elements of a theory of care. Thus, she has furthered the project of those who have loosely described an ethic of care<sup>72</sup> either in opposition to an ethic of justice or autonomy or in attempt to apply an ethic of care to a number of particular areas.<sup>73</sup> Much work, of course, remains to be done. How do we select among those who

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71. With the recent passage of Proposition 187, California has determined it will not "care" for outsiders and has excluded illegal aliens from government programs such as health services, welfare, and education. Proposition 187 was recently struck down as unconstitutional, in most parts, by a federal judge in California. See *League of United Latin American Citizens v. Wilson*, Nos. CV 94-7596 MRP, CV 94-7652 MRP, CV 94-7570 MRP, CV 94-0187 MRP, CV 94-7571 MRP, 1995 WL 699583 (C.D. Cal. Nov. 20, 1995); Paul Feldman, *Major Portions of Prop. 187 Thrown Out by Federal Judge; Immigration: U.S. Law Preempts State from Barring Federally Funded Services to Those in the Country Illegally, Ruling Says. Issues Are Expected to be Decided Eventually by Supreme Court.*, L.A. TIMES, November 21, 1995, at A1.

72. Theorists such as Gilligan, Noddings, Ruddick, Held, and Friedman discuss an ethic of care based on relationships, context, and concern; however, the parameters of care have never been clearly defined. Many of these writers have attempted to apply care to particular problems or to set boundaries or to integrate care with an ethic of justice. See, e.g., FRIEDMAN, *supra* note 1, at 117-41 (arguing for gender-neutral care-giving, and integration of care with justice, in order to form a better individual moral perspective); GILLIGAN, *supra* note 2, at 174 (positing that appreciation of connection between justice and care promotes better understanding of work and family relations; HELD, *supra* note 1, at 175-76 (contending that an ethic of caring alone, without concern for justice, is deficient); NODDINGS, *supra* note 4; RUDDICK, *supra* note 10 at 219-51 (arguing for an ethic and practice of "mothering" that would further anti-war movements). Tronto's is the most fully developed theory of what care requires and how it can serve as a standard of moral judgment.

73. The ethic of care has been used to analyze problems of human nature and our relation to the polity and government. See Nedelsky, *supra* note 11; see also *supra* note 1 and sources cited therein (discussing moral philosophy); *supra* note 4 and sources cited therein (discussing education); *infra* notes 76-110 and accompanying text (discussing law).

require our care when there are so many needy recipients, given the poverty, hunger, oppression, illness, warfare, and cruelty that is manifested everyday throughout the world. Would we be able materially to change the conditions of human suffering if everyone sought to measure themselves on Tronto's scale of being a good and caring person? How many of us have the material and emotional resources to engage in caring behavior "for all of the caring needs that present themselves" to us in our lives? If thousands of years of civic, religious and moral education have not increased the expression of caring values in our societies, how can we expect a new "degendered" ethic of care radically to transform not only our attitudes, but also our behavior? What should we make of the people who care too much?<sup>74</sup>

Tronto's work is a major contribution to moral and political philosophy. She has pushed us to consider these questions and to contend with the definitional boundaries she has set for herself in the quest for an ethic of care. Whether or not her effort will be taken seriously is the question to which I now turn, because I do not think that the ethic of care can be detached from gender quite as easily as Tronto hopes.

Can an ethic of care be detached from gender? Should it be detached strategically to gain acceptance or should it be detached from gender because care is a universal, not gendered, value? Tronto's argument for an ethic of care implicates strategic, political, and moral levels of analysis, and the consideration of these issues may not yield uniform conclusions. For example, somewhat ironically, acceptance of Tronto's degendered ethic of care returns an ethic of care to a claim for a universal morality that is contrary to the arguments of those who see care as a contextualized, particularistic value. In this sense, Tronto seeks to substitute a new universal ethic for Kantian ethics, though its dimensions include particularistic obligations. This relationship between the universal and the contextual continues to plague moral theorists, and Tronto's ethic of care does not entirely satisfactorily bridge these boundaries. To what extent is the ethic of care a universal value that we wish to require of all moral beings? To what extent is the practice of care necessarily particularistic, relativistic, and context-specific?

