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Professor of Law, Brooklyn Law School. I am grateful to Susan N. Herman and Betty Levinson for their comments and to Suzanne Brackley and Stephanie Manes for invaluable research assistance. A Brooklyn Law School Faculty Research grant generously supported my research and writing. This essay is part of a larger project on tensions within feminist legal theory and practice.

HEARING WOMEN NOT BEING HEARD: ON CAROL GILLIGAN'S *GETTING CIVILIZED* AND THE COMPLEXITY OF VOICE

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CAROL Gilligan's essay, *Getting Civilized*,[1] raises issues that are critical for thinking about gender and law in the nineties. Moving beyond the notion of "different voice" that shaped her earlier work,[2] she identifies a number of obstacles that make it difficult for women to express their "voice" and to have their voices heard in society and, by implication, in law. Because I agree with Carol Gilligan as to the significance of these obstacles, in this comment I further explore the complexity of "voice" in the context of what I call "feminist lawmaking," the practice by which feminist advocates have sought to transform law.

For Gilligan, Anita Hill testifying against Clarence Thomas was a profound historical moment. Hill, the "Rosa Parks" of gender wars,[3] was talking to the country; Gilligan remembers "listening to Anita Hill—hearing her, and *then hearing her not being heard.*"[4] The story of Anita Hill is a parable for the problems of "second-stage" feminism. The first stage is to recognize women's "different voice," or, as I will discuss, voices, and to make it possible for these voices to be heard. The second stage is to recognize all of the ways in which women's voices can be heard and yet are not really heard—to identify the complexity of voice.

Carol Gilligan's work on "different voice" has had considerable impact on the development of feminist legal theory[5] generally and also

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1. Carol Gilligan, *Getting Civilized*, 63 Fordham L. Rev. 17 (1994).

2. Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).

3. Gilligan, *supra* note 1, at 22.

4. *Id.* at 17 (emphasis added).

5. Carol Gilligan's work, particularly her book *In A Different Voice*, *supra* note 2, has clearly influenced feminist legal theory. A Westlaw search in September 1994 using the search words "Gilligan and feminist theory" found 242 articles in law reviews.

For examples of application of Gilligan's work to the law, see Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and An Ethic of Care in Law*, 15 Vt. L. Rev. 1 (1990); Pamela S. Karlan & Daniel R. Ortiz, *In A Different Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 Nw. U. L. Rev. 858 (1993); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley Women's L.J. 39 (1985); Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 Stan. L.

has influenced my work.[6] I have been concerned with the complexity of how women's voices are heard in the process of "feminist lawmaking." For example, I have explored the difficulties that the concept of "battered woman syndrome" poses because it is misheard or misunderstood "as reinforcing stereotypes of women as passive, sick, powerless and victimized."[7] Although the purpose of admitting expert testimony on battering was to describe many of the common experiences that battered women share, it is too often "misused and misheard to enshrine old stereotypes in a new form."[8] Progress has been made in incorporating women's voices into law, but this does not mean that these voices can be heard by the listener or by society at large, or that they will be heard accurately. Thus I have described the challenge for feminists in law: "*How* do we describe and name a legal problem for women—describe it in detail, in context—and translate it to unsympathetic courts in such a way that it is not misheard and, at the same time, does not remain static? *How* do we develop legal theory and practice that is not only accurate to the realities of women's experience but also takes account of complexity and allows for change?"[9] As Gilligan observes, to explore and "explain the '*how*' " creates an opening for profound transformation.[10]

In law, women's voices have begun to be heard. Women's voices have had an impact on reshaping the law in areas such as violence against women, employment discrimination, family law and reproductive rights. There has been an explosion of feminist legal scholarship that has explored issues affecting women in almost every area of the law. Women are entering the legal profession in droves, and there are now two women on the Supreme Court. The development of feminist legal theory and practice has meant that a wide range of women's ex-

Rev. 1547, 1550-54 (1993); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543, 570-91 (1986). Gilligan's work is now a staple of casebooks on women and the law and feminist legal theory. *See* Katherine T. Bartlett, Gender and Law 589-669 (1993) (Chapter 5: "Women's Different Voice(s)"); Mary Becker, Cynthia Grant Bowman & Morrison Torrey, Feminist Jurisprudence 59-67 (1994) (Chapter 3B: "Differences in the Eighties").

