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HEEDING THE VOICE OF NATIVE WOMEN: TOWARD AN ETHIC OF DECOLONIZATION

CARRIE A. MARTELL* AND SARAH DEER**

How often have we heard it reiterated that the destiny of the world depends on woman—that woman is the appointed agent of morality—the inspirer of those feelings and dispositions which form the moral nature of man The elevation of our race does depend upon the manner in which woman executes this commission. Nor does the destiny of man as an individual alone depend on female influence, but that of nations, kingdoms, and empires.

-Qua-Tsy (Cherokee), 1855¹

We must endeavor to reach the Indian's standpoint if we would learn what was the true relation of man and woman to each other

-Alice Fletcher, 1899²

The interdisciplinary field of American Indian studies involves a wide variety of scholastic fields, ranging from anthropology to political science to sociology. Nearly all of these fields have explored, to some extent, the role of gender in the lives of American Indians and Alaska Native women. Yet little has been written about the role of gender in the field of tribal legal studies.³ With few exceptions, it can be argued that Native women's voices have been traditionally absent from most mainstream legal dialogues.

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1. NATIVE AMERICAN WOMEN'S WRITING 1800-1924: AN ANTHOLOGY 410 (Karen L. Kilcup, ed., 2000).

2. LOUISE MICHELE NEWMAN, WHITE WOMEN'S RIGHTS: THE RACIAL ORIGINS OF FEMINISM IN THE UNITED STATES 128 (Oxford Univ. Press 1999).

3. See Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 2-3 (1997). Berger also notes that a major exception is an article by Judith Resnick addressing the landmark United States Supreme Court case *Santa Clara Pueblo v. Martinez*. See *id.* at 3 n.4 (citing Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989)).

The twenty-fifth anniversary of the publication of *In a Different Voice* by Carol Gilligan⁴ offers a unique opportunity to explore the role of gender in the legal field. This essay is an attempt to discern whether Gilligan's theories resonate to the experience of women in the Native context. It also seeks to broaden the discussion about law and gender to include the discussion of colonization, and the attempted destruction of indigenous legal traditions. Part I examines certain limitations in Gilligan's book; namely, that the issues of colonial power and the impact of colonization are not addressed. Part II attempts to broaden the discussion about gender and moral development to include indigenous perspectives. Finally, Part III looks to some contemporary indigenous judiciaries to see how modern tribal courts are addressing gender and moral issues as part of a larger effort to sustain independent sovereignty.

I. THE PROBLEM OF UNIVERSALITY

In her book *In a Different Voice*, Gilligan espouses a paradigm that assumes a patriarchal culture in which women's moral voices are deemed inferior to men's moral voices.⁵ It is not apparent that Gilligan's theories encompass or account for colonialism, colonization, or indigenous values. Based on her observations of white, middle class undergraduate students and their responses to *hypothetical* dilemmas, Gilligan concludes that men and women make moral decisions according to separate criteria: Women according to the ethic of care and men according to the ethic of rights, logic and reason. One scholar critiquing Gilligan's work wrote that

the biggest problem with [these] Chodorovian⁶ accounts of gender difference is that they credit the differences they find to essential, universal features of male and female psychosexual development rather than to the economic and social positions men and women hold, or to the actual power differences between individual men and women.⁷

4. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (Harvard Univ. Press 1993) (1982).

5. *Id.* at xxiv.

6. Scholars have suggested that Gilligan's work is based on theories of psychoanalysis by Nancy Chodorow that discuss the relationship between mother and daughter.

7. Katha Pollitt, *Marooned on Gilligan's Island: Are Women Morally Superior to Men?*, *REASONABLE CREATURES: ESSAYS ON WOMEN AND FEMINISM* 42-62 (Knopf Publishing 1994), available at <http://www.northampton.edu/faculty/hweiss/Pollitt.pdf>.

