puberty is in this judgment increasingly constructed not merely as fully consenting but as temptress:

> The older the girl, the greater the possibility that she may have been the willing or even instigating party to the liaison, a factor which will be reflected in sentence.[88]

The equation is made between puberty and consent and the female other is constructed to mirror or even to create the desire of the male subject. Her absence of subjectivity is underlined in the case of *R v Bailie-Smith*[89] where the defendant successfully appealed against an incest conviction arguing that he mistook his 13 year old daughter for his wife. How could such a mistake have been possible? For the court this was a female body without subjectivity.

One of the biggest dichotomies in legal notions of consent arises in the distinction between consent to offences of physical violence and consent to offences of sexual violence. This distinction in itself is problematic in that sexual violence is always physical to the extent that it has a physical dimension and physical violence may also be sexual. It is easier to draw a distinction by considering specific offences which have or do not have a sexual or physical dimension to their legal definitions. Rape, indecent assault and incest all have sexual dimensions without which the offence is not committed. In the cases of rape and incest, sexual intercourse is required. The offences of common assault, assault occasioning actual bodily harm, grievous bodily harm, and grievous bodily harm with intent do not have a sexual element as part of their legal definitions, although within any one case there may be a sexual dimension. Consent is theoretically a defence in respect of all of the aforementioned offences.

The great majority of these offences of legally defined physical violence are committed by men and the great majority of them are committed against men.[90] Just as the sexual space of the male subject is constructed by the laws relating to sexual violence, so the physical space of the male subject is constructed by the law relating to physical violence. It is this space which defines the male subject's possibilities for self-expression in violence, most specifically consensual violence between men/boys.

The construction of the male subject through his participation in 'manly sports' is ensured through a line of cases from *Coney*[91] to *Attorney General's Reference (No 6 of 1980)*[92] which have preserved a space for that construction. It is possible to consent to visible violence in the case of 'properly conducted'[93] games and sports. In other areas of violent self expression, the male subject is in more difficulties. If there is no visible, physical harm, consent can be a defence but the test here will be whether the conduct of the complainant viewed as a whole could have been considered to have constituted consent[94] – a very different test from the completely subjective one in rape.

88 *Ibid*, p 571.

89 [1977] 64 Cr App Rep 76.

90 Patricia Mayhew, *Summary Findings British Crime Survey* (HMSO, 1994). This summary, which is based on the 1993 statistics, shows that the great majority of victims of assault crimes are males aged between 16 and 29.

91 (1882) 8 QBD 534.

92 [1981] All ER 1057.

93 *Attorney-General's Reference (No 6 of 1980)* [1980] All ER 1057, p 1059.

94 *R v Donovan* [1934] 2 KB 498. Even for common assault, consent will not be an effective defence in the case of prize fights, presumably because they are illegal in any event.

Where an intentional assault has caused visible physical harm, consent cannot be a defence unless that harm is transient or trifling or if it falls into one of the categories of exceptional circumstances as set out by case law and confirmed by *Brown*.[95] These exceptional circumstances are 'manly sports',[96] rough but innocent horseplay'[97] and where the purpose justifies the harm, most notably legitimate and authorised medical interventions.

Brown settles that: 'It is not in the public interest that people should try to cause each other actual bodily harm for no good reason' and where such good reason does not exist, consent cannot be a defence. In respect of visible violence outside of that very limited space, a male subject will not be allowed to consent, just as in the very considerable space for heterosexual male sexual violence, the law does not in its construction of rape allow the female other not to consent.

Further, the judgment in *Brown* made it clear that not only were homosexual sadomasochistic activities considered to be no good reason for the infliction of physical harm but also the House of Lords sought to extend its protection to the young men who could be 'proselytised and corrupted' by 'cult violence'. This is protection which the law does not seek to extend to young female victims of rape in general because there is no age below which the victim cannot consent. Nor was it extended to the specific 15 year old victim in *Satnam and Kewall*[98] where rape convictions against the two defendants were quashed and the court chose to reaffirm *Morgan*, leaving the honest belief test in fact and making no comment on the fact that a 15 year old can legally consent to sexual intercourse for the purposes of a rape charge although she cannot consent to indecent assault.

