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Feminist Jurisprudence: Justice and Care

I. INTRODUCTION

The nature of law changes according to one's perspective of, or the way one views, the law.¹ Jurisprudence is a collection of those perspectives, and includes many subcategories, including positivist jurisprudence, natural law, originalism, utilitarianism, and legal realism.² Jurisprudential theory is important in order to have a viewpoint from which to examine cases and the law, and we submit that feminist theory provides fertile ground for examining and developing law under a practical jurisprudence.³ Feminist jurisprudence, if the number of books and arti

1. According to the Heisenberg indeterminacy principle, we cannot observe both the location and the motion of sub-atomic particles at the same time. To observe one, is to change the other. We think this principle applies to other things as well; the observation of a phenomenon (such a social movement) will often cause that phenomenon itself to change. STEPHEN W. HAWKING, *A BRIEF HISTORY OF TIME: FROM THE BIG BANG TO BLACK HOLES* 54-56 (1988).

2. BLACK'S LAW DICTIONARY 595 (6th ed. 1991) defines "jurisprudence" as: "The philosophy of law, or the science which treats of the principles of positive law and legal relations." In short, jurisprudence looks at legal systems and how they function. Scales writes that in addition to looking at the structure of legal systems and valuing abstract principles such as neutrality, we need to do more when evaluating legal systems:

A legal system must attempt to assure fairness. Fairness must have reference to real human predicaments. Abstract universality is a convenient device for some philosophical pursuits, or for any endeavor whose means can stand without ends, but it is only extrinsically important. Its actual value depends upon its success in promoting that which is intrinsically valuable. By inquiring into the mythic structure of objectivity, we see that abstract universality explicitly contradicts the ideal of a "government of laws, not men." Our task therefore, is to construct a system which avoids solipsism, which recognizes that the subjectivity of the law-maker is not the whole of reality.

Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1380 (1986).

3. As Cole notes, "social theorists need a method." David Cole, *Getting There: Reflections on Trashing From Feminist Jurisprudence and Critical Theory*, 8 HARV. WOMEN'S L.J. 59, 59 (1985). Feminists are, without question, social theorists in the respect that they are deeply concerned with changing society. Cole defines method as "the bridge between theory and practice." *Id.* at 59, n. 3. It is one thing to develop a theory, but it is an entirely different proposition to turn that theory into practice. Scales writes:

Law needs some theory of differentiation. Feminism, as a theory of differentiation, is particularly well suited to it. Feminism brings law back to its purpose—to decide the moral crux of the matter in real human situations. Law is a complex system of communication; its communicative matrix is intended to give access to the moral crux. Finding the crux depends upon the relation among things, not upon their opposition. In any case, imperfect analogies are available; a case is similar or dissimilar to others in an unlimited variety of ways. The scope and limits of any analogy must be explored in each case, with social reality as our guide. This is a normative, but not illogical process. Any logic is a norm, and cannot be used except with reference to its purposes. Why should that be so

cles on the subject are any indication,⁴ is a dynamic area of legal thought. But before one may define a "feminist" jurisprudence, one must first look to the meaning of *feminism*.⁵

A. A Brief History of Feminism

It can be argued that feminism, in one form or another, existed even before the Golden Age of Greece.⁶ Feminism and feminists today take many forms and are known by many labels: radical, or dominance feminists; "pragmatic" feminists; essentialist feminists; formal equality feminists; substantive equality feminists; nonsubordination feminists; dominance theory feminists; different voice feminists; and non-essentialism feminists. More relevant to our consideration is the development of the feminist movement in Western culture and the particular forms of feminism that are currently part of the feminist dialogue.

The roots of modern feminism date from the French and American revolutions. From that time the question arose, "If men should be free, why not women too?" Mary Wollstonecraft wrote *A Vindication of the Rights of Men* during the French Revolution as a response to Edmund Burke's *Reflections on the Revolution in France*, in which he attacked the revolution and its sympathizers.⁷ Her book was popular and successful until other works, such as Thomas Paine's *The Rights of Men*, supplanted its popularity.⁸ Wollstonecraft also wrote *A Vindication of the Rights of Women* using the same type of reasoning she used in her first work. *The Rights of Women* is a well-written treatise, but the book lost popularity

hard to perceive, to teach, and to do?

Scales, *supra* note 2, at 1387.

4. In February 1997 a WESTLAW search among law reviews and other legal periodicals under the search terms *feminist* and *jurisprudence* returned 3180 different citations.

5. Many questions abound about how feminist ideas could or ought to address perceived flaws in the current legal system:

Feminist legal scholars have devoted enormous energies to patching the cracks in the [legal system]. The debate has been and continues to be, arduous. Which differences between the sexes are or should be relevant for legal purposes? How does one tell what the differences are? Does it matter whether the differences are inherent or the result of upbringing? Is it enough to distinguish between accurate and inaccurate stereotyped differences? Or are there situations where differences are sufficiently "real" and permanent to demand social accommodation?

Scales, *supra* note 3, at 1375. Even self-described feminists disagree about the exact definition of "feminism." We have attempted to use the term inclusively. See *infra*, note 11.

6. See, *E.g.*, ARISTOPHANES, *LYSISTRATA* (Donald Sutherland, trans., 1961) (The play's comedy turns on women's decision to abstain from social contacts with men so as to persuade the men to cease their warring ways.).

7. 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 99 (M. H. Abrams et al. eds., 6th ed. 1993).

8. *Id.*

after Wollstonecraft's death, when her well-meaning but naive husband exposed her unconventional way of life.⁹

John Stuart Mill, best known for his work on Benthamism and economics, was another notable proponent of the female rights. Mill was the first to make a motion in the House of Commons for female suffrage, and he and/or his wife, Harriet Taylor, wrote the revolutionary work, *The Subjugation of Women*.¹⁰ The strains of women's legal voice have risen in a steady crescendo ever since.¹¹

B. Six Forms of Modern Feminism

Feminism today may be classified into at least six separate schools of thought. The first type of feminism, formal equality, can be described as the principle of equal treatment: "individuals who are alike should be treated alike." Thus, men and women, as substantially alike individuals who differ biologically and perhaps psychologically, but not in any other substantial way "should have the exact same legal rights."¹² Aristotle referred to this kind of equality, although only in relation to men. Scales writes, "In this country, the engine of the struggle for equality has been Aristotelian: Equality means to treat like persons alike, and unlike persons unlike."¹³ The formal equality model of feminism is rapidly losing

9. *Id.* at 101.

10. See *infra* notes 50-54 and accompanying text.

11. As Cole notes: "The term 'feminism' encompasses a wide range of political and personal stances." Like Cole,

[w]hen this Article uses the term broadly, it is not so much to describe a particular substantive content as to locate a perspective in the social spectrum. . . . In this broad sense, "feminist" refers to any claim that articulates a position related to women or "the feminine," . . . and that substantively affirms women's right to equality. . . . [i]t is not to suggest that feminism is monolithic, but only that various feminisms share certain generalizable attributes and perspectives that afford insights into self-reflection."

Cole, *supra* note 3, at 59, n. 82. We also recognize that not all feminists are women nor are all women feminists. As MacKinnon notes: "Male is a social and political concept, not a biological attribute. As I use it, it has *nothing whatever* to do with inherency, preexistence, nature, inevitability, or body as such." Catherine MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 636 n.3 (1983) (emphasis in original). If we do not define "male" and "female" strictly along sexual lines, the reader may wonder why we bother to differentiate between the two views at all. Gilligan gives one explanation:

Nancy Chodorow, attempting to account for "the reproduction within each generation of certain general and nearly universal differences that characterize masculine and feminine personality and roles," attributes these differences between the sexes not to anatomy but rather to "the fact that women, universally, are largely responsible for early child care."

CAROL GILLIGAN, IN A DIFFERENT VOICE 7 (1982) quoting Nancy Chodorow, *Family Structure and Feminine Personality, WOMAN, CULTURE AND SOCIETY* (M.Z. Rosaldo & L. Lamphere, eds., 1974).

