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Robin L. West

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# JUSTICE AND CARE

ROBIN L. WEST\*

The language of judging, I think it is safe to assume, is and ought to be the language of justice. Modern arguments, seemingly to the contrary, dictate that the language of judging should be the “language of efficiency,” the “language of rights,” or the “language of language.” These arguments as well, however, are, without exception, premised on the explicit assumption that the language of justice is indeed the language of efficiency,<sup>1</sup> of rights,<sup>2</sup> or of language itself.<sup>3</sup>

I would like to discuss the heart of the matter, and directly address the language of justice. I will begin with a thoughtful essay on the topic, entitled *Ideas and Images of Justice*, by Father William J. Byron,<sup>4</sup> a Jesuit Priest and former president of

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\* Professor of Law, Georgetown University. B.A., University of Maryland Baltimore County; J.D., University of Maryland Law School; J.S.M., Stanford Law School.

<sup>1</sup> See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 44-45 (1981) (“Language is like the free market. No legislature or bureaucracy prescribes the forms of speech, the structure of language, or the vocabulary that individuals use. Like a free market, a language is an immensely complicated yet private and decentralized institution.”) (footnote omitted). Posner defines justice in an antiseptic and somewhat clinical manner. He comments, “[f]or us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.” *Id.* at vii (citation omitted); see also William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 *J.L. & ECON.* 249 (1976).

<sup>2</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 185 (1977) (“Even if the Constitution were perfect, of course, and the majority left it alone, it would not follow that the Supreme Court could guarantee the individual rights of citizens. A Supreme Court decision is still a legal decision ... [a]nd no judicial decision is necessarily the right decision.”).

<sup>3</sup> See JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 257 (1990) (commenting that “translation can be an image of thought, a model of social life, including in the law, for all of our life together requires the constant reading of one another’s texts and the creation of texts in response to them”).

<sup>4</sup> WILLIAM J. BYRON, S.J., *QUADRANGLE CONSIDERATIONS* 102 (1989).

Catholic University. In this essay, Father Byron culls from our philosophical and literary traditions three powerful images of justice. He then argues that such images might serve as guides for Catholic University Law School's mission of teaching for social justice.<sup>5</sup>

After discussing these three images and generally endorsing them as guiding norms for judging as well as teaching, I will contrast them with what might be called images of care, compassion, or kindness. I will then suggest that these images be regarded as complementary and interrelated, not contradictory as they may appear at first glance. Ultimately, I will urge that justice, by definition, must be caring and, conversely, that caring, by definition, must be just. The language of judging, like the language of teaching, must be both if it is to be either.

The first image Father Byron discusses is that of the "plumb-line." He first notes that "the philosopher tends to deal with justice as a concept while the prophet treats justice as a command."<sup>6</sup> He continues:

The nation will be inspected. It will be measured for its uprightness, its integrity. Just as a wall that is "out of plumb" will collapse, so a society that is unjust is going to topple .... Do our dealings pass the plumb-line test? Are they on the "up and up," or "on the level," or "fair and square?" The plumb-bob falls toward the exact center of the earth. The line between hand and bob is therefore "upright," an image of justice.<sup>7</sup>

This is a powerful image. I suggest that our original Constitution, which contained both protection for the slaveholder's property interest in his "human chattel," and a promise to the world that equality and liberty would thrive on the shores of the United States, failed the plumb-line test.<sup>8</sup> These grand

<sup>5</sup> BYRON, *supra* note 4, at 112-13.

It would seem to me ... that the maintenance of order and the definition of rules are far less urgent for our nation today than the need to internalize, individually and collectively within the legal community, an idea of justice powerful enough to drive our lawyers more directly into positions of advocacy for the poor.

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My advice to the student lawyer is to begin looking at the world through the framework of the scales of justice.

*Id.*

<sup>6</sup> BYRON, *supra* note 4, at 108.

<sup>7</sup> *Id.* at 109.

