

10-1-1995

Losing the Struggle for Another Voice: The Case of Family Law

Carol Smart
University of Leeds

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Family Law Commons](#)

Recommended Citation

Carol Smart, "Losing the Struggle for Another Voice: The Case of Family Law" (1995) 18:2 Dal LJ 173.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

Articles

Carol Smart*

Losing the Struggle for Another
Voice: The Case of Family Law

This paper is based on empirical work in progress concerning co-parenting and the ways in which mothers and fathers organize the care of children after separation. It deals with two foundational issues: Gilligan's concept of "another voice" and its congruence with recent developments in family law in the United Kingdom and other developed countries including Canada and the United States. The author concludes that the ethic of care incorporated in the British legislation and given some expression in the judicial system does not fully recognize two kinds of caring. There is caring about and caring for. The caring about of fathers for children is generally lauded. The caring for of mothers for children is ignored or denigrated.

The new legislation also adopts as its paradigm the good parent as being the one who concedes and who does not require state intervention. In a specific case study, the author demonstrates that the new legislation can operate to deny the existence and effects of spousal violence against a woman and her child.

Introduction

This paper is based on empirical work in progress,¹ the primary concerns of which are the concept of co-parenting and the ways in which mothers and fathers organise the care of children in the post-divorce or separation situation. This enquiry is set in the context of a major new piece of family legislation in the UK, namely *The Children Act 1989* which was brought into force in 1992. Although this focus means that I shall be discussing some of the specifics of legislation in England and Wales it is my objective to transcend parochialism by using and developing ideas and concepts which have a wider application and which will be familiar to and, hopefully, useful to a broad audience. The significance of what I have to say does not reside so much in the actualities of law reform or the

* School of Sociology and Social Policy, University of Leeds, UK.

1. The current project, entitled 'Negotiating Parenthood' is funded by the Economic and Social Research Council. It involves interviewing 60 parents at the point of divorce and again after one year. It also involves interviewing solicitors about their views on the new *Children Act 1989*. There was also a pilot project for this research, which was funded by The Nuffield Foundation, and was carried out in 1989-90 shortly before the new legislation was fully introduced (in 1992). The pilot project interviewed 30 parents on their experiences of the divorce process, with particular reference to issues concerning children.

specifics of my English fieldwork, but in the possibility that ideas and concepts *may* be useful across different contexts where there are similar developments in family law.

My paper is also concerned with the question of violence. I am interested in how, once again, violence against women in the family seems to be being submerged and I wish to explore how this may be related to the emergence of a new ethos in family law which seems incapable of grasping the significance of violence against women. Before I can reach the core of my argument, however, I must necessarily outline and consider two foundational issues. The first is my use of Gilligan's idea of 'another voice' and the second is to sketch recent developments in family law in the UK. These developments have striking parallels in Canada, the USA, Australia, New Zealand, and many other developed countries.

Another Voice

So much has been written and spoken on Carol Gilligan's original work published in 1982 that I do not intend to reprise all the themes and counter-themes here.² I acknowledge all the valid criticisms of her work, and I would also admit that I find some aspects of her basic thesis quite problematic. But this basic thesis, namely that there are masculine and feminine modes of moral reasoning, seems to be readily confirmed in everyday life. Moreover, even those who disagree with her have not so much ignored her ideas, as set off on an intellectual journey to try to refine them. It is as if Gilligan has triggered the start of a new industry of feminist moral philosophy which is now unstoppable and would continue even if Gilligan's original ideas were to be totally refuted. Although we cannot credit Gilligan alone for the revitalisation of feminist moral philosophy, she has certainly pushed questions of ethics further up the feminist agenda and, in my view, feminist theory and politics has become aware of the ethical/philosophical vacuum in its thinking. This has been an important development, especially for feminists working in the field of law.

I therefore use Gilligan's basic ideas cautiously and I shall try to resist importing some of the more problematic connotations that are associated with them. In particular, I cannot hold with the idea that men and women reason differently because of any essential difference between the sexes. (In fact I do not think that Gilligan argues this, but her ideas have been taken to support this view and so it is always important to distance oneself

2. For a good example of a very thorough debate on Gilligan's ideas see M.J. Larrabee, ed., *An Ethic of Care* (London: Routledge, 1993).

from this reading). Nor am I comfortable with the idea that differences in moral reasoning are linked to psychological processes of ego development which are assumed to vary in boys and girls. I cannot agree with an argument which implies that our beliefs/behaviours are reducible to experiences which occur at a prioritised stage of ego development. Thus I do not think that there is an essential feminine way of reasoning any more than I think there is an essential female way of reasoning.

I am, however, more open to the idea that conditions of existence are part of the construction of consciousness and that, in as much as in our culture men and women, boys and girls, experience different conditions of existence we should not be surprised that they may form and articulate their consciousnesses in different ways as well as prioritising different issues. This argument, which is hardly new in sociology, is close to Tronto's formulation on different modes of moral reasoning. Tronto³ argues that the mode of reasoning articulated by girls/women is really an ethics which derives from a situation of subordination. It is therefore, not simply a matter of gender difference, but will also be reflected where subordination takes different forms (i.e. 'race', class, disability, religion).

If we leave aside the argument about how a different mode of moral reasoning comes about we can focus on whether this dualist typology⁴ actually helps us to understand certain social issues and gender processes. Somewhat to my surprise (because I did not start out by trying to prove or disprove Gilligan's ideas) when I carried out the pilot project to my current empirical research, I found this typology to be extremely useful. In the pilot project⁵ I interviewed a small number of mothers and fathers and asked them to speak about how they made arrangements for their children and what they thought of the existing legal process (this was before the law had been changed in practice). What I heard was mothers talking about what was best in the circumstances, their worries and hurt, their desire to keep their children in contact with their fathers, their views on what was damaging and so on. What I heard from the fathers was a

3. J. Tronto, "Beyond Gender Difference to a Theory of Care" in Larrabee, *supra* note 2 at 240–57.

4. Dualist typologies have been roundly criticised in feminist work (e.g. J. Butler, *Gender Trouble* (London: Routledge, 1990) and S. Hekman, *Gender and Knowledge* (Boston: Northeastern University Press, 1990)) because they are too simplistic but also because they reflect a naturalistic assumption that a binary division (in all things) is basic and that, in turn, all binaries can be mapped back onto a presumed binary division of sex. Binaries therefore bind us to the thing we may wish to transcend, namely a presumption that there are natural or given differences between men and women.

