In: legal ethics and legal practice: contemporary issues (ed. Parker/Sampford): p. 25-56

LJ 413-J

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Portia Redux: *Another Look at Gender, Feminism, and Legal Ethics*[1]

CARRIE MENKEL-MEADOW

I. Introduction: The Opposing Images of Justice and Care, Justice and Mercy

In 1985 I wrote an article entitled, 'Portia In A Different Voice: Speculations on a Women's Lawyering Process'.[2] In that article I attempted to explore how gender differences might effect the ways in which lawyers performed their tasks, structured their work, made ethical decisions, and made and enforced the law. The article was a speculation on and application of the then very popular theories of a noted educational psychologist, Carol Gilligan. Gilligan's book, *In A Different Voice: Psychological Theory and Women's Development*,[3] was at that time both soundly embraced and criticized by American, British, and Australian feminists.[4] Her argument, which I will elaborate again below, posited a male mode of moral reasoning

[1] This piece represents an act of arrogance and humility, not unlike the twin oppositions of justice and mercy. It seems arrogant to me to take on and correct my own ideas, to grant them an importance others have not. Yet, it is because I have learned so much from others reacting to my earlier work and to my reading of Portia, that I humbly ask the permission to correct myself and to be allowed publicly to acknowledge the greater complexity that comes from realizing that nothing is as simple as we think. In the years I have been thinking about these issues, and *The Merchant of Venice* in particular, I have benefited greatly from conversations, discussions and readings with others. I especially want to thank Richard Weisberg, Daniel Lowenstein, Robert Watson and Jane Maslow Cohen who have greatly affected my thinking about Portia, as well as the participants in the Griffith University Conference on Legal Ethics, particularly Stephen Parker, Max Charlesworth, Richard Tur, Charles Sampford, and my friend, David Luban. I would also like to thank the University of Iowa Law Faculty Colloquium, Owen Fiss' Seminar on Feminism and Law at Yale Law School, Ellen Aprill, Mitt Regan, Bill Eskridge, Mike Seidman, Naomi Cahn, and my colleagues at UCLA and Georgetown for their helpful comments, criticisms, arguments, and support and their ongoing engagement with the issues raised herein.

[2] C. Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process', *Berkeley Women's L.J.* 1 (1985), 39. (Hereinafter: *Portia I.*)

[3] C. Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (1982). Hereinafter: *Different Voice.*

[4] See, e.g., C. Smart, *Feminism and the Power of Law* (1989), 72–76 (criticizing Gilligan's emphasis on 'feminine virtues' as the antithesis of patriarchal values). See generally N. Naffine, 'Law and the Sexes: Exploration in Feminist Jurisprudence' *L. Inst. J.* 65 (1991), 984.

referred to as the 'logic of the ladder' because of its vertical hierarchy of values.[5] This male mode of reasoning was based on abstracted, universalistic principles applied to problematic situations to create an 'ethic of justice'.[6] Opposed to male moral reasoning was the female 'ethic of care', based on the structure of the 'web'. This female ethic was grounded in a relational, connected, contextual form of reasoning which focused on people, as well as the substance of a problem.[7]

Both Carol Gilligan and I used the character of Portia from Shakespeare's *The Merchant of Venice*[8] to illustrate the oppositional ethics that exist in any problem of justice or moral reasoning. Both of us inscribed in our reading of Portia — disguised as a male jurist and variously interpreted to be a lawyer, judge, legal envoy, or law clerk — a lawyer who appealed to the equitable, contextual, merciful sides of law, rather than to the draconian certainty of rules and universal principles.

A great deal has happened since 1985, and I welcome this opportunity to re-examine the arguments that I and others have made in our claims of a feminist ethic based on an ethic of care.[9] In this article, I shall first review the initial arguments and claims of those of us who used the structure and findings of Gilligan's work to create a claim of an 'ethic of care' based on a women's lawyering process, differentiated from the more conventional and accepted male norm of lawyering. Secondly, I shall briefly review the theoretical, empirical, and methodological critiques of this work that emerged in the years following publication, as well as debate about these claims. Thirdly, I shall report, briefly, on some of the emerging empirical tests of these claims. Fourthly, I want to re-explore the role that the metaphors and images of the character of Portia play in this debate. My own re-reading of Portia's lawyerly role illuminates the complexity of the issue of what it means to engage in a 'woman's lawyering process'. I

[5] *Different Voice*, above n. 3, at 62–63. [6] Ibid. [7] Ibid.

[8] William Shakespeare, *The Merchant of Venice*, ed. J. R. Brown (The Arden Shakespeare 1964).

[9] See, e.g., J. Areen, 'A Need for Caring', *Mich. L. Rev.* 86 (1988), 1067, 1073 (highlighting the use of the parent-child relationship as the paradigm for a new approach to moral issues based on Gilligan's work establishing a 'care perspective'); L. Bender, 'From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law', *Vt. L. Rev.* 15 (1990) 1, 7 (defending feminist 'difference theory' against critiques that it contributes to the inability to speak of women as a class); J. Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations For Our Judges', *S. Cal. L. Rev.* 61 (1988) 1877, 1880 (questioning the ability of judges to be 'impartial,' asserting instead that judges administer the law with both an 'ethic of care' and 'justice'); S. Sherry, 'Civic Virtue and the Feminine Voice in Constitutional Adjudication', *Va. L. Rev.* 72 (1986), 543, 584–91 (using Gilligan's work to propose two different means to move moral development from its conventional roots); P. J. Spiegelman, 'Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web', *J. Legal Educ.* 38 (1988), 243, 245–46 (using Gilligan's concept of two modes of thinking about conflict resolution to re-examine conventional legal education).

explore how the layers of meaning in Portia's character and depiction continue to serve as an apt metaphor for the complexities of examining the role of gender in legal ethics and practice. Finally, I shall return to some questions to be asked and studies that remain to be done. The significance of an ethic of care for law practice is itself a difficult and important question, which could be explored irrespective of its connection to gender.[10] Yet, I persist in my views that care is gendered in our culture and that its expression in the law and legal ethics will continue to be disproportionately, but not exclusively, expressed by women and other 'subordinated' people.[11]

II. Lawyering in a Different Voice: An Ethic of Care, Connection, Context, and Relationships

Carol Gilligan's work as a psychologist focusing on moral dilemmas was fuelled in part by a recognition that most of the critical work in developmental psychology, was based on studies of male behaviour.[12] Gilligan posited that the conclusions reached by the leading developmental psychologists might not be responsive to the patterns of development of girls and women.[13] In particular, Gilligan considered how women decide whether or not to have an abortion, how women respond to Kohlberg's hypotheticals,

[10] Joan Tronto has begun this inquiry at the philosophical level of what an ethic of care in morality, detached from gender, would look like, J. Tronto, *Moral Boundaries: A Political Argument for An Ethic of Care* (1993), see C. Menkel-Meadow, 'What's Gender Got to Do With It? — Morality and the Ethic of Care (A Review of Tronto's Moral Boundaries)', *NYU J. of L. and Soc. Ch.* (forthcoming, 1995). Stephen Ellman has begun this inquiry with a specific focus on the practice of law, 'The Ethic of Care as An Ethic for Lawyers', *Geo.L.J.* 81 (1993), 2665.

[11] I use subordination here in the sense of exclusion from the dominant culture or domination by others. These are slippery terms. E.g., in *The Merchant of Venice* Shylock, the Jew, is the subordinated person and Portia, a woman, is part of the dominant culture, especially when she acts as a male jurist. Subordination or domination can, but does not have to lead to an 'oppositional' approach to what the dominant culture values. Thus, another question linked to the present inquiry is whether those who need to be 'cared' for (the excluded, oppressed, dominated) need to articulate a morality to give them what they need or to achieve recognition of what they do for others. Most of the 'caring' in this world is done without pay by women, or for little pay by people of colour and the lowest-paid wage-earners in a given society. Tronto, above n. 10, at 112–113.

[12] See E. H. Erikson, in *Childhood and Society*, ed. J. Erikson (2nd ed., 1963), 25–47 (utilizing psychoanalysis to detect mental disturbance and moral conflict in a case study of a small boy); E. H. Erikson, in *Identity: Youth and Crisis*, ed. J. Erikson (1968), 261–94 (discussing women's 'inner space, and social biases as preventing women from achieving the "normal" development pattern of identity formation'); L. Kohlberg, 'Moral Stages and Moralization: The Cognitive-Developmental Approach', in T. Lichoria, *et al.* (eds.), *Moral Development and Behavior* (1976), 31 (presenting an overview of the cognitive-developmental theory of moralization where boys generally show a 'higher' degree of moral development than girls); J. Piaget, *The Moral Judgment of the Child*, trans. by M. Gabain (3rd ed., 1965), 192 (describing the individual examination of both 'difficult' children and 'average' parents exclusively in masculine terms).

[13] *Different Voice*, above n. 3, at 1.

and how women make important life decisions.[14] In her book, she elaborates through the questioning of girls and women, as well as boys and men in some of the studies, on a method of moral decision-making associated with, but not restricted to, girls and women.[15]

In considering what to do in a number of situations, including the Kohlbergian Heinz dilemma,[16] Gilligan found that women are more likely to consider the other, to consider the people in the problem in relation to each other and to seek solutions that minimize pain to all, rather than to find universal principles that reflexively determine an issue.[17] Thus, Amy, a sixth-grade girl, believes that in the Kohlberg problem, the pharmacist and Heinz should sit down together and try to work out an instalment payment contract, or some other way to resolve the problem which attempts to meet all of the parties' needs and minimize pain to all.[18] On the other hand, Jake, a sixth-grade boy, decides the Kohlberg problem as a mathematical equation: life is worth more than property, therefore it is permissible for Heinz to steal the drug.[19] Hilary, a young lawyer in another one of Gilligan's studies, is upset to see an incompetent opposing lawyer overlook a document that would help his case, and she longs to lean across the adversarial table and help her client's opponent.[20]

In more recent work, Gilligan used a fable to continue to test the tendencies of girls and boys to elaborate different moral languages in solving problems. In one such fable, two industrious moles have worked all summer to dig themselves a shelter for the winter.[21] When winter arrives, a less forward-thinking porcupine pleads with the moles to share their comfortable hole. In their concern, they take the porcupine in and then are hurt by the sharpness of the porcupine's quills[22] in the close and small space.[23] What, subjects of the study are asked, should the moles do?[24] Adolescents

[14] Ibid., at 71–74, 25–32, 151–174. [15] Ibid., at 2.

[16] Ibid., at 25–26 (asking if it is morally permissible for a man to steal a drug for his dying wife when their pharmacist is charging more than the husband can afford to pay).

[17] Ibid., at 62–63. [18] Ibid., at 29. [19] Ibid., at 26.

[20] Ibid., at 135–36. In the actual situation as reported, Hilary succumbs to the adversarial system and does nothing, in part because of her perceived personal vulnerability in a new profession. Legal ethicists might suggest that Hilary have a 'moral dialogue' with her client to discuss whether 'justice' and 'care' would influence the client to give Hilary permission to reach out and tell opposing counsel about the document.

[21] D. T. Meyers, 'The Socialized Individual and Individual Autonomy', in E. F. Kittay and D. T. Meyers (eds.), *Women and Moral Theory* (1987), 139, 141 (discussing Gilligan's use of this fable to illustrate different paths of moral development).