<sup>8</sup> It was not until 1865 that 27 of the then 36 states ratified the Thirteenth

promises were not on the “up and up”; they were not “on the level.” And just as a wall that is “out of plumb” will collapse, so did the early nation.

As harsh as it may sound, what makes this image compelling is its imperative dimension. “I am going to measure my people Israel by a plumb-line; no longer will I overlook their offenses.”<sup>9</sup> “The nation *will be* inspected. It *will be* measured for its uprightness, its integrity.”<sup>10</sup> We will also be inspected, measured, held to account for our breaches, for our culture’s failure to administer the death penalty evenhandedly between black and white offenders,<sup>11</sup> for our failure to administer the protection of the criminal justice system evenhandedly between rich and poor citizens.<sup>12</sup> These injustices must be righted; justice demands it. If we are to be moral, we can do no less.

This image of justice is an idea that finds eloquent and frequent expression in the language of our judges. Indeed, it is hard to think of a case, court, or judge that does not strive to meet the plumb-line test in both language and outcome. The second image Father Byron reminds his readers of has its roots in the legend of Thomas More, or at least in Richard Bult’s dramatization of that legend in *A Man For All Seasons*.<sup>13</sup> In that play More suggests that justice is a matter of personal integrity, and uses his own cupped hands to symbolize it. To quote from the play, “[w]hen a man takes an oath ... he’s holding his own self in his own hands. Like water. (He cups his hands.) And if he opens his fingers *then*—he needn’t hope to find himself again.”<sup>14</sup> Byron comments on this image: “I suggest that the cupped hands image the internalization of the water of justice. By opening the fingers in falsehood or infidelity, something of

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Amendment to the Constitution. This amendment presently reads, “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII.

<sup>9</sup> BYRON, *supra* note 4, at 109 (quoting *Amos* 7:7-8).

<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 320-45 (1987) (Brennan, J., dissenting) (discussing study which indicates race influences imposition of death penalty on defendants); CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* (1993).

<sup>12</sup> For a general discussion of the topic, see JEFFREY H. REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON* (1990).

<sup>13</sup> ROBERT BOLT, *A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS* (Vintage Books 1990) (1962).

<sup>14</sup> *Id.* at 140.

the self is lost. It is a matter of personal integrity."<sup>15</sup>

This is also a compelling image. To be just, we must not relinquish, compromise, or allow our self-constituting principles to slip away. Compromise, of course, is not always a bad thing; often it is quite a good thing. But when we compromise principles that define us, such as acquiescing to bigotry in the armed services to gain political advantage, or tolerating human rights abuses in a distant country for a domestic quid pro quo, we have given away our right to define ourselves as persons committed to principles of anti-discrimination here at home and to international human rights abroad. This sense of justice as integrity also finds expression in the language of judging, most notably perhaps in our respect for precedent.<sup>16</sup>

Lastly, Father Byron explains:

The familiar trays in balance on a scale provide by far the best image of justice.

....

... An imbalance is also an injustice when one side's advantage ... has been taken at the expense of the other side, [that] the advantaged down-tray represents a passive benefit derived from an injury inflicted by another (even by impersonal social forces), the question of relatedness must be traced with care. The closer the relatedness, the larger the obligation to work to bring the trays into balance.<sup>17</sup>

I think that this is the most powerful and demanding image. It requires not just personal integrity and uprightness, but self-scrutiny and compensation as well. Does the material advantage we enjoy in this culture, our standard of living, come at the expense of other less advantaged cultures? If so, we must even the scales. Is the comparative comfort and luxury of the education received and enjoyed at this institution somehow related to the shortages of materials, resources, funds, and self-esteem found in public grade schools throughout this country? If so, we again must right the balance. Justice demands it.

I think these are powerful images and ideas of justice. They suggest that justice demands institutional consistency, personal

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<sup>15</sup> BYRON, *supra* note 4, at 109.