Because an ethic of care, both in its conceptualization and in its practice, is still empirically associated with gender,<sup>75</sup> the relation of the current theory and practice of care (predominantly, but not exclusively, by women)

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74. Anita Allen has cogently criticized the ethic of care as women's domain in denying women the autonomy and privacy rights they may require in societies that have acculturated and required women to lose themselves in caring for others. ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988). If we value caring more highly, does that mean that Mother Theresa, who cares so much, will have a privileged place from which to argue against abortion?

75. See TRONTO, *supra* note 8, at 112-117 (discussing the actual conditions of caring) and at chs. 3 and 6 (treatment of women theorists).

must be confronted in any theoretical project to define care and its practice. Tronto cannot simply detach care from gender by wishful thinking or by development of a theory which does not account fully for the present empirical reality.<sup>76</sup>

In her review of Gilligan's work, Tronto claims that empirical work has demonstrated that there is no gender difference in moral development.<sup>77</sup> Tronto reviews theoretical, methodological, and empirical critiques, as well as attempted replications of Gilligan's work.<sup>78</sup> Yet, the empirical evidence is more mixed. While some studies have failed to replicate Gilligan's "gendered themes"<sup>79</sup> in moral reasoning, others have traced robust gender differences, especially when further qualified by other factors.<sup>80</sup> In her own subsequent work, Gilligan has found that the themes of ethics of justice or care as decision-making frameworks help to define default positions when people seek guidance in moral reasoning. Although both genders are capable of reasoning from both frames and women seem more able to cross-over and reason from both an ethic of justice and an ethic of care, one-third of all women who make ethical choices remain solidly within an ethic of care, connection, and relationship.<sup>81</sup> Similarly, researchers Rand and Dana Jack found that lawyers reasoned without pronounced gender differences when the rules were clear (i.e., when professional responsibility rules specify the role of the criminal defense attorney). They fall back on gendered differences, however, in resolving more ambiguous legal ethical dilemmas, such as what role to take in representing an unfit parent seeking custody.<sup>82</sup> The debates about gender differences in reasoning and behavior continue

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76. This is not to say that Tronto ignores the current reality. Tronto is quite clear that caregiving behavior is currently associated empirically with women, particularly women of color and other "oppressed" groups. See *id.* at 112-117. To complicate the gender construction of caring further, it would be useful to study systematically the inspirational and powerful caring networks that have developed around the care of people with AIDS. The gay male community has become one of the most caring groups of our society, exemplifying what a truly caring society would look like. See, e.g., PAUL MONETTE, *BORROWED TIME: AN AIDS MEMOIR* (1990).

77. TRONTO, *supra* note 8, at 82.

78. See Judy Auerbach, Linda Blum, Vicki Smith, Christine Williams, *On Gilligan's In A Different Voice*, 11 FEMINIST STUDIES 149 (1985); Linda K. Kerber, Catherine G. Greeno and Eleanor E. Maccoby, Zella Luria, Carol B. Stack, and Carol Gilligan, *On Gilligan's In A Different Voice: An Interdisciplinary Forum*, 11 SIGNS 304 (1986); Symposium, *Women and Morality*, 50 SOC. RES. 487 (1983) (responding to the debate sparked by Gilligan's *In A Different Voice*); see generally TRONTO, *supra* note 8, at 77-91.

79. See GILLIGAN, *supra* note 2, at 2.

80. See Menkel-Meadow, *Portia Redux*, *supra* note 5 (literature review and summary of applications of Gilligan's work to moral and ethical reasoning and practice in law).