6. *See* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. Rev. 589, 613-18 (1986) (explaining that Gilligan's work suggests that rights discourse in the women's movement can foster women's individual self-development and sense of collective identity); *see also* Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice?"* 15 Harv. Women's L.J. 37 (1992) (discussing how Gilligan's "different voice" theories might affect feminist legal strategy); Judi Greenberg, Martha Minow & Elizabeth M. Schneider, *Contradiction and Revision: Progressive Feminist Legal Scholars Respond to Mary Joe Frug*, 15 Harv. Women's L.J. 65 (1992) (same).

7. Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 Women's Rts. L. Rep. 195, 214 (1986).

8. *Id.* at 215.

9. *Id.* at 200 (emphasis added).

10. Gilligan, *supra* note 1, at 30 (emphasis added).

periences are now brought into the open.[11] Experiences that were previously invisible like rape, intimate violence, sexual harassment and incest are now made visible. But again, as Gilligan describes, visibility does not mean being listened to, that the listener "gets it," or that the listener, or society at large, has really "taken it in."

There are many reasons why it is difficult for women's voices to be heard. The first is that there are many "different voices." Feminist activists and scholars now recognize that a wide range of different theoretical perspectives, many different feminisms and feminist theories, and many different feminist strategies exist.[12] In addition, the development of a strong multicultural feminist community, broad critiques of feminist essentialism and attention to issues of race, class, disability and heterosexism also have enriched feminist dialogue. These developments underscore a paradox in feminist theory and practice: "By definition, feminism claims to speak from the experience of women. Yet that experience counsels attention to its own diversity, and to the role of contextual variations and multiple identities in mediating gender differences."[13] Thus, although the Ninth Circuit adopted a nominally "feminist" "reasonable woman" standard for sexual harassment,[14] there is much disagreement among feminist legal scholars as to whether this standard is a good thing.[15]

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11. The narrative turn in feminist legal scholarship, based on the sharing of personal stories, has also brought the range of women's experiences into the open. However, in order to emphasize the multiplicity of voices, it is particularly important that these narratives be complex and ambiguous, rather than positing a particular experience or perspective as unitary or "the truth." *See* Kathryn Abrams, *Unity, Narrative and Law*, 13 Stud. in L. Pol. and Soc'y 3, 22-23 (1993). It is also important that they link the particular experiences recounted with more general implications and connect them to feminist practice. *See* Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. Rev. 520, 521 (1992); Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 Fla. L. Rev. 25, 25-26 (1990).

12. For example, major casebooks on feminism and law describe many different feminist theories. In Gender and Law, *supra* note 5, there are six different feminist theoretical frameworks: formal equality, substantive equality, nonsubordination, women's different voice(s), autonomy and non-essentialism. In Feminist Jurisprudence, *supra* note 5, the chapter on Feminist Theory includes discussions of feminist methodology, difference in the eighties, dominance theory, formal equality, hedonic feminism, pragmatic feminism, socialist feminism, postmodern feminism, essentialism and heterosexism.

13. Rhode, *supra* note 5, at 1554.

14. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (using the reasonable woman standard to judge sexual harassment in the workplace).

15. *See* Schneider, *supra* note 11, at 559-67 (questioning whether the "reasonable woman" standard "penalize[s] women's different experiences and women's departures from a stereotypical norm"); *see also* Sarah A. DeCosse, *Simply Unbelievable: Reasonable Women and Hostile Environment Sexual Harassment*, 10 Law & Ineq. J. 285, 298 (1992) (pointing out that the reasonable woman standard may actually "threaten the credibility of a broad range of women" by excluding "the varied perspectives of women of different races, classes, sexual orientations, and abilities"). Compare Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and In Practice*, 77 Cornell L. Rev. 1398, 1434 (1992) (arguing that

Many of the issues that women are raising, like violence or sexual harassment, bring conflict into the open. Gilligan suggests that in the face of such conflict, men disconnect from women's concerns and women dissociate parts of their selves;[16] both phenomena might also be understood as forms of denial.[17] These subjects are extremely threatening, and there is always the "pull of the familiar."[18] This description of a different process of disconnection and dissociation resonates with lawyers' observations about ways in which both men and women may be problematic jurors in cases involving battered women who have been charged with homicide or assault of an intimate partner: male jurors are more likely to minimize the violence or blame the woman, while women are more likely to say "I wouldn't let that happen to me."[19]