[22] Some who have heard this story see in the porcupine's quills his 'difference' from the moles, in ways that are analogous to race, class, and ethnicity. The fable can thus be read differently by different hearers and can be expanded to consider what effect 'difference' has on what the moles should decide to do (adapt, innovate, evict, share, etc.).

[23] Ibid.

[24] I have used this fable, as well as the Heinz dilemma, in law school classes to discuss legal ethics, and also in my conversations with legal scholars and practitioners. Responses to the fable are sometimes gendered, sometimes not, but they are often based on legal, not moral, principles, such as first-in-time land-ownership, landlord–tenant principles, or labour principles.

with a 'rights' or 'justice' orientation — more often boys in the research — suggest that the moles should throw the porcupine out because they dug the shelter. Indeed, if the porcupine refuses to leave it, they maintain, it would be permissible for them to shoot the porcupine.[25] Those who use a 'care' approach — more often girls in the studies — develop solutions like covering the porcupine with a blanket or asking the porcupine to help enlarge the hole — solutions that both seek to meet the needs and minimize the harm to all parties.[26]

Gilligan's research elaborates greater complexity in the 'tale of two moralities'. As the data accumulates, it appears that most men reason from rational, abstract principles or rules, like a weighing of competing rights, and about one-third of women reason in this way.[27] Women are more likely, though not exclusively, to reason from a care perspective that relies on notions of responsibility, human connection, and care. Women are more likely to rearrange rules or principles or to seek incrementally inclusive solutions in order to accommodate the needs of people.[28]

Thus, women focus on the connection to others, on the people involved and their relationships, and on the contexts of the moral problems. They are less likely to want to make absolute statements about how rules should determine the rights and wrongs of situations. The male voice is associated with the traditional male values of independence, autonomy, separation from others, universal principles often considered the basic tenets of modern liberalism.[29] The female voice is associated with a self connected to others, intimacy, care, and responsiveness to relationships.

Gilligan is read by some to be too essentialist in her description of these two voices — a biological determinist.[30] She herself identifies these forms of reasoning as 'themes' not necessarily associated with gender,[31] although it seems from her empirical studies that they are in fact strongly associated with gender.[32] The association of these values with gender, and how they come to be associated with each other, has been quite controversial. It has spawned a wide variety of feminist, as well as philosophical and empirical,

[25] Meyers, above n. 21, at 141. [26] Ibid.

[27] Meyers, above n. 21, at 141–42. It is interesting to consider the possibility that these rights-reasoning women may be the women most likely to go to law school.

[28] Ibid.

[29] See, e.g., R. West, 'Jurisprudence and Gender', *U. Chi. L. Rev.* 55 (1988), 1, 3–5 (contrasting the 'human being' described and constructed by feminists' non-legal theory with the 'human being' described, constructed, and assumed by masculine-based jurisprudence); L. A. Blum, Gilligan and Kohlberg, 'Implications for Moral Theory', in M. J. Larrabee (ed.), *An Ethic of Care: Feminist & Interdisciplinary Perspectives* (1993), 49, 49 (characterizing Kohlberg and his school of moral development as based on 'impartiality' and traditional notions of autonomy).

[30] See, e.g., L. R. Pruitt, 'A Survey of Feminist Jurisprudence', *U. Ark. Little Rock L.J.* 16 (1994), 183, 193 at n. 45 (referring to Gilligan's work as approaching biological determinism).

[31] *Different Voice*, above n. 3, at 2. [32] Ibid., at 2.

objections, based, in part, on a fear of reinstituting a dualistic and oppositional conception of gender.[33]

Interestingly, some of Gilligan's more recent work which was designed to respond to some of these concerns, actually reinforces some of the dualistic aspects of moral reasoning.[34] When asked to choose another way of resolving some of the moral hypotheticals discussed above, boys and girls demonstrated an ability to shift from one mode of reasoning to another.[35] This suggests that humans — both females and males — are capable of reasoning from different perspectives, especially when directed to consider other approaches to reasoning. What is significant, however, in the later research is Gilligan's characterizations of the tendencies of boys and girls to start with a particular 'focus' or 'choice'.[36] This tendency is regarded by some as a moral 'default' or 'preferred' position.[37] Gilligan suggests that even if we are able to do both forms of problem-solving, it is a moral choice we make when we decide how to reason.[38] The demonstration that children know both orientations and can frame and solve moral problems in at least two different ways means that the choice of moral standpoint is an element of moral decision.[39] What remains significant and unresolved in this research is the role that socialization and other social factors, like professional context, play in the choices people make.[40]

Many feminists fear that valorizing women's differences will legitimate discriminatory treatment of women's difference and assign women to conventional domestic, maternal and other 'caring' roles.[41] Some suggest that in her limited empirical samples she has not made a case that most

[33] See, e.g., J. Williams, 'Deconstructing Gender', *Mich. L. Rev.* 87 (1989), 797, 799–802 (challenging the description of gender offered by 'difference feminists' regarding how women as a group differ from men as a group); C. A. MacKinnon *et al.*, 'Feminist Discourse, Moral Values, and the Law — A Conversation', *Buff. L. Rev.* 34 (1985), 11, 25 (stating that a 'double standard' defining the two genders in an oppositional fashion, results in the continued subjugation of women).

[34] C. Gilligan and J. Attanucci, 'Two Moral Orientations', in C. Gilligan, *et al.*, (eds.), *Mapping the Moral Domain: A Contribution of Women Thinking to Psychological Theory and Education* (1988) 73, 74 (discussing the 'two moral visions' that recur in human experience).

[35] Ibid., at 83. [36] Ibid., at 80–81. [37] Ibid., at 84.

[38] Ibid., at 84–85. [39] Ibid., at 83–85.

[40] Gilligan continues to rely on psychological object relations for much of her theorizing about gender differences. See ibid., at 28–29. Others, like myself, are interested in exploring other explanatory variables, such as professional context and socialization. Thus, moral reasoning methods may be subject to greater 'switching' or plasticity depending, not only on the stage of life, but also on the context in which the decisions must be made. See below, text accompanying nn. 99–105.

[41] See, e.g., J. C. Williams, 'Deconstructing Gender', *Mich. L. Rev.* 87 (1989), 797, 806 (stating that the effort to reintroduce traditional stereotypes as 'women's voice' fails to recognize the extent to which these stereotypes are used to marginalize women); A. M. Coughlin, 'Excusing Women', *Cal. L. Rev.* 82 (1994), 1, 90–91 (positing that the caring norm endorsed by Gilligan is closely linked to negative qualities traditionally assigned to women, and contribute to their oppression in society).

women reason this way, and that other circumstances, like law training, can blunt whatever gender differences may exist. Some critics fault Gilligan as guilty of falling prey to her own criticism of male moral philosophers and developmental psychologists — she has studied mostly women and girls.[42]

Yet at the same time, some feminists claim that Gilligan's account of a different morality is derived from women's experience, experiences that have been overlooked by moral philosophers and social scientists through the years. Some root that 'experience' in oppression or exclusion,[43] in the physical and emotional connections of mothering,[44] or in the objectification that comes from being viewed as sex objects.[45]

Gilligan, and many others following in her footsteps by identifying these themes, attempts to separate the question of causation — biological essentialism, socialization, oppression — from observed gender differences.[46] I fall into this group by focusing on the effects of perceived gender differences, although I do cast my vote in favour of a claim that difference is socially derived and that developed meanings of 'culture' attach to biological 'facts'.[47]

To the extent that Gilligan confronts the causation question, she utilizes

[42] D. Nails, 'Social Scientific Sexism: Gilligan's Mismeasure of Man', *Soc. Res.* 50 (1983), 643. This criticism of Gilligan's first book, *In A Different Voice*, seems inappropriate for it is clear that she talked to both girls and boys. See *Different Voice*, above n. 3, at 24–63 (comparing discussions with Amy to those with Jake, as well as those with Karen to those with Jeffrey). Nonetheless, some of her more recent studies have attempted to take account of this critique. See also Gilligan and Attanucci, above n. 34, at 77 (referring specifically to the inclusion of both women and men in three research studies).

[43] See, e.g., S. Harding, *Whose Science? Whose Knowledge? Thinking from Women's Lives* (1991), 124–26 (locating some of what women 'know' in their oppression thus enabling them to develop connections with other oppressed groups).

[44] See, e.g., S. Ruddick, *Maternal Thinking: Toward A Politics of Peace* (1989), 46–47 (defining maternal work as 'caring labour' in order to secure for women, who provide most caring services, the political power, autonomy, and economic benefits needed for self-validation and recognition); West, above n. 29, at 16 (stating that women are more 'connected' to life than men due to their role as primary caretakers of children).

[45] See, e.g., C. A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987), 118–19 (hereinafter: *Feminism Unmodified*) (defining 'objectification' as a theory, developed by radical feminist analysis, locating the subordination of women in both mistaken ideas about what women can do and in the social meaning of female identity); C. A. MacKinnon, *Toward A Feminist Theory of the State* (1989), 122–24, (hereinafter: *Feminist Theory*) (discussing the objectification of women through the use of patriarchal, supremacist sexuality to define women's lives).

[46] *Different Voice*, above n. 3, at 2.

[47] See S. J. Kessler and W. McKenna, *Gender: An Ethnomethodological Approach* (1978), 91–95 (defining 'social learning theory' as the process by which children learn what they can and cannot do as they begin to value gender 'appropriate' behaviour). See also H. Chapin, 'Why Do Little Girls?' on *Living Room Suite* (Elektra Records, 1978) (singing about how socialization makes 'little girls grow crooked, when little boys grow tall and little girls become broken, when little boys are whole.'). My thanks to Richard Tur for this piece of popular culture.

psychoanalytic object-relations theory to suggest that young boys must separate and individuate from their non-same-sex (m)others in order to grow up, while girls can stay attached to their primary child-rearing figure, who even if she is not the 'mother' is still likely to be a female child-care giver [48] Among the many critiques of Gilligan's work[49] are those that suggest that this Freudian tale of human development is situated in traditional, white, middle-class, nuclear family life and may be inapplicable to the many other ways and forms in which human beings are raised [50] Thus, if a relational approach to moral problem-solving is based on connection to an 'object' of nurture, the gender association with this form of reasoning may be more complex with different combinations of child-rearing Surprisingly, there has not been as much criticism of the family *locus* of socialization itself as the major determinant of moral learning [51] In my view, gender-linked styles of moral reasoning can be the result of other societal socialization forces — educational institutions, peers, media — which suggest to children and adults how they should 'be' [52]

Gilligan never expressly sought to displace the male ethic of 'jusuce' or rights, instead she sought to supplement or complement it, add to it,

[48] See N Chodorow, *The Reproduction of Mothering* (1978), 167 (discussing the process of individuation that occurs for boys, while stressing the empathy girls develop as they fuse their identities with their female caretakers), D Dinnerstein, *The Mermaid and the Minotaur* (1976), 38–54 (describing childhood psychological forces that effect adult behaviour)