Indeed, some scholars have noted that *In a Different Voice* relies heavily on the experiences of white, middle-class women in America.⁸ While we tend to agree with these critiques, we wish to add that *In a Different Voice* also overlooks that colonization, in addition to patriarchy, attempted to damage and destroy women's voices. Although it is understood that Gilligan was attempting to explain the shortcomings of Kohlberg's hierarchal morality stages, where women scored low as compared to men,⁹ by overlooking the damage that colonization has brought to all women's voices, *In a Different Voice* falls short of providing a comprehensive view of gendered moral development. Gilligan wanted to reformulate the way we think about women's morality, and even though she did not intend to explore gender differences explicitly, her work has been interpreted as such, which is precarious due to its limited application to white middle class women.¹⁰

Heeding the voice of Native women requires an acknowledgement that many cultures have not traditionally followed a patriarchal model. There is a significant body of evidence that many tribal cultures served to empower and enrich the lives of women through spirituality, traditions, and belief systems. These indigenous cultures and their corresponding legal traditions can serve as examples of how other cultures might adapt and change so as to honor all voices within a particular community.

It is certainly the case that an understanding of the personal life experiences of . . . Native American women informs feminist theory in that we see the ways in which their lives are unique and similar to other women. Information regarding the lives of diverse

8. See, e.g., Carol B. Stack, *The Culture of Gender: Women and Men of Color*, 11 SIGNS 321, 322 (1986) (noting inconsistencies between Gilligan's theories and data from the author's own study on "Black return migrants to the rural South"); Patricia Hill Collins, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT (1990), available at http://www.woldww.info/classes/Principles_of_Inquiry/Collins-Toward%20an%20Afrocentric%20Feminist%20Epistemology+.htm (stating that African-American women "experience a convergence" from the values and institutions that Gilligan describes as motivating women); Toinette Eugene, *Sometimes I Feel Like a Motherless Child: The Call and Response for a Liberational Ethic of Care by Black Feminists*, in WHO CARES? 45-62 (Mary Brabeck, ed., 1989) (reflecting on aspects of African-American ethic of care which is embodied by black women); Catherine G. Greeno & Eleanor E. Macoby, *How Different is the "Different Voice?"* 11 SIGNS 310, 312 (1986) (critiquing Gilligan's work as perhaps failing to take into account changes in moral thinking between girls and boys as they grow older).

9. Allen Cypher, *Notes on In a Different Voice by Carol Gilligan*, <http://www.acypher.com/BookNotes/Gilligan.html> (last visited March 10, 2006).

10. Joan C. Tronto, *Beyond Gender Difference to a Theory of Care*, 12 SIGNS 644, 645 (1987).

groups of women is critical in transforming theory which is primarily based on and directed to white middle-class women.¹¹

Gilligan is interested primarily in “theories in which men’s experience stands for all of human experience—theories which eclipse the lives of women and shut out women’s voices.”¹² Yet, Native women’s voices have traditionally been respected within tribal communities, and “many Indian people of both sexes also would know that women traditionally have exercised a degree of meaningful power within many of their cultures that has always compared favorably with the power non-Indian women have exercised in social systems dominated by values of white patriarchy.”¹³ In fact, on certain issues, such as cultivation of food in Haudenosaunee (Iroquois) societies, women’s voices have traditionally directed and controlled activities. “Women also bore the responsibility to provide—for themselves, for their children and other relatives, and for the community at large. The land belonged to them, not their husbands and brothers.”¹⁴

Gilligan’s theories, based on Chodorovian accounts of gender difference, do not necessarily fit a tribal perspective of gender. Her theories are ensconced in a hierarchal power system that differentiates between men and women. These theories result from a system of oppression that forces women into stereotypic nurturing roles that make them dependent on men. However, this system of oppression was relatively absent in pre-colonial tribal societies.

By the 18th century, white males in North America and Europe knew exactly what the status of women was, both in the home and in the world at large. Women of European origin were born into a patriarchal society. They were reared from birth to be obedient to their fathers and submissive helpmates for their future husbands. This was not so in Native American society.¹⁵

Gilligan’s theories, like many western scholars’ theories, universalize women’s experiences. This oversight inadvertently causes Native women to disappear from the discourse.

11. Mary E. Brayboy & Mary Y. Morgan, *Voices of Indianness: The Lived World of Native American Women*, 21 *WOMEN’S STUDIES INT’L FORUM* 341, 353 (1998).

12. GILLIGAN, *supra* note 4, at xiii.

13. Robert Williams, *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context*, 24 *GA. L. REV.* 1019, 1032 (1990).

14. JOHN DEMOS, *THE TRIED AND THE TRUE* 45 (1995).

15. Eirlys Barker, *Princesses, Wives and Wenches: White Perceptions of Southeastern Indian Women to 1770*, in *WOMEN AND FREEDOM IN EARLY AMERICA* 44 (1997).