Lack of credibility accorded to women is another serious problem. Judges may let women's voices into the courtroom, but state Gender Bias Task Forces and a wide range of scholarly literature confirm that women's voices, whether as litigant or expert, are not accorded much credibility or weight even when they are admitted.[20] There are also many subtle ways of what Gilligan calls "shutting women up" after

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the reasonable woman standard is preferable because it teaches courts "to think from a different perspective than that of the reasonable man or person"). Even Cahn, however, proposes a new "contextualized" standard which would recognize different voices among women. *Id.* at 1435. *But see* Carol Sanger, *The Reasonable Woman and the Ordinary Man*, 65 S. Cal. L. Rev. 1411, 1417 (1992) (praising the Ninth Circuit's effort to shape new attitudes via a standard that "discourages employees from touching one another" and "contemplates new ways for working men and women to relate to one another").

16. Gilligan, *supra* note 1, at 18.

17. For a discussion of denial, see Elizabeth M. Schneider, *The Violence of Privacy*, 23 Conn. L. Rev. 973, 979-85 (1991).

18. Gilligan, *supra* note 1, at 20.

19. It is also widely recognized by attorneys that female jurors often judge female victims more harshly, since the victim's lifestyle is always under scrutiny. *See* David Margolick, *Ideal Juror for O.J. Simpson: Football Fan Who Can Listen*, N.Y. Times, Sept. 23, 1994, at B18 (citing Linda A. Fairstein, Chief, Sex Crimes Prosecution Unit, Manhattan District Attorney's office).

20. For a discussion of problems of lack of credibility accorded women, see Lynn Hecht Schafran, *The Three C's of Credibility*, Judges J. (forthcoming January 1995). Schrafran, Director of the National Judicial Education Program to Promote Equality for Women and Men in the Courts, defines "credibility" as:

> [A] word that encompasses many meanings, truthful, believable, trustworthy, intelligent, convincing, reasonable, competent, capable, someone to be taken seriously, someone who matters in the world. "Credible" is the crucial attribute for a lawyer, litigant, complainant, defendant or witness. Yet for women, achieving credibility in and out of the courtroom is no easy task.

Id. See also Kathy Mack, *Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process*, 4 Crim. L.F. 327 (1993); Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. Sch. L. Rev. 123, 128-33 (1992); *Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System*, 8 Ga. St. U. L. Rev. 539, 703-04 (1992) ("Social science research shows that in a variety of contexts, both males and females perceive females as being less credible

they have "gotten in" to the institutions where they have not been welcome; for example, reimposing the values of the traditional disciplines,[21] spraying graffiti on bathroom walls, telling women that they will be "labeled" if they take women's studies courses or use the "f-word" to describe themselves, or including misogynistic comments in course evaluations. Finally, if women's voices *are* really heard, then there is always backlash, for the best way to undermine the message is to kill the messenger.[22] Think, for example, of the incredible scrutiny to which Anita Hill has been subjected, ranging from David Brock's scurrilous attack[23] to countless explorations of her personal life.[24]

Yet, Carol Gilligan and I share hope. Women do speak up and resist, and we must continue to do so, despite our more complex understanding of the many ways in which our voices may not be heard. Gilligan talks about "political resistance," particularly on the part of adolescent girls with whom she has worked: "girls continuing to speak what they were feeling and thinking, and to talk about what they were seeing and hearing when it went against the grain of what was socially constructed or generally accepted as true."[25] I see this in my own sixteen-year-old daughter, Anna, and in Shannon Faulkner's courageous fight to enter the Citadel.[26] The different ways that women resist oppression have also increasingly been explored by feminist legal scholars[27] and is a promising area of work. This notion of resistance is

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than males in all senses of the term, and that recent years have by no means eliminated these attitudes.").

21. Gilligan, *supra* note 1, at 28.

22. *See generally* Susan Faludi, Backlash (1991).