[49] For several major collections of criticisms, see J Broughton, 'Women's Rationality and Men's Virtues A Critique of Gender Dualism in Gilligan s Theory of Moral Development', *Soc Res* 50 (1983), 597, Flanagan and Adler, 'Impartiality and Particularity , *Soc Res* 50 (1983), 576 (methodological and philosophical critiques of Gilligan), L K. Kerber *et al*., 'On *In a Different Voice* An Interdisciplinary Forum', *Signs J Women Culture & Soc'y* 11 (1986), 304 (historical, sociological and empirical critiques of Gilligan), M J Larrabee, 'Gender and Moral Development A Challenge for Feminist Theory', in *Ethic of Care*, above n 29, at 3, 3–5 (introducing a collection of articles focusing on the work Gilligan) For important critiques from within legal feminism, see *Feminism Unmodified*, above n 45, at 38–39 (criticizing Gilligan's failure to recognize that it is impossible to know 'women's voice' because the voice we hear is the choked response to male dominance), *Deconstructing Gender*, above n 33, at 802–22 (1989) (outlining deficiencies of Gilligan's theory of gender differences), W W Williams, 'The Equality Crisis Some Reflections on Culture, Courts, and Feminism', *Women's Rts L Rep* 7 (1982), 175, 196 (questioning whether it is a double-edged sword when difference feminists advocate 'special privileges' for women based on their differences) See also K P Addison, 'Taking Women's Experience Seriously Moral Passages', in *Women and Moral Theory*, above n 21, at 87–107 (arguing that Gilligan's theory of female moral development fails to take account of the processes by which moral decisions are reached)

[50] See C B Stack, 'The Culture of Gender Women and Men of Color' in *Ethic of Care*, above n 29, at 108, 110–11 (maintaining that gender consciousness and moral development emerge from class and race specific experiences) And for a critique based on class, see Buck-Morss, in *Socio-economic Bias in Piaget s Theory Implications for Cross Cultural Studies in Psychology in Social Context*, ed A Buss (1976), 349

[51] See S M Okin, *Justice, Gender, and the Family* (1989), 8–10 (noting that in both contemporary theories of justice and political philosophy, family life is 'assumed')

[52] Examples abound Consider the autonomous Marlboro Man', or media s perfect wives and mothers like Mrs Miniver, Jimmy s mother in *Lassie*, June Cleaver in *Leave it to Beaver*, Carol Brady in *The Brady Bunch* and Donna Reed in *It s a Wonderful Life*

make it more robust by including another level of moral consciousness in legal and justice reasoning The need to establish and clarify rights, individual autonomy and the predictability of clear rules, must be tempered by acknowledging needs as well as rights, minimizing harm to people when making choices, and being certain that particular rules, when applied, do not wreak havoc in particular situations This is equity modifying law, mercy tempering justice, common law interpreting statute, discretion softening rules [53] Whether moral reasoning, legal ethics and lawyering behaviour are protean enough to contain all of these values at one time is a difficult question But the structure of Gilligan's argument is to let more into our *ratio decidendi* in order to make moral decisions and action more textured and more fully justified, rather than to limit the factors we consider when making them As one commentator has put it, 'justice need not be uncaring and caring need not be unfair' [54]

The appeal of Gilligan's 'relational feminism' led to a number of applications of her work in theoretical and speculative forms Some saw in her work the revaluation of female qualities that to a large extent have been denigrated by our masculinist society, and they welcomed the valorization of care, connection, and nurture [55] Others saw the reinstatement of dangerous gender stereotypes which would continue to separate the sexes and, in hierarchical form, devalue the female [56]

In my own work on women lawyers, the appeal of Gilligan's claims was that they invited me to speculate on what the meaning would be to the legal profession with the expansion of women entrants [57] If women were the same as men, then their increased entrance would have little significance As one apocryphal story has it, Erwin Griswold, Dean of the Harvard Law School, somewhat unhappy about the admission of women to his male bastion in the early 1950s, later than most schools, stated, 'We will try to change this school as little as possible and admit only a handful of

[53] See generally D Kennedy, 'The Structure of Blackstone s Commentaries , *Buff L Rev* 28 (1979), 205 (explaining how law expresses oppositional values that can be used either to 'supplement' each other or to create manipulable indeterminacies of rules for political use), see also C Dalton, 'An Essay in the Deconstruction of Contract Doctrine , *Yale L J* 94 (1985), 997 (suggesting that conventional doctrinal analysis does not adequately describe the world in which we live)

[54] S Harding, 'The Curious Coincidence of Feminine and African Moralities , in *Women and Moral Theory*, above n 21, at 296, 297

[55] See, e g , C F Epstein, *Deceptive Distinctions* (1988), 76–77 (observing that Gilligan s theories have been embraced by feminists who positively regard 'caring morality)

[56] See e g , F Olsen, The Sex of Law in D Kairys (ed), *The Politics of Law* (1990), 453, 458–59 (arguing that the focus on a distinct female experience may ultimately maintain dominant values')

[57] See, e g , C Menkel Meadow, Feminization of the Legal Profession The Comparative Sociology of Women Lawyers in R L Abel & P S C Lewis (eds) *3 Lawyers in Society Comparative Theories* (1989), 196, (hereinafter *Feminization*) (suggesting that if women are more likely to espouse an ethic of care then they might practice law differently)

very qualified women'.[58] If there were gender differences, however, then the entrance of women into the legal profession might mean even more than a significant gain for equality and civil rights. It could mean a transformation in legal practice. And, as women seek to 'integrate' into the profession there might be analogies to be drawn as to what effects other groups, hitherto excluded by race, class etc., might have on the reform of the profession.[59] So, in my article, 'Portia In a Different Voice?'[60] I asked the question what difference would entrance of women into the profession make if there was some validity to the claims of Gilligan's 'relational feminism'?[61]

A. Law Practice

Most simply stated, those who make claims that women will make changes in the legal profession because of their gender argue that women may be more likely to adopt less confrontational, more mediational approaches to dispute resolution;[62] that women will be more sensitive to client's needs and interests, as well as to the needs and interests of those who are in relation to each other, for example, clients' families, or employees.[63] They suggest that women employ different moral and ethical sensibilities in the practice of law, that women will employ less hierarchical managerial styles, that women are more likely to have social justice or altruistic motives in

[58] Dean Griswold was also known for inviting the female students over for dinner and asking them what they expected to do with their degrees. See Speech of Attorney-General Reno, American Law Institute, May, 1993. See also K. B. Morello, *The Invisible Bar: The Woman Lawyer in America: 1638 to the Present* (1986), 101–03 (describing Dean Griswold's perspective on the policy of admitting women to Harvard Law School).

[59] See C. Menkel-Meadow, 'Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law', *U. Miami L. Rev.* 42 (1987), 29, 29–53 (discussing the effects the exclusion of certain groups of people from lawmaking have had on the law); C. Menkel-Meadow, 'Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering', *Case W. Res. L. Rev.* 44 (1994), 621, 637–45 (arguing that changes in the demographics of the legal profession have resulted in demands to change work policies and work style); D. B. Wilkins, 'Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers', *Stan. L. Rev.* 45 (1993), 1981, 1983–84 (exploring the implications of racial identity and the obligation black lawyers have to incorporate the needs of the black community into their professional roles as corporate lawyers).

[60] *Portia I*, above n. 2, at 39 (considering the effects that women's moral development might have on the 'lawyering process').

[61] Ibid., at 39–43.

[62] See, e.g., E. Hill, 'Alternative Dispute Resolution in a Feminist Voice', *Ohio St. J. on Disp. Resol.* 5 (1990), 337, 342 (applying a feminist perspective to alternative dispute resolution).

[63] See, e.g., C. Menkel-Meadow, 'Is Altruism Possible in Lawyering?' *Ga. St. U. L. Rev.* 8 (1992), 385, 418, (hereinafter *Altruism*) (maintaining that lawyers should regard themselves as a 'helping profession', and work to build positive connections with all those people who come into 'legal contact' with one another).

practising law. They believe that women will be more likely to develop greater integration between their work and family lives,[64] seeking what the literature refers to as horizontal, as well as vertical satisfaction.[65]

Empirical research seeking to assess these differences in women's lawyering is quite mixed and often depends on the frame of reference of the researcher. Thus, sociologist Cynthia Fuchs Epstein, after a full career of studying women lawyers, suggests that those seeking difference will find it, while those who seek to establish women's 'equality' to men may be more likely to find more overlap in behaviour than difference.[66] In short, Epstein maintains there may be more variation among individuals within a particular gender in their legal behaviour, than differences across gender.[67] While some studies support the notion that women may have different motives for studying and practising law,[68] other studies report that whatever differences previously were present are diminishing over time, either because the greater number of women entering law reduces the stark motivational differences, or because students in general have become more conservative over time.[69] Still other studies report that

[64] See generally E. Spangler, *et al.*, 'Token Women: An Empirical Test of Kanter's Hypothesis', *Am. J. of Soc.* 84 (1978), 160 (maintaining that because women sense and bear a greater responsibility for family responsibilities, they will insist on a range of changes in the workplace).

[65] *Feminization*, above n. 57, at 227 (noting that social psychology illustrates the different quality of male ambition as vertical, and female ambition as horizontal). For a more comprehensive description of these contributions to the legal profession by women, see also R. Jack and D. C. Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (1989), 149–55 (describing how some women reshape the traditional role of the lawyer to suit their own morality). Also, see generally K. Abrams, 'Feminist Lawyering and Legal Method', *L. & Soc. Inquiry* 16 (1991), 373 (looking at changes feminist lawyers are trying to promote in the profession, and the methods they employ to do so); P. Goldfarb, 'A Theory–Practice Spiral: The Ethics of Feminism and Clinical Education', *Minn. L. Rev.* 75 (1991), 1599 (exploring the methodological similarities between clinical education and feminist jurisprudence); A. Shalleck, 'The Feminist Transformation of Lawyering: A Response to Naomi Cahn', *Hastings L. J.* 43 (1992), 1071 (examining the 'ethic of care' as device for gauging the feminization of lawyering).

[66] Epstein, above n. 55, at 72–98 (asserting that gender differences in moral development may be 'all in the mind' of the perceiver).

[67] Ibid., at 83 (citing a study of sex differences that shows men and women share a common range of personality characteristics). See also C Tavris, *The Mismeasure of Women* (1992), 57–92 (asserting that the attempt to define qualities as 'masculine' or 'feminine' is misguided and groundless).

[68] See, e.g., J. Taber, *et al.*, 'Gender, Legal Education and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates', *Stan. L. Rev.* 40 (1988), 1209, 1238 (concluding that women are more likely to be motivated by a desire to serve society than men). See also S. Homer, and L. Schwartz, 'Admitted But Not Accepted: Outsiders Take An Inside Look at Law School', *Berkeley Women's L.J.* 5 (1990), 1, 28 (summarizing a survey in which more women than men stated that it was their 'desire to help society' that best described the reason they attended law school).

[69] See, e.g., D. L. Chambers, 'Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family', *L. & Soc. Inquiry* 14 (1989), 251, 261 (finding that although there are no significant differences in motivation to study law, more men tend to go into private firms than do women).

there are no gender differences in motivation to study or practise law at all.[70]

At present virtually no studies report on how the different genders actually do practise law, because no researcher has been able to design an inclusive gender and multi-ethnic observational study of actual lawyering behaviour; most studies rely on self-reports or reactions to hypotheticals. Some studies do report differences in preferences about how to practise law.[71] Some of these studies substantiate the claim that women prefer less confrontational forms of work, such as mediation or deflection from litigation altogether in transactional or other forms of legal work.[72] Other studies report little gender difference in orientation to or goals for legal work, or actual performance, but do report gendered perceptions of what is expected of male and female lawyers.[73] In addition, demographic work on the location of women lawyers throughout the world demonstrates continued occupational segregation, with women working disproportionately in those fields which are either devalued by men, or those fields consistent with stereotypic notions of what is women's work — such as family law.[74] Thus, it may be too early to tell whether there is 'push' or 'pull' in terms of which directions women or other outsiders in law pursue.[75]

[70] See, e.g., L. E. Teitelbaum, *et al.*, 'Gender, Legal Education and Legal Careers', *J. Legal Educ.* 41 (1991), 443, 443 (discussing results of a study showing that among currently enrolled students there were no notable differences in motivation).