5. C. Smart, "The Legal and Moral Ordering of Child Custody" (1991) 18 *J.L. and Society* 485.

concern about their own rights as fathers, their anger with the law/solicitors for failing to respect their rights, their need to fight the system and their wives, their demands. To an astonishing extent I heard mothers talking in the framework of an ethic of care whilst the fathers spoke in terms of an ethic of justice. Mothers, broadly speaking, wished to retain connectedness, even if they wanted some connections to be limited, whilst fathers understood the situation in terms of ideas of objective fairness, equality, due process and rights.

But we should be cautious in how we treat this data. Not only was this an exploratory, pilot project which would not stand the weight of affirming or refuting Gilligan's ideas, but we should not pull the utterances of these mothers and fathers out of the specific social context and historical moment in which they were spoken. I was interviewing parents at a time when there was much public concern over the harm done to children by divorce and, specifically a concern that our old legislation made it harder for parents to achieve a consensus over the care of their children. The political context was quite specifically one in which it was assumed that fathers were merely cast aside at the point of divorce and that mothers had become 'the problem' because it was assumed that they wilfully denied their former husbands their rights as fathers. Mothers were being blamed while fathers were seen as victims. It was perhaps little wonder therefore that the men spoke so much of their rights and mothers appeared to be so placatory. So these different modes of articulation cannot, I suggest, be said to emerge from some core or *a priori* difference inherent in the moral development of the subjects I interviewed. I would suggest that we must be more sociological in our interpretation and that this involves situating these 'findings' in their social context.

Moreover, although the speech of the mothers and fathers reflected the sort of differences that Gilligan identifies, it would be entirely misleading to suggest that women talked only of caring and connectedness whilst men talked *only* of rights. The fathers spoke about caring too. The dualism offered by Gilligan therefore did not exactly 'fit' what these parents seemed to be trying to express. It was here that I found Tronto's⁶ refinements on Gilligan so useful. Tronto's work on the ethic of care identifies two modes of caring. One is caring *about* and one is caring *for*. Caring about such things as famines in Ethiopia, civil war in Rwanda, torture in South America is traditionally seen as an ethical stance. Caring

6. J. Tronto, "Women and Caring: What can Feminists Learn about Morality from Caring?" in A. Jaggar & S. Bordo, eds., *Gender/Body/Knowledge* (New Brunswick: Rutgers University Press, 1989).

for, however, is the actual act of caring which might be to nurse the sick child, tend to the daily needs of the frail and so on. Tronto's point is that in orthodox moral theory caring for is not seen as a moral activity, whilst caring about—which may not entail action—is. She therefore argues that although caring is recognised as an ethical position, some types of caring are excluded from this recognition because they are seen as mere reflex behaviour and not as a reflexive, conscious form of choice and/or action. So when women care *for* it is assumed that this is instinctual and not an ethical act. But if fathers care *about* they are treated as good moral actors who merit recognition. Thus this distinction between caring for and caring about can be mapped onto gender difference because, although either men or women can do both, typically women in our culture do the caring for.

What I found in the pilot study was that fathers (mainly) talked about caring about their children whilst mother talked (mainly) about caring for. Building on Tronto's ideas, I have suggested that family law in Britain has been typically more impressed by statements on caring about (when expressed by fathers) than the activities of caring for (when described by mothers). Thus mothers, when they spoke about the work they did in caring for their children and the sacrifices they made, were hardly acknowledged. These actions were seen as being as normal as breathing and thus as worthy of as much acknowledgement as such taken for granted activities usually generate. But when fathers articulated their care about their children, even if they had never really cared for them, their utterances seemed to reverberate around the courts with a deafening significance.

The pilot project therefore suggested that fathers spoke in terms of rights (particularly equal rights) and that this ethic of justice was comprehensible to the courts. But equally, when they spoke of caring (typically in the form of caring about) they were heard sympathetically. Thus I have problems with Gilligan's criticism of Western legal systems where she assumes them to be based solely on an ethic of Justice and where an ethic of care has no place, or cannot be heard. I would argue that, on the contrary, in family law there is indeed room for an ethic of care. But it may be that only one type of care is currently recognised and this is the type of care most fathers are most likely to articulate, namely caring about.⁷ Alternatively we might interpret the way in which UK family law

7. I have stressed here the idea that 'caring about' is the most usual type of care that fathers express in disputes over children because there is not yet a great deal of evidence in the UK to suggest that many fathers do much 'caring for'. However, when fathers do become involved in caring for their position is usually strengthened immeasurably.

responds to statements about care in relation to the gender of the speaker. Thus when fathers speak of care, whether it is caring for or caring about, they are listened to, but when mothers speak of care (of either sort) it is simply treated as unremarkable and of no particular significance.

Pursuing these questions I became interested in what could be 'heard' and what was given legitimacy in comparison with what was not heard and thus disregarded. I suggest that the way in which women articulate their position in relation to children is no longer valid, the legitimate discourse is now in the mouths of the fathers.⁸ The point is that in the last 5 years in England and Wales there has been a significant shift which has rendered inaudible what mothers have to say and although the issue of care is clearly on the family law agenda, it is not a rhetoric which gives voice to women/mothers, but one which ironically gives a new voice to men/fathers.⁹ We might appear therefore to have reached an ironic position in which by demanding the introduction of an ethic of care, we have contributed to giving a new status to only one type of ethic of care (namely caring about) whilst demoting the significance of the practice of caring for. Hence my concern about losing the struggle for another voice is not a simple plea to embrace Gilligan's core idea. We do not necessarily need more voices on care and caring. Rather we need to recognise that a differentiated ethic of care is already operating and that this now denies legitimacy to the kind of caring typically associated with women's activities. Thus, on the face of it, there is endless talk of care but this has apparently demoted the significance of the caring that women typically do. The questions that I wish to pose therefore are whether the new system of family law in England and Wales gives equal weight to caring for and caring about and how this relates to whether equal value is accorded to expressions of care when they are articulated by men rather than women.

