

## Review Essay: The Power of Women

*Toward a Feminist Theory of the State.* By Catharine A. MacKinnon.\*  
Cambridge: Harvard University Press, 1989. Pp. xvii, 330.

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In *Toward a Feminist Theory of the State*, Catharine MacKinnon presents a compelling description of the gendered nature of our social reality. She describes her work as seeking “to understand gender as a form of power and power in its gendered forms.”<sup>1</sup> At the same time she cautions that “to look for the place of gender in everything is not to reduce everything to gender.”<sup>2</sup>

The first third of the book examines marxism, a theory about class exploitation,<sup>3</sup> from a feminist perspective, feminism, a theory about sex exploitation,<sup>4</sup> from a marxist perspective, and considers efforts to integrate the two, particularly in the wages for housework movement.<sup>5</sup> The middle section of the book, entitled “Method,” discusses consciousness raising, politics, and sexuality.<sup>6</sup> This section is the heart of MacKinnon’s “femi-

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1. C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE xi (1989) [hereinafter TOWARD].

2. *Id.*

3. “Marxist theory argues that society is fundamentally constructed of the relations people form as they do and make things needed to survive humanly. . . . Class is its structure, production its consequence, capital a congealed form, and control its issue.” *Id.* at 3.

4. “As the organized expropriation of the work of some for the benefit of others defines a class, workers, the organized expropriation of the sexuality of some for the use of others defines the sex, woman. Heterosexuality is its social structure, desire its internal dynamic, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue.” *Id.* at 3-4. Comparing the role of sexuality and work in each theory, MacKinnon observes: “Sexuality is to feminism what work is to marxism: that which is most one’s own, yet most taken away.” *Id.* at 3.

5. *See id.* at 63-80.

6. *See id.* at 81-154.

nism unmodified."<sup>7</sup> The remainder of the book applies this theory, developed in the first two sections, to the liberal state<sup>8</sup> and to rape,<sup>9</sup> abortion,<sup>10</sup> pornography,<sup>11</sup> and sex equality theory.<sup>12</sup>

MacKinnon describes her thought progression as follows: "[T]he project went from marxism to feminism through method to analyze congealed power in its legal form, and state power emerged as male power."<sup>13</sup> And so the work has emerged, quilt-like, over 18 years.<sup>14</sup> Patterns first explored in earlier discussions of rape, abortion, pornography, and equality appear in *Toward a Feminist Theory of the State* as a final design—that of systemic dominance.<sup>15</sup> MacKinnon writes: "Rape, battery, sexual harassment, sexual abuse of children, prostitution and pornography . . . express and actualize the distinctive power of men over women in society; their effective permissibility confirms and extends it."<sup>16</sup>

As one example of this "distinctive power," MacKinnon cites the statistic that "only 7.8 percent of women in the United States are not sexually assaulted or harassed in their lifetimes."<sup>17</sup> One reviewer criticized MacKinnon's use of this statistic in her earlier book as an exaggeration of the problem of sexual harassment of women.<sup>18</sup> My reaction to this statistic was, "Who are these 7.8 percent of women, and where in the United States do they live?" From hoots by construction workers to the

7. MacKinnon describes radical feminism as "feminism unmodified." *Id.* at 117.

8. *Id.* at 157-70.

9. *Id.* at 171-83.

10. *Id.* at 184-94.

11. *Id.* at 195-214.

12. *Id.* at 215-34.

13. *Id.* at xi.

14. Themes and ideas she has worked on are organized here into a coherent whole, giving both her critics and supporters an opportunity systematically to follow her thoughts. Preceding works from which this book has grown are listed at 321.

15. MacKinnon has described this systemic domination of women by men as analogous to a legal structure maintaining white supremacy. For a discussion of *Loving v. Virginia*, 388 U.S. 1 (1967), in which the Supreme Court invalidated an antimiscegenation law as violative of the 14th amendment's equal protection clause, see C. MACKINNON, *FEMINISM UNMODIFIED* 42, 245 n.35 (1987). The Court in *Loving* was unconcerned that the statute treated whites and blacks identically, forbidding their intermarriage. It found instead that the statute violated the equal protection clause because its purpose, the maintenance of black subordination in a system of white supremacy, was an impermissible one. *Id.* at 8, 11-12. See also Whitman, *Law and Sex* (Book Review), 86 MICH. L. REV. 1388, 1391 (1988).

16. *TOWARD*, *supra* note 1, at 127.

17. *Id.*

18. See Bartlett, *MacKinnon's Feminism: Power on Whose Terms?* (Book Review), 75 CALIF. L. REV. 1559, 1564 n.6 (1987).

advertising present everywhere, the litany of ways in which women are told that we are sexual objects is truly astonishing. The street is a great leveler, where even privileged women who are respected in their professions or families are fair game as street meat.<sup>19</sup>

Professor MacKinnon is a powerful speaker and a compelling rhetorician.<sup>20</sup> Her prose captures the terseness and intensity of her voice.<sup>21</sup> A significant part of MacKinnon's forcefulness is that she draws back the curtain that obscures the reality of our daily lives and shows us the system of sexism under which we live.<sup>22</sup> Her work describes the social construction of gender<sup>23</sup> with women as the powerless, the subordinated.<sup>24</sup> Like one who has been seen naked and grabs for a towel, many readers respond to MacKinnon's message by quickly pulling back the curtain. But denial of this sexist social reality does not negate its existence.

Because of the terseness of her prose, and perhaps also because of the power of her message, hers is a voice often misunderstood.<sup>25</sup> MacKinnon's theme of the dominance of women by men—the subordination of women—has created a debate about her work and its relation to the power

19. At the end of the film, *A Question of Silence* (Sigma Films 1982), discussed *infra* note 22, a male passerby says to a female psychologist, "Watch where you're going, cunt."

20. C. MACKINNON, *supra* note 15, is a collection of MacKinnon's speeches.

For a description of MacKinnon's "categorical rhetoric" and its limits, see Harris, *Categorical Rhetoric and Critical Social Theory* (Book Review) (forthcoming in BERKELEY WOMEN'S L.J. (1990), manuscript on file with author).

21. Consider the following example of MacKinnon's style: "explicitly socialist-feminist groups come together and divide, often at the hyphen." TOWARD, *supra* note 1, at 11.

22. The film *A Question of Silence*, *supra* note 19, also draws back the curtain to reveal the subjugation of women.

In *A Question of Silence*, a Dutch film written and directed by Marleen Gorris, three women, a secretary, a waitress, and a housewife, who have never before met each other, kill a man, a boutique owner, in a spontaneous and horrible act of violence. The housewife, after she is taken into custody, ceases to speak. Several other women, witnesses to the killing in the boutique, do not come forward to the police and also remain silent.

Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147, 148 (1988). The film is one of the most vivid depictions of women's powerlessness, yet it also portrays women rebelling. They are immediately squelched, paying a price for attacking subordination. But they have fought back. MacKinnon's work does not conclude that women have no power to rebel. The film is discussed in Murphy, *A Question of Silence*, and Root, *Distributing 'A Question of Silence'—A Cautionary Tale*, in FILMS FOR WOMEN (C. Brunson ed. 1986).

23. It is a relief that MacKinnon uses sex and gender "relatively interchangeably." TOWARD, *supra* note 1, at xiii. As she points out, "[m]uch has been made of a supposed distinction between sex and gender. Sex is thought to be the more biological, gender the more social." *Id.* This distinction has always been troubling, because "both are social and political," as MacKinnon acknowledges. *Id.*

24. See, e.g., *id.* at 8 (discussing the reality of women's powerlessness discovered through consciousness raising and found "to be both externally imposed and deeply internalized.").

25. MacKinnon acknowledges that she has been misinterpreted. In the introduction to this book, she writes that the prior publication of earlier parts of the book gave her the "benefit of the misunderstandings, distortions, and misreadings of a wide readership." *Id.* at xi.

of women. This debate centers around the dichotomy which I describe in this essay as the power/powerlessness dialectic.

This power/powerlessness dialectic is perhaps best encapsulated by an exchange which occurred in 1984 at SUNY-Buffalo Law School, during a forum about feminist discourse in which MacKinnon participated. After listening to MacKinnon's description of the gendered nature of reality and women's subjugation, Mary Dunlap, a feminist lawyer, rose protesting, "I am not subordinate to any man . . . Everyone who believes that you do not have to be subordinate to men, stand. . . ." <sup>26</sup> MacKinnon interpreted Dunlap's exhortation to women to feel empowered and to reject subordination as a denial of gender, as a dissociation by those in the room who did stand from the condition of women. <sup>27</sup>

Ruth Colker, discussing the same conversation, characterizes Dunlap's protestation as directed at "MacKinnon's unwillingness to acknowledge progress or movement toward authenticity as inconsistent with her [Dunlap's] and other women's life experiences." <sup>28</sup> Pointing out that "Dunlap is a committed feminist," <sup>29</sup> Colker criticizes MacKinnon for discounting feminist descriptions of freedom, while only accepting feminist descriptions of subordination. <sup>30</sup>

26. A version of this dialogue first appeared in *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 75 (1985) [hereinafter *Feminist Discourse*] and is discussed by MacKinnon in C. MACKINNON, *supra* note 15, at 305-06 n.6. The full text of Dunlap's remarks is as follows:

I am speaking out of turn. I am also standing, which I am told by some is a male thing to do. But I am still a woman—standing. I am not subordinate to any man! I find myself very often contesting efforts at my subordination—both standing and lying down and sitting and in various positions—but I am not subordinate to any man! And I have been told by Kitty MacKinnon that women have never not been subordinate to men. So I stand here an exception and invite all other women here to be an exception and stand. Everyone who believes it is true that we have never not been subordinate to men, remain seated. Everyone who believes that you do not have to be subordinate to men, stand if you can. *Feminist Discourse, supra*, at 75.

27. MacKinnon described the exchange as "a stunning example of the denial of gender." C. MACKINNON, *supra* note 15, at 305 n.6. She writes that she "was encouraged that only about a quarter of an audience of predominantly female law students" actually did stand. *Id.* at 306. *See also* Olsen, *Comments on David Krell's "Lucinde's Shame: Hegel, Sensuous Woman, and the Law,"* 10 CARDOZO L. REV. 1687, 1688 (1989) (citing this exchange as an example of feminists choosing to "pretend that equality already exists.").

28. Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity*, 68 B.U.L. REV. 217, 249 (1988). Dunlap replies to MacKinnon in Dunlap, *The 'F' Word: Mainstreaming and Marginalizing Feminism*, 4 BERKELEY WOMEN'S L.J. 251, 258 n.29 (1989-90). Dunlap challenges MacKinnon "and the other feminists who have taken to calling names and levelling accusations at those of us who disagree with them" to be open in revealing stories about their personal lives as part of their feminism. *Id.*

29. Colker, *supra* note 28, at 250.

30. *Id.* Pat Cain also criticizes MacKinnon's failure in the Buffalo exchange "to see the relevance of the lesbian claim to non-domination, even when it stands—literally—in front of her." Cain, *Feminist*

MacKinnon's vision of gender hierarchy and women's position of powerlessness within that hierarchy contrasts sharply with the sense of empowerment women like Mary Dunlap feel when combatting that hierarchy. Women feel empowered in important aspects of our lives, from birthing a child, to leaving a battering spouse, to demonstrating with other women in favor of procreative choice, as well as in more mundane daily life where we may also feel our sense of selfhood and personal power.<sup>31</sup>

The Buffalo exchange represents a conflict between a deterministic view of social relations, which defines women as subordinated and powerless, and the acknowledgment of the possibility for empowerment, which suggests women might transcend powerlessness. Women who try to assert power to effect a change in the gendered nature of social relations are not dissociating themselves from women as a group; they are not necessarily trying to define themselves as having power and leaving behind their powerless sisters. Rather, they are embracing their identification with women and trying to change the gendered reality, as does MacKinnon herself.<sup>32</sup>

This essay examines the possibility and impossibility of women's power in MacKinnon's latest work, highlighting her discussion of the dichotomy between consciousness of victimhood<sup>33</sup> and the assertion of self. This duality is manifested both in the criticisms of MacKinnon's

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*Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 203 (1989-90).

31. See A. LORDE, *Uses of the Erotic: The Erotic as Power*, in *SISTER OUTSIDER* 53 (1984) ("As women, we have come to distrust that power which rises from our deepest and nonrational knowledge."). See Wildman, *Integration in the '80's: The Dream of Diversity and the Cycle of Exclusion*, (forthcoming in 64 TUL. L. REV. (1990), manuscript on file with author) for one consciousness raising group's conversations about the exercise of personal power, whether in wrestling with a difficult paragraph, addressing a large class, or getting a sick child to take her medicine.

32. Asserting power as a woman to change the gendered reality is not personally costless in such a society. MacKinnon herself was not offered a tenured teaching post until recently. See Lewin, *Job Offer to Feminist Scholar May Mark Turn*, N.Y. Times, Feb. 24, 1989, at B5, col. 3 (describing the University of Michigan Law School tenure offer to MacKinnon). See also Olsen, *Feminist Theory In Grand Style* (Book Review), 89 COLUM. L. REV. 1147, 1149 n.14 (1989), commenting: "As long as an outstanding legal scholar like MacKinnon was not given a tenured teaching post in the United States, feminist scholarship remained vulnerable within legal academia." The cost of asserting herself on behalf of women was made a very public message within the legal academy.

The ways in which relatively privileged women can embrace identification with all women to try to change that gendered reality are matters of great debate among feminists. Furthermore, identification as women does not provide automatic or clear answers as to the most beneficial course of action. The well-known disputes in the feminist community about pornography, surrogate motherhood, and pregnancy discrimination highlight this problem.

33. MacKinnon describes her use of the term "victim" as descriptive, "who does what to whom and gets away with it," not moral, connoting responsibility, prescriptive, strategic, or emotional. TOWARD, *supra* note 1, at 138. The disclaimer is important, but the term "victim" unfortunately still carries much of this baggage and serves to obscure the power of women.

theory of rape and in the absence from MacKinnon's feminist theory of the state of women's lives with children.

MacKinnon rejects the identification of women's power as it is defined by men. Criticizing Carol Gilligan's analysis of the "different voice" in women's morality, which asserts that women value care and connection,<sup>34</sup> MacKinnon points out that "perhaps women think in relational terms because women's social existence is defined in relation to men."<sup>35</sup> She criticizes liberal feminism for not taking "social determinism and the realities of power seriously enough,"<sup>36</sup> by which she means the realities of women's lack of power.<sup>37</sup> MacKinnon describes how, through consciousness raising, women discovered that "women's so-called power was the other side of female powerlessness"<sup>38</sup> and how women's "nagging or manipulating is the other side of the power they lack to have their every need anticipated."<sup>39</sup>

Yet in this book MacKinnon acknowledges the power of women. For example, in discussing John Stuart Mill's petition to Parliament for women's suffrage, MacKinnon characterizes the argument in favor of women's suffrage as "demeaning to all women."<sup>40</sup> Mill had argued that suffrage should be granted to women because women in one class are not likely to vote differently from men in the same class, and, therefore, that "limiting the extension of the franchise to women who 'belong to' men of the same class" would be appropriate. MacKinnon acknowledges that it is demeaning to suggest that women are possessions of men or that they have no minds of their own. Yet MacKinnon's critics accuse her of embracing this deterministic vision of male-female relations.<sup>41</sup>

While it is not accurate to portray MacKinnon as denying the power of women, it is useful to examine the tension between women's powerlessness and power in her work. MacKinnon acknowledges that "as an

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34. *Id.* at 51, referring to C. GILLIGAN, IN A DIFFERENT VOICE (1982).

35. *Id.* at 51.

36. *Id.* at 52.

37. *Id.* at 94.

38. *Id.*

39. *Id.*

40. *Id.* at 6-7.

41. See, e.g., Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified* (Book Review), 82 NW. U.L. REV. 352, 378-79 (1988) (criticizing MacKinnon for perpetuating "the stereotype of women as victims" and implying "that is all women are."). See also Bartlett, *supra* note 18, at 1563, which asks: "Can women both have a hold on the reality of their oppressed circumstances, and also be fooled by men to think that the way the world is the way it's supposed to be?"

individual self, one has little power; but as an other in a social milieu, one ultimately has more."<sup>42</sup> Women struggle to transform society and their gendered position within it "with forms of power forged from powerlessness."<sup>43</sup> The social construction of gender places women in a contradictory situation: "Women's work has been minimized both in the sense of being prevented from being realized and in the sense that its importance has been precluded from realization."<sup>44</sup> An analogous conflict exists over women's power and the possibility of that power, a conflict which MacKinnon makes explicit: "And there is a connection: so long as women are excluded from socially powerful activity, whatever activity women do will reinforce their powerlessness, because women are doing it; and so long as women are doing activities considered socially valueless, women will be valued only for the ways they can be used."<sup>45</sup>

Consciousness raising, central to feminist methodology, affirms that women can indeed act to change this gendered reality by building "a community frame of reference."<sup>46</sup> According to MacKinnon, women possess a form of power "which they have not yet seized."<sup>47</sup> MacKinnon describes the possibility of women acting in complicity with the male dominated status quo while simultaneously exercising their power to change that reality:

Mostly, women comply. Women learn they are defined in terms of subordinate roles; failing to challenge these roles confirms male supremacy in a way it needs. Daily social actions are seen to cooperate with and conform to a principle. They are not random, natural, socially neutral, or without meaning beyond themselves. They are not freely willed, but they are actions nonetheless. From seeing that such actions have meaning for maintaining and constantly reaffirming the structure of male supremacy at their expense, women can come to see the possibility, even the necessity, of acting differently. Women can act because they have been acting all along. Although it is one thing to act to preserve

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42. TOWARD, *supra* note 1, at 47.

43. *Id.*

44. *Id.* at 80.

45. *Id.*

46. *Id.* at 101 ("[C]onsciousness raising . . . shows women their situation in a way that affirms they can act to change it.").

47. *Id.*

power relations and quite another to act to challenge them, once it is seen that these relations require daily acquiescence, acting on different principles, even in very small ways, seems not quite so impossible.<sup>48</sup>

MacKinnon reveals not only the gendered nature of social reality but also how it is rendered invisible and made to seem part of the natural order. She shows how the curtain is drawn to cover that reality by our compliance in everyday life. "Feminism," according to MacKinnon, "locates the relation of woman's consciousness to her life situation in the relation of two moments: being shaped in the image of one's oppression, yet struggling against it."<sup>49</sup> She further acknowledges, "Women often find ways to resist male supremacy and to expand their spheres of action. But they are never free of it."<sup>50</sup>

Thus, MacKinnon's own work appears to have moved beyond the need to take sides in the dichotomy expressed in the Buffalo dialogue with Mary Dunlap, in which Dunlap demanded recognition as a woman for her resistance to male dominance, and in which MacKinnon insisted that women identifying with women own the subordinated reality in which we are placed. MacKinnon's writing in *Toward a Feminist Theory of the State* reflects the dialectic reality of these two positions and the possibility that they are both correct at the same time, accurately describing women's experience. Women's power exists at the intersection of these two moments, where and when we recognize our strength in resistance and our powerlessness in being dominated.

One example of the dialectic intersection of power and powerlessness is present in the self-perception of battered women. Martha Mahoney describes women at this dialectic intersection when she discusses battered women's reluctance to identify themselves as battered. Women at this intersection perceive themselves correctly as strong and resilient in the face of such oppression and therefore may reject the image of themselves as battered and powerless.<sup>51</sup> As Mahoney explains, these women are not only sufferers of intolerable physical abuse, but also may be strong and

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48. *Id.* at 101.

49. *Id.* at 102.

50. *Id.* at 138.

51. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, (forthcoming in 43 STAN. L. REV. (1990), manuscript on file with author) (discussing the danger to women of rejecting the powerless image and therefore failing to seek help).



assertive in their own lives.<sup>52</sup>

Another example of the dialectic intersection of power and powerlessness in people's lives was pointed out by a friend in a twelve step program who cites the parallels between programs such as Alcoholics Anonymous, where an individual is struggling against the disease of alcoholism, and the condition of women, struggling against systemic dominance. Both struggles employ a similar method, consciousness raising, in which members of the group share their experiences. Twelve step programs begin with an acknowledgment by participants that each lacks power over alcoholism, in the same way that MacKinnon urges women to recognize their powerlessness in the gender hierarchy. In twelve step programs, the road to recovery begins through this recognition.

An important difference between the situation of women and the recovering alcoholic is the tenet of twelve step programs that tells the individual to trust in a power higher than oneself. Such a spiritual dimension has not been central to the 20th century women's movement, perhaps to its detriment. This absence of a spiritual dimension also marks a sharp contrast between the women's movement and the civil rights movement, which was grounded in Black churches.<sup>53</sup>

Through consciousness raising, women can begin to act to change this gendered reality.<sup>54</sup> Feminist method takes seriously the "use and abuse by men"<sup>55</sup> of women, bringing experiences that are otherwise viewed as marginal to the center of attention.<sup>56</sup> Several landmark tort cases exemplify the marginalization of the abuse of women by men. An astonishing number of these tort cases involve women who have suffered egregious personal injury. Tort law is concerned with protecting personhood against the invasion of bodily security, whether intentional, negligent, or from abnormally dangerous activity, yet in these cases the plight of the harmed women is not central to the lawsuits nor related to the reason that the cases have been regarded as important.

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52. *Id.* Mahoney explains that descriptions of women in battering relationships as other than 'strong' and 'assertive' "reflects white middle-class norms about the family: women are either strong and assertive or coerced. Some of us may be both—a lot may depend on the level and type of coercion involved." *Id.*

53. See generally T. BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 (1988).

54. See *supra* note 46 and accompanying text.

55. C. MACKINNON, *supra* note 15, at 5. See also Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review), 41 STAN. L. REV. 751, 764 (1989).

