PHILOSOPHICAL MUSINGS ON PERSONS, GROUPS and RIGHTS

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Long ago there was a revolution in Greece. It was at first a patriarchal revolution and then a revolution of rationality. In their patriarchy the Greeks were no better, and probably no worse, than many other cultures of the ancient Middle East and Europe. Their special claim in our history lies in the way they developed reason. While all humans undoubtedly have found reason to be an essential tool of survival in a not-always friendly world, the ancient Greeks managed to rip it clear of its moorings in individual practice. They learned to "abstract" from the concrete particulars. The harmony of music, probably known to many cultures and passed by example and imitation from generation to generation, was given a mathematical formulation and explanation. Narrative myths of creation and astronomy were replaced by "scientific" explanations in terms of causes. The practical geometry of the Egyptians became the abstract geometry of Euclid. The certainty of deduction joined with the purity of abstraction to produce a kind of knowledge that seemed almost divine.[1]

The influence of Hellenistic thought was profound. When Rome was a growing empire, Greece was the center of learning. Greek logic and egalitarian ethics found their way to the highest levels of Roman legal and political life through the teachings of the Stoic philosophers. Greek thought helped provide philosophical foundations for the developing Christian religion, and Christian tendencies toward universalism and egalitarianism found support and expression in Stoic doctrine. Greek rationalist thought played an important role once again in the flowering of medieval culture. The first great legal system of medieval Europe, canon law, was based on Stoic-influenced Roman law, and the first universities were devoted to the study of that same Roman law. Scholastic philosophy extended the abstract reasoning of the Greeks and 'perfected' the interpretation of Roman law as a system of abstract principle.[2] From these beginnings came modern civil law systems. While English law was not as immediately drawn from the Greco-Roman tradition, it too could not escape the influences of Greek rationalism. Learning in the universities looked to classical sources, and in the law many early judges and

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[1]For a discussion of these and related developments, see A. Bonnard, *Greek Civilization*, Vol. 2 (New York: The Macmillan Company, 1959) c.3, "The Birth of Science". Some of the most important passages are excerpted in J.C. Smith and D. N. Weisstub, *The Western Idea of Law* (Toronto: Butterworths, 1983) at 244-250. See also M. Clagett, *Greek Science in Antiquity* (New York: Abelard-Schuman, 1955) c. 1-7.

[2]For these and related matters, see H. J. Berman, "The Origins of Western Legal Science" (1977) 90 *Harvard Law Review* 900.

Chancellors were clerics or had church training.

In the struggles that produced greater social freedom, constitutional democracy and capitalism, abstract rationalism provided a perfect methodology. The differences between people that might have been used to justify asymmetrical power relationships would simply be abstracted away, as it were. Just as triangles cut from lead, brass and gold are from a geometrical perspective just triangles, so the peasant, merchant and noble are from a political and legal perspective just persons. Suddenly we have mathematical precision and simplicity. In the judicial system the rule of law develops: the same laws apply in the same ways to govern the relationships between and among all people. In the political system democracy develops: one 'man' one vote. The old shackles of birth and class are irrelevant. Everyone is free; everyone is fundamentally equal.

The process of legal and political abstraction cannot be total; there must be some core that is extracted, something that will count as the basic and essential person. For many Greeks, including the Stoics, that something was the divine spark of rationality. For Christians it was the immortal soul. For the state, controlled by economic interests, it became the person in the role of contract-maker. It was the citizen, the legal person, the 'economic man'. The vision of society which made justification of representative democracy and free-market capitalism possible required that the citizen / legal person have those characteristics necessary to allow choice and agreement, and *only* those characteristics. Society came to be seen in terms of free agreements, with contract replacing debt as the organizing normative concept,[3] so the citizens / persons had to be capable of free, rational choices. Anything more, and there might be grounds for differential awarding of rights and powers, a violation of fundamental equality. Anything less, and we could not justify the actual outcomes of the market or the political process. So the citizen / legal person was assumed to be a rational, autonomous decision-maker, nothing more and nothing less.

But agreement between free, rational actors is not sufficient for the maintenance of justice. The conditions necessary for the continued exercise of free choice and agreement, and enjoyment of their fruits, must be guaranteed. Otherwise groups of individuals may agree among themselves to deprive others of freedom or the fruits of their choices. The mechanism used to maintain the conditions of liberty was that of fundamental or inalienable rights. These were political, religious, intellectual and property rights: freedom of speech, press and religion; thought and association; life, liberty and the pursuit of happiness; possession and alienation of property; and so on. They were powers and liberties which set out the

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[3]See D. J. Guth, "The Age of Debt, The Reformation and English Law" in D.J. Guth and J.W. McKenna, eds, *Tudor Rule and Revolution: Essays for G.R. Elton From His American Friends* (Cambridge: Cambridge University Press, 1982) at 69-86.

minimal boundaries and social conditions for a society based on effective, equal freedom of choice (liberty) and agreement. As *rights*, they functioned to limit legal and political reasoning. The good consequences produced by an individual or collective action would not provide sufficient justification in the face of a violation of one of these rights; that is, rights function as a way of blocking consequentialist and utilitarian arguments.[4] Rights, then, could protect the fundamental mechanisms of free choice and agreement for everyone. As a result, the state, law and morality arising from consent and agreement would be justified. This is the so-called "social contract". Equal liberty is the guiding value.

This conception of the person and state, which is usually more unexpressed ideology than explicit theory, is sometimes called liberalism.[5] It gives the appearance of liberty, equality and justice. Every person has the rights necessary to map a unique life. The state exists solely to guarantee the conditions of free choice and agreement, to protect the free market, so to speak, and is 'neutral' between various conceptions of what constitutes the good life. Compared to the dead hand of tradition, this looks good indeed. Change for the better appears possible.