<sup>16</sup> See generally Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990) (discussing reliance on precedent and its use in law); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) (discussing same).

<sup>17</sup> BYRON, *supra* note 4, at 109-10.

integrity, and impartial universality. However, they are not sufficient standing alone. Consistency, integrity, and impartiality without more will neither ensure public virtue, nor good judging.

Let me illustrate the problem by contrasting the images of consistency, integrity, and impartiality with three images of care, and then interrelating them. For the first image of care, consider the familiar image of a mother's protective and nurturing embrace of her newborn. Her posture is not upright, but curved. To nurture and protect her child, she makes herself into an "O"—not a plumb-line. A tree provides shade, not with its erect trunk, but through its gracefully curved branches. Similarly, a mother provides care, protection, warmth, comfort, and love to her newborn, not through the independent linearity of a morally upright pillar of strength, but through the interwoven, interdependent strength of the circle of care.

For the second image of care, in contrast to the image of Thomas More holding the waters of justice in his cupped hands, I am reminded of a photograph of a nun weeping over the beautiful, but lifeless, bodies of six little boys, toddlers, lying side by side on the ground, all of whom were inexplicably killed during war. She is reaching out to them with her long fingers extended and spread wide. Her hands are not cupped, but open. Her tears, the waters of justice, are not held back. They are spilling out. She gives herself to those who are weaker. She does not cup her hands or herself. She does not hold herself back.

The third image of care comes from the movie *Aliens II*. My favorite scene of the movie is at the very end, after the fight for good is won and the aliens have been bested. Sigourney Weaver, the commander and heroine, is in a spaceship returning to Earth. She is one of only two survivors. The second survivor is a small female child.

In the last scene, the camera focuses in on the two survivors, exhausted from battle, but finally at peace. First, we see the child. Although prematurely aged by the brutality of the battle, she is finally able to sleep peacefully during the ride back to Earth. The camera then turns to Sigourney Weaver, who we also expect to see asleep. Instead, we see that although she is lying down, she is wide awake with her eyes focused intently on the sleeping child. She will not shift her gaze. She will protect this child, fiercely if necessary, until the child reaches safety.

She will not allow the child to leave her sight. She is anything but blindfolded. She is anything but impartial. She is focused absolutely on the child.

As previously stated, justice and care are seemingly contrasting images. It is easy to see how justice and care could be viewed as opposites, as incompatible, or as threats to each other. At best they could be seen as yin-yang checks on each other, but still polarities: one public, one private; one male, one female; one rational, one affective. I think, however, such an outlook would be wrong.

The relationship between care and justice for which I will argue might best be represented by a Venn diagram. Imagine the pursuit of justice and the pursuit of care as two circles, not concentric or independent, but overlapping. The area of overlap contains both true justice and true care. In other words, each is a necessary condition of the other. The non-overlapping areas of the circles contain a self-righteous smugness where one would hope to find justice, and a tribal or animalistic partiality where one would hope to find care.

I am going to illustrate further the importance of care to the definition of justice with a few more images drawn from law, legal philosophy, American literature, current events, and a bit more science fiction.

I begin with the pursuit of justice. The plumb-line, the cupped hands, and the scales of justice are appropriate visual metaphors, respectively, for consistency, personal integrity, and impartiality or universality, all of which are components of justice. But what are consistency, personal integrity, and impartiality without care? There are, of course, many who would argue for precisely the opposite of the relation I am urging here. They argue that the pursuit of virtue or justice is only evidence of moral worth when it is motivated by duty rather than by care, sentiment, sympathy, or inclination. As Professor Lee Dimock states in her book on justice:

In the *Groundwork of the Metaphysics and Morals*, Kant insisted over and over again that the highest and unconditional good can only be found in those instances when one acts not from an inclination but from duty. Kant concedes ... that there might be those who actually take delight in the contentment of others as their own work. But an action of this kind however right and amiable it may be, has no genuinely moral worth. Indeed, for him (Kant) the only genuinely moral person is some-

one who does good not because he likes to, but because he dislikes it; someone who is, (quoting Kant now) 'Cold in temperament and indifferent to the sufferings of others. It is precisely in this that the worth of character begins to show. That he does good not from inclination but from duty.'<sup>18</sup>

The distinction between duty and inclination set out by Kant is also found in Oliver Wendell Holmes' famous argument against strict liability: "Not only is it unwise for policy reasons to seek to compensate every suffering victim for any and all mishaps through the simple expediency of picking the deep pocket. But, of even greater consequence, it would be unjust."<sup>19</sup> The words of Holmes reflect the Kantian or, perhaps, George Willian disdain for those who confuse compassion for suffering with the dictates of true moral duty.

How should we view this noncaring, duty-bound man of justice? To bring the discussion back to the language of judging, what should be made of Holmes' insistence that justice compels us to resist our compassion towards a man hit by lightning?<sup>20</sup> How should we view the modern courts' insistence that when a juror judges whether or not to impose the death penalty upon a capital defendant, he or she must *not* become sympathetic to the life story of the defendant because to do so would be emotional and, therefore, lead to an irrational and unjust decision?<sup>21</sup> Is there moral worth in personal integrity or the pursuit of duty if divorced from compassion, the inclination to care, or the inclination to share in the comfort and pains of others?

<sup>18</sup> LEE DIMOCK, *RESIDUES OF JUSTICE* (1995).

<sup>19</sup> ROBERT L. RABIN, *PERSPECTIVES ON TORT LAW* 9-10 (4th ed. 1995) (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881)).

<sup>20</sup> Holmes states:

Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, then to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.

*Id.* at 10.

<sup>21</sup> See *Saffle v. Parks*, 494 U.S. 484 (1990) (holding Eighth Amendment does not require jurors be allowed to base sentencing decision in capital cases upon feelings for defendant after hearing mitigating evidence); see also *California v. Brown*, 479 U.S. 538, 542 (1987) (upholding jury instruction during penalty phase of capital murder trial that jurors must not be swayed by "mere sentiment, ... sympathy, [or] passion."). Jurors have, however, been allowed to consider the situation of the victim's family. See *Payne v. Tennessee*, 501 U.S. 808, 826-27 (1991) (allowing admission of evidence concerning impact of murder on victim's family as relevant to jury's decision to impose death penalty).



Western literature, whatever might be said of Western philosophy, to put it lightly, has been quite harsh on this Kantian man of duty. There are probably hundreds of examples drawn from canonical literature of the moral pitfalls of this anti-sentient pursuit of justice. In American literature, of course, one need look no further than Mark Twain's Huckleberry Finn to find this aspect of the Kantian image caricatured and criticized.<sup>22</sup> In the novel, Huckleberry Finn refuses to turn in his friend Jim, an escaped slave. Finn explains that morality just does not *feel* good if it requires him to turn in his friend. Every teenage reader of Huckleberry Finn intuitively recognizes not only who is caring and who is uncaring, but also who is just and who is unjust in this famous passage. They see the inherent injustice in divorcing the pursuit of justice from natural inclination and the moral dictates of the bonds of friendship. Similarly, I would argue that the consistent application of the death penalty untouched by compassion or sympathy is a failure of justice, not just a failure of care. It is a failure of justice for precisely the reasons intuited by both Huckleberry Finn and generations of Twain's young readers.

Let us return to the image of the scales of justice, the image most directly tied to legal virtue. What should we make of the judge's claim that the virtue of legal justice lies in judicial balance, impartiality, and impulse for universality, when those qualities are untempered by the particularizing gaze of the discriminating protector? What do we lose when we don the blindfold to take up the scales of justice?

