

ENRICA RIGO*

LEARNING BY CARING:
A PROPOSAL FOR A FEMINIST PERSPECTIVE
ON CLINICAL LEGAL EDUCATION

ABSTRACT. Rather than maintaining a contraposition between the professional and the social justice model of legal clinics, the article proposes a care-oriented approach to clinical legal education. The learning by caring methodology provides a lens for a feminist perspective on clinical legal education that goes beyond the 'feminization' of the themes confronted in the clinics. Caring implies an approach to law and social justice that calls into question traditional paradigms of access to justice centered on legal decisions and rights adjudication. More than calling for problem solving approaches caring calls for medium- and long-term strategies that take charge of the problems at stake.

CONTENT. 1. From learning by doing to learning by caring – 2. Feminist perspectives on clinical legal education and care – 3. Law, care and legal clinics

* Associate Professor of Legal Philosophy, Roma Tre University; Founder of the Legal Clinics on Migration and Asylum.

1. *From learning by doing to learning by caring*

Legal clinics are largely intended as examples of experimental learning that implement the methodology of *learning by doing* where *doing*, besides *solving* problems, is often associated with *performing* and *competing*. The learning by doing approach has been central to the development of the European Higher Education system under the auspices of the *Bologna Process*. The interaction of students with real (or real-simulated) worlds and social-environments has been considered essential to acquire the soft and transferable skills necessary for professional careers. In this picture, the social justice mission that had originally characterized Legal Clinics has been progressively overshadowed by the learning outcomes and has become a by-product of the skills acquiring process.

Rather than maintaining a contraposition between the professional and the social justice model of legal clinics, I propose a care-oriented approach to clinical legal education that questions both sides of the dispute. Further, I vindicate that the shift from *learning by doing* to *learning by caring* provides a lens for a feminist perspective on clinical legal education that goes beyond the ‘feminization’ of the themes confronted in the clinics. *Caring* implies an approach to law and social justice that calls into question traditional paradigms of access to justice centered on legal decisions and rights adjudication. Indeed, more than calling for problem solving approaches *caring* calls for medium- and long-term strategies that *take charge* of the problems at stake. Most of the challenges of contemporary society revolve around some kind of crisis that are concerned with or affect care: from the special care needs of people in vulnerable conditions, to the lack of care highlighted by environmental crisis. In many cases, ultimate solutions are neither feasible or desirable goals to respond to the crisis of contemporary societies. Although strategies of *care* do not necessarily provide solutions to problems, they may teach us ways to take charge of and to cope with the problems. To use Donna Haraway words, caring has to do with that ‘mundane trouble’ that sustains and reproduces lives and societies: ‘Staying with that kind of mundane trouble requires facing those who come before, in order to live responsibly in thick copresents, so that we may bequeath

something liveable to those who come after'.¹

2. *Feminist perspectives on clinical legal education and care*

Clinical legal education and legal feminism have frequently shared common fields of struggles for the enhancement of women rights. An important example is the role played by the Refugee law clinic at Harvard University and the Refugee and Human Rights Clinic at UC Hastings College of the Law in the field of gender and asylum.² More generally, the legal activism of legal clinics has contributed to the development of the *radical legal realism* that characterizes feminist jurisprudence.³ A feminist perspective on legal clinics is, thus, not only defined by the themes involved, such as gender violence, intersectional discrimination, reproductive rights, sexual orientation, gender identity and so on. It is also concerned with the approach to law and legal education in itself.

Leaving aside these fields of encounter between legal clinics and legal feminism, the scarcity of feminist theoretical perspectives on clinical legal education mirrors the long absence of feminism in legal education as such.⁴ In turn, this can be seen as a consequence of the challenge that a feminist epistemology poses to traditional methodologies of teaching and learning law. Feminist epistemology is based on experience rather than rational abstraction and, therefore, calls into question any sharp distinction between theories of knowledge and ethics as well as any depiction of knowledge as something that flows from the teacher to the students or that is discovered through a Socratic method.⁵ According to Susan Williams, in a feminist epistemology,

¹ D Haraway, 'When Species Meet: Staying with the Trouble' (2010) 28 *Environment and Planning D: Society and Space* 53, 53.