Because differences between individuals are assumed to be politically, legally and morally irrelevant, the original focus of reform for a liberal is membership in the system itself. Slaves, women, children and the mentally disabled were at one time or another excluded from membership. Since the full citizen is characterized only as an autonomous, rational decision-maker, exclusion of these groups was typically justified by denying that their members exhibited the necessary mental capacities for free, rational choice. We find this in everything from Aristotle's justifications for slavery and patriarchy to contemporary sexist jokes and apologia for apartheid. The absolute character of the exclusion of these groups made for a simple agenda of reform: grant members of the excluded group all of the rights accorded to the ordinary citizen. This meant abolishing slavery, granting the vote

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[4]This conception of rights permeates the work of Ronald Dworkin. See especially "Hard Cases" 88 *Harvard Law Review* 1057, reprinted as Chapter 4 of *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), and the title essay in *Taking Rights Seriously* (c. 7).

[5]I do not claim this is the only possible conception of the person and state which might be called "liberal", or even that it is the best justified. For example, in *Liberalism, Community, and Culture* (New York: Oxford University Press, 1989), Will Kymlicka ably argues that equal consideration for the interests of each member of the community (or equal concern and respect) is more fundamental to liberalism than liberty. That is a perfectly viable interpretation of one strand of our tradition, and as Kymlicka's book illustrates, following it produces results that may seem surprising to many. Yet it remains but one strand of a complexly woven intellectual tradition. I do not claim that existing political organizations ever fully and exclusively embody liberal ideology, or that people who think this way do not think in other (arguably) liberal and illiberal ways as well; political and cognitive dissonance is the way of the world. What I do hold is that this conception of liberalism captures a powerful, coherent and intellectually elegant mode of thinking which is common in the West, and thus helps clarify and explain recurrent political strategies, arguments and tensions.

and removing barriers to free choice of profession, housing, education and the like. Abolition of slavery, which had been recognized as a requirement of abstract rationalism from the time of the Greek and Roman Stoics, succeeded in Britain and the United States only in the 19th century. The push continued for universal male suffrage and civil rights. Beginning at the end of the 18th century, liberal feminism became a powerful impetus to reform the treatment of women. On the reforming liberal view, all persons (women and men, blacks and whites, poor and rich) are essentially equal in all ways that make a difference to the fundamental capacity to take equal part in public and community life. While we may differ dramatically in all kinds of 'personal' and 'private' ways, we all share the essential characteristics necessary for participation in the public life of the community: free will and reason.

While liberal theory has never been fully realized in practice, it does capture something of the moral and ideological direction of many modern states. But it sits uneasily with a second great trend in the modern world, nationalism and other forms of communalism. Rather than see the group (state, nation, or whatever) as emerging from the free choices of individual persons, communalism tends to see the individual as emerging from, or being defined by, the group. The individual is seen not as an abstracted, rational decision-maker but as a group-member. Group membership becomes a necessary part of the description of a citizen. While liberalism is fundamentally universalist, providing no grounds for recognizing deep divisions between people anywhere in the world, communalism is separatist, seeing essential differences between people arising from their memberships in distinct groups. For the former, national boundaries and political arrangements should be no more than the current results of free choices people make. Unless the fundamental rights of people are being violated, there is no reason to interfere with the political process and its products. For the latter, national boundaries and political arrangements are of much more than temporary significance, for they help define, or perhaps threaten, the very identities of people. The liberal's person is Canadian or Muslim or Vietnamese incidentally, accidentally or 'privately'. The communalist's person is essentially or 'publicly' these things.

Just as the liberal view requires protection for the existence and functioning of the core person, defined as a rational decision-maker, so the communalist view requires protection for its functioning, core person, defined at least in part as a group-member. In both cases the guiding value can most plausibly be seen as attaching to the individual person. The liberal finds the value of liberty only in the activities and lives of free individuals. The communalist too can look to individual lives to see the guiding value(s) realized.[6] In the latter case, though, those guiding

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[6] In this paper I shall ignore those versions of communalism that set the group itself above the individual and find the supreme good in the existence, life or perfection of the collective. Ultimately, value must arise from or through consciousness, and arguments supporting the existence of an

values are filled with the content which centrally contributes to group identity: it may be the value of a life lived after the style of a Mennonite, an Anglophone or a Lithuanian. Communalist thought thus seeks protection and furtherance of the particular group, for only this can make possible the special value that comes from living the life appropriate to the group.

Preserving and promoting the group is typically done in either of two ways. The first is the road of nationalism: define a homeland, separate from other political bodies and incorporate a new sovereign nation state. If properly done this has the result of giving group members the political power to promote and further define their unique national identity. The second is the road of group rights: use the liberal mechanism of inalienable rights, and claim the rights necessary to preserve and promote the group's identity within a larger state.

Are the liberal and communal visions consistent? Can a single society be both? The sovereign nation state might, by accident, satisfy both theories if it were sufficiently homogeneous that the 'private' or 'personal' values of individuals would lead them to make those agreements and political arrangements that further group interests and identity. It's easy to be liberal when your identity isn't threatened. But what if there are significant minorities and those minorities have their own communal visions? Given the limited mechanisms developed within the liberal, rationalist tradition for dealing with diversity, there are few choices: *subdivide* into smaller, homogeneous nations; *suppress* the minorities in the hope of creating homogeneity; *assimilate* the minorities by increasing the economic, emotional or other value of membership in the dominant group; or *stabilize* the relationships between the groups by means of group rights. We have seen all of these mechanisms employed or suggested in Canada. All but the last rely on isolation and homogeneity to solve the problem of groups. Subdividing, or separatism, functions as a political means of maintaining the liberal ideology of abstraction; under the best conditions, separation into groups with internally consistent views of the nature of the good life allows the communalist value of group-identity to arise from free choice and agreement. Suppression and assimilation mimic the liberal society by force or seduction. Only the approach of group rights faces the problem squarely and seeks to make heterogeneity consistent with liberalism.

What can a group right be? It might be a right whose content reflects a

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'emergent *group* consciousness' are too weak to counterbalance the dangers of tyranny acceptance of such ideas creates. The reality of group actions, responsibilities and benefits makes group rights possible, but does not *justify* their creation or recognition. In this paper I shall take the position that the justification for collective rights is to be found in the value of the lives led as members of the group. I take no position on how that value must be distributed between the members of the group, non-group members, and past and future generations. (For persuasive defences of the possibility of collective rights, see Kymlicka, *supra*, footnote 5 and M. McDonald, "Collective Rights and Tyranny" 56:2 *R. de l'U. d'Ottawa / U. of Ottawa Q.* 115.)

particular conception of the good life: for example, the right to be educated in English. Or it might be a right whose content is 'neutral', but which is accorded to members of only certain groups: for example, granting the right to be educated in one's first language to native speakers of French and English only. Both of these approaches are repugnant to liberalism. The first removes the liberty to choose one's own conception of the good life, and the second violates the liberal ideal of *equal* freedom. To preserve and promote a particular style of life by means of rights must, in the end, require modification of the liberal ideal of equal freedom to choose and follow one's own conception of the good life.