[71] See, e.g., Jack and Jack, above n. 65, at 149–55 (describing the strategy of integrating care into the practice of law); S. Caplow, and S. A. Scheindlin, '"Portrait of A Lady": The Woman Lawyer in the 1980s', *N.Y.L. Sch. L. Rev.* 35 (1990), 391, 422–23 (recognizing a preference among women for less aggressive, more creative ways to practice law).

[72] *Feminization*, above n. 57, at 212–14 (examining 'public versus private sector' and 'litigation versus transactional lawyering' trends by gender, not only in the United States, but also in a number of other countries).

[73] See, e.g., L. Burton, *et al.*, 'Feminist Theory, Professional Ethics, and Gender-Related Distinctions in Attorney Negotiating Styles', *J. Disp. Res.* (1991), 199, 243–45 (noting differences between how female and male lawyers are generally perceived); C. B. Craver, 'The Impact of Gender on Clinical Negotiating Achievement', *Ohio St. J. Disp. Resol.* 6 (1990), 1, 1–9 (noting that perceived gender differences affect the way people expect female attorneys to perform).

[74] See C. Menkel-Meadow, 'The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession', *Osgoode Hall L. J.* 24 (1986), 897, 907–11 (noting that women are 'pulled' into those areas of law for which they are regarded to be predisposed); *Feminization*, above n. 55, at 211–14 (noting that women are shut out of what is regarded as high status work). For an account of how both black and white women have fared in the professions, see N. J. Sokoloff, 'Evaluating Gains and Losses by Black and White Women and Men in the Professions, 1960–1980', *Soc. Probs.* 35 (1988), 36.

[75] See C. Menkel-Meadow, 'Exploring A Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change', *Law & Soc. Inquiry* 14 (189), 289, 311 (examining women's occupational segregation in domestic relations and criminal law as an impetus for important feminist legal reforms in these areas of the profession); see also D. Rhode, 'The "No-Problem" Problem: Feminist Challenges and Cultural Change', *Yale L.J.* 100 (1991), 1731, 1788 (concluding that available data on the legal profession reveal significant gender-based differences, but noting the extent of such differences depends greatly on context). We do know that the experience of discrimination or perceived injustice leads to a disproportionate representation of ethnic minorities in civil rights work. See, e.g., Wilkins, above n. 59, at 1982 (noting that black lawyers have historically regarded their legal training as a tool to represent the black community, which white lawyers will not serve).

B. The Production of Legal Knowledge

Contributions to the development of law go beyond some of the process claims about practice referred to above, and suggest areas where women or other excluded groups in the profession have had or will have an impact on the substantive law. Women lawyers have adopted a variety of strategies or patterns of arguments in advocating legal and doctrinal change.[76] These arguments range from utilizing conventional categories to protect women's interests, such as claims for privacy and equality, to recrafting old categories, such as the defence of consent in rape. Women lawyers are also creating new categories of analysis, such as sexual harassment and pornography,[77] exposing the male and white bias,[78] or assumptions of male experience in defining legal categories, such as freedom from connection in defining liberty,[79] and arguing that woman's difference will produce different legal theories and constructions thereof, such as the recognition of additional compensable wrongs in the tort arena.[80] Finally, feminist scholars and lawyers are exposing how the law disadvantages women, even when framed in 'neutral' terms, and how arguing from a women's perspective may transform the legal emphasis from one of rights to one of needs.[81] Like critical race theorists, feminists argue that

[76] See generally C. Menkel-Meadow, 'Mainstreaming Feminist Legal Theory', *Pac. L.J.* 23 (1992), 1493 (describing structures and patterns of feminist argument about the law).

[77] *Feminism Unmodified*, above n. 45, at 103–116, 206–213.

[78] See, e.g., P. McIntosh, 'White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies', in M. Andersen and P. H. Collins (eds.), *Race, Class and Gender: An Anthology* (1992), 70, 73 (discussing how places of privilege allow us to take 'normal' for granted).

[79] See R. West, 'Reconstructing Liberty', *Tenn. L. Rev.* 59 (1992), 441; J. Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities', *Yale J.L. & Feminism* 1 (1989), 7, 7 (calling for a feminist reconception of autonomy); K. Karst, 'Woman's Constitution', *Duke L.J.* (1984), 447, 486–95 (fashioning a jurisprudence based on interdependence, rather than on individuation). This effort parallels the effort to demonstrate that health issues have been defined largely around medical research based on male-only subjects. See R. Dresser, 'Wanted Single, White Male for Medical Research', *Hastings Center Rep.* 22 (Jan.–Feb. 1992), 24, 26–28 (tracing the origins of the exclusion of women from medical research studies); see also V. Merton, 'The Exclusion of Pregnant, Pregnable and Once-Pregnable People (a.k.a. Women) From Bio-Medical Research', *Am. J. L. & Med.* 19 (1993), 369.

[80] See, e.g., L. Bender, 'A Lawyer's Primer On Feminist Theory and Tort', *J. Legal Educ.* 38 (1988), 3, 28–38.

[81] This claim has been raised in many areas, but it is particularly prevalent in social welfare law. See J. Brenner, 'Towards A Feminist Perspective on Welfare Reform', *Yale J.L. & Feminism* 2 (1989), 99, 125–29 (asserting that the enuy of women into the labour force and the influence of feminism may make it possible to enact legislation that will address the universal need to raise children and care for adults); L. A. Fritzler Fennell, 'Interdependence and Choice in Distributive Justice: The Welfare Conundrum', *Wisc. L. Rev.* (1994), 235.

their position as outsiders,[82] and as the 'acted upon' in law,[83] allows them to see other possibilities of legal regulation and definition.

Recently, women theorists and lawyers have moved from 'traditional' women's issues to applying their analyses to more conventional legal doctrinal areas. This move is an attempt to illuminate how corporations, labour unions, organizations, and bankruptcy proceedings might be reconfigured to include women actors.[84]

Claims that women might begin to think of legal categories in different ways do not require adherence to an essentialist position about women's natures. If only a few women think of legal categories in different ways or shift the perspective from which the larger community analyses legal problems, then women will have contributed to a broadening of our thinking about law. Just as 'two heads are better than one', the inclusion of both genders will increase the number and quality of ideas available to solve legal problems and to revise conventional, and often taken-for-granted, categories. In my view, this analysis also provides a forceful argument for the inclusion of other groups traditionally excluded from the law, including visible and invisible minorities, the physically challenged, gays, and racial and ethnic minorities. Any disruption of conventional and dominant group thinking must improve the quality of legal decision-making.

Another example of women's creativity, the story *A Jury of Her Peers*[85] has joined the canon of feminist approaches to law to demonstrate that women see things differently from men and often reach different factual, as well as moral, conclusions. The story troubles those who identify with 'justice' concerns in the law more than those who focus on 'care'. In the story, a sheriff and his men are sent to investigate the murder of an isolated man. They gather evidence from the victim's home while his wife, the obvious

[82] See, e.g., M. Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method', *Women's Rts. L. Rep.* 11 (1988), 7, 8 (arguing that 'outsiders', including feminists and people of colour, regard the law as a tool with which to combat injustice).

[83] See, e.g., P. Williams, *The Alchemy of Race and Rights* (1991) (offering several moving accounts of how being an object of legal regulation gives one a particular perspective on the law's oppressive functioning on subordinated people).

[84] See generally J. Conaghan, 'The Invisibility of Women in Labor Law: Gender-Neutrality in Model-building', *Int'l J. Soc. L.* 14 (1986), 377 (arguing that labour legislation fails to improve women's employment positions because traditional labour law models fail to recognize women's different work experiences); M. Crain, 'Feminizing Unions: Challenging the Gendered Structure of Wage Labor', *Mich. L. Rev.* 89 (1991), 1155 (contending that labour unions can be a pivotal tool in feminist efforts to alter the structure of wage labour); K. Gross, 'Re-Vision of the Bankruptcy System: New Images of Individual Debtors', *Mich. L. Rev.* 88 (1990), 1506 (concluding that a focus on women debtors enables one to understand the complexity and moral dimension of bankruptcy); K. Lahey, and S. Salter, 'Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism', *Osgoode Hall L.J.* 23 (1985), 543 (suggesting that female scholars must promote feminist values of participation, decentralization, and power-sharing in order to change the patriarchal mentality of the business world).

[85] S. Glaspell, 'A Jury of Her Peers', in E. O'Brien (ed.), *The Best Short Stories of 1917* (1918).

suspect, is in jail. The sheriff's men are accompanied by a few of their wives who are concerned that they did not pay enough attention to the lonely wife. While the men search for the obvious — artefacts of the crime or other proof of motive — the women gather in the kitchen and, without speaking a word to each other, gradually come to understand from the broken neck of the wife's pet bird, that the man abused his wife. The women conclude that the wife was morally justified in killing her husband.[86] They quietly remove the bird, the only physical evidence of motive, in the hope that their act will free the jailed wife. Hence, they acquit the wife in their own moral court.

While legal scholars, lawyers and judges may debate the justice of the women's actions, the story has evoked at least some consideration of how women reason differently and, in this case, how they connect seemingly unrelated matters in order to understand the situation more profoundly. The women's ability to empathize with the wife enables them to see the 'evidence' buried in the 'non-evidentiary'.[87] Have they made a correct moral judgment? The discussion in a law-school classroom or roomful of judges is most interesting: gender plays a large role.

C. Legal Ethics and Moral Decision-Making

Applying Gilligan's claims of different ethics — 'justice' and 'care' — to the moral or ethical dilemmas encountered in law practice, we can analyse how a focus on independence, autonomy and rules might be contrasted with a focus on others, relationship, care, context, and reduction of harm. Considering the sources of the more widely understood, at least in legal circles, ethic of justice, we find that the social contractarian theories of Locke, Hobbes, Kant and Rawls create a legal system in which the community of lawyers adopts rules to specify behaviour *a priori*, to create a sense of community, and to set bounds on what will be acceptable behavior. The drafting of ethics codes by law societies, bar associations, courts and the like seems a clear illustration of the social contract at work.[88] By agreeing

[86] The validity of the battered woman's defence is widely debated in the United States. See C. Littleton, 'Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women', *U. Chi. Legal F.* (1989), 23; H. Maguigan, 'Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals', *U. Pa. L. Rev.* 140 (1991), 379.

[87] For one illustration of how this story, as a narrative, can be used in legal education, see Comments, 'Lessons in Law From Literature: A Look at the Movement and A Peer At Her Jury', *Cath. U. L. Rev.* 39 (1990), 557, 581–93. See also C. Menkel-Meadow, 'Feminist Legal Theory, Critical Legal Studies and Legal Education or the "Fem–Crits" Go to Law School', *J. of Leg. Educ.* 38 (1988), 61 (describing the use of the story to examine gendered views of law at Critical Legal Studies conference of legal scholars and practitioners).