At this stage it is perhaps necessary to map out briefly the legal developments to which I refer.

8. This is not, in my view a kind of timeless and unchanging patriarchy at work silencing women. On the contrary we must acknowledge that mothers (in general) used to have a legitimate discourse which was accorded a legitimate hearing. This was the ideology of motherly love which had to be fought for but which became ultimately a received wisdom. This ideology had its problems for women (i.e. the 'bad' mother) but it did provide a voice. It is this that has now been superseded by a different orthodoxy.

9. I am not arguing that men should be silenced nor that the care they feel for their children is somehow worthless or meaningless. It is important that fathers both care for and about their children and I discovered instances in my pilot research where fathers became 'real' carers for the first time after divorce. My point is that we seem to have reached a situation in which fathers can be heard only at the expense of silencing mothers. I am yet to be persuaded that this will be in the best interests of children in the long run.

Recent Developments in Family Law in the UK

There have been significant changes to the philosophy and practice of family law in Britain since the beginning of the 1980s. Perhaps the main shift is the movement away from the idea of marriage as a breakable contract between two adults (with children playing a fairly peripheral part) to the idea of marriage as a parenting contract which cannot be broken because the contract is really with a child. Thus divorce legislation in the early 1980s reflected the principle of the clean break and the idea that husbands and wives should be able to disentangle themselves relatively easily. Although children were significant to an extent, the practice of giving sole custody to mothers meant that children were not a policy problem—even if they were a personal problem. By the end of the 1980s however, children had moved to the centre stage of policy thinking. There were three main reasons for this.

1. During the 1980s there grew up a fathers' rights movement. Initially this was a movement which struggled to reduce men's financial obligations to their wives, but it became increasingly focused on the issue of children once the clean break principle had been established. This movement demanded the joint custody of children on divorce and initially used equality arguments to press their case. Later they used arguments about the welfare of children.
2. In this decade there grew a concern over the rights of children in general which in turn gave rise to a greater focus on the needs of children when parents separate. Research suggested that divorce was an identifiable variable in terms of the future life chances of children. However, this research has been very hard to interpret and it has become linked to various trends in psychological thinking as well as political trends. Specifically, by the end of the 1980s, it was argued that the main harm of divorce as far as children were concerned was the effect of losing a father.
3. Thirdly this argument about the specific effects of losing a father (or never having a father) became linked to the Thatcherite, and now Majorite, concern that such lone mother headed households breed delinquents and the underclass.¹⁰

A number of tendencies therefore came together at this time. They were not entirely new ideas or concerns, but they coalesced into a

10. See the work of N. Dennis & G. Erdos, *Families Without Fatherhood* (London: Institute of Economic Affairs, 1992) and P. Morgan, *Farewell to the Family?* (London: Institute of Economic Affairs, 1994) for examples of these kinds of arguments which were developing strength throughout the 1980s.

sufficiently strong lobby for reform that the Government decided to act by introducing new legislation.

Two major pieces of legislation mark the shift in principle that I have outlined above. The first was the *Children Act 1989* and the second was the *Child Support Act 1992*. I shall focus mainly on the former, but it is important to recognise that there have been two major pieces of legislation in recent years and to understand their dual impact. The *Children Act* abolished ideas of sole or joint custody and introduced the principle that parents' legal obligations to children were unchanged by divorce. It also stresses in practice the basic assumption that the welfare of the child is synonymous with having continuing close contact with both parents.¹¹ The *Child Support Act*¹² was introduced to force fathers to pay support to their first families and to give the children of the first family priority over the children of a second union. The Act introduced a new agency with stringent criteria for assessing levels of child support which could overrule clean break arrangements and which sought to recoup money paid to ex-wives through the benefit system. Basically, the Act requires that a divorced father should think very carefully before taking on new familial commitments since he could no longer rid himself of his financial obligations to his first children. Taken together, these two pieces of legislation spelled out, in their different ways, a simple message, namely that parenthood is forever, both legally and financially and for both mothers and fathers.¹³

11. See J. Roche, "The Children Act 1989: Once a Parent Always a Parent?" (1991) 5 J. of Soc. Wel. L. 345.

12. Although I do not have space to discuss the *Child Support Act* in detail it is important to recognise that it is currently at the point of collapse in the UK. The resistance to it by middle class fathers has been overwhelming and the Act became unpopular more widely than this constituency when it became clear that the main target of the Child Support Agency would be fathers who were paying maintenance already and who were still in touch with their children. These fathers were the 'soft target' because they could be easily found and pressured. In addition the Act lost support because it was retrospective. Thus previous Court agreements were overruled and fathers who had given up home ownership in lieu of future maintenance payments found that they had to pay anyway. Although the Act was meant to benefit children and their carers (mothers) it also soon became clear that it was the Treasury which benefited in the first instance. This was because mothers received no more money, but it was paid to them by their former husbands rather than the Benefits System. Ultimately, of course, it also became apparent that fathers did not want to pay for the real costs of child rearing in their first families. They have fought very hard against the possibility of shifting the poverty of lone parenthood away from women who have borne it for so long.

13. I think it is very important to recognise that both of these legislative measures enforce the idea of the indelible nature of parenthood. However, in practice, these two Acts often work against each other. One example has been the way in which child support payments have been set so high that fathers cannot afford the travel costs of visiting their children (since this cost is not taken into account in the calculations). Moreover, there is anecdotal evidence that the

The Children Act 1989

The Act makes it clear that the first concern of the courts is the welfare of the child; this is to be the paramount consideration. In order to assist the courts to arrive at the welfare principle consistently it lists seven factors that must be taken into account. Amongst these seven is the requirement to consider the wishes of the child. It was felt necessary to state this plainly in the Act because it was increasingly clear that the welfare of children had not always been of paramount importance before, and it was also clear that in England and Wales, the courts had not really thought it necessary to inquire of children what they might wish.

The next key principle in the Act is the stated preference for 'no orders'. The courts are required to consider whether it would not be better for the child to make no order at all. I shall return to this point below, but first the orders available are as follows:

A contact order: this requires the person with whom the child lives to allow the child to have contact with a named person (usually father, but also grandparents).