12. KATHARINE T. BARTLETT, ET AL, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 71 (1993).

13. Scales, *supra* note 2, at 1374 (footnote omitted).

popularity because it does not adequately deal with gender differences; nonetheless, this early brand of feminist reasoning has led to greater women's suffrage, increased equal protection of the law, and equal pay.

Second, the substantive equality form of feminism looks at the results or effects of a rule or law.¹⁴ Substantive equality demands "that rules take account of these differences to avoid unfair, gender-related outcomes."¹⁵ "The test in any challenge should be 'whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status.'¹⁶ Substantive equality has focused on such things as maternity leave provisions and child care assistance, but has also addressed such issues as affirmative action and other gender-specific benefits to remedy past societal discrimination.¹⁷ As Scales notes, "the 'relevant' differences have been and always will be those which keep women in their place."¹⁸

Third, nonsubordination or dominance theory focuses on the "imbalance of power between women and men."¹⁹ This theory primarily addresses the issue of "whether a rule or practice serves to subordinate women to men."²⁰ The dominance theory focuses on issues such as sexual harassment of women, marital rape, domestic violence, and the battered women syndrome.

Fourth, the autonomy theory of feminism argues "that women should have greater personal autonomy, freedom to make their own choices, and power to control their own lives."²¹

A fifth type of feminist theory is non-essentialism, which deals with the problem of over generalization, or the stereotyping of members of a particular group.²² According to Bartlett, non-essentialism's primary focus is on "the implied attribution to all women of the traits of those who are white, middle class, heterosexual, able-bodied, and otherwise privi-

14. Scales writes:

In the past, biological differences have been used to show that classifications are not sex-based. Thereby, the reasons for having antidiscrimination laws have been seen as the reasons to allow discrimination. . . . The issue is not freedom to be treated without regard to sex; the issue is freedom from systematic subordination because of sex.

Id. at 1394.

15. BARTLETT, *supra* note 12, at 249.

16. Scales, *supra* note 2, at 1394 (footnotes omitted). Scales borrows this question from Catharine MacKinnon.

17. BARTLETT, *supra* note 12, at 249.

18. Scales, *supra* note 2, at 1378 (footnote omitted).

19. BARTLETT, *supra* note 12, at 413.

20. *Id.*

21. *Id.* at 671.

22. *Id.* at 871.

leged."²³ Non-essentialists believe that the differences between individual women need to be more fully taken into account.

Finally, the feminine or different voice(s) theory looks at "women's differences . . . less as problems to be addressed than as potentially valuable resources that might serve as a better model of social organization and law than existing 'male' characteristics and values."²⁴

Although each form of feminism has much to offer (and there is some overlap among them), this paper deals primarily with different voice theory. Different voice theory lends itself particularly well to the development of a fair and practical jurisprudence, and we hope to demonstrate that a workable jurisprudential model may be drawn from the best elements of both "female" and "male" legal perspectives without ignoring the contributions of men or by making women into helpless victims and ignoring autonomy. The question, therefore, is not which gender is *right*—but what is *fair* for both sexes in achieving "justice."

C. *The Different Voice*

Baier writes:

It is clear, I think, that the best moral theory has to be a cooperative product of women and men, has to harmonize justice and care. The morality it theorizes about is after all for all persons, for men and for women, and will need their combined insights. . . . what we need now is a "marriage" of the old male and the newly articulated female insights.²⁵

The model for feminine jurisprudence is not necessarily based upon uniquely female characteristics. While many of the characteristics of feminine jurisprudence are not gender-specific, they are perhaps most often and most easily traced through the feminine experience. Thus, instead of looking at the concept of a "feminine" jurisprudence as a pure gender issue, it is useful to consider the different voice as

characterized not by gender but by theme. Its association with women is an empirical observation, and it is primarily through women's voices that [one may] trace its development. But this association is not absolute, and the contrasts between male and female voices . . . highlight a distinction between two modes of

23. *Id.*

24. *Id.* at 589.

25. Annette C. Baier, *The Need for More than Justice*, JUSTICE AND CARE: ESSENTIAL READINGS IN FEMINIST ETHICS 47, 57 (Virginia Held ed., 1995).

thought and . . . focus on a problem of interpretation rather than [a representation or] generalization about either sex.²⁶

Obviously there are inherent differences between men and women. But it is often difficult to say "different" without making a value judgment. By some feminists' definition, maleness or femaleness is not in itself biologically defined, but socially determined. As one feminist uses the terminology, for instance, "maleness" is "more epistemological than ontological, undercutting the distinction itself, given male power to conform being with perspective" ²⁷ In this view, the "female" or the "male" voice is not an inborn trait that accompanies *either* an X or a Y chromosome. Each voice can be found in *every* person, and the discovery of that voice is dependent upon the person's individual experience and the social milieu in which the individual spends his or her formative years. "The perspective from the male standpoint is not always each man's opinion, although most men adhere to it, nonconsciously and without considering it a point of view, as much because it makes sense of their experience (the male experience) as because it is in their interest."²⁸ The male voice *is* the male voice because it makes sense of the male experience. Similarly, the female voice—a voice different from the voice heard so loudly for centuries—*is* the female voice because it makes sense of the female experience.

1. A Caring Judicial System

The idea of a judicial system based on care, rather than on rules, draws heavily from the work of noted psychologist Carol Gilligan. Gilligan's research is based on observations of children, and those observations have been extrapolated to include adults' actions as well:

In a study on sex differences on the games that children play done on elementary-school-aged children, it was found that "boys play out of doors more often than girls do; boys play more often in large and age-heterogenous groups than girls; they play competitive games more often, and their games last longer than girls' games."²⁹

The last finding is interesting because it demonstrates that

26. GILLIGAN, *supra* note 11, at 2.

27. MacKinnon, *supra* note 11, at 636, n.3.

28. *Id.*

29. GILLIGAN, *supra* note 11, at 4 (quoting Janet Lever, *Sex Differences in the Games Children Play*, 23 SOCIAL PROBLEMS 478-487 (1976)).

[b]oys' games appeared to last longer not only because they required a higher degree of skill and were thus less likely to become boring, but also because, when disputes arose in the course of a game, boys were able to resolve the disputes more effectively than girls. . . . In fact, it seemed that the boys enjoyed the legal debates as much as they did the game itself.³⁰

Perhaps then, the traditionally male-dominated legal profession, which is by nature a dispute-resolving discipline, became male-dominated out of primitive man's ability to effectively resolve the earliest playground disputes over the last drumstick from Tyrannosaurus Rex.

But while males seem to demonstrate a talent for confrontation and debate, girls, as Gilligan observed, tend to be more pragmatic toward the rules of the game.³¹ For while males tend throughout childhood to become "increasingly fascinated with legal elaboration of rules and the development of fair procedures for adjudicating conflicts, [that fascination] does not hold for girls."³² Girls regarded rules as good as long as the rule compensated completely for any harm that may have been done by the rule's violation. Generally, the girls observed were more tolerant about violations of the rules, more willing to make exceptions, more easily reconciled to changes in the game, and more likely to resolve conflicts creatively.³³ Gilligan's thesis is that care and relationships are largely overlooked by the judicial system's current methods of analyzing moral dilemmas. But "while they are used by both men and women, women focus on care and relationships considerably more than men do."³⁴

2. *Adapting*

Considering the playground of contemporary society, in which the rules of the game have been drawn and are strictly enforced primarily by males, "if a girl does not want to be left dependent on men, she will have to learn to play like a boy."³⁵ Very often, learning "to play like a boy" requires a woman to subvert, or at least stifle, her feminine voice in order to make it in a man's world. Generally when the law deals with a para-

30. *Id.* at 9.

31. *Id.* at 10. Lever points out that "girls are more tolerant in their attitudes toward rules, more willing to make exceptions, and more easily reconciled to innovations. As a result, the legal sense . . . 'is far less developed in little girls than in boys.'" *Id.* (citations omitted).

32. *Id.* at 10.

33. *Id.*

34. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 34-35 (1988).