II. TRIBAL PERSPECTIVES ON GENDER

Prior to colonization, most tribal communities did not utilize gender categories that placed men at the top of the hierarchal ladder. In fact, in many traditional societies, gender roles are seen as complementary based on a dualistic scheme between equal forces that assist one another. For example, in the Creek culture, “[t]he balance of male and female principles permeates all Creek thinking. The balances, therefore, involve the division of various powers, functions, and privileges.”¹⁶

Generally, American Indian gender roles stand in stark opposition to the European American binary system of gender roles. American Indian concepts can be described as non-binary complementary dualism. By that, we mean that the gender lines are fluid and do not have fixed boundaries. Both sexes have roles and duties to perform, which balance one another, “[d]ualism embraces difference in principle, not as division, but rather as complementarity.”¹⁷ It is a versatile description that continues “to offer exceptional sanctuary to an attitude about gender that cherishes a wide arena of personal autonomy and freedom.”¹⁸ Men and women in indigenous societies do not necessarily have equal roles, rather balanced roles with the opposite gender within their community. There is a sense of parity and equilibrium among the genders that is anchored in duality and spirituality. The roles are not mutually exclusive and men and women can cross over boundaries. The gender lines are set up to complement each other; to provide “equilibrium.”¹⁹

The masculine and feminine principles are always conceived in harmony in classical Muscogee values. This holds true in cosmic principles, in social structure, in the division of labor, in botany, pharmacology, and in government. While the matrilineal Creek system of familial descent is widely understood, much of the rest of the body of female principles and their equal complementarity to

16. JEAN CHAUDHURI & JOYOTPAUL CHAUDHURI, *A SACRED PATH: THE WAY OF THE MUSCOGEE CREEKS* 48 (UCLA Am. Indian Studies Ctr. 2001).

17. Anne Waters, *Language Matters: Nondiscrete Nonbinary Dualism*, in *AMERICAN INDIAN THOUGHT* 97, 103 (Anne Waters ed., 2004).

18. *Id.* at 111.

19. See generally Sylvia Marcos, *The Borders Within: The Indigenous Women's Movement and Feminism in Mexico*, in *DIALOGUE AND DIFFERENCE: FEMINISMS CHALLENGE GLOBALIZATION* 87-88 (Marguerite Waller & Sylvia Marcos eds., 2005) (discussing the shifting balances in concepts of equality between men and women after feminist groups came into the Chiapas area in Mexico). Marcos also discussed how among indigenous Mexican women's movements in the mid-1990s women “crossed over” between so-called traditional women's roles and that of insurgents or “soldado.” *Id.* at 93.

the male has become ambiguous because of post-Colombian forces.²⁰

III. ETHIC OF CARE AND TRIBAL PHILOSOPHIES

Gilligan's ethic of care places all of the caring components within women's realms and the ethic of justice all within men's realms. She does not consider a tribal perspective on gender that does not attribute such ethics or morals to either gender. In fact, some scholars have argued that the ethic of care that Gilligan described can be more correctly attributed to American Indian people in general, not to one sex. This is credited in part to being raised in a tribal community where the concerns of the community are placed above the individual.²¹ Others have attributed the ethic of care to minority groups in general in the United States.²²

Utilizing a Eurocentric viewpoint, Gilligan tries to reformulate the way we value women and their ethic of care. However, in general, indigenous societies of the past did not define these moral values as the sole characteristic of women. Both men and women had attributes of the ethic of care, such as responsibility for self and others, harmony, relationships of moral obligation, and connection. This is translated into dual gender roles that honor and respect the position of women within their communities.²³

Tribal societies manifested these dual gender roles, as well as women's position of authority. For example, Pueblo women in the Southwest were responsible for feeding others, grinding corn, cutting and drying meat, and preparing food for their families. Men, on the other hand, tended corn plots, traded with other tribes, and defended the community. The roles were well defined, yet complementary:

This pattern of mutual service was thought to represent the balance and harmony of the universe. The earth itself seemed to embody female qualities (the power of reproduction, for example), while the sky and rain were male; from their union came the corn and other crops on which human life depended.²⁴

20. CHAUDHURI & CHAUDHURI, *supra* note 16, at 43.

21. Dorothy Roberts Arvizu, *The Care Voice and American Indian College Students: An Alternative Perspective for Student Development Professionals* 34 J. OF AM. INDIAN EDUC. 1, 8 (1995), available at [http://jaie.asu.edu/v34/V34\\$3car.htm](http://jaie.asu.edu/v34/V34$3car.htm).

