

Portia in a Different Voice: *Speculations on a Women's Lawyering Process**

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INTRODUCTION

As a scholar of the legal profession, I have asked whether the increased presence of women in the legal profession might lead to alternative ways of seeing what lawyers do and how they do it.¹ Will it be simply that more lawyers are women, or will the legal profession be transformed by the women who practice law? In recent years, two developments in feminist scholarship have offered insights which promise to shed some light on that question. This essay explores some of the potential applications to law of these two developments in feminist scholarship stated as speculative hypotheses for further study.²

The first of these developments in feminist scholarship is the self-conscious observation of how women's entry into formerly male-dominated fields has changed both the knowledge base of the field³ and the

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¹ Menkel-Meadow, *Women as Law Teachers: Toward the Feminization of Legal Education*, in *ESSAYS ON THE APPLICATION OF A HUMANISTIC PERSPECTIVE TO LAW TEACHING* 16 (1981) [hereinafter cited as Menkel-Meadow, *Women as Law Teachers*]; Menkel-Meadow, *Women in Law?*, 1983 *AM. B. FOUND. RESEARCH J.* 189.

² C. Menkel-Meadow & G. Blumberg, *A Research Proposal on the Impact of Women on the Legal Profession and Law* (1983) (a study-in-progress of how women behave as lawyers designed to test empirically some of the hypotheses contained herein). (The proposal is on file with the author).

³ A FEMINIST PERSPECTIVE IN THE ACADEMY: THE DIFFERENCE IT MAKES (E. Langland & W. Gove eds. 1981); A. RICH, *Toward a Woman-Centered University* in *ON LIES, SECRETS AND SILENCE: SELECTED PROSE 1966-1978* 125 (1979); Abel & Nelson, *Feminist Studies: The Scholarly Is Political*, 2 *THE WOMEN'S REV. OF BOOKS* 10 (vol. 4 Jan. 1985).

methodology by which knowledge is acquired.⁴ Since our knowledge of how lawyers behave and of how the legal system functions is based almost exclusively on male subjects of study,⁵ our understanding of what it means to be and act like a lawyer may be misleadingly based on a male norm. We need to broaden our inquiry to include the new participants in the profession so that we can discover whether our present understandings are accurate.⁶ With more women lawyers available for study we may learn first, whether women perform lawyering tasks in ways different from men; second, whether our descriptions of what lawyers do may have to change to reflect different goals or task orientations; and third, whether the increased presence of women in the profession may have broad institutional effects. Current studies of gender differences in other fields offer a powerful heuristic for application to our understanding of the lawyering process.

The second development is a body of theoretical and empirical research in psychology and sociology. This research has postulated that women grow up in the world with a more relational and affiliational concept of self than do men. This concept of self has important implications for the values that women develop and for the actions that are derived from those values.⁷ This research is controversial and is generating criticism from many different quarters.⁸ I am not unsympathetic to some of

⁴ C. GILLIGAN, IN *A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 6-23 (1982). Gilligan points out that much moral and psychological developmental theory (from Piaget, Kohlberg, and Erickson) is derived from studies using male subjects only.

⁵ See, e.g., J. HEINZ & E. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982); J. CARLIN, *LAWYERS ON THEIR OWN* (1962). Cf. C. EPSTEIN, *WOMEN IN LAW* (1981).

⁶ The present essay focuses on gender, but what I have to say about the exclusion of whole classes as subjects of study applies as well to minorities, ethnicities and other excluded, non-mainstream groups, such as the handicapped, lesbians and gay people.

⁷ See, e.g., C. GILLIGAN, *supra* note 4; N. CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); D. DINNERSSTEIN, *THE MERMAID AND THE MINOTAUR* (1978); J. MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* (1976); N. NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1974); A. SCHAEF, *WOMEN'S REALITY* (1981). These are selected from a wider body of literature written mostly, but not exclusively, by women as a result of feminist interest in doing research in areas previously dominated by men. Most striking about these works from a variety of disciplines is the emphasis in each on women's affiliational or relational values. There is little agreement about the source of these values or attributes. Some authors find psychological, others sociological, causes; others do not posit a cause. But all of these authors have observed these attributes or values in women.

⁸ One critique is focused on this research's failure to account for the political origin of these attributes. That is, some have argued that women exhibit caring and affiliational values because it is only natural for them to care about relationships in a world where women acquire status and power only in a derivative sense through their connection with men. This critique says we cannot know what women would value in a world where they are not oppressed. Comments by Catharine MacKinnon, Mitchell Lecture Series, State University of New York at Buffalo School of Law (Nov. 20, 1984), reprinted in *The 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law—a Conversation*, 34 *BUFFALO L. REV.* 11, 20 (1985).

Another critique fears the political backlash from an effort to label qualities male and female in ways that may perpetuate old stereotypes and justify sex discriminatory laws. This is a variant of the current debate in feminist jurisprudence over formal versus substantive equality (or equal versus special treatment). See, e.g., Note, *Toward a Redefinition of Sexual*

the criticism, which in part reflects a growing maturity and differentiation in feminist scholarship.⁹

I find persuasive, though not unproblematic, the notion that values, consciousness, attributes, and behavior are gendered,¹⁰ *i.e.*, that some are identified as belonging to women and others to men. The attachment of gender labels is a product of both present empirical research¹¹ and social process. Thus, we may label the quality of caring a female quality, but note its presence in many men. Further, a man who exhibits many feminine qualities may be perceived as feminine, *e.g.* "He's too sensitive to be a good trial lawyer," or alternatively, an assertive woman may be met with remarks such as, "She's as sharp as any of the men on the team."¹² Attributing behavior characteristics to a particular gender is problematic, because even as we observe such generalizations to be valid in many cases, we risk perpetuating the conventional stereotypes that prevent us from seeing the qualities as qualities without their gendered context.¹³

The process is one that most feminists deplore because what is labeled female or feminine typically is treated as inferior, and is subordinated to what is labeled male or masculine. This is particularly true if the context in which they are found is one, such as the practice of law, which has itself traditionally been labeled male.¹⁴ For the purpose of this essay I will assume that gender differences exist as they have been documented by such writers as Simone de Beauvoir, Carol Gilligan, Nancy Chodorow, Jean Baker Miller, Anne Schaefer and others,¹⁵ and will

Equality, 95 HARV. L. REV. 487 (1981) [hereinafter cited as Note, *Toward a Redefinition of Sexual Equality*]; Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RIGHTS L. REP. 175 (1982); Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1985).

Yet another critique is that the qualities observed are the product of class, socio-economic relations or oppression and thus not necessarily gender-based. See, *e.g.*, Buck-Morss, *Socio-economic Bias in Piaget's Theory: Implications for Cross-Cultural Studies* in PSYCHOLOGY IN SOCIAL CONTEXT 349 (A. Buss ed. 1975).

Finally, Gilligan's work has been criticized on methodological and interpretivist grounds. See Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RESEARCH 597 (1983); Flanagan & Adler, *Impartiality and Particularity*, 50 SOC. RESEARCH 576 (1983); Nails, *Social-Scientific Sexism: Gilligan's Mismeasure of Man*, 50 SOC. RESEARCH 643 (1983).

⁹ For an excellent typology of the different schools within feminism, see A. JAGGER, *FEMINIST POLITICS AND HUMAN NATURE* (1984).

¹⁰ S. DE BEAUVOIR, *THE SECOND SEX* (1953); C. GILLIGAN, *supra* note 4.

¹¹ C. GILLIGAN, *supra* note 4; E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* (1974); Spence, *Changing Conceptions of Men and Women: A Psychologist's Perspective* in E. Langland & W. Gove, *supra* note 3.

¹² Remarks overheard by the author by lawyers describing other lawyers.

¹³ One could argue that qualities or traits cannot exist without a gendered context or that all qualities and traits are gendered. In this view, the notion that there could be a neutral, objective, or genderless way to describe the qualities of lawyering is impossible.

¹⁴ "But the important question is what effect the presence of women as barristers in our courts would have upon the administration of justice, and the question can be satisfactorily answered only in the light of experience." *Re Application of Bradwell*, 55 Ill. 535, 542 (1869), *aff'd*, *Bradwell v. Illinois*, 83 U.S. 130 (1873). See also Schwartz, Brandt & Milrod, *The Battles of Clara Shortridge Foltz*, 1985 CAL. DEFENDER 7.

