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Gilligan's Travels

Joan M. Shaughnessy*

Some time ago I attended a conference for women law teachers in New Orleans. I was new to law teaching and grappling with concepts that were far from the world of practice. Critical legal studies, feminist jurisprudence, and other movements were entirely new to me. Several times in the course of that week in New Orleans speakers referred to an important and vital work. That title is still in my old notes—*In a Different Voice*, by Carol Gilligan.¹ I assumed at the time that the book was a major piece of legal scholarship, the type of work that is reviewed in a dozen law reviews. So I decided to give it a go when I finished *The Politics of Law*.²

Months passed. One day I was looking through my notes and came across that title again—*In a Different Voice*. Wanting a break from whatever it was that I was doing, I went to the card catalog to find the book. I was puzzled to find that we did not have it. The book was ordered and when it arrived, its absence from our card catalog was explained. The book, subtitled *Psychological Theory and Women's Development*, is not a legal work. Professor Gilligan is not a lawyer, she is a psychologist who teaches at Harvard's Graduate School of Education.

Why, I wondered then, did this book hold such fascination for women legal scholars?³ Why was a study of developmental psy-

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1. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982) [hereinafter "Different Voice"].

2. *The Politics of Law* (David Kairys ed. 1982).

3. Gilligan's book is analyzed from a legal perspective in Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley Women's L.J. 39 (1985). Professor Menkel-Meadow raises many of the questions I address below; her answers are more hopeful than my own. Gilli-

chology so vital to us? Since I first browsed through *In a Different Voice*, I have mulled over these questions. I do not seem to be able to let them go. This essay is an attempt to set out some tentative answers.

Gilligan's book begins with a review of the psychological literature.⁴ She describes briefly the work of major theorists of human development, particularly child development. Gilligan notes that traditional developmental theory is based on studies of males, leading psychologists to view female development as deviant.⁵ For example, Gilligan cites Freud's conclusion that women "show less sense of justice than men" and Piaget's statement that the legal sense "is far less developed in little girls than in boys."⁶ Any woman who has chosen a life in the law will be shaken by these views.

Gilligan initially focuses on flaws that she perceives in the work of Lawrence Kohlberg, a leader in the field of moral development.⁷ Kohlberg describes what he views as a universal pattern of moral development. According to Kohlberg, an individual progresses through the stages of moral development by becoming more autonomous and less dependent on the judgment of others.⁸

gan's work also inspired the 1984 James McCormick Mitchell Lecture at the law school of the State University of New York at Buffalo, published as *Feminist Discourse, Moral Values and the Law*, 34 Buffalo L. Rev. 11 (1985) [hereinafter "*Feminist Discourse*"]. Robin West's recent article, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988), places Gilligan's work within a larger framework of feminist and jurisprudential theory. Interest in Gilligan's work extends beyond the fields of law and psychology. For reactions to Gilligan's work from scholars in a variety of disciplines, see *Women and Morality*, 50 Soc. Res. 487 (1983), *On In a Different Voice: An Interdisciplinary Forum*, 11 Signs 304 (1986); *Women and Moral Theory* (Eva Feder Kittay & Diana Meyers eds. 1987).

4. *Different Voice*, *supra* note 1, at 5-23.

5. *Id.* at 6.

6. *Id.* at 7, 10.

7. Gilligan's discussion of Kohlberg can be found throughout her book, but particularly at 18-63. Kohlberg's own work is voluminous. Summaries of his pattern of moral development can be found in *Appendix A: The Six Stages of Justice Judgment* in *The Psychology of Moral Development: The Nature and Validity of Moral Stages* 621 (Lawrence Kohlberg ed. 1984) [hereinafter "*Moral Development*"]; Lawrence Kohlberg, Charles Levine and Alexandra Hower, *Moral Stages* (1983); Lawrence Kohlberg, *A Reply to Owen Flanagan and Some Comments on the Puka-Goodpaster Exchange*, 92 *Ethics* 513 (1982) [hereinafter "*Kohlberg's Reply*"].

8. In Kohlberg's view, progress through the stages of moral development occurs as individuals broaden their social experiences. Those who develop furthest are those who have "opportunities for power, responsibility, and participation in the secondary institutions of society (i.e., institutions of government, law, and economy, in contrast to the primary institutions of society such as the family, the adolescent peer group, and other small face-to-face groups)." *Kohlberg's Reply*, *supra* note 7, at 518. Kohlberg contends that gender differences disappear in studies using his model when researchers control for education and role-taking opportunities. *Id.* at 517-22; *Moral Stages*, *supra* note 7, at 129. See also Zella Luria, *A Methodological*

The pattern is one of increased separation and individuation until the person has reached "a perspective outside of that of his society."⁹ As a result of this perspective, the individual develops and is guided by universal ethical principles. Development culminates in moral judgments based upon universal principles of justice and respect for persons.¹⁰ In Kohlberg's view, advanced moral reasoning is abstract and the reasoner's focus is on a morality of rights.

Gilligan contends that this description is characteristic of *male* development, rather than *human* development.¹¹ In her opinion, girls and women develop a different moral focus than men. Rather than embracing a morality based upon justice and rights, women make moral judgments based upon the need to care for others and to exercise responsibility. Drawing on psychoanalytic theory, Gilligan finds a psychological basis for this difference.¹² She argues that the focus on separation so central to Kohlberg's theory is not a universal characteristic of development. Rather, it is a central theme only of male development.

The explanation lies in the nearly universal fact that women are the primary caretakers of all children—boys and girls. As a consequence, boys must strive to detach themselves from their mothers in order to develop their own gender identity. In contrast, girls identify closely with their mothers and their gender identity is developed through a continued attachment to their caretaker. Thus "girls emerge from this [early childhood] period with a basis for 'empathy' built into their primary definition of self in a way that boys do not.... Girls emerge with a stronger basis for experiencing another's needs or feelings as one's own (or of thinking

Critique, 11 Signs 316, 318-19 (1986). Gilligan notes that at least some controlled studies using Kohlberg scales have shown significant sex differences. *Reply by Carol Gilligan*, 11 Signs 324, 328-29 (1986) [hereinafter "Gilligan's Reply"].

9. *Different Voice*, *supra* note 1, at 20 (quoting Lawrence Kohlberg, *Continuities and Discontinuities in Childhood and Adult Moral Development Revisited* in *Collected Papers on Moral Development and Moral Education* 29-30 (1973)).

10. *Moral Stages*, *supra* note 7, at 61.

11. Gilligan notes that Kohlberg, like other leading developmental psychologists, relied upon studies of boys in developing his model of moral development. *Different Voice*, *supra* note 1, at 6-7, 11-12, 18. Kohlberg contends that later studies support his view that the pattern he developed in his studies of males is equally applicable to females. *Kohlberg's Reply*, *supra* note 7, at 516-18.

12. *Different Voice*, *supra* note 1, at 7-9. Gilligan is drawing on Nancy Chodorow's work, *The Reproduction of Mothering* (1978). For a helpful summary of her theory, see Nancy Chodorow, *Feminism and Difference: Gender, Relation, and Difference in Psychoanalytic Perspective*, in *The Psychology of Women* 249 (Mary Roth Walsh ed. 1987). Gilligan also relies upon Jean Baker Miller's *Toward a New Psychology of Women* (1976) in developing her argument that women place a particular value on attachment. *Different Voice*, *supra* note 1, at 48-49, 168-70.

that one is so experiencing another's needs and feelings)."¹³ As a consequence, women's lives are characterized by "[t]he quality of embeddedness in social interaction and personal relationships."¹⁴ It is because women are oriented toward relationships, Gilligan contends, that their moral understanding centers around concepts of care and responsibility. In turn, the male moral orientation toward rights, with its emphasis on noninterference, can be explained by the need for separation.

Gilligan relies heavily on interviews to substantiate her view that women and men develop different approaches to morality.¹⁵ The contrasts are striking. She quotes two eleven-year-old children responding to the question, "What does responsibility mean?" Jake answers, "It means pretty much thinking of others when I do something, and like if I want to throw a rock, not throwing it at a window, because I thought of the people who would have to pay for that window." Amy responds, "That other people are counting on you to do something and you can't just decide, 'Well, I'd rather do this or that.'"¹⁶ Jake describes responsibility as refraining from doing harm; Amy sees it as fulfilling other's expectations.