81. See Carol Gilligan, *Moral Orientation and Moral Development*, in WOMEN AND MORAL THEORY, *supra* note 1; see also Diana T. Meyers, *The Socialized Individual and Individual Autonomy: An Intersection Between Philosophy and Psychology in WOMEN AND MORAL THEORY*, *supra* note 1.

82. See JACK AND JACK, *supra* note 48, at 54-55.

apace.<sup>83</sup> Without systematically reviewing the research here,<sup>84</sup> it is sufficient to note that the empirical results are more mixed than Tronto implies.<sup>85</sup>

In her effort to detach gender from an ethic of care, Tronto carefully reviews the studies that have found no gender differences in moral reasoning. Yet her reporting here is incomplete in two respects. First, it does not do justice to the contrary studies that continue to find gender difference in moral reasoning and political values.<sup>86</sup> Second, while acknowledging that women do most of the caring work in our present society, Tronto does not explore fully the link of this current empirical reality to the development of her more humanistic and universal appeal to a degendered ethic of care. Her study implicates gender both in morality in the creation of moral theory, and in acts of moral reasoning, both hypothetical and real in the practice of care. The relationship between these levels of analysis is not always clear. Is an ethic of care an example of morality? Is a certain kind of morality a necessary condition to the development of a caring practice? Gender differences may operate differently in each of these spheres. Can we have a degendered theory of care with a gendered practice of care? How does the practical experience of care affect the structure of its theory? For example, men may "practice" care differently from women by providing economic support, by "fixing things" mechanically, by "taking out the garbage," or by a host of male stereotyped behaviors that men experience as "taking care of" others. How does "male practice of care" affect theory development?

Whether or not gender difference in moral reasoning will prove robust as the studies proliferate, most moral philosophers, political scientists, and ethicists who are exploring the dimensions of care are women (despite the fact that they are disproportionately underrepresented in academia). Thus,

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83. For excellent collections of empirical studies and polemical arguments about gender differences, see CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS* (1988); CAROL TAVRIS, *THE MISMEASURE OF WOMEN* (1992).

84. I have done so in other places. See, e.g., Menkel-Meadow, *Portia*, *supra* note 5; Menkel-Meadow, *Portia Redux*, *supra* note 5; Menkel-Meadow, *Mainstreaming*, *supra* note 10; Carrie Menkel-Meadow, *The Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, in 3 *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* (Richard Abel and Philip Lewis eds., 1990) [hereinafter Menkel-Meadow, *Feminization*]; Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 *CASE W. RES. L. REV.* 621 (1994) [hereinafter Menkel-Meadow, *Culture Clash*].

85. Indeed, for all who labor in the gender differences fields, presentation of empirical studies often tracks the ideological commitments of the authors. I do not mean to single out Tronto for criticism. All of us who cite empirical work as secondary support for our arguments do so. The truth, at the present moment in social science history, is that there is research available "on both sides." Often even primary researchers develop their categories and studies with a predisposed view to what they will find. Epstein elaborates on this use of social science research agendas for particular arguments in *DECEPTIVE DISTINCTIONS*, *supra* note 83.

86. See FRIEDMAN, *supra* note 1.

to the extent that this is true,<sup>87</sup> Tronto must then confront the strategic question of how an ethic of care will be incorporated into the moral philosophy canon, when developed by female theorists, even if those theorists seek to elaborate an ethic of care that is not gender-based.

Similarly, even if a morality based on an ethic of care is developed to appeal on a more universal human level, Tronto's treatment of the practice of an ethic of care must account for the present over-representation of women in caring roles and the transitional problem of moving toward a world of greater gender equity in care. As she points out, when men engage in activities associated with care, such as doctoring as distinguished from nursing or in service professions such as waiting tables, the care activity itself is valued more highly.<sup>88</sup> Most of what we consider caring work in our present society, such as childrearing, nursing, teaching, serving,<sup>89</sup> food preparation,

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87. Tronto criticizes current female moral theorists and rehabilitates, to some extent, some important male theorists. Yet she does not provide a comprehensive treatment of moral philosophy in this volume and she does not much touch on modern male moral theorists; see, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984); BERNARD WILLIAMS, *MORAL LUCK* (1991); BERNARD WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* (1972); BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985). These authors, among others, fail to elucidate an ethic of care which might suggest some gender influence in the articulation of ethical concepts to be studied. Thus, in a sense, Tronto herself contributes to the gender boundaries in moral theory.