35. GILLIGAN, *supra* note 11, at 10.

dox, it deals with it by suppressing the disruptive term.³⁶ The law does not favor nonconformity. The principle of civil disobedience is evidence of, and is in fact based upon the law's distaste for nonconformity. For someone to approach the law with the attitude of being more tolerant, willing to make more exceptions, and more easily reconciled to innovations—that is, with a different, or feminine voice, history has shown that often the nonconforming attitude will be met with disdain, indifference, or even contempt:

With respect to many gender-related issues, the law ignores woman's perspective and treats man's perspective as objective truth. It strives to impose order on a disordered world by incorporating difference (women, Blacks, gays, the poor) through assimilation, or denying difference through exclusion. In law, one side must win. . . . It requires the drawing of lines between that which is "inside," or legitimate, and that which is "outside," or illegal. Historically, heterosexual white men have drawn those lines. Thus, the legal perspective, despite its facade of neutrality and objectivity, is defined by the male perspective.³⁷

Traditional legal theory does not allow for many grey areas. It is obvious that the values of women and men differ. A day in the life of a married couple will attest to that fact. So it is in society, where very often those values have been codified into law. Yet, "it is the masculine values that prevail."³⁸ Very often male behavior is regarded as the norm and female behavior as some deviation from that norm.³⁹ And like the boys playing games on the playground, application of these masculine values requires that all cases have a winner and a loser.

Even so, society is gradually getting away from the "winner-loser" mind set with the growing popularity of alternative dispute resolution and other "win-win" negotiative processes. It seems logical that other contextual-based and discretionary options could also be integrated into current legal framework. Over a century ago the value of a discretionary voice in the courtroom was known. As Matthew Carpenter, addressing the United States Supreme Court, put it, while some cases may require "rough qualities possessed by men, . . . [t]here are many causes in which

36. See Cole, *supra* note 3, at 83.

37. *Id.* (citations omitted).

38. VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 76 (1929) (quoted in GILLIGAN, *supra* note 11, at 16).

39. GILLIGAN, *supra* note 11, at 14 (citing DAVID MCCLELLAND, *POWER: THE INNER EXPERIENCE* 81 (1975)).

the silver voice of woman would accomplish more than the severity and sternness of man could achieve."⁴⁰ Whereas in traditional jurisprudence women's issues are seen often as problems that need to be addressed, feminist jurisprudence sees gender differences "as potentially valuable resources that might serve as a better model of social organization and law than existing 'male' characteristics and values."⁴¹

II. THE PROBLEMS WITH TRADITIONAL JURISPRUDENCE

In the first section of the paper we defined jurisprudence and several types of feminism. In this section we discuss why more traditional forms of jurisprudence are not entirely satisfactory. We are not claiming that feminist jurisprudence is the ultimate solution to all of society's problems, but incorporation of a feminine voice into the chorus of legal thought may provide a fresh perspective in solving some of traditional legal theory's problems.

A. *Male Bias and Female Invisibility*

Scales writes that "[t]he term 'feminist jurisprudence' disturbs people. That is not surprising, given patriarchy's convenient habit of labeling as unreliable any approach that admits to be interested, and particularly given the historic *a priori* invalidation of women's experience."⁴² "Thus, the legal perspective, despite its facade of neutrality and objectivity, is defined by the male perspective. The law, moreover, carries the authority of the state, and it is thereby empowered to make man's point of view a reality."⁴³ However, as feminists and post-modernists agree, there is no objective position from which we can view life. We cannot not directly interact with life, a text, or a case. We are always interpreting the environmental stimuli we deal with; however, in making our interpretations we are constrained by the community and culture in which we live. By that we mean that there is no such thing as "objective meaning." Yet, neither is meaning itself completely subjective. We live in a historical, communal, and cultural structure that constrains meaning in certain ways. All approaches are interested and biased to some extent—if for no other reason than the time in which we live and the assumptions we grow up with. Any system that ignores the perspective of an entire class or entire classes of people is at best unfair, and at worst, perilous. Even with the system's

40. Matthew Carpenter, *Bradwell v. Illinois*, 83 U.S. 130, at 137 (1872).

41. BARTLETT, *supra* note 12, at 589.

42. Scales, *supra* note 2, at 1399.

43. Cole, *supra* note 3, at 83-84.

claim of neutrality and objectivity, it strains to "hear" the different voice with its somewhat limited hearing. Robin West adds:

By the claim that modern jurisprudence is "masculine," I mean two things. First I mean that the values [and] the dangers that characterize women's lives are not reflected at any level whatsoever in contracts, torts, constitutional law, or any other field of legal doctrine. The values that flow from women's material potential for physical connection are not recognized as values by the Rule of Law, and the dangers attendant to that state are not recognized as dangers by the Rule of Law.⁴⁴

Often male-based systems deal in dichotomies, such as male/female, good/bad, right/wrong, but life rarely breaks down into such neat categories. Cole explains how this tendency works in society: "[o]ur culture denies the feminine an independent voice and defines the feminine as other to man's one, as object to man's subject."⁴⁵ Society's definition is problematic, because when faced with two choices, one choice tends to be labeled "good" while the other is labeled "bad."

[S]ex role turns out to be one of the most important determinants of human behavior; psychologists have found sex differences in their studies from the moment they started doing empirical research. But since it is difficult to say "different" without saying "better" or "worse," since there is a tendency to construct a single scale of measurement, and since that scale has generally been derived from and standardized on the basis of men's interpretations of research data drawn predominantly or exclusively from studies of males, psychologists "have tended to regard male behavior as the 'norm' and female behavior as some kind of deviation from that norm."⁴⁶

Law is particularly susceptible to this polarized way of thinking:

In the past, two legal choices appeared to resolve claims of social injustice: Law could either ignore differences, thereby risking needless conformity, or it could freeze differences, thereby creating a menu of justifications for inequality. Concrete universality

44. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

45. Cole, *supra* note 3, at 79-80.

46. GILLIGAN, *supra* note 11, at 14, quoting DAVID MCCLELLAND, *POWER: THE INNER EXPERIENCE* 81 (1975).

eliminates the need for such a choice. When our priority is to understand differences and to value multiplicity, we need only to discern between occasions of respect and occasions of oppression. Those are judgments we know how to make, even without a four-part test to tell us, for every future circumstance, what constitutes domination.⁴⁷

Perhaps the law is so susceptible to polarized thinking because it is used to operating with two adversarial parties. One of the things feminists do, is to try to escape dichotomies and to see that there are a whole range of choices between the extremes available; this also allows the labels of "good" and "bad" to slip away, and also permits other implications of a case to be more fully considered, such as how the case will affect society as a whole, and how great are the needs of the parties and their families in the long run. Perhaps law's polarized vision explains why it is a "truism that hard cases make bad law."⁴⁸ Justices have wanted to do the right thing, but have not been able to see all the choices open to them.

B. *Justice Without Care Leads to Unhappiness*

The story of the life of John Stuart Mill is illustrative of the difficulties with focusing on justice to the exclusion of other feelings and considerations. Mill was "deliberately trained by his father [to become] the leader of the Utilitarians" after the death of Bentham.⁴⁹ When Mill was about twenty, he faced "a great crisis in his mental development—the kind of self-searching forty-days-in-the-wilderness . . . that so many other Victorians underwent."⁵⁰ Today, we would probably refer to his experience as a major depression.⁵¹ "His Benthamistic desire to reform the world no longer seemed to him sufficient cause for living."⁵² Justice alone no longer satisfied him, and he was, in fact, profoundly unhappy.

Mill overcame his crisis, or depression, through reading Wordsworth, Coleridge, Goethe, and Carlyle, and concluding that "although Benthamism rightly regarded happiness as the end of life, a person can attain hap-

47. Scales, *supra* note 2, at 1388.

48. *Hilton v. South Carolina Public Railways Comm.*, 502 U.S. 197, 207 (1991) (O'Connor, J., dissenting).

49. John W. Bowyer & John L. Brooks, *Introduction to John Stuart Mill*, THE VICTORIAN AGE 239 (2nd ed. 1954).

50. *Id.* at 240.

51. See NORTON ANTHOLOGY, *supra* note 7, at 993. Mill's condition is referred to as a "nervous breakdown," and since this term has next to no legal or medical significance, we have chosen to use the term "depression."

