

We Can Do Better

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I want to work toward answers to two very hard questions. Here is the first: How do we avoid essentialist or stereotyped conceptions of women and men while holding to the possibility that women have the insight and inclination to transform the practice of law?

I take as given the need to expose and resist stereotypes that constrain us as women and men—to deny the essentialist claims that women but not men are nurturing, that men but not women are quantitatively apt, that women are inconsistent and inconstant, while men are logical and true. I acknowledge that there are times when “Anything You Can Do, I Can Do Better” is a healthy song to sing. At the same time, I believe that the presence of women in formerly all male centers of influence can and should transform practice within those institutions. (The words “can” and “should” are carefully chosen; I do not believe that transformation is an automatic consequence of integration.) How can we reconcile the claim of similar capacities with the promise of transformation?

I will approach this difficult question by telling a story about resonance and voice. The story is set in the American South in the twentieth century. The focus is on maintaining a civic voice, and there is a want of resonance on account of race. This story about resonance and voice is also a story about stereotype and transformation, for, as I hope to show, stereotypes (or cultural expectations) about people deny resonance to their voices. And, as I also hope to show, in gendered domains, like law or nursing, as in a racialized domain like the American South, voices muted for want of resonance can be voices of constructive transformation.

My story of the American South teaches that transforming practice requires courage to go against the cultural grain, and this lesson brings me to my second question: How do we fortify students, male and female, so that they have the courage to exploit the transformative potential of gender integration in the professions? In an effort to answer this question, I will offer two stories about legal education for practice against the cultural grain. In these stories, the focus

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is on maintaining a relational voice, and there is a want of resonance on account of patriarchal tradition.

Story #1: Being a Citizen of the South

Although I've lived and worked in New York for the past thirty-odd years, I spent a recent semester living and working in Lexington, Virginia as the Frances Lewis Scholar in Residence at Washington & Lee's excellent law school. This time in Virginia stirred memories of my childhood.

I spent the first ten years of my life in Virginia, at a traditionally black college in the Tidewater region. From 1943 until 1953, I was steeped in the beauty of Virginia's landscapes, the gentleness of its climate, the rich subtleties of its etiquette, and the poison of its racial and class hierarchies. I left before *Brown v. Board of Education*¹ de-legitimized ways of life that were background conditions of my childhood.

Returning in the year 2000, I felt a strong sense of familiarity that had both positive and negative aspects. Virginia's temperatures, fragrances and tastes gave me a bone-deep sense of comfort. Despite more than thirty years in New York, I remembered how to say good morning to strangers and to "Sir" or "Ma'am" anyone over twelve. But despite my transformation from rather peculiar ten-year-old to retired judge, chaired professor, and scholar-in-residence, the end of official segregation, and the risk of social sanction that now attends expressions of racial animus, I maintained a reflex for race-related contempt or violence—a set of muscles that tense still—and perhaps too quickly—at certain coded provocations.

I wanted to enter—thought I *should* enter—this community as intellectual colleague, as teacher and mentor, as citizen, as temporary and partial participant, but participant nonetheless, in the ongoing construction of the entities we call Washington & Lee, Lexington, Rockland County, Virginia, and the South. Sense memories of the geographic space helped me to feel at home in a very personal way. My colleagues and students at Washington & Lee were warmly welcoming and had an energy for good work and thoughtful discourse that made me feel engaged and at home professionally.

But memories of the rules and symbols of caste hierarchy were strong, and even though an African-American man had assumed the rank of governor, I was not confident that I could stay on to become a full citizen of the nested southern communities in which I once again found myself. Being at home in Virginia between 1943 and 1953 had meant—for me, for my family, for most of the people I loved—feeling pushed to the margins of civic life. Within our families and within the institutions (churches, schools, civic and social organizations, businesses) that we created and controlled, we held

1. 347 U.S. 483 (1954).

responsibility for what we, individually and collectively, were and what we would become. Our agency was clear; it was encouraged; and it was honored. Ted DeLaney is one of two African-American undergraduate professors at Washington & Lee. DeLaney's great-grandfather and his colleagues built a magnificent Baptist church that still stands on Lexington's Main Street. Within that church community, African-American voices resonated. One could voice a suggestion or an aspiration with the knowledge that it would be heard and might be realized. But in larger southern communities, there was no resonance. African-Americans were not thought of as the players who defined the community. Our suggestions or aspirations for the community sounded as curiosities rather than civic participation. We had to struggle against the grain of the larger culture to feel ownership of a community-defining role. An important and wearing part of that struggle was maintaining the courage to forego approval and maximum comfort in a social world dominated by pressures to conform to expectations. You might summarize this situation by saying that the Virginia of my childhood was a white-dominated society in which African-American agency in broader civic spheres was impeded, not only by the sometimes violent opposition with which it was met, but also for want of resonance.