88. Gender hierarchies have been documented in virtually all of the professions both internally (men dominate at the higher levels of even traditionally female "helping" professions such as librarianship or social work) and in the stratification of the professions themselves ("male" professions always head the prestige scale of relative professional rankings). See Menkel-Meadow, *Feminization*, *supra* note 84, at 196 (looking at comparative professional stratification studies). Tronto notes that even for men in caring professions such as medicine, those who do the least direct "care" are most prestigious, such as research physicians and surgeons. The delivery of care is quite gendered.

In my father's recent illness, I was struck by how males "cared" by offering discrete technical assistance and decision-making while women care-givers, including both doctors and nurses, were more diffusely involved in both the physical and other aspects of caring. The male surgeons performed their discrete tasks and did little medical follow-up. The nurses and female-dominated infectious disease physicians were more engaged in monitoring and caring for multiple systems and overall comfort. To my "technical" doctor-brother's credit, it was he who organized an interdisciplinary team of physicians to solve and monitor combined surgical and medical problems. He also noticed the sexism of his own profession—the infectious disease team was derisively called the "sisters" as a way of calling attention to their femaleness and derogating their treatment protocols. In this case of an individual, it should be noted that interdisciplinary work of medical and surgical intervention, combined with exhausting physical and emotional care delivered by both loved ones and paid care staff (male and female nurses) were needed to create health. Thus, like Tronto, I believe care will eventually require the "balance" and multi-disciplinary care of both genders and many different forms of care.

89. Women still predominate in the service industries and men in production. As production decreases in proportion to the national product, we see continued occupational segregation in new service industries (such as the computer industry, etc.). See, e.g., NAT'L RESEARCH COUNCIL, *WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB* (Barbara F. Reskin and Heidi I. Hartman eds., 1986); Barbara F. Reskin, *Bringing the Men Back In: Sex Differentiation and the Devaluation of Women's Work*, 2 *GENDER & SOC'Y* 58 (1988).

and eldercare, is performed by women. As a result, the practice of care has a female<sup>90</sup> cast. Thus, in determining the elements of care, we must consider that our present description may be based on current care activities as constructed by present caregivers who are mostly women. Further, we must acknowledge that care activities must be made morally and politically more attractive to those who do not engage in care practice.

Given that most care is now delivered by women, can a political argument for care rest on degendered neutral grounds? Tronto must move us from the *is* (and the current gendered forms in which care is found) to the *ought* or *should* be. A political argument must tell us how those who have not cared before can be made to care. A claim that we must recognize the temporality of our autonomy and independence and understand our interdependence and vulnerability is a start. Alone, however, it will not cause those who are temporarily able to change the allocations they make of their own work and family efforts.<sup>91</sup> What kinds of political and moral education, transformative experiences or other conditions would Tronto propose to lead us to a less gendered actuality and conception of an ethic of care?<sup>92</sup>

#### IV.

#### WHAT'S LAW GOT TO DO WITH IT? CARE AND THE LAW

Although Tronto's project is explicitly directed to moral and political philosophy and to feminist theory,<sup>93</sup> a morality or ethic of care has proven

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90. By using "female," I hope to avoid the essentialist statement that caring is feminine. To say that women do most of the caring is not to say that there are essential "feminine" ways of caring. Recent examples of female care gone wrong in infanticide committed by the mother, such as the Susan Smith case in South Carolina, demonstrate that female care is not always nurturing. See Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017 (1992).