As willing and enthusiastic 'victim' or as protesting complainant, the male subject cannot have consent constructed against him in matters of visible physical violence.[99] Of course, the same protection is extended to the female complainant but only in matters of visible physical violence where she is much less likely to be the victim and not in sexual violence where she almost always is.

Disciplining Gendered Bodies

Legal notions of consent construct gender in the law: they assist in the construction of the male as subject and the female as other. They also differentially discipline the bodies of the male subject and the female other. The mirror – the watchful eye of disciplinary power – reflects differential norms for the male subject and the female other.

The male body is disciplined by the law through the constrictions on its capacity to exert nonconsensual violence on another male body but the capacity of the male body as political, sexual force is intensified by the space provided to the male subject in sexual offences and particularly in rape. The body of the female other is disciplined through the space which is provided to the male subject to construct her consent where none exists and by the complicity which that exacts from her in her own ontological degradation.

The very construction of sexuality creates the possibility for disciplining the body and the law constructs sexuality, particularly through its mercurial notions of

95 *R v Brown* [1992] 2 WLR 441.

96 *Coney* p 534.

97 Archbold, *Criminal Pleading and Practice* (1988, 43rd edn) paras 20–124 quoted in *R v Brown*, *op cit*, p 449.

98 *op cit*.

99 *R v Brown*, *op cit*.

consent, to provide space for the sexual expression of the male subject. The space for the female other is as mirror for that desiring male subject.

It is interesting to note that where the female other is perceived to be outside the parameters of desirable female, the law does not construct her as mirroring male desire. In the case of *Kimber*,[100] the defendant was convicted of assaulting a 56 year old mental patient, 'Betty'. Following *Morgan*, the defendant argued honest belief in consent. The court, upholding the conviction, focused on Betty's consent and Betty's desires, although, following *Morgan*, the issue was his honest belief. The space for the male subject to legitimately express his sexual desires is not extended here because those desires are constructed outside the normal and the female other is not perceived as mirroring them.

The female body is disciplined as a sexual body, disciplined to mirror the sexual desire of the male subject, to expand the space of his legitimate desire. Where her body is constructed as sexual, the space for her consent is consistently contracted; where her body is not constructed as sexual – as in the case of the ageing woman or the very young girl – that space is expanded. The criminal law disciplines the female body, as it denies subjectivity to the woman/girl.

Conclusion

It has been possible to see how the discourse of the criminal law constructs gender across a range of offences. Law's power is disciplinary – constructed around the mirror – the watchful eye of which also reflects gendered norms for the disciplined subject. In its disciplinary aspect, the law extends the power of the male subject to construct himself as desiring subject in respect of the female other who mirrors that desire. Concomitantly, it disciplines the body of the female other, subject to that power. The male physical body is itself disciplined in relation to the body of other male subjects.

The constructions of reason and consent in legal discourse are central to this process. Reason is constructed against the female other as it is ascribed to the male subject, although he is not tested by it. Differential constructs of consent create the power of the male subject for the legitimate space of the sexually constructed female other, as they limit the power of that subject's physical body. As watchful eye, as reflected norm, as refracted desire: the law's mirrors powerfully construct gender and in so doing, they gender justice.

THE EQUALITY/SAMENESS/DIFFERENCE DEBATE

Patriarchal attitudes, assumptions and labelling, discussed in Chapter 5 entails the implicit assumption that women are 'different'; that women comprise the 'other' – a species excluded from the 'natural' patriarchal ordering of society. This perception is critical for it affects in a fundamental way the manner in which civic society – and law – is viewed. Simone de Beauvoir in her seminal work *The Second Sex*[101] considered women as the 'other'. Carol Gilligan, a psychologist, in *In a Different Voice: Psychological Theory and Women's Development*[102] brought the subject of sameness versus difference centre stage with her analysis of the 'different voice' in which women appear to speak emotionally and psychologically.

100 [1983] 2 All ER 316.

101 (1949) Trans HM Parshley, Pan Book, 1988.