² K Musalo, 'A Short History of Gender Asylum in The United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims' (2010) 29 *Refugee Survey Quarterly* 46; D Anker, 'Legal Change from the Bottom up: The Development of Gender Asylum Jurisprudence in the United States' in E Arbel, C Douveregne and J Millbank (eds), *Gender in Refugee Law. From the Margins to the Centre* (Routledge 2014).

³ MC Quinn, 'Feminist Legal Realism' (2012) 35 *Harvard Journal of Law and Gender* 1.

⁴ C MacKinnon, 'Feminism in Legal Education' (1989) 1 *Legal Education Review* 85.

⁵ SH Williams, 'Legal Education, Feminist Epistemology and the Socratic Method' (1993) 45 *Stanford Law Review* 1571.

'knowledge is socially created, not individually discovered, and it is created through a process that involves emotion as well as reason'.⁶ Indeed, the mobilization of feelings and emotions is also central in the analysis of the critical legal scholar Mark Tushnet who underlines that, 'Clinical education concerns people, unstructured situations, and feelings, all of which in our culture are generally associated with being female'.⁷

As anticipated above, I vindicate that the *learning by caring* approach provides an important lens for a feminist perspective on clinical legal education as it articulates a feminist epistemology. However, 'care' is not a straightforward term to define. Emma Dowling recently observed that the English word 'care' does not come from the latin *cura* (which means to look after something or someone), but rather from the old English *caru* which express sorrow, anxiety or even burdens of the mind.⁸ The normative tradition of the 'ethic of care'⁹ certainly incorporate this emphasis on duties, compassion and self-denial, to the point that its critics highlight the risk of undermining the autonomy and agency of both the care givers and the care receivers.¹⁰ Nonetheless, other meanings of care can be ascribed to different philosophical traditions such as that of Michel Foucault that intended the 'care of the self' as a practice of freedom where, in turn, freedom rather than duties and liberation and lays at the basis of ethic.¹¹ If Foucault's main reference for the care of the self is Greek philosophy, care can also be traced in the Christian theology. In contrast with his own time, the central figure of

⁶ Ibid 1574.

⁷ M Tushnet, 'Scenes from the Metropolitan Underground: Critical Perspective on the Status of Clinical Education' (1984) 52 *George Washington Law Review* 272, 274. See also M Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 *Yale Law Journal* 1515.

⁸ E Dowling, *The Care Crisis. What Caused It and How Can We End It* (Verso 2022).

⁹ This expression refers to the stream of studies initiated by Carol Gilligan and its influence on several scholars among whom Nel Noddings, Eva Kittay, Virginia Held and Joan Tronto. See C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982); N Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (University of California Press 1984); E Kittay, *Love's Labor: Essays in Women, Equality and Dependency* (Routledge 1999); V Held, *The Ethics of Care: Personal, Political, and Global* (OUP 2006); J Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993).

¹⁰ J Keller, 'Autonomy, Relationality, and Feminist Ethics' [1995] *Hypatia* 128.

¹¹ M Foucault, 'The Ethics of the Concern of the Self as a Practice of Freedom' in P Rabinow (ed), *Ethics. Subjectivity and Truth* (New Press 1984).

the patristic Augustine of Hippo celebrated human manual work, that should not be considered as a punishment for sin, and, alongside with the care for nature, included in manual work the care for the bodies and souls.¹²

By referring to Joan Tronto's definition,¹³ Dowling affirms that in feminist academic theory care encompasses 'all the supporting activities that take place to make, remake, maintain, contain and repair the world we live in and the physical, emotional and intellectual capacities to do so'.¹⁴ Both feminist theory that use the category of *care* and Marxist and Workerist feminists that implement *social reproduction* analysis to focus on the maintenance and reproduction of labor force and social relations in capitalist societies, have stressed that care work has been naturalized, made invisible and unrecognized in order to be freely exploited and depleted.¹⁵ Historically, most care and social reproduction activities have been cast as women's unpaid work, and this has to do with both the subordination and the invisibilization of care, one the one side, and its crisis in capitalist societies, on the other. As Nancy Fraser puts it, 'on the one hand, social reproduction is a condition of possibility for sustained capital accumulation; on the other, capitalism's orientation to unlimited accumulation tends to destabilize the very processes of social reproduction on which it relies'.¹⁶

This short overview makes clear that, contrary to what we tend to think, care does not indicate a peaceful relationship but rather involves the recognition of conflict. As domestic workers, housewives, sex workers, parents and many other care-giving figures continuously experience, we care about what we dislike as much as what we like. Around care, gendered, racialized and class hierarchies are constituted, and they concern both care givers and care receivers. Ultimately, care indicates relations of dependency and *vulnerabilities* – in the sense of *inevitable* dependency highlighted by Martha

¹² Saint Augustine (of Hippo), *The Literal Meaning of Genesis* (Paulist Press 1982).