The conflict between liberalism and communalism cannot be solved within the framework of liberal thought. The key to liberalism is abstract rationalism. We are equal *in abstraction* from the characteristics which make us individually unique, and we are free when our legal and moral duties are determined solely by our choices and agreements. Communalism rejects this extreme abstraction of persons, seeing actual group affiliations as being part of the political, legal and moral essence of persons. For the communalist, abstract equality can find a place only *within the group*. Equality between members of different groups must be filtered through their group affiliations. This requires according equality of respect for the groups themselves. For example, members of different linguistic communities may be treated equally by providing constitutional guarantees for equal treatment of certain practices that help define and maintain the groups. Certain languages may be accepted as "official", and schooling, social services, legal representation and so on provided.

The communalist view of equality between groups, however, cannot be understood on the liberal model. Simply substituting groups for individuals in the liberal scheme will not do. Liberal freedom and equality depend on emptying the concept of citizen of particular content, while the communalist's valued form-of-life depends on filling the concept of citizen with value-rich content.[7] To treat groups and group membership formally and abstractly is to invite obliteration of the content that makes group membership valuable. A group right must be more than a liberal right for a group; it must be a right to a particular content, a right to particular *results*. But as soon as a particular content or result is mandated, the

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[7]Kymlicka's distinction between the existence of "cultural structures" and the "character of a culture" (*supra*, footnote 5, esp. c. 8 at 166 ff.) does not fully bridge this gap. It is perhaps true that, in theory, a community may take on *any* character over its history, and so is not rigidly defined by a particular content. But it does not follow from this that actual norms, values, practices and institutions can be ignored without endangering the significance of a culture to its members. Life is lived and choices are made in the particular, so it is the particular character of a culture at specific points in time which makes life as a member of the group valuable or, from Kymlicka's perspective, provides a meaningful "context of choice". The group, or "cultural structure", cannot be *meaningfully* protected in the abstract: it must be sustained as a 'concrete' (though changing) set of institutions and practices through which it is embodied at each moment in time.

equal freedom of individuals to choose and agree must be restricted. The liberal ideal is violated.

What has gone wrong? Do we have to choose between liberty and a rich cultural life? Perhaps what we should do is go back to the very beginning. What happens if we question the starting point? The key to the long, powerful and appealing liberal tradition of freedom and equality is abstract rationalism. We took a shortcut to the just society by abstracting from, or ignoring, our differences. Interaction between individuals and groups was based on agreement and competition, often zero-sum. At best, relationships reflected reciprocity and mutual respect, with justice as fairness taking center stage. The resulting society was aggressive, cold and impersonal. Alienation and despair came easily. With only minor exceptions, abstract rights, duties and powers were the only recognized connections between people. The characteristics and relationships that make each of us special and that give meaning and depth to our lives were for the most part politically, legally and morally irrelevant.

Radical feminists have criticized liberalism along these lines, suggesting, in essence, that satisfactory social arrangements must take account of the 'real' or 'concrete' individual, with all of her needs, capacities, values and connections. Abstract liberal equality is a mask which disguises the personally experienced inequalities of gender, class, race and sexual orientation. By abstracting from the particulars, we render the 'raw' power of sexism, classism, racism and heterosexism legally, politically and morally invisible. So convincing and coherent is the liberal ideological mask that the first, and perhaps most difficult, task of feminism has been consciousness raising.

Communalism is related to, but distinct from, this feminist critique. It too depends on a rejection of the wholly abstract legal person. But whereas the feminist approach implicitly suggests the desirability of expanding the range of normatively relevant characteristics to cover everything the individual would value about herself, the communalist typically chooses *one* concrete characteristic, membership in a specific group, to make politically relevant. Real people fall under a wide variety of descriptions – North American, Canadian, Acadian, dog-lover, photographer, worker, mother, musician, etc. – but within the political and legal context these will be organized into a hierarchy of 'priorities', and only a very limited number will be recognized as politically relevant. The description with the highest priority normally is taken as the basis for defining a group supported by state structures: to the extent that Canada is politically stable, the description of citizens as "Canadian" is taken as the most important concrete characteristic to be preserved and promoted. Hence the ongoing debate over national identity and the constitution. Other politically recognized, but less important, descriptions are fostered either by absorption into the constitutional description of the dominant identity (for example, by building legal recognition and

protection for "official languages" into the constitution), or by developing a judicial notion of "group rights". Still farther down the list of priorities lie those characteristics that are not accorded political recognition at all. They are 'private'.

To be successful, the techniques of recognizing group rights and manipulating the definition of the primary group require that accommodations between groups not be so costly as to outweigh the value of maintaining the larger group identity. Defining Canada as a nation with "two founding peoples" was an attempt to define Canada in such a way as to make life as a Canadian more valuable than life as a non-Canadian. The push for bilingualism is a similar attempt. The surge of nationalism in Quebec, Acadia and the First Nations suggests that today many people find the benefits of living the life of a Canadian, so defined, to be less appealing than other options. Similarly, recognition of group language rights results in group stability only if the value of the lives led as a result of those rights is sufficiently high in comparison to lives lived either without such rights or outside of Canadian sovereignty.

All of this is familiar in the current constitutional turmoil. Communalism has played a valuable role in challenging the liberal ideology of abstraction and 'neutrality'. Our political and legal systems must take seriously at least some of the concrete and relational characteristics of people. Communalism has not provided a solution, however. It is a creature of the same tradition that created liberal ideology. At least in Canada, it too relies primarily on rights, sovereignty (separateness) and homogeneity. It too gives in to the temptation of the power politics of essentialism and bifurcation: "You're with us or against us." Indeed, communalism may be looked upon as another means by which the male politics of dominance (usually just called politics) is carried on. Liberalism 'rationalized' the politics of dominance by injecting abstract equality and fair-play via rights; communalism gerrymanders the resulting liberal societies by manipulating the sense of connectedness.