22. Tronto, *supra* note 10, at 649-50.

23. Arvizu, *supra* note 21 at 8.

24. DEMOS, *supra* note 14, at 28.

Gendered roles were defined based upon the balance observed in the natural world. Both male and female positions were important to the survival of the people as a whole, and both had attributes of the ethic of care.

Similarly, Cherokee culture in the southeast dictated that men and women divide the duties based on their creation stories.²⁵ Men helped clear the fields, but women were largely responsible for the agriculture, which included planting and protecting their crops.

The myth of Kana'ti and Selu provided the Cherokees with an explanation for why men and women in their society lived the way they did, occupying separate categories that opposed and balanced each other. Cherokee men and women performed different tasks, followed different rules of behavior, and engaged in different rituals.²⁶

This system supported a way of life where Cherokee women were highly regarded due in large part to their association with corn production. Economically, the society depended on women and their cooperation with Cherokee men who provided the meat.²⁷

In addition, Iroquois society was organized around a matrilineal clan system where children's clan membership was based on their mother's affiliation, and not their father's clan affiliation. The society was not equal between men and women; rather, they had distinct roles that worked together for the benefit of the tribal community. Women's ability to name people within the clan determined their power within tribal communities. Property was conveyed through women, and they chose the leaders of their tribal councils. Iroquois women could also decide whether or not to go to war based on their willingness to provide food for warriors. Women worked the fields surrounding the village, while men hunted and fished. In fact, "[t]he Iroquois constitutional system of gendered checks and balances sought to insure, at least in theory, that women's voices could always be heard and respected on all issues of tribal policy."²⁸ Women's position and place were valued in Iroquois life because of the system of gender roles

25. The role of indigenous narratives and creation stories as foundations of law and culture has been explored by several scholars. See, e.g., K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 199-201 (1941); Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. OF COMP. L. 287, 314 (1998); JOSEPH BRUCHAC, *OUR STORIES REMEMBER: AMERICAN INDIAN HISTORY, CULTURE, AND VALUES THROUGH STORYTELLING* 34-41 (2003).

26. THEDA PERDUE, *CHEROKEE WOMEN: GENDER AND CULTURE CHANGE, 1700-1835* 17 (1998).

27. *Id.* at 24-25.

28. Williams, *supra* note 13, at 1046.

between men and women, where women's work was just as important as men's.²⁹

IV. COLONIAL IMPACT ON NATIVE GENDER ROLES

Native women's status and position within their tribal communities was greatly affected by colonial invaders who sought to gain access to land resources. Gender was of considerable importance to the colonizers because Native women held considerable power when compared to women in European countries.

Many tribal communities were matrilineal in nature, which stood in stark contrast to the patriarchy forced by colonizers. A Native woman wielded great power, as lineage and property were often traced through her line. She had control over her body, her family, and her relationships. Europeans, on the other hand, believed that men were the cultural bearers, and they had difficulty conceptualizing a female being that had such important responsibilities in the transmission of culture. "The Eurocentric ontological depiction of a disconnected, bounded, rational, cultural male father creator of the universe, stood in antithesis to (what was seen Eurocentrically as) unrestrained, unbounded, irrational raw female mother-nature destroyer of the universe."³⁰ Europeans noticed and wrote about the freedom and power that Native women had, although they were frightened by it and labeled it as illogical. By giving it inhuman attributes and stereotyping women's roles in contrast to what they deemed as lazy Native men, colonizers were able to provide justification for breaking down the system that respected women.

French, Spanish, and English leaders all sought to diminish and marginalize the strong roles women had within their respective communities. Colonizers did this by destroying traditional gender roles and imposing a binary dualistic logic on tribal communities. Binary dualism enforced strict gender boundaries and a male hierarchy, as that was the only way to reduce the influence of women within their communities.³¹

Europeans brought with them the view that men were the absolute heads of households and women were to be submissive to them. It was then that the role of women in Cherokee society began to decline. One of the new values Europeans brought to the Cherokees was a lack of balance and harmony between men and women. It

29. *Id.* at 1041.

