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Book Review - Susan M. Behuniak, A Caring Jurisprudence

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BOOK REVIEW

SUSAN M. BEHUNIAK, A CARING JURISPRUDENCE: LISTENING TO PATIENTS AT THE SUPREME COURT, LANHAM: ROWMAN & LITTLEFIELD PUBLISHERS, INC. 1999. PP. V - 192. (ISBN 0-8476-9455-0)

Lady Justice sits blindfolded, a familiar figure, balancing the scales of justice in one hand, and wielding the sword of authority in the other. Instead of sitting alone in her deliberations, however, the Angel of Mercy stands behind her, with wings spread wide, as she whispers words of compassion in Lady Justice's ear. This image, depicted in the cover art and enlivened within the text of Susan M. Behuniak's *A Caring Jurisprudence*, provides the overriding symbol of Behuniak's scholarly and articulate challenges to the traditional American legal system.

Through clear, methodical analysis, Behuniak imagines for us all a jurisprudence that wholly integrates our traditional ethic of justice with an ethic of care, encouraging judges to use mercy and compassion as guides in considering the more personal and emotional issues brought before them. Applying her theories to well known United States Supreme Court decisions involving abortion and physician assisted suicide, Behuniak first gives a detailed critique of the shortcomings inherent in the mainstream ideal of justice at work in these crucial opinions. She establishes the ways in which justice has been traditionally understood to require impartial, reasoned and universally applied decision-making. Behuniak then proposes a model of justice that integrates compassion and mercy as necessary parallels to reason and blind impartiality. She illustrates her proposal by revisiting the cases, this time focusing on the patients themselves in order to show what a more caring jurisprudence might look like in practice.

A Caring Jurisprudence begins with a comparison of legal and medical knowledge, which is significant because abortion and physician assisted suicide are clearly medically based issues. Behuniak explains how, from the beginning of a legal or medical education, students are taught to distrust the emotional, and to leave personal feelings behind in favor of trained, analytic reasoning. She aptly describes the way in which traditional medical training fails to recognize patients as people with particular knowledge about their own conditions. Rather, the medical profession tends to treat patients as "cases with symptoms" (9) so that a person with a condition such as bowel cancer *becomes* the condition itself, and may be referred to simply as "the bowel cancer" (6).

According to Behuniak, legal knowledge is also limited in significant ways. First, the adversarial nature of our legal system requires us to focus on the dispute and to define legal issues in binary terms, overlooking the possibility of compromise or recognition that there may be more than two sides to an issue (17). Second, the structure of legal reasoning and the required terminology of "legalese" fail to allow for the expression of personal feelings and stories. As Behuniak explains, when a legal issue is framed around a personal hardship such as an unwanted pregnancy or terminal illness, the personal and moral aspects must be submerged in order to create a justiciable case or controversy (18). In fact, a patient's voice barely exists in court; instead, the medical experts and attorneys present the patient's story through the prism of medical and legal knowledge. Consequently, the attorney's voice merges with the client's voice in such a way that the lawyer actually *becomes* the client. This accepted fiction is even documented in official court transcripts reporting that "Roe argued" or "Cruzan refuted" (20). Under this scheme, patients often feel unheard, because courts typically fail to address the patients' personal concerns, as Behuniak later demonstrates through the Supreme Court cases dealing with abortion and physician assisted suicide.

In Chapter Two, Behuniak focuses on the abortion cases, where she argues that medical and legal knowledge have been merged, while the personal knowledge of patients has been

pushed aside. She illustrates how the Court heard and accepted medical knowledge in *Roe v. Wade*, 410 U.S. 113 (1973). Accordingly, the Court focused on the physicians' needs when deciding the case rather than addressing the needs of women who seek abortions. Writing for the majority, Justice Blackmun relied on his own independent medical knowledge to divide a pregnancy into trimesters, and to describe the state's interests in terms of a three-part pregnancy (48). Thus, the majority opinion embraced medical fact, not only in the framing of abortion as a medical issue and in the deference given to medical expertise, but also in the structure of its holding.

Behuniak's work goes on to chart the patterns that have emerged through the holdings in the abortion cases decided after *Roe*, in which the Court has clearly protected the physician-patient relationship and preserved the physician's discretion. However, when government regulations have no legal bearing on physicians, they appear to be most often upheld, even where the restrictions impose real burdens on women seeking abortions (60). In perfect detail, Behuniak shows the disparate effects of providing medical knowledge a legal forum, while excluding patients' voices and their particularized knowledge.