In an early story entitled *All The King's Horses*,<sup>23</sup> Kurt Vonnegut gives a nightmarish version of impartiality, albeit under admittedly tortuous conditions that no real judge or juror should ever have to face. The story is nevertheless instructive. Vonnegut's protagonist and a group within his charge are stranded on the proverbial desert island in the clutches of a mad tyrant. The tyrant insists on playing a game of chess in which the pieces are the live persons in the protagonist's party. Each captured chess piece is killed, and the protagonist realizes that should he lose the game all of his men, including himself, will be killed as

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<sup>22</sup> MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* (William Morrow & Co. 1994) (1884).

<sup>23</sup> KURT VONNEGUT, *All the King's Horses*, in *WELCOME TO THE MONKEY HOUSE* 84 (1988).

well.

The protagonist eventually sees a move that will enable him to win the game, but it requires the sacrifice of a pawn. The pawn who must be sacrificed happens to be his son. He sees with equal clarity that if he does not make the move he will lose, and all, including his son, will die. The reader suffers along with the protagonist, who finally drags himself to the reluctant conclusion that he must sacrifice his son to save the lives of the others.

The protagonist's wife, an equally talented chess player and also one of the game's pieces, sees the move and discerns that her husband intends to go through with the sacrifice. She yells at him not to do it, and throws herself protectively on her son.

What is missing from the protagonist's decision? Why is it, that to many readers, the wife's intervention seems to have greater moral worth than the husband's decision which would have saved lives? Part of the problem may be a misplaced insistence on universality; the protagonist's refusal to see and respond to the particular demands of being a parent; to provide for the needs of his own child; to distinguish and prioritize the claims of those to whom he is bound by parental obligation; to honor those claims above conflicting claims of utility, consistency, duty, or personal integrity. In short, the answer may lie in the protagonist's failure to honor those claims above the pursuit of justice.

I think the protagonist's dilemma also exists in the language of judging. I believe that we can justifiably fault such language when the pursuit of impartiality and universality is untempered by judicial recognition of the particular litigants in the court's legal and moral imagination.

For example, the common flaw in both *Hawkins v. McGee*<sup>24</sup> and *Peevyhouse v. Garland Coal & Mining Company*<sup>25</sup> was the courts' insistence in both cases that the particular be generalized in a way that would serve greater utility. In *Hawkins*, an injured hand was analogized to a broken machine so as to facilitate a commodity-based rather than an injury-based rule of damages.<sup>26</sup> In *Garland*, the injury suffered by a farmer due to the wrongful mining of his farmland was assessed by the relatively

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<sup>24</sup> 146 A. 641 (N.H. 1929).

<sup>25</sup> 382 P.2d 109 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963).

<sup>26</sup> *Hawkins*, 146 A. at 643-44.

insignificant diminution in the farm's market value, rather than by the substantial devastation of human lives.<sup>27</sup> To many student readers, the impulse toward universality, generality, and impartiality in both *Hawkins* and *Garland* is their nagging flaw rather than their virtue.<sup>28</sup> Similar to Vonnegut's chess player,<sup>29</sup> the moral failing of these cases is a result of the fact that each judge refused to recognize his personal obligation to connect with the particular litigants as individuals in order to better prioritize their claims and protect their interests. Judges have a special obligation to the particular litigants before them, just as parents have a special obligation to their children.<sup>30</sup>

On the most abstract level, the insistence by normative economists that courts adopt the ex ante rather than ex post perspective when resolving cases poses the same dilemma as Vonnegut's chess player. One reason we should continue to honor Judge Wright's decision in *Williams v. Walker-Thomas Furniture Company*<sup>31</sup> is precisely because he refused to adopt the ex ante perspective.<sup>32</sup> He should be praised for refusing to universalize the plaintiff before him, refusing to see her as representative of a class, and refusing to treat her as anything less than uniquely within his ambit of particularized obligation.<sup>33</sup>

What becomes of a theory of justice based upon consistency and the plumb-line and untempered by nurturance, when it slights the nurturing impulse to bring members of the community to their highest potential and cultivate the greatness in the human spirit? John Rawls proposed perhaps the most rigorous, generous, and humane theory of liberal justice in the second half of this century.<sup>34</sup> Rawls asks for consistency in society's intui-

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<sup>27</sup> *Garland*, 382 P.2d at 114.