91. For a fuller discussion of feminist debates on work and family conflicts, see Joan C. Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. Rev. 1559 (1991)(examining the interplay between the rhetoric of choice and mothers who work outside the home); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. Rev. 797 (1989)(arguing that the feminization of poverty and women's career/family conflicts challenges the insight of "sameness" feminists); see also Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989)(describing how framing discussions about work and family conflicts exclusively as a women's issue unduly narrows the debate by excluding the voices of men and ignoring the implications of race and class).

92. The health epidemics of AIDS and breast cancer transformed some communities who have come to share care responsibilities and love from a recognition of mutual vulnerability and concern.

93. I imagine that other reviewers will also note the irony or difficulty in Tronto's project. She both situates her work in feminist theory and calls for its incorporation into general theories of human nature and moral behavior. At the same time, she seeks to decenter the place of gender — a project that is difficult for all feminist theorists who seek acceptance and "mainstreaming" of their work. See Menkel-Meadow, *Mainstreaming*, *supra* note 10. Is Tronto devaluing women by seeking to marginalize them from a consideration of care when that may be one of women's most significant contributions to theory and practice? I realize this formulation assumes some gender difference, in contrast to Tronto's position.

to be quite evocative in legal studies. So as I applaud the effort to specify the parameters and conditions of an ethic of care, I close here by drawing out some of the implications of this work for jurisprudence, legal theory, ethics and practice. I will briefly review these issues as elaborated by Tronto to encourage more detailed explorations of how an ethic of care affects law and justice.

Jurisprudence has long relied on traditional liberal theories of social contract, individualism, autonomy and the rights of the individual against the state.<sup>94</sup> Yet, recent feminist and critical attacks on liberal assumptions have broadened the analysis of a consideration of justice. Thus, following on the work of Carol Gilligan and others, legal theorists began to explore how legal rights, duties, obligations and needs<sup>95</sup> might have to be reconceptualized to take account of the experiences of women, and other outsider groups. Most evocative have been claims that the liberal conceptions of liberty and autonomy assume a fully responsible, distanced individual who seeks separation and maximum non-interference, both in his personal life and in his relations with the state.<sup>96</sup> Taking account of women's needs from the state and legal system might require a different conceptualization of interests, including state and individual obligations to provide support, care and attachment rather than distance.<sup>97</sup> These theories are controversial and they have had little effect on the development of legal doctrine thus far. However, they have served to offer the kind of reconstructed visions or legal paradigms that Tronto proposes for moral philosophy.<sup>98</sup> It might be useful to contemplate what obligations would befall the state or what legal changes would be necessary if we treated Tronto's ethic of care as a legal, as well as moral, imperative.

Several scholars have explicitly considered how a duty of care, as expressed in conventional tort law, might be transformed or expanded. Their

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Of course, neither of us has any definitive empirical support for our respective positions on gender difference.

94. For good reviews of how traditional jurisprudence and American constitutional principles rest on these tenets of liberal theory, see Karst, *supra* note 5; Elizabeth Mensch, *The History of Mainstream Legal Thought, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 2d ed. 1990); West, *Jurisprudence and Gender, supra* note 59; see also BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); BRUCE A. ACKERMAN, *WE THE PEOPLE* (1991); JOHN B. RAWLS, *POLITICAL LIBERALISM* (1993).

95. The move from a discussion of rights to needs was a rather radical move for legal theorists. That the legal system should satisfy people's needs may date in law from the New Deal and legal realism. Its articulation in legal theory, though, came later. See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990); Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964).

96. E.g. HELD *supra* note 1, at 182-91; Nedelsky, *supra* note 11, at 12-20; West, *supra* note 11, at 446-53. But see McClain, *supra* note 10 (arguing that the feminist critique of liberalism as atomistic is often inaccurate).