52. THE VICTORIAN AGE, *supra* note 50, at 240. Suicidal ideation is a classic sign of depression.

piness only by seeking such an unselfish end as the happiness of others."⁵³ In other words, Mill realized that what is today known as the ethic of care was just as important as the ethic of justice. Or put another way, multiple viewpoints are not only helpful but healthy. Others have noticed that the law's exclusive focus on justice causes unhappiness for others.

For the main complaint about the Kantian version of a society with its first virtue justice, construed as respect for equal right to formal goods such as having contracts kept, due process, equal opportunity including opportunity to participate in political activities leading to policy and law-making, to basic liberties of speech, free association and assembly, religious worship, is that none of these goods do much to ensure that the people who have them and mutually respect such rights will have any other relationships to one another than the minimal relationship needed to keep such a 'civil society' going. They may well be lonely, driven to suicide, apathetic about their work and about participation in political processes, find their lives meaningless and have no wish to leave offspring to face the same meaningless existence. Their rights, and respect for rights, are quite compatible with very great misery, and misery whose causes are not just individual misfortunes and psychic sickness, but social and moral impoverishment.⁵⁴

This malaise affects women more than it affects men. Cole points out that "[o]ne cannot speak as a feminist in a social culture that defines feminine as silent without some measure of affirmative self-reflection. . . . For a woman to be unreflective in man's world is to be objectified, silenced, and pacified—to be rendered an object."⁵⁵ And those women who realize that they have been rendered an object experience feelings of frustration, depression, and powerlessness. Only by adding the feminine voice to the already existing voice, can we hope to achieve what Bentham and Mill hoped to achieve: the greatest happiness for the greatest number. Some would argue that the male voice needs to be silenced in order to hear the

53. *Id.*

54. Baier, *supra* note 25, at 51. See also, Robert Wright, *The Evolution of Despair*, TIME, Aug. 28, 1995, at 50 (discussing the theories of evolutionary psychologists who argue that our psyches are unsuited to live in the modern world, and that humans have become increasingly depressed because of growing isolation from one another).

55. Cole, *supra* note 3, at 81.

feminine voice. Others seek a greater blend of voices, hoping to change what sounds like a solo into a harmonious duet.

It is not only in legal circles that people have become concerned about what happens to people when they concentrate solely on justice. Baier writes that recently in moral and social philosophy, while not denying the importance of justice, people are nevertheless "challenging the assumed supremacy of justice among the moral and social virtues."⁵⁶ She notes that the challenge is surprising because many who are challenging the supremacy of justice are those who have historically been denied it. She writes:

Those who have only recently won recognition of their equal rights, who have only recently seen the correction or partial correction of longstanding racist and sexist injustices to their race and sex, are among the philosophers now suggesting that justice is only one virtue among many, and one that may need the presence of the others in order to deliver its own undenied value.⁵⁷

She also notes that many such philosophers have been influenced by Carol Gilligan's *In a Different Voice*.⁵⁸ Perhaps these philosophers, while marginalized, have learned to value what we might term the "feminine" and they have realized that while they have achieved much by gaining access to "justice," they also risk losing part of their voice if they give up the values they previously held.⁵⁹

Scales describes her vision of life without the ethic of care in the following quotation; she also points out the problem inherent in taking the ethic of care too far:

The rights-based side of things, for all its grand abstraction, describes a pretty grim view of life on the planet. It treats individuals in society as isolated monads, as natural adversaries who must each stake out his own territory and protect it with the sword/shield mechanisms called 'rights.' This model of aggression is half of what is required for holocaust. False glorification of the "care-based" ethic supplies the other side of the suicidal equation, because a death march requires willing-looking victims. The incorporationist version of the care-based ethic celebrates oblivion. Its Disney-movie appeal diverts attention from the issue

56. Baier, *supra* note 25, at 47.

57. *Id.*

58. *Id.*

59. See the discussion *infra* of Bender's tort students text part IV.

of powerlessness, and, indeed, makes a political virtue of it. Masters glorify the contentment of their slaves, empires of their colonies. Here, hegemony strikes again. An incorporationist legal regime would, at best, merely institutionalize a familiar female critique—steady but ineffectual.⁶⁰

The problems with a feminist-based jurisprudence will be discussed further in section IV.

C. *Another Problem—The System Is Not Working*

Another problem with the traditional system of justice is that family law issues often receive short shrift—they are not dealt with as the serious and far-reaching issues they are. For example, until 1992 Utah had yet to do away with the marital rape exemption. That is, one spouse could not successfully charge the other spouse with rape. One reason for the delay could very well have been the preponderance of male judges and attorneys who form and interpret the state's laws.

The first Menendez brothers trial and the O.J. Simpson criminal trial showed us that something is seriously amiss in the United States criminal trial system. The United States civil trial system is not without its problems, either. The recent brouhaha surrounding a multimillion dollar jury verdict for spilled coffee shows that some tort awards are completely out of proportion to the damage suffered. Ideally, the American legal system operates upon the notion that justice is "blind," and that all are equal before the bench. The notion operates differently, however, in practice. In many cases the rich and the white get a different brand of justice than the poor and the black.⁶¹ These are all problems that need to be dealt with soon by the legal profession or the legislative branch will make its own changes.

D. *Feminist Jurisprudence is Threatening*

Many people are afraid that if we incorporate a feminist justice of care into our legal system the result will be anarchy, or at least a reduction of legal stability. The choice, however, is not between the status quo and no law at all. Our responsibility is to improve the law and make it more responsive to all citizens. American jurisprudence is a constantly

60. Scales, *supra* note 2, at 1391-92 (footnote omitted).

61. As an illustration, take the factually similar and contemporaneous cases involving political scion William Kennedy Smith, who is white, and professional boxing champion Mike Tyson, who is black. Both men were accused of rape. Both men asserted the defense that the women "meant yes, even while crying no." Smith was acquitted. Tyson was convicted.

growing, constantly developing, very much alive creature. By its very nature it must change and adapt to its surroundings. Utter rejection of the status quo is not necessary—merely a channeling of the direction of jurisprudential change. Just as Audre Lourde states that we can never dismantle the master's house with the master's tools,⁶² neither can we dismantle the house of justice without tools. What is needed is new tools to repair and perhaps remodel the house of justice.⁶³

Baier writes:

The most obvious point is the challenge to the individualism of the Western tradition, to the fairly entrenched belief in the possibility and desirability of each person pursuing his own good in his own way, constrained only by a minimal formal common good namely a working legal apparatus that enforces contracts and protects individuals from undue interference by others. Gilligan reminds us that noninterference can, especially for the relatively powerless, such as the very young, amount to neglect, and even between equals can be isolating and alienating.⁶⁴

And Baier adds:

Traces of the old patriarchal poison still remain in even the best contemporary moral theorizing. Few may actually say that women's place is in the home, but there is much muttering, when unemployment figures rise, about how the relatively recent flood of women into the work force complicates the problem, as if it would be a good thing if women just went back home whenever unemployment rises, to leave the available jobs for the men. We still do not really have a wide acceptance of the equal right of women to employment outside the home. Nor do we have wide acceptance of the equal duty of men to perform those domestic tasks which in no way depend on female anatomy, namely cooking, cleaning, and the care of weaned children.⁶⁵

We need to find a way of incorporating individual rights with caring relationships and realize that not all are equal—whether or not the law states that we are created as equals. The law already treats children and the

62. AUDRE LOURDE, *SISTER OUTSIDER*, 110, 111 (1984).

63. See Cheryl B. Preston, *This Old House: A Blueprint for Constructive Feminism*, 83 *GEO. L.J.* 2271 (1995).

64. Baier, *supra* note 25, at 52.

65. *Id.* at 54.

mentally incompetent differently, we need to allow for other differences and varied life situations. Justice should be the right of every man and woman—not just the privileged.