Recalling the feeling of a lack of civic resonance, it occurred to me that the situation of African-American people in the South during the mid-twentieth century was similar to that of many first-year law students. I thought of the many students who had said to me over the years that there was no space in classroom discourse to voice their reactions to and feelings about the cases they read or to say what they thought most important about the doctrinal developments they traced. And I thought of the smaller but significant number of students who, as a result of this loss of voice, disengaged from the intellectual life of law school and deferred or lost their dreams of making a contribution or making a difference in the legal profession.

What was the consequence for mid-twentieth century Virginia of being a white-dominated society? Have Virginia's strides toward becoming a more genuinely multiracial polity been transformative? Might they be? I do not know enough to answer these questions with accuracy or in detail. Speculation, however, will serve to draw out the consequences of a group's lack of resonance generally and to permit comparison between a white-dominated Southern society and a male-dominated profession.

Let us suppose that despite within-group differences that belied the categorization, whites in Rockland County came to be thought of as rugged individualists. And let us suppose that a majority of whites in Rockland County embraced this characterization. Let us suppose that despite within-group differences that belied the categorization, blacks in Rockland County came to be thought of as holding communal values, prizing collective effort

and mutual support. And let us suppose that a sizeable proportion of blacks in Rockland embraced this categorization. It would follow, I suppose, that a white dominated Rockland County would be likely to govern itself so as to protect free competition, protect private property and keep taxation, collective effort and redistributions of resources to a minimum.

If blacks became more active in Rockland County's civic life, what would occur? It is hard to say. I would expect that black civic leaders would be under great pressure to assimilate to an individualistic norm. I would expect that resonance formerly denied categorically to African-American voices would be—or seem to be—denied to *stereotypically* African-American voices. Still, I would hope that Rockland County would be transformed, not from an individualistic community to a collectivist community, but into a community that took a more open and balanced view of both individual and collective values. That is to say, I would hope for a diverse, rather than an assimilationist, civic culture.

Story # 2 and Story #3: Being a Lawyer in a Gentleman's World

The title of these stories honors the Guinier-Fine-Balin critique of legal education. The stories concern—and honor—the work of Carol Gilligan, my mentor in the psychological and developmental meanings of resonance and voice and my colleague in providing resonance for relational voices (often, but by no means always women's voices) in the mainstream of legal education.

Carol and I work to train students to enter a profession that has been male-dominated but is now being taken up by nearly equal numbers of men and women. We work against weakened, but still operative, stereotypes of men (more assertive, more analytical, more rule-oriented) and women (more accommodating, more relational, more contextual). We also work against a view of the profession and practices in legal education that conform to the male stereotype—against the belief that because law school and the practice of law are assertive, analytical and rule oriented endeavors, lawyers should not be, or be trained to be, accommodating, relational, or contextual.

Looking to the stereotypes as they are described above, we regard the choice between assertive and accommodating stances as a strategic one. We understand that both can be useful, appreciate the value of having the flexibility to adopt either, and see careful strategic thinking about stance as more fundamental than the choice of stance.² We see legal analysis as a structured activity that necessarily involves the interplay of rule and context and therefore see danger in discounting the importance of either.³ We focus our efforts on

2. See Workways Forum, at <http://www.law.nyu.edu/workways.html> (last visited Nov. 23, 2002).

3. See Peggy Cooper Davis & Carol Gilligan, *A Woman Decides*, 32 MCGEORGE L. REV 895 (2001).

the relational, believing that effective lawyering is impossible without systematic use of interpersonal and intrapersonal intelligence and that sophisticated analysis and critique of relational work have been neglected in the legal academy.

Before I can discuss intelligibly the relational work that we do, I must define the term, for it is often misunderstood. In the course of defining the relational, I will need to explain the difference between a stereotypically feminine focus and a relational focus so that you can see why we have chosen the latter. Much of what I will need to communicate in defining the relational is captured in an exchange between Carol and a research subject, a bright adolescent named Iris:

Iris reports confidently that she prizes “standards” and finds them comforting. Iris says that she also prizes relationships, but she admits to being inhibited in her relationships: “If I were to say what I was feeling and thinking,” Iris reports, “no one would want to be with me — my voice would be too loud.”