The responses of two twenty-five-year olds asked to define the meaning of morality are similar to those of Jake and Amy. A man says, "I think it is recognizing the right of the individual, the rights of other individuals, not interfering with those rights. . . . [T]he human being's right to do as he pleases, again without interfering with somebody else's rights." A woman responds, "We need to depend on each other, and hopefully it is not only a physical need but a need of fulfillment in ourselves, that a person's life is enriched by cooperating with other people and striving to live in

13. *Different Voice*, *supra* note 1, at 8. Chodorow's theory is an explanation of the formation of gender identity in a world in which early childhood care is provided primarily by mothers, not fathers. Chodorow herself argued that shared parenting would result in fewer psychological differences between men and women. We do not yet know whether the differences in moral reasoning noted by Gilligan are to be found in children reared primarily by fathers or equally by both parents.

14. *Different Voice*, *supra* note 1, at 8-9.

15. Gilligan, working with other researchers, conducted three different studies involving interviews about issues of moral choice. Her research design is described in *Different Voice*, *supra* note 1, at 2-3. Gilligan's reliance in her book on selected statements from interviews has been the subject of some criticism. See John Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 Soc. Res. 597 (1983); Debra Nails, *Social-Scientific Sexism: Gilligan's Mismeasure of Man*, 50 Soc. Res. 643 (1983). Both authors examined transcripts of Gilligan's interviews and differ with Gilligan in their assessment of her subjects' responses.

16. *Different Voice*, *supra* note 1, at 37.

harmony with everybody else."¹⁷

Throughout Gilligan's book women describe moral issues in terms, not of rights, but of meeting the needs of others. A good person is one who helps, who nurtures, who takes care of others. The following statements from college-age and adult women in Gilligan's study illustrate the way in which the "different voice" is expressed in discussing the meaning of morality.

I think I have a real drive, a real maternal drive, to take care of someone—to take care of my mother, to take care of children, to take care of other people's children, to take care of my own children, to take care of the world. When I am dealing with moral issues, I am sort of saying to myself constantly, "Are you taking care of all the things that you think are important, and in what ways are you wasting yourself and wasting those issues?"¹⁸

Morality involves realizing that there is an interplay between self and other and that you are going to have to take responsibility for both of them. I keep using that word *responsibility*; it's just sort of a consciousness of your influence over what's going on.¹⁹

By yourself, there is little sense to things. It is like the sound of one hand clapping, the sound of one man or one woman, there is something lacking. It is the collective that is important to me, and that collective is based on certain guiding principles, one of which is that everybody belongs to it and that you all come from it. You have to love someone else, because while you may not like them, you are inseparable from them. In a way, it is like loving your right hand. *They are part of you*; that other person is part of that giant collection of people that you are connected to.²⁰

These illustrations are among the many Gilligan uses to describe the ethic of responsibility and care, an ethic not developed in Kohlberg's work.²¹ Gilligan's description of the "different voice" is persuasive and compelling. We are left wanting to believe her conclusion that "in the different voice of women lies the truth of an ethic of care, the tie between relation and responsibility, and the origins of aggression in the failure of connection."²² For in her description of the ethic of care, she shares "the vision that everyone

17. *Id.* at 19-20.

18. *Id.* at 99 (quoting Diane, a woman in her late twenties).

19. *Id.* at 139 (quoting Alison, a college sophomore).

20. *Id.* at 160 (quoting Claire, a woman in her late twenties).

21. Kohlberg has recently acknowledged that his description of moral development deals with only a limited area—what he describes as "justice reasoning." Moral Stages, *supra* note 7, at 17-29, 126-41. He concedes that considerations based on care also play a role in moral development. However, Kohlberg denies that differences in moral reasoning are gender-related. *Id.*

22. Different Voice, *supra* note 1, at 173.

will be responded to and included, that no one will be left alone or hurt."²³

Gilligan identifies a second important difference between the moral thinking displayed by women and that displayed by men. She finds that the modes, as well as the principles, of moral thinking differ. As Gilligan describes it, the ethic of rights is developed and applied in an abstract, logical manner. Those using the ethic of rights arrive at solutions to moral problems by briefly identifying and hierarchically ordering the rights implicated by the problem.²⁴ By contrast, the application of the ethic of care requires contextual particularity—an understanding of the individuals involved and the connections among them—in order to arrive at the most satisfactory solution.²⁵ According to Gilligan, emphasis on the social and emotional context in which moral decisions are made is characteristic of women's moral reasoning. Thus, for many women, "absolute judgment yields to the complexity of relationships."²⁶

Gilligan's work concludes with a chapter entitled "Visions of Maturity."²⁷ She argues in this chapter that in adulthood men and women move closer together, learning to incorporate both voices. Women, who begin the process of moral development conscious of the importance of caring and attachment to others, grow to recognize the importance of personal integrity, and thus of the concept of individual rights. Similarly, men come to recognize that the absolutes of truth and fairness can be a barrier to intimacy. In the words of one of Gilligan's male subjects, "[e]quality fractures society and places on every person the burden of standing on his own two feet."²⁸

This brief description does not capture the appeal of Gilli-

23. *Id.* at 63.

24. *Id.* at 19, 21-22, 26-32.

25. *Id.* at 21-22, 31-32, 99-101.

26. *Id.* at 59. Gilligan's contention that the ethic of rights is less contextual than the ethic of care has generated a great deal of discussion. See, e.g., Women and Moral Theory, *supra* note 3, at 178; Gertrude Nunner-Winkler, *Two Moralities? A Critical Discussion of an Ethic of Care and Responsibility versus an Ethic of Rights and Justice*, in *Morality, Moral Behavior and Moral Development* 348 (William Kurtines & Jacob Gewirtz eds. 1984). The abstract reasoning seen in Kohlberg's subjects may not be inherent in the moral reasoning he describes but may instead stem from his methodology. Kohlberg developed his account of moral development by analyzing responses to brief hypothetical dilemmas. By contrast, much of Gilligan's work is based upon interviews with pregnant women actually considering the possibility of an abortion. Kohlberg has denied that the principled reasoning he describes as mature is inconsistent with sensitivity to context. *Kohlberg's Reply*, *supra* note 7, at 520-21.

27. *Different Voice*, *supra* note 1, at 151-74.

28. *Id.* at 167.

gan's book. *In a Different Voice* draws on myth, literature, psychological texts, and extensive quotations from interviews in reaching its conclusions. This is its great strength and its limitation. The book, which is free of jargon and statistics, is accessible to lay readers. The stories and statements, from novels and from Gilligan's subjects, are immediately engaging. The reader can readily follow Gilligan's arguments through her examples.

It is important, however, in using Gilligan's work, to understand its limitations. It is a report of research in progress, an attempt to set forth a theory of moral development which more adequately explains human growth. It suggests that men and women may experience moral development differently. But as Gilligan notes in her introduction, "[t]he different voice I describe is characterized not by gender but theme."²⁹ Gilligan believes that the different voice is "empirically" associated with women, but her book does not attempt to set forth empirical data; nor does it attempt to explain definitively "the origins of the differences described or their distribution in a wider population, across cultures, or through time."³⁰ Much work remains to be done before Gilligan's theory can be taken as established and its consequences for our future moral lives understood.

In a Different Voice has generated substantial debate among psychologists, including both Kohlberg and Gilligan.³¹ On many questions, Kohlberg and Gilligan are in substantial agreement. Kohlberg accepts the argument that morality includes issues of care as well as issues of justice and acknowledges that his theory does not fully account for care.³² Both agree that men and women are able to reason based on considerations of care and of justice and that the difference between the two perspectives is not one of moral competence but rather one of moral orientation.³³

The question of whether the caring orientation is characteristically female is the subject of ongoing study. Some empirical studies have found gender differences,³⁴ but Kohlberg and others

29. *Id.* at 2.

30. *Id.*

31. For a summary of the questions psychologists have raised about Gilligan's work, see Anne Colby and William Damon, *Listening to a Different Voice in The Psychology of Women*, *supra* note 12, at 321.