¹⁵ See *supra* note 7.

leave to others the important inquiry into the origins of these differences, be they biological,¹⁶ sociological,¹⁷ political,¹⁸ or some combination of these. My perspective on this issue is that as long as such differences exist, studies of the world—here the legal profession—that fail to take into account women's experience of that world¹⁹ are incomplete, and prevent us from having a greater repertoire of societal as well as individual choices.

An important part of this inquiry is whether it is yet possible to see if women conduct themselves as lawyers differently from men. I have commented elsewhere that just because there are increasing numbers of women in the practice and teaching of law,²⁰ we do not yet know whether women will transform the practice or themselves when they are found in sufficient numbers. Social research has indicated that those in token numbers may feel strong pressure to conform to the already existing norms of the workplace and to minimize, rather than emphasize, whatever differences exist.²¹ Thus, when we look at women who are lawyers in 1985, we may be studying those women who have been successful in assimilating to male norms.²² Although there is already some evidence of Portia-like²³ dissatisfaction with the present male voice,²⁴ more

¹⁶ R. BLEIER, *SCIENCE AND GENDER* (1984).

¹⁷ See Buck-Morss, *supra* note 8.

¹⁸ See *supra* note 8, especially MacKinnon article.

¹⁹ Catharine MacKinnon has pointed out that women do not yet "possess" a lawyering process that is their own—*i.e.*, not defined in relation to men's (in the possessive sense); thus for her it may be too early to talk about a "women's lawyering process." (Conversation with Catharine MacKinnon, March 25, 1985).

²⁰ Menkel-Meadow, *Women as Law Teachers*, *supra* note 1. See also C. EPSTEIN, *supra* note 5.

²¹ R. KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977); Kanter, *Reflections on Women and the Legal Profession: A Sociological Perspective*, 1 HARV. WOMEN'S L.J. 1 (1978); Spangler, Gordon & Pipkin, *Token Women: An Empirical Test of Kanter's Hypothesis*, 84 AM. J. SOC. 160 (1978).

²² See Note, *Toward a Redefinition of Sexual Equality*, *supra* note 8. On the question of the extent to which women speak in a different voice or use a different language (a disputed issue in feminist scholarship), see R. LAKOFF, *LANGUAGE AND WOMEN'S PLACE* (1975). Some would say that women have had to be bilingual in order to succeed in the male world, speaking both the prevailing male language as well as women's own language. In a recent speech, Carol Gilligan illustrated this point by reporting on a follow-up study of two of her subjects. At age 15 when Amy was asked again about the Heinz dilemma, see *infra* text accompanying notes 40-49, she answered in terms similar to Jake's (the "male" voice) and then asked, "Do you want to know what I really think?" and continued with a response similar to her earlier response at age 11. Comments by Carol Gilligan, Mitchell Lecture Series, State University of New York at Buffalo School of Law (Nov. 20, 1984), reprinted in *The 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law—a Conversation*, 34 BUFFALO L. REV. 11, 36 (1984), this poignantly illustrates the ability of an adolescent girl being socialized to the male world by learning to speak in two voices. At this point, we can only wonder whether at some age Amy will stop asking if we want to hear what she really thinks.

²³ Portia is one of the first women "lawyers" to be named in western culture. In *The Merchant of Venice*, Portia, disguised as a man (which is the only way she can argue the law), appears as a learned doctor of laws and eloquently pleads for mercy when others ask only for justice:

But mercy is above is scept'red sway;
It is enthroned in the hearts of kings,
It is an attribute to God himself,
And earthly powers doth then show likest God's
When mercy seasons justice.

women lawyers may be necessary to form a critical mass that will give full expression to a women's voice in law (whether expressed exclusively by women or with men in another voice.)

Because our realization that women can transform a profession is quite new, I call what follows "speculations on a women's lawyering process." I hope to provoke further inquiry and dialogue on this subject as we begin to include women lawyers in our studies of the legal profession and the legal system. In addition, I hope to encourage those who wish to give expression to values and behaviors in the legal profession that are currently under-represented to do so, with the belief that this will produce a better legal system for lawyers, clients, and others who are affected by our legal institutions.

I. A DIFFERENT VOICE: PSYCHOLOGICAL THEORIES ABOUT WOMEN

Several recent studies and books in psychological development have traced the implications of gender differences in psychological development for personality, moral development, child rearing, and ultimately, the very structure of major social institutions. The common theme that unites this body of work by psychologists such as Chodorow, Dinnerstein, Miller, Schaef, and most recently, Gilligan, is that women experience themselves through connections and relationships to others while men see themselves as separately identified individuals. In the view of Dinnerstein and Chodorow, these differences are the result of a child-rearing system which is based on mothering, so that growing up is a process of identification and connection for a girl and separation and individuation for a boy.²⁵ Miller and Schaef, working as psychologists, heard women express values different from men's: vulnerability instead of strength, and responsiveness instead of independence.²⁶ Noddings and Gilligan, both professors of education, observed values of caring, responsiveness and relatedness in women, while they found values of principle, rights and universalism in men.²⁷ These observations and hypotheses led to the conclusion that women tend to see themselves as affiliated and related to others, while men are more likely to see themselves as separate,

W. SHAKESPEARE, *The Merchant of Venice*, Act IV, Scene 1, in THE COMPLETE SIGNET CLASSIC SHAKESPEARE 630 (S. Barnet ed. 1963). See also C. GILLIGAN, *supra* note 4, at 105.

²⁴ See, e.g., Fox, *Good-bye to Gameplaying*, JURIS DR. 37 (Jan. 1978) (a powerful critique of the games which the practice of law consists of, including the macho sporting ethic in litigation; the author speaks about why she gave up litigation practice); Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980) (a more general and theoretical critique of the structure of law and legal systems as creations of men intending to protect and preserve patriarchal social relations).

²⁵ See, e.g., N. CHODOROW, *supra* note 7, and D. DINNERSTEIN, *supra* note 7.

²⁶ See J. MILLER, *supra* note 7, and A. SCHAEF, *supra* note 7.

²⁷ See C. GILLIGAN, *supra* note 7, and N. NODDINGS, *supra* note 7.

individualized, and different from (m)other. Although each of these writers came at their inquiry with different questions, their findings and theories are strikingly similar.²⁸

Because Carol Gilligan's work is the most recent entry into this stream of research, and because it has already served as a powerful heuristic for legal studies,²⁹ I will explore, mostly by speculative analogy rather than by suggesting a possibly fallacious direct relationship, how, from a women's different voice in moral development, we might infer a women's different voice in legal processes.

In her book, *In a Different Voice: Psychological Theory and Women's Development*,³⁰ Gilligan observes that much of what has been written about human psychological development has been based on studies of male subjects exclusively. As a consequence, girls and women have either not been described,³¹ or they are said to have "failed" to develop on measurement scales based on male norms.³² Just as Gilligan has observed that studies of human psychological development have been centered on males, feminists have observed the law to be based on male values and behaviors. As Frances Olsen notes:

Law is supposed to be rational, objective, abstract and principled, like men; it is not supposed to be irrational, subjective, contextualized or personalized like women. The social, political and intellectual practices that constitute "law" were for many years carried out almost exclusively by men. Given that women were long excluded from the practice of law, it should not be surprising that the traits associated with women are not greatly valued by law. Moreover, in a kind of vicious cycle, the "maleness" of law was used as a justification for excluding women from practicing law. While the number of women in law has been rapidly increasing, the field continues to be heavily male dominated.³³

This phenomenon has also been noted by the sociologist Cynthia Fuchs Epstein, who observed that because white middle-aged men have been the demographic norm of "lawyer" for so long, we come to identify the characteristics of white middle-aged maleness as necessary for lawyering. We do not consider what the qualities of being a lawyer are independent of their identification with the male gender.³⁴ Thus, with

²⁸ See *supra* note 7.

²⁹ See Karst, *Women's Constitution*, 1984 DUKE L.J. 447 (1984); Schneider, "In a Different Voice": Reflections on a Feminist View of Rights, GEO. WASH. L. REV. (forthcoming); Spiegelman, *Court-Ordered Hiring Quotas After Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-C.L. L. REV. (1985).