<sup>28</sup> See Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341, 1346 (1995) (noting typical student reaction).

<sup>29</sup> See *supra* note 23 and accompanying text (discussing moral dilemma of father caught in chess game with mad tyrant where his family members are pawns).

<sup>30</sup> See Lewis B. Kaden, *Courts and Legislatures in a Federal System: The Case of School Finance*, 11 HOFSTRA L. REV. 1205, 1253 (1983) (noting judicial obligation to respond to litigants' agendas and justify decisions with articulated reasons).

<sup>31</sup> 350 F.2d 445 (D.C. Cir. 1965).

<sup>32</sup> *Id.* at 448-49.

<sup>33</sup> See *id.* at 449 (noting that "[w]hether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction.").

<sup>34</sup> JOHN RAWLS, A THEORY OF JUSTICE (1971).

tions regarding the rewards of genetic luck.<sup>35</sup> Consistent with demands to treat each member of society justly, Rawls argues, we should likewise consider each member's natural talents (for which the member can take little or no credit) as societal rather than personal property.<sup>36</sup>

Robert Nozick, echoing Rawls' criticism of Benthamic utilitarianism,<sup>37</sup> responded to this argument by stating that there is something in the Rawlsian redistributive scheme that fails to take the differences between persons seriously.<sup>38</sup> Nozick's complaint has merit. It suggests that Rawls' conception of justice, for all its egalitarian generosity, is particularly non-nurturing of the human spirit.<sup>39</sup>

Nozick's objection to Rawls' theory, as well as countless objections to other progressive theories of justice, is captured in an early Vonnegut story, *Harrison Bergeron*.<sup>40</sup> In this story, Vonnegut imagines an egalitarian "dystopia" in which the effects of unevenly distributed talent, so grossly disproportionate to moral worth, are to be neutralized<sup>41</sup>—that being the next best thing to redistribution. For example, in Vonnegut's play, in order to neutralize talent, dancers wear clunky weights to make them clumsy,<sup>42</sup> athletes are burdened with "handicap bags" so they are not as strong,<sup>43</sup> intelligent people have buzzers inserted in their brains to interrupt their complicated thoughts,<sup>44</sup> and musically gifted individuals wear devices in their ears that diminish their hearing capacity.<sup>45</sup> Thus, in a society striving for egalitarianism,

<sup>35</sup> *Id.* at 95-100.

<sup>36</sup> *Id.* at 12, 15, 72, 179, 585. "Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view." *Id.* at 72.

<sup>37</sup> *Id.* at 32-33.

<sup>38</sup> ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 224-27 (1974).

<sup>39</sup> *Id.*

<sup>40</sup> KURT VONNEGUT, *Harrison Bergeron*, in *WELCOME TO THE MONKEY HOUSE* 7 (1988).

<sup>41</sup> Vonnegut creates a world in which everyone is required by law to be equal. *Id.* In this world "[n]obody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else." *Id.* Under the mandate of the Constitution, everyone's abilities were kept on an equal level through "man-made handicaps" imposed by a government agency called the "United States Handicapper General." *Id.*

<sup>42</sup> *Id.* at 8-9.

<sup>43</sup> VONNEGUT, *supra* note 40, at 10.

<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Id.* at 12.

material and psychic reward are rendered consistent with moral worth. Obviously this comes at a considerable cost, not just to the societal pool of talent on which we all draw,<sup>46</sup> but also to the culture. While the culture has become consistent, it has also become cruel; and the cruelty is borne by individuals.