32. *Kohlberg's Reply*, *supra* note 7, at 513; *Moral Stages*, *supra* note 7, at 19-22.

33. *Gilligan's Reply*, *supra* note 8, at 327-331; *Feminist Discourse*, *supra* note 3, at 47-48 (remarks of Gilligan); *Moral Stages*, *supra* note 7, at 24-25.

34. In a 1986 article, Gilligan reports the results of two studies by Harvard Graduate School of Education doctoral candidates which found significant sex differences in the use of justice and care orientations in solving moral problems. *Gilligan's Reply*, *supra* note 8, at 330. See also Carol Gilligan, *Moral Orientation and Moral Development in Women and Moral Theory*, *supra* note 3, at 19.

have pointed to studies which fail to support Gilligan's claim that a preference for care over justice is more characteristically female.³⁵ Kohlberg maintains, instead, that the choice of perspective depends upon the type of dilemma asked and the "socio-moral atmosphere" surrounding the individual.³⁶ Thus, he contends, an individual will likely choose a care orientation to resolve moral problems within close personal relationships, and choose a justice orientation to resolve more general moral problems.³⁷

Questions remain as to whether Gilligan has demonstrated the "different voice" people use in resolving personal, as opposed to impersonal, moral problems, or the "different voice" women, as opposed to men, use to solve moral problems generally.³⁸ The ethic of care she describes is undoubtedly an important aspect of morality, an aspect many women believe is particularly their own.

* * *

In the years since the publication of *In a Different Voice*, Gilligan's work has been embraced by a growing number of legal scholars, particularly feminist scholars. Her theory seems to answer a heartfelt need among legal scholars and educators. That need, I believe, has been for an answer to the question, "What difference will women make?" After a century of virtually fruitless struggle, women began entering the legal profession in large numbers over a decade ago. Year after year, every law school in the country graduates a substantial percentage of women.³⁹ Those who fought so hard to achieve this victory now need to know what effect women will have on the legal profession. The lives of thousands of women have been enriched by their opportunity to study and practice law, but is there nothing more? Can we not look forward to a legal landscape enriched and transformed by the

35. Nunner-Winkler, *supra* note 26, at 358-60; Moral Stages, *supra* note 7, at 129-30.

36. Kohlberg explains his use of the term "socio-moral" atmosphere and summarizes current research on the topic in Moral Stages, *supra* note 7, at 53-59, 131-33. His argument is essentially that moral decisions are frequently made in a group setting and that in those groups which encourage strong interpersonal ties, a caring orientation is likely to be found.

37. Moral Stages, *supra* note 7, at 131-32. See generally Catherine Greeno and Eleanor Maccoby, *How Different is the "Different Voice"?*, 11 Signs 310, 313-14 (1986) (summarizing psychological studies which reveal that, while women view themselves and are viewed as more empathetic and altruistic than men, they show no difference in their behavior, at least toward strangers). The authors suggest that "if a real sex difference in altruism emerges, it will be found with respect to helpful acts directed toward friends and intimates, not toward strangers." *Id.* at 314.

38. Gilligan's own work has focused on women's decisions concerning their own abortions, quintessentially private problems.

39. Cynthia Fuchs Epstein, *Women in Law* 5 (1981).

presence of women?⁴⁰

The early rhetoric of the modern women's movement did not suggest that any such change was anticipated. For years, the struggle to open the doors of the legal profession and other bastions of male employment was fought by rejecting claims of gender difference as mere stereotypes; there are no provable differences between men and women, it was argued.⁴¹ They could conduct litigation, manage estates, diagnose heart disease, and fly commercial airlines with equal ability. Accordingly, women would no longer be excluded from "male" jobs.

Arguments rejecting gender differences had deep historic roots in the women's movement, beginning with Mary Wollstonecraft's work in the late 1700s.⁴² Such arguments were also well-suited to American legal tradition, with its emphasis on equal opportunity.⁴³ Nevertheless, such arguments represented only one strand of a more complex intellectual heritage. Throughout the 19th and 20th centuries, many feminists have embraced, rather than rejected, gender differences. Women have argued that their

40. This question is treated in Carrie Menkel-Meadow, *Women in Law? A Review of Cynthia Fuchs Epstein's Women in Law*, 1983 Am. B. Found. Res. J. 189.

41. David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 *Law & Inequality* 33, 53-58 (1984).

42. Mary Wollstonecraft, *Vindication of the Rights of Women* (Miriam Brody ed. 1985)(London 1792).

43. Thus, the Seneca Falls Declaration of Sentiments and Resolutions, adopted at Seneca Falls, New York, on July 19, 1848, was intentionally modelled after the Declaration of Independence. It read in part:

We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights;

...

Resolved, That woman is man's equal—was intended to be so by the Creator, and the highest good of the race demands that she should be recognized as such.

...

Resolved, That the equality of human rights results necessarily from the fact of the identity of the race in capabilities and responsibilities.

Resolved, therefore, That, being invested by the Creator with the same capabilities, and the same consciousness of responsibility for their exercise, it is demonstrably the right and duty of woman, equally with man, to promote every righteous cause by every righteous means; . . . and this being a self-evident truth growing out of the divinely implanted principles of human nature, any custom or authority adverse to it, whether modern or wearing the hoary sanction of antiquity, is to be regarded as a self-evident falsehood, and at war with mankind.

Declaration of Sentiments and Resolutions, Seneca Falls, *reprinted in Feminism: The Essential Historical Writings* 76 (Miriam Schneir ed. 1972).

In 1971, the United States Supreme Court belatedly accepted the argument that many legal restraints imposed upon women were the result of harmful stereotypes and thus violated the equal protection clause. *Reed v. Reed*, 404 U.S. 71 (1971).

concern for human life, their purity and their moral sensitivity equipped them to make a special contribution to public life.⁴⁴

This long-standing paradox in feminist thought—rejecting *and* embracing gender difference—has recently become the focus of debate among women within the legal profession. For many feminists the placement of women in the legal profession has not been an end in itself, but a means to a larger goal—the goal of transforming American law. Increasingly, feminists in law, like those in other disciplines,⁴⁵ are questioning and frequently rejecting the equal rights analysis that has served as the hallmark of the women's movement for so many years. The developments in women's psychology exemplified in Gilligan's work have been influential in the development of this criticism.

The change in the feminist approach to law developed in response to the experience of women working within the legal system. In the last several years, the limitations and ironies inherent in the concepts of "equality" and "individual rights" have been repeatedly demonstrated. The rude shock of the *Gilbert*⁴⁶ and *Geduldig*⁴⁷ cases, in which the Supreme Court blithely rejected challenges to discrimination based on pregnancy by distinguishing between pregnant and non-pregnant "persons," is still generating debate. Women's groups have divided on the question of whether laws providing "special" employment benefits for new mothers violate the equality principle and thus endanger women's gains in fighting employment discrimination.⁴⁸ The stubborn and seemingly intractable differential between the average wages of men and women, which has persisted through decades of sex discrimi-

44. The disparate strands of feminist rhetoric are discussed in Eileen Boris, *Looking at Women's Historians Looking at Difference*, 3 Wis. Women's L. J. 213 (1987); Elizabeth Clark, *Religion, Rights and Difference in the Early Women's Rights Movement*, 3 Wis. Women's L. J. 29 (1987); Nancy F. Cott, *Feminist Theory and Feminist Movements: The Past Before Us*, in *What is Feminism?* 49 (Juliet Mitchell and Ann Oakley eds. 1986).

45. Two recent works provide a useful introduction to the range of modern feminist thought. *What is Feminism?*, *supra* note 44; Alison Jaggar, *Feminist Politics and Human Nature* (1983).

46. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

47. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

48. *California Fed. Sav. & Loan Ass'n v. Guerrare*, 479 U.S. 272 (1987). *See also* Nancy Erickson, *The Feminist Dilemma Over Unwed Parents' Custody Rights: The Mother's Rights Must Take Priority*, 2 Law & Inequality 447 (1984). This work describes the conflict among feminists raised by *Kirkpatrick v. Christian Homes of Abilene, Inc.*, 460 U.S. 1074 (1983), in which the ACLU, including attorneys representing the Women's Rights Project and the Children's Rights Project, represented an unwed father seeking custody of a child placed for adoption. The National Center on Women & Family Law, Inc., and the Committee for Mother and Child Rights submitted an amicus brief opposing involvement of unwed fathers in the custody decision.

nation legislation and litigation, is another disturbing factor.⁴⁹ The dire consequences of recent changes in divorce law, often championed by the women's movement in the name of equality, is another cause for concern.⁵⁰ In short, although equality has by no means been abandoned as an organizing principle of the women's movement, it is increasingly subject to challenge.⁵¹

Feminist scholars also question the adequacy of reliance on individual rights as a basis for improving the position of women within our legal system. Individual rights, in our system, are primarily negative.⁵² They surround the autonomous individual with a zone of privacy which cannot be infringed by the state or by others. Feminists argue that rights analysis, with its emphasis on the autonomous actor, ignores (and thus sanctions) the disparity of power between men and women. They trace several related sources of this disparity. Catharine MacKinnon, for example, finds the roots of powerlessness in the pervasive sexual domination of women by men. She argues that to restrict public intrusion into our sexual lives, as rights analysis does, is to perpetuate women's subordination. In MacKinnon's words, "[t]his right to privacy is a right of men 'to be let alone' to oppress women one at a time."⁵³

Similarly, women have, in theory, gained important economic and political rights, including rights to hold office and to be employed in the professions and other traditionally male fields. These rights, however, have failed in practice to secure for most women true economic and political power. The reason, once again, appears to be the assumption of rights-based analysis that each per-

49. Judy Mann, *The Salary Gap*, Washington Post, Oct. 14, 1987, at B3, col. 5; Equal Pay Act of 1963, 29 U.S.C. § 206 (1982 & Supp. 1988); Equal Employment Opportunity Act of 1964, 42 U.S.C. § 2000e-17 (1982 & Supp. 1988); Cole, *supra* note 41.

50. The debate among feminists on this issue is exemplified by comparing Lenore Weitzman, *The Divorce Revolution* (1985), Martha Fineman, *Illusive Equality: On Weitzman's Divorce Revolution*, 1986 Am. B. Found. Res. J. 781, and Martha Fineman, *Ideology, Contradiction and Social Change: A Study of Rhetoric and Result in the Regulation of the Consequences of Divorce*, 1983 Wis. L. Rev. 789, with Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. Cin. L. Rev. 1 (1987).

51. Catharine MacKinnon, *Feminism Unmodified* 32 (1987). The challenge to the equality principle is exemplified by *Papers from the 1986 Feminism and Legal Theory Conference*, 3 Wis. Women's L. J. 1 (1987). A useful summary of feminist alternatives to formal equality is to be found in Mary Becker, *Prince Charming: Abstract Equality*, 1987 Sup. Ct. Rev. 201.

52. For two important recent attempts to reformulate rights discourse in a more communitarian vein, see Martha Minow, *Interpreting Rights*, 96 Yale L. J. 1860 (1987); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. Rev. 589 (1986). Both authors draw on Gilligan for their work.

53. MacKinnon, *supra* note 51, at 101-02. See also Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 Tex. L. Rev. 387 (1984).

son is an autonomous individual, able to compete fully in the economic sphere. This assumption ignores the significant burdens placed on women by reason of their early socialization, their education, their family responsibilities and other consequences of the pervasive sexual biases still found in our society.⁵⁴ As a result, women are "encourage[d] . . . to blame themselves for their failures in the market."⁵⁵

Thus, our legal system's focus on "rights," premised on the model of an autonomous, fully competitive individual, has come to seem fatally flawed.⁵⁶ This focus lacks the ability to respond to the different situations of actual individuals in the world, failing to recognize that people do not exist in isolation, but rather within a complex, imperfect social structure. Only those most advantageously placed within this social structure are able to fully enjoy the benefits our legal system provides.

This attack on rights analysis is not a new one. It is at least as old as Anatole France's ironic reflection that both the rich and the poor are prohibited from sleeping under the bridges of Paris.⁵⁷ The new contribution of feminist scholars has been to subscribe and draw attention to the way in which women are systematically dominated in our society. The law can be seen as advantaging men over women in the same way it advantages rich over poor, white over black. In this sense, it can be called a "male" system.⁵⁸

Reexamination of the fundamental structure of our legal system has led some feminists to make a further claim. They contend that the basic moral premises of our legal system, with emphasis on abstract rights and on the autonomous individual, are themselves inherently "male," reflecting a male moral orientation.⁵⁹ This feminist perspective helps to account for the great interest among legal scholars in Gilligan's work. *In a Different Voice* provides rationale for feminist dissatisfaction with "equal rights." Gilligan's psychological theory supports claims that moral orientations are indeed gendered and that abstract, rights-based

54. Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983).

55. *Id.* at 1552.

56. See, e.g., Deborah Rhode, *Feminist Perspectives on Legal Ideology* in *What is Feminism?*, *supra* note 44, at 151.

57. Anatole France, *The Red Lily* 80 (1894).

58. Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 Harv. Women's L. J. 83 (1980); Elizabeth Fox-Genovese, *Women's Rights, Affirmative Action and the Myth of Individualism*, 54 Geo. Wash. L. Rev. 338, 341-47 (1986); Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635, 644 (1983).

59. MacKinnon, *supra* note 58, at 644-45; Diane Polan, *Toward a Theory on Law and Patriarchy* in *The Politics of Law*, *supra* note 2, at 294; Olsen, *supra* note 53.

reasoning is particularly male. Moreover, as Gilligan notes, "it becomes clear why a morality of rights and noninterference may appear frightening to women in its potential justification of indifference and unconcern."⁶⁰

Gilligan's work goes further. It sets forth an alternative moral framework which is identified as particularly female. Gilligan's theory thus holds out the tantalizing possibility that the presence of women within our legal system will transform the very premises of that system. Feminist scholars hope that, as the "different voice" becomes more prevalent in law, our legal system will demonstrate more concern for the needs of each unique person and a growing emphasis on building and strengthening the relationship among individuals will emerge. Informed by the ethic of care, the law could become less individualistic and more communitarian in its focus.⁶¹

Scholars also foresee a transformation in the manner in which law is practiced and administered. The legal system's "combative, adversarial format"⁶² is seen as another consequence of the competitiveness so central to male psychology. Scholars suggest that the entry of women into the profession will temper this adversariness with a cooperative, nonadversarial approach more attuned to women's central concern with maintaining relationships.⁶³

In a Different Voice has unquestionably had a major impact on the legal academy.⁶⁴ My query is whether Gilligan's work re-

60. *Different Voice*, *supra* note 1, at 22.

61. Kenneth Karst, *Woman's Constitution*, 1984 Duke L. J. 447; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543 (1986); Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in Law*, 42 U. Miami L. Rev. 29 (1987); *Feminist Discourse*, *supra* note 3, at 36 (remarks of Spiegelman). My colleagues Tom Shaffer and Uncas McThenia have pointed out to me the many ways in which the feminist arguments I summarize here fit into a larger intellectual movement. The challenge to the vision of the individual "as a free rational will," in the words of Iris Murdoch, is increasing throughout the academy. Iris Murdoch, *Against Dryness: A Polemical Sketch*, in *Revisions: Changing Perspectives in Moral Philosophy* 43, 44 (Stanley Hauerwas & Alasdair MacIntyre eds. 1983). Feminist jurisprudence is one aspect of this challenge, which Clare Dalton has called the "Post Enlightenment Project." Address by Clare Dalton, Association of American Law Schools Workshop for Women in Legal Education, Washington, D.C. (October 23, 1987).

62. Polan, *supra* note 59, at 301.

63. Menkel-Meadow, *supra* note 3, at 54-55; James Foster, *Antigones in the Bar: Women Lawyers as Reluctant Adversaries*, 10 Legal Stud. F. 287 (1986).