[88] See generally C. Pateman, *The Sexual Contract* (1987) (offering a feminist critique of the exclusion of women from the social contract by the prior 'silent' and non-consensual 'sexual contract' that excludes women from the public sphere).

to follow the ethical norms and rules, lawyers are entitled to pursue their individual self-interest, and that of their clients, within the limits set by the rules. Lawyers and clients have rights and a few limited duties to self, other and the court, but they are otherwise free to maximize individual gain and autonomy within these limits. As noted by my constitutional law colleague, Professor Kenneth Karst, the key to an ethic of justice is a rights consciousness that is located in the right not to be interfered with — personal and individual liberty.[89] From this we can see the foundations of the common law adversary system: 'I take care of my side and you take care of yours and almost anything we do to win our "rights" is justified.'

Juxtaposed against this philosophy of liberal individualism is the ethic of care that struggles with rules, prefers to make decisions in contexts, tries to keep the parties in relation, and conceives of a responsibility to others. Some recent theorists have attempted to locate the elements of Gilligan's ethic of care in earlier, as well as more recent, philosophy, valuing virtue and relationship over rules and decisions,[90] or by suggesting that the political philosophers do focus on the ethics of outcomes and the consequences of particular schemes of rules.[91] If traditional legal ethics regards its source in canons of ethics and right-behaviour, an ethic of care is rooted in situational ethics told by narrative, or the 'case law'. An ethic of care suggests concern for others and reduction of harm. It suggests that a shift in focus from converting the negative-sum games of law in which the lawyers derive the benefit to a more positive-sum game in which the parties benefit,[92] might transform the adversary system.[93] The difficult question in analysing these themes in practical legal ethics is, do they produce different principles or processes for resolving ethical dilemmas?

Thus far, there is only limited data from which to answer this question.

[89] Karst, above n. 79, at 486–87.

[90] See generally A. C. Baier, 'Hume, The Women's Moral Theorist', in *Women and Moral Theory*, above n. 21, at 37 (tracing Gilligan's ethic of care in the work of David Hume).

[91] In this view John Rawls could be regarded as developing 'rules' from his 'veil of ignorance' in order to incorporate a concern that the resulting system be just and that care be provided for the least advantaged member of society. J. Rawls, *A Theory of Justice* (1971), 136–42.

[92] Cf., C. Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving', *UCLA L. Rev.* 31 (1984), 754, 783–821 (rejecting the win/lose mentality of negotiation in favor of a problem-solving approach that focuses on addressing clients' needs and increasing clients' satisfaction).

[93] See, e.g., *Altruism*, above n. 63, at 418. Another possible source of difference with respect to substantive legal rules, as well as ethical rules or norms, may be whether the theorist or rule-maker views the world as consisting of scarce resources that need restrictive rules for equitable distribution, or as a world of expanding resources to be shared through concern of the other and a recognition of interdependence. See E. Mensch, 'The History of Mainstream Legal Thought' in D. Kairys (ed.), *The Politics of Law* (1982), 24, 25 (contrasting classical jurists who developed legal rules in response to a world viewed as a structure of protected spheres of individual rights and powers with modern reconstitutionists who viewed legal rules as tools to foster the ever-expanding 'pie' of goods and resources); J. Q. Wilson, *The Moral Sense* (1993), 73–78 (discussing how legal rules protecting property rights assure equity, although not always equality).

At least one study has expressly set out to test Gilligan's theories in moral decision-making by lawyers. Rand Jack and Dana Crowley Jack, the latter a student of Gilligan's, interviewed thirty-six lawyers, matched by age and gender, in western Washington State to explore moral conflict and legal ethics dilemmas.[94] The Jacks sought to elaborate on what it means to act morally, by examining the role of Gilligan's ethics of justice or care, the tension between individual ethics and institutionalized professional ethics, and the interplay of personal and professional morality in the making of moral decisions in the law.[95] The interviews were divided into three sections. First, the attorneys were asked about their general orientation to legal ethics decision-making.[96] Second, they were asked how they handled actual moral dilemmas they encountered when practising law.[97] Finally, the lawyers were asked how they would deal with several hypothetical ethical dilemmas.[98]

The Jacks did find gender to be associated with different moral orientations and responses to the ethical dilemmas. A disproportionate number of women were more likely to express a care orientation, which levelled off when the professional rules or roles were clear.[99] Men expressed care and connection concerns too, but were clearly more comfortable with the conventional role of being a 'hired gun' following the wishes of the client.[100] At the same time, the Jacks noted that responses to ethical dilemmas were situationally based. Both male and female lawyers responded clearly with a justice or rights orientation when the ethical or professional norms were clear.[101] For example, in criminal defence advocacy, differences emerged only when there was less clarity in the professional expectations.[102] In the general moral orientation portion of the interviews, women lawyers were slightly more likely to express dissatisfaction with the conventional role morality in the adversary system.[103] Thus, the professional role, legal education, and an understanding of the norms of the profession could often, if not always, trump gender patterns in moral reasoning.

The data collected in a study of lawyer ethics and behaviour in the negotiation context is even more ambiguous.[104] A group of researchers

[94] Jack, above n. 65, at xi–xii. [95] Ibid., at 1.

[96] Ibid., at 55–64. [97] Ibid., at 65–72.

[98] The first hypothetical dilemma involves a client who confesses to a murder, but the confession is legally excludable from the trial. (Ibid., at 72–78). The second hypothetical dilemma includes a situation where the lawyer received information that his client seeking custody will likely be a poor parent. (Ibid., at 78–85).

[99] Ibid., at 54–55. [100] Ibid. [101] Ibid. [102] Ibid., at 75.

[103] Ibid., at 105. For additional discussion of the role of morality in any justification of the adversary system, see D. Luban, 'The Adversary System Excuse', in D. Luban (ed.), *The Good Lawyer* (1983) 83, 85 (arguing that a lawyer's morality of conscience should trump her sense of 'professional obligation' if the two should diverge); R. Wasserstrom, 'Lawyers as Professionals: Some Moral Issues', *Human Rights* 5 (1975) 1, 15–16 (claiming that it is the nature of a 'professional' to be entrenched in her institutional role, such that the professional role dominates the moral one).

[104] See generally Burton, *et al.*, above n. 73, at 199.

asked a group of attorneys in one city to analyse their most recent negotiation, while in another city they interviewed attorneys about their views on ethical and professional responsibility issues.[105] There was little to no gender difference in who was considered a caring or justice-oriented negotiator, although high ratings in both care and justice seemed to be required for a negotiator to be rated as a highly 'effective' negotiator.[106] Although men and women reported different orientations to ethics problems, these problems were framed in hypothetical, rather than real terms, and thus it is impossible to separate the empirical reality of actual behavior from self-reported descriptions.

Critics from within the law have suggested that associating critiques of the adversary system and the legal profession more generally with gender is neither accurate nor likely to help transform or reform legal ethics.[107] Instead, ethical dilemmas should be seen as situational and contextual, calling for a mixture of justice and care to meet each situation. Further, both at the theoretical level and at the empirical level, with the advent of more studies on lawyers, some suggest that women are just as likely to act from rights-justice and adversarial stances as men are likely to act from a position of care.[108]

Although I still think that gender has something to do with one's moral orientation and the law, before I return to the question of what women lawyers' legal ethics might be, let us consider how the character of Portia in *The Merchant of Venice* illuminates both the complexities of the rule and morality of law and the ambiguities of gender in legal role-playing.

III. Does Portia Speak in a Different Voice?

The play *The Merchant of Venice* places discussions of ethics, morality and right-doing at its centre.[109] Complicated for modern readers by the

[105] Ibid., at 224. The data from these two studies are based on very small samples and represent great inequalities in numbers of men and women and so cannot be seen as social-scientifically rigorous

[106] Ibid., at 227

[107] See, e.g., N. Cahn, 'Styles of Lawyering', *Hastings L. J.* 43 (1992), 1039, 1040 (revising the focus from gender-based styles of lawyering to a focus on the different methods by which law is practiced and the implications of ethics in lawyering); cf., Shalleck, above n. 65, at 1079 (warning that a focus on gender-based styles may be misleading if it is based on the assumption that lawyering 'style' can be separated from 'substance')

[108] See, e.g., Craver, above n. 73, at 17–18 (finding no correlation between gender and clinical negotiating achievement), C. F. Epstein, 'Faulty Framework: Consequences of the Difference Model for Women in the Law', *N.Y.L. Sch. L. Rev.* 35, 309, 317–21, 335 (arguing that differences between men and women are not necessarily organic, but are the result of socialization, and that adherence to the 'difference model' inevitably leads to social inequality)

[109] The play is also of interest to legal scholars and lawyers because of its focus on promises, contracts, commercial law, cross-culturalism, and law as theatre, see A. Allen, and M. Seidl, 'The Merchant of Venice as Private International Commerce', *Am. U. J. Int'l L. & Pol.* 10 (1994)

controversial aspects of its anti-Semitism, the play still deals with important modern moral and legal ethical dilemmas — contracts, commercial bonds, fidelity, marriage, friendship, loyalty, justice, the spirit versus the letter of the law, legal remedies,[110] and choice.[111] Portia has become an evocative figure primarily because of the 'mercy speech' which she delivers in the trial scene in Act IV, and I shall focus upon her role in that scene. Nonetheless, the deeper meaning of Portia's character must also be derived from her behaviour in other scenes of the play.[112]

During the trial scene of *The Merchant of Venice*,[113] Portia, disguised as a male jurist, comes to 'save' the fate of her lover Bassanio's friend, Antonio, against the demands of enforcement of the bond of Shylock the Jew. The recompense is a 'pound of flesh' for failure to honour a debt.[114] Over the years, many literary critics and legal commentators have read this scene as central to one of the major themes of the play, that 'mercy should season justice'. Portia is seen as the symbol of mercy and Shylock the symbol of 'justice, judgement and Law'.[115] The source of much of this commentary is Portia's first main speech in the scene where she sets the stage by asking Shylock to consider the virtues of mercy:

> The quality of mercy is not strain'd,
> It droppeth as the gentle rain from heaven
> Upon the place beneath. it is twice blest,
> It blesseth him that gives, and him that takes,

[110] For a recent application of Portia's complex statement and action of mercy as applied to criminal sentencing see E. L. Muller, 'The Virtue of Mercy in Criminal Sentencing', *Seton Hall L. Rev.* 24 (1994), 288 (arguing for the application of philosophical notions of mercy as justice in criminal sentencing)

[111] See A. N. Benston, 'Portia, the Law, and the Tripartite Structure of The Merchant of Venice' in T. Wheeler (ed.), *The Merchant of Venice: Critical Essays* (1991), 163, 163–65 (analysing *The Merchant of Venice* as a series of dichotomies, including mercy and law, Christian and Jew, love and friendship, prodigality and frugality)

[112] See D. H. Lowenstein, 'The Failure of the Act: Conceptions of Law in The Merchant of Venice, Bleak House, Les Miserables and Richard Weisberg's Poethics', *Cardozo L. Rev.* 15 (1994), 1139, 1157–70 (focusing on Portia as a representative of both law and mercy, and rejecting Weisberg's assumption that Portia represents law only when she is playing the role of a man)

[113] I have limited my discussion of Portia to the famous trial scene. For a more complete treatment of Portia, including an examination of her speeches and actions throughout the rest of the play, see J. M. Cohen, 'Feminism and Adaptive Heroinism: The Paradigm of Portia As a A Means of Introduction', *Tulsa L.J.* 25 (1990), 657, 687–733 (discussing Portia's redefined role as literary heroine)

[114] Shakespeare, above n. 8, at Act IV, Sc. 1

[115] See, e.g., J. R. Brown, 'Introduction' to William Shakespeare, The Merchant of Venice', above n. 8, at xi, l–lii (discussing the tendency of critics to analyse *The Merchant of Venice* as a presentation of justice versus mercy, and arguing that this conflict is not the 'governing idea' of the play). See also, E. F. J. Tucker, 'The Letter of the Law in Merchant of Venice', *Shakespeare Survey*, 29, 93–101. In stereotypical religious terms, Shylock represents the value of rigorous rules, exemplified by the Talmud, and Portia represents the value of forgiveness, exemplified by the New Testament. In fact, counter religious interpretations can be found in the text and teachings of both religious traditions.