30. Waters, *supra* note 17, at 102.

31. *Id.* at 101-09.

was what we today call sexism. This was not a Cherokee concept. Sexism was borrowed from Europeans.³²

The balance and division of labor within Cherokee society, as well as many other tribal nations was disrupted. Some Native men and women internalized these European gendered constructs.

Beginning in the late nineteenth century, boarding schools were another tactic used by colonizers to destroy the equilibrium that traditionally existed between genders. Mandatory for most Native children, the boarding schools sought to “civilize” tribal communities by training students to act as white people and speak only English. Tribal traditional practices, such as spiritual ceremonies, were forbidden.³³ Most importantly for this discussion, European patriarchal gender roles were forcibly instilled upon the children through a variety of assimilation policies.

For the most part, schools prepared Native boys for manual labor or farming and Native girls for domestic work. Children were also involuntarily leased out to white homes as menial labor during the summers rather than sent back to their homes. Indian girls learned useful skills such as ironing, sewing, washing, serving raw oysters at cocktail parties, and making attractive flower arrangements, in order to transform them into middle-class housewives.³⁴

Colonizers worked to diminish the arena where women once had a strong voice within cultural and legal traditions.³⁵ However, as will be argued in the next section, they did not succeed in wiping out Native women’s voices entirely, nor did they succeed in destroying tribal attitudes and ways of looking at gender. This is apparent from modern day tribal court cases dealing with gender issues. The tribal court cases do not reflect

32. WILMA MANKILLER & MICHAEL WALLIS, *MANKILLER: A CHIEF AND HER PEOPLE* 20 (1993).

33. See generally Andrea Smith, *Soul Wound: The Legacy of Native American Schools*, AMNESTY MAGAZINE, available at <http://www.amnestyusa.org/amnestynow/soulwound.html> (stating that at a Native boarding school in North Dakota, “mouths were scrubbed with lye and chlorine solutions for uttering Native words.”).

34. ANDREA SMITH, *CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE* 37 (2005).

35. NEWMAN, *supra* note 2, at 128.

Sitting Bull . . . turned to me saying, “You are a woman; take pity on my women, for they have no future. The young men can be like the white men, till the soil, supply the food and clothing, they will take the work out of the hands of the women, and the women, to whom we have owed everything in the past, will be stripped of all which gave them power and position among the people. Give a future to my women!” He drew a ring from his finger, and said; “Take this to remind you of my request. Help my women.”

Id. (internal citations omitted).

an American patriarchy, nor Gilligan's ethic of care, rather they demonstrate specific indigenous ideas about gender and the duality in the relationship between men and women. The survival of these unique indigenous perspectives on gender is a testament to the strength and perseverance of Native people generally and may serve as an example of how gender roles may be modified more broadly.

V. CONTEMPORARY TRIBAL JURISPRUDENCE AND GENDER

Indigenous jurisprudence is generally guided by a more holistic approach to justice than the dominant (Anglo-American) judicial system. For example, Pat Lauderdale notes "[t]he common ground of indigenous jurisprudence stems from the respect for all life forms rather than the modern separation of humans from nature."³⁶ Other scholars have noted the tendency of tribal courts to embrace a more holistic approach to problem-solving than the more mainstream adversarial systems.³⁷

Contemporary tribal court cases addressing gender issues demonstrate a unique tribal perspective or way of thinking about legal cases dealing with gender that is based on tribal customs and traditions. The cases do not demonstrate Gilligan's ethic of care; rather, tribal court cases reveal a continued presence of the dual nature of genders in tribal life. By exploring several tribal court cases from the Sitka Community in Alaska, the Winnebago Tribe in Nebraska, the Navajo Nation, and Rosebud Sioux, it becomes apparent that modern tribal communities still possess a distinctive tribal perspective on gender, rather than the "ethic of care" versus "ethic of justice" version of morality promoted by Gilligan. Cases dealing with child custody, divorce, and sexual assault exemplify these principles.