64. I do not mean to suggest that the legal academy has embraced Gilligan's work without question. To the contrary, some feminist scholars have expressed reservations about its implications. See, e.g., *Feminist Discourse*, *supra* note 3, at 74 (remarks of MacKinnon); Schneider, *supra* note 52, at 616-17 n.140; Deborah Rhode, *The "Woman's Point of View,"* 38 J. Legal Educ. 39 (1988).

ally does herald sweeping changes in our legal system due to the presence of women. It seems to me that, in anticipating these changes, commentators discount the grave difficulties posed by an attempt to translate a picture of individual moral development into a prognosis for system-wide change. These difficulties range from the powerful pressures for internal change experienced by women as they develop into mature lawyers to the institutional limitations of our legal system.

* * *

What happens to the "different voice" when women enter the domain of law, a domain for so long shaped by men alone? The first difficulty women encounter is that of being heard at all, in any voice. Long before they reach law school, women have learned a whole range of behavior for relating to men. They have learned to be "feminine" in voice, in movement, in appearance. This learning can be very debilitating for women in law. Recently Jo Ann Harris, a very successful woman lawyer and former prosecutor, wrote:

I am 5'11" tall, and have a low-pitched voice which, when projected can break a brick at 50 yards.

Of all the qualities born and bred which have contributed to whatever success the law has brought me, in the courtroom and in the office, I credit these two factors most.⁶⁵

Harris' assessment is probably correct. Most women's speech is structured to avoid being authoritative, and thus non-threatening.⁶⁶ Women have particular difficulties in conversation with men. As one observer noted, "In mixed company there's no question which sex has cornered the market on long-winded chatter. Men readily interrupt the speech of women, and women allow the interruption. In one systematic analysis of taped conversations between men and women, the men did 98 percent of the interrupting."⁶⁷ The net effect of these tendencies is that women experience great difficulties in making themselves heard and understood—in class, in court, in conference.

65. Jo Ann Harris, *As Federal Prosecutors: Talking Man-to Man in Women Lawyers: Perspectives on Success* 153 (Emily Couric ed. 1984).

66. Susan Brownmiller summarized recent research on the difference between male and female voices and speech in her work, *Femininity* 115-21 (1984). Women pitch their voices toward the upper end of the natural range, and reduce the decibel level. *Id.* at 115-16. The net effect is to make women sound smaller than they are. Women also tend to vary the pitch of their sentences, frequently ending on the upswing. *Id.* at 116. This pattern communicates politeness and hesitation and "seem[s] to beg for outside confirmation." *Id.* Similarly, women are reluctant to use declarative sentences and commands in their speech. *Id.* at 118. They tend to mask declarations and commands by putting them in the form of questions. *Id.*

67. *Id.* at 120-21.

Women convey deference and dependence through their gestures as well as their speech.

The lessons of femininity instruct in polite compliance, and the rules of etiquette demand that the female relinquish her initiative in social encounters. Indeed, the delicate tissue of formalized male-female relations is constructed on artful expressions of feminine dependence. To be helped with one's coat, to let the man do the driving, to sit mute and unmoving while the man does the ordering and picks up the check—such trained behavioral inactivity may be ladylike, gracious, romantic and flirty, and soothing to easily ruffled masculine feathers, but it is ultimately destructive to the sense of the functioning, productive self.⁶⁸

This behavior reflects a deeper tendency on the part of women to subordinate themselves to men—a tendency that women struggle to overcome as they enter the legal profession. If they cannot overcome it, they are silenced.⁶⁹

One method of coping with this struggle is to learn from those who are not silenced, to learn from men. As one observer recently expressed it, “[g]oing to law school is learning to speak male as a second language, and learning it fluently.”⁷⁰ This comment captures the experience of women law students on several levels. It describes the type of language professors and other students accept and listen to respectfully—direct, clear, and forceful. But the reference is to more than simple speech patterns and voice. The comment relates to a mode of thinking, of approaching problems, which has dominated legal education since the end of the last century.

The classic statement of the technique was fashioned by Karl

68. *Id.* at 201.

69. See Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. Legal Educ. 137 (1988); Christine Littleton, *Reconstructing Sexual Equality*, 75 Calif. L. Rev. 1279, 1317-21 (1987); Stephanie Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. Legal Educ. 147 (1988); *Project: Gender, Legal Education, and the Legal Professions*, 40 Stan. L. Rev. 1209, 1239 (1988) (hereinafter “*Gender Project*”); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 Stan. L. Rev. 1299 (1988); K.C. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 Am. U. L. Rev. 1141, 1145-47 (1985). James Elkins has written eloquently about the impact of legal education on women law students. See James Elkins, *On the Significance of Women in Legal Education*, 7 A.L.S.A. F. 290 (1983). He has also brought us the writings and reflections of his own women students in *Worlds of Silence: Women in Law School*, 8 A.L.S.A. F. 1 (1984)(special issue edited by Elkins) (hereinafter “*Worlds of Silence*”). This volume vividly portrays the pain, the uncertainty and the occasional joy experienced by women in law school.

70. Worden, *supra* note 69, at 1145 (quoting Address by Sheila McIntyre, 8th Annual Conference on Critical Legal Studies in Washington, D.C. (Mar. 16-18, 1984)).

Llewellyn, a man who cared deeply about people and whose writing is full of that passion:

The first year . . . aims to drill into you the more essential techniques of handling cases. It lays a foundation simultaneously for law school and law practice. It aims, in the old phrase, to get you "thinking like a lawyer." The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice—to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of the law. It is not easy thus to turn human beings into lawyers. Neither is it safe. For a mere legal machine is a social danger. Indeed, a mere legal machine is not even a good lawyer. It lacks insight and judgment. It lacks the power to draw into hunching that body of intangibles that lie in social experience. None the less, it is an almost impossible process to achieve the technique without sacrificing some humanity first. Hence, as rapidly as we may, we shall first cut under all attributes of *homo*, though the *sapiens* we shall then duly endeavor to develop will, we hope, regain the *homo*.⁷¹

The process which Llewellyn describes has been criticized and tinkered with,⁷² but by and large a student's early law school experience remains true to Llewellyn's description. Most law teachers continue to believe that students need to learn the analytical abilities, the precision, the ease with legal machinery which Llewellyn describes. They are learning the language of the law, without which they cannot function in their profession. In effect, they are learning the voice of power.

When we set this description of the law school experience next to descriptions by Gilligan and others of women's psychology, we begin to see the deep difficulties that women law students encounter. The starting point of Gilligan's analysis of women's psychology is her finding that women place primary importance on the sense of attachment and connection. Connection is maintained by attention to the entire context in which a human problem arises. Psychologists have found that in learning, as elsewhere, women strive to develop a sense of empathy, "a communion with what they are trying to understand."⁷³

Much of what happens in legal education is antipathetic to

71. Karl Llewellyn, *The Bramble Bush* 101 (1960).

72. See, e.g., Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *The Politics of Law*, *supra* note 2, at 40.

73. Mary Field Belenky, Blythe McVicker Clinchy, Nancy Rule Goldberger & Jill Mattuck Tarule, *Women's Ways of Knowing* 143 (1986).

this psychology.⁷⁴ The approach is critical, "cold," not accepting. The human context is obscured.⁷⁵ The "facts" are brief and are endlessly changed as the teacher spins out hypotheticals, stripping away the student's sense of connection with her values and beliefs. This discontinuity between women's customary way of thinking and the approach they learn in law school underlies the reaction that "going to law school is learning to speak male as a second language."⁷⁶

Education in the law involves far more than the mere acquisition of information about legal rules. Students are immersed in a new way of looking at the world; a new paradigm, in the words of one recent writer.⁷⁷ The effects of this experience can be overwhelming.

Such shifts can be so strong that the converted person may not remember life under the prior paradigm. She will brand any other way of thinking other than the new paradigm as absurd. Once fully grasped, the new paradigm will be deemed "obvious"—the only possible way the world could be.⁷⁸

The paradigm offered by American law is alien to the student

74. See Janet Rifkin, *Mediation from a Feminist Perspective*, 2 *Law & Inequality* 21, 23-25 (1984); Meredith Gould, *The Paradox of Teaching Feminism and Learning Law*, 7 *A.L.S.A. F.* 270 (1983); Elkins, *supra* note 69.