³⁰ C. GILLIGAN, *supra* note 4.

³¹ *Id.* at 151-56.

³² *Id.* at 16.

³³ F. Olsen, *The Sex of Law* (unpublished manuscript on file with the author).

³⁴ C. EPSTEIN, *WOMAN'S PLACE: OPTIONS AND LIMITS IN PROFESSIONAL CAREERS*, 87-88 (1970).

males as the only source of our descriptions of lawyers,³⁵ what is normal, good or true is identified solely with how men behave in law,³⁶ a close parallel to Gilligan's conclusions in the area of moral development.

The male-derived model of moral reasoning and psychological development described by Gilligan values hierarchical thinking based on the logic of reasoning from abstract, universal principles. Gilligan measures her findings against the work of her colleague, Lawrence Kohlberg. His theory of moral development comprised of six "universal" stages³⁷ is based on a study of eighty-four boys from childhood through adulthood. Gilligan explains that when Kohlberg's model is applied to women, they tend to score at stage three, a stage characterized by seeing morality as a question of interpersonal relations and caring for and pleasing others.³⁸ In looking at moral judgments and hearing the "women's voice," Gilligan discovered that:

[w]hen one begins with the study of women and derives developmental constructs from their lives, the outline of a moral conception different from that described by Freud, Piaget, or Kohlberg begins to emerge and informs a different description of development. In this conception, the moral problem arises from conflicting responsibilities rather than from competing rights and requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract.³⁹

An example drawn from Gilligan's work best illustrates the duality of girls' and boys' moral development. In one of the three studies on which her book is based,⁴⁰ a group of children are asked to solve Heinz's

³⁵ See *supra* note 5.

³⁶ See Note, *Toward a Redefinition of Sexual Equality*, *supra* note 8, at 499-508.

³⁷ L. KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981); L. Kohlberg, *The Development of Modes of Thinking and Choices in Years 10 to 16* (Ph.D. Dissertation, Univ. of Chicago, 1958). Kohlberg's six stages of moral development begin with an egocentric focus on satisfying moral problems based on individual needs (stages one and two) and move to a more other/social identified focus on rules of obedience for public order and predictability and approval based on customs and understandings of social norms (stages three and four) and conclude with the use of principles, abstractions and universal, free-standing logic (stages five and six). See C. GILLIGAN, *supra* note 4, at 27. Specifically, Kohlberg's stages of moral reasoning are:

Stage One: Punishment and Obedience Orientation (based on satisfying physical needs and avoiding punishment);

Stage Two: Instrumental Relativist Orientation (based on satisfying instrumental needs);

Stage Three: Interpersonal Concordance or "good boy-nice girl orientation" (based on efforts to please others);

Stage Four: Law and Order Orientation (based on authority and rule orientation);

Stage Five: Social Contract and Legalistic Orientation (based on general societal standards with utilitarian themes);

Stage Six: Universal Ethical Principles (based on logical, universal and consistent principles of justice, reciprocity and equality).

Adapted from Kohlberg, *From Is to Ought: How to Commit the Naturalistic Fallacy and Get Away With It in the Study of Moral Development*, in *COGNITIVE DEVELOPMENT AND EPISTEMOLOGY* 151-231 (T. Mischel ed. 1971).

³⁸ C. GILLIGAN, *supra* note 4, at 18.

³⁹ *Id.* at 19.

⁴⁰ Gilligan's book is based on three separate studies. In the first study, Gilligan interviewed 25

dilemma, a hypothetical moral reasoning problem used by Kohlberg to rate moral development on his six-stage scale. The dilemma is that Heinz's wife is dying of cancer and requires a drug which the local pharmacist has priced beyond Heinz's means. The question is posed: should Heinz steal the drug?⁴¹

To illustrate and explain the differences between the ways boys and girls approached this problem, Gilligan quotes from two members of her sample, Jake and Amy. Jake, an eleven-year-old boy, sees the problem as one of "balancing rights," like a judge who must make a decision or a mathematician who must solve an algebraic equation. Life is worth more than property, therefore Heinz should steal the drug.⁴² For Amy, an eleven-year-old girl, the problem is different. Like a "bad" law student she "fights the hypo"; she wants to know more facts:⁴³ Have Heinz and the druggist explored other possibilities, like a loan or credit transaction? Why couldn't Heinz and the druggist simply sit down and talk it out so that the druggist would come to see the importance of Heinz's wife's life? In Gilligan's terms, Jake explores the Heinz dilemma with "the logic of justice" while Amy uses the "ethic of care."⁴⁴ Amy scores lower on the Kohlberg scale because she sees the problem rooted in the persons involved rather than in the larger universal issues posed by the dilemma.⁴⁵

In conventional terms Jake would make a good lawyer because he spots the legal issues of excuse and justification, balances the rights, and reaches a decision, while considering implicitly, if not explicitly, the precedential effect of his decision. But as Gilligan argues,⁴⁶ and as I develop more fully below,⁴⁷ Amy's approach is also plausible and legitimate, both as a style of moral reasoning and as a style of lawyering. Amy seeks to keep the people engaged; she holds the needs of the parties and their relationships constant and hopes to satisfy them all (as in a negotiation), rather than selecting a winner (as in a lawsuit). If one must be hurt, she attempts to find a resolution that will hurt least the one who can least bear the hurt. (Is she engaged in a "deep pocket" policy analysis?) She looks beyond the "immediate lawsuit" to see how the "judgment" will

students enrolled in a course on moral and political choice and interviewed them again five years later to explore issues of moral choice and the self in young adults. In the second study, 29 women were interviewed when they were making a choice about whether to have an abortion; twenty-one were interviewed again at the end of the year following the choice. In the third study, a sample of males and females matched for age, intelligence, education, occupation and social class at nine points across the life cycle, were questioned about their conceptions of self and morality, their experiences of moral conflict and choice, and their judgments about hypothetical moral dilemmas. *Id.* at 2-3.

⁴¹ *Id.* at 25-26.

⁴² *Id.* at 25-27.

⁴³ *Id.* at 27-29.

⁴⁴ *Id.* at 30.

⁴⁵ *Id.* at 31.

⁴⁶ *Id.* at 29-32.

⁴⁷ See *infra* text accompanying notes 67-105.

affect the parties. If Heinz steals the drug and goes to jail, who will take care of his wife? Furthermore, Amy is concerned with *how* the dilemma is resolved: the process by which the parties communicate may be crucial to the outcome. (Amy cares as much about procedure as about substance.) And she is being a good lawyer when she inquires whether all of the facts have been discovered and considered.⁴⁸

The point here is not that Amy's method of moral reasoning is better than Jake's, nor that she is a better lawyer than Jake. (Some have read Gilligan to argue that the women's voice is better. I don't read her that way.) The point is that Amy does some things differently from Jake when she resolves this dilemma, and these things have useful analogies to lawyering and may not have been sufficiently credited as useful lawyering skills. Jake and Amy have something to learn from one another.

Thus, although a "choice of rights" conception (life vs. property) of solving human problems may be important, it is not the only or the best way. Responsibilities to self and to others may be equally important in measuring moral, as well as legal decision making, but have thus far been largely ignored. For example, a lawyer who feels responsible for the decisions she makes with her client may be more inclined to think about how those decisions will hurt other people and how the lawyer and client feel about making such decisions. (Amy thinks about Heinz, the druggist, and Heinz's wife at all times in reaching her decision; Jake makes a choice in abstract terms without worrying as much about the people it affects.)⁴⁹

In tracing through the sources of these different approaches to moral reasoning, Gilligan's analysis tracks that of Chodorow, Dinnerstein and Noddings.⁵⁰ Men, who have had to separate from their differently gendered mother in order to grow, tend to see moral dilemmas as problems of separateness and individual rights, problems in which choices must be made and priorities must be ordered. Women, who need not completely separate from their same gendered mother in order to grow, see the world in terms of connections and relationships. "While women thus try to change the rules in order to preserve relationships, men, in abiding by these rules, depict relationships as easily replaced."⁵¹ Where men see danger in too much connection or intimacy, in being engulfed and losing their own identity, women see danger in the loss of connection, in not having an identity through caring for others and by being abandoned and isolated.⁵²

⁴⁸ For a full discussion of Amy's and Jake's responses to the Heinz dilemma, see C. GILLIGAN, *supra* note 4, at 25-32.