A prohibited steps order: this allows the court to identify certain steps which a parent cannot take (for example, removing the child from her home or to another jurisdiction, or even preventing a parent from seeing a child).

A residence order: this states with whom the child is to live.

A specific issue order: this arises when the court has had to make a decision on a specific issue over which parents cannot agree (for example, to which school a child should go).

In these provisions the Act has done two things. First of all it has abolished the old idea of custody which, it was argued, made parents into winners and losers and thus promoted conflict. The new residence order merely states where the child is to live; it has no bearing whatsoever on parental responsibility which is now virtually indelible for married parents. So the father who does not have the children living with him still

Child Support Act has made some fathers very hostile to their former wives and thus delicate balances have been disrupted, sometimes leading to violence. What is interesting however, has been the response of fathers' rights groups to these two Acts. Regarding the *Children Act*, these groups have argued that the law does not go far enough to ensure that fathers can have their children live with them if they so choose. Regarding the *Child Support Act* their resistance to it has been so great that the Government has pledged to alter it. The Head of the Agency felt obliged to resign and she was the subject of a great deal of abuse, death threats and obscene and dangerous mail (i.e. razor blades fixed into envelopes to cause injury on opening).

has the full range of parental responsibilities and he can exercise them without consultation with the residential parent. He could only be prevented from doing so if the mother could make a case for a prohibited steps order or a specific issue order. However, this possibility is related to the second element introduced by the Act. This second element is the preference by the courts for no order at all. Given that the most desirable outcome is now regarded as the one in which parents finalise their negotiations, or leave the court, with no order at all—even an order for residence—a climate is now created in which requests for prohibited steps and specific issue orders are met with considerable disapproval.

The dominant framework now has become one in which it is assumed that the good parent is the one who concedes and who does not require state intervention into his or her private life. It is important to understand how this has come about because it is not clear that this was ‘in the minds’ of the policy formulators initially.¹⁴ The *Children Act* was devised by the English Law Commission and was therefore subject to much discussion and debate. The leading Family Law Commissioner, then Professor Brenda Hoggett, wrote extensively on what she regarded as the aims of the Act. For her this element of non-intervention was vital. Her point was that the state does not intervene in how parents raise their children in intact marriages (except in very exceptional circumstances). She therefore could see no reason why this policy should change at the point of divorce. Her argument was that the sudden rush of interest by welfare officers and court officers merely pathologised the situation unnecessarily and, in any case, parents usually know what is best for their children. Her aim was therefore to spare parents this rather degrading circus and to give them the right to decide without having the courts check and then ratify their decisions. This was a powerful argument and can be seen in terms of the classical lawyers disdain for the encroachment of the ‘psy’ professions into what is regarded as a properly legal field.¹⁵ It could also, more charitably, be seen as a way of empowering parents and restricting the powers of the state.

However, in practice there now seem to be problems with this non-interventionist approach (although I must stress that this is a tentative conclusion at this stage of the research). The main problem resides with the thorny problem of intervention versus non-intervention in the domestic

14. See B. Hoggett, “The Children Bill: The Aim” (1989) 19 *Family Law* 217.

15. See for example A. Bottomley, “What is Happening to Family Law? A Feminist Critique of Conciliation” in J. Brophy & C. Smart, eds., *Women in Law: Explorations in Law, Family and Sexuality* (London: Routledge & Kegan Paul, 1985). See also M. Murch, *Justice and Welfare in Divorce* (London: Sweet and Maxwell, 1980).

sphere and the presumption that, in principle, non-intervention is better than intervention. This issue has been thoroughly aired in feminist work on family law, most specifically in instances of domestic violence—but also more broadly in terms of the recognition that non-intervention by the state must be regarded as just as significant a policy decision as intervention.¹⁶ The debate has always centred upon the failure to recognise that in a marriage contract the wife is not as powerful as the husband. Thus in a contract where the parties are unequal it has been argued that the state must be prepared to intervene or else it is implicitly condoning an unjustified exercise of power by the economically or physically more powerful husband. Forcing the state to intervene in family situations has been seen as a victory for feminist argument, even though it is recognised that this intervention is far from perfect and that it has certain problematic consequences.

The problem that feminists in the UK have come to face, however, is that they are increasingly dissatisfied with an increasingly conservative, centralised state. Of course the state was never exactly the feminists' friend, but throughout the 1970s, and even in the 1980s where the local state was concerned, there was a view that the state could be an ally in limited circumstances. This has now changed considerably. State interventions into the family seem to have become more punitive, most particularly in relation to single parent households. Certainly in cases of divorce where mothers are lesbian, the view has been that it is desirable to have as little state intervention as possible.

This means that we are faced with a dilemma. In the area of divorce or separation, should we concede that it is better to negotiate privately or should we argue for a policy which allows for more court hearings in which judges make the final decisions in difficult cases? Of course, posing the problem like this oversimplifies the issues but it does bring the problem into sharp relief. But before I go on to pursue this thorny question through the vehicle of a specific case study, there is another dilemma I wish to raise. This is the meaning of the concept of welfare when the term 'welfare of the child' is used.

Once again this is not a new issue.¹⁷ Feminists have long noted that there is no fixed understanding of what the 'welfare' of the child means. Not only is it subject to changes in psychological orthodoxies, but it is a

16. See F. Olsen, "The Family and the Market: a Study of Ideology and Legal Reform" (1983) 96 *Harvard Law Review* 1497; and N.Z. Hilton, "Mediating Wife Assault: Battered Women and the 'New Family'" (1991) 9 *Can. J. Fam. L.* 29.