56. See also B. HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984).

*Tarasoff v. Regents of the University of California*<sup>57</sup> is a well-known case concerning psychotherapists' duty to warn those threatened by patients. The case involved the violent, fatal stabbing of a female student. *Riss v. City of New York*<sup>58</sup> is a landmark case concerning the duty of police to provide protection. The woman victim in this case was tragically blinded and scarred when a thug hired by her former boyfriend threw lye in her face. Ms. Riss later married this same boyfriend,<sup>59</sup> presenting a chilling example of the lack of power in women's ascribed social role as the subordinated gender. Such subordination has contributed to battered woman's syndrome, as women are subjected to assault even when attempting separation.<sup>60</sup> *Sindell v. Abbott Labs*,<sup>61</sup> known for introducing the concept of market share liability, involved DES daughters and the marketing of a drug that could cause cervical cancer. *Steinhauser v. Hertz Corp.*,<sup>62</sup> a modern version of the thin-skulled plaintiff doctrine, tells of the schizophrenic victim's history of sexual abuse and notes that she was a "normal child" except for this incident, trivializing the fact she had been molested three times by an uncle.<sup>63</sup> *Cox Broadcasting Corp. v. Cohn*<sup>64</sup> considered a rape and murder victim's father's right to privacy.<sup>65</sup>

The facts of these cases show that although sexual use and abuse of women has occurred frequently, the legal culture views that reality as marginal to legal discussion. The courts treat these cases as centering upon altogether different subjects. Law regards the sexual use and abuse of women as a rare occurrence, which, even when acknowledged, is still marginalized.<sup>66</sup>

One wonders whether the sex of the female victim played a role in the outcome of other tort cases. Ms. Palsgraf, the famous victim in Cardozo's

57. 17 Cal. 3d 425, 131 Cal. Rptr. 14 (1976).

58. 22 N.Y.2d 579, 293 N.Y.S.2d 897 (1968).

59. N.Y. Times, Nov. 28, 1974, at A1, col. 4, cited in PROSSER, WADE & SCHWARTZ, TORTS, CASES AND MATERIALS 627 (8th ed. 1988).

60. See also Mahoney, *supra* note 51 (discussing separation assault and the cycle of woman battering).

61. 26 Cal. 3d 588, 163 Cal. Rptr. 132 (1980).

62. 421 F.2d 1169 (2d Cir. 1970).

63. 421 F.2d at 1171 n.2, 1172.

64. 420 U.S. 469 (1975).

65. See also *The Florida Star v. B.J.F.*, 109 S.Ct. 2603 (1989) (concerning First Amendment right of press to publish rape victim's name).

66. Just as abuse of women is marginalized in these major tort cases, in another landmark tort case, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the subordination of blacks by racism is veiled in a discussion of the press's constitutional privilege relating to state libel laws. See also *supra* note 15.

and Andrews' debate about duty, proximate causation, and foreseeable plaintiffs was of course a woman. Was her injury not taken seriously because of her gender?<sup>67</sup> In *Dillon v. Legg*,<sup>68</sup> the mother who witnessed the injury of her young child by a negligent driver was found to have a newly created cause of action for the negligent infliction of emotional distress. Might this have been an example of reification of the maternal role?<sup>69</sup>

The cases discussed here represent only the tip of the litigation iceberg; those cases which have been filed, tried, appealed, and reported. Many cases are simply not brought.<sup>70</sup> Tort law has failed to protect the interest of women in bodily security or to treat those harms as serious.<sup>71</sup>

Another important example of the powerlessness versus personal power dichotomy represented in the Buffalo exchange inheres in criticism of MacKinnon's theory of rape and consent. For many, MacKinnon's discussion of rape and consent precipitates a sense of exasperation and outrage.<sup>72</sup> MacKinnon, assert her critics, believes that all heterosexual intercourse is rape. They rebel against this idea, imagining their own sexual relationships with their partners. They cannot bear to identify themselves as a rapist or as a rape victim. To do so would destroy visions of their own happy sexual union. Since *they* cannot be rapists or rape victims in their world view, MacKinnon must be wrong.

This condensation of MacKinnon's theory does not do her justice. Her analysis is more sophisticated and important than suggesting that all men

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67. See *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928). See also J. NOONAN, *PERSONS AND MASKS OF THE LAW* 111-51 (1976).

68. 68 Cal. 2d 728, 69 Cal. Rptr. 72 (1968).

69. See *supra* notes 34-35 and accompanying text. See also Chamallas with Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

70. Similarly in the criminal law area, rape is underreported. S. ESTRICH, *REAL RAPE* 10-15 (1987) (discussing the definitional difficulties relating to sexual assault). See also Henderson, *Review Essay: What Makes Rape a Crime?* (Book Review), 3 BERKELEY WOMEN'S L.J. 193 (1987).

71. For discussions concerning infusing gender issues into the torts course, see Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989); Love, *Bringing Gender Issues into the Torts Course*, TORTS AND RETORTS: NEWSLETTER OF AALS SECTION ON TORTS-COMPENSATION SYSTEMS, Fall 1989; Wildman, *The Classroom Climate: Encouraging Student Involvement*, 4 BERKELEY WOMEN'S L.J. 326 (1989-90).

72. See, e.g., Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 451 (1984). Although not disrespectful in the tone of his criticism, Schwartz does single out MacKinnon's view of "the significance of consent as a defense to a charge of rape" for comment. Schwartz also quotes the following statement by MacKinnon: "Persistent male initiation and passionate penetration differ [only in degree] from rape." See also *id.* at 452 n.186 (portraying MacKinnon as describing all heterosexual intercourse as essentially rape).

are rapists or that all heterosexual sex is rape. She is making a point about the systematic denial of choice to women. Women are denied choice because their social role is constructed and that role is one in which women are available for sex with men. MacKinnon points out that under male supremacy "the elements 'with force and without consent' appear redundant."<sup>73</sup> "Sexuality is central to women's definition,"<sup>74</sup> and dominance and submission are eroticized.<sup>75</sup> She urges that consent is meaningless in the context of a social construction in which women are subordinate. That women are powerless to consent meaningfully parallels the powerlessness side of the Buffalo dichotomy. But women also simultaneously have "power forged from powerlessness,"<sup>76</sup> as MacKinnon herself has recognized.

Does MacKinnon believe that women can experience self-determining power within heterosexual relationships? When asked about women's enjoyment of their sexuality in a heterosexual context, MacKinnon compared the exploitation of workers under marxism to the role of women in socially constructed sexuality and observed, "Even workers can have a good day."<sup>77</sup> With her humor, MacKinnon recognized the dialectic possibility of powerlessness and power. Women do have some power in heterosexual relations, even in the face of powerlessness. She deflected the question of whether pleasure is truly possible for women in heterosexual relations, recognizing that such power must necessarily coexist with the powerlessness of societal subordination—a powerlessness which is most often denied. If pleasure is, as many women insist, possible in heterosexuality, MacKinnon's critique of heterosexuality under male dominance must be understood on a more complex level. The power/powerlessness dialectic suggests that both power and powerlessness may be present at the same time.

Another challenging question facing feminists today is the role of women's relation to children with respect to the power/powerlessness dichotomy. Children, very much a part of many women's lived lives, are largely absent in *Toward a Feminist Theory of the State*. Children are marginalized by this culture, rendered invisible. Can a feminist theory that

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73. TOWARD, *supra* note 1, at 172 (referring to standard penal code definitions of rape).

74. *Id.*

75. *Id.* at 177.

76. *Id.* at 47.

77. Conversation with West Coast Feminist Critical Legal Scholars, in Stanford, California (Spring 1986).

does the same solve the problems of women's existence as subordinated? How might an application of feminism unmodified, as exemplified in a feminist theory of the state, apply to childbirth and child rearing? Care for the elderly is another realm of uncompensated work performed primarily by women and rendered invisible by the existing societal order. A feminist state might well bring in from the margin and make central care for both the elderly and children.

Much of the strength of MacKinnon's feminist theory of the state comes from her ability to show how aspects of this societal reality which are central to women's lives are marginalized, privatized, and essentially placed outside the sphere of the state. She is at the height of her descriptive skill when she depicts this landscape and suggests that women must start by recognizing it as their own:

The first step is to claim women's concrete reality. Women's inequality occurs in a context of unequal pay, allocation to disrespected work, demeaned physical characteristics, targeting for rape, domestic battery, sexual abuse as children, and systematic sexual harassment. Women are daily dehumanized, used in denigrating entertainment, denied reproductive control, and forced by the conditions of their lives into prostitution. These abuses occur in a legal context historically characterized by disenfranchisement, preclusion from property ownership, exclusion from public life, and lack of recognition of sex specific injuries. Sex inequality is thus a social and political institution.<sup>78</sup>

This portrait is breathtaking in scope; yet it is glaringly incomplete. It omits any mention of children other than to acknowledge the abuse of women when they are children. Yet relating to children by birthing and/or rearing them is a concrete part of most women's lives.<sup>79</sup>

Of course, child rearing need not be the domain of women, either exclusively or even primarily. However, the social reality for most women is that life with children *is* their domain, or at least a central, formative part of their world. This aspect of sex segregation is visible any weekday morning in any neighborhood park, in any gender survey of elementary

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78. TOWARD, *supra* note 1, at 244.

79. See Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985) (describing pregnancy as episodic in women's lives).

school teachers, or in the waiting room of any pediatrician. In this culture it is primarily women who care for children; part of women's problem in a sexist culture is that child rearing is perceived as women's domain.<sup>80</sup> While there are exceptions, the exceptions are just that—unusual.<sup>81</sup>

MacKinnon correctly points out: "Experiences of sexual abuse have been virtually excluded from the mainstream doctrine of sex equality because they happen almost exclusively to women and because they are experienced as sex."<sup>82</sup> Similarly, issues that relate to children and would help to change many women's lived reality in a positive sense, have been viewed as excludable from the mainstream of sex equality doctrine, perhaps also because they happen to women.<sup>83</sup> This area of law is regarded as private.<sup>84</sup>

Care of children is litigated only in terms of child custody upon divorce and otherwise is seen as a personal matter in which the state properly does not intercede. One exception in which the state does view its participation as proper is the so-called "surrogate" mother issue, which has received much recent attention. A feminist theory of the state should consider why any mother should be called a surrogate.<sup>85</sup> When equal protection or due process arguments have been made about children and custody, those arguments have usually benefited men.<sup>86</sup> When parenting is recognized as an issue of sex equality, the issue has become another vehicle for male control, harming women's interests, rather than being an

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80. See, e.g., Gottschalk, Jr., *Maternity Leave: Firms Are Disrupted by Wave of Pregnancy at the Manager Level: After-30 Motherhood Snags Debenture Offer, Clouds Rating of TV News Show: Careers Put on Slower Track*, Wall St. J., July 20, 1981, at 1, col. 6 (suggesting that women's children cause all the problems in the business world).

81. And the unusual male exceptions get lots of credit for their work with children, work which women do as a part of daily life that is systemically rendered invisible. For example, one recent faculty committee assignment was specially scheduled to accommodate a father taking care of his children in his wife's absence. He required special accommodation. The extra burden was shouldered by the single mother on the committee, who of course always cared for her children.

82. TOWARD, *supra* note 1, at 243.

83. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974) (discrimination based on pregnancy is not sex discrimination).

84. See Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) for a discussion of the public and private spheres. For an unusual case considering child care as a public law issue, see *De la Cruz v. Tormey*, 582 F.2d 45 (9th Cir. 1978).