⁴⁹ One critique of this exercise is that no one has asked for what Heinz's wife thinks about the situation. It is, after all, her life that is at stake. MacKinnon, *supra* note 8.

⁵⁰ See *supra* note 7.

⁵¹ C. GILLIGAN, *supra* note 4, at 44.

⁵² The same result may be observed even if one is not persuaded by the neo-Freudian model of

Both Gilligan and Noddings see differences in the ethics men and women derive from their different experiences of the world. Men focus on universal abstract principles like justice, equality and fairness so that their world is safe, predictable and constant. Women solve problems by seeking to understand the context and relationships involved and understand that universal rules may be impossible.⁵³

The two different voices Gilligan describes articulate two different developmental processes. To the extent that we all have both of these voices within us and they are not exclusively gender based,⁵⁴ a mature person will develop the ability to consider the implications of both an abstract rights analysis and a contextualized responsibilities analysis.⁵⁵ For women, this kind of mature emotional and intellectual synthesis may require taking greater account of self and less account of the other; for men, the process may be the reverse. Such an integration⁵⁶ will not resolve all issues of personal development. Those who seek interdependence will not necessarily find it by the individualistic integration and reciprocity of reasoning styles proposed above. And if this integration fosters equality between the sexes, there still remains the problem of equity. As one of Gilligan's subjects observed: "People have real emotional needs to be attached to something and equality doesn't give you attachment. Equality fractures society and places on every person the burden of standing on his own two feet."⁵⁷ The different paths toward mature moral development for men and women⁵⁸ may give us more than

child development: boys may be encouraged by either parent to individuate and separate as a process of growing up, regardless of the relationship to the mother, simply because of stereotypic notions of appropriate childrearing. See J. KAGAN, *THE NATURE OF THE CHILD* (1984).

⁵³ C. GILLIGAN, *supra* note 4, at 118.

⁵⁴ *Id.* at 2-3. Some may see these voices simply as two different voices which are not necessarily gender-related. As Gilligan says:

The different voice I describe is characterized not by gender but theme. Its association with women is an empirical observation, and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex. In tracing development, I point to the interplay of these voices within each sex and suggest that their convergence marks times of crisis and change. No claims are made about the origins of the differences . . .

Id.

⁵⁵ As a legal educator I have used this exercise heuristically to ask students how Amy would solve a particular legal problem and how Jake would solve the problem in order to suggest that these two perspectives lead to at least two possible solutions.

⁵⁶ Integration should not mean submersion of one into the other so the second gets lost, as some fear androgyny might do by eliminating all gender. However, integration of sexual themes in our present world usually means the engulfing of the feminine by the masculine. As in marble cake, where there is never enough chocolate for the chocolate lover, integration of gender themes in our present world usually means the engulfing of the female by the male.

⁵⁷ C. GILLIGAN, *supra* note 4, at 167. This is a quote from a male subject who, in expressing the pain of losing a relationship in which his experience of the relationship differed greatly from his girlfriend's, came to realize that relationships mean more than simple equality.

⁵⁸ As men proceed from stages of ego to social to universal values on Kohlberg's scale, women progress through corresponding stages of self (survival) to other (responsibility) to care (of

one road to take to the same place, or we may find that there is more than one interesting place to go.

II. THE DIFFERENT VOICES OF LAWYERING

What does moral or psychological development have to do with the law? Gilligan's observations about male-female differences in moral reasoning may have a great deal to suggest about how the legal system is structured, how law is practiced and made, and how we reason and use law in making decisions.⁵⁹ I will speculate about each of these below but will focus primarily on the implications of these insights for the lawyering process.

Two sets of questions illustrate how we might think about the impact of two voices on our legal system as presently constituted and as it might be transformed. First, how has the exclusion, or at least the devaluation,⁶⁰ of women's voices affected the choices made in the values underlying our current legal structures? When we value "objectivity," or a "right" answer, or a single winner, are we valuing male goals of victory, exclusion, clarity, predictability?⁶¹ What would our legal system look like if women had not been excluded from participating in its creation? What values would women express in creating the laws and institutions of a legal system? How would they differ from what we see now? How might the different male and female voices join together to create an integrated legal system?⁶² Second, can we glimpse enclaves of another set of values within some existing legal structures? Is the judge "male," the jury "female?" Is the search for facts a feminine search for context and the search for legal principles a masculine search for certainty and abstract rules? It could be argued that no functional system could be either wholly masculine or wholly feminine, that there is a tendency for one set of characteristics in a system to mitigate the excesses of the other. Thus, the harshness of law produced the flexibility of equity, and conversely, the abuse of flexibility gave rise to rules of law to limit discretion. In this sense, the legal system could be seen to encompass both male and

both self and other). Men and women may need to go through different development processes to arrive at maturity, a suggestion which has been noted by scholarly psychologists as well as popular writers. See, e.g., D. LEVINSON, *THE SEASONS OF A MAN'S LIFE* (1978); G. SHEEHY, *PASSAGES* (1976).

⁵⁹ See *supra* note 29.

⁶⁰ Some argue that women and all they value have been totally excluded from the legal system and from the world at large, see MacKinnon, *infra* note 86; others maintain that women and what they value are present, but devalued, see F. Olsen, *supra* note 33.

⁶¹ Predictability may be a male value since the male-dominated world of work may be more predictable than the largely female-dominated work of parenting.

⁶² As I have alluded to in *supra* notes 7 and 56, there is in this enterprise of labeling by gender a danger of creating further polarization rather than integration. Some polarization may be necessary before we can integrate, and indeed we are already situated in a world with more polarization than efforts to integrate.

female voices already. Yet, even though our present legal structures may reflect elements of both sets of values, there is a tendency for the male-dominated or male-created forms and values to control. Thus, equity begins to develop its own harsh rules of law and universalistic regulations applied to discretionary decisions, undermining the flexibility that discretion is supposed to protect.⁶³ Because men have, in fact, dominated by controlling the legal system, the women's voice in law may be present, but in a male form.

These two sets of questions explore a central issue, which is whether, to the extent that there are value choices to be made in the legal system, those choices will be differently made and with different results when the people who make decisions include a greater representation of women among their numbers. Some may prefer to see these different values as not necessarily taking gendered forms—I do. But even if the choices of values are not themselves gendered, it may be that women will favor one set of values over another in sufficient numbers, or with sufficient intensity, to change the balance at times.⁶⁴ Although existing structures give a glimpse of what the legal system could look like, we cannot yet know what the consequences of women's participation in the legal system will be—some fear the women's voice will simply be added on and be drowned out by the louder male voice; others fear an androgynous, unvoiced world with no interesting differences.⁶⁵

Perhaps by examining these issues in their concrete forms we can see how Portia's different voice might expand our understanding of the lawyering process. I will explore some of the tasks of the lawyer and skills that lawyers employ, and the larger adversarial system in which lawyering is embedded. The rules with which lawyers practice, which until recently have been articulated almost exclusively with male voices, will be examined so we can begin to speculate about how a woman's voice might affect the ethical rules which govern the profession and the substantive principles of the law. It is my hope that this preliminary review will spark more thorough and comprehensive research.

III. THE ADVOCACY-ADVERSARIAL MODEL

The basic structure of our legal system is premised on the adversarial model, which involves two advocates who present their cases to a disinterested third party who listens to evidence and argument and declares one party a winner. In this simplified description of the Anglo-American model of litigation, we can identify some of the basic concepts

⁶³ See, e.g., J. HANDLER, *THE CONDITIONS OF DISCRETION* (forthcoming).

⁶⁴ This was the argument some suffragists made. It is heard currently in political analysis referred to as "gender gap." See B. ABZUG, *THE GENDER GAP* (1984).