'Tis mightiest in the mightiest, it becomes
The throned monarch better than his crown.
His sceptre shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings:
But mercy is above this sceptred sway,
It is enthroned in the hearts of kings,
It is an attribute to God himself;
And earthly power doth then show likest God's
When mercy seasons justice: therefore Jew,
Though justice be thy plea, consider this,
That in the course of justice, none of us
Should see salvation: we do pray for mercy,
And that same prayer, doth teach us all to render
The deeds of mercy. I have spoke thus much
To mitigate the justice of thy plea,
Which if thou follow, this strict court of Venice
Must needs give sentence 'gainst the merchant there.[116]

In this passage, which is evoked by feminists and others seeking the feminine side of mercy and justice,[117] Portia tries to persuade Shylock that power is the possession of earthly kings who inspire fear and dread, rather than the attribute — mercy — that brings kings closer to God by feeling it in their hearts. Portia is appealing to Shylock to give up his legal claim, with a powerful reference to the contrast between state and earthly power and religion. In the context of the play, such a reference is distinctly ironic. Shylock's God is not Portia's God and Shylock sees the law as a source of equal treatment in Venice, at least until other Venetian laws are conveniently uncovered, even if he is an outsider Jew. In addition to her appeal to the sacred, Portia asks Shylock to be empathetic, to recognize that only when others impose the law upon us are we likely to ask for mercy.[118] When we are the actor imposing the law or demanding justice of others, we want the law to operate exactly according to text. By reminding Shylock that we all want salvation, she asks him, in effect, to 'do unto others as you would have them do unto you.' It is from this famous and evocative speech that Gilligan[119] and I[120] have argued that Portia represents a feminine, mediating force in law, calling for the tempering of justice with mercy and appealing to hearts as well as sceptres.

[116] Shakespeare, *The Merchant of Venice*, ed. J. R. Brown (The Arden Shakespeare 1964), IV. i. 180–201.

[117] I use feminine here in its most traditional formulation — qualities attributed to women. In modern feminism, what is feminine is disputed by feminists of different political persuasions and national and class cultures. See *Feminism Unmodified*, above n. 45, at 8 (defining femininity as 'woman's identity to women as well as women's desirability to men' according to masculine notions of desirability); see also Smart, above n. 4, at 86–87 (comparing the 'feminine' discourse of nursing to the 'masculine' discourse of lawyering).

[118] For my views on how empathy can be created through story-telling as well as being effective in asking the reader to see things through the eyes of another, see generally C. Menkel-Meadow, 'The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law', *UCLA Women's L.J.* 2 (1992), 287 (reviewing P. J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (1991)).

Yet it is important to examine the rest of the scene to fully understand the complexity of Portia's role as lawyer. Shylock rejects Portia's pleas. 'I crave the law,' he says, 'The penalty and forfeit of my bond.'[121] At that moment Portia becomes an extraordinary, albeit conventional, lawyer. She recognizes that the law must be followed and the bond enforced because precedents must be obeyed or 'many an error by the same example will rush into the state, — it cannot be.'[122]

Having decided that the law must be enforced, Portia demands to see the document — the contract of debt. She gives Shylock his judgment — a pound of flesh, closest to the heart of Antonio. Then, in an act of clever lawyering and language manipulation, Portia proceeds to read the text of the law quite literally. She reports that Shylock had better find a skilled surgeon, for the bond grants him a pound of flesh, but

This bond doth give thee here no jot of blood,
The words expressly are 'a pound of flesh':
Take then thy bond, take thou thy pound of flesh,
But in the cutting it, if thou dost shed
One drop of Christian blood, thy lands and goods
Are (by the laws of Venice) confiscate
Unto the state of Venice.[123]

Portia shows Shylock the law and tells him that if he urges justice he shall have justice and, thus, must live by the law himself. Shylock capitulates and asks for the previously offered 'settlement' of three times the money owed. Yet, Portia, the masterful lawyer still, recounts another Venetian law in response. Because Shylock will have 'justice,' interpreted as the letter of the law, he must contemplate how those laws affect him as well, since, according to the law, any alien (including a Jew) who seeks to tamper with the life of a citizen shall lose his property, half to the citizen harmed and half to the state. Furthermore, his life shall be at the discretion of the Duke. The Duke and Antonio, however, show Shylock their mercy. They

[119] '*Different Voice*', above n. 2, at 105 (discussing how Portia's call for mercy illustrates the absurdity of a literal execution of justice).

[120] *Portia I*, above n. 2, at 42 (suggesting that women lawyers were asserting 'Portia-like' dissatisfaction with the stereotypical male justice-oriented approach to law).

[121] Shakespeare, above n. 116, IV. i. 202–3.

[122] Ibid., IV. i. 217–18. Is this touch of *stare decasis* too Anglo for a court in Venice? Or, was Venice, as the commercial 'mediator' between east and west, particularly desirous of a certain and 'uniform' commercial code? I leave that to the legal historians and comparativists.

[123] Ibid., IV. i. 302–8.

allow him to live, but only as a Christian, forcing him to give up his faith and identity, and they condition their mercy on Shylock's promise to leave his property to his Christian son-in-law.

Has mercy triumphed over justice? No. Portia has played a clever lawyer's game and shown that she can be as manipulative of language and the law as any of her brethren. Can we, as others have argued in their commentaries, try to read the feminine back into her plea for mercy because she is dressed as a male when she plays the judge? Does Portia demonstrate the need for women to conform to conventional legal rules when they become lawyers, in a sort of professional form of cross-dressing?[124] In this argument we have to see her plea for mercy, also made while disguised, as expressing her real, more female, self. And, we must also acknowledge that the actual acts of 'mercy' in this scene are committed by men, Antonio and the Duke.

Yet, without reading too much into it, I think Portia's 'disguise' is an important metaphor for what the Jacks found about the role of gender in ethical decision-making. Portia's judge's robes are those of the professional role and 'mantle' she must take on. Like the women in the Jacks' sample, she tries to use non-rule-based measures of morality and justice — mercy, heart, feeling, concern for Other — to appeal to Shylock, but when forced to resort to law and rules, she shows herself as capable as any male lawyer. Perhaps it is Shylock's unwillingness to accept her offer of mercy that pushes Portia into the literal reading of the contract — demonstrating how hard it is, even for judges, to dislodge the desire of litigants for their self-interested 'justice'. Of course, disentangling implications of gender in this play is further complicated by the fact that Portia, in Shakespeare's time, was actually played by a male disguised as a female while playing Portia. Of course, all the words were written by a male.[125] And, as some commentators have suggested, Portia's 'justice' is correct — Shylock would, after all, be a murderer or at least have murderous intent. Should punishment be meted out for the consequences it would deter or should

[124] See M. B. Garber, *Vested Interests: Cross-Dressing and Cultural Anxiety* (1992); J. P. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990); E. K. Sedgwick, *The Epistemology of the Closet* (1990) (all of which assess the role of gender and sexual identity, cross-dressing and other forms of 'gender play' as affecting our conceptions of knowledge from our gendered positions in society and exploring how 'plastic' we can make our knowledge bases by altering aspects of our gender or sexual identity. See also S. Kessler, and W. McKenna, W., *Gender: An Ethnomethodological Approach* (1978) (exploring the same issues through a variety of studies of gender including a focus on trans-sexuals).

[125] Would Portia's character, or any of the other characters, for that matter, have been different if written by Judith Shakespeare, William's 'fictional' sister? See V. Woolf, *A Room of One's Own* (Harcourt, 1929), 80–84 (positing that it would have been impossible for any woman in the sixteenth century to write plays as remarkable as those of Shakespeare because women were not sent to school and were not trained in the use of advanced literary techniques).

punishment be sensitive to the rehabilitative possibilities of particular wrongdoers?

Yet Portia[126] still evokes a feminist aspiration for law and legal ethics.[127] As Jane Cohen has nicely summarized, those of us who have relied on Portia as a metaphor for women's role in the legal profession see three roles for women. First, women would inhabit the role of lawyer differently than men if they could overcome men's domination of the profession. Secondly, women will reconstruct the profession and the legal system to be more co-operative, more contextualized, less rule-bound, more responsible to others, as well as clients, and more conscious of socially just ends. Thirdly, women will refuse to capitulate to a 'macho' ethic of law and will try to incorporate their own integration of psycho-social health, and family balance, into their roles as lawyers.[128]

Portia is a complex character, able to slip back and forth between both gender and professional roles; she demonstrates what sociologists term 'role virtuosity' and flexibility. Sophisticated feminists now know that we cannot make claims for 'women' based on a universalistic attribution of generalized characteristics of womanhood.[129] Thus, Portia's variegated behaviour demonstrates that not all women act from some essentialist place called 'womanhood'. Indeed, the treatment of Jews as cruel, usurious,

[126] On the role of literature and literary characters in helping us to structure and reconceive moral dialogue, see, e.g., M. Camilleri, Comment, 'Lessons in Law from Literature: A Look at the Movement and A Peer At Her Jury', *Cath. U. L. Rev.* 39 (1990), 557, 594 (categorizing the use of literature in legal study as one means to articulate a public commitment to a shared moral value system); R. Coles, *The Call of Stories: Teaching and the Moral Imagination* (1989); M. C. Nussbaum, '"Finely Aware and Richly Responsible": Literature and the Moral Imagination', in A. J. Cascardi (ed.), *Literature and the Question of Philosophy* (1987), 169, 169–71; R. Weisberg, *Poethics* (1992), 251–52 (arguing that no legal utterance has any moral meaning that is not conveyed through a linguistic medium); R. West, 'Economic Man and Literary Woman: One Contrast', *Mercer L. Rev.* 39 (1988), 867, 868 (arguing that literature plays an essential role in legal analysis by helping lawyers understand, sympathize, empathize, and celebrate with others).

[127] One learned commentator has labelled my work as a 'visionary idealization' of law practice, an appellation I happily accept. See Cohen, above n. 113, at 663 n. 22. Professor Cohen collected a wide variety of articles that used the Portia metaphor to reflect on the lawyering process of women. Ibid., at 664 n. 23 (citing D. Fossum, 'Women in the Law: A Reflection on Portia', *A.B.A.J.* 69 (1983), 1389); F. Heidensohn, 'Models of Justice: Portia or Persephone: Some Thoughts on Equality, Fairness, and Gender in the Field of Criminal Justice', *Int'l J. Soc. L.* 14 (1986), 287; G. W. LaRussa, 'Portia's Decision: Women's Motives for Studying Law and Their Later Career Satisfaction as Attorneys', *Psychol. of Women Q.* 1 (1977), 350; K. Lazarou, 'Fettered Portias: Obstacles Facing Nineteenth Century Women Lawyers', *Women Law. J.* 64 (1978), 21; M. J. Mossman, 'Portia's Progress: Women as Lawyers: Reflections on Past and Future', *Windsor Y.B.* 8 (1988), 252; J. Ruskin, 'How Portia Would Argue the Baby M Case', *N.Y. Times*, 2 February 1987 at p. A16).