85. See, e.g., Rothman, *Motherhood: Beyond Patriarchy*, 13 NOVA L. REV. 481, 486 (1989); see also Taub, *Surrogacy: Sorting Through the Alternatives*, 4 BERKELEY WOMEN'S L.J. 285 (1989-90).

86. See Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 1789 (1983) (describing how the use of formal equality at divorce is harmful to women); Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984).

avenue for making positive changes in women's lives.<sup>87</sup> Just as "[s]exual abuse has not been seen to raise sex equality issues because these events happen specifically and almost exclusively to women as women,"<sup>88</sup> so, too, issues relating to the birth or care of children happen primarily to women as part of the way women are culturally defined as caretakers and nurturers.

Feminist theory faces a dilemma here between embracing the positive values in this definition of women's sphere, as do many cultural feminists,<sup>89</sup> and rejecting that definition as one thrust upon us. MacKinnon has refused to accept what she views as a male-constructed definition of women's power.<sup>90</sup> Can a dialectic solution, maintaining that women are both powerful and powerless, paradoxical as that sounds, help us to find and use our power without accepting our victim status?

MacKinnon criticizes Engels' effort to theorize about women's subordination<sup>91</sup> and the marxist reflex under which "women become 'the family.'"<sup>92</sup> She correctly objects to the marxist meaning of reproduction "punned into an analysis of biological reproduction"<sup>93</sup> because it obscures the role of sexuality in constructing women as subordinated. MacKinnon's theory is valuable because it makes sexuality central; it is problematic because it fails to discuss—and thereby marginalizes—women's life with children.

MacKinnon does allude to this part of women's lives, but only in passing. Childbearing and child rearing are included in a list of services that women perform for men,<sup>94</sup> and children are referred to as "conse-

87. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

88. TOWARD, *supra* note 1, at 243.

89. See, e.g., N. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978); D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND THE HUMAN MALAISE* (1977) (criticized by MacKinnon as follows: "[T]aking women's biology as the basis of women's liberation only negates biological justifications for women's subordination without questioning their basis." TOWARD, *supra* note 1, at 58-59.).

90. MacKinnon has questioned how we can identify our "different voice" when the feet of patriarchy are on our necks. See *Feminist Discourse*, *supra* note 26, at 28.

91. See TOWARD, *supra* note 1, at 19 (discussing F. ENGELS, *ORIGIN OF THE FAMILY, PRIVATE PROPERTY, AND THE STATE* (1972). Marx is let off the hook as MacKinnon observes: "his first failing and best defense are that the problems of women concerned him only in passing." TOWARD, *supra* note 1, at 19.

92. *Id.* at 12.

93. *Id.*

94. *Id.* at 10.

quent progeny,"<sup>95</sup> pawns in the politics of male domination. Children are also mentioned in a list of women's stories that were explored in consciousness raising groups.<sup>96</sup> Women talk about their lives with children when using feminist methodology, lending support to the idea that this part of women's lives cannot be overlooked by feminist theory. In their world with children many women do feel their personal power, even as they may feel their domination by the sexist social reality. This sphere with children may be incidental to MacKinnon because it is so clearly male-defined as ours for their use. But so is pornographic depiction of women's sexuality, a subject to which MacKinnon has devoted substantial effort.

Why is it so hard for feminist legal theorists to write about this part of women's lives?<sup>97</sup> It cannot be simply that they do not have children, since some do. Feminist theorists who have not worked in the pornography industry are still able to grasp its devastating implications for women's lives. One reason writing about women and children may be so difficult is that this sphere is not noticed by law, unless and until child rearing encroaches upon the male privilege of ownership or control. The everyday world of diapers, laundry, and explaining right from wrong is considered unworthy of attention.

Only one reviewer of MacKinnon's earlier work, Brenda Waugh, has been troubled by the absence of discussion of children and women's lives in the structuring of a feminism unmodified.<sup>98</sup> Waugh used poetry, rather than law review prose, to express her concerns. One of Waugh's themes is the difficulty she has in finding the time to write her review because of conflicting demands from her life with children.<sup>99</sup> She is working on an outline, when her daughter asks to be read to. The outline is put aside.<sup>100</sup>

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95. *Id.* at 110.

96. *Id.* at 88.

97. For one exception see Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1310-11 (1987) (discussing breastfeeding in a restaurant).

98. Waugh, *When Did We Last Meet? Let Us Now Speak A Book Review, Complete with Forty-five Footnotes* (Book Review), 12 LEGAL STUD. F. 221 (1988).

99. As a mother with young children and a law professor, I find I am bilingual as to time. Time has a quality of constant shortage in the legal sphere; with children, time moves slowly and there is lots of it, unless we are trying to make the transition from one world to the other to get to work "on time."

100. Waugh, *supra* note 98, at 223. Parents will relate to Waugh's theme of interruption. Even as I try to write this essay about feminist theory, I stop to explain black and blue marks to my daughter, who has fallen off her bike. Why is the job of discussing abstract feminist theory rewarded more by society? Black and blue marks seem more important and harder to understand.

Watching the cultural imprinting of girliness, of subordination, on my wonderful daughter has



In one touching verse, Waugh describes her children sleeping on a quilt under a tree. She can read the book and work on the review, because it is a quiet moment.<sup>101</sup> But Waugh returns to the theme of time and too many demands: "Soon, this review, grew into a whole new source of guilt."<sup>102</sup> She lists all the things she "should" be doing, concluding "I should be unmodified."<sup>103</sup>

Waugh repeatedly cites MacKinnon's question, "What are babies to men?"<sup>104</sup> MacKinnon, who asked this question in *Feminism Unmodified*, acknowledged that it is an "important exploration," which she was not pursuing.<sup>105</sup> Waugh asks, "What are babies to ME!// Yea, is that an important exploration?"<sup>106</sup> Feminist method teaches us to begin with the experience of women, to take women's descriptions of our lives seriously. MacKinnon has said law school teaches "that to become a lawyer means to forget your feelings . . . if you are a woman, forget your experience."<sup>107</sup> This central experience of many women, life with children, cannot be ignored by feminist legal theory.

This world of women in relation to children may be embarrassing to feminists to own as a "women's world." To the extent the women's movement of the seventies said, "Let us in we are just like men,"<sup>108</sup> children were perceived as a liability or an embarrassment.<sup>109</sup> But this world with children is a place where women exercise their personal power, while recognizing and experiencing this power as circumscribed. A

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been painful to observe. How much can a parent counteract that socialization? How do you explain to a child why mommy and daddy must use separate bathrooms at the swimming pool, when at home we use the same one? When my son at age three cried because I had to tell him he couldn't be a mommy when he grew up, I railed at our language. It didn't help a three year old when I explained that he could be a nurturing Daddy. How much in the daily routine of life must we accept, keeping the curtain drawn?

101. *Id.* at 227-28.

102. *Id.* at 230.

103. *Id.*

104. *Id.* at 234, 236, 239, 245 (quoting C. MACKINNON, *supra* note 15, at 93).

105. C. MACKINNON, *supra* note 15, at 93.

106. Waugh, *supra* note 98, at 234.

107. C. MACKINNON, *supra* note 15, at 205.

108. *See, e.g.,* TOWARD, *supra* note 1, at 216-21, discussing sex discrimination jurisprudence as a comparison of women to men: "[A] woman is legally recognized to be discriminated against on the basis of sex only when she can first be said to be the same as a man." *Id.* at 216.

109. *See, e.g.,* Waugh, *supra* note 98, at 243-44. Waugh describes being embarrassed when she, inhabiting the world with children, leaves the book review—from the male world of work—on a library table in the children's reading room and it is picked up and read by another mother. Maybe the embarrassment travels in both directions, because we have such a strong cultural sense that the two worlds cannot or should not mix.

feminist theory which does not reach these women will not reach women.

Ultimately MacKinnon's theory stops short and renders invisible and irrelevant to her feminism unmodified this reality of most women's lives. MacKinnon acknowledges that her work is a beginning.<sup>110</sup> She explicitly mentions that "comprehension and change in racial inequality are essential to comprehension and change in sex inequality,"<sup>111</sup> that feminist theory must build on the work of women of color.<sup>112</sup> The inclusion of women's lives with children must also be part of the next quilt of feminist theory that we stitch. As we move toward a feminist theory of the state, we must further explore the connections and contradictions between the role of women in relation to children and the other areas of our lives which are defined and limited by the male state.

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110. *See, e.g.*, TOWARD, *supra* note 1, at 249 (acknowledging that possibilities of feminist law and theory "cannot be assessed in the abstract but must engage the world").

111. *Id.* at xii.

112. *Id.* MacKinnon names Kimberle Crenshaw, Mari Matsuda, Cathy Scarborough, and Patricia Williams. Others could be added to this list, including Regina Austin, Anita Allen, Paulette Caldwell, Trina Grillo, Angela Harris, and Rachel Moran.

# Making Change: Women and Ethics in the Practice of Law

*Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers.* By Rand Jack and Dana Crowley Jack. New York: Cambridge University Press, 1989. Pp.xi, 218.

Judith Leonie Miller<sup>†</sup>

The implicit overlap between the burgeoning literatures of professional ethics<sup>1</sup> and gendered moral theory<sup>2</sup> gives rise to a compelling question:

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1. While an exhaustive bibliography of this literature is far beyond the scope of this review, the interested reader may wish to sample some of the following books and articles: THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (D. Luban ed. 1983); M. FREEDMAN, LAWYERS' ETHICS IN THE ADVERSARY SYSTEM (1975); S. GILLERS & N. DORSEN, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (1985); A. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (1980); G. HAZARD, ETHICS IN THE PRACTICE OF LAW (1978); G. HAZARD & D. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION (2d ed. 1988); K. KIPNIS, LEGAL ETHICS (1986); D. LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988) (includes an excellent and extensive bibliography); C. WOLFRAM, MODERN LEGAL ETHICS (1986); Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U.L. REV. 191 (1978); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909 (1980); Pepper, *The Lawyer's Amoral Role: a Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613; Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); Rhode, *Why the ABA Bothers: a Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981); Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980); Simon, *Ideology of Advocacy: Procedural Justice and Professional Ethics*, 29 WIS. L. REV. 30 (1978); Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 NAT. L.F. 1 (1975).

2. The starting point for any investigation into this literature is C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Although a complete bibliography of the literature leading up to and building on Gilligan's work is again beyond the scope of this review, the following materials may be especially useful: WOMEN AND MORAL THEORY (E. Kittay & D. Meyers eds. 1987); Auerbach, Blum, Smith & Williams, *On Gilligan's In a Different Voice*, 11 FEM. STUD. 149 (1985); M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, WOMEN'S WAYS OF KNOWING (1986); Broughton, *Women's Rationality and Men's Virtues: a Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597 (1983); N. CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978); D. DINNERSTEIN, THE MERMAID AND THE MINOTAUR (1976); DuBois, Dunlap, Gilligan, MacKinnon & Menkel-Meadow, *Feminist Discourse, Moral Values and the Law—a Conversation*, 34 BUFFALO L. REV. 11 (1985); Flanagan, *Virtue, Sex and Gender: Some Philosophical Reflections on*

if it is empirically true that there is a distinctively female moral stance<sup>3</sup>, how does that stance affect the practice of law as women enter the field in increasing numbers? The question contemplates both a predictive and a normative resolution. How might things be? How should things be? These issues, in turn, demand a rigorous interrogation of the way things are. What is the practice of law really like? What does women's moral stance really entail? What accounts for these realities perceived in the legal and moral worlds?