It is not uncommon for those seeking ways out of the problems of male politics and communal division to draw upon the family as inspiration for, and a model of, a "kinder, gentler society". Hence we find images of the "family of man", the "brotherhood of all people", and "children of God". By seeking to elevate the perception of kinship between people, reformers hope to promote harmony, cooperation and tolerance. Unfortunately, the image of the family used is conditioned by the patriarchy which helped create the problems of liberalism and communalism in the first place. It is hierarchical, authoritarian and gendered. The images, especially if they are religious, often center on fathers and sons. This is curious in light of the fact that the actual day-to-day functioning of the mini-society of the family was by ideology, and often by law, the special responsibility of women. One would have thought that the central image used for a political model would be that of the mother, and that mothers would be the relevant experts. The patriarchal father, an authority figure who spends most of

his time *outside* of the day-to-day functioning of the family, is a poor political model. The mother, especially under patriarchy, is continually dealing with the particulars of family and human existence: food, dirt, sickness, education, conflict and cooperation. She cannot treat these in the abstract; policies and rules, however helpful they may be, do not end her task. Dirty clothes and childhood diseases show no respect for even the most finely conceived arguments of principle. She must deal with the concrete reality of each event. Each child must be treated as unique. At the same time she cannot escape her own sense of fairness and justice; family members must be treated fairly, too. Because of the special tasks imposed on women in patriarchal social systems, women in these societies, and especially mothers, have the greatest experience with uniting particularity and justice, the very problem communalism sets for liberalism. It is not unusual for a mother to confront on a daily basis the problem of being fair to individuals while respecting and responding to their widely different needs, abilities and temperaments. All of this must be done while coping with the never ending physical demands of life and preserving harmonious relations within the family. If there is an ethics that arises in the context of mothering, an ethics especially suited to the life of the family, it may give some clues as to how justice and particular group identity might be harmonized.[8]

Feminism, offering a radical critique of the rationalist, liberal tradition, is doing the necessary research. Feminist psychologists and philosophers have been studying the possibility, nature and reality of an alternative ethics associated in some way with women's circumstances, nature or traditionally assigned work. I shall first briefly describe three of the most influential feminist ethical theories, and then discuss their implications for political theory.

The most influential researcher in this area has been Carol Gilligan.[9] Although she is a psychologist, her work has stimulated vigorous debate in philosophy too, and many of her positions 'ring true' for women and men of widely differing backgrounds. The basic thesis that comes out of her research on moral learning in children is that in addition to the abstract, rights-and-principles style of moral reasoning familiar to us all from the rationalist tradition of philosophical, legal and political argument, there is another voice, another mode of moral thought, which should be heard and respected. This is the voice of care, the voice

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[8]This is not equivalent to saying that the state should be modelled on the family. There is good reason to believe that the modern conception of the state is already based in large measure on the *patriarchal* family. Instead, I am suggesting that we ask whether modes of ethical thought developed in the non-abstract, 'private' world might provide new ways of dealing with the problem of combining universality (justice/fairness) and particularity in the 'public' world.

[9]Gilligan's most important writings on the topic include: "In a Different Voice: Women's Conception of the Self and of Morality" (1977) 47 *Harv. Educ. Rev.* 481; "Woman's Place in Man's Life Cycle" (1979) 49 *Harv. Educ. Rev.* 431; *In a Different Voice* (Cambridge: Harvard University Press, 1982).

of responsibility to others and to oneself. It focuses on the needs, values and feelings of individuals in particular settings rather than abstract rights and universal principles, and resolves conflicts by conciliation, mediation and negotiation rather than by adjudication. It aims not to respect rights but to avoid harm and to maintain relationships. It is an ethics of care rather than of rights.

The development of a theory of the ethics of responding or caring is only in the initial stages. For purposes of this paper the most useful and extensive analysis currently available is found in *Caring* by Nel Noddings.[10] Noddings gives a phenomenological or what many people would call a subjective account of caring and its role in ethics. Citing Gilligan's major writings on the subject, she says:

> Many persons who live moral lives do not approach moral problems formally. Women, in particular, seem to approach moral problems by placing themselves as nearly as possible in concrete situations and assuming personal responsibility for the choices to be made. They define themselves in terms of *caring* and work their way through moral problems from the position of one-caring.[11]

Caring, then, displaces right or obligation as the central ethical concept. From the point of view of one-caring, it involves two major aspects: "engrossment" and "motivational displacement". Engrossment is "feeling with" another person: "I receive the other into myself, and I see and feel with the other. I become a duality."[12] It is "apprehending the other's reality, feeling what he feels as nearly as possible..."[13] This leads to motivational displacement, a "displacement of interest from my own reality to the reality of the other... When we see the other's reality as a possibility for us, we must act to eliminate the intolerable, to reduce the pain, to fill the need, to actualize the dream... [W]hen the other's reality becomes a real possibility for me, I care."[14] Being engrossed rather than detached leads to acting "with special regard for the particular person in the concrete situation... [T]he one-caring displays a characteristic variability in her actions – she acts in a nonrulebound fashion in behalf of the cared-for... To care is to act not by fixed rule but by affection and regard."[15]

But the full caring relationship is not one-sided. There must be reciprocity in the sense that the cared-for person "receives" the caring not as a passive beneficiary but as one who recognizes the caring.[16] Caring, then, is a special kind

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[10]N. Noddings, *Caring: A Feminine Approach to Ethics & Moral Education* (Berkeley: University of California Press, 1984).

[11]*Ibid.*, at 8.

[12]*Ibid.*, at 30.

[13]*Ibid.*, at 16.

[14]*Ibid.*, at 14.

[15]*Ibid.*, at 24-25.