97. E.g. HELD, *supra* note 1, at 195-214; Nedelsky, *supra* note 11 at 12, 20-26.

98. For a provocative statement of how these values can be used to justify different kinds of competing welfare reforms, see Johanna Brenner, *Towards a Feminist Perspective on Welfare Reform*, 2 YALE J.L. & FEMINISM 99 (1989).

proposals include broader obligations of care and concern for others, with liability flowing therefrom (i.e., a duty to make the world safer, a duty to rescue and assist, rather than post-hoc paid damages for fault-based injuries).<sup>99</sup>

In family law, an explicit focus on an expanded notion of care has served as a new justification for revisiting old values and ensuring equity in post-divorce family life. Scholars have suggested that, in the context of both parental and spousal relationships, an ethic of care philosophically justifies the support awards that mediate against more formalist and harsher, if more modern, contract-based theories of family obligations.<sup>100</sup> Using parallel arguments, feminist theorists have argued that a more caring conception of the state might alter welfare allocations<sup>101</sup> and bureaucratic practices.<sup>102</sup>

In the years following publication of Gilligan's *In A Different Voice*, legal scholars were quick to apply an ethic of care to the widely disparate disciplines of civil procedure,<sup>103</sup> contract law,<sup>104</sup> constitutional law,<sup>105</sup> and

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99. See, e.g., Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759 (1990) (discussing ways that feminist theory might transform tort law theories of burden of proof, allocation of economic loss, and duty of care). See also Viola Brady, *The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 IND. L.J. 551 (1980); Steven I. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994) (developing a theory of a duty to rescue drawing on common law and natural rights theory and arguing that such a duty arises from an individual's responsibility toward the community).

100. See June R. Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359 (1994) (critiquing three different visions of community in the process of examining income sharing proposals); Regan, *supra* note 56; Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989) (demonstrating that women are not better off under a no-fault system of divorce and proposing an investment partnership model of post-divorce allocation, which would produce fair results for both spouses); see also Judith C. Areen, *A Need for Caring*, 86 MICH. L. REV. 1067 (1988) (highlighting the use of parent-child relationships as a paradigm for approaching moral problems); Grace G. Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981) for arguments that those who develop the "caring" relationships of quasi-marital status by cohabiting both owe duties of care to each other and are entitled to the "care" of legal status as beneficiaries of social and governmental programs.

101. See Bender, *supra* note 99; WOMEN, THE STATE AND WELFARE (Linda Gordon ed., 1984).

102. See generally, KATHY E. FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* (1984) (advocating a more legitimate concern for community by reformulating current bureaucracy through feminist discourse); Cynthia R. Farina, *Getting From Here to There*, 1991 DUKE L. J. 689 (1991) (reviewing Cass Sunstein's *After the Rights Revolution: Reconceiving the Regulatory State* (1990) and Chris Edley's *Administrative Law* (1990) and arguing for a feminist approach to bureaucracy and public administration). I have chosen here not to elaborate these arguments more fully, given the harsher times in which we now live. With the defeat of the Clinton Health Care reforms and the likely structures of Republican-led welfare reforms we do not seem to be moving toward a more "caring" relationship between the government and its needy citizens.

103. See, e.g., Paul J. Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243 (1988).

104. See, e.g., Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029 (1992).

judicial behavior.<sup>106</sup> Much of this work remains controversial given the critiques of difference models and the claim that essentialism is assumed in the work. Furthermore, the law has been unable radically to reconceptualize its philosophical underpinnings. Yet, Tronto offers a new opportunity for a fuller description of an ethic of care. She does so not just in the more foundational aspects of jurisprudence and the reasoning for law's existence, but in the specifics of particular legal doctrines that might be necessary to effectuate a legal ethic of care. Tronto's standard of care could perhaps serve as a counter-standard to the increasing use of the efficiency standard by which laws are measured.<sup>107</sup>