So framed, the inquiry raises some of the most crucial, and seemingly intractable, issues confronting both feminism and professionalism, and one must applaud all genuine efforts to address them. One such effort is to be found in *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers*, by Rand Jack and Dana Crowley Jack.<sup>4</sup> Drawing upon the literatures described above, and building upon a study that they designed and conducted, these authors offer a critique of law and the legal profession as moral projects and as gendered institutions.

Because this book is situated in a larger investigation of gender, and of personal and professional morality, it must be evaluated in terms of its contribution to that investigation. This review, then, seeks to critique its object not simply as an isolated product, but rather as part of the larger, continuing project. What does the book contribute to our knowledge of things as they are? What causal account does it offer for the reality it

*the Moral Psychology Debate*, 92 ETHICS 499 (1982); Gibbs, Arnold & Burkhart, *Sex Differences in the Expression of Moral Judgment*, 55 CHILD DEV. 1040 (1984); Gilligan & Attanucci, *Two Moral Orientations: Gender Differences and Similarities*, 34 MERRILL-PALMER Q. 223 (1988); Henley, *Psychology and Gender*, 11 SIGNS: J. WOMEN CULTURE & SOC. 101 [hereinafter SIGNS] (1985); Kerber, Greeno, Maccoby, Luria, Stack & Gilligan, *On In a Different Voice: an Interdisciplinary Forum*, 11 SIGNS 304 (1986); L. KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* (1981); Kohlberg, *The Claim to Moral Adequacy of a Highest Stage of Moral Judgment*, 70 J. PHIL. 630 (1973); Lloyd, *Reason, Gender, and Morality in the History of Philosophy*, 50 SOC. RES. 490 (1983); Nicholson, *Women, Morality, and History*, 50 SOC. RES. 514 (1983); N. NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1984); Rhode, *The "Woman's Point of View,"* 38 J. LEGAL EDUC. 39 (1988); Tronto, *Beyond Gender Difference to a Theory of Care*, 12 SIGNS 644 (1987); J. Walker, *In a Diffident Voice: Cryptoseparatist Analysis of Female Moral Development*, 50 SOC. RES. 665 (1983); L. Walker, *Sex Differences in the Development of Moral Reasoning: a Critical Review*, 55 CHILD DEV. 667 (1984).

3. It should be noted that none of the scholars investigating gender and moral development claims an absolute correlation between gender and moral stance. To the contrary, some women engage in "rights" reasoning, *see infra* notes 6-10 and accompanying text, although this type of reasoning has been found to be more typically male; similarly, some men evince the "care" perspective, *id.*, that is more often associated with women. Since the inquiry at hand, however, is relevant only to the degree that these moral stances are gendered, this review will assume such a correlation without further caveat.

4. R. JACK & D. JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* (1989) [hereinafter cited by page number only].

describes? What alternative vision does it propound?

I. DESCRIBING THE PROJECT:  
ANALYTICAL ASSUMPTIONS AND EMPIRICAL FINDINGS

The centerpiece of this book is an empirical study of women and men in the legal profession. In both framing their inquiry and interpreting their findings,<sup>5</sup> however, the authors have embraced a particular view of morality, and of the nature of law; the empirical work is situated, both organizationally and conceptually, within the context of these views. Because they thus delineate the contours of the research, inform the project's interpretive strategies, and color the resulting conclusions, these analytical assumptions must be understood before one approaches the work itself.

A. *Analytical Assumptions*

1. *The Two Moralities.*

Building upon the work of Carol Gilligan, and in particular her critique of Kohlberg's model of moral development<sup>6</sup>, the authors initially posit the existence of two discrete moral stances. The first, which they term "the morality of rights," has in this account evolved from a male point of view, although it has passed for years as the product of a gender-neutral, human point of view<sup>7</sup>. It is coextensive with the conventional notion of justice, rooted in autonomy, which has characterized public life in western culture. From this perspective, "Moral superiority is gauged in terms of the relation of the self to the rules of society, with highest attainment

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5. Readers who wish more detailed information regarding the methodology of the study may consult the coding manual and the compiled figures and tables included in the book as Appendices I and II, pp. 172-95.

6. Kohlberg, working exclusively with boys rather than girls, constructed a scheme of moral development that prized abstract notions of right and obligation, fairness and justice, over contextual, concrete, individual concerns. In this scheme, girls and women were found to be less morally developed. See, e.g., L. KOHLBERG, *supra* note 2. Gilligan, working with both girls and boys, found different but equally developed forms of moral reasoning that roughly accorded with gender. Boys tended to think in terms of Kohlberg's abstract values, applying general rules or principles to decide outcomes, while girls reasoned much more contextually, seeking to preserve particular relationships and satisfy all of the needs at stake. See C. GILLIGAN, *supra* note 2.

7. One cannot help but notice, given this book's thorough reexamination of supposed gender neutrality, that no further distinctions are acknowledged as among relatively powerful groups of women and men. How, if at all, are these moral stances further affected by race, ethnicity, and class?

emphasizing rights and obligations, rules and principles, and questions of justice, fairness, reciprocity, and equality . . . .”<sup>8</sup> The second possibility, that of “the morality of care,” is structured around “an imperative to avoid harm and preserve relationships,”<sup>9</sup> the antithesis of blindfolded justice. It has evolved, and manifested itself, in the heretofore private, and therefore invisible, lives of women.<sup>10</sup>

## 2. *The Nature of Law and the Legal Profession.*

In this book, the realms of law, rights, and personal autonomy are for the most part treated as coextensive. Law serves to define, legitimate, and protect the claims of the individual as against those of other individuals. The practice of law therefore contemplates the assertion of such claims on behalf of individual clients. The lawyer’s role is that of a “mouthpiece”<sup>11</sup> or a “hired gun.”<sup>12</sup> This role is psychologically demanding, and morally complicated, because it requires that one speak for, and only for, another. The resulting potential for dissonance is, in the authors’ view, a source of tension for lawyers, a tension exacerbated for women by other professional strictures on what the authors take to be “feminine” attributes.<sup>13</sup>

### a. *Professional Role.*

The core of advocacy, as formulated in this book, is an odd mix, unique to the legal profession, of “partisanship” and “neutrality.”<sup>14</sup> Partisanship requires that one embrace the client’s view to the exclusion of all others.<sup>15</sup> Simultaneously, neutrality requires that one temporarily abandon one’s own view. Professional morality is quite clearly allied with

8. P. 6.

9. *Id.*

10. *See, e.g.*, p. 158.

11. Pp. 28-31; *passim*.

12. This usage appears in several passages throughout the book. In perhaps the most telling sentence, because the metaphor is both used and found inadequate, the authors note that “In a sense, the client has purchased more than a hired gun. The client has also acquired a piece of the attorney’s integrity, credibility, mind, and soul.” P. 29.

13. *See infra* notes 73-83 and accompanying text.

14. Pp. 32-33; *passim*.

15. In support of this characterization, the authors cite Lord Brougham’s famous observation that “An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client.” P. 32, (citing quote in Frankel, *The Search for Truth: An Umpireal View*, 123 U. PENN. L. REV. 1031, 1036 (1975)).

the morality of rights, defined from the perspectives of the larger society and the individual client, and justified in both functional and moral terms. Our legal system, so the first argument goes, is designed around the assumption of vigorous advocacy, and any abandonment of role concomitantly threatens that system. In addition, clients themselves are thought to have a moral claim on one's partisanship and neutrality.

b. *Moral Distance.*

For lawyers whose personal morality is oriented to rights, rather than to care, this professional role is untroubling. They experience no "moral distance"<sup>16</sup> between their moral and professional selves.<sup>17</sup> To the degree that one is care-oriented, however, one is faced daily with just such a moral distance, as the claims of society, on the one hand, and the individual client, on the other, are contradicted by the perceived demands of others with whom the client, and therefore the attorney, is actually or imaginably connected.

B. *The Study.*

The data upon which the authors rely, both statistically and anecdotally, are drawn from a study that they conducted in the state of Washington. Thirty-six attorneys were interviewed, half of whom were women and half men, matched for type and duration of practice.<sup>18</sup> The interviews, which sought to identify and isolate elements of each type of morality, and further to identify the degree to which they correlated with gender and with personal and professional roles, consisted of three segments. In the first, the respondents were asked to talk about their own sense of morality.<sup>19</sup> In the second, they were invited to describe any

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16. P. 35; *passim*.

17. It is possible to imagine rights-oriented attorneys, like those who represent the American Civil Liberties Union, who are nevertheless committed to certain ends and do not perceive of themselves as guns for hire. These lawyers might well experience a kind of moral distance at times, but the book generally equates moral distance with care orientation.

18. On average, these attorneys had practiced law for just over six years in 1984, when the study was conducted, "and thus the women represent[ed] the recent surge of females entering the profession." P. xii.

19. The participants were asked four questions in this segment: "What does morality mean to you?" and "What makes something a moral problem or dilemma for you?" P. 56; "Is the concept of justice important to you as a practicing lawyer?" and "How would you define justice?" P. 59.

real-life moral dilemmas they had confronted in their practices.<sup>20</sup> In the third, they were asked to respond to two hypothetical moral dilemmas, one involving a criminal and the other a domestic relations matter. The former was designed to invite a clear, unambiguous response dictated by professional role, on the one hand, and pose the possibility of serious injury or death to an unknown person or persons, on the other.<sup>21</sup> The latter was intended as a situation in which the demands of professional obligation were less clear, and the potential for psychological or physical injury to known child victims was more immediate and concrete.<sup>22</sup> Overall,

The three parts of the interview imposed a hierarchy of control over the attorney being interviewed. In the general section of the interview, a lawyer had wide latitude to define both the subject of response and the standpoint from which reply would be made. Personal morality was easily introduced here. In a real-life dilemma, an attorney had discretion to select the topic of response, but the professional perspective was definitely suggested by the interview format. Presumably personal morality would enter here

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20. In this segment, participants were asked "Has there ever been a situation in your work where you faced a moral conflict, and where you were uncertain what was the right thing to do?" P. 65.

21. This hypothetical dilemma was described as follows: "Suppose you are representing an accused murderer who has confessed to the crime in such detail that no one, including you, has the slightest doubt that he committed the murder. Without the confession, there is not sufficient evidence to prosecute, much less convict, your client. A psychiatric examination and the bizarre speech and behavior of your client convince you that he is very crazy. In fact, you are sure that you could have the confession excluded on the grounds that he was incompetent to waive his right to an attorney when given his *Miranda* warnings prior to confessing. You also have every reason to believe that your client continues to be very dangerous." P. 73.