Consider for a moment the other side of the Venn diagram. What is compassion, nurturance, and particularity when untouched by the demands of justice in the sense of consistency, integrity, and impartiality? Just as a parent's failure to pay special heed to the demands of his own children, even when in the pursuit of justice, seems a bit inhuman, an excessive preference seems a bit too human. Care, compassion, and nurturance, untempered by justice, consistency, integrity and a universalizing impulse, can transform into viciousness, racism, nationalism, tribalism, and specism.

Emblazoned in the memories of those who lived through the civil rights era is the haunting and terrible image of a white woman protectively, compulsively, and committedly holding her daughter tight in her grasp while yelling hateful, injurious, and spirit-murdering racial epithets at small African-American children attempting the heroic act of entering a recently desegregated school building. This is an example of particularity with a vengeance. It is care untempered by justice. It is nurturance turned into viciousness.

Finally, what of particularity untempered by the scales of justice? Consider one final image that appeared on the news a while ago: Celebrities landing in private jets for the purpose of sharing their compassionate views on global population at a world conference in Cairo.<sup>47</sup> Without criticizing the views of those individuals on reproductive freedom, there is a grotesque problem with this picture. It is the flip side of the problem with Vonnegut's "anti-meritocratic dystopia." First, the picture fails

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<sup>46</sup> See NOZICK, *supra* note 38, at 228. "People's talents and abilities are an asset to a free community; others in the community benefit from their presence and are better off because [they are] there rather than elsewhere or nowhere." *Id.*

<sup>47</sup> The United Nations International Conference on Population and Development was held in September of 1994. See Peter Steinfeld, *Beliefs; A Language Barrier at the World Population Conference Involved Much More Than Words*, N.Y. TIMES, Sept. 24, 1994, at A9; Doug Struck, *U.N. Population Conference Adopts Blueprint Without Vatican Approval*, BALTIMORE SUN, Sept. 14, 1994, at 3A; John Waller, *After Cairo, Bitterness Lingers: Some Delegates Felt Strong-Armed*, WASH. TIMES, Sept. 15, 1994, at A13.

the plumb-line test. There is something not on the "up-and-up" about "privileged" inhabitants of the First World involving themselves in issues regarding the overpopulation of the less privileged societies of the Third World. It seems to be a failure of personal integrity. Most importantly, it is a stunning refusal to engage in the self-scrutiny demanded by the powerful interpretation that Father Byron gives of the scales of justice.<sup>48</sup> The image makes us painfully aware of our collective refusal to ask whether the downside to the advantages enjoyed by the super rich in this society is somehow causally related not just to their God-given talents that we all cherish and nurture, but also to the suffering of the Rwandan, Somalian, or Haitian child.

This failure of justice is exhibited not only through the excesses of the glamorous. We also see it in the language of judging. It is most tragically exemplified in the refusal of our courts to carefully trace, in the manner urged by Byron, the causal relationships between white privilege and the sufferings of people of color in Fourteenth Amendment jurisprudence. More generally, the failure of justice is revealed by the daily refusal of those in the First World that enjoy the fruits of this privilege to acknowledge the demands of the scales of justice, consistency, and integrity, and to adjust their private lives accordingly. We care deeply about, and will move heaven and earth to protect, the particular individual talents and potentials of our own culture's children. However, we have utterly failed to balance that privilege against the suffering of the rest of the world, or to even consider the causal relationship between the two.

In Father Byron's words, that is indeed a failure of justice.<sup>49</sup> It is by far the greatest moral challenge of the day. I would only add to his analysis that because of the refusal to pick up the scales and weigh our global responsibilities, the otherwise healthy, happy, joyous, and particularizing care that we bestow upon our own children is not, in the end, very compassionate.

In conclusion, if we want to be caring, we must widen the circle of care to embrace the demands of global and social justice. Until we do so as a society, it should come as no surprise that the language of our judges profoundly reflects that deep moral failing.

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<sup>48</sup> See BYRON, *supra* note 4, at 110.

<sup>49</sup> *Id.*