[128] Cohen, above n. 113, at 664–65.

[129] See, e.g., E. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988), ix (discussing how a generic notion of an 'essential' woman obscures the heterogeneity of women and undermines feminist theory).

and evil in Shakespeare's essentialist world should remind us of the danger of attributing individual qualities to whole groups of people.[130]

Yet Portia's role virtuosity is not without purpose; she comes to save her husband's friend. Thus, posed as a judge, she is not impartial — she has a purpose. Consider the difficulties of partiality and purpose in the roles of judges and lawyers as they seek both to represent and rule on particular clients, parties, and laws. As judges, would women play their roles with more emotional partiality or concern for the Other?[131] Portia's effort is to save someone, a noble goal. But, she 'disguises' herself as an impartial judge and clearly, in a modern context, would be disciplined for her bias and lack of disclosure in the case.[132] Are those who represent good causes to be forgiven the means that they employ? This remains a heated issue in legal ethics, as elsewhere in moral philosophy, and there is no clear answer.

And what are we to make of Portia's brilliant lawyering to save her husband's friend whose debt in fact helped finance her marriage? What are we to make of the fact that Portia, like any advocate, has taken the short-term, immediate gratification approach, rather than the long-term view? Are we concerned that Portia, like others in the play, is racist and does not see the humanity of the Jew, while nonetheless asking him to see the humanity of Antonio? Hell hath no fury like a woman advocate advancing her own cause. Portia's behaviour warrants the frequent criticism that accompanies 'strident' feminist law reformers who blindly see all men as the enemy.

Thus, one feminist has urged us to abandon Portia as a heroine because she has accomplished her results with manipulation, racial hatred and forced religious conversion, rather than the beneficent mutual understanding of feminist mediation, even if she has done so by demonstrating her strength, agency, intelligence, and power in resolving the conflicts of

[130] For an eloquent reread ing of the positive depictions of Jewishness in the play see Weisberg, above n. 126, at 94–104 (commenting on Shylock's commitments to oaths, marital fidelity, faith, and filial relations). See also M. A. Hamilton, 'The End of Law', *Cardozo Stud. in L. & Lit.* 5 (1993), 125, 125–30 (explaining how Shylock is portrayed as considerably more virtuous than the Christians in the play).

[131] See, e.g., P. A. Cain, Comment, 'Good and Bad Bias: A Comment on Feminist Theory and Judging', *S. Cal. L. Rev.* 61 (1988), 1945, 1946 (asserting the existence of judicial bias, but arguing for a distinction between good bias, grounded in empathy and understanding, and bad, judicially-problematic bias, situated in a judge's inability to transcend personal preferences necessary to administer justice); J. Resnik, 'Feminism and the Language of Judging', *Ariz. St. L.J.* 22 (1990), 31, 37–38 (discussing how the language of feminism should modify an analysis of effective judging from the impartial, dispassionate and disengaged, to dependence, connection and compassion); Resnik, above n. 9, at 1880–81 (exploring the interaction between feminist theory and requirements of judging).

[132] See D. B. Saxe, 'Shylock, Portia and a Case of Literary Oppression', *Cardozo Stud. in L. & Lit.* 5 (1993), 115, 118 (presenting a farcical, secular court judgment condemning Portia's behavior as a jurist).

the play.[133] Indeed, by refusing Bassanio's final offer to pay the debt thrice and release Shylock, she refuses to broker a settlement as a mediator and insists that Shylock shall have his 'justice'.

Yet Portia's actions in Act IV must be read together with her action in Act V, as well as with her prior big scenes in Acts I and II, in which she comes to terms with the patriarchal 'rules' established for the choice of her mate. Ultimately, Portia is a learner and a harmonizer. She accepts the rules of her father, and she teaches her husband a lesson or two about marital fidelity and loyalty in the concluding 'rings' scene, while still making room for her husband's friend. Thus, Portia adopts the rules and ways of men, yet simultaneously extracts promises of love and fidelity, as well as suggesting other roles for law and justice which stress our connections to one another as members of humanity.[134]

IV. Implications for a Gendered View of Legal Ethics: Of Care, Mercy and Other 'Soft' Values

What should we make of these contradictory readings of Portia? First and foremost, that she is a flawed, but admirable, human being trying to conduct her affairs in a world in which a woman could not speak openly as a lawyer or plead for mercy or justice. That she is the prisoner of a patriarchal system which seeks to arrange her life, as well as her marriage, without allowing her self-determination. Secondly, that women cannot take all of the credit for asking that justice be tempered with mercy. The attribution to Portia of a stand for mercy is simplistic, superficial, and probably wrong, though it remains an evocative symbol and an evocative symbol may have its own life and usefulness. Thirdly, that mercy without justice is not necessarily a good thing either — the 'mercy' granted Shylock at the end of the play is a coerced conversion that many of us would decry as a forced and unjust result had it occurred in a mediation. Fourthly, and here I differ with Jane Cohen, that legal systems need both justice and mercy and that something is served by remembering and observing when they act in opposition to each other, in order to use one as a corrective for the other. In this sense we might detach these attributes from gender

[133] Cohen, above n. 113, at 721. Cohen's critique goes further and strikes at the heart of Portia as metaphor. She reminds us that the Duke discusses mercy first, thus mercy should at least not be chronologically associated with Portia. She notes that Portia's appeal to mercy is religiously, not ethically based and thus is exclusionary, rather than feminist and inclusive. Cohen also explains that males make the linguistic references to mercy and that only men actually demonstrate acts of mercy in the play. And, most tellingly, although we know Portia is in disguise, the other members of the scene do not. They regard her as male, and thus they associate mercy with a male jurist. Ibid., at 725–26.

[134] My reading of Act V has been greatly influenced by Lowenstein, above n. 112, at 1170–74 (interpreting Portia as consistently true to her values, as well as to the rule of law and mercy and redemption).

so that neither sex is solely responsible for their achievement. Yet to the extent that aspects of these qualities are symbolically, if not empirically, associated with gender, it helps us see the value of an inclusive profession that allows a variety of peoples to inhabit it so that a variety of values can be expressed.

Despite her more complicated activities in the play, Portia still retains the symbolic value of offering something other than the formal justice Shylock originally thinks he wants. I do think it significant that Shakespeare gave the 'mercy' speech to a woman, albeit a disguised one, and to one of his stronger and most efficacious women characters at that. Women entering a male profession offer the promise of other values or expressions of how to practise law or how to make ethical decisions. But they are not the only repositories of alternative values, and they will not be the only source of change, for they will be asked to conform simply to be able to enter the profession — just as Portia had to don her disguise.

Political scientist Joan Tronto makes an important point when she suggests we should consider what an ethic of care might mean, even as it is elaborated by Gilligan and her women subjects as 'female'.[135] She urges that as we elaborate what this ethic is, we must detach it from gender and subject it to rigorous tests of validity.[136] In her view, the ethic of care consists of several elements. First, it must be contextual; it would be virtually impossible to specify an ethic of care in advance or to develop rigid principles of care.[137] Secondly, the perspective of care suggests that conflict be resolved or worked out with the least harm to the parties and with a concern for the continuance of relationships.[138]

Applying an ethic of care to legal ethics and lawyering behaviour requires even more elaboration. What does it mean to apply an ethic of care in a representational capacity[139]? Under current rules and formulations, the lawyer may take account of the other party only if her client shares an ethic of care. Does an ethic of care at the very least require the lawyer to allow a client to choose some care for the other, rather than the assumed

[135] J. Tronto, 'Beyond Gender Difference to A Theory of Care', *Signs* 12 (1987), 644; Id., *Moral Boundaries: A Political Argument for An Ethic of Care* (1993).

[136] Ibid., at 652–54. [137] Ibid., at 658.

[138] Ibid., at 660. Concern for continuing relationships is actually more controversial in feminist theory than most feminist moral philosophy addresses. Relationships are often assumed to be worth preserving, but other branches of feminism advocate terminating harmful relationships, e.g., *viz-a-viz* battering spouses and abusive partners. For a recent attempt to specify how an ethic of care might inform legal counselling, see generally P. Zwier, and A. Hamric, *The Ethics of Care and Legal Counselling* (1993) (arguing that conventional legal counselling places 'rights consciousness' and regard for client self-interests at the fore of legal decision-making, and suggesting, alternatively, a more inclusive 'caring' model influenced by biomedical ethics and concerns for others).

[139] For an eloquent and detailed attempt to explicate what an ethic of care would be like in legal representation see S. Ellman, 'The Ethic of Care as An Ethic of Lawyers', *Geo.L.J.* 81 (1993), 2665.

self-interestedness of the client in an adversary system? Does the zealous representation that the lawyer provides her client demonstrate a care of the client, even if it excludes care of the opposing side? What happens if the client wants no care at all? What are the limits that the lawyer can go to, in order to preserve the lawyer's sense of care, when the client differs in values or perspectives? How does the lawyer care for all clients she must work for? Does the lawyer balance care for clients and care for other personal, social, and professional relationships and responsibilities?

What does it mean to apply contextual analysis when the rules are part of the context? What does it mean when the rules themselves are ambiguous or self-contradictory, as with so many ethical rules that require competing duties — to clients, and to the legal system. How do the requirements of substantive law interact with ethical requirements? Does equity permit more care and context, as with unconscionability and other such doctrines, where law requires harsher results, or is this a false polarity? Are some substantive rules moving faster in requiring concern than ethical rules,[140] as in the case of required lawyer disclosure of client fraud in American banking regulation?[141] Obviously, to elaborate specifically an ethic of care in lawyering is still a formidable task.

Increasingly in law we see the impulse for an ethic of care being articulated in practical terms in the context of mediation and alternative dispute resolution. In my view, this is what Portia tries to do at the beginning of the mercy speech by seeking a solution in which Shylock has his money and Antonio his flesh. But Shylock wants something else, namely vengeance and recompense for the harm he suffers from those who hate his Jewishness. Shylock, as a member of a 'subordinated' group also thinks he wants the protection of the 'neutral' law (until he learns that the law is not so neutral). If Portia truly embodied an ethic of care and was a good mediator, she would have tried to meet these needs of Shylock in order to end the conflict in a more satisfactory way. An ethic of care takes account of needs. As one scholar states, '[m]oral problems can be expressed in terms of accommodating the needs of the self and of others, of balancing competition and cooperation, and of maintaining the social web of relations in which one finds oneself.'[142]

[140] What are the underlying assumptions of human behaviour implicated in lawyer's ethics rules — that lawyers are representatives of self-interested individuals — or that they are society's problem-solvers, facilitators and help-mates? In other areas of substantive law, there may be more overt regulation of 'good' behaviour than we find in the self-perpetuating symbol of the zealous advocate. Must the advocate always do the most for his client's self-interest — the maximalist advocate — or is it enough to be merely 'adequate' as an advocate?

[141] See D. E. Curtis, 'Old Knights and New Champions: Kaye, Scholer, The Office of Thrift Supervision, And The Pursuit of The Dollar', *S. Cal. L. Rev.* 66 (1993), 985, 990 (recounting the debate between Kaye, Scholer's perception of its ethical duties as counsel and the substantive regulatory rules that apply to attorneys as well as their clients).

[142] Tronto, above n. 135, at 658.

Yet an ethic of care also presents problems — for whom shall we care? How can we assure fairness of caring outside of our own familial, national, religious and cultural groups? Can we care for all, especially where there may be limited resources from which we need to claim, as in present and future tort claimants in mass torts?[143] How can conflicting claims of care be met (such as claims for care from one's clients and one's family, or clients with conflicting goals)?