22. This hypothetical dilemma was posed as follows: "Suppose that you are an attorney in a divorce proceeding, and your client seeks custody of the two young children of the marriage. In the course of your representation your client gives you a bundle of documents that inadvertently contains a letter bearing on the fitness of your client to have custody of the children. The information in the letter is not known and is not likely to become known by the other side. Without disclosure of the letter, you believe your client will win the custody battle; you're equally confident that the other party will prevail if the letter is revealed. In your own mind the information clearly makes your client a marginal parent and the other party a far superior parent." P. 78. Midway through the participants' discussion of this dilemma, the fact situation was altered "so that the letter contained the threat of serious bodily harm to the children." *Id.*

Although this hypothetical, like the one preceding it, is nicely calculated to capture a difficult moral dilemma, one also notices the degree to which it has been abstracted from its underlying facts. Might it not be possible, however, that some moral reasoning takes place in just that process of abstraction through which, for example, specific words become "a letter bearing on the fitness of your client to have custody"? Or, to put it another way, wouldn't many attorneys seek to avoid the dilemma in the first instance by concluding that the letter wasn't really damning, or that their clients weren't "clearly...marginal" or "very dangerous"?



in the lawyer's selection and discussion of situations of moral conflict. But because the person was specifically being asked to respond as a lawyer, that role asserted a proper point of view from which to reply. Finally, the hypothetical dilemmas left the least leeway for an individual to insert a personal perspective.<sup>23</sup>

The interviews were later transcribed and blind-coded<sup>24</sup> for evidence of care- and rights-orientations in both personal and professional roles. Ultimately, the responses were grouped within four roughly-defined "positions," which the authors go on to apply more broadly to lawyers in general. Position 1, that of "maximum role identification,"<sup>25</sup> occurs in those situations where personal and role moralities wholly coincide. Attorneys in this position perceive moral responsibility to reside in legal institutions,<sup>26</sup> perceive the range of relevant moral considerations to be limited to those dictated by professional role,<sup>27</sup> and rely on institutional arrangements both to define and to justify their conduct.<sup>28</sup> They also evidence a "stoic detachment" from their causes and clients.<sup>29</sup> Not surprisingly, since the rights orientation has already been identified primarily with men and wholly with law, "men more often reacted from Position 1."<sup>30</sup> Position 2, marking "the subjugation of personal morality,"<sup>31</sup> is occupied by lawyers who "recognize[] disagreement between the

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23. P. 54.

24. "Position and personal morality were defined separately and were coded independently. The procedure was to read through the interview to first score the personal morality, then to reread the interview in order to score the lawyers' positions. Coders were blind to the hypothesized relation of personal morality to role as they scored interviews." Note 13 to Chapter 4, p. 204.

While this methodological approach seems eminently sound, one wonders on occasion about the labels affixed to various narrative responses. For example, the authors treat as traditionally rights-oriented a lawyer who commented that "What my criminal law professor once told me is that the secret . . . is to play the thing as if it were a game. . . . Obviously you have to read into that all the ethical obligations and things like that; but he said you should take the stance, if you have a problem representing a criminal defendant: Just pretend he's your brother, and then think of what you would do." P. 58. While the game analogy upon which the authors focus evokes traditional notions of the lawyer's role, this response seems considerably more complicated. It moves from the game image to an acknowledgement of ethical obligation to a potentially contradictory rule of conduct expressed in terms of a familial relationship.

25. P. 99.

26. P. 100.

27. P. 102.

28. P. 103.

29. P. 104.

30. P. 105.

31. P. 106.

world of personal morality and imperatives of professional role."<sup>32</sup> The critical difference between Positions 1 and 2 is self-awareness: lawyers in both engage in rights reasoning, draw upon the same rationales and rely upon the same mechanism of psychological distance.<sup>33</sup>

Position 3 entails the "recognition of moral cost" that implicitly results from a care perspective.<sup>34</sup> "From the outside, lawyers in [this position] may appear to occupy the attorney role in much the same way as lawyers in Positions 1 and 2. They may reach the same decisions and act in the same manner. Differences lie in the process of decision making, evaluation of the decision, and perception of and response to moral cost."<sup>35</sup> These responses may include sentiments of reluctance or regret, as well as "concrete action to mitigate or repair destructive consequences."<sup>36</sup> In either event, these attorneys feel a sense of personal responsibility, and the moral distance between personal and professional self results in great tension.<sup>37</sup> Such attorneys describe their situation as a "no-win, either/ or dichotomy."<sup>38</sup> Again not surprisingly, since "women carry a disproportionate share of the care orientation among the lawyers . . . interviewed, they also appear in this position in a substantial majority."<sup>39</sup> That being so, the authors predict that "women will most often experience tension between personal and professional moralities in practicing law."<sup>40</sup>

Finally, Position 4, occupied by attorneys who "demonstrate a very high degree of care reasoning"<sup>41</sup> (primarily women), entails "minimum role identification."<sup>42</sup> Attorneys in this position actually act upon the dictates of personal morality, even when they run counter to the demands of professional role.<sup>43</sup>

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32. *Id.*

33. Pp. 108-09.

34. P. 110.

35. P. 111.

36. *Id.*

37. P. 112.

38. P. 115.

39. P. 120.

40. *Id.*

41. P. 125.

42. P. 120.

43. Pp. 120-21.

## II. EVALUATING THE PROJECT

As was earlier noted, this empirical undertaking is situated in a larger inquiry. That inquiry ultimately demands an account that is accurate and thorough in its description of reality, attentive to the causes and contexts of that reality, and analytically rigorous in its predictions and aspirations. What is the present state of things, vis-a-vis gender, morality, and the legal profession? How did things come to be as they are? How might things be in the future, and how ought they to be? In order to evaluate the overall worth of this work, one must assess its treatment of each of these questions.

### *A. Describing How Things Are.*

Although this study yields some compelling stories, and presents data that demand further evaluation, the book itself is seriously flawed by its unquestioning embrace of the assumptions described at the beginning of this review. In their positing of gendered moral stances, and in their depiction of the legal profession, the authors have adopted useful approaches without fully examining, or coming to terms with, their implications.

#### *1. The Two Moralities.*

Since this distinction lies at the heart of the work, it merits especially close scrutiny. At the outset, of course, one must acknowledge its persuasive empirical underpinnings: an increasingly impressive body of work suggests that these stances exist, and that they are to some degree gendered.<sup>44</sup> One can acknowledge these facts, however, and still doubt the soundness of the conceptual superstructures that are sometimes erected upon them. Several such doubts arise within the context of this book. Some of them result from the authors' failure to examine the causes of things as they are, or to explain how they might be otherwise, and are therefore discussed in the next sections. Three misgivings, however, have to do with the categories themselves, their descriptive adequacy and their normative content.

#### *a. Defining the Two Moralities.*

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44. See *supra* note 2.

First, in an undertaking such as this, one must ultimately take a position with respect to the question of if, and to what degree, these moral stances purely exist in the world. While definitions themselves are by nature overly simple, their elaboration in a larger analysis, if it is to be useful, must cumulatively articulate some clearer and more sustained sense of their meaning in the world. Here, however, the authors have avoided just such an articulation. By way of caveat, they assert that "each individual reflects a special blend of moral understanding which is affected by culture, ethnicity, social and economic class, and historical experience,"<sup>45</sup> and that "the categories of rights and care thinking often overlap, particularly at the higher levels of moral thinking."<sup>46</sup> These caveats, however, are thought not to alter the fact that "the two models have broad explanatory power in our attempt to understand how men and women interact with the worlds of social and moral decision making."<sup>47</sup> One wonders. To the degree that morality is an individual blend, descriptively speaking, and a conceptual overlap, analytically speaking, this book, and the larger inquiry of which it is a part, is correspondingly bereft of its focus. That is, it is one thing to suggest, as these authors ultimately do, that two moral perspectives ought ideally to be synthesized or held in a complementary balance;<sup>48</sup> it is another thing altogether to suggest, as they seemingly also do, that the perspectives are, by definition, already balanced. To the degree that the latter is true, two possibilities follow. Either the conscious work of synthesizing and balancing is unnecessary, or one must conclude that some blends, some syntheses and balances, are normatively superior to others.<sup>49</sup>

Another definitional complication arises with the authors' attempt to situate these two moralities in literature and in history. It is perhaps best illustrated in terms of their treatment of *Antigone*,<sup>50</sup> a play by Sophocles which they use as an extended metaphor throughout the book.<sup>51</sup> At the

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45. P. 10.

46. P. 11. The "higher levels" themselves, however, are left undefined.

47. *Id.*

48. This argument is found primarily in Chapter 6, pp. 156-171. *See also infra* notes 107-29, and accompanying text.

49. *See also infra* notes 60-72, and accompanying text.

50. The authors use the translation by Dudley Fitts and Robert Fitzgerald in THE GREAT BOOKS FOUNDATION no. 1, set 1 (1966). All citations in this review are to Robert Fagles' translation in the Penguin Classics' THE THREE THEBAN PLAYS (1984) [hereinafter Fagles].

51. An extended treatment of the play appears on p. 2-5. Thereafter, the book makes passing references to Antigone's invocation of "a tradition of higher or natural law," p. 13, to Antigone and Creon's "distinctive moral voices," p. 15, to law as "a universe more reflective of Creon than

core of the play is a dialogue between two characters, Antigone and Creon. In a battle for control of Thebes, Antigone's two brothers have killed one another and their uncle, Creon, has become king. Creon has branded one of the brothers, Polynices, a traitor, and has decreed that no one should bury his body, which lies outside the walls of the city. Antigone buries him nonetheless, and ultimately hangs herself after Creon orders her imprisonment (and eventual starvation) in an underground tomb. In the characters of Antigone and Creon, the authors find in distilled form the morality of care and the morality of rights, respectively, and their reading therefore highlights the problem of definitional contradistinction, by means of which the content of each moral stance is described primarily in terms of its contrast with the other.<sup>52</sup>

The starkness of Sophocles' narrative, and the complexity of his characters, illustrate the violence that may be done to reality through the too-ready imposition of a binary model, however qualified. It is true that Antigone appeals to familial connections, especially when she seeks to persuade her sister, Ismene, to join her; it is equally true that Ismene refuses her, and Creon later condemns her, in the language of law.

But a very different reading is possible. Antigone, after all, perceives herself to be obeying a higher law; it is not simply love of her dead brother that drives her.<sup>53</sup> Creon, on the other hand, has made a "law"

Antigone," p. 22, to Antigone's "commitment to the network of human relationships," p. 25, to Creon's "total detachment" and Antigone's "passionate ardor," p. 41, to Antigone's act as an attempt "to force the powerful state to recognize possible harm from a blind application of law without regard to individual situations" and Creon's decree as a "concern for order," p. 62, to Antigone's "lawlessness" as an act "threatening rather than mending the social order," p. 64, and to Antigone's "uncompromising compassion," p. 158. Finally, in the closing pages of the book, Creon is offered again as an illustration of "the dangers of noncontextual reasoning which can lead to an insensitivity to human need and ultimately to the destruction of others," and Antigone is depicted as "vulnerable . . . in the face of the state's power." p. 169.

52. This contradistinction pervades the book, notwithstanding occasional aspirational references to blending and overlap. It should also be noted that the authors' treatment of this play anticipates another issue treated more fully in this review's later discussion of historicity, *infra* notes 84-95 and accompanying text. Reliance on ancient, male-authored texts belies the implicit assumption that the morality of care is newly visible, and especially accessible to women. Antigone may speak the vocabulary of care (or, as will be noted in a moment, she may not), but Sophocles put it into her mouth. This is a point of some significance when one seeks, as we will in the next section, to account for things as they are. Indeed, the authors raise this issue, and turn aside from it, when they uncritically note that "Sophocles grounds this opposition of law and relationships in gender." P. 3.