A child welfare case at Sitka Community Association Tribal Court in Alaska reflects a Tlingit matrilineal society and values based on the mother's clan responsibilities. In *Hepler v. Perkins*,³⁸ a Tlingit mother from Sitka attempted to regain custody of her child from the non-Indian father and grandparents.³⁹ Both mother and child were Sitka tribal members.⁴⁰ The mother and child were living away from the tribal community when the

36. Pat Lauderdale, *Indigenous North American Jurisprudence*, 38 INT'L J. OF COMP. SOCIOLOGY 131, 132 (1997).

37. See generally Robert Odawi Porter, *Strengthening Tribal Sovereignty through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 239-45 (1997) (describing the tradition of "peacemaking" among the Seneca People).

38. 13 INDIAN L. REP. 6011-19 (Sitka Cmty. Ass'n Trial Ct., Apr. 7, 1986).

39. *Hepler*, 13 INDIAN L. REP. at 6011.

40. *Id.*

paternal grandparents went to the state of Washington to gain custody of the child.⁴¹ The mother asked the Tribal Court of Sitka Community Association to rule on whether under customary tribal law the tribe continues to assume responsibility for her child even when she and her child are away from Sitka.⁴² The Tribal Court of Sitka referred the case to their Court of Elders to rule on this important issue of clan jurisdiction over children of female members.⁴³ The Court of Elders found that

children of female members of a clan are children of the clan regardless of where or under what circumstances they may be found. Clan membership does not wash off, nor can such membership be removed by any force, or any distance, or over time. Even in death clan membership continues, and in re-birth is it renewed.⁴⁴

Based on the tribal custom of female clan membership and their responsibility to care for children, the Tribal Court decided that they had inherent authority to protect their children, even when they were away from the Sitka community.⁴⁵ Therefore, they ruled that the state of Washington had violated the Indian Child Welfare Act by awarding temporary custody of the child to the non-Indian parent and grandparents.⁴⁶

The Sitka case is exemplary of the roles that Sitka women play within their tribal community. As a matrilineal society, clan membership is determined through the mother. As described by the Elders, clan membership does not wash off and is not affected by distance. The descriptions of familial and clan relationships are distinctly those of the Sitka Tribe, and are based entirely on how they view female gender within the Sitka community. The court ruled in favor of the Indian mother, not based on an ethic of care of women's morality, but rather, based on Sitka values about clan membership and clan responsibility for children.

The Winnebago Supreme Court reviewed the question of sexual assault and equal protection under Winnebago tribal law.⁴⁷ Several appellate cases were consolidated before the Supreme Court of the Winnebago in 1998, all dealing with underage male minors charged with sexual assault (statutory rape).⁴⁸ The male defendants argued that they were unfairly prosecuted

41. *Id.*

42. *Id.*

43. *See id.* at 6016 (quoting the Court of Elders decision).

44. *Id.*

45. *See id.* (citing to the Court of Elders decision).

46. *Id.*

47. *Winnebago Tribe of Neb. v. Hugh Bigfire*, 25 INDIAN L. REP. 6229, 6229 (Sup. Ct. of Winnebago Tribe of Neb., Sept. 11, 1998).

48. *Id.*

instead of the females with whom they had sexual contact.⁴⁹ Lawyers for the males argued that the Winnebago courts should grant equal protection, and, therefore, the law would apply equally to male and female Winnebago tribal members.⁵⁰ In the initial case, *Winnebago Tribe of Nebraska v. Bigfire*,⁵¹ the tribe reasoned that there was justification for “unequal” treatment of men and women based on Ho-Chunk culture.⁵² In that case, the sexual act was deemed non-consensual and the tribe referred to traditional laws that did not tolerate rape or domestic violence.⁵³

In the consolidated cases, *Winnebago Tribe of Nebraska v. Hugh Bigfire*,⁵⁴ the defendants argued that the equal protection guarantees of the Winnebago constitution legally supersedes the Ho-Chunk custom of treating males differently.⁵⁵ The tribe, on the other hand, argued that this “unequal” treatment is permissible based on government efforts to protect the community and to prevent teenage pregnancy.⁵⁶ The Winnebago Supreme Court applied strict scrutiny to the gender issues raised.⁵⁷ They found that sexual intercourse has different and more severe consequences for women than for men.⁵⁸ The court held that there was a compelling government interest to prevent pregnancy in young women in the tribal community.⁵⁹ More importantly, the Winnebago Supreme Court considered Ho-Chunk tradition explored in the earlier case. The court explained that

under traditional Winnebago customary law, gender differences commonly were drawn for the punishment of offenses related to sexual misconduct because of the natural biological differences in this area between the sexes, the different consequences of misconduct for men and women, and different roles ascribed by the tribal tradition to men and women (without creating any hierarchy or cross-gender disrespect) . . . Ho-Chunk tradition recognizes *and respects* different roles for males and females in the Winnebago