23. David Brock, The Real Anita Hill (1993).

24. *See, e.g.*, Janet Cawley, *Thomas Heatedly Denies Allegations: Capitol Hill Drama Tarnishes Two Lives*, Chi. Trib., Oct. 12, 1991, at C1; Bill Hewitt, *She Could Not Keep Silent: Anita Hill's Challenge to Clarence Thomas—and the Nation—Grew Out of Convictions Formed by Her Oklahoma Upbringing*, People, Oct. 28, 1991, at 40; Richard Lacayo, *A Question of Character: Clarence Thomas and Anita Hill Were Both Known for Truthfulness and Integrity—Until Now*, Time, Oct. 21, 1991, at 43; *Professor's Roots Stretch From Farm to Yale: Rural, Religious Background Left Anita Hill Idealistic, Friends Say*, Star Trib., Oct. 11, 1991, at 12A.

25. Gilligan, *supra* note 1, at 25-26.

26. Shannon Faulkner, who has fought her way into the Citadel military college in South Carolina, is an example of a young woman who has the courage to speak up. She is articulate, poised and direct, not afraid to confront the military's powerful status quo and eager to forge a path for other women to follow. Perhaps more importantly, "her suit has started brush fires across the state." *See* Catherine S. Manegold, *The Citadel's Lone Wolf*, N.Y. Times, Sept. 11, 1994, § 6 (Magazine), at 56. Since Shannon began her struggle "[a]t least 43 women have written to the Citadel for applications or information." *Id.* at 59.

27. Resistance theory examines the way in which individuals accommodate, mediate and resist dominant social practices; resistance theorists posit that nonconformity to accepted norms and values can be interpreted as a form of political resistance. It can be difficult to determine when those who deviate from acceptable social standards are expressing some form of political protest or exhibiting freedom from social constraints, and when such "deviance" is merely the result of not having a broader spectrum of choices. *See generally* Martha R. Mahoney, *Exit: Power and the Idea of*

important for, in Gilligan's and my own most hopeful mode, that resistance is what made Anita Hill speak up and what will give other girls and women the courage to speak up. Aware of the complexity of voice and the obstacles that face us, we must make sure that our voices will not only be heard, but also listened to, understood and integrated into, as Carol Gilligan puts it, "Civilization."[28]

Leaving in Love, Work, and the Confirmation Hearings, 65 S. Cal. L. Rev. 1283, 1307-19 (1992) (rejecting the idea that "exiting" an oppressive environment is the primary manner of resisting oppression); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev 1 (1991) (discussing the battering of women as a struggle for power and control); Dorothy E. Roberts, *Deviance, Resistance, and Love*, 1994 Utah L. Rev. 179, 179-83 (discussing resistance theory in relation to the Black community's "deviants and outlaws"); Dorothy E. Roberts, *Motherhood and Crime*, 79 Iowa L. Rev. 95 (1993) (situating women's crimes within the context of patriarchal power); Elizabeth M. Schneider, *The False Dichotomy of Victimization and Agency in Feminist Legal Theory*, 39 N.Y.L. Sch. L. Rev. (forthcoming 1994) (arguing that feminist legal work should explore acts of resistance to oppression in order to move beyond the problematic victimization/agency dichotomy).

Resistance comes in many forms. For example, it has been argued that members of "the black community" who choose criminal lifestyles are resisting the dominant culture in that they are "refus[ing] to surrender to the stranglehold of material deprivation and social constraints." *See* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. Cal. L. Rev. 1769, 1778 (1992). Similarly, Nancy Ehrenreich implicitly relies on resistance theory in *The Colonization of the Womb* when she asserts that many women who refuse medical intervention during their pregnancies are resisting the hegemonic forces of a patriarchal medical field. Nancy Ehrenreich, *The Colonization of the Womb*, 43 Duke L.J. 492, 496-97 (1993). Finally, in *Sapphire Bound!*, Regina Austin argues that some black teenagers who become pregnant are resisting society's mandates by controlling their own reproduction and rejecting the dominant culture's perception of what behaviors are appropriate and rational. Regina Austin, *Sapphire Bound!*, 1989 Wis. L. Rev. 539, 560-61, 572.

28. Gilligan, *supra* note 1, at 31.