⁶⁵ See, e.g., Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1577 (1983).

and values which underlie this choice of arrangements: advocacy, persuasion, hierarchy, competition, and binary results (win/lose). The conduct of litigation is relatively similar (not coincidentally, I suspect) to a sporting event—there are rules, a referee, an object to the game, and a winner is declared after the play is over. As I have argued elsewhere,⁶⁶ this conception of the dispute resolution process is applied more broadly than just in the conventional courtroom. The adversarial model affects the way in which lawyers advise their clients (“get as much as you can”), negotiate disputes (“we can really get them on that”) and plan transactions (“let’s be sure to draft this to your advantage”). All of these activities in lawyering assume competition over the same limited and equally valued items (usually money) and assume that success is measured by maximizing individual gain. Would Gilligan’s Amy create a different model?

By returning to Heinz’s dilemma we see some hints about what Amy might do. Instead of concluding that a choice must be made between life and property, in resolving the conflict between parties as Jake does, Amy sees no need to hierarchically order the claims. Instead, she tries to account for all the parties’ needs, and searches for a way to find a solution that satisfies the needs of both. In her view, Heinz should be able to obtain the drug for his wife and the pharmacist should still receive payment.⁶⁷ So Amy suggests a loan, a credit arrangement, or a discussion of other ways to structure the transaction. In short, she won’t play by the adversarial rules. She searches outside the system for a way to solve the problem, trying to keep both parties in mind. Her methods substantiate Gilligan’s observations that women will try to change the rules to preserve the relationships.⁶⁸

Furthermore, in addition to looking for more substantive solutions to the problem (i.e., not accepting the binary win/lose conception of the problem), Amy also wants to change the process. Amy sees no reason why she must act as a neutral arbiter of a dispute and make a decision based only on the information she has. She “belie[ves] in communication as the mode of conflict resolution and [is convinced] that the solution to the dilemma will follow from its compelling representation. . . .”⁶⁹ If the parties talk directly to each other, they will be more likely to appreciate the importance of each other’s needs. Thus, she believes direct communication, rather than third party mediated debate, might solve the prob-

⁶⁶ Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

⁶⁷ Gilligan notes that Amy recasts the problem because she hears a different question than Jake does when she is asked, “Should Heinz steal the drugs?” For Amy, the question is not whether he should obtain the drug, but how. C. GILLIGAN, *supra* note 4, at 31.

⁶⁸ *Id.* at 44.

⁶⁹ *Id.* at 30.

lem, recognizing that two apparently conflicting positions can both be simultaneously legitimate, and there need not be a single victor.

The notion that women might have more difficulty with full-commitment-to-one-side model of the adversary system is graphically illustrated by Hilary, one of the women lawyers in Gilligan's study. This lawyer finds herself in one of the classic moral dilemmas of the adversary system: she sees that her opponent has failed to make use of a document that is helpful to his case and harmful to hers. In deciding not to tell him about the document because of what she sees as her "professional vulnerability" in the male adversary system, she concludes that "the adversary system of justice impedes not only the supposed search for truth (the conventional criticism), but also *the expression of concern for the person on the other side.*"⁷⁰ Gilligan describes Hilary's tension between her concept of rights (learned through legal training) and her female ethic of care⁷¹ as a sign of her socialization in the male world of lawyering. Thus, the advocacy model, with its commitment to one-sided advocacy, seems somehow contrary to "apprehending the reality of the other"⁷² which lawyers like Hilary experience. Even the continental inquisitorial model,⁷³ frequently offered as an alternative to the adversarial model, includes most of these elements of the male system—hierarchy, advocacy, competition and binary results.⁷⁴

So what kind of legal system would Amy and Hilary create if left to their own devices? They might look for ways to alter the harshness of win/lose results; they might alter the rules of the game (or make it less like a game); and they might alter the very structures and forms themselves.⁷⁵ Thus, in a sense Amy and Hilary's approach can already be found in some of the current alternatives to the adversary model such as mediation.⁷⁶ Much of the current interest in alternative dispute resolu-

⁷⁰ *Id.* at 135-36.

⁷¹ *Id.*

⁷² See N. NODDINGS, *supra* note 7, at 14.

⁷³ The inquisitorial system contemplates a more active judge and is considered to be less adversarial and less controlled by combative attorneys than is the Anglo-American system. However, there is a great deal of scholarly debate about the accuracy of this picture. See generally M. SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION*, ch. 1 (1979).

⁷⁴ The notion that the adversary system requires binary results may be somewhat exaggerated given the possibility of compromise in verdicts, see Coons, *Approaches to Court Imposed Compromises—The Uses of Doubt and Reason*, 58 NW. U.L. REV. 750 (1967), and the use of complex and creative remedies in some forms of major litigation, see Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

⁷⁵ For example, Amy and Hilary may use mediation or pairs of judges in which one of the pair is a woman and the other a man. See *infra* note 101.

⁷⁶ Mediation was first suggested by men. See, e.g., O. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENTS* (1978). However, to the extent that mediation is regarded as "soft," men who mediate are regarded as being somewhat like women (e.g., nonanalytic and nonassertive) and are devalued accordingly, or treated as "social females," see Littleton, *The Reconstruction of Sex Equality* (1985) (unpublished manuscript on file with author). In my course on mediation and alternative dispute resolution, a disproportionate number of the students are women, indicating a high level of interest in mediation among women entering the legal profession.

tion is an attempt to modify the harshness of the adversarial process and expand the kinds of solutions available, in order to respond better to the varied needs of the parties. Amy's desire to engage the parties in direct communication with each other is reflected in mediation models where the parties talk directly to each other and forge their own solutions.⁷⁷ The work of Gilligan and Noddings, demonstrating an ethic of care and a heightened sense of empathy in women, suggests that women lawyers may be particularly interested in mediation as an alternative to litigation as a method of resolving disputes.⁷⁸

Even within the present adversarial model, Amy and Hilary might, in their concern for others, want to provide for a broader conception of interested parties, permitting participation by those who might be affected by the dispute (an ethic of inclusion).⁷⁹ In addition, like judges who increasingly are managing more of the details of their cases,⁸⁰ Amy and Hilary might seek a more active role in settlement processes and rely less on court-ordered relief. Amy and Hilary might look for other ways to construct their lawsuits and remedies in much the same way as courts of equity mitigated the harshness of the law courts' very limited array of remedies by expanding the conception of what was possible.

The process and rules of the adversary system itself might look different if there were more female voices in the legal profession. If Amy is less likely than Jake to make assertive, rights-based statements, is she less likely to adapt to the male-created advocacy mode? In my experience as a trial lawyer, I observed that some women had difficulty with the "macho" ethic of the courtroom battle. Even those who did successfully adapt to the male model often confronted a dilemma because women were less likely to be perceived as behaving properly when engaged in

⁷⁷ There are many models of mediation being used in a variety of different contexts, but in its classic form the mediator's role is to facilitate communication between the parties so that they can reach their own solution to the problem. Mediation should not be confused, in this context, with arbitration, in which the third party acts more like an adjudicator and actually decides for the parties. See, e.g., J. FOLBERG & A. TAYLOR, *MEDIATION* (1984); Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982).

⁷⁸ Mediation has become a complex subject for feminists. Some feel that feminism and women have much to bring to the practice of mediation. See, e.g., Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQUALITY 21 (1984). Other feminists see mediation as being harmful to the interests of women in contexts where they will be forced to compromise newly obtained legal rights or where there is an imbalance of power between the sexes, as in many domestic disputes. See Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431 (1985). My view is that mediation as a process is not necessarily good or bad for women's interests; it depends on who the mediator is and what model of mediation is being used. For instance, mothers frequently mediate between children they love equally. However, some disputes may need authoritative rulings to set precedents or to prevent the abuse of large disparities of power. See Menkel-Meadow, *For and Against Settlement*, 33 UCLA L. REV. 301 (1985).

⁷⁹ This principle of inclusion is given some recognition in the current rules on joinder of indispensable parties. FED. R. CIV. P. 19. Would women want more parties to be indispensable?

⁸⁰ See Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

strong adversarial conduct.⁸¹ It is important to be "strong" in the courtroom, according to the stereotypic conception of appropriate trial behavior. The woman who conforms to the female stereotype by being "soft" or "weak" is a bad trial lawyer; but if a woman is "tough" or "strong" in the courtroom, she is seen as acting inappropriately for a woman. Note, however, that this stereotyping is contextual: the same woman acting as a "strong" or "tough" mother with difficult children would be praised for that conduct. Women's strength is approved of with the proviso that it be exerted in appropriately female spheres.