75. See Julius Getman, *Colloquy: Human Voice in Legal Discourse*, 66 *Tex. L. Rev.* 577 (1988); *Worlds of Silence*, *supra* note 69, at 45-46 (remarks of Buchmelter), 50 (remarks of Dalporto) and 66 (remarks of White).

76. See generally *Feminist Discourse*, *supra* note 3, at 39 (remarks of Gilligan) ("To enter the legal system, therefore, women had to act as though they did not know things that they felt they knew. . . ."); *Worlds of Silence*, *supra* note 69, at 54 (remarks of Treadway) ("As women, we are confronted with something totally foreign and repulsive to our being."); Weiss & Melling, *supra* note 69, at 1313-21.

77. Williamson Chang, *Zen, Law and Language: Of Power and Paradigms*, 16 *New Mexico L. Rev.* 543 (1986). Chang is drawing here on a concept first developed by Thomas Kuhn in *The Structure of Scientific Revolutions* (2d ed. 1970). See also John Bonsignore, *Law as a Hard Science: On the Madness in Method*, 2 *A.L.S.A. F.* 47 (1977).

78. Chang, *supra* note 77, at 549. As my colleague Uncas McThenia has very kindly pointed out, James B. White makes a similar point in his text, *The Legal Imagination* (1973). White reprints and poses questions about a passage from Twain's *Life on the Mississippi* in which Twain describes the change in his perceptions of the Mississippi as he learned to be a pilot. "[A] day came when I began to cease from noting the glories and the charms which the moon and the sun and the twilight wrought upon the river's face; another day came when I ceased altogether to note them. . . . All the value any feature of it had for me now was the amount of usefulness it could furnish toward compassing the safe piloting of a steamboat." *Id.* at 12. There are differences between the Kuhn/Chang paradigm shift and the experience described by Twain, but both are irreversible. See also Carol Cohn, *Sex and Death in the Rational World of Defense Intellectuals*, 12 *Signs* 687 (1987). Reflecting on a year spent studying nuclear defense strategy, the author observes, "I had not only learned to speak a language: I had started to think in it. Its questions became my questions, its concepts shaped my response to new ideas. Its definitions of the parameters of reality became mine." *Id.* at 713.

who speaks with the "different voice" that Gilligan describes. The fundamental structure and basic organizing principles of American law are not found in the web of connection that Gilligan describes as central to women's psychology. Instead, they are built upon the vision of the autonomous individual that Gilligan sees as central to male thinking.⁷⁹ Many legal scholars have seen enormous potential for a feminist change in law as a result of this difference, but much of the pressure for change may in fact flow in the opposite direction.

Students spend three years of law school working within the rights-based legal system we have established. Of necessity, they read, write, and argue almost exclusively within this framework. From the study of civil liberties, with its emphasis on freedom from government interference, to the study of contract law, with its careful scrutiny of the conditions under which one individual will be compelled to keep a promise to another, the central principle of autonomy is constantly reinforced in law school.⁸⁰ Inevitably, the thinking of women students is affected by their constant exposure to the organizing principle of the law.

Gilligan describes girls and women who seem over time to subordinate their own voices to the other voice they have been taught to use. As she observes, "The difficulty women experience in finding or speaking publicly in their own voices emerges repeatedly in the form of qualification and self-doubt, but also in intimations of a divided judgment, a public assessment and a private assessment which are fundamentally at odds."⁸¹ Such a conflict must ultimately be resolved and one likely resolution is the inter-

79. Sherry, *supra* note 61.

80. I do not mean to suggest that concerns of care are utterly lacking from our legal system. Obviously such a contention would be foolish. Care does not, however, in my view, provide the organizing principle for our legal system. As Gilligan herself observed in a recent essay,

[There is] an important distinction, between care as understood or construed within a justice framework and care as a framework or a perspective on moral decision. Within a justice construction, care becomes the mercy that tempers justice; or connotes the special obligations or supererogatory duties that arise in personal relationships; or signifies altruism freely chosen — a decision to modulate the strict demands of justice by considering equity or showing forgiveness; or characterizes a choice to sacrifice the claims of the self. All of these interpretations of care leave the basic assumptions of a justice framework intact: the division between the self and others, the logic of reciprocity or equal respect.

Gilligan, *supra* note 34, at 24. Although Gilligan was not addressing the legal system here, her statement does seem to me an accurate description of the place of care in current legal theory.

81. *Different Voice*, *supra* note 1, at 16.

nalization of the "public assessment."⁸²

Part of the difficulty that women face in law school, and later in the practice of law, is undoubtedly attributable to their numbers.⁸³ Women have always been a small minority in the legal profession. It is only very recently that they have begun to enter the profession in substantial numbers. Some of the pressure that women feel to behave and speak like men may come from their position as minorities in the legal profession. Until very recently, the only role models available to students and young lawyers were men. Their peer groups in law school and in practice were overwhelmingly male. That fact alone may account for much of the sense women feel that as they become lawyers they are also becoming like men. Sociologist Rosabeth Kanter reports that when a group contains a small proportion of women, men tend to react by exaggerating displays of aggression and potency, those features of their culture which they perceive as common to the male majority.⁸⁴ Women are left with the choice of remaining isolated from the group or becoming insiders by accepting the (exaggerated) male culture.

For women engaged in a professional training, there is a need not only to belong to a group of peers but also to learn a new role, that of a lawyer. Law has been a male profession for so long that the understanding of what a lawyer *is*, for women and for men, is almost inseparable from our understanding of what a man is.⁸⁵ In their attempts to behave as they believe a lawyer should, women feel extraordinary pressure to behave "like men."⁸⁶

Thus, to date, the distortions created by women's status as outsiders in a male profession have made it almost impossible for women to realize and express their own sense of what it means to practice law. These distortions should gradually diminish as wo-

82. See *Feminist Discourse*, *supra* note 3, at 59 (remarks of Gilligan). A recent study of Stanford law students and alumni found only limited gender differences in the respondents' approaches to legal problems. The authors of the study suggest that legal training may reduce gender differences in moral reasoning. *Gender Project*, *supra* note 69, at 1225-27, 1248-51.

83. See *Feminist Discourse*, *supra* note 3, at 56 (remarks of Menkel-Meadow).

84. Rosabeth Kanter, *Men and Women of the Corporation* 222-23 (1977).

85. Epstein, *supra* note 39, at 276-77.

86. See, e.g., James Stewart, *Are Women Discriminated Against at Large Law Firms?*, *Wall St. J.*, Dec. 20, 1983, at 1, col. 1; *Worlds of Silence*, *supra* note 69, at 58 (remarks of Spencer). Ironically, such behavior may result in negative reactions because it is "unfeminine." Cf. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1116-20 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *cert. granted*, 108 S.Ct. 1106 (1988) (No. 87-1167). See also, MacKinnon, *supra* note 51, at 74-75; Deborah Rhode, *Perspectives on Professional Women*, 40 *Stan. L. Rev.* 1163, 1188-95 (1988).

men become a larger percentage of the legal profession. No longer will peer groups be overwhelming male. No longer will the status of lawyer be defined as solely a male status.

* * *

Nevertheless, there will still be severe limits on the lawyer's role, and on women's abilities to express themselves in that role. Those limits spring from the nature of the law itself. The United States has from its beginnings been a fragmented society. Americans have always been of different faiths and ethnic origins. As a consequence, perhaps, the idea of law plays an extraordinarily important part in our society. Indeed, law has been called our national religion.⁸⁷ We have a tendency to believe that we can address all the problems and flaws of our society through law. For many of us, law becomes synonymous with good. It is precisely this perception that causes difficulty for so many women in law school and later in the practice of law—a difficulty occasioned by their socialization to service and nurturing of others.

For fundamentally, in my view, the law is not nurturing. Our willingness to treat law as a civil religion can blind us to the basic nature of law. Law is regulated force. In a recent essay, Robert Cover stated this point strongly:

Not only does the violence of judges and officials, the violence of a posited constitutional order, exist. It is generally understood to be implicit in the practice of law and government. Violence is so intrinsic a characteristic of the structure of the activity that it need not be mentioned. Read the Constitution. Nowhere does it state the obvious: that the government thereby ordained and established has the power to practice violence over its people. That, as a general proposition, need not be stated, for it is understood in the very idea of government.⁸⁸

Cover's essay is concerned, in part, with the most extreme example of legal violence, the death penalty. His point is a more general one, however, and has important implications for women in law. The experience of law—practicing it, administering it, invoking it or being its subject—is the experience of force, of power, and, at times, of violence.⁸⁹ This aspect of law is most obvious in

87. See, e.g., Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 Sup. Ct. Rev. 123, 123-25, 150-51; 1787: *The Constitution in Perspective*, 29 Wm. & Mary L. Rev. 1 (1987).