[16]*Ibid.*, at 65-78.

of relationship or a special way of living in relation to others. We naturally care for those in our intimate circle of love. As we move outward to colleagues, students, clients and the like, our expression of care is conditioned by "how we feel, what the other expects of us, and what the situational relationship requires of us."[17] These people are already within circles of established relationships with us. But we also are prepared to care for strangers who are linked to these circles by formal or personal relations: the strangers who become my students each September; the man who becomes my sister's husband. Noddings does not rest with "circles and chains", however. The "ethical self", "an active relation between my actual self and a vision of my ideal self as one-caring and cared-for"[18] moves me toward encountering *all* others as one-caring. Just as the life of liberty is the greatest good for the liberal, so the life of caring and being cared for is the greatest good for Noddings.

The caring relationship, as it finds expression in the relationship of mother and child, is given further refinement by Sara Ruddick in her book *Maternal Thinking.*[19] She argues that the activity or practice of caring for children, which can be done by either females or males, gives rise to characteristic virtues, temptations and ways of thinking. Thinking of children as complicated, fragile and needy, she divides the caring for children into three related "demands" or tasks: *preservation, growth* and *social acceptability.*[20] Everyone would agree that child care begins with the need to preserve the life of a relatively helpless infant in a hostile world. The child must be fed, nursed through illness, protected from extremes of temperature, dangerous animals and accidental injury, and so on. Although there may be some difference of opinion on the matter, Ruddick argues that nurturing or fostering growth is also included in maternal practice. And finally, the child must be 'trained' in such a way that she becomes an adult acceptable to the mother's social group. The mother's group is "that set of people with whom she identifies to the degree that she would count failure to meet their criteria of acceptability as her failure. The criteria of acceptability consist of the group values that a mother has internalized as well as the values of group members whom she feels she must please."[21] The three tasks often conflict. The tension can be extreme in a society where mothering is done by those relatively powerless to affect conditions determining the success of maternal practice and where the powerful insulate themselves from the demands of maternal practice. All too often mothers are expected to raise their sons to be soldiers or mindless

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[17]*Ibid.,* at 46.

[18]*Ibid.,* at 49.

[19]S. Ruddick, *Maternal Thinking – Toward a Politics of Peace* (New York: Ballantine Books, 1989). The book originated from "Maternal Thinking" (1980) 6:2 *Feminist Studies* 342.

[20]*Ibid.,* c. 1.

[21]*Ibid.,* at 21.

workers, and their daughters to be submissive servants of men.

Maternal practice gives rise to what Ruddick calls "preservative love", the *"activity* of caring for or treasuring creatures whose well-being is at risk".[22] Engaging in this activity on a daily basis produces an attitude of protectiveness called "holding". Holding means "to minimize risk and to reconcile differences rather than to sharply accentuate them. Holding is a way of seeing with an eye toward maintaining the minimal harmony, material resources and skills necessary for sustaining a child in safety."[23] In this attitude "priority is given to keeping over acquiring, to reconciling difference, to conserving the fragile, to maintaining the minimal harmony and material conditions necessary to a child's life."[24] Maternal thinking, grounded in the aims of maternal practice and expressing itself in the attitude of "holding", generates a "pacifist" approach to conflict and peace: "...to avoid battle whenever possible, to fight necessary battles nonviolently, and to take, as the aim of battle, reconciliation between opponents and restoration of connection and community."[25]

It may seem that these three related theories have nothing helpful to say about politics and group rights. They center on personal and intimate relationships, while politics must govern the interactions of strangers. Their paradigms are from the 'private' sphere in which personal bonds of affection condition every interaction; they seem ill suited to the disinterested, even hostile, public world of business, politics and war. And to make matters even worse, the ideals and values incorporated into these ethical views may well be those that make women subordinate, docile and useful in a patriarchal society. Even feminists have wondered whether "women's morality" is anything more than a "slave morality", part of the ideology of male dominance. How can "women's morality" serve as a guide for social organization when its function is to ensure subservience in an unjust social hierarchy? Won't it simply perpetuate the exploitation of women and other groups?[26]

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[22]S. Ruddick, "Preservative Love and Military Destruction" in Joyce Trebilcot, ed, *Mothering: Essays in Feminist Theory* (Totowa: Rowman & Allanheld, 1984) 231 at 240. Also see Ruddick, *supra*, footnote 19, c. 3.

[23]*Supra*, footnote 19 at 78-79.

[24]*Supra*, footnote 22 at 240.

[25]*Supra*, footnote 22 at 239.

[26]See, for example, B. Houston, "Rescuing Womanly Virtues: Some Dangers of Moral Reclamation" *Canadian Journal of Philosophy* Supplementary Vol. 13, 237 at 248ff. In her discussion she paraphrases Claudia Card as asking, 'Is Gilligan picking up on something Nietzsche identified as a "slave morality"?' (Houston at 248, citing Claudia Card, "Virtues and Moral Luck", Working Series I, No. 4, November 1985, Institute for Legal Studies, University of Wisconsin Law School, Madison). Also see C. MacKinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1987) at 38-39, and *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 51-52.

The objections show how radical the feminist challenge must be. The distinction between the 'public' and the 'private' must be dramatically diminished, if not wholly eliminated. Even if the 'private' morality of caring and relationship discussed by Gilligan, Noddings and Ruddick serves the interests of patriarchy, it does so *when restricted to a private realm isolated from the political process*. The exclusion of fairness and due process from the private, family realm is as perverse as the exclusion of caring and relatedness from the public, political realm. The demands for fairness and caring become oppressive when they are isolated from each other. To be fully human is to be both fair and caring, the same as everyone else and yet different: 'public' justice and 'private' caring fuse.

Even if the ethics of caring functions to maintain the powerlessness of women, it is far from clear that this disqualifies it from being an appropriate moral foundation for state and legal power. Political theorists such as Locke and Hobbes treat state power as something that must be created and protected by careful justification. In reality, the state is in no danger of disappearing or becoming impotent. The real problem of political power is that of directing it in benign ways. If women alone are required to live by the ethics of care, the 'real' power of the state and of men as a group will oppress women. But if care could become a guiding ideal of the state (and those who run it) there is no obvious reason to believe it would be a "slave morality" for ordinary citizens, female or male.