102 Harvard University Press, 1982.

THE SECOND SEX

Simone de Beauvoir[103]

Woman? Very simple, say the fanciers of simple formulas: she is a womb, an ovary; she is a female – this word is sufficient to define her. In the mouth of a man the epithet female has the sound of an insult, yet he is not ashamed of his animal nature; on the contrary, he is proud if someone says of him: 'He is a male!' The term female is derogatory not because it emphasises women's animality, but because it imprisons her in her sex: and if this sex seems to man to be contemptible and inimical even in harmless dumb animals, it is evidently because of the uneasy hostility stirred up in him by woman. Nevertheless he wishes to find in biology a justification for this sentiment. The word female brings up in his mind a saraband of imagery – a vast, round ovum engulfs and castrates the agile spermatozoon; the monstrous and swollen termite queen rules over the enslaved males; the female praying mantis and the spider, satiated with love, crush and devour their partners; the bitch in heat runs through the alleys, trailing behind her a wake of depraved odours; the she-monkey presents her posterior immodestly and then steals away with hypocritical coquetry; and the most superb wild beasts – the tigress, the lioness, the panther – bed down slavishly under the imperial embrace of the male. Females sluggish, eager, artful, stupid, callous, lustful, ferocious, abased – man projects them all at once upon woman. And the fact is that she is a female. What if we are willing to stop thinking in platitudes, two questions are immediately posed: what does the female denote in the animal kingdom? And what particular kind of female is manifest in woman?...[104]

These biological considerations are extremely important. In the history of woman they play a part of the first rank and constitute an essential element in her situation. Throughout our further discussion we shall always bear them in mind. For, the body being the instrument of our grasp upon the world, the world is bound to seem a very different thing when apprehended in one manner or another. This accounts for our lengthy study of the biological facts; they are one of the keys to the understanding of woman. But I deny that they establish for her a fixed and inevitable destiny. They are insufficient for setting up a hierarchy of the sexes; they fail to explain why woman is the Other; they do not condemn her to remain in this subordinate role forever.[105]

Carol Gilligan's research

One of the most significant catalysts in the gender debate has been the work of educational psychologist Professor Carol Gilligan, whose work *In a Different Voice: Psychological Theory and Women's Development*[106] was published in 1982. Lawrence Kohlberg had earlier established a six-stage model of human development, based on moral reasoning, which when the results of boys was compared to those of girls, showed that girls consistently underperformed.[107]

103 1908–86.

104 *The Second Sex*, p 3.

105 *Ibid*, p 34.

106 Harvard University Press, 1982.

107 L Kohlberg, 'Stage and Sequence: The Cognitive-Development Approach to Socialisation', in A Goslin (ed), *Handbook of Socialisation Theory and Research* (1971); 'Moral Stages and Moralisation: The Cognitive-Development Approach', in T Lichone (ed), *Moral Development and Behaviour: Theory Research and Social Issues* (1976); *The Philosophy of Moral Development* (San Francisco: Harper & Row, 1981).

Gilligan's research concerned the interpretation of the manner and extent to which girls and boys differed in their reactions to a moral dilemma. Two of the children studied, Jake and Amy, aged eleven years, were of comparable intelligence, education and social class. The problem posed concerned Heinz, a poor man whose wife required drugs in order to save her life. Heinz could not afford to pay for the drug, and the pharmacist would not lower the price. The children were asked whether, given the severity of the situation, Heinz would be morally justified in stealing the drug.

Carol Gilligan demonstrated the differing forms of reasoning undertaken by Jake and Amy. When asked whether Heinz should steal the drug, Jake answered 'yes', on the basis that, although this would amount to theft, the law itself could contain mistakes, and that if Heinz was prosecuted the judge should take this into account and give him a light sentence. Jake's reasoning followed a logical, rational pattern. Jake, Gilligan writes, considers the moral dilemma to be 'sort of like a math[s] problem with humans' (math[s] being 'the only thing that is totally logical'). Amy, on the other hand, reasoned very differently. Lacking Jake's confident, logical approach Amy first considers whether there are alternatives to stealing the drug ('a loan or something'). When asked why Heinz should not steal the drug Amy considers not the law but the effect on the relationship between Heinz and his wife (if he is caught, his wife might not get the drug and would get more sick). Amy's whole response to the dilemma revolves around a concern for relationships, a reliance on the connectedness of people rather than pure logic. Viewed from one perspective, this could be interpreted to mean that Amy's development is 'stunted by a failure of logic'. That, however, would be a false interpretation which has as its basis the assumption that boys and girls must reason to a shared standard: a standard set by the boys. In Gilligan's assessment, 'Amy's judgments contain the insights central to an ethic of care, just as Jake's judgments reflect the logic of the justice approach'. Amy's judgments are assessed by Gilligan in the following manner:

> ... the world she knows is a different world from that refracted by Kohlberg's construction of Heinz's dilemma. Her world is a world of relationships and psychological truths where an awareness of the connection between people gives rise to a recognitions of responsibility for one another, a perception of the need for response. Seen in this light, her understanding of morality as arising from the recognition of relationships, her belief in communication as the mode of conflict resolution, and her conviction that the solution to the dilemma will follow from its compelling representation seem far from naive or cognitively immature. Instead, Amy's judgements contain the insight central to an ethic of care, just as Jake's judgments reflect the logic of the justice approach.'

In the extracts which follow, the manner in which feminist scholars have reacted to Carol Gilligan's work is considered.

PORTIA IN A DIFFERENT VOICE: SPECULATIONS ON A WOMEN'S LAWYERING PROCESS[108]

Carrie Menkel-Meadow[109]

Introduction

As a scholar of the legal profession, I have asked whether the increased presence of women in the legal profession might lead to alternative ways of seeing what lawyers do and how they do it.[110] Will it be simply that more lawyers are women, or will the legal profession be transformed by the women who practice law? In recent years, two developments in feminist scholarship have offered insights which promise to shed some light on that question. This essay explores some of the potential applications to law of these two developments in feminist scholarship stated as speculative hypotheses for further study.

The first of these developments in feminist scholarship is the self-conscious observation of how women's entry into formerly male-dominated fields has changed both the knowledge base of the field[111] and the methodology by which knowledge is acquired.[112] Since our knowledge of how lawyers behave and of how the legal system functions is based almost exclusively on male subjects of study,[113] our understanding of what it means to be and act like a lawyer may be misleadingly based on a male norm. We need to broaden our enquiry to include the new participants in the profession so that we can discover whether our present understandings are accurate. With more women lawyers available for study we may learn first, whether women perform lawyering tasks in ways different from men; second, whether our descriptions of what lawyers do may have to change to reflect different goals or task orientations; and third, whether the increased presence of women in the profession may have broad institutional effects. Current studies of gender differences in other fields offer a powerful heuristic for application to our understanding of the lawyering process.

The second development is a body of theoretical and empirical research in psychology and sociology. This research has postulated that women grow up in the world with a more relational and affiliational concept of self than do men. This concept of self has important implications for the values that women develop and for the actions that are derived from those values.[114] This research

108 [1985] *Berkeley Women's Law Journal* 39. (Footnotes edited.)

109 At the time of writing, Professor of Law, University of California, Los Angeles.

110 Menkel-Meadow, 'Women as Law Teachers: Toward the Feminisation of Legal Education', in *Essays on the Application of a Humanistic Perspective to Law Teaching* (1981); Menkel-Meadow, 'Women in Law?' (1983) *Am B Found Research J* 189.

111 E Langland and W Gove (eds), *A Feminist Perspective in the Academy: The Difference it Makes* (1981); A Rich, 'Toward a Woman-Centred University', in *On Lies, Secrets and Silence: Selected Prose 1966-78* (1979) p 125; Abel and Nelson, 'Feminist Studies: the Scholarly is Political' (1985) 4 *The Women's Rev of Books* 10.

112 C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982).

113 See eg J Heinz and E Laumann, *Chicago Lawyers: The Social Structure of the Bar* (1982); J Carlin, *Lawyers on Their Own* (1962). Cf C Epstein, *Women in Law* (1981).