Amy and Hilary might create a different form of advocacy, one resembling a "conversation" with the fact finder, relying on the creation of a relationship with the jury for its effectiveness, rather than on persuasive intimidation. There is some anecdotal evidence that this is happening already. Recently, several women prosecutors described their styles of trial advocacy as the creation of a personal relationship with the jury in which they urge the jurors to examine their own perceptions and values and encourage them to think for themselves, rather than "buying" the arguments of one of the advocates.⁸² This is a conception of the relationship between the lawyer and the fact-finder which is based on trust and mutual respect rather than on dramatics, intimidation and power, the male mode in which these women had been trained and which they found unsatisfactory.⁸³

In sum, the growing strength of women's voice in the legal profession may change the adversarial system into a more cooperative, less

⁸¹ This "macho" trial ethic dominates the teaching of trial advocacy in programs such as the one offered by the National Institute for Trial Advocacy. Trial attorneys are taught to intimidate their witnesses, especially in cross-examination, to control the witness by never asking a question to which the attorney does not already know the answer, and to regard impeachment of a witness as a highly confrontational act. Ironically, some trial attorneys think that a non-confrontational impeachment process is frequently much more effective. See, e.g., P. BERGMAN, *TRIAL ADVOCACY IN A NUTSHELL* (1979).

A trial judge once threatened to hold me in contempt of court for cross-examining a witness, even though opposing counsel had not made any objections, because he thought it "inappropriate for a young lady to be so argumentative." This is a good example of the stereotyping described by Epstein, *supra* note 34, at 87-88. Behavior that seems appropriate, indeed competent, for a male, is often seen as totally inappropriate for a female.

⁸² Women as Criminal Trial Attorneys, workshop presented at the Conference on Women in the Legal Workforce, University of Southern California, Los Angeles (March 19, 1983). Prosecutors who spoke of these competing images of trial lawyer styles work in an office that has just been ordered, as a result of a sex discrimination suit, to promote more women. Experienced women prosecutors in that office had seldom been promoted beyond a certain level though less experienced men had been. Could this have been because the women were not seen as fulfilling the male image of a good prosecutor? In the same city, a supervisor in the Public Defender's office has ordered the attorneys to try a certain quota of cases per year "to demonstrate to the DA how tough we are." *Id.*

⁸³ The recent movie *All of Me* amusingly illustrates how women's consciousness might transform trial practice. While actors Lily Tomlin and Steve Martin inhabit the same male lawyer's body, they battle over whose trial ethics should prevail. Martin, as the stereotypic male trial attorney, is willing to use any argument or theory to win his case, while Tomlin is shocked and refuses to permit him to use an argument that is not factually correct, and that would hurt the other side.

war-like system of communication between disputants in which solutions are mutually agreed upon rather than dictated by an outsider, won by the victor, and imposed upon the loser. Some seeds of change may already be found in existing alternatives to the litigation model, such as mediation. It remains to be seen what further changes Portia's voice may make.

IV. LAWYERS AT WORK: THE FEMINIZATION OF LAW PRACTICE

Does the female voice of relationship, care and connection lead to a different form of law practice? Although the present adversarial system may limit the ways in which concern for others may be expressed toward adversaries, the values of relationship and care may be expressed with one's work partners. In this area at least, we have some evidence that Portia's voice has had an influence. As Epstein has documented,⁸⁴ early attempts to form a separate feminist practice focused on establishing nonhierarchical organizations with participatory decision-making. This was a political expression of the psychological qualities observed by Gilligan in the relationships and connections that women lawyers sought to forge with each other while engaged in practices that pitted them against the traditional models. Some of these women lawyers were explicit in their rejection of male principles in the ordering of legal work.⁸⁵

The historical source that helped create these feminist forms derives from perhaps the most original feminist methodology to date, the consciousness raising group. As Catharine MacKinnon has argued,⁸⁶ this particular form of organization is more than a form; it is a methodology that creates knowledge from shared, collective experience. Communication occurs in a leaderless circle, and in some groups attention is paid to equality of presentation time and rotation of instrumental and affective tasks. There is a devaluation of expertise; everyone has life experiences from which something might be worth learning. Can this form of female organization of work affect the practice of law?

While hierarchy produces efficiency and individual achievement, as lawyers, Amy and Hilary might chose to emphasize other values such as collectivity and interpersonal connection. This attempt to work in a different way not only affects relationships within the working unit, but is also apparent in the work of feminists who seek to demystify law and the legal profession by working with clients on lay advocacy projects or self-representation.⁸⁷

⁸⁴ C. EPSTEIN, *supra* note 5, ch. 9.

⁸⁵ FOX, *supra* note 24.

⁸⁶ MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1984); MacKinnon, *Feminism, Marxism and the State: An Agenda for Theory*, 7 SIGNS 515 (1982).

⁸⁷ For an argument for the demystification of law, see Rifkin, *supra* note 24, at 84-88.

To illustrate the issues involved in a women's way of practicing law, consider the following example. My colleague Grace Blumberg, an expert in marital property law, was asked to write the first draft of an amicus brief in a case involving the legal treatment of a professional degree in a community property regime.⁸⁸ She describes the work on this effort with a group of California women lawyers as follows:

The effort to transform a generally literate coherent brief into "proper form" took some 100 person hours, more than eight times the amount of time it took the author to write the brief. . . . The participants, leaving the author aside, seemed to get some substantial psychic rewards from this 100 hours spent mostly in conferences of two and three persons. They created an atmosphere of social intimacy between relative strangers. Although at least 90 percent of the time was spent hard at work, the atmosphere was of a social event. Food was always served even though it was not any discernible meal time. . . . Personal information and confidences were exchanged in the interstices of work. I was struck by the incongruity of my product (female)⁸⁹ and my process (male) and in contrast, their product (male) and process (female).⁹⁰ My product was revealing, tentative and dialectic. In contrast my process was individualistic and individual, highly concerned with the goal of efficiency and not at all interested in collaboration as an end in itself. In contrast, their product was extremely formal, authoritarian, concealing and impersonal. Their process was communitarian and communicative, full of feeling and interpersonal experience.⁹¹

The story of this brief-writing exercise also reveals another aspect of the women's lawyering process—concern for the interconnection of personal and professional life. In the "interstices of work," the lawyers engaged in this project shared information about their personal lives and brought sustenance to each other (intellectually, emotionally and nutri-

⁸⁸ The case was *In re Marriage of Sullivan*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984), involving the question of whether a professional degree, in this case a medical degree, is community property for the purposes of allocating and dividing its proceeds at the time of marital dissolution. The author of the brief is an expert on the allocation of marital property and a feminist who saw one of the issues as protecting a woman's investment in her husband's degree by foregoing the opportunities to develop her own career and by working to support the acquisition of the husband's professional degree. The case raises interesting issues for professional women in deciding whether their affiliation is with the professional class, in which case they would probably see the degree as separate property, or with women as a class, who in the present world would stand to gain more from a holding that a professional degree is community property. The case was decided on hybrid grounds: the court recognized a right of reimbursement, but avoided deciding the community property issue. *Id.* at 768-69, 691 P.2d at 1025, 209 Cal. Rptr. at 358. The California legislature acted quickly to formalize the reimbursement treatment while the *Sullivan* case was pending before the Supreme Court.

⁸⁹ She considered her product to be female because it was scholarly, tentative, and not argumentative, but her process to be male because she worked alone as an expert and was concerned with efficiency in the process of completing the brief.

⁹⁰ The group's product was considered to be male because it was a traditional argumentative brief, stated in definite, authoritative terms, and their process to be female because of the collaborative and communitarian manner in which the work was done.