Carol says to Iris: “If you are not saying what you are feeling and thinking, then where are you in these relationships?”

Iris sees the paradox — sees that she is “looking into . . . a psychological blind alley.” Carol goes on to say that “[t]he paradoxical sacrifice of relationship for the sake of relationships is the core dynamic of initiation into a patriarchal social order.”⁴

Carol teaches that very little boys and adolescent girls learn to silence relational concerns in order to fit into a patriarchal culture in which decisions are made and actions are taken, not as a result of having grappled with competing wants and needs, but on the basis of hierarchy and rules that mark the obligations of one’s status. Relational work is the challenging work of acknowledging and grappling with competing wants and needs. In Carol’s terminology, it is braving together the “weather” of separate wills, with particular appetites and needs. Patriarchy and other forms of social hierarchy do not thrive on genuine relationships but require the suppression of genuine relationship in favor of adherence to the rules of status or caste. Because the psyche resists hierarchy, patriarchal cultures are likely to be suspicious of the psychological; they are likely to value intellectual work most highly when it is apsychological, focused primarily on principle or rule, and dismissive or neglectful of the particulars of human situations.

It is important to note—and often overlooked—that in Carol’s account *both* boys and girls experience a repression of the relational self. It is not that girls are relational and boys are not. Development is gendered in (at least) two more

4. Adapted from Carol Gilligan, *Remembering Iphigenia: Voice, Resonance, and the Talking Cure*, in *THE INNER WORLD IN THE OUTER WORLD: PSYCHOANALYTIC PERSPECTIVES* (Edward Shapiro ed., 1999).

subtle ways. First, because women's position is subordinate, our culturally prescribed flight from genuine relationship leads to conformity with status rules that require selfless deference and accommodation.⁵ Selfless deference and accommodation require the relational skill of attunement to the needs and wants of others, but they are the near antithesis of genuine relationship. Similarly, because men's position is superordinate, their culturally prescribed flight from genuine relationship leads to conformity with status rules that require selfless industry and control. The second gender difference in the flight from relationship has to do with its timing: because the experience of genuine relationship is repressed later in the life of a girl, at a time when she is more articulate and intellectually more developed, in Carol's account of male and female development, women are likely to have easier access to the threatened relational voice and a greater ability to resist its repression.

The stereotype of women that I have set out above mixes characteristics that are attributable to the two developmental differences just described. Stereotypes are false as categorical statements, but they are usually grounded in particular observations. The observation that supports the stereotype of accommodation is the observation that women and girls sometimes fail to resist cultural pressures to repress the relational and are, as a result, selflessly accommodating when they might be assertive of their own wants and needs. Two kinds of observations support the stereotype of relationality. The first are products of our tendency to conflate accommodation and relationality; observations of accommodating behavior are taken as evidence of relationality. The second are observations of the attunement that facilitates both accommodation and genuine relationship. The psychological intelligence required to "read" oneself and others is observed, rightly, as evidence of relationality, whether it is used in the service of accommodation or, more happily, in the service of genuine relationship.

The relational work that Carol and I are doing with law students is, as I have said, grounded in the belief that excellence in lawyering requires developed interpersonal and intrapersonal intelligence. Lawyering is an interactive and strategic enterprise, and strategic interaction requires psychological insight. We aspire to teach students to think critically about interactions with clients, witnesses, decisionmakers, colleagues, and opposing counsel. Of course, our goal is not to make our students selflessly accommodating in their professional interactions. Our goal is to make them smart, strategic and conscious of when and how the choices they make in a written or oral interaction reduce or enhance their ability to conceptualize and achieve a client's ends or affect the shape of the law. Because we work in a male-dominated profession in a patriarchal culture, our work to strengthen

5. See generally Peggy Cooper Davis & Carol Gilligan, *Reconstructing Law and Marriage*, forthcoming in *THE GOOD SOCIETY* (reviewing Nancy Cott's *Public Vows*).

students' relational skills must go against the cultural grain. It must incorporate techniques for giving resonance to repressed relational voices. Here are two stories of our work together.

Story # 2. The Lawyering Program is a required, substantial, and increasingly well-integrated part of the first year curriculum at NYU, and students see it as an important component of their education. The Program consists of a series of simulations, one of which involved interviewing and counseling a parent who feels that she must, in the interest of students' safety, disclose facts about the medical condition of her daughter's teacher. Students engaged in an initial interview with the parent quickly conclude that their task is to assess the risk of liability for tortious invasion of privacy.