III. TOWARD A FEMINIST JURISPRUDENCE

As Cornell writes, “[f]eminists, for all of the divergence among them, continue to join in a united call for justice for women.”⁶⁶ Mill was an active proponent of women’s rights, possibly in part because of the change in his value system. “In 1866 Mill made the first motion in the House of Commons for woman suffrage.”⁶⁷ “In 1869 Mill said that he regarded the emancipation of women and co-operative production as the two great changes necessary to the regeneration of society. We of course agree that the greater cooperation of women and men could change society and is a goal worth pursuing. Mill published *THE SUBJUGATION OF WOMEN* in 1869. It is an excellent statement of the feminist arguments based on traditional, or male biased legal philosophy.”⁶⁸ Mill’s work represents a continuing tradition as feminists continue to work for equality.

66. Drucilla Cornell, *The Philosophy of the Limit: Systems Theory and Feminist Legal Reform, DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 68 (Drucilla Cornell et al. eds., 1992).

67. *THE VICTORIAN AGE*, *supra* note 50, at 241. The fact that a man, who was a member of the House of Commons had to propose extending the vote to women illustrates Baier’s point that

Rights have usually been for the privileged. Talking about laws, and the rights those laws recognize and protect, does not in itself ensure that the group of legislators and rights-holders will not be restricted to some elite. Bills of rights have usually been proclamations of the right of some in-group, barons, land-owners, males, whites, non-foreigners. The “justice perspective,” and the legal sense that goes with it, are shadowed by their patriarchal past.

Baier, *supra* note 25, at 53. However, as Baier also notes, the “privileged” have used the existing legal system to expand society’s concept of rights and to expand the types of people entitled to protection of their rights. Mill and Wollstonecraft are two examples; the problem is, however, that this approach can only go so far.

It is however also true that the moral theories that made the concept of a person’s right central were not just the instruments for excluding some persons, but also the instruments used by those who demanded that more and more persons be included in the favored group. Abolitionists, reformers, women, used the language of rights to assert their claims to inclusion in the group of full members of a community. The tradition of liberal moral theory has in fact developed so as to include the women it had for so long excluded, to include the poor as well as rich, blacks and whites, and so on. Women like Mary Wollstonecraft used the male moral theories to good purpose. So we should not be wholly ungrateful for those male moral theories, for all their objectionable earlier content. They were undoubtedly patriarchal, but they also contained the seeds of the challenge, or antidote, to this patriarchal poison.

Id.

68. *THE VICTORIAN AGE*, *supra* note 49, at 242. We realize that Mill’s wife, Harriet Taylor, may have written or co-written the article; even if this is so, Mill nonetheless permitted or insisted that the article be published under his name.

The lack of equality, and what to do about it, continues to be a problem in our society. However, feminists provide a unique perspective: "Grounded in experience whose validity society has denied, a feminist is less likely to be deluded into believing that we can unproblematically think our way out."⁶⁹ Because of this perspective, women seek a variety of possible solutions instead of seeing problems as "either/or" propositions. "Within the 'different voice' theory, women's differences are viewed less as problems to be addressed than as potentially valuable resources that might serve as a better model of social organization and law than existing 'male' characteristics and values."⁷⁰ "Because the feminist in a male society lives a paradoxical existence, she is able to pursue and reveal the latent contradictions in 'objective' social constructs."⁷¹ Relationships and the exercise of power are also important to feminists. Baier writes:

Relationships between those who are clearly unequal in power, such as parents and children, earlier and later generations in relation to one another, states and citizens, doctors and patients, the well and the ill, large states and small states, have had to be shunted to the bottom of the agenda, and then dealt with by some sort of "promotion" of the weaker so that an appearance of virtual equality is achieved. Citizens collectively become equal to states, children are treated as adults-to-be, the ill and dying are treated as continuers of their earlier more potent selves, so that their "rights" could be seen as the rights of equals. This pretense of an equality that is in fact absent may often lead to desirable protection of the weaker, or more dependent. But it somewhat masks the question of what our moral relationships *are* to those who are our superiors or our inferiors in power. A more realistic acceptance of the fact that we begin as helpless children, that at almost every point of our lives we deal with both the more and the less helpless, that equality of power and interdependency, between two persons or groups, is rare and hard to recognize when it does occur, might lead us to a more direct approach to questions concerning the design of institutions structuring these relationships between unequals (families, schools, hospitals, armies) and of the morality of our dealings with the more and the less powerful.⁷²

69. Cole, *supra* note 3, at 82.

70. BARTLETT, *supra* note 12, at 589.

71. Cole, *supra* note 3, at 62.

72. Baier, *supra* note 25, at 55 (emphasis in original).

Obviously we cannot treat everyone as though they were equal in terms of needs and individual capacity; an infant and the President of the United States, for example, have little in common. The concept of differing power and need for care is suggested by the riddle of the sphinx.⁷³ Obviously someone who walks on four, then two, then three legs during the course of his life is not always as "equal" as they might be at another point in his life. A key question is: what are our moral relationships and obligations to others?

A. *Relationships and Obligations*

Perhaps the answer is the "caring neighbor" standard; perhaps it is something else that needs still to be developed. But whatever the standard is or ought to be, no one has yet found a satisfactory answer. Feminists are in a unique position to help develop a better resolution of the problem with the sounding of their "different voice."

Baier pens:

Women's traditional work, of caring for the less powerful, especially for the young, is obviously socially vital. One cannot regard any version of morality that does not ensure that it gets well done as an adequate "minimal morality," any more than we could so regard one that left and concern for more distant future generations an optional extra.⁷⁴

When politicians speak of family values is this not what they mean, that future generations will have the love and benefits that past generations have enjoyed? Many are willing to argue that single parent families are the single largest cause of the breakdown of society; does it not make sense then, that we must all worry about future generations? Baier continues:

Vulnerable future generations do not choose their dependence on earlier generations. The unequal infant does not choose its place in a family or nation, nor is it treated as free to do as it likes until some association is freely entered into. Nor do its parents always choose their parental role, or freely assume their parental responsibilities any more than we choose our power to affect the conditions in which later generations will live.⁷⁵

73. See SOPHOCLES, OEDIPUS THE KING (David Grene & Richard Lattimore, eds., 1954).

74. Baier, *supra* note 25, at 55.

75. *Id.* at 56.

We need to recognize that we all have obligations. There are always burdens to go with benefits, and to simply stress the ethic of rights is to lie—for to be part of a community is to accept the responsibilities that go with it. These responsibilities, to be truly effective, must be freely chosen and self-enforced:

The emphasis on care goes with a recognition of the often unchosen nature of the responsibilities of those who give care, both of children who care for their aged or infirm parents, and of parents who care for the children they in fact have. Contract soon ceases to seem the paradigm source of moral obligation once we attend to parental responsibility, and justice as a virtue of social institutions will come to seem at best only first equal with the virtue, whatever its name, that ensures that each new generation is made appropriately welcome and prepared for their adult lives.⁷⁶

So what is this ethic of care that we have been talking about? Baier defines care as “a felt concern for the good of others and for community with them. The ‘cold jealous virtue of justice’ (Hume) is found to be too cold, and it is ‘warmer’ more communitarian virtues and social ideals that are being called into supplement it.”⁷⁷ Notice that Baier uses the word “supplement” not “replace.” There are good things about our legal system; there is no need to throw out the baby with the bathwater, but occasionally, the water does need to be changed.

We are most interested in what feminism can add, not with destroying the system. Although justice and care seem to be somewhat gender linked, they are not necessarily so, and anyone can be a proponent of either, or both. Scales has been profoundly influenced by Carol Gilligan’s book, *In a Different Voice*. She writes that Gilligan equates the development of an “ethic of rights” or an “ethic of justice” with boys and the development of an “ethic of care” or a focus on equity with girls.⁷⁸ Males

76. *Id.*

77. *Id.* at 48.