To the extent that Tronto's work raises issues of ethics and interpersonal obligations and responsibilities, it serves as an important touchstone for legal ethics and lawyer-client relations. As I have noted elsewhere, concepts of care, concern for the other, empathy, and altruism are very problematically assigned to lawyering, where adversarial relations are assumed to be the norm.<sup>108</sup> Yet, Tronto's work may significantly influence our understanding of lawyers' obligations to their own clients, if not their adversaries. Stephen Ellmann has applied the ethic of care to the lawyer-client relationship. He argues that care is achieved through a reasoning, as well as affective, process. Caring lawyers, he maintains, will care more for some than for others (with implications for case choices and strategic decision-making). If care is taken as a central concern of lawyering, he holds interpersonal relations between lawyers and clients will be benefitted, and some principles of legal ethics, such as the need for zealous representation, will require reconstruction. Some moral dilemmas in lawyering will be more easily resolved, and resolved with more principle.<sup>109</sup> Ellmann seeks to take the ethic of care seriously—offering the prescription that if a lawyer cannot avoid doing some harm, she should at least minimize the harm she

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105. See, e.g., Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

106. See, e.g., Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

107. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

108. See Menkel-Meadow, *Portia*, *supra* note 5; Menkel-Meadow, *Portia Redux*, *supra* note 5; Menkel-Meadow, *Altruism*, *supra* note 24.

109. Stephen J. Ellmann, *The Ethic of Care As An Ethic for Lawyers*, 81 GEO. L. J. 2665 (1993). While I do not endorse all of Ellmann's conclusions or descriptions of the lawyer-client relationship and legal ethics, his article provides the kind of careful exposition of applying a new central value "care" to the crafting of rules and relationships and his work illuminates the kind of reconstructive theoretical and practical work that Tronto's work is meant to inspire. Taking new theories seriously and working through the detail of their application is important intellectual work, and Ellmann's "meditation" on Gilligan could now be expanded by incorporating Tronto's more specific description of the ethic of care. What responsibility of care do we owe to our clients, our adversaries and others affected by our legal actions? See *id.* at 2714-2726 (discussing the Hidden Bodies case, using the ethic of care framework). A rigorous consideration of care in the lawyering context would also have to consider the competition for care by the lawyer's clients and the lawyer's family members. See Menkel-Meadow, *Culture Clash*, *supra* note 84.

causes. This might require more discretionary ethics than rigid rules or a new form of moral education.<sup>110</sup>

An ethic of care in law, legal ethics, and legal decisionmaking will likely seem imprecise to moral philosophers. To say that one should care does not dictate precisely for whom we should care or how. Nor does it answer the question of when we sacrifice our client to promote justice for the other side. Yet, Tronto's effort to specify standards for our moral responsibility for the welfare of others through an ethic of care, deserves at least equal attention by those who consider what is just or whether we have achieved freedom. Legal scholars and practitioners, as well as moral philosophers and political theorists, would do well to wrestle with this book, exploring its limits and dilemmas, while focusing on its promise to reorient values we take seriously. Tronto's work offers an opportunity to explore moral, political, and legal dimensions of our human interdependence and need to be cared for and care for others.

## V. CONCLUSION

Tronto's work is an important book and I urge readers to explore its implications. No doubt others will test the limits and problems of its efforts to construct an ethical standard of care. Tronto elucidates an ethic of care in a provocative, interesting, and ultimately successful manner. I am content, therefore, with the moral argument in favor of an ethic of care. I am, however, less satisfied with the other boundary set by Tronto—her political argument for an ethic of care. By seeking to detach women from the ethic of care, by tracing its sources in the work of male philosophers, and by slighting the empirical reality of women's caring practices, she misses the heart of the issue. If an ethic of care is proposed by and acted on predominately by women, and Tronto's descriptions of the power and politics of moral theory are correct (and I believe they are), then we cannot strategically hide the influence of women in both the conceptualization and practice of care. I would prefer to acknowledge the important role of women, and men, where they have contributed to this enterprise, in both theory construction and in the practice of care. Then, we may transform a feminist project into a humanist one, both in theory and practice.

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110. For similar arguments, see William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