88. Robert Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 Ga. L. Rev. 815, 819 (1986). See also the discussion of Cover's essay in Minow, *supra* note 52, at 1893-1911, arguing that legal argument can restrain and redirect power.

89. For a somewhat more optimistic discussion of the effect of a life in the law on a lawyer's character, see Anthony Kronman, *Living in the Law*, 54 U. Chi. L. Rev. 835 (1987). My colleague Tom Shaffer has also described law practice in terms

the practice of criminal law. A prosecutor's task is to ensure that the defendant feels the force of the state—fine, imprisonment, death. Defense counsel's task is to resist the imposition of that force.⁹⁰

But the experience of the law as the experience of force is by no means limited to the criminal law. Hundreds and thousands of people stand before housing court judges every day. For them, too, the law is force—the marshals arriving to place their belongings on the curb and to lock the door against them.

The law may color the background of a marriage or a birth, but it is a distant influence. The law and its personnel predominate, however, when families disintegrate. Then the law has and uses its power to give custody of a child or take that custody away. The law uses its power to divide the family home and goods. Thus, even in the most intimate areas of life, the law is most immediately present when voluntary relationships no longer work and the power of the law is invoked.⁹¹

My point is simply this. An agent of the law—a lawyer, a judge—is professionally engaged, most of her working days, in the exercise of power.⁹² It is precisely this task that women have historically been excluded from performing. The exercise of legalized force through law, like other exercises of power in our society, has been an exclusively male prerogative. The patterns of male development which Gilligan describes briefly in her book appear to be well-suited to the training of powerful adults. Boys are described as being more “competitive,”⁹³ as “striv[ing] to learn and master

very different than those I present here. See Thomas L. Shaffer, *On Being a Christian and a Lawyer* (1981). He finds a central role for care in the experience of practicing law. *Id.* at 21-33.

90. Reflecting on the implications of Gilligan's work for law practice, one practitioner has noted:

In a criminal trial [of a battered wife], where the accused faces the powerful machinery of government prosecution and the possibility of years in jail, zealous representation must require that the lawyer use to her client's best advantage, the very social and institutional sexism that may have driven the client to do her murderous deed. That is, the lawyer must turn to the woman's advantage the traditional language of absolute judgment, of gender-neutrality, of equality based on rationality, and of an ideology of noninterference in the private domain.

Ann Hasse, *Legalizing Gender-Specific Values*, in *Women and Moral Theory*, *supra* note 26, at 282, 294.

91. This is not necessarily a negative role. Indeed, many feminists have faulted the law for its unwillingness to exercise force to control domestic violence. See, e.g., Lisa Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 *Harv. Women's L. J.* 57 (1984).

92. See MacKinnon, *supra* note 51, at 74.

93. Different Voice, *supra* note 1, at 9.

the technology of their culture,"⁹⁴ as striving for "achievement" and "success."⁹⁵

By contrast, as Gilligan notes, "Women's place in man's life cycle has been that of nurturer, caretaker, and helpmate, the weaver of those networks of relationships on which she in turn relies."⁹⁶ The developmental pattern which Gilligan describes is well-suited to this traditional role for women. Girls learn "sensitivity to the needs of others" and "overriding concern with relationships and responsibilities."⁹⁷ This concentration on care which is so well-suited to private, intimate relationships may be incompatible with the lawyer's role. As one commentator noted, reflecting on the Gilligan/Kohlberg debate:

Males and females are constituted by the social world and choose to be constituted in ways for which they are reinforced. Females tend to have more contextual and relational moral orientations than males because they are reinforced for traits which lead to success in the world(s) of "domestic interchange." Males (and females) who occupy [Kohlberg's highest state of justice reasoning] do so because the contingencies of reinforcement in their world place value on activities like doing normative philosophy . . . and attending theoretically to the world of large social interactions. Moral change, then, would be explained, in much the way Kohlbergians already do, in terms of tests and challenges offered by experience, by the conflicting demands of different social worlds which we may come to move from, in, and between.⁹⁸

I have said that lawyers deal in power—legalized force. This is simultaneously the source of the law's great strength in our society and its great weakness. The instruments of the law, when stripped to their bones, are crude. The law can imprison or refuse to imprison, it can transfer objects and money from one person to another or refuse to do so, it can order someone to do an act or refrain from acting, and it can punish failure to follow the order. It can take a life. It can achieve the goals that force is capable of achieving. But it cannot, directly, achieve anything more.

Consider, for example, school desegregation—a landmark of legal achievement in our century—an achievement that required the work of decades by lawyers and judges, and an achievement that required the use of force. In the final analysis, law could, to some extent, assure that black and white school children sat in the

94. *Id.* at 12.

95. *Id.* at 151-153.

96. *Id.* at 17.

97. *Id.* at 16-17.

98. Owen Flanagan, *Virtue, Sex and Gender: Some Philosophical Reflections on the Moral Psychology Debate*, 92 *Ethics* 499, 509 (1982).

same classrooms, that black and white teachers were found on the same school faculties, that black and white children received the same books and equipment. But law, and the lawyers and judges involved in the school cases, could not go much further. The work of actually uniting the communities of black and white children, of establishing "webs of connection" among them, primarily belongs to others—to teachers, to parents, to community leaders. The law, at its best, can only prepare the way for human interaction, it cannot achieve it.

The same is true of lawyers at work in ordinary child custody cases. Here too, the role of the law, and the lawyers and judges administering it, is limited. An order can be entered giving "custody" of a child to her mother with visitation for her father and child support payments in the amount of \$300.00 a month from father to mother. These decrees are of vital importance to the persons involved, and enormous attention has lately been paid to enforcing them. Nevertheless, even at its best, the law accomplishes little in such cases. At most, lawyers and judges can obtain for a child the monetary support necessary to a comfortable childhood and can assure that both parents will have an opportunity to build a caring responsible relationship with the child by ordering that both parents be given the opportunity to spend time with the child. But the law has no real ability to go further and establish networks for connection between children of divorce and their parents. It can only allow for the possibility.

Thus, there are grave limitations on what women, in their capacities as lawyers and judges, are actually able to achieve for clients and litigants. Over time, the law may develop more creative remedies; but by its very nature, law is coercive. To some extent, women's inclinations for activities of care will necessarily be frustrated as they encounter the law's limitations. Eventually, women are likely either to feel alienated from their practice or to learn to downplay their inclinations for caring activities.

* * *

Another aspect of the law's coercive nature deserves our attention. Although the law is limited in what it can accomplish, in its proper sphere it is extremely powerful. In the course of their work, lawyers and judges are frequently required to inflict great pain. Anyone with a background in procedure and evidence who reflects on Gilligan's work will be struck by how hard the law often tries to avoid "knowing" completely the persons before it and their relationships. We are surrounded by large bodies of doctrine which serve to exclude "irrelevant" evidence and to ensure

that decision-makers are utter strangers to those they judge.⁹⁹ Our trials are conducted in such a way as to ensure that the people involved with the law are seen at their least comfortable and natural.¹⁰⁰

Although there are many possible reasons for these facts, it seems to me that one partial explanation is relevant to the discussion here. It is difficult to inflict pain, and the more intimately we know another person, the more difficult it becomes. To know all may well be to forgive all, and that the law cannot afford. Therefore, we take refuge in a tried and true mechanism—we limit what we know. We remove ourselves from the person who will suffer the pain we must inflict.