If there is a good objection to the inclusion of the morality of caring in political life, it must be that it simply cannot be done. Such a position would probably hold that the nature of humans, society or caring itself makes such a morality fitted only to intimate settings. For the sake of argument, I shall assume that relatively large scale political organization is desirable, or at least inevitable, so that a moral system which applies only to intimate groups cannot be a satisfactory guide for politics. The question then becomes whether preserving relationships, caring, responding, and the attitude of "holding" have anything to say about political life and process. What would a society based on caring be like?

Many classical liberals attempted to identify just social institutions by asking what everyone would agree to if given a choice. That question has merit. Suppose we ask, in liberal fashion, what social arrangements would be agreed to by people who accept the ethics of responding and caring. The trick lies in the assumptions which make an answer possible. The most famous and impressive modern social contract argument was developed by John Rawls in his book *A Theory of Justice*.[27] He persuasively argues that basic social arrangements and institutions are just if and only if they would be freely chosen by people meeting under conditions of complete *fairness*. He outlines a fair "original position" and shows how reason would lead the parties in such a position to certain principles of

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[27]J. Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

justice. His conception of fairness requires stripping away any characteristics which might lead people to choose a particular substantive outcome which favoured themselves. They have knowledge of general matters of natural and social science and psychology, but no particular knowledge of their own worldly circumstances. To make the calculus work, Rawls further stipulates that people in the original position are solely self-interested.[28] In short, they are self-interested, rational, autonomous decision-makers with some general knowledge of the world.

If the morality of caring, rather than of justice, is brought to center stage, this specification of the "original position" is clearly unacceptable. How can we expect a society to reflect care, responsiveness and relatedness when it is founded on the assumption that people are mutually disinterested? Let us then change the description of the original position. While not giving up the idea of a 'fair' agreement, suppose we modified the original position so that it reflected the ethics of care. People in the original position would know:
— that they will very likely be connected with other people through bonds of interest, affection and care;
— that these connections will form unique and complex webs;
— that caring and being cared for will be among the greatest goods they and others will experience;
— that nearly everyone will find significant value in living lives appropriate to various groups; and
— that everyone will be someone's child and very likely someone's parent.
Fairness is maintained by requiring that no one in the original position know the 'post-agreement' circumstances, capacities or needs of themselves or those with whom they will be connected. This version of the original position clearly moves away from the liberal ideal of 'state neutrality', for we are building into the original position a clear preference for a particular form of the good life: the life of connectedness and belonging, of caring and being cared for.

What 'principles of justice' and basic state structures would people in such a position agree to? This is not the place to work this out in detail, but a rough outline might be possible. It is important to observe that the procedure itself would be less of a bargain or contract than a cooperative strategy session, for everyone would deal with everyone else not as competitors but as people worthy of care. If the requirements of an ethics of caring are to be reflected in the resulting social system, the 'principles of justice' must above all *allow for flexibility and response to individual circumstance, and foster respect for connections between people*. They must not be what Annette Baier described as "traffic rules for self-asserters",[29] restricted to procedure, but must be concerned in part with

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[28]*Ibid.*, at 13.

[29]A. Baier, "What Do Women Want in a Moral Theory?" (1985) 19 *Nous* 53 at 62.

substantive result. One way of constructing principles of 'justice' that bring together formal equality and substantive content is to combine the notions of equality and care in a single requirement, right or ideal. People in the original position might agree that the fundamental social ideal for **state structures and procedures** is that each citizen should be treated with *the greatest degree of care compatible with equal care for everyone else*. This is a simple translation of the liberal ideal of greatest equal freedom (Rawls' first principle of justice), and puts the state in the position of one-caring for each citizen. Ronald Dworkin's fundamental right of "equal concern and respect" might even be used if it is understood as requiring care for each individual in her particularity.[30]. The substitution of "care" for "freedom" totally changes the flavour of the basic ideal. "Freedom" is procedural, concerning itself only with the way in which a result is reached. It thus ignores actual outcomes, which depend on the substantive positions of the parties. "Care", on the other hand, is an "engrossment", a connection with the world of a particular individual. One cannot care without being concerned for actual outcomes.

The significance of this fundamental ideal for state structures and procedures is easily misunderstood. If coupled with the patriarchal conception of the state as a type of hierarchical authority structure, 'caring' can as easily serve the interests of the dominant group(s) as 'justice', 'brotherhood' or 'the will of God'. Any ideal, when placed in the service of authority, can be corrupted by the simple needs of interpretation. Who will decide what constitutes caring (justice, brotherhood, the will of God)? As long as we think in terms of hierarchy and authority, Plato's answer may be as good as any. And yet, if a society is truly to embody the ideal of caring, we cannot simply substitute "Care" for "The Good" in *The Republic*. If Noddings is correct, caring functions not as an abstract principle of universal application, or a good which can be simply distributed through the economic system. It is most fundamentally a way of responding and relating to people. There is no 'principle of caring' that will solve problems of distributing scarce resources. The solution lies with people, in their political as well as personal lives, actually caring in particular situations. The caring state, if it is appropriate to call it that at all, would need to be significantly more flexible and responsive than the states we now know. Politics, in the best sense of the word, would need to play a much greater role in the state. Indeed, the central function of the state might be thought of as *enabling response and caring* (in the particular) rather than *controlling behaviour via general rules*.

Recognizing that the modern authoritarian state does not foster caring, people

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[30]It is not accidental that Will Kymlicka's arguments in favour of recognizing cultural membership as a primary good take equal concern rather than liberty as fundamental to liberalism. See *supra*, footnote 5. Kymlicka's argument, of course, justifies elevating only a few affiliations to political relevance.

in the original position would not choose a politics of hierarchy and opposition. They would probably design flexible **political structures and processes** that encouraged consensus and participation, and leadership which formed webs rather than hierarchies. The strategy would be to devise political structures and processes which worked by giving everyone as much opportunity as possible to be heard, listened to and responded to. Politics would aim at inclusion and responding, rather than hierarchy and will. This is clearly some form of democracy, but the resulting society would be unlike any of the major world powers. The shapes this democratic society might take have not yet been adequately studied.[31] What is needed is serious, non-imperialist, research into 'informal' politics and 'traditional' societies. The processes by which women pressured the Federal Government into including Section 28 in the *Charter of Rights*[32] in 1982 and First Nations citizens responded to the *Meech Lake Accord* and the Oka affair in 1990 can teach us much about ephemeral and responsive politics. The consensual processes at work within the First Nations of Canada have much to teach us if we have the humility to listen with respect and openness. To discover a caring state, we must look up from our traditional paths of authority, will and obligation.