78. Scales, *supra* note 2, at 1380-81. Of course, assigning justice to boys and care to girls is a generalization and neither Scales nor Gilligan goes so far as to say that the development of these perspectives are strictly gender based. The broad assertion nonetheless tends to hold up. Although, most women can deal with either ethic, fewer men develop the “ethic of care.” So, gender does seem to be a relevant factor. “Gilligan asserts that as a matter of personal moral development, the ability to integrate the ethics of care with the ethics of rights signals maturity.” *Id.* at 1381 (footnote omitted).

tend to focus on autonomy, or “the separation between self and others” while females “perceive[] relationship[s] as constitutive of the self.”⁷⁹

Paradigmatic male values, like objectivity, are defined as exclusive, identified by their presumed opposites. Those values cannot be content with multiplicity; they create the other and then devour it. Objectivity ignores context; reason is the opposite of emotion; rights precluded care. As long as the ruling ideology is a function of this dichotomization, incorporationism threatens to be mere co-optation, a more subtle version of female invisibility.⁸⁰

Scales adds, “Feminism does not claim to be objective, because objectivity is the basis for inequality. Feminism is not abstract, because abstraction when institutionalized shields the status quo from critique. Feminism is result-oriented. It is vitally concerned with the oblivion fostered by lawyers’ belief that process is what matters.”⁸¹ A fundamental tenet of feminist jurisprudence clearly identifies the first idea with how women tend to be socialized and the second idea with how men tend to be socialized. However, this socialization is most likely a remnant of ancient society rather than a notion hardwired into our brains. We can all learn to value the viewpoint of the other—if we are willing. “It is in the perspective of the other that we begin to see ourselves.”⁸²

B. *Consciousness Raising*

One of the ways that we can learn to understand the perspective of the other is through consciousness raising. Consciousness raising is more than a bunch of discontented women sitting around complaining about men; it is the opportunity to exchange stories and to explain how certain events in our lives make us feel. “Consciousness raising assures women that their point of view, which male culture has historically repressed and devalued, can be resurrected. It puts women in touch with a world that men have declared untouchable, and exposes the male ideology that masquerades as objectivity.”⁸³ Not only does consciousness raising affirm a woman’s perspective, it is a way for women or men to examine their beliefs about the world and think about how their actions may affect others. “Consciousness raising requires vigilant self-reflection on the social

79. *Id.* at 1382-83 (footnotes omitted).

80. *Id.* at 1383.

81. *Id.* at 1385.

82. Cole, *supra* note 3, at 91.

83. *Id.* at 62.

meaning of being a woman in a man's world. Self-reflection, for feminists as well as for any other marginalized group, is not so much a choice as a way of being."⁸⁴ "Therefore, consciousness raising takes us beyond indeterminate subjectivity towards social consensus. It is through the method of consciousness raising that feminism's negative critique [of the legal system] becomes transformative."⁸⁵ The negative critique becomes transformative because it does more than simply criticize, it gains insight and identifies weaknesses. Seeing the legal system for what it is, will allow us to fortify the weak parts without impairing the foundation.

The substitution of intersubjectivity for objectivity as a means of legitimating social values requires an entirely different process. Rather than attempting to deny subjectivity, one must listen to and account for all subjective perspectives. Rather than viewing the world as constituted by objects, one recognizes others' claims to subject status. Methodologically, this calls for conversation and discourse between equal subjects, instead of introspection by an individual who plays God. The process therefore guards against the tendency of theorists to universalize their perspective and, more importantly, the tendency of theory itself to assume an all-encompassing stance. An intersubjective process implies, in its very method, a certain equality and mutual respect between human beings.⁸⁶

C. *E Pluribus Unum*

The struggle is not who will or should rule, it is about how we can come to a consensus and at the same time allow people the freedom to choose their own lives free from current societal restraints. Scales believes that we must

make a choice between adjudicative principles. The choice is not, however, between male and female hegemony. The choice is rather between a compulsion to control reality and a commitment to restrain hegemony. Do we want a system that brooks no disagreement or one that invites as many points of view as the varieties of existence require?⁸⁷

84. *Id.* at 89 (footnote omitted).

85. *Id.* at 63.

86. *Id.* at 59, n.39.

87. Scales, *supra* note 2, at 1385-86 (footnotes omitted).

"We must look beyond the familiar and look instead to the unfamiliar—we must gain a consciousness of that which is not necessarily of our own traditional view, but of the view of others. By so doing we may allow ourselves to be liberated from our self-imposed oppression and allow ourselves possible solutions."⁸⁸

The feminist approach takes justification seriously; it is a more honest and efficient way to achieve legitimacy. The feminist legal standard for equality is altogether principled in requiring commitment to finding the moral crux of matters before the court. The feminist approach will tax us. We will be exhausted by bringing feminist method to bear. Yet we must force law makers and interpreters to hear that which they have been well trained to ignore. We will have to divest ourselves of our learned reticence, debrief ourselves every day. We will have to trust ourselves to be able to describe life to each other—in our courts, in our legislatures, in our emergence together.⁸⁹

To practice feminism is harder than it seems; we must look at a variety of viewpoints and not focus exclusively on our own, we must strive to do justice while being fair, supporting law, and caring for those affected by our decisions. "[I]f society is in some sense constituted by the world views that give meaning to social interaction, then to change consciousness is to change society itself."⁹⁰ Given the present state of society would this be such a bad thing?

IV. THE TROUBLE WITH FEMINIST JURISPRUDENCE

Law, as a whole, is a combination of rules and interpretation of those rules, objectivity and subjectivity, rules and standards, logical theory and practical application, posited laws and ethical principles.⁹¹ A distinctively polemic jurisprudence "should be the last thing that any member of an oppressed group—if that is how the modern American woman should be described—wants to see dominate legal thought."⁹² This "feminine" juris-

88. Cole, *supra* note 3, at 77 (citations omitted).

89. Scales, *supra* note 2, at 1403.

90. David Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 592 (1984).

91. See Richard Posner, *Conservative Feminism*, U. CHI. LEGAL F. 191, 212 (1989).

92. *Id.* Judge Posner goes on to explain that those who reject formalism are not feminist jurisprudists simply because they have rejected the formalistic aspects of the law. Rather, they "are legal realists, or pragmatists, or instrumentalists, or skeptics—which is to say that they possess outlooks on law that long predate the entry of women in significant numbers into positions of influence in the legal profession." *Id.* at 213.

prudence, with its ethic of care (as opposed to an ethic of rights), is one in which discretion and individual circumstances take the fore in a judicial decision. But a purely discretionary system, lacking formality of any kind, is at its extreme, a "people's court" typified by mobocracy and vigilantism, with the minority group standing atop the gallows, such as in the appeal-less, judge-jury-and-executioner Klan courts in the pre-civil rights South.⁹³

A. *Is It Feminist at All?*

Leslie Bender, a prominent legal feminist and law professor, made this interesting observation:

Each year that I teach torts I watch again as a majority of my students initially find [the] legal "no duty" rule reprehensible. After the rationale is explained and the students become immersed in the "reasoned" analysis, and after they take a distanced, objective posture informed by liberalism's concerns for autonomy and liberty, many come to accept the legal rule that intuitively had seemed so wrong to them. They are taught to reject their emotions, instincts, and ethics, and to view accidents and tragedies abstractly, removed from their social and particularized contexts, and to apply instead rationally-derived universal principles and a vision of human nature as atomistic, and as free from constraint as possible. They are also taught that there are legally relevant distinctions between acts and omissions. . . . How would this drowning-stranger hypothetical look from a new legal perspective informed by a feminist ethic based upon notions of caring, responsibility, interconnectedness, and cooperation?⁹⁴

How, indeed. Bender's analysis of her students' response presents an interesting problem with the idea of a feminine jurisprudence. If Bender is speaking about the general response of her students, and that response was uniform among most of her students, then one can hardly look at the ethic of care—at least as it is described by Bender—and see an ethic that is purely feminine in nature. Instead of *feminine*, perhaps, the proper term should be *humanist*.⁹⁵ The idea of the humanist or caring sort of law, one

93. Admittedly, such an extreme discretionary system could also lead to tyranny by the vocal minority, just as today more money is channeled to AIDS research than to cancer research though arguably more members of society are affected by cancer than by AIDS.