49. See *id.* (stating that in one case, the sexual contact was nonconsensual). In the other cases, the sexual contact was deemed to be consensual. *Id.*

50. *Id.*

51. 24 INDIAN L. REP. 6232 (Winnebago Tribal Ct., June 19, 1997).

52. *Bigfire*, 24 INDIAN L. REP. at 6239. Ho-Chunk is the traditional name of the Winnebago people.

53. *Id.*

54. 25 INDIAN L. REP. 6229, 6230 (Sup. Ct. of Winnebago Tribe of Neb., Sept. 11, 1998).

55. *Bigfire*, 25 INDIAN L. REP. at 6230.

56. *Id.*

57. *Id.* at 6321.

58. *Id.* at 6232.

59. *Id.* at 6233.

Tribe, and particularly, tolerates and encourages different responses to sexual misconduct for men and women.⁶⁰

After conducting research into the tribal gender values through consultation with tribal members, Elders, and research on Ho-Chunk customary law, the Supreme Court concluded that gender differences constitute a natural part of Ho-Chunk life, and that men and women have different roles to provide for each other in relationships.⁶¹ In the two cases, the court ruled that the equal protection claims failed because the charges against the males made them more accountable, which coincided with traditional male roles of protecting women within the community.⁶²

The Winnebago cases reflect distinct Ho-Chunk views on gender differences between men and women. Sexual assault is taken seriously at Winnebago, especially when it concerns underage tribal members. In the nonconsensual cases, the Winnebago Supreme Court decided it was justified for men to be treated harsher than women because Ho-Chunk ways of looking at men and women allow for this discrepancy in treatment. Women can become pregnant as a result of sexual activity, and therefore, the consequences are greater for them. Also, men in Ho-Chunk society have a duty to protect women, so Ho-Chunk values and ethics indicate that it is appropriate to have different penalties for men and women. The Winnebago case is decided in favor of the women victims due to Ho-Chunk morality.

In 1993, the Tribal Court of Appeals for Rosebud Sioux looked carefully at the role of gender in a child custody case.⁶³ The Tribal Court of Appeals reviewed a custody decree in a domestic violence case.⁶⁴ They ruled that the trial court correctly awarded custody to the mother in a divorce case.⁶⁵ The court based their decision on the welfare of the child, which should never be subservient to the interests of the parents.⁶⁶ The Tribal Court put the interests of the children first, instead of the shortcomings of the parents.⁶⁷ Domestic violence cases are especially challenging for mothers who have suffered abuse at the hands of their partners, because judges often unfairly consider them to be a threat to their children. This case alludes to the special place children and women hold

60. *Id.* at 6232.

61. *Id.* at 6233.

62. *Id.*

63. *Spotted Tail v. Spotted Tail*, 20 INDIAN L. REP. 6074, 6075 (Rosebud Sioux Ct. App., June 16, 1993).

64. *Id.* at 6074.

65. *Id.* at 6075.

66. *Id.*

67. *Id.*

within most tribal communities. Children's interests are of primary concern to the tribe, because they represent future generations and the continuation of the tribal community.

The Navajo Nation Supreme Court explored Navajo traditions and gender roles in several recent cases. The Navajo Nation Supreme Court looked at spousal maintenance and attorney fees in a divorce case, *Naize v. Naize*.⁶⁸ The Navajo Supreme Court agreed with the lower family court's decision to grant fees to the wife based on Navajo custom and tradition, which dictates that you "do not throw your family away."⁶⁹ In Navajo tradition, the husband moves into the wife's home upon marriage, and the joint efforts of the man and woman work to benefit the family.⁷⁰

[I]f the marriage does not survive, customary law directs the man to leave with his personal possessions (including his horse and riding gear, clothes, and religious items) and the rest of the marital property stays with the wife and children at their residence for their support and maintenance. Whatever gains the marital property generate goes to support the wife and children and to a lesser extent the wife's close relatives.⁷¹