Carol sits in on a critique of a pair of videotaped client interviews. She flags in each tape the parent's account of the moment at which s/he discovered, to the embarrassment of both parent and teacher, that the teacher takes an anti-convulsant medication. Carol describes these moments as breaks in relationship. She then makes a pedagogic move that turns the students' attention to an intrapersonal analysis that will inform their critique of the interviews. She asks the students what they tend to do when they experience a break in relationship.

A male student says that he withdraws. A female student says that were she the parent, she would feel an uncomfortable sense of power; she reports that her pattern when she feels that she has power in a relationship is to yield it. Neither student had felt free in the counseling session to raise with the client the possibility that parent and teacher might repair the relationship and explore together the possibility of danger.

Carol then makes a pedagogic move that legitimates the students' intrapersonal work by linking it to the project of developing a more versatile approach to professional interactions. She asks the students whether they would be interested in having more options in the counseling setting—whether they would like to try on responses to a break in relationship other than their default responses. All say that they would. The conversation deepens. We consider how relationships were established and maintained in the videotaped client interviews—noting times when people were commendably attuned as well as times when they were reflexively avoidant. We note the value of noticing and responding to moments when professional effectiveness requires attunement between colleagues or between lawyer and client. Turning to the client's problem, we broaden our focus from litigation risk-assessment to the bigger world of the client's concerns and goals (attention to which requires, among other things, litigation risk-assessment). We open our eyes to the broken relationship between parent and teacher. We are able to talk not only about risks of litigation but also about addressing the parent's concerns without disclosing the teacher's apparent condition to others. In Guinier's terminology,

we have moved beyond the image of lawyers as gladiators to the image of lawyers as problem solvers. We open our eyes to the relationships among parent, teacher, headmaster, school board, pupils. We are able to talk more comprehensively about fear and risk and responsibility. We are able to imagine approaches to disclosure—and methods of disclosure—that would affect a judge or jury's subsequent decision as to whether the disclosure was necessary or reasonable. At this point rule interpretation and psychological logic merge.

Story # 3. In another Lawyering simulation, students negotiate an agreement to resolve a dispute over the performance and payment of a small construction contract. In preparation for a Lawyering Theory Workshop with Carol, Lawyering faculty watched the videotaped negotiations of two teams (configured so that members of a student team that had planned together negotiated separately against members of an opposing team that had also planned together). One attorney for the consumer was unusually assertive and unusually unwilling to make concessions. She got a remarkably good deal for her client.

On first viewing of the assertive student's negotiation, none of us on the faculty thought of her in relational terms. We thought her tough, aggressive, and uncompromising. For some reason these characteristics seemed to us incompatible with a relational stance.

Carol was patient with us. She drew our attention to body language. We noted the student's almost constant eye contact with the student representing the contractor. She drew our attention to question form. We noted the high proportion of consecutive questions—clear evidence of sharp listening and direct response. Carol drew our attention to the flow of the discourse. We noted the student's clear recall of her opponent's prior admissions and concessions. We noted her pattern of responding directly—although often with a clear “no”—to her opponent's requests.

We were embarrassed. We realized that we had fallen into the common error of mistaking the relational and the selfless. We reminded ourselves that the real Gilligan—as opposed to the sound-bite Gilligan—sees selfless accommodation and subordination to the other as pathology rather than as relationship. We remembered that her question to Iris, “Where are you in this relationship?” is a characteristic Gilligan question. We remembered that relational thinking is not inconsistent with advancing the strategic interests of one's client. Or one's self.

In exchanges of this kind, Carol helps us to give resonance to the relational voices of students and faculty alike as she brings a psychological logic to the lawyering process. It is controversial work that goes against the grain of law school culture. It is often met with skepticism. But it has empowered our

students,⁶ and it is supported at NYU by a faculty committed to honoring diverse approaches to pedagogy and to lawyering as a listener's art in increasingly diverse worlds of practice. With continued support, we hope that this kind of work will show that gender integration of the legal profession is more than an opportunity to prove that we are capable of practicing law as it was practiced before—of doing anything that men did and doing it better. We hope to show that gender integration is an opportunity to transform practice, as we integrate the workways of the past with workways that a gentleman's profession was inclined to neglect. An opportunity to show that anything men can do in the law, men and women can do better.

6. For documentation of the empowerment of women students at NYU Law School, see LINDA HIRSHMAN, *A WOMAN'S GUIDE TO LAW SCHOOL* 22-31 (1999).

HOW JUSTICE AFFECTS WOMEN