This is most clearly the case for judges, but I think it happens with lawyers too. We consider a certain distance between lawyer and client to be professionally appropriate. We severely limit contacts with “opposing” parties. We avoid thinking about the effect of our questioning on witnesses. In short, the professional roles we assume as lawyers and judges have built into them a protective distancing mechanism, a mechanism explained by the need for lawyers and judges to inflict pain in the course of carrying out the laws coercive power in our society.¹⁰¹ This mechanism is described by Scott Turow, a litigator and former prosecutor, in his novel *Presumed Innocent*. The narrator, an assistant district attorney, is describing the beginning of his opening statement, in which he invariably points at the defendant.

And so I point. I extend my hand across the courtroom. I hold one finger straight. I seek the defendant's eye. I say: “This man has been accused.” He turns away. Or blinks. Or shows nothing at all. In the beginning, I was often preoccupied, imagining how it would feel to sit there, held at the focus of scru-

99. See, e.g., Federal Rule of Evidence 404 (generally excluding evidence of the character of a witness or litigant); Model Code of Judicial Conduct Canon 3(c) (1984) (requiring judicial disqualification for personal knowledge of disputed evidentiary facts or for personal bias or prejudice concerning a party); *Irvin v. Dowd*, 366 U.S. 717, 721-23 (1961); *Kunk v. Howell*, 40 Tenn. App. 183, 191, 289 S.W.2d 874, 878 (Tenn. Ct. App. 1956); *Lewis v. State ex rel. Baxley*, Sol, 260 Ala. 368, 370, 70 So.2d 790, 792 (1954) (permitting prospective jurors to be stricken for cause when they have prior knowledge about the case before them); Model Rules of Professional Conduct Rule 3.4 (forbidding a lawyer to argue his personal opinion as to the justness of his client's cause).

100. See Arthur Leff, *Law*, 87 Yale L. J. 989, 995-98 (1978); Milnor Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 Stan. L. Rev. 81 (1975). An analysis of these pieces would take me far afield. However, it is worth noting that Ball finds elements of the trial which operate to alienate the decisionmaker from the parties. In his view, this alienation facilitates impartiality. *Id.* at 100-02.

101. Cover, *supra* note 88, at 819-23; Cf. Shragg, *A Degree of Detachment*, N.Y. Times, July 26, 1987, § 36 (Magazine), at 48.

tiny, ardently denounced before all who cared to listen, knowing that the most ordinary privileges of a decent life—common trust, personal respect, and even liberty—were now like some cloak you had checked at the door and might never retrieve. I could feel the fear, the hot frustration, the haunted separateness. Now, like ore deposits, the harder stuff of duty and obligation has settled in the veins where those softer feelings moved. I have a job to do. It is not that I have grown uncaring. Believe me. But this business of accusing, judging, punishing has gone on always; it is one of the great wheels turning beneath everything we do. I play my part. I am a functionary of our only universally recognized system of telling wrong from right, a bureaucrat of good and evil. This must be prohibited; not that. One would expect that after all these years of making charges, trying cases, watching defendants come and go, it might have all become a jumble. Somehow, it has not.¹⁰²

In my view, this distancing—this “settling in the veins”—is to some extent an inevitable result of the role, whether the role is filled by a man or by a woman.¹⁰³

* * *

Thus, the law as it is experienced by women, and men, conflicts to a significant extent with the ethic of care Gilligan describes. The law is not, however, immutable. The remaining question is whether we can, and should, strive to replace the ethic of justice with the ethic of care. The ethic of justice, as many scholars have persuasively argued, is subject to serious dangers and distortions. At its worst, it degenerates into a blind legalism capable of perpetrating enormous cruelty in the name of the law.¹⁰⁴ Even at its best, however, our jurisprudence, with its ideal of equality of rights under law, has proven unable to deal effectively with inequality of need in our society.¹⁰⁵

The ethic of care also carries with it dangers and potential distortions when used as a basis for jurisprudence. The ethic of care is grounded in the primacy given to understanding and responding to the unique needs of individuals. As such, it rejects the

102. Scott Turow, *Presumed Innocent* 3-4 (1987).

103. See, e.g., Comment, *Starting a TRO Project: Student Representation of Battered Women*, 96 Yale L. J. 1985, 2013-15 (1987). The authors argue that many students representing battered women in a clinical program become over-involved with their clients and can suffer severe negative reactions if their efforts are not met with success. The solution offered is “proper training (to) help teach appropriate professional distancing.” *Id.*

104. See Lynne Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574, 1687-1593 (1987) for an excellent summary of the leading scholarship on this problem. See also Martha Minow, *Forward: Justice Engendered*, 101 Harv. L. Rev. 10, 74-95 (1987).

105. See *supra* notes 46-56 and accompanying text.

possibility of moral governance by universal norms.¹⁰⁶ As individuals, we can be guided by the commitment to care and need not be concerned with our inability to identify a rule governing our actions.¹⁰⁷ But, if our law is to function at all beyond the bounds of each individual case, it must be capable of general application.¹⁰⁸ To this extent, law cannot respond fully to the ethic of care. This tension between the particular and the general is, I think, unavoidable. Ours is a society too large and too cumbersome to dispense entirely with governance by rule.

Another limitation may be inherent in the ethic of care. As Gilligan repeatedly argues, the ethic of care is initially developed through the experience of intimacy and close connection with others.¹⁰⁹ This stress upon responding to the needs of those to whom one is attached continues to be the focus of the ethic of care.¹¹⁰ The centrality of attachment for the ethic of care presents dangers as well as promise for the law. Our ability to attach ourselves to others—to develop relationships in which we can recognize and respond to unique needs—is not infinite. It is present most strongly for those closest to us and can be developed outward toward others we come to know. But, at some point, the capacity for attachment is exhausted. There will be those for whom we are unable to care. What of them? At the level of the individual, our relationships with others are naturally limited. If each of us cares for those known to us, we can hope that all of us will be sustained by some web of connection. It is, however, profoundly disturbing to envision lawmakers—judges, legislators, administrators—governing their decisions by the degree of connection they feel with those who will be affected by their decisions.¹¹¹ They are, or should be, responsible to, and for, us all. Thus, a profound conflict confronts those with society-wide duties. At one level, all demand

106. Nils Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* 5, 185-89 (1984).

107. *Id.* at 53-57.

108. For an essay discussing the relationship between legal rules and the voice of human experience, see Mark Yudof, "Tea at the Palaz of Hoon": *The Human Voice in Legal Rules*, 66 *Tex. L. Rev.* 589 (1988). In *Justice Engendered*, Martha Minow argues that the tension described here can be reconciled. Minow, *supra* note 104, at 90-95. Robin West has also briefly, but forcefully, disagreed with the argument presented here. She contends that "a community and a judiciary that relies on nurturing, caring, loving, empathic values rather than exclusively on the rule of reason will not melt into a murky quagmire, or sharpen in the dreaded specter of totalitarianism." West, *supra* note 3, at 65.

109. *Different Voice*, *supra* note 1, at 7-19.

110. *Id.* at 159-60.

111. See generally Richard Wasserstom, *Roles and Morality in The Good Lawyer* 25 (David Luban ed. 1984); Yudof, *supra* note 108, at 603-05.

care. But in some sense, to care for all is to care for none. Nel Noddings makes this argument in her book, *Caring*.

The duty to enhance the ethical ideal, the commitment to caring, invokes a duty to promote skepticism, and noninstitutional affiliation. In a deep sense, no institution or nation can be ethical. It cannot meet the other as one-caring or as one trying to care. It can only capture in general terms what particular ones-caring would like to have done in well-described situations. Laws, manifestos, and proclamations are not, on this account, either empty or useless; but they are limited, and they may support immoral as well as moral actions. Only the individual can be truly called to ethical behavior. . . .¹¹²

To me, the "different voice" is more of an admonition for humility rather than a herald of transformation. It is a reminder that much of what is best in us, much of what enriches human life, is found outside the law. Those of us in law must guard against the temptation to portray our work as the ultimate good. If we attempt to appropriate to law all that supports and nourishes our people, we risk impoverishing our society and holding out a dazzling promise we cannot fulfill.

112. Noddings, *supra* note 106, at 103. See also Sara Ruddick, *Preservative Love and Military Destruction: Some Reflections on Mothering and Peace* in *Mothering: Essays in Feminist Theory* 231, 238-39 (Joyce Trebilcot ed. 1983).