94. Bender, *supra* note 34, at 33-34.

95. Although the "no duty" rule may not be illustrative of *all* legal principles, one would nevertheless expect that such a response would be uniform. The authors, both law students, one

that is not so rule-bound as to deprive the court of any latitude for mercy or contemplation of individual circumstances, is the sort of law at the heart of feminine jurisprudence. But is it not also so in formalistic or traditional law? What Bender would term an "ethic of care" could easily be referred to as "policy," "mercy," or the "discretion" of the court. Perhaps the question is not "whether there is a distinctively feminine outlook on law, as distinct from an outlook that men and women share," but whether the outlook that both genders share is displayed by both genders in their actions, "though perhaps in different proportions."⁹⁶

B. *The Penalty for Breaching the Ethic of Care*

Consider, for example, another tort case—a simple automobile accident, in which a common, everyday tortfeasor, while speeding through town, smashes into a victim who is exercising her pedestrian right of way in a crosswalk. The collision crushes the victim and leaves her without the use of her arms or legs. Of course the tortfeasor will be held legally responsible for the harm caused, and the court will make the tortfeasor pay. But is justice then entirely done? Money damages could hardly be said to be adequate compensation for the loss of one's limbs, nor are money damages sufficient to compensate the suffering the victim's family will certainly face. Perhaps, then, the driver may satisfy justice by serving time in prison. A justice of care might find that the driver's having to deal with the emotional results of having deprived someone of the use of her limbs and her livelihood is all the prison the driver needs, and would be the most effective way to increase the driver's caution in the future. To expect that kind of grief or emotional reaction for such an act in today's society, however, is asking much. Without remorse, there is no catalyst for change.

Bender maintains that no matter how much money is paid, or penance done, there is still a great deal of care-giving that will have to be done by the victim's family, friends, or others. This care-giving is not necessarily deemed to be the responsibility of the tortfeasor. The ethic of care would require payment for that care-giving as well—even to the extent of having

male and one female, had exactly the response to the "no duty" rule that Professor Bender describes among her own students. But because Bender uses that response to demonstrate a "feminine" response, and at least a conscious subjection of the feminine caring response through "reasoned analysis . . . [and] a distanced, objective posture," which is commonly associated with "male" legal jurisprudence, and because this response is not peculiarly female, it is somewhat difficult to term the "ethic of care" a uniquely "female" jurisprudential theory—especially since, as Professor Bender and the authors' own experience demonstrate, the "intuitive" ethic of care which is offended by rules rooted in "rationally-derived" principles such as the "no duty" rule is not always a response unique to women.

96. Posner, *supra* note 91, at 213.

the tortfeasor give that care personally.⁹⁷ Bender concludes that “[t]his seemingly minor change would transform the core of negligence law to a human, responsive system.”⁹⁸

The idea is a nice one, but care-giving work, or the act of nurturing and bringing the victim of a tort back to health or well-being, is not always (or is rarely) a quantifiable effort. Additionally, to make the tortfeasor continue to perform care giving in response to the harm caused would be to inflict a penalty, rather than to exact compensation. Certainly the family or friends of the victim have to continue to cope in many instances with the continuing effects of a tort, but to cause the tortfeasor to be beholden to the victim for the rest of his life is, in no uncertain terms, punishment. Why do we punish people? If we cause the injurer to pay or to provide care personally for the rest of the victim’s life, we must ask, “Why?” Do we hope to dissuade similar actions by others in the future? Is it to exact some sort of retribution from the injurer? Or, would we inflict such a sentence upon the injurer because of some sort of reformatory prospect—some aspiration that by imposing the punishment on the injurer somehow we can teach him or her to exercise an ethic of care to some greater degree.⁹⁹ Finally, to place this kind of burden—this sentence—upon the injurer is to effectually do away with the criminal justice system. If we are to inflict this kind of punishment upon people for their failure to act in accord with a particular ethic of care, then perhaps we ought to do away with the civil justice system altogether in favor of a purely criminal one.

C. *The Caring Neighbor Standard*

Some feminist legal scholars would replace the “reasonable person” standard with the “caring neighbor” standard.¹⁰⁰ Critics of the “caring” standard, however, point out that in determining the standard of care we must keep in mind that most neighbors are not caring, and most accident

97. See Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 905.

98. Bender, *supra* note 34, at 36.

99. What is it that we hope to accomplish? Do we desire punishment, restitution, deterrence, or something else? Each theory for why we punish has its own advocates. For example, every parent has his or her own notions of the proper way to discipline a child for spilling milk. Some parents take the retributive approach and discipline by spanking—hoping for deterrence of future carelessness. Others take the reformatory approach and discipline their children by making the child clean up the milk and learn the consequences of his or her actions. Which approach do we take as a society so as to teach a greater ethic of care? That, too, depends upon each individual’s experience with each respective system of “justice.”

100. See Bender, *supra* note 96, at 905.

victims are not neighbors.¹⁰¹ Indeed, to hold a person potentially liable for not acting as a caring neighbor will not have a persuasive effect upon people in general to act with greater care in their dealings and interactions with other people.¹⁰² Judge Posner addresses Bender's proposed transformation of the law into a "human, responsive system" thus:

The only effect of adopting Bender's proposal [to replace the reasonable standard with the caring standard] would be to shift negligence liability in the direction of strict liability. Her "caring neighbor" is an unnecessary step in the analysis. She might as well argue directly for strict liability on the ground that it is the more altruistic regime than negligence.¹⁰³

But strict liability is extremely rule-based, and less concerned with the particulars of a case than perhaps the feminine ethic of care would be—and those characteristics of ruleness and cold universality immediately bring to mind the "masculine" ethic of rights rather than the ethic of care.¹⁰⁴ So in some ways the Bender model is more feminine, or care-based. But in other ways it is distinctively masculine in its formality.

101. See Posner, *supra* note 91, at 214.

102. Judge Posner illustrates this principle with a hypothetical:

[S]uppose an accident having expected cost of \$100 could be prevented only by an expenditure of \$110 on care. Then the failure to prevent the accident would not be negligent, and . . . the injurer would not be liable to his victim. But presumably a caring neighbor would go the extra step to prevent the accident . . . so under Bender's proposal the injurer would be liable if he failed to prevent the accident. But liability would not (except in special circumstances) induce him to take the extra care, which by definition would cost more than the expected accident; he would rather pay the expected judgement. Liability in such a case would just make negligence liability strict liability.

Id. at 214, n. 43. It is also important to keep in mind that Judge Posner focuses on the economic (and perhaps *realist*) theory of law. Again, the injurer may feel remorse for his wrong, and his conscience may move him to spend the extra \$10 on care rather than hit someone with his car and for the rest of his life have to deal with the knowledge that he had seriously injured someone. Speaking somewhat cynically, though realistically, those persons willing to spend the extra \$10 are fewer and fewer. In growing proportions of today's society, the cost of remorse is substantially greater than \$10.

103. *Id.* at 214.

104. *Id.* Judge Posner explains the seeming irony thus:

Strict liability is sometimes defended on the ground that it provides more compensation to more accident victims. This is a partial analysis. Strict liability can also result in higher prices, and the burden may be borne by consumers. The net distributive impact is unclear. If these complications are ignored, maybe a feminine outlook on law could be expected to stress compensation.

Id. Arguably, however, where automobile-pedestrian accidents occur, and inasmuch as there are pedestrians who jaywalk and drivers who do not speed, there are cases in which the driver is not necessarily negligent.

D. *The Source of the Feminine Voice*

In listening to this feminine voice, one wonders from whence the voice derives its distinctive tonal qualities. While there are those who would argue that such a voice is inherent in all women, others argue that the feminine voice, with its tonal qualities of care and responsibility, is simply a reflection of values that have arisen from women's subordination by men, and is a voice full of the virtues and characteristics that women have developed over the ages in response to millennia of victimization.¹⁰⁵ So, in actuality, the feminine voice is, in its purest form, just as deep and resonant as the male voice; only after centuries of care-giving, subordination, and socialization, has that voice evolved to the pitch of care-giving and responsibility that is today associated with woman-ness. To listen to this feminine voice, then, would be to compound the effects of age-old male domination and reaffirm the male-induced (and male-supported) roles adopted by women. More and more women are reexamining their traditional roles and changing the timbre of their voices to express their awareness of societal expectations. Over time the many feminine voices have distinguished their individual parts, and thus have enriched humanity's song.