She perhaps best illustrates her theory that the Court favors medical knowledge over the patients' knowledge through an account taken from the oral arguments presented during *Roe v. Wade.* Jane Roe's attorney, Sarah Weddington, was interrupted during her legal arguments regarding fetal personhood when the Court challenged her for failing to discuss the Hippocratic oath in her brief (44). Behuniak points out the special significance of the Court interrupting Weddington's legal arguments to ask her about medical ethics. Earlier in the proceedings, Weddington had attempted to discuss the consequences of pregnancy for women in order to show how the freedom to choose whether to terminate or carry out a pregnancy should be considered a fundamental right. At that point, Justice Stewart warned Weddington against result-oriented arguments that veered into the "policy" arena (39). Somehow, the "medical knowledge was welcomed by the very legal norm that excluded patients' experiences as improperly result-oriented"

(44). By accepting and giving weight to both legal and scientific knowledge, while rejecting the more subjective, emotional, and particular knowledge of the patients, the Court decided these abortion cases without hearing all of the available facts.

Similarly, the physician assisted suicide cases discussed in Chapter Three also failed to make adequate use of patients' knowledge. Although attorneys introduced some of the patients' knowledge during oral arguments (88), only one *amici* brief presented the Court with personal stories illustrating the consequences that physician assisted suicide bans had on terminally ill patients and their loved ones (87). The majority opinions in *Washington v. Glucksberg*, 138 L.Ed. 2d 772 (1997) and *Vacco v. Quill*, 138 L.Ed 2d 834 (1997) followed the traditional legal norms that guided the abortion decisions, again accepting legal and medical knowledge while casting aside the particular knowledge of the patients (91).

However, Justice Stevens' concurrence in *Glucksberg* and *Quill*, and his dissent in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) demonstrated that he actively listened for the patients' concerns. Justice Stevens seemed to understand that in the personal experiences of the dying patients, and contrary to medical knowledge, death is more than a physical event. To the patients, death is a process of losing themselves. Stevens also recognized that suffering includes more than just physical pain (96). Further, he acknowledged that although alleviation of pain is medically possible, such treatments are not necessarily available to the suffering patients who need them (98). While he voted with the majority in upholding the Washington and New York bans against physician assisted suicide, Justice Stevens still departed from mainstream legal ideology by honoring the patients' personal experiences, even where they appeared to contradict medical knowledge.

In her last two chapters, Behuniak builds on existing feminist legal theory in articulating her proposal for a jurisprudence of care that would: first, place the patients and their concerns at the center of the cases; second, fearlessly address cultural and policy-oriented concerns; and third, call upon the

Court to find ways of including more particular, involved, and emotional knowledge in the judicial process. She applies this model to the abortion and physician assisted suicide cases to determine how a differently focused, more inclusive process might affect the outcome of the cases. However, Behuniak's analysis reveals that the kind of knowledge accepted by the Court also determines which facts will be given weight and whose concerns the Justices choose to address in their opinions. It is in these final chapters that Behuniak introduces us to the voices of the patients, which had previously been muffled by the traditional notions of justice that govern our legal system.

In formulating her model for a caring jurisprudence, Behuniak incorporates a variety of sources suitable to the task she has set out for herself. More specifically, her sources span the range from drama (Brian Clark's play, *Whose Life Is It Anyway?* and Shakespeare's *Merchant of Venice*) and song ("Amazing Grace") to books exploring the meaning and process of death, such as *How We Die* (1993) by Sherwin B. Nuland, and *On Death and Dying* (1969) by Elizabeth Kubler-Ross. In illustrating her core themes, Behuniak even finds ways to enlist a sculpture of Lady Justice with the Angel of Mercy and a guidebook on tapestry weaving. Although she relies heavily on feminist theory, she also makes sure to include the voices of the patients themselves, taken from letters, journals, autobiographies, and trial briefs. The patients' personal stories, which are scattered throughout the book, take center stage in Behuniak's final chapters. In this way, the reader becomes witness to the same kind of intensely personal knowledge that the Court might hear under Behuniak's model of jurisprudence, wherein justice is truly tempered with compassion and patients' concerns are directly addressed.

A Caring Jurisprudence is structurally sound in that Behuniak frequently summarizes where she has been in her argument and maps out where she is going next. Although it might be criticized as unnecessarily repetitive, this stylistic choice works to enhance Behuniak's arguments by cementing each new addition to the foundation she is building before the next argument is laid out. In so doing, she creates a solid

framework that can be easily extended to other areas of the law.

Ultimately, Behuniak issues nothing short of a formal challenge for others to continue where she leaves off (120). Through the careful refrain of her common themes, it becomes possible to envision how her model for a more caring jurisprudence can be applied in legal settings other than the biomedical cases she explores here. Her book is an important addition to feminist legal scholarship, which could effectively serve as a supplementary text in any law school classroom where modern constitutional theory or feminist jurisprudence is taught. Beyond that, the book provides a methodology to support and encourage judges in finding better ways to temper justice with compassion by inviting personal stories and voices into the judicial process.

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