17. See C. Smart & S. Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (London: Routledge, 1989).

highly political concept in as much as certain meanings are taken up and used at different moments in quite specific political campaigns. In addition, it is a common-sensical notion, with parents having very individualised understandings of the welfare of their specific children. It might therefore seem that the Law Commission was right in principle to lay down that arrangements should be left to parents to make. Such a principle might seem to allow parents to escape from the changing orthodoxies of the 'psy' professions and/or the rigour of somewhat fundamentalist government ministers. But unfortunately, a very rigid meaning of the concept of welfare is discernable in practical interpretations of the Act. What parents seem to be finding (and once again I am being tentative here) is that as long as they agree with each other on everything they want to do, they can do what they like within the usual constraints of not actually harming the child. Thus parents can agree that the father will leave and will never see the children again (although they can no longer agree that he should pay them no maintenance). If they agree to this no one will object in practice that this is against the interests of the children. There is no mechanism to require fathers to see their children such as a financial levy or even financial inducement.¹⁸ However, if a mother feels she has reasons to try to restrict a father's contact with her children she will find it almost impossible to implement her wishes because the dominant orthodoxy is that there should be no such constraints after divorce—just as there were none before divorce. Because contact is, *a priori*, regarded as in the best interests of the child, her wishes are seen as damaging and as obstructive (although a father's wishes not to see his children are not). Thus the prevailing meaning of welfare is only enforced when parents disagree—or to be more precise when mothers wish to restrict what fathers want. Thus the new orthodoxy is imposed on those who wish to restrict contact but not on fathers who wish to have no contact at all. In this way, the practice of the new Act always constructs the mother as the potential problem or obstacle to the desired outcome of the welfare of the child.¹⁹

18. I should make it clear that I am not arguing for such a measure, I am merely trying to show how uneven our existing measures are.

19. It is important to note however that in the *Child Support Act* it is the father who is constituted as delinquent. Perhaps what is most interesting in this comparison though is that fathers have resisted this labelling vociferously and (probably) effectively. Mothers seem unable to constitute themselves as a pressure group to defend and redefine themselves in a comparable way.

Returning to losing the struggle

In the first section of this paper I explored a theoretical argument about the way in which family law can be said to hear certain voices but not others. In the second section I mapped out actual changes to the law and the growth of certain orthodoxies and the revival of the principle of non-intervention. In this section I want to draw these ideas together through the mechanism of a key case study. I want to trace the experiences of one woman as she encountered the new system and to reveal, frequently using her own words, how she has had hardly any voice at all as she has been swept through a system which might almost seem designed for deafness.

There is, however, a very crucial additional element to this particular case study and it is one which has been completely forgotten in the rush to embrace both the liberal principle of non-intervention and positively to affirm the prodigal father. This element is the part played by systematic violence and abuse of the mother by the father. The new legislation seems entirely modelled on some idealised vision of the symmetrical family where powers and roles are equal. It does not seem to anticipate any real deviation from this model and ironically, in striving not to pathologise the family on divorce, seems only capable of responding to the less than ideal household by treating the mother as the source or site of the problem. The implacability of this new system of family law is perhaps best expressed through the following case study.

The Story of Kathy Moore

Kathy is in her mid-twenties, she is an Irish Protestant who ran away to England with an Irish Catholic against the wishes of her parents. She has a son of nearly 5 years and has been separated from her partner for just over two years. Soon after the birth of her son, Kathy realised that she was going to have to be the breadwinner for the family and so she decided to go to University to get some qualifications. It was at this time that problems began to emerge. Kathy had taken full care of James, her son, for the first year but when she started University she needed help and her partner, Brian, would share in looking after James. But at this time Brian started to become more and more possessive and abusive, accusing Kathy of sleeping around and so on. Kathy gradually became aware that Brian was using drugs, although she was not fully aware of the extent until after they split up. As Brian's behaviour became more and more problematic Kathy decided they would have to separate as she could no longer stand the oppressive nature of his jealousy. At that stage Kathy was quite prepared to share the care of James on a 50:50 basis. She was at this point half way through a 3 year degree and James had a place in the University

nursery. Kathy fully subscribed to the idea that fathers should be involved in child care and she wanted her son to have a close relationship to his father. But shortly after they separated, Brian's behaviour became worse and he started physically to attack Kathy, to break into her home, to abuse her in front of their child, to attack her in the street and to imprison her in his house when she took her son to see him. One of the worst tortures he inflicted on Kathy was his habit of going to the University nursery and removing James without telling her. He would keep him for several days at a time. By this stage Kathy was very worried about the care he could give James. Before they had separated she had discovered James strapped in his chair in front of an open window having cried himself to sleep. Brian was meant to be looking after him but had gone out with friends instead. She also discovered that when Brian took James away he would leave him with a friend's girlfriend to look after whilst he went out to find drugs.

Kathy began to realise that Brian's behaviour was not only reckless in terms of normal standards of child care, but that the more that James witnessed the abuse that Brian heaped on Kathy, the more disturbed he was getting. Kathy has had several injunctions served on Brian to try to prevent him from assaulting her, but they have never had powers of arrest attached. In any case, she found that each time she got one, Brian simply became more threatening and he could always use James to punish Kathy. At one stage Kathy became completely victimised.

Plus there was a very important element of this victim cycle of abuse when Brian mentally and emotionally abused me for a long time. By the time we'd reached this point, I had absolutely no self esteem, I had no way of knowing that there was help out there, or that I could stop the abuse. There was nothing to tell me that I could actually get this stopped, that I didn't have to go through it. Some machinery in my brain was saying, 'He's going to be your abuser forever and there's nothing you can do about it.' That was the way I was thinking, and it only took to see James distressed to shake me out of that, but it took a long time to be completely free of that thought process.

I fear him very much. I don't fear anything else after Brian . . . Sometimes he accosts me in the street, and as soon as it happens I always have a panic attack. I break out into a sweat immediately at the thought of it happening and I can't speak to him. I see his eyes, and I can always tell from his eyes whether he has his nice personality or his nasty one. I'll see that, and I panic because I know exactly what's going to happen next, and know I'm going to have to endure it. So I'm going to have to live through it without dying—which would be a release. And it's that bad, it's that desperate. And I'm looking round for someone to help me and I don't even see anything, my eyes are darting about but I don't focus. And I'll just have to endure this until he decides to stop, and I've no control over when it ends or how it ends and my only thought is, 'How will I stop James getting involved in this?' I've got to run somewhere, and yes, I know he'll trip me up, and kick me

while I'm down, but I've got to run somewhere, but it's got to be somewhere where James isn't.²⁰

At this point one might imagine that all Kathy would have to do would be to reveal this history to the court and Brian would be prevented from interfering in her life and from seeing James, except under supervised contact. But Kathy has found it almost impossible to get into court. The new legislation wants parents to agree between themselves and so Kathy constantly found herself in 'private negotiations' with either mediators, the court welfare office, the barristers or solicitors.