53. In one especially compelling speech, Antigone exclaims to Creon:

Nor did I think your edict had such force  
that you, a mere mortal, could override the gods,  
the great unwritten, unshakable traditions.  
They are alive, not just today or yesterday:  
they live forever, from the first of time,

that is immediate, specific, contextual, and arguably self-interested; there is increasing irony, as the play unfolds, in his claim as lawgiver. In addition, both he and Ismene invoke Antigone's obligations to her family, and to those who love her, in order to demonstrate that she has made the wrong choice.<sup>54</sup> Indeed, one might credibly argue that Antigone more nearly embodies a rights orientation than a care orientation. A wholly contextual, wholly relationship-oriented person, one who sought to "avoid harm and preserve relationships,"<sup>55</sup> would have chosen to preserve familial ties among the living, rather than insisting upon the law of the gods with respect to the dead. Antigone's moral choice irrevocably, and foreseeably, dooms the community of which she is a part.<sup>56</sup>

These points matter not as abstruse issues of literary interpretation, but as illustrations of the pitfalls of a classificatory scheme that is binary in its conception and superficial in its application. In fact, it seems that "care," thoroughly defined, partakes of law and obedience more broadly conceived. Similarly, although the arrogance and self-interest of this particular lawgiver obscure the point, it is possible to think of law, and perhaps even of rights, as a way of caring for, and among, larger groups of people.<sup>57</sup> This is not the same thing as saying that two fundamentally distinguishable approaches may be blended in some individuals, or at some levels of moral attainment. Nor will it do simply to acknowledge in a single sentence, as these authors do, that "each [category] incorporates elements of the other."<sup>58</sup> If that is so, the explication of these elements, and the manner of their incorporation, becomes a project of profound importance. Indeed,

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and no one knows when they first saw the light.

These laws—I was not about to break them,  
not out of fear of some man's wounded pride,  
and face the retribution of the gods.

Fagles, *supra* note 50, at 82.

In the end, Antigone is vindicated. The gods approve of her action, and condemn Creon's.

It is also interesting to note that several of the participants in the authors' study, especially those in Position 4, spoke in terms of their obligation to a higher law. Pp. 120-26. The relationship between such higher laws and the morality of care, however, is never explained, although the concept of natural law is briefly included in a discussion of philosopher kings. Pp. 12-20.

54. See, e.g., Fagles, *supra* note 50, at 62, 84-85.

55. P. 6.

56. The play ends not only with Antigone's death, but also with the suicides of Creon's son (her fiance), and Creon's wife.

57. Aspirational notions of blend and complementarity notwithstanding, this book is built upon a perceived distinction between individual rights and community well-being. This distinction is perhaps articulated most clearly on pages 8-10.

58. P. 11.

to anticipate a later portion of this review, this descriptive neglect ultimately defeats the authors' larger aspirational purpose: they seek to elaborate the thesis that "standing alone, neither Creon's view nor Antigone's adequately undergirds a moral, stable, and healthy society."<sup>59</sup> But given the stark, oppositional formulation of those views, as said to be illustrated by the play, one is hard-pressed to imagine how they might possibly stand together. If Creon and Antigone embody two distinct moral postures, only one can prevail.

These observations do not, of course, negate the existence of empirically discerned differences. They do, however, suggest the interpretive care with which one must approach those differences. The easy abstraction of contradistinctive "moralities" obscures the subtle and complex nature of the phenomenon, and correspondingly limits the inquirer's field of vision.

b. *Valuing the Two Moralities.*

This descriptive neglect is compounded, again to the detriment of the book's aim, by the authors' failure to take a position with respect to the normative merit of each of the moralities, or the spectrum of syntheses, balances, and blends to which they might give rise.<sup>60</sup> The ideal is depicted in terms of process rather than outcome, in terms of verbs rather than nouns.<sup>61</sup> Envisioning that process is itself an undertaking fraught with difficulties,<sup>62</sup> but the problem is further complicated by the book's uneven agnosticism regarding the relative merit of the two moralities, an agnosticism manifest in a central assumption of normative equivalence<sup>63</sup> but occasionally belied by tone or metaphor.

In its treatment (or nontreatment) of this issue, the text conveys subtly contradictory messages. For example, a decided preference for the morality of care seems to inform the observation that "the world looks very differ-

59. P. 5.

60. See *supra* notes 44-59 and accompanying text.

61. See *infra* notes 107-29 and accompanying text.

62. *Id.*

63. It is also worth noting, at this point, that this resolutely nonjudgmental approach becomes entangled in its own paradox: "Following the rules [that is, acting on rights morality] has the advantage of treating everyone the same and thus achieving fairness. Contextual responsiveness [that is, acting on care morality] has the advantage of treating unique individuals differently and thus achieving fairness. The paradox unravels only if we can set up ways of judging when people should be treated similarly and when differently." P. 13. The paradox thus defined and dismissed gives way, of course, to a more fundamental paradox, since "ways of judging" can mean nothing more or less than rules.

ent for those who see themselves as competing for a place in the lifeboat than for those already in the lifeboat working together to keep it afloat."<sup>64</sup> In this metaphor, the project of keeping the boat afloat is clearly, if implicitly, preferred. It is a better thing to do, a better way to be. This preference is worrisome precisely because the metaphor also suggests again the intractability of the synthesis problem: competing for a place in the boat, and keeping it afloat, are fundamentally different and, at some point, inherently contradictory enterprises.<sup>65</sup>

Elsewhere, however, the authors avoid any moral evaluation of the two moralities as such. In one passage, for example, they comment that "Reconstituting a relationship does not necessarily avoid hurt; it may actually provide an opportunity for violence. The touchstone of care morality . . . is not the external formality of relationships but the qualities that make for healthy relationships and constructive social units."<sup>66</sup>

If this is indeed the "touchstone" of care morality, it is not clear how any countervailing influence, or infusion, of rights morality might resolve the problem, just as it is ultimately not clear how care morality might exert a positive influence over rights morality.<sup>67</sup> Yet it is precisely, and only, in terms of their braking or compensatory functions that the two moralities seem to be valued, to the degree they are explicitly valued for themselves.<sup>68</sup> The morality of rights, although it is largely subsumed in, and discussed in terms of, "professional" or "role morality," is thought to protect the individual, in unspecified ways, in the face of competing group claims,<sup>69</sup> and to limit the potential for "abuse of discretion" and exercise of "prejudice" which is to some degree inherent in a morality of care.<sup>70</sup> The latter, in turn, can render the morality of rights more "humane."<sup>71</sup>

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64. P. 9.

65. The metaphor is also interesting in yet another way, because it suggests a dark side to community relations. Before one can work in cooperation with others to keep the boat afloat, one must first be in it. The morality of care, that is, presupposes the existence of connectedness and community; it has nothing to say to, or on behalf of, those who have no community, or have been excluded by the communities with which they would choose to be affiliated. This point is nowhere discussed in the book.

66. P. 64.

67. See *infra* notes 107-29 and accompanying text.

68. In fact, much of the value attributed to the desired blend of moralities is expressed in terms of its benefit to individual lawyers: if one's personal morality is one of care, and if one is not forced to leave that morality behind when one acts professionally, one is better off. See, e.g., p. 97. The same thing might be said, however, about any point of view, however reprehensible.

69. See, e.g., p. 171.

70. P. 20.

71. See, e.g., pp. 64, 94.



Rights morality, in this picture, is a public virtue, lived out by individuals in and through institutions. Care morality, in contrast, is depicted as ineluctably private in its origins, and its manifestations, though sometimes public, are therefore beyond the power of external normative judgment.<sup>72</sup> The important point here is that, contrary to the authors' implicit premise, the normative ingredients of the two moral stances are not readily fungible, and their respective merits, in both instrumental and absolute terms, are not susceptible of ready balance. It is not, that is, a simple question of meeting in the middle, or achieving the right mix, and the book's false normative symmetry therefore serves to obscure, rather than to clarify, the larger account of how things are.

None of this is meant to suggest that there is a real normative hierarchy at work here, and that the authors have got it wrong. It is meant to suggest, however, that the two moral stances must ultimately be elucidated in terms of value. If each is possessed of some intrinsic merit, what is it? If, on the other hand, their merit is to be found largely in their capacity to complement and counterbalance one another, what exactly are the mechanisms by means of which these ends are achieved, and why are such ends themselves meritorious? In describing things as they are, and surely in imagining how things might be, one cannot avoid these questions.

## 2. *Law and the Legal Profession.*

As an account of modern-day lawyering, this book seems fundamentally accurate. As an account of law writ large, however, it seems conceptually incomplete. Society is, after all, precisely the transformation of a chaotic assembly of autonomous individuals into a web of civic relationships, and it is largely law that effects the transformation. If that is so, then law seems to be not so inexorably allied with the morality of rights, at least as narrowly defined in this book. Indeed, the relationship between care morality and law might usefully be reconceived as the difference between a small and a large picture. Care focuses on the immediate and the known: *this* client, *these* children, *that* family, *those* predictable victims. It does not follow from this focus on the immediate, however, that individuals stand in no relationship to the geographically or

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72. In commenting on the care-oriented actions of one of their survey participants, for example, the authors note that "we examine only the structure of how she thinks, and are in no position to assess whether she has made an error in judgment within that structure." P. 64. The only available measure of care-oriented action, it seems, is retrospective and instrumentally evaluative.

chronologically distant and unknown. To the contrary, relationships on this scale also exist, but one needs a public vocabulary, that of law, in order to describe them.

### 3. *Problems of Women in Practice.*

The link between gendered moral stances and the practice of law is, of course, the female practitioner. Indeed, the growing number of women in the profession was seemingly the impetus for this book. In what is perhaps their least persuasive chapter, however, the authors reach beyond the realm of moral theory to examine how women reconcile professional and personal (implicitly gendered, implicitly contradictory) "systems of perceiving, valuing, and responding."<sup>73</sup> In fact, they go even further, canvassing the various ways in which women who wish to succeed in law are required to leave their "femininity" of dress and manner at home, together with their moral orientation and their (presumably concomitant) need for strong personal relationships.<sup>74</sup> Women deal with these pressures, it is asserted, by (1) acting like men, (2) splitting themselves between home and office, or (3) "reshaping" the practitioner's role.<sup>75</sup> While the authors acknowledge that some women are less concerned with this mixed bag of "feminine" values,<sup>76</sup> their taxonomy of solutions conveys a certain negative judgment with respect to such women. If a care-oriented woman must sometimes "act like a man," a rights-oriented woman *is* a man. A woman who genuinely chooses to dress in business suits, behave aggressively, and privilege career over relationships—a woman, that is, who perceives no problem requiring resolution in any of these three ways—is unmasked as not a woman at all.

In addition to the troublesome hidden judgment at work here, there is also something very disturbing about lumping together moral stance with dress, manner, and personal needs. The combination adds up to something that is made to seem quasi-ontologically "feminine," socially created but thereafter immutable. This equation is perhaps best illustrated by the story of one of the study participants, recounted by the authors at some length

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73. P. 130.