The guiding ideal for the **interactions of individuals** is similarly alien to modern expectations. In a liberal society, interactions are regulated by the fundamental duty to respect the rights of others. While a caring society would not counsel us to disregard rights, respect for rights cannot be central to the ideal, for rights are abstract and caring is particular. One is tempted to use the same formula chosen to govern the relations between the state and the individual: greatest equal concern. But in the context of individual interactions, that clearly violates the particular values of real people. It is utopian and well down the road to vicious abstraction to require us to ignore the differences in feelings, expectations and needs arising from different relationships. It is foolish to require that I care as much for a person I have never met and who has no formal or personal ties with me as I do for my infant child. While it seems perfectly appropriate that I should treat such a person with care, should the occasion arise, it would be both psychologically unrealistic and counterproductive to demand that my degree of care for everyone be the same. The greatest good, the life of caring and being cared for, the life of valued relationships, would be diminished by such levelling of care. Degrees of affinity arise from the relationships in which we find ourselves or into which we enter. We would probably want to establish a *minimum* "standard of care" which reflected the behaviour not of the "reasonable man" but

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[31]For an enlightening discussion of leadership consistent with this sort of politics, see N. P. Lyons, J. Forbes Saltonstall and T. J. Hanmer, "Competencies and Visions: *Emma Willard Girls Talk about Being Leaders*" in C. Gilligan, N. P. Lyons and T. J. Hanmer, eds, *Making Connections* (Cambridge, Mass.: Harvard University Press, 1990), at 183-214.

[32]*Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* [enacted by the *Canada Act, 1982* (U.K.), c.11].

of the "caring neighbour".[33] "Neighbour" would be a variable concept based on the actual relationship involved. Actual expectations, needs and capacities would have to be taken into account. Perhaps the fundamental 'law' of personal interaction would be a true law of negligence in which a universal duty of *caring* was taken seriously.

The guiding ideal for **judicial process** would not be the vindication of rights, which best fits a competitive, isolationist conception of social conflict, but rather the expression of care and the preservation, enhancement or even establishment of connections. Conciliation, mediation and other processes which look to individual circumstances and respect for relationships would be emphasized. To the extent that *adjudication* is necessary, people in the original position would probably not choose adversarial, zero-sum procedures. Once again, we have much to learn from other societies.

In a society designed by caring people, **distributive justice** would play an important role. Recognizing their own vulnerability and the vulnerability of those with whom they may be connected, people in the original position would seek a system of distribution that responded to the actual needs of individuals: *To each according to her need.* At the same time they would recognize that such expressions of care would require some degree of redistribution, since those with the greatest needs may not have the ability to satisfy them. If redistribution is to be just, it must not only respond equally to the needs of all, but also ask equally of everyone's effort: *From each according to her ability.* However, this is only the beginning. Should the various degrees of affinity people bear to one another affect the contributions they can be asked to make? Within certain limits the answer seems to be yes. It does not seem unjust to expect a parent to contribute more of her life to a young child than to a stranger. Barring crushing social conditions, parents normally do this quite willingly, and the special contribution of parents helps produce the value found in the relationship. But it does not follow from this that degrees of care between individuals should be precisely mandated, or that 'outsiders' should not be asked to help when the primary relationships fail to provide adequately. Social support, or redistribution, needs to take place when someone's individual needs are not being met. If this can be accomplished by enhancing or enabling an existing relationship valued by the beneficiary, that is ideal, for such an approach not only cares for the individual but also enhances a relationship in which meaning and identity may be found. Providing adequate support and encouragement for mothers, for example, not only ensures protection and nurturing for children, but also benefits the parent-child relationship, a connection of immense value to people. So although people in the original position might take the Marxist dictum as a guiding ideal of distributive justice, it would

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[33]See Leslie Bender's excellent article "A Lawyer's Primer on Feminist Theory and Tort" 38 *Journal of Legal Education* 3 at 20ff.

need to be applied so as to recognize and enhance valuable relationships between people. And since the application of ideals of redistribution would take place within non-authoritarian political processes and structures of the caring society, we should be careful not to suppose that society would be 'governed' by a 'principle of distributive justice' capable of resolving, in advance, all matters of distribution.[34]

What does this sketch of the "caring society" have to do with communalism? Recall that communalism posed a problem for liberalism because it demanded a specific content or result, while liberalism restricted itself to 'formal' process. The caring society looks for 'justice in result', just as communalism might be said to do. But unlike communalism, its ideal is response to the individual in *all* of her particularity. Part of an individual's particular circumstance which must be responded to will be her relational characteristics: mother, Ukrainian, Buddhist, etc. To care for someone who finds value in being a member of these groups calls for recognition of and support for processes and institutions of the groups. Distribution of goods in society must be used to enhance relationships, but because she finds value in living under *all* of these descriptions, the support for any particular group cannot be absolute, exclusive or definitive. Her political and legal position cannot be exhaustively determined by any one group affiliation. She is not just a Ukrainian, with interests in common only with other Ukrainians. She is also a Buddhist, in relation with other Buddhists, and a mother, in relation not only with her child but also with other mothers. If we care for such a complexly defined person, we will foster her relationships with many different groups with differing memberships.