Can care be taught?[144] As I have argued elsewhere, legal ethics and practice questions could benefit from placing both the lawyer and the client in the role of the other as they set about their work in the adversary system.[145] 'Would I want this to be done to me?' might be a useful question to begin interviews, counselling sessions, and other legal activities. Legal ethics training and teaching would thus be linked to lawyering education generally — learning how to listen, being empathetic, developing problem-solving skills. Are law students 'trainable' in legal ethics or morality? Is it easier if such ethics teaching is connected to legal skills instruction?[146] Of course, clients and lawyers will always be able to distinguish, with great self-righteousness, how they are deserving of different treatment than their opponent, as Shylock did in response to Portia's effort to get him to think and feel empathetically.

The extremes of the adversary system might be modified by a caring and empathetic concern for not only the other, but also for an effort to solve the conflict or problem that resulted in a dispute in the first place. Thus, in Gilligan's study, Amy tries to make the best of a bad situation for everyone. Both broadening and narrowing the issues between parties might help them resolve underlying conflicts that are 'bigger' than any particular dispute. This will not work in all cases. As I have stated in a variety of other contexts, situations requiring punishment in the criminal law or

[143] See, e.g., P. Schuck, 'The Worst Should Go First: Deferral Registries in Asbestos Litigation', *Harv. J. of L. & Pub. Pol.* 15 (1992), 541.

[144] As my friend and colleague Howard Lesnick has asked, 'why do we say empathy and care have to be taught when we assume greed and self-interest are already known?' (Personal correspondence, October, 1994).

[145] C. Menkel-Meadow, 'Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for A Golden Rule of Candor', *U. Pa. L. Rev.* 138 (1990), 761, 770–74. In my mediation course I call this 'empathy training.' It is also called 'applying the Golden Rule to legal ethics' — an enormously difficult project in an adversary system that sees the Other not as like, but as different and highly objectionable.

[146] The Keck Foundation, a private foundation in the United States, recently funded a variety of law schools to create increased ethics instruction by teaching ethics 'pervasively' throughout the curriculum. Recipients of the grant have created a number of ethics problems and methods for looking at ethics issues in traditional curricula as well as in skills or lawyering curricula. See D. Rhode, *Professional Responsibility: Ethics By the Pervasive Method* (1994). It is unclear whether this increased education will lead to a greater sensitivity to rule-ethicality, knowledge of the governing ethics codes, or to morality in the larger, philosophical or personal sense.

clear lines of tolerated and not tolerated behaviour, in civil rights and some tort actions, may still require full-blown advocacy. But I nevertheless believe that justice does not always require bipolar results and binary solutions to problems which would be better approuched with more contextual and less oppositional consideration.

Asking students and lawyers to consider the effects of their work on others and on themselves, to consider the wear and tear of conventional adversary practice, and to work through legal ethical hypotheticals in groups, is one of the ways that the conventional justice system, modelled on individual autonomy, could be affected by the voices of women and minorities in the law. Collective grappling with ethical problems as they unfold has always seemed far more enriching to me than resolving difficult problems through *a priori* rules that can then be argued to be inapplicable or capable of distinction. I know that we shall have to agree on some first principles for our legal communities, but it seems to me that, before we finalize our rules, we need to hear more conversations with more Portias and others who have new, if complex, suggestions as to how we should determine legal morality.

Most discussions of women or other excluded groups in the law address this exclusion from the perspective of the previously excluded individuals.[147] Obviously, for women and minorities previously excluded, working in the legal profession is an expression of individual achievement, fulfilment, and self-determination. The work is also a source of pleasure in doing things for others, being self-supporting, and contributing to the growth and development of one of our major human institutions. These are values which white male professionals have always esteemed, and women and minorities have come to demand equality in the ability to express those values in the legal workplace. It is less obvious, however, how the legal profession as a whole will benefit from the entrance of women and other excluded groups and I shall focus briefly on that issue.[148]

From an epistemological perspective, there is the controversial claim that women and minorities 'know' things differently[149] from white men and thus will change the way in which society produces legal knowledge

[147] See generally Morello, above n. 58 (discussing historical exclusion of women from the legal profession and continued exclusion of women from powerful positions in the legal field); D. Rhode, 'Perspectives on Professional Women', *Stan. L. Rev.* 40 (1988), 1163 (outlining the history of occupational inequality, and evaluating possible legal responses to this inequality from a feminist perspective).

[148] I have written extensively about this benefit in other contexts, see, e.g., *Feminization*, above n. 57, at 230–39.

[149] See, e.g., M. F. Belenky, *et al.*, *Women's Ways of Knowing: The Development of Self, Voice and Mind* (1986), 3 (describing distinct ways in which women observe reality and form opinions about truth, knowledge and authority); S. Harding, *The Science Question in Feminism* (1986), 136–141 (explaining the debate within feminist theory concerning women's distinct knowledge and perspective, as well as regarding the existence of a feminist science).

and develops legal ethics. Whether this special knowledge comes from the double vision of an excluded/subordinated status which requires women and minorities to master the master's vocabulary, as well as their own, (a theory of knowledge based on social position) or from a more essentialist or role-based knowledge, (such as the knowing of 'mothers,'[150]) many, but certainly not all,[151] feminists have argued that adding women to the development of legal doctrine, legal ethics, and law practice will expand, broaden and transform the way we produce and use law.

The inclusion of women and others in the profession also creates the obvious benefit of providing lawyers who can serve the previously underrepresented or unrepresented, or represent better those interests served by more conventional lawyers. I do not mean to suggest that women lawyers should serve only women clients or minority-group lawyers should serve only minorities. But, in some cases, comfort with a same-group representative may facilitate the expression of legal needs and desires that might be repressed with more conventional, dominant group representation.

One of the most telling findings of many of the Gender Bias Task Force Reports in the United States is that disparate treatment of some groups in the court system is perceived by the general public, and the legitimacy of the entire system is compromised thereby.[152] When the public observes court proceedings, commonly through jury service or other participation, such as being a witness or observer through non-fictional television programming of actual trials or People's Court, as well as the fictional accounts on such programmes as *LA Law* or *Law & Order*, adverse treatment

[150] See the conflicting and competing claims of the value of mothering in creating knowledge in Ruddick, above n. 44, at 28–57; M. Ashe, 'The "Bad Mother" in Law and Literature: A Problem of Representation', *Hastings L.J.* 43 (1992), 1017, 1020 n. 8 ('[T]he revalorization of motherhood by "cultural feminists" . . . often implicates "essentialistic" notions concerning women. These notions can bolster destructive stereotypes or can divide women among themselves by excluding some women from the scope of relevance of "feminist theory".'); R. H. Bloch, 'American Feminine Ideals in Transition: The Rise of the Moral Mother 1785–1815', *Feminst Stud.* 4 (1978), 101, 101 (introducing the historical issue of motherhood in American literature from the eighteenth to the twentieth Century); J. Williams, 'Gender Wars: Selfless Women in the Republic of Choice', *N.Y.U. L. Rev.* 66 (1991), 1559, 1566 (assailing Gilligan's extolling the virtue of self-sacrifice in motherhood because it derives from the cult of domesticity that oppresses women).

[151] The claim of a gender, as well as a race-based, epistemology is the centrepiece of a hotly-debated academic controversy. See, e.g., K. T. Bartlett, 'Feminist Legal Methods', *Harv. L. Rev.* 103 (1990), 829, 867–87 (explaining theories of feminist epistemology and considering practical value of the different positions); Harding, above n. 43, at 106–37 (explaining and evaluating two main theories of feminist epistemology, feminist empiricism and feminist standpoint theory); R. L. Kennedy, 'Racial Critiques of Legal Academia', *Harv. L. Rev.* 102 (1989), 1745, 1801–07 (arguing that race-based epistemology reaffirms undesirable ideas of an inherent racial difference).

[152] See 'The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force', *So. Cal. L. Rev.* 67 (1994), 745, 967 (stating that courts must work to eradicate gender bias not only for the sake of the legal personnel, but also for the sake of the citizenry, which must have confidence in its court system).

of particular individuals because of their social characteristics becomes evident in a way in which regular actors in the system may be totally unaware. Thus, public attention to issues of gender and racial differential treatment, through such efforts as court-sponsored Task Force Reports, serves to illuminate in a public way what is going on in private, and, in turn, may result in pressures to the profession to 'clean up its act' if it wishes to improve its already tarnished reputation.

Finally, attention to gender issues and quality of life issues with which women are more likely to be concerned, may cause the profession as a whole to re-evaluate the demand of its 'greedy institutions' which seem to require so much devotion to work. Should a lawyer's 'ethics' or morality be judged by how he treats others, including employees? Is the demand of brutally hard working-hours in some legal employment itself an issue of ethical concern?[153] Interestingly, in some instances the development of parental or healthcare-giving leave has occurred because of the activism of some male attorneys who also seek to spend more time with their families and who seek to humanize their commitment to work. In my own research into law-firm policies I have uncovered instances of middle-aged men who have become innovators on issues of leave, either because their daughters have become lawyers and consequently understand more fully the impediments of the 'glass ceiling' as it affects mothers,[154] or because of their own needs to spend time with families, often second families which they began in their more mellow middle years. For some, the aggravating wear and tear of adversarial legal practice leads to mid-life evaluation and changes in what is desired in legal practice. The key to understanding this phenomenon is to realize that innovation may be sparked by women raising issues or making demands, but the effects of these innovations may be pursued from surprising sources ('merciful men' like the Duke in *The Merchant of Venice*). It also suggests that innovation may come from self-interest, as well as a moral commitment to the underlying values of the common good of changing the profession.

Thus, broadly defined 'legal ethics' — leading our lives as lawyers, making decisions about our clients, our opponents, ourselves and our families, searching to be 'good lawyers' as well as 'good people' — in my view is

[153] In a recent meeting of Bar leaders in the US, the group voted to press for an anti-discrimination clause to be added to the ABA Model Rules of Professional Conduct, but efforts to recommend or encourage more 'flexible' working hours were defeated. Proceedings of the Institute on the Future of the Legal Profession, National Assembly, Case Western Reserve University School of Law, June 1–3, 1993.

[154] Interestingly, one unpublished report, taken from an analysis of American census data demonstrated that divorced women with children worked the greatest number of hours, perhaps due to the need for income. See Halliday, Aschaffenberg & Granfors, 'Gender, Time and Structure in the American Legal Profession, Data From the 1980 Census (1987)', presented to Conference on Women in the Legal Profession, Madison, Wisconsin (July, 1987).

enhanced by taking account of the values of 'others,' those previously outside the profession. Whether the character Portia or the real Portias who currently practice law are actually the representatives of alternative values, we cannot yet say. But it seems to me that both legal education and law practice should look for ways to allow a broader range of values to be expressed, while acknowledging that debate and discussion will be difficult. We are at the first stage, acknowledging and arguing about whether mercy has a place in a rule-bound system of justice, trying to figure out what it means to be a caring lawyer. The second stage will seek to define these terms more rigorously, to apply them to particular situations and to let the moral philosophers and legal ethicists debate their validity. We will try to educate new lawyers to be sensitive to these additional values and then we will have to measure if they are and if it makes any difference in what they do. For me, Portia may have more value as a symbol than as a reality. But, as a foil or as an alternative to a rigid system of rules and justice, she provides a metaphor for at least one critique of law that I look forward to following in the years to come.