114 See eg C Gilligan *op cit*, N Chodorow, *The Reproduction of Mothering* (1978); D Dinnerstein, *The Mermaid and the Minotaur* (1978); J Miller, *Towards a New Psychology of Women* (1976); N Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (1974); A Schaef, *Women's Reality* (1981).

is controversial and is generating criticism from many different quarters[115] I am not unsympathetic to some of the criticism, which in part reflects a growing maturity and differentiation in feminist scholarship.[116]

I find persuasive, though not unproblematic, the notion that values, consciousness, attributes, and behaviour are gendered,[117] ie that some are identified as belonging to women and others to men. The attachment of gender labels is a product of both present empirical research[118] and social process. Thus, we may label the quality of caring a female quality, but note its presence in many men. Further, a man who exhibits many feminine qualities may be perceived as feminine, eg 'He's too sensitive to be a good trial lawyer', or alternatively, an assertive woman may be met with remarks such as, 'She's as sharp as any of the men on the team'.[119] Attributing behaviour characteristics to a particular gender is problematic, because even as we observe such generalisations to be valid in many cases, we risk perpetuating the conventional stereotypes that prevent us from seeing the qualities as qualities without their gendered context.

The process is one that most feminists deplore because what is labelled female or feminine typically is treated as inferior, and is subordinated to what is labelled male or masculine. This is particularly true if the context in which they are found is one, such as the practice of law, which has itself traditionally been labelled male. For the purpose of this essay I will assume that gender differences exist as they have been documented by such writers as Simone de Beauvoir, Carol Gilligan, Nancy Chodorow, Jean Baker Miller, Anne Schaef and others, and will leave to others the important enquiry into the origins of these differences, be they biological, sociological, political, or some combination of these. My perspective on this issue is that as long as such differences exist, studies of the world – here the legal profession – that fail to take into account women's experience of that world are incomplete, and prevent us from having a greater repertoire of societal as well as individual choices.

An important part of this enquiry is whether it is yet possible to see if women conduct themselves as lawyers differently from men. I have commented elsewhere that just because there are increasing numbers of women in the practice and teaching of law,[120] we do not yet know whether women will transform the practice or themselves when they are found in sufficient numbers. Social research has indicated that those in token numbers may feel strong pressure to conform to the already existing norms of the workplace and to minimise, rather than emphasise, whatever differences exist.[121] Thus, when we

115 See eg Catharine MacKinnon, 'Comments', Mitchell Lecture Series (1984) reprinted in The 1984 James McCormick Mitchell Lecture: 'Feminist Discourse, Moral Values and the Law – A Conversation' (1985) 34 *Buffalo L Rev* 11, 20.

116 For an excellent typology of the different schools within feminism, see A Jagger, *Feminist Politics and Human Nature* (1984).

117 S de Beauvoir, *The Second Sex* (1953); C Gilligan, *op cit*.

118 C Gilligan, *op cit*; E Maccoby and C Jacklin, *The Psychology of Sex Differences* (1974); Spence, 'Changing Conceptions of Men and Women: A Psychologist's Perspective', in Langland and Gove *op cit*.

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

120 Menkel-Meadow, 'Women as Law Teachers' *op cit*.

121 R Kanter, *Men and Women of the Corporation* (1977); Kanter, 'Reflections on Women and the Legal Profession: A Sociological Perspective' (1978) 1 *Harvard Women's LJ*; Spangler, Gordon and Pipkin, 'Token Women: An Empirical Test of Kanter's Hypothesis' (1978) 84 *Am J Soc* 160.

look at women who are lawyers in 1985, we may be studying those women who have been successful in assimilating to male nomns. Although there is already some evidence of Portia-like[122] dissatisfaction with the present male voice,[123] more women lawyers may be necessary to form a critical mass that will give full expression to a women's voice in law (whether expressed exclusively by women or with men in another voice).

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

... In conventional terms Jake would make a good lawyer because he spots the legal issues of excuse and justification, balances the rights, and reaches a decision, while considering implicitly, if not explicitly, the precedential effect of his decision. But as Gilligan argues, and as I develop more fully below, Amy's approach is also plausible and legitimate, both as a style of moral reasoning and as a style of lawyering. Amy seeks to keep the people engaged; she holds the needs of the parties and their relationships constant and hopes to satisfy them all (as in a negotiation), rather than selecting a winner (as in a lawsuit). If one must be hurt, she attempts to find a resolution that will hurt least the one who can least bear the hurt. (Is she engaged in a 'deep pocket' policy analysis?) She looks beyond the 'immediate lawsuit' to see how the 'judgment' will affect the parties. If Heinz steals the drug and goes to jail, who will take care of his wife? Furthermore, Amy is concerned with how the dilemma is resolved: the process by which the parties communicate may be crucial to the outcome. (Amy cares as much about procedure as about substance.) And she is being a good lawyer when she enquires whether all of the facts have been discovered and considered.