Therefore, the wife's request in the *Naize* case for spousal maintenance was awarded.⁷² However, the Navajo Supreme Court decided that the husband should not have to provide wood and coal for his ex-wife's lifetime because of the finality of the divorce in Navajo custom.⁷³ Customary law dictated that in order to restore balance and harmony after the divorce, each party should return to his or her own home and leave each other alone.⁷⁴ The ex-wife's request for attorney fees was also upheld.⁷⁵

The Navajo Nation Supreme Court decided to grant spousal support to the female divorcee based on Navajo customary law that indicates that the marital home, all possessions within, and the children belong to the women.⁷⁶ However, the court altered the lower court's decision to have the ex-husband cut wood for his ex-wife because Navajo tradition indicates finality in divorce in order to restore harmony to the community.⁷⁷ In this

68. 24 INDIAN L. REP. 6152, 6153 (Navajo Nation Sup. Ct., May 28, 1997).

69. *Naize*, 24 INDIAN L. REP. at 6153.

70. *Id.*

71. *Id.* at 6152.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

case, the Navajo court relied entirely on Navajo customary law and traditions regarding the position of women within Navajo society.

The final case is an adoption case in the Navajo Nation.⁷⁸ The District Court of Window Rock made a decision to grant custody of a neglected child to the mother's extended family.⁷⁹ Based on Navajo customary law instead of the Indian Child Welfare Act (ICWA),⁸⁰ the District Court decided not to let the child be adopted by a non-Indian family, as Navajo attitudes toward family dictated that, "the Navajo view of the relationship of children to parents is not one of a simple parent and child relationship, but an entire pattern of expectation and desirable action surrounding children."⁸¹ There is a distinct relationship between Navajo children and their parents based on reciprocal expectations and relations. Children are highly valued in Navajo society as "an integral part of a functioning self-reinforcing and protecting group."⁸² This group consists of a large extended family based on matrilineal society. A child can be adopted by the extended family for an indiscriminate amount of time in order to retain the family and clan ties. The entire extended family is expected to care for the child as a natural part of community and clan obligations.

In *In re J.J.S.*, a Navajo case, the child was placed with the extended family and was not adopted out to a non-Indian family.⁸³ Instead of using federal law to decide the case, the court relied on Navajo tradition that dictates the importance of the extended family in raising a child.⁸⁴ The bonds between children and grandparents are extremely important and the court reflected these values by allowing the child to stay with his or her extended family.⁸⁵

The above-described cases are but a sample of the efforts by contemporary tribal courts to address gender issues in a distinctly indigenous way. By reclaiming their own tribal perspectives on gender, they are engaging in a unique ethic of decolonization—an ethic which balances traditional views on morality with contemporary needs and problems.

78. *In re J.J.S.*, 11 INDIAN L. REP. 6031, 6031 (Navajo District Window Rock, Nov. 4, 1983).

79. *Id.* at 6032.

80. 25 U.S.C. §§ 1901-1963 (2000).

81. *In re J.J.S.*, 11 INDIAN L. REP. at 6031.

82. *Id.* at 6032.

83. *Id.*

84. *Id.*

85. *Id.*

VI. CONCLUSION

At the very heart of sovereignty is the power to provide a safe environment for all citizens and to restore harmony when breakdowns occur. Sadly, tribal judiciaries continue to be an unknown entity to most of the American legal system. An overall lack of education about and respect for tribal institutions leads to the continued divestment of tribal sovereignty, and once again, to the disempowerment of women.⁸⁶

The major limitation in Gilligan's work is that it does not account for the role colonization has played in the destruction and devaluation of women's voices. The perseverance of traditional gender roles in contemporary indigenous jurisprudence provides indication that decolonization should play a central role in addressing the apparent imbalance between men and women in contemporary American society. Heeding the voice of Native women will serve the best interests of not only Native peoples, but of American culture generally. Acknowledging the historical and continuing attempts to devalue women's voices through colonization will provide a more holistic approach to addressing gender imbalance in today's world.

86. Stacy L. Leeds, *Voices: Women in the Tribal Judiciary—Tribal Court Stature and the Protection of Women*, 13 PERSPECTIVE MAGAZINE, ABA COMMISSION ON WOMEN IN THE PROFESSION 3, 3 (2005).