Robin West: Jurisprudence and Gender

The Separation Thesis: A human being, whatever else he is, is physically separate from all other human beings.
1. Human beings are, definitionally, distinct from one another.
2. The referent of “I” is singular and unambiguous.
3. The word “individual” has an uncontested biological meaning, namely that we are each physically individuated from every other.
4. We are individuals “first.”
5. What separates us is epistemologically and morally prior to what connects us.

The purpose of this essay: To put forward the global and critical claim that by virtue of their shared embrace of the separation thesis, all of our modern legal theory is essentially and irretrievably masculine. The separation thesis is not true of women. Women are in some sense connected to life and to other human beings.

Liberal legal theory
Official Value: Autonomy
Official Harm: Annihilation, Frustration

Critical legal theory
Unofficial Value or Longing: Connection, Community
Unofficial Harm or Dread: Alienation, Isolation

Cultural Feminism
Official Value: Intimacy and the Ethic of Care
Unofficial Harm: Separation

Radical Feminism (the subterranean descriptions of subjectivity that emerge from the unofficial story)
Unofficial Value or Longing: Individuation
Unofficial Harm Dread: Invasion, Intrusion

The contradiction: West attempts to explain the contradiction that exists between the given values and the subjective desires. There is a contradiction in:
Liberalism: between the given values of autonomy and the subjective desire for connection
Feminism: between the given values of intimacy and the subjective desire for individuation

How to account for the existence of this contradiction? She adopts Duncan Kennedy’s efforts: the contradiction is based on a real, lived contradiction grounded in material, unreconstructed reality.

The fundamental contradiction and patriarchy
Women live within the parameters of this fundamental contradiction within the oppressive conditions of patriarchy. What is required is a description of how patriarchy effects, twists, perverts, and to some extent causes that contradiction. Feminism must envision a post-patriarchal world…In a utopian world, all forms of life will be recognized, respected, and honored. A perfect legal system will protect against harms sustained by all forms of life, and will recognized life affirming values generated by all forms of being.

Implications for Jurisprudence
- The Rule of Law does not value intimacy—its official value is autonomy. How does this lead to women’s economic impoverishment?
- The Rule of Law does not recognize the danger of invasion nor the individual’s need for individuation and independence. How does this impact the understanding of rape and abortion?
- How have women fared under a legal system which fails to value intimacy, fails to protect against separation, refuses to define invasion as a harm, and refuses to acknowledge the aspirations of women for individuation and physical privacy?
- The need for ungendered jurisprudence: legal doctrine that takes women’s lives as seriously as it takes men’s.