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

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

122 W Shakespeare, *The Merchant of Venice*.

123 See eg Rifkin, 'Toward a Theory of Law and Patriarchy' (1980) 3 *Harvard Women's LJ* 83. (Extracted at p 23.)

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

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

The two different voices Gilligan describes articulate two different developmental processes. To the extent that we all have both of these voices within us and they are not exclusively gender based, a mature person will develop the ability to consider the implications of both an abstract rights analysis and a contextualised responsibilities analysis. For women, this kind of mature emotional and intellectual synthesis may require taking greater account of self and less account of the other, for men, the process may be the reverse. Such an integration will not resolve all issues of personal development. Those who seek inter-dependence will not necessarily find it by the individualistic integration and reciprocity of reasoning styles proposed above. And if this integration fosters equality between the sexes, there still remains the problem of equity. As one of Gilligan's subjects observed: 'People have real emotional needs to be attached to something and equality doesn't give you attachment. Equality fractures society and places on every person the burden of standing on his own two feet.'[124] The different paths toward mature moral development for men and women may give us more than one road to take to the same place, or we may find that there is more than one interesting place to go.

II. The Different Voices of Lawyering

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

Two sets of questions illustrate how we might think about the impact of two voices on our legal system as presently constituted and as it might be transformed. First, how has the exclusion, or at least the devaluation, of women's voices affected the choices made in the values underlying our current legal structures? When we value 'objectivity' or a 'right' answer, or a single winner, are we valuing male goals of victory, exclusion, clarity, predictability? What

124 *In A Difference Voice*, p 167.

would our legal system look like if women had not been excluded from participating in its creation? What values would women express in creating the laws and institutions of a legal system? How would they differ from what we see now? How might the different male and female voices join together to create an integrated legal system? Second, can we glimpse enclaves of another set of values within some existing legal structures? Is the judge 'male' the jury 'female'? Is the search for facts a feminine search for context and the search for legal principles a masculine search for certainty and abstract rules? It could be argued that no functional system could be either wholly masculine or wholly feminine, that there is a tendency for one set of characteristics in a system to mitigate the excesses of the other. Thus, the harshness of law produced the flexibility of equity, and conversely, the abuse of flexibility gave rise to rules of law to limit discretion. In this sense, the legal system could be seen to encompass both male and female voices already. Yet, even though our present legal structures may reflect elements of both sets of values, there is a tendency for the male-dominated or male-created forms and values to control. Thus, equity begins to develop its own harsh rules of law and universalistic regulations applied to discretionary decisions, undermining the flexibility that discretion is supposed to protect. Because men have, in fact, dominated by controlling the legal system, the women's voice in law may be present, but in a male form.

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

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

The Advocacy-Adversarial Model

The basic structure of our legal system is premised on the adversarial model, which involves two advocates who present their cases to a disinterested third party who listens to evidence and argument and declares one party a winner. In this simplified description of the Anglo-American model of litigation, we can identify some of the basic concepts and values which underlie this choice of arrangements: advocacy, persuasion, hierarchy, competition, and binary results (win/lose). The conduct of litigation is relatively similar (not coincidentally, I suspect) to a sporting event – there are rules, a referee, an object to the game, and

a winner is declared after the play is over. As I have argued elsewhere,[125] this conception of the dispute resolution process is applied more broadly than just in the conventional courtroom. The adversarial model affects the way in which lawyers advise their clients ('get as much as you can'), negotiate disputes ('we can really get them on that') and plan transactions ('let's be sure to draft this to your advantage'). All of these activities in lawyering assume competition over the same limited and equally valued items (usually money) and assume that success is measured by maximising individual gain. Would Gilligan's Amy create a different model?

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

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

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

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