E. *The Propriety of the Ethic of Care for Legal Reform*

But even if the ethic of care does not have its roots in feminine history, what makes it a proper model for legal reform? Is this breakdown of men and women's voices anything but purely arbitrary and artificially created labeling? Why must the division be made down gender lines? Why may it not be drawn down hair-color lines, shoe-size lines, or some other physical characteristic? The fact that males have dominated a particular field, while an important consideration, is not conclusive evidence that the overwhelming male-ness of that field is what in fact defines the nature of that field.

If the ethic of care is not founded in the history of oppression of women, but instead finds its source in the purely feminine experience of motherhood and nurturing, what indicates that that experience is applicable or germane to governing and regulating relationships between other persons is that everyone needs nurturing to some degree. Children die for lack of nurturing. Even though the idea of an ethic of care is based on a set of principles of morality that are meant to extend beyond a "domain of special relationships,"¹⁰⁶ that set of principles cannot be said to be uni-

105. See Linda C. McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171, 1196-1202 (1992).

106. GILLIGAN, *supra* note 11, at 73.

form across the spectrum of diverse social, economic, and cultural threads that create the fabric of American society. Still, it cannot be denied that when and where caring exists, both the care-giver and the care-recipient benefit. But there is danger in caregiving. One such danger of caregiving is described thus:

[T]he literature about mothering and caring acknowledges that mothers and care givers are not immune from the danger of projecting one's own perspective onto the other when assessing the other's needs and interests and that, in fact, caring sometimes involves using one's own judgement about the other's needs, even when doing so conflicts with the other's perspective.¹⁰⁷

Relationships upon which those principles would be based differ not only among cultures, but, as the feminist voice theory itself asserts, between genders. There is little to indicate that the experience of motherhood and the experience of nursing children would be any more efficacious in the efficient and equitable distribution of justice than is the current formalistic "masculine" model.¹⁰⁸ "But the polarity between empathetic, equitable, discretionary, situation-specific justice, on the one hand, and the 'rule of law' virtues of neutrality and 'ruleness,' on the other, is far older than feminist jurisprudence."¹⁰⁹ It is highly improbable that an implementation of a feminine ethic of care could take place without radical transformation of the legal system—something that is unlikely as long as the legal profession is male dominated.¹¹⁰ Just how would women in general be affected by a transformation to a legal system based more on judicial discretion and contextualism? Judge Posner speculates: "It is hard to say whether women would be on balance better or worse off if the legal system were more empathetic than it is, but it does not appear that women fare particularly well under the discretionary system of qadi justice in traditional Moslem law."¹¹¹

107. McClain, *supra* note 105, at 1202.

108. *Id.* at 1196-1202. McClain points to recent feminist empirical work on care which "argues that care giving is 'not an appropriate model for all social relationships,' since it 'fosters exclusivity and privatism rather than a sense of collective responsibility.'" *Id.* (quoting Emily K. Abel & Margaret K. Nelson, *Circles of Care: An Introductory Essay*, in *CIRCLES OF CARE*, 4, 7 (Emily K. Abel & Margaret K. Nelson, eds., 1990)).

109. Posner, *supra* note 91, at 217.

110. See McClain, *supra* note 105, at 1196-1202.

111. Posner, *supra* note 91, at 212.

F. *The Coercive Element*

The legal system as it operates today is generally concerned with objective standards rather than with subjective interpretations of conduct. "Coercion of caring activity where a caring attitude is absent might satisfy a legalistic duty of care but such 'caring' might lack moral worth."¹¹² The law cannot compel a person to exercise a "caring" attitude any more than it can compel any other kind of feeling within a human being. A court cannot compel a person to feel pity, remorse, or compassion. A court cannot compel a person to feel joy for another party in a lawsuit—or for anyone for that matter. Certainly in highly particular circumstances the court may impose its ruling as to the morality or ethical nature of a particular act. Courts of inquiry in cases of violations of the attorney's professional code of ethics, for instance, are examples in which the court may exercise legal coercion. But such coercion is upon a member of a profession. The primary means of motivation for ethical conduct in society is a desire to do what is best for society and the community as a whole. Gilligan's ethic of care would apply to all of humanity rather than simply between specific individuals, and there remains "a fundamental question whether such an ethic (or duty) [as the ethic of care] is an appropriate subject for legal coercion, as opposed to personal and communal aspiration."¹¹³ Coercion is neither practical nor likely, but caring can be a goal for more people as they are influenced by caring others.

G. *The Problematic Catch-all Model for the Ethic of Care*

Whose ethic of care ought we apply? If we are to look to a "caring neighbor" standard, which neighbor ought we choose? Some critics have pointed out that to choose one model of what that ethic of care ought to be might "invite state censure or control of actual women who fail to live up to or whose experience is not reflected in such idealized standards."¹¹⁴ A model based on some arbitrarily delineated ethical ideal cannot recognize the vast racial, social, and economic differences among people in general. For instance, it would be next to impossible to reach a consensus from five women¹¹⁵ representing five different religious, marital, and economic backgrounds as to what a proper "ethic" of care ought to include, inasmuch as each person's idea of "caring" may be different. In an ideal situation, the legal system would be much more empathetic to all minor-

112. McClain, *supra* note 105, at 1201.

113. *Id.*

114. *Id.* at 1202.

115. The hypothetical could just as easily include men, but for the sake of simplicity in determining the "feminine voice," the sampling includes only women—as "authorities" on the feminine voice.

ity groups. But “[s]uch models, if they are to be used, need to recognize the real constraints on women’s lives due to poverty, lack of health care, abusive relationships, and the like that contribute to some mothers’ feelings of powerlessness to meet some middle-class ideal of care.”¹¹⁶

Nonetheless, these are the reasons why we need to explore an “ethic of care.” Such an ethic attempts to account for real, personal situations and is far more pragmatic than abstract ideals of “justice.” It does, in fact, exist in some forms in today’s justice system. No contract will be found unconscionable where the court does not look at the respective bargaining power of the parties. Such an approach could be expanded. Each case decided in court might thus make the rule of law to fit each particular situation rather than make each particular situation fit a particular rule of law.

V. CONCLUSION

As we have discussed, while feminism might not be the perfect jurisprudential theory, neither are traditional theories satisfactory for dealing with the practical realities of our world.

Feminists have always been willing to challenge the status quo in their search for expanded rights and a better life for all. We ought to fear the day when society becomes complacent enough to stand idly by as American jurisprudence takes its own course. Justice is part of government, and ours is a government for the people and *by* the people. By expanding the definition of “equality,” feminists hope to thereby expand access to both justice and feelings of connection to society—access and connection of *all* people *by* all people.

Feminism is more pragmatic than some of its brother theories. Women have grown accustomed to playing by male rules on the playground. “Feminist jurisprudence cannot afford to rest in idealism or despair, for women who recognize their unequal treatment cannot afford to accept it. Because feminist theory and theorists are grounded in the material reality of gender, their theory is immediately connected to human relations.”¹¹⁷

As we wrote at the beginning of our paper, we seek cooperation between men and women to form a more perfect combination of perspectives and roles. We do not seek to make women of men or men of women.¹¹⁸ After all, gender is gender, and rather than merge the two into one

116. McClain, *supra* note 105, at 1202.

117. Cole, *supra* note 3, at 86.

118. We look again to Gilligan for a simple and insightful observation. Gilligan points to the very beginning, “to Adam and Eve—a story which shows, among other things, that if you make a woman out of a man, you are bound to get into trouble.” GILLIGAN, *supra* note 11, at 6.

homogenous and androgynous form, we ought to revel in and explore the possibilities that come from our differences. For many, such a renovation of the judicial system would involve compromise and change; but as Cole writes, "[t]he road to social change may in fact be circular: it begins with mutual respect and ends with the conditions that might make mutual respect possible."¹¹⁹ No matter how we characterize it or where we begin, we must strive for mutuality of respect and individual sovereignty in determining the direction of our lives.

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119. Cole, *supra* note 3, at 91.

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