⁹¹ Letter from Grace Blumberg to Carrie Menkel-Meadow (Jan. 10, 1982) (on file with the author).

tionally). Virtually every report of women lawyers discusses the impact of personal lives on professional lives and vice versa, where one finds almost no such reports in the descriptions and ethnographies of male lawyers.⁹² The concern for the quality of life and the relation between one's work and one's personal life is consistent with the ethic of care and relationship exhibited by Gilligan's female subjects. To Jake, who can separate life and property, the division between work and the rest of one's life is easier. Indeed, the inability to individuate reported by Gilligan has been noted as sociologically dysfunctional for women lawyers who do not have enough "role virtuosity"⁹³ to separate different aspects of themselves so that they can convert from adversarial courtroom conduct in one moment to a collegial meal with opposing counsel in the next moment.

Perhaps the most salient feature of Portia's different voice is in the lawyer-client relationship, where the values of care and responsibility for others seem most directly applicable. Amy and Hilary, with their ability to "take the part of the other and submerge the self," may be able to enter the world of the client, thereby understanding more fully what the client desires and why, without the domination of what the lawyer perceives to be "in the client's best interest." More fully developed sensitivities to empathy and altruism, as reported by Gilligan and Noddings, may enable women lawyers to understand a fuller range of client needs and objectives. As we increasingly become aware that lawyers and clients may not have the same view of the world or what they want from that world,⁹⁴ the ability to examine *all* of the client's perspective becomes even more significant. Where the Jakes of this world may make assumptions about the primacy of economic and efficiency considerations of their cases, the Amys and Hilarys may see a greater number of issues in the social, psychological and moral aspects. Of course, in a fully mature and integrated vision of lawyering all of these aspects of the case would be considered important, as noted by one of Gilligan's subjects:

It is taking the time and energy to consider everything. To decide carelessly or quickly or on the basis of one or two factors when you know that

⁹² Menkel-Meadow, *Women in Law?*, *supra* note 1, at 195; *see also supra* note 5.

⁹³ Role virtuosity is the ability to perform a large number of potentially conflicting roles. C. EPSTEIN, *supra* note 5, at 288. Lawyers are expected to perform a large number of roles, some of which require one to play different roles with the same people, such as when an adversary on a case turns out to be a colleague on a bar association committee. Shakespeare aptly described the phenomenon of role virtuosity among lawyers:

Please ye may contrive this afternoon
And quaff carouses to our mistress' health
And do as adversaries do in law,
Strive mightily, but eat and drink as friends.

W. SHAKESPEARE, *The Taming of the Shrew*, Act I, Scene 2, in *THE COMPLETE SIGNET CLASSIC SHAKESPEARE*, *supra* note 23, at 340.

⁹⁴ *See* D. ROSENTHAL, *LAWYER, CLIENT: WHO'S IN CHARGE?* (1974); D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING* (1977); Lehman, *The Pursuit of a Client's Interest*, 77 *MICH. L. REV.* 1078 (1979); Menkel-Meadow, *supra* note 66.

there are other things that are important and that will be affected, that's immoral. The moral way to make decisions is by considering as much as you possibly can, as much as you know.⁹⁵

Where a reluctance to make choices and universal judgments may prevent girls from reaching Kohlberg's fifth or sixth stages,⁹⁶ the tendency to personalize and contextualize problems may incline women lawyers to ask for more information on a broader range of subjects and thereby develop a fuller understanding of the context of the client's life. This, in turn, may make women better lawyers, especially in their relationships with clients and in their ability to see the human complexities of some legal problems.

V. LEGAL REASONING AND RULE-MAKING

In presenting their legal cases within a differently structured system, Amy and Hilary might reason about and plan their cases with a hope of expressing feminine values in their decision-making. Amy and Hilary might create different rules of the game. If Amy "fights the hypo" to learn more facts, might she not have a different conception of relevance and admissibility in deciding a dispute? If women are more concerned with the context in which the dispute is embedded, would they not search for more facts and be less concerned about creation of a precedent of universal applicability?⁹⁷ Gilligan suggests that women seek to reconstruct hypothetical dilemmas like Heinz's in order to get more information about the people and the places they live to avoid making abstract, formal judgments that might not work in particular cases.

Gilligan also points out that the insistence on more facts and on a more contextualized understanding of the dilemma helps the actor appreciate the social contingencies of the problem:

Hypothetical dilemmas, in the abstraction of their presentation, divest moral actors from the history and psychology of their individual lives and separate the moral problem from the social contingencies of its possible occurrence. In doing so, these dilemmas are useful for the distillation and refinement of objective principles of justice and for measuring the formal logic of equality and reciprocity. However, the reconstruction of the dilemma in its contextual particularity allows the understanding of cause and consequence which engages the compassion and tolerance repeatedly noted to distinguish the moral judgments of women. Only when substance is given to the skeletal lives of hypothetical people is it possible to consider the social injustice that their moral problems may reflect and to imagine the individual suffering their occurrence may signify or their resolution

⁹⁵ C. GILLIGAN, *supra* note 4, at 147.

⁹⁶ *Id.* at 2-3.

⁹⁷ Is the case-by-case development of the common law a more contextualized, female process, and the creation of statutory law a more universalistic, male process?

engender.⁹⁸

These observations have implications for legal education as well as the practice of law. If the reconstruction of legal problems in their historical, psychological, and social contexts is useful for the "distillation and refinement of objective principles of justice and for measuring the formal logic of equality," then in preparing people to be lawyers, Amy and Hilary might include more interdisciplinary work as educationally relevant to law school.⁹⁹ Legal problems would be more likely to be seen as a "web," perhaps a seamless one, of multivariate causes and consequences, all requiring study.

According to Gilligan, Amy and Hilary have trouble judging disputes in a male-created context because of their difficulty in perceiving one right answer, and also perhaps because of the price they might pay in losing the approval of one of the parties.¹⁰⁰ Might more women judges affect the process of judging? Does the use of a jury provide a useful framework for a kind of judging where no single perception of the truth must prevail, but where a verdict is the product of a mediated consensus? If men and women approach the world with different substantive values, should each trial court have a team of judges, one male and one female?¹⁰¹ If the male judge emphasizes justice, might the female judge pay attention to mercy, seeking that resolution "in which no one is hurt?"¹⁰²

If Amy and Hilary use different considerations in their moral reasoning, would they create different ethical codes for the profession based on their different ways of engaging in moral reasoning? We have some evidence that Hilary would not place the same emphasis on the adversarial model of placing one's own client above the other if the result might be to hurt the other side (as well as to defeat a meritorious claim).¹⁰³ Would Amy and Hilary have adopted the original Kutak Commission's proposal¹⁰⁴ to increase the duty of a lawyer to reveal a client's wrongdoing if it caused harm to another? Would Amy and Hilary create rules about relationships between lawyers, based on mutual affiliation in the same profession, and requiring greater candor and fair-

⁹⁸ C. GILLIGAN, *supra* note 4, at 100.

⁹⁹ This argument parallels the critique of law and legal education made first by the legal realists and more recently by the Critical Legal Studies movement. See, e.g., Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); THE POLITICS OF LAW (D. Kairys ed. 1982) [hereinafter cited as Kairys].

¹⁰⁰ See C. GILLIGAN, *supra* note 4, at 66.

¹⁰¹ I am indebted to Janet Lederman for exposure to the practice of this idea.

¹⁰² See C. GILLIGAN, *supra* note 4, at 105.

¹⁰³ See *id.* at 135; see *supra* text accompanying notes 70-76.

¹⁰⁴ See Commission on Evaluation of Professional Standards, Model Rules of Professional Conduct (Discussion Draft, Jan. 30, 1980). The rules as adopted by the American Bar Association in August 1983 were significantly different from this discussion draft in that requirements for mandatory *pro bono* work, mandatory disclosure of client wrong-doings, and a duty of fair dealing in negotiation were deleted in the final version.

ness in dealing with each other?¹⁰⁵ Would the conflict of interest rules or withdrawal from representation rules be different because of an ethic of care and affiliation that would lead to a different conception of client loyalty? Might a broader conception of the legal problem and its causes lead to less concern about the unauthorized practice of law and more toleration, if not encouragement, of work with other professionals and lay persons to solve those problems?

These are only a few of the available speculations about how our adversarial system might be affected by Portia's different voice. These and others not here mentioned await further expression and study as more women enter the legal profession and study its effects.