A caring society, then, will recognize and support group membership, for in our relations with others we find meaning, value and personal identity. At least some of our needs are for relatedness and connectedness; we need to be parts of ethnic, cultural, linguistic, artististic, intellectual, sporting, family and other communities. But the caring society cannot play favorites among group affiliations; it must respect and respond to the multivalent nature of all individuals. Because a caring society would treat each citizen with *the greatest degree of care compatible*

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[34]One particularly vexing problem which will need to be clarified is the relationship between the various ideals mentioned above and the specific good of relatedness or connectedness in which care is embodied. Relatedness is a good which can be furthered or hindered by allocation of resources, and functions as a primary good in the caring society. If we follow the liberal model of Rawls, we may be tempted to accept an analogue of his second principle of justice, the "difference principle". We would then set as an ideal the equal distribution of the good of connection unless unequal distribution would be to the benefit of the 'least well-connected', so to speak. While this is tempting, it establishes a degree of rigidity which is contrary to the particularity of caring itself. Caring and connection are unlike other goods, for they are both valuable in themselves and the dynamics by which problems of distribution are resolved. The process of deciding distribution (even of connectedness) calls for caring, and in that act of caring, the good to be distributed is invoked and perhaps even altered.

with equal care for everyone else, it would, to the greatest extent possible, seek *accommodation and conciliation* between groups with conflicting interests. Not only does this show equal care for all, but it also respects the fact that members of those groups very likely are in other, non-conflicting relations with each other.

However necessary group rights might be in a quasi-liberal society, they make a poor mechanism for group accommodation in a caring society. The recognition of any specific group right will elevate the importance of that affiliation above other affiliations, thus promoting a kind of political essentialism in which membership in the group is taken to define one's basic political and legal position. Other affiliations become invisible in the political and legal realm. Group rights function in a patriarchal system to make some group affiliations 'public' and hence politically visible and powerful, and other group affiliations 'private' and hence politically invisible and impotent. In a caring society, *any* affiliation which contributes to the value of a person's life should be politically meaningful. 'Private' and informal relations must merge with 'public' and formal relations.

How, then, can stability be maintained between groups? Won't minorities simply be assimilated or annihilated? The solution must lie in the political and legal processes of the caring society. We saw that political process would aim at inclusion, participation and response, and leadership would take the form of webs rather than hierarchies. The overlapping weave of multiple group membership would be reflected in politics. While A's identity as a Ukrainian will connect her with B and C, and may put her in competition with D and E, her identity as a Buddhist may connect her with D and E and put her in competition with B and C. If, in this example, the political system recognized both religious and ethnic relationships, the chances of polarization and annihilation would be drastically reduced. No one is a pure 'other'. Why would A choose to show disregard for D and E in all their particularity? Although they may not be Ukrainian, they are, or may become, connected to her in a multitude of other ways. Once the multivalent nature of human connections is recognized and taken seriously by a political system, the bitter results we find in patriarchal and hierarchical systems which abstract from individual complexity will seem less inevitable.

This sketch undoubtedly seems hopelessly utopian to 'hard-headed realists' and other guardians of 'the unvarnished truth'. But we should not be too quick to dismiss the political implications of feminist theory. Twenty five hundred years of masculine politics in search of the just society could not prevent, and very likely even produced, the witch trials, the Holocaust and the killing fields. In light of the sorry history of abstractionist politics, feminists can hardly be faulted for insisting that we redefine politics to include women and the needs, values and views of those who have been excluded. In our own 'private' lives we find bases for hope. How often on television do we see a group threatened with extinction and, upon observing it's members' ordinary lives, feel a sense of kinship or connection with

them? In struggling against a harsh climate, or lovingly raising their children, or being caught up in song, they share something with us; we too are survivors and parents and lovers of music. We share forms of life. And in that sharing, we respond to their needs: we care. We say, "Something ought to be done." But we count as exceptional those people who say, "I ought to do something," and proceed to do it. Most of us feel politically impotent; our care for others is blocked by political 'reality'. A political system aiming at inclusion, participation and responding would harness that potential for caring far better than current systems that feed on and generate difference, isolation and hatred.

Communalism is a strong challenge to the liberal state. As we have seen, it is repugnant to the assumptions that make the liberal justification for the state, law and morality possible. It demands a different conception of, and justification for, law and the state. To that extent it is radical. But it is also conservative in that it does not contain within itself a new and satisfactory view of the relation of the individual and society. By elevating one specific group affiliation to political and legal recognition, communalism divides people from one another, encouraging separation and fragmentation, and making a caring society impossible. Membership in the politically recognized groups becomes all-important, and competition, confrontation, conflict and isolation become constant threats. The other connections between people that would function to unite a society remain politically and legally invisible. Nationalism, for example, divides women from one another, saying you're American or Russian or Israeli or Palestinian first, and your status as a woman is either of no relevance to political choices, or must always yield to the needs of national identity. Connection and care between women as women is politically blocked, and their sons march off to war.

Feminists have long struggled to make the connections between women everywhere politically relevant. Indeed, a primary function of the feminist conception of "patriarchy" is to show the politically relevant connections between women in many different cultures. In response, communalists of all flavours have accused feminism of racism and ethnocentrism. While mistakes have been made,[35] and feminists are people too, the underlying radical feminist critique and methodology, with its emphasis on consciousness raising, non-exclusivity and listening to those who have been silenced, is basically self-corrective and thus offers the best hope of a solution for everyone. *All* of a person's particular characteristics must be politically respected. That includes recognition, respect and support for her group affiliations, whether they are racial, cultural, intellectual, familial or anything else. We cannot be said to care for a person when we

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[35]For example, some 19th century feminists made wholly unjustified alliances with white racists in America, and in the 20th century the practical political agenda of the North American feminist movement has over-emphasized white middle class concerns. See A. Davis, *Women, Race & Class* (NY: Random House, 1981).

annihilate her valued cultural tradition, destroy her family through poverty or perverse residence laws, separate her from other women who share her aspirations, and so on. Once we stop abstracting from concrete individual lives, the personal and 'private' *is* political. If justice and care are to be realized in the world, everyone *must* be listened to in their own voices. The society in which caring stands alongside fairness as a guiding ideal for politics, law and morality has the best chance of realizing feminist goals; at the same time it furthers communal interests once they are stripped of their political absolutism.

In *The Republic* Plato sought to define the nature of *justice* in the individual by looking at justice 'writ large' in the state. What I have suggested in this paper is that we turn Plato on his head and seek an understanding of the *caring, responsive* state by looking at caring 'writ small' in personal and family relationships. Perhaps by listening to those who have not been allowed to speak in their own voices and by taking the mundane, 'private' world of everyday life seriously we can move toward a society whose structures, laws and politics reflect both freedom *and* care.