In these private negotiations Kathy always found that she was treated as the 'unreasonable' parent. It was Brian's argument that he was only violent because Kathy was trying to restrict his relationship with James. He argued this even at the time when Kathy offered a 50:50 arrangement. He said it was not good enough because Kathy wanted the times of contact specified and clear. Brian wanted complete freedom over when he would see James. Moreover, Brian abused and physically attacked both the Welfare Officer and Kathy's solicitor. The Welfare Officer, who recommended the 50:50 sharing arrangement, refused to alter his report even after he had been attacked. He accepted Brian's argument that he had only done it because he was so distressed about his son. Kathy's solicitor merely refused to go to court with her again but has not made a formal complaint about Brian's behaviour.

Kathy's solicitor refused to raise the issue of violence at the first court hearing. She argued that the judge was not interested in what went on between parents *before* separation and that it would be assumed that the physical separation would, in any case, end the violence. Besides the fact that this was quite wrong in Kathy's case, the general principle has gained ground that it does not matter how dreadful the relationship between parents might have been during the marriage, because what matters is their parenting role (not marital role) and their future relationship to the child. The good parent is the one who can put the past behind him or, more usually, her. Initially this was what Kathy actually tried to do. She thought that as long as James knew both parents loved him, and as long as they worked together, it would be alright. She stated:

And all the books I've read say that's the way its going to be. But none of the books I've ever read about this helping children cope with separation, they never tell you what to do if one parent is undermining everything, . . . One parent is doing it, and one parent isn't. They don't tell you how to deal with that. I've never met anyone who can.²¹

20. Interview with Kathy Moore.

21. *Ibid.*

The problem that Kathy faced was that the new system assumes that parents only have to be reasonable and solutions can be found. The parent who then refuses to agree to what is deemed reasonable, is the one who is seen as the problem. Thus in spite of Brian's behaviour Kathy felt that she was defined as the problem. It was her the mediators, welfare officers, barristers and solicitors kept asking to be reasonable when she later said she wanted to stop contact between Brian and James. No one took the violence or her fear seriously. As she put it, everyone just seemed to assume that they had a *stormy* relationship. She said they were identified as one of *those couples*.²² When Brian threatened her and physically abused her, it was described as an argument. He would be ranting and hitting and she would be pleading, begging and trying to calm him down. In her view this was not an argument.

At no point did Kathy feel she was able to put her case. In private negotiations she was too frightened of Brian to speak and no one prevented Brian from shouting at her. Even in the judge's chambers Brian was not prevented from shouting and having his say. Kathy reports it that Brian merely shouts,

Sorry your Honour, it's just that being on my own as a father, I'm so frustrated about nobody listening to me. I just have to get it out. I'm sorry I'm in contempt of court, but I've got to get this out.

And she goes on:

And they let him get away with it, always, and I'm sitting there saying nothing and, at the end, always, the judge will make a little speech to us both, a very patronising speech about how we shouldn't be doing this, we've got a little child and what are we doing to our little boy because of our inadequacies, and our feelings? Would we think for one moment about what this is putting a little child through? And I'm looking at the judge and I'm nodding my head and the tears are streaming down, and Brian's looking at me and going 'Yes, she knows I'm right'. Never have I felt I was listened to, ever, apart from the first court hearing . . .²³

22. There is a possible 'racial' dimension to this definition of Kathy and Brian as 'one of those couples'. Although Kathy came from a middle class Protestant Irish family in Ireland, once in England where she was a poor student living in the wrong part of Leeds, she may have become merely a typical unruly, unreasonable Irish woman. She speaks eloquently of the disrespect with which she was treated and her complete shock that the court officials and so on would not believe her word. She does not herself attribute this to racism and so I raise it tentatively. It is however no secret that Irish people do not necessarily feel that the English Legal System is unbiased towards them.

23. *Ibid.*

Putting Kathy's Case in Context

There has been a growing amount of concern both in North America and in the UK about the expansion of mediation and its failure to acknowledge and/or to deal with violence. Whilst the old divorce procedures may have been far from perfect, it was then possible for women to get away from violent husbands more fully than they can now. Moreover, they could leave the negotiating to solicitors. Now they must be in close proximity to their abusers and they are told they must have an ongoing relationship with them—for the sake of the children. They are also required to 'negotiate' at close quarters and to engage in planning the future. In a kind of cruel irony we can see that the old adage that women should stay in abusive relationships for the sake of the children has taken on a new life. In the past it was assumed that women should tolerate abuse because divorce would damage the children. For a relatively brief period wives were able to escape this abuse through the mechanism of divorce and it was held that it was better for children to suffer the divorce than to live in an abusive household. Now a new corner has been turned and while wives are not blamed for divorcing if they are abused, they are no longer allowed to escape from their husbands. In this context the idea that parenting is forever takes on a more sinister appearance.²⁴

In the context of responding to violence, it has also been argued that, unlike the old matrimonial proceedings, the new family law is entirely non-judgmental. Thus it is now presumed, for example, that the spouse who commits 'adultery' should not be punished and that there is little to be gained from trying to apportion blame if couples are starting new lives. In the context of the UK this shift away from a judgemental approach was part of the rationale for abandoning the old fault based divorce law. Without doubt the old system was messy and unpopular and spouses would fight very hard not to be defined as the guilty party because of the financial penalties which were attached. However, the desire to transcend

24. It would be misleading to say that the courts never restrict a father's contact with a child because of his violence towards the mother. What few reported cases there are on the new Act suggest that courts weigh in the balance the father's commitment to the child against his violence to the mother. If he is deemed to be very committed his violence will not prevent him from having contact. However, if his violence is such that it seems to spill over into a neglect of the child the courts might deprive him of contact. In one case in October 1992 (*Re T*, [1993] 2 F.L.R. 450) the Court of Appeal dismissed an unmarried father's claim for parental responsibility and joint residence. The case is gruesome. It reveals a similar history to that of Kathy's. In spite of the father's astonishing violence at every stage the courts try to get the mother to concede. She is obliged to go to counselling and one judge awards contact which resulted in the father taking the baby away and refusing to return her for 9 days. It took the mother nearly 3 years to have contact terminated and throughout that time she was subject to violence and abuse.