¹³ Tronto (n 9).

¹⁴ Dowling (n 8) 21.

¹⁵ L Fortunati, *L'arcano della riproduzione. Casalinghe, prostitute, operai e capitale* (Marsilio 1981); A Picchio, *Social Reproduction: The Political Economy of the Labour Market* (CUP 1992); S Federici, *Caliban and the Witch* (Autonomea 2004); T Bhattacharya, 'Introduction: Mapping Social Reproduction Theory' in T Bhattacharya (ed), *Social Reproduction Theory: Remapping Class, Recentering Oppression* (Pluto Press 2017).

¹⁶ N Fraser, 'Contradictions of Capital and Care' (2016) 100 *New Left Review* 99, 100.

Fineman¹⁷ – as well as their incorporation into politics and law.¹⁸

Through the lens of a feminist epistemology the conflictual nature of care should not be neglected. On the contrary, it is rather fundamental to understand how without care ‘there could be no culture, no economy, no political organization’,¹⁹ as well as the extent to which ‘care creates the fabric that holds our societies together and brings our generations together’.²⁰

3. *Law, care and legal clinics*

If we look at law through the lens of care, we are forced to rethink the very paradigm of rights’ adjudication and decision. While to decide means to solve a problem, by cutting off the reasons of one of the parties, and by drawing a line between the lawful and unlawful, before and after, inside and outside; to take care, instead, means *to stay with* the problem (to use once again Donna Haraway’s expression): to take charge of the problem and to shoulder it through paths that do not follow linear trajectories. Think about disabilities, gender identity, intersectional issues: these are not problems that you ‘solve’. When you stay with your problem, you take routes that you need to change, sometimes you need to step back or just to take a rest, but you rarely know where the route will take you. From this point of view, a feminist epistemology does not establish a truth but needs to be continuously questioned and verified.

The lesson of care is a lesson that I learned working with antiviolence centers self-organized by feminist groups. Violence against women is not *solved* by jailing the perpetrators. Women *stay with* the problem of secondary victimization, *stay with* the consequences of violence on their kids, *stay with* the problem of finding their path in a

¹⁷ M Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law & Feminism* 1.

¹⁸ MG Bernardini and others (eds), *Vulnerabilità: etica, politica, diritto* (IF Press 2018).

¹⁹ Fraser (n 16) 99.

²⁰ Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Care Strategy’, COM (2022) 440 final.

patriarchal society. The new established Legal Clinic on the fight against gender-based violence and multiple discrimination at the Law Department of Rome Tre University²¹ is the result of a collaboration with the University's antiviolence-center run by the feminist organization *Casa delle donne Lucha y Siesta*. The antiviolence centre is dedicated to the memory of Sara Di Pietrantonio, a student of our University who was victim of femicide in 2016. I consider both the University's antiviolence centre and the Department's legal clinic as important achievements that reinforce the engagement of the University in the contrast of gender violence. The two projects also wield a high symbolic meaning as, in Italy, the femicide of Sara Di Pietrantonio marked the momentum of a renewed awareness of the structural nature of gender violence and coincided with the outbreak of a feminist wave that politicized gender violence at the global level, from Latin America to Europe.

Many slogans of the feminist No One Less (Ni Una Menos) movement highlight the challenge that the reproduction and maintenance of life poses to patriarchy, capitalism and colonialism and the violence produced by these mutually sustained systems.²² At the same time, and in contrast to the positions of a large part of 'governance feminism',²³ the 'solution' against gender-based violence advocated by the No One Less movement does not call for the increase of punishments but rather for women's access to rights, welfare and income that are at the basis of self-determined and autonomous choices. Proposals for transformative justice processes upheld by anti-carceral black feminists influence the discussions on abolitionism that, beside the critique to prisons, today includes migrants' confinement and criminalization as well as the use of coercive measure for the treatment of mental illness.²⁴ The incitement of

²¹ The Clinic on Gender-Based Violence and Multiple Discrimination is coordinated by the Private Law Professor Maria Rosaria Marella, the Penal Law Professor Antonella Massaro and myself. The clinic also builds on the long experience developed within the collaboration between feminist antiviolence organizations and the Legal Clinic on Migration and Asylum that I have coordinated since 2010.