VI. THE SUBSTANCE OF THE LAW: LAWMAKING IN A DIFFERENT VOICE

What if Amy and Hilary had been or could become lawmakers—whether legislators or judges—using a different voice in legal reasoning and lawmaking? Would the substance or principles of our laws be any different? This is a large question which occupies many of those at work on feminist jurisprudence.¹⁰⁶ I do not intend to take up this issue in any great detail here. I will simply explore some of the more obvious issues raised by the work reviewed in this essay and emphasize that most, if not all, of our laws are man-made. It might be useful to speculate on how different moral emphases might create new laws or express values other than those reflected in our current law.

My colleague Kenneth Karst has recently attempted to explore the implications of Gilligan's analysis for a "Woman's Constitution" by considering how women's values might infuse and perhaps change our conceptions of the meaning of the Constitution.¹⁰⁷ He suggests that women's concern for "webs of connection" might result in a more inclusive reading of the equal protection clause. Further, he suggests that the values in the Constitution may derive from a male conception of freedom that is expressed in terms of freedom *from* the interference of others. For example, the rights of liberty, property, due process and equality express a desire for separation from the government and from others. In essence, our basic liberties are expressed as individual liberties rather than as col-

¹⁰⁵ Compare White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RESEARCH J. 926 (1980) with Proposed Rule 4.2, Model Rules of Professional Conduct, *supra* note 104. The proposed rule, which would have required truthfulness in negotiation, was deleted from the final rules as approved by the American Bar Association.

¹⁰⁶ See E. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN (1980); MacKinnon, *supra* note 86; Schneider, *supra* note 29; Rifkin, *supra* note 24; Scales, *Toward a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981); Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WISC. L. REV. 55 (1979); Taub & Schneider, *Women's Subordination and the Role of Law in Kairy's*, *supra* note 99, at 117.

¹⁰⁷ Karst, *supra* note 29.

lective rights.¹⁰⁸

Karst evocatively suggests that a women's voice of care and connection might lead to doctrinal changes in the areas of state action in discrimination law and in the state's affirmative duty to assist all its members to be able to fully participate in the community. Thus, our conception of state responsibility under the Constitution might be enlarged, and a conception of "responsibility" might supplement or replace altogether our notion of individualistic constitutional "rights."¹⁰⁹ Karst also suggests that the political context of lawmaking, particularly in the constitutional arena, would be more likely to be expressly involved in legal decision-making with a stronger women's voice by explicitly providing for more participation by women on the theory that they have something unique to contribute. Most interesting in Karst's analysis is the notion that the very terms of our constitutional and legal vocabulary might be redefined with a women's voice in greater evidence: words such as liberty, autonomy and equality might come to mean different things when expressed with a women's voice or looked at in a women's context. A few illustrations might illuminate these speculations.

Today, even the most important of "women's rights," the "right" to abortion, is framed exclusively in individualistic terms of privacy and professional decision-making. Would women constitutional lawmakers see these rights in other terms—in values of inclusion, connection, collectivity and social responsibility? Would a woman's concern over reproduction be seen as more her own and less the doctor's?¹¹⁰ If the women's legal rights movement had not been forced to assimilate itself to a male-ordered constitution based on individual rights, it might have adopted different strategies for cases such as the pregnancy cases.¹¹¹ Women might have argued not for the right to be treated as having an individual disability, but for the requirement that society acknowledge and act on its collective responsibility for reproduction and its costs.¹¹²

Definitions of liberty would most likely be different if Amy and Hil-

¹⁰⁸ Whether wittingly or not, in criticizing the individualistic and indeterminate nature of legal rights, Karst and Gilligan have aligned themselves with Critical Legal Studies scholars.

See, e.g., Schneider, *supra* note 29; Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978); Freeman, *Anti-Discrimination Law: A Critical Review*, in Kairys, *supra* note 98, at 96; Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 211-14 (1979). See also Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175 (1982).

¹⁰⁹ Karst, *supra* note 29, at 493.

¹¹⁰ See *Roe v. Wade*, 410 U.S. 113 (1973).

¹¹¹ See *Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). See also Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Littleton, *supra* note 76.

¹¹² I have alluded here to aspects of the debate about equal treatment versus special treatment (or formal versus substantive equality) that is being carried on in feminist theory circles. See Williams, *supra* note 8; Note, *Toward a Redefinition of Sexual Equality*, *supra* note 8. This is an important debate, but beyond the scope of this article.

ary sat on the Supreme Court.¹¹³ The narrow definition of liberty as the possible loss of individual physical liberty would probably be enlarged to include the permanent disconnection from one's child as a sufficient denial of liberty to justify its legal protection through the appointment of counsel and other protections.¹¹⁴

As feminist jurisprudence has begun to explore such questions as the meaning of a "rights-based" strategy¹¹⁵ for empowering women in society, we have learned that equality may not be sufficient in a world where one has the right to equal pay for equal work, but where equal work is not available. As equity and comparable worth have come to replace equality in some contexts, other staples of our jurisprudence may have to be reconsidered. Reciprocity connoting separable obligations may be replaced by interdependence connoting mutuality of need. Citizens could have a "right" to be connected, to belong, to be affiliated, to be cared for (an expanded social welfare program?), at the same time that they have the right to be free from coercion.

I do not mean to suggest that all women speak with a unified voice on these issues; already we have evidence that women lawmakers speak with many voices.¹¹⁶ However, I do think that an increasing number of women's voices could or will alter our legal sensibilities and values. The issues are far too complex to be explored in detail here, but the discussion and debates about the laws that Portia's voice might create will affect the legal culture for some time to come.

VII. DIRECTIONS FOR NEW SPECULATIONS

This brief and speculative discussion of how another voice might inform the law and the lawyering process may create more problems than it illuminates. Are these different voices gender-based or just two thematically different ways of looking at the world? If these are women's voices, why haven't they been heard yet, since there are an increasing number of women in all parts of the profession? Will the new voices become assimilated to the old before they are heard in the legal system? Have those women who have already become lawyers been socialized or self-selected to succeed with a man's voice? Have we sought to explain

¹¹³ I am aware that Sandra Day O'Connor sits on the Supreme Court, and that thus far she has not spoken in a different voice. What better proof could there be that the different voices are not exclusively gender-based and that success in the present world has required some assimilation to the male mode?

¹¹⁴ See *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18 (1981), in which the Supreme Court held that the termination of parental rights of an imprisoned mother did not constitute a sufficient liberty interest to require court-appointed counsel. This opinion demonstrates a particularly disconnected, individualistic conception of liberty. My speculation is that women judges might be more likely to see the connection to a child as a "liberty" interest.

¹¹⁵ See Schneider, *supra* note 29.

¹¹⁶ See *supra* notes 111-114.

too much by transposing psychological observations to the legal arena? And perhaps most importantly, how will the "women are different" argument play itself out in current legal disputes? Many of us feel the differences every day. What we deplore is when they are used to oppress or disempower us or when they are used as immutable stereotypes that prevent recognition of individual variations. We don't yet know how many of the differences will disappear in a world socially and legally constructed so that gender is not a basis for domination.¹¹⁷ My point of view is that while we are observing the differences we might ask if we have something to learn from them. Whether or not the different voice is gendered, we might look at how our legal system might take account of a few more voices.¹¹⁸

The new voice may create its own problems and dilemmas—the values of care, responsibility and relationship present their own difficulties. Can we care for all? How many (our client, the other client, the other lawyer, the entire system) can we be responsible for at any one time? Are all relationships good, the unequal relationships to the same extent as the equal relationships? By caring too much for others, do we lose sight of ourselves? Will too much contextualism prevent the emergence of any general principles by which we can guide ourselves? These are among the difficulties we will have to confront when and if a women's voice in the lawyering process is heard.

It is increasingly important to examine whether and how Portia might speak in a different voice and how we might try to avoid descriptions of the legal world that commit a serious fallacy by using the part (the male world of lawyers) to describe the whole. We have a demanding research agenda ahead for the study of a women's lawyering process in legal education, in the practice of law, in the structure of the profession and the legal system, and in the doctrinal and substantive values of our laws.

¹¹⁷ See Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977).

¹¹⁸ Other previously excluded voices, such as the voices of Black, Hispanic, Asian, gay or disabled lawyers, might also change the way we view the legal system some day when all have had a chance to express those voices and be heard.