the punishment that followed in the wake of a finding of guilt has led to a situation in which almost any behaviour during marriage is deemed to be irrelevant. This has in turn been seen as a move towards a forward-looking divorce law in preference to a backward-looking series of recriminations and punishments. But this rush into nonjudgementalism can mean that even the *ongoing consequences* of systematic marital cruelty are treated as benign. As Kaganas and Piper argue in relation to mediation,

The concern of mediators to remain neutral and to avoid allocating blame not only leads to a failure to confront problems of power and domination, it can have the effect of exacerbating them.²⁵

Kaganas and Piper concentrate on mediation as a problem where violence is concerned. However, I would argue that the problem is now wider than this. Couples can still avoid mediation in the UK but they cannot avoid the new, widespread ethos created by the *Children Act*. They will find their solicitors and barristers sounding increasingly like mediators rather than partisans. They will also find that solicitors are reluctant even to raise the issue of *past* violence because judges now deem it to be irrelevant to the *future* arrangements for children.

There is also another irony here to which Kaganas and Piper refer. This is the presumption that the divorce or separation marks the end of a difficult relationship, thus freeing the parties to start a new, more harmonious phase of parenting. But drawing on Canadian and US research,²⁶ they argue that it is at the point of separation and after that women can be most vulnerable to violence. And UK and Australian research also suggests that the point at which the mother hands a child over for a contact visit becomes an occasion for violence.²⁷ This was, of course, exactly what happened in Kathy's case. In fact, one of the mothers in the earlier pilot study remarked, somewhat cynically, that her former husband had stopped being violent towards her when he came for the children. She put this down to the fact that he was now living with another woman who, her children reported, he was now beating. This was a mother who was so frightened of her husband that she physically forced her daughter to go on access visits against her will. The mother was fearful

25. F. Kaganas & C. Piper, "Domestic Violence and Divorce Mediation" (1994) 3 J. of Soc. Wel. L. 265 at 267.

26. See for example Hilton, *supra* note 16, and P. Bryan, "Killing us softly: divorce mediation and the politics of power" (1992) 40 Buffalo L. Rev. 441.

27. H. Astor, "Domestic violence and mediation" (1990) 1 Australian Dispute Resolution J. 143; and F. Kaganas & C. Piper, "Towards a definition of abuse" (1993) 3(2) Family Mediation 7.

that he would think that she, rather than their daughter, was being difficult and that he would become violent.

The concentration on the problem of mediation and its inability to deal with violence has alerted us to the extensive effects of an abuse of power in a context in which parties are meant to negotiate as equals. However, in the UK the whole of our divorce proceedings are now cast in the form of negotiations between equals, not just the mediation element. Not only is there a strong ethos of non-intervention (which I would argue is entirely inappropriate where there is violence) but the orthodoxy of the welfare of the child is now interpreted as disqualifying any airing of problems as between the parties themselves. These are seen as diversionary. I want therefore, briefly and tentatively, to consider this new orthodoxy.

Kathy's Case and the New 'Forward-Looking' Orthodoxy

In Kathy's case, she found herself in a situation in which she felt sure that Brian's behaviour was bad for James. Not only did she find his manipulations of the child appalling, but she knew that James was frightened of his father and was disturbed by his violence.²⁸ Kathy also had strong reasons to think that Brian was an irresponsible and erratic carer. He moved from smothering the child and overstimulating him, to threatening to harm him and leaving him with virtual strangers. However, every professional she encountered insisted that she was selfish not to realize how important a father is to a child. Kathy was, however, willing to accept this as a general principle, but she was tortured by the fact that she could not persuade anyone that, in this specific case, the general principle should not apply. What she discovered was that Brian's insistence that he cared 'about' the child was well received. Moreover, there was a general belief that fathers had been so badly treated in the past, that one could understand their passion in trying to make everyone realize their love and commitment. It was seen as quite understandable that this passion should be expressed as physical violence.²⁹ My point is, however, that an impenetrable circle seems to have been established where the significance

28. There has been considerable silence in the last decade in the UK over the question of whether spousal violence causes 'indirect' harm to children. The Fathers' Rights Movement has argued that being a 'bad' husband does not make a man a 'bad' father. However, recent research by NCH Action for Children, *The Hidden Victims: Children and Domestic Violence* (London: NCH Action for Children, 1994) suggests that witnessing such violence can indeed be very harmful.

29. Because this study is in such early stages we cannot compare the effects of women's violence with the effects of men's violence when it comes to the residence of children after divorce. However, in one case we have come across an unmarried father who gained an order for residence for 2 very small children, and also highly restricted contact by the mother, on the

of violence cannot now be acknowledged. As long as there is a simple consensus that the welfare of the child is served by contact with a father, neither solicitors nor mediators nor court welfare officers have to take the responsibility of forming individual judgments—even in manifestly extreme cases of violence.³⁰

Conclusion: Issues of Social Justice

It is, of course, unwise to draw conclusions in the middle of an ongoing research project and so, by way of concluding I want to return to questions of ethics/social justice and values and the sort of issues that Gilligan originally put on our agenda. The questions that many feminists in North America, Australia and the UK are asking is ‘What kind of Family Law do we want now?’ The current trends in the UK have been described above, but there are other important developments too. Mavis Maclean³¹ has pointed out that family law in the UK is likely to become more and more akin to administrative law. The Child Support Agency, for example, is likely to replace the judicial function of allocating maintenance and the sharing of the matrimonial home. These matters will follow a formula which will not require judicial discretion. Moreover, this will reduce the role of solicitors since arrangements they negotiate can be overruled by the Agency. Moreover, the cost of Legal Aid in matrimonial cases is now so high that ways of reducing the time spent by expensive legally trained personnel on divorce work will soon be devised. It is quite likely that

grounds that on ONE occasion after they separated, when he was refusing to let her take the older child with her and the baby, she turned up at their home in an intoxicated state and apparently stabbed him in the elbow after a fight broke out. He acknowledged that he had been violent too. The father clearly stated in the interview that the mother had never been drunk and/or violent before or after.