²² R Gutiérrez Aguilar, 'La lotta femminista contro la violenza in Messico' in M Bonomi (ed), *La luna che muove le maree. L'assalto al patriarcato* (AgenziaX 2020) 37.

²³ J Halley and others, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Law & Gender* 335.

²⁴ A Davis and others, *Abolition. Feminism. Now* (Haymarkets Books 2022).

the Italian tradition against mental asylums to re-invent institutions and to convert ‘cure’ into ‘care’ resonates with the anti-carceral motto ‘Care Not Cops’.²⁵

By drawing on the legacy of re-inventing institutions, my proposal for a feminist perspective on clinical legal education is to develop care-oriented legal clinics that shift the focus from ‘problem solving’ approaches to ‘taking charge’ of the problems through care strategies that redefine access to justice as a responsive and transformative social process. Disabilities, gender-based violence, people in need for international protection, environmentally displaced persons are examples of conditions of vulnerability that challenge traditional conception of social justice and requires long term strategies that continuously adjust themselves according to changing needs and conditions. This proposed approach extends the educational goal of legal clinics that should not be limited to the legal competencies necessary to obtain a favourable decision but should be concerned with the whole process of accessing justice, the different legal and social actors involved, as well as the consequence of legal decisions considered in medium and long terms.

In care-oriented legal clinics students are both care receivers of learning processes and caregivers toward groups and individuals in vulnerable conditions. At the same time, a care-oriented mission should be considered transversal to all University’s missions. Through the teaching mission, Universities are in fact called to answer the need for care expressed by students and the academic community as a whole. Indeed, the Covid- 19 pandemic increased the complexity of the higher education environment, boosting the gaps in access to education and producing new challenges for students in coping with isolation, distance learning, increased fragility and issues, related to psychological and emotional well-being. Through the research mission, Universities are called to develop innovative and responsive care strategies required by stakeholders (ie, public institutions, NGOs and associations, social enterprises and other social actors). Finally, in line with their third mission, Universities should play an active role in shaping the surrounding environment by addressing structural care gaps and weaknesses, with a specific focus on vulnerable social groups.

²⁵ F Rotelli, *L’istituzione inventata. Almanacco Trieste 1971-2010* (Alfa & Beta 2015); David and others (n 24).

Legal clinics could be conceived as institutions of care that intervene along three lines in order to transform social justice's paradigms from decision to care: people, urban scale and environment. Caring for people means to take care of persons assisted by the clinics, students but also of to take care of the academic community at large. It means to stay with the problem of the masculinity of legal culture and how to survive it, to resist it and to transform it in all academic legal subjects. Caring at the urban scale means to understand clinics as commons within the urban social fabric and among the pool of resources and actors responsible for their management.²⁶ The urban scale plays a central role in reproducing and sustaining life and life relations, and it represents a strategic field for rethinking communities of care beyond families, neighborhoods, and gender binarism. Finally, caring for the environment has to do with the fact that, exactly like natural resources, unpaid care-work is 'naturalized' in order to be made freely appropriable and exploitable or, at most, remunerated with the coin of 'love' and 'virtue'.²⁷ As underlined by MacKinnon, 'The legal realists' famous aphorism – that you can tell more about what a judge will decide based on what he had for breakfast than on legal doctrine – leaves out who cooked the breakfast and who served it'.²⁸ Clinical legal education implies a lot of care and relational work and part of the transformation of legal culture also concerns the fair recognition of this work.

²⁶ MR Marella and E Rigo, 'Le cliniche legali, i beni comuni e la globalizzazione dei modelli di accesso alla giustizia e di *lawyering*' (2015) 33 *Rivista critica del diritto privato* 537.

²⁷ Fraser (n 16).

²⁸ MacKinnon (n 4) 89.