30. In Kathy’s case however one barrister eventually took a stance against Brian’s violence. In August 1994, Kathy went to court to try to stop Brian having any further contact with James (and herself). She had been badly advised by her solicitor who had not acquired the necessary reports and so just before the hearing she was advised by the barrister she had just met, that she would lose. But Kathy insisted that they go ahead even though there would have to be an adjournment. When she got into court she discovered that Brian’s barrister was not going to protect Brian. He stated that although it was his ethical duty to serve the interest of his client, he saw the needs of the child as more important. So he refused to cross examine Kathy and put Brian on the stand and invited him to speak. Brian ‘spoke’ for two hours, during which time security officers had to be called several times. The judge then gave Kathy an injunction banning Brian from going near her, her home or her parents, and called for the necessary reports. Brian lost control of himself and had to be removed by security guards. Notwithstanding this, the judge made it plain that he was unlikely to make an order for no contact at the final hearing.

31. M. Maclean, “The Implications of the Shift Towards Administrative Methods” in *The Joseph Rowntree Family & Parenthood Seminar Papers* (London: Joseph Rowntree Foundation, 1994).

para-legals, like mediators, will become more central to this process. The fact that the *Children Act* states a clear preference for 'no orders' signifies the extent to which the old, expensive legal system is becoming redundant. One might as well have a relatively inexpensive mediator or para-legal issuing 'no orders' as an expensive judge or registrar.

Given these huge transformations it is clearly pointless to imagine a return to any of the old systems. The problem then becomes one of how to insert questions of social justice (in general) and the treatment of specific individual cases into this increasingly bureaucratic and formulaic system.

A First Element of Social Justice

The first issue of social justice which is currently absent from family law is any debate about 'fairness' in decisions about the care of children after divorce. I have elaborated on this point elsewhere³² so I will not deal with it in detail here. Arising from the pilot study, I found that many of the mothers I interviewed expressed a strong sense of unfairness in relation to what were then custody and access decisions. Put briefly, they felt that they had brought up the children and made all the sacrifices³³ but that at the point of divorce this was entirely disregarded. For many they felt that they were losing the most important role they had in their lives, that of being mothers. They felt especially cheated in that they had assumed that they had entered into a socially recognised contract in which they would give up careers and pensions in return for this role. The response of the new family law to their expressions of unfairness has, however, been to accuse such women of selfishness for putting themselves before the future interests of their children. Little or no weight has been given to the gender contract they entered into in good faith.³⁴ These mothers did not wish to deny their husbands contact with the children, nor did they expect to receive large amounts of maintenance. But they were astonished to discover that, having done what social policy and political rhetoric required of them, at the point of divorce it counted for nothing and indeed began to appear to have been socially, financially and emotionally imprudent.

32. Smart, *supra* note 5.

33. These sacrifices are well documented in C. Glendinning & J. Millar, eds., *Women and Poverty in Britain* (London: Wheatsheaf, 1987); See especially H. Joshi, "The Cost of Caring" in *ibid.* at vol. D 112.

34. Let me make it plain that I do not think it is a good idea for women to rely on this gender contract, but in reality we know that many women in the UK have little choice but to give up work, or at least to work only part-time, if they want to have children.

To insist that this unfairness is addressed does not of course mean that the social injustice can be easily redressed. I would not, for example, wish to create a benefit system which assumes that only women should care for children. Nor could one be ignorant of the injustice that might arise from insisting that individual men pay for a socially organised method of child care which is not of their individual making or even choice. But the painful situation that so many mothers now find themselves in should no longer be treated as solely an individual dilemma nor as an individual pathology to be overcome by counselling or, as some lawyers seem to prefer, the knocking of heads together.

A Second Element of Social Justice

In addition to recognising the harms of the gender contract in child care, I would argue that we need to put violence back onto the divorce agenda in the UK. Where violence is concerned it is vitally important that the forward-looking orthodoxy is reversed and the ongoing harm and damage of violence is acknowledged. There are many practical problems associated with this proposal of course. I am aware, for example, that after more than a decade of legislation on domestic violence we know that different women want different things from the state and the law in these circumstances. However, if a woman wishes to raise the issue of violence, if she is separating to escape from it, and/or if she is in ongoing danger of it, it seems to me that different principles must apply.³⁵ We are capable of accepting that if a parent is cruel to a child they may lose their parental rights or at least the right to see the child. This principle needs to be extended to cases of cruelty to spouses. The implications of this are that we should not impose a presumption of co-parenting on women who have been victimised by violence. Indeed, we should start to reappraise the issue of whether spousal violence should not in fact provide grounds to deprive a parent of contact with their children as well. Such a provision would not of course automatically make women safe, but at present we seem to have a system of appeasement of violence which not only fails to make women safe but which condones violence. It also completely ignores the harm that such violence might do to children. We need, therefore, to start to talk again in terms of 'cruelty' in order to re-import

35. For a discussion of some of the problems and issues surrounding such ideas see Hilton, *supra* note 16. Also D. Ellis & N. Stuckless, "Preseparation Abuse, Marital Conflict Mediation, and Postseparation Abuse" (1992) 9(3) *Mediation Quarterly* 205; H. Magana & N. Taylor, "Child Custody Mediation and Spouse Abuse: A Descriptive Study of a Protocol" (1993) 31 *Fam. & Conciliation Courts Rev.* 50.

into family law the seriousness of this abuse and a sense of moral commitment to dealing with it.

It is in these two areas that I am most concerned about losing the struggle for another voice. In the first instance, the new family law talks endlessly about caring but still ignores the social and financial consequences of the practice of caring as it affects the economically weaker members of the household (typically the mother). It perpetuates a social injustice by ignoring the ongoing reality of the gender contract which women enter into when they start to care for children. In the second instance, the new family law hides the social injustice of physical cruelty to women (and in some instances to men) and indirectly to children, by refusing to see the significance of *past* behaviour for *future* arrangements. These issues need to be renamed as social harms/injustices in order to bring them back into public debate or, put another way, to give voice to them in the context of the new family law which seems uncaring about these ethical problems.