74. Pp. 132-37.

75. Pp. 137-55.

76. At least, one may infer such an acknowledgment in their corollary admission that their "generalizations about early acculturation admit of many exceptions." P. 132.

and in a notably cautionary tone.<sup>77</sup>

This woman, when first interviewed, had seemingly adopted the first approach identified by the authors. She had embraced a "male," rights-oriented view of her own practice, had adapted herself to the demands of professional role, and had single-mindedly pursued her career. Later, however, when the study was over, the authors learned that she had abandoned the practice of law, perhaps temporarily, to get married. When reinterviewed, she belatedly revealed the degree to which she felt her personal needs, which she described as "human" rather than "feminine,"<sup>78</sup> had gone unmet. She had been particularly haunted, it seems, by two images. One, a cartoon, depicted "a woman who was about thirty-five years old, unmarried, without children, getting out of her BMW, complete with little tie, briefcase, with money, going into a shrink's office and saying 'I don't know why I'm so unhappy.'"<sup>79</sup> The other was a picture "of myself on the [judicial] bench, unmarried, without children, as a dried-up prune."<sup>80</sup>

What is disturbing about this story is not the individual decision to leave practice and marry, but rather the images that defined the "need" behind the decision, and the authors' unquestioning acceptance of them. These are not pictures of "human" need; it is hard to imagine, for example, that the cartoon as described would be deemed amusing, revealing, or otherwise meaningful if a man were substituted for the woman. Similarly, men seldom worry about becoming "dried-up prunes."<sup>81</sup> Indeed, the authors concede the social reality that informs these images, noting that "society presents people with competing alternatives for adulthood, either achievement or relationships."<sup>82</sup> But what is socially created is nevertheless treated as natural. The problem is seen not to lie in the gendered nature of social roles, but rather in "the failure of the legal profession...to respond to women entering the work force with the kind of imaginative,

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77. Pp. 137-44.

78. P. 142.

79. *Id.*

80. *Id.*

81. The actual gender specificity of these images serves also to underscore the inadequacy of the book's own depiction of benign gender equivalence. For example, it is simply not true that, because "men [traditionally] achieved, [while] women knit together the fabric of social relationships[,] . . . [e]ach gender was denied the rewards and benefits of the other's world." P. 143. Men have in fact enjoyed most of the rewards and benefits of both worlds, and have arguably accrued additional benefits from keeping those worlds distinct.

82. P. 144.

flexible structures needed to facilitate a merger of public and private obligations."<sup>83</sup>

B. *Accounting For Things As They Are.*

1. *Gendered Distribution of Moral Stances.*

Any analysis that urges a positive future role for the morality of care,<sup>84</sup> and identifies women as the present repositories of that morality, owes a special duty to the past. How is it that these moral stances are, or have become, gendered? The answer must lie in the public history of politics, in the private history of psychology, or in some ineffable sexual essence. Regardless of which of these explanations one ultimately adopts, it is clear that the question cannot be ignored if one's enterprise is more than merely descriptive.

This book is a more ambitious enterprise, and its resolute refusal to entertain the question is therefore troublesome. Initially, the authors suggest that they intend merely to explain their findings,<sup>85</sup> but they also ask, "can we use gender differences to suggest productive changes in the legal system?"<sup>86</sup> The book itself is an affirmative argument for such changes. Thus, it will not do simply to sidestep the hard issues of ahistoricity and essentialism. One cannot help but feel that this is precisely what happens when, by invoking their debt to Gilligan, the authors deflect any potential criticism of their own work: "While Gilligan's work has provided a critical corrective to dismissal of women's moral orientation as inferior to men's, it runs the danger of idealizing women's morality and overlooking the historical and social contexts within which it develops. Critics assert that Gilligan revives an essentialist, ahistorical understanding of women's traits."<sup>87</sup> The issue, thus obliquely acknowledged, is just as quickly bracketed and set aside: "Nonetheless, her work has substantial explanatory power and resonates with experience. For many, her thinking has helped clarify and order recurring events in their lives."<sup>88</sup>

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83. *Id.*

84. *See infra* notes 107-29 and accompanying text.

85. Pp. 11-12.

86. P. xiv.

87. P. 11.

88. *Id.*

Whatever may be true of Gilligan's work,<sup>89</sup> and however much these authors may have relied on it in undertaking this project, the fact remains that the product is their own, and is essentially and centrally prescriptive in nature. They believe that the law, and the practice of law, needs a good dose of care morality, and they hope that women will bring it along as they enter the profession. They also believe that the law needs to change in other, unspecified ways in order particularly to accommodate the perceived needs of women.<sup>90</sup>

What they do not seem to believe, in spite of the occasional aside about prejudice, stereotyping, and related social ills, is that the link between gender and moral stance is in any way troubling in itself. For example, they acknowledge that "nonanatomical gender differences arise out of particular social and historical realities,"<sup>91</sup> and that we must therefore guard against stereotyping and discrimination.<sup>92</sup> They also, however, remark that "difference does not have to connote inequality; it is simply another way of marking diversity. As biology shows us, diversity provides strength, creative innovation, and the improved likelihood of survival. Rather than see differences as a basis for subjugating one group or another, one should see differences as a source of enrichment and of an increase of human possibilities."<sup>93</sup>

The problem here, of course, is one of causation. The teachings of biology with respect to diversity are irrelevant, if not actively pernicious, when the differences at issue are admittedly the artifacts of a social history marked by hierarchy, violence, dominance and oppression. This is not to suggest that nothing good could emerge from such a history, but rather that the good thing must be evaluated and valued within the context of that history. The argument here seems to be that the roots of difference are irrelevant, since this difference has turned out to be a wonderful and generally beneficial thing, and we need now concern ourselves only with ensuring that "women and men . . . hav[e] care and rights perspectives integrated and in balance, with the balance struck for each person a function of cultural experience"<sup>94</sup> rather than gender.<sup>95</sup> If present differ-

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89. Needless to say, a thorough examination of Gilligan's work, and the scholarship that has subsequently built upon it, is far beyond the scope of this review.

90. See *supra* notes 73-83 and accompanying text.

91. P. 12.

92. *Id.*

93. P. xiv.

94. The term "cultural experience," although undefined, is potentially troubling. See *supra* note

ence is arguably the product of the "subjugat[ion of] one group" by another, however, it cannot effortlessly and unproblematically be transformed, through a simple trick of vision, into "a source of enrichment and of an increase of human possibilities,"<sup>96</sup> still gendered, but now benignly so. Instead, the process of genuine synthesis, or of complementary integration, will require coming to terms with women's history, and men's place in it.

While political realities are wholly bracketed, the book does essay a brief description of recent psychological work in this area,<sup>97</sup> which is generally concerned with early childhood relationships between daughters and mothers, on the one hand, and sons and mothers, on the other. "Because they are of the same sex as their mother, girls form their sense of gender through identification, while boys must establish a masculine identity through separation and differentiation from femaleness."<sup>98</sup> (There is also a brief discussion of Piaget's study of gender-differentiated play,<sup>99</sup> including the observation that "our culture prepares females and males for different roles."<sup>100</sup>) The authors do not, however, go on to elaborate the implications of this account for their work. If, as they comment, "each viewpoint [of rights and of care] potentially threatens the other, and each evolves its own strategy for self-perpetuation,"<sup>101</sup> one is left to wonder how these perceived threats and strategies are to be circumvented or overcome.<sup>102</sup> If psychology, like politics, accounts for our present arrangements, and if we aspire to alter those arrangements, we must inevitably engage both in their own terms.

## 2. *Law and the Legal Profession.*

Just as the existence of gendered moral stances demands explanation,

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95. P. 12.

96. P. xiv.

97. In addition to their reliance on Gilligan, the authors draw also on Chodorow and on Dinnerstein, *supra* note 2.

98. P. 7.

99. Pp. 130-32, citing J. PIAGET, *THE RULES OF THE GAME* (1932).

100. P. 131.

101. P. 7.

102. Although Dinnerstein argues, as a prescription for improved psychological and social health, that men must share in the care of young children, *see* D. DINNERSTEIN, *supra* note 2, no similar solution is proposed or addressed here.

so does the nature of law and the legal profession, particularly since this book argues that the former will have a salutary effect on the latter. To be sure, given the authors' premises, a rights orientation is to be expected of an institution that has been imagined and made concrete by men. Nevertheless, the book inadvertently complicates the question of causation, and undermines its own thesis, when it elaborates upon the observation that "lawyers need not go far afield to find [professional] authority for diluting neutrality and taking active responsibility for the moral quality of their actions [i.e., blending the perspectives of rights and care]."<sup>103</sup> In support of this assertion, they cite the American Bar Association's *Model Rules of Professional Conduct* and an essay written in 1907 by George Sharwood, which prompted the ABA's first code of professional ethics.<sup>104</sup> In these materials they discern a "portrait of the attorney as an independent moral agent,"<sup>105</sup> rather than as the neutrally partisan advocate earlier described.

If this is true, it cannot also be true that the law, and the practice of law, as institutions demand the sort of "unfettered advocacy" elsewhere attributed to them.<sup>106</sup> If the code of professional responsibility, as formally enunciated, allows for the desired transformation, it cannot also be held simply and straightforwardly responsible for the status quo. Instead, one must look elsewhere for explanations. If professional role, as explicitly defined by the profession, allows scope for the exercise of care morality, and if the possibility of that exercise was contemplated decades ago, what has prevented the wished-for outcome? If Sophocles could imagine the perspective of care, and put its language into the mouth of a female character, why did it find no place in western notions of public life? One must suspect that the answer has something to do with power and with preference.

### C. *Imagining How Things Might Be.*

The authors' answer to the question raised in their preface, "can we use gender differences to suggest productive changes in the legal system?,"<sup>107</sup> is quite clearly affirmative. Indeed, they explicitly prefer

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103. P. 162.

104. P. 162, citing G. SHARWOOD, ESSAY ON PROFESSIONAL ETHICS (1854), reprinted in REPORTS OF THE AMERICAN BAR ASSOCIATION 32 (1907).

105. P. 162.

106. P. 31.

107. P. xiv.

Position 3 as the perspective from which “men and women [may] hav[e] care and rights perspectives integrated and in balance”:<sup>108</sup> “In Position 3’s tempering of partisanship, neutrality, and detachment, we see the seeds for rethinking the lawyer’s role in a way that preserves the virtues of institutional ethics while infusing the critical concerns of care morality.”<sup>109</sup>

Although the entire book is essentially a brief for this conclusion, it fails to address the central questions raised by such an aspiration within the context of its own premises and findings. As an initial matter, it is not clear why the legal system requires “productive change” in the first instance if one extrapolates from this empirical work, since “most of the lawyers . . . interviewed avoid the pitfalls of overidentification and dissociation [with professional role]. Despite the either/or demand of the role, most live with the benefits and tensions of a position somewhere in between.”<sup>110</sup>

Even assuming that change is necessary, however, one cannot readily imagine how this formulation might be translated into a recipe for its achievement. Indeed, Positions 3 and 4 are distinguished by precisely the difference between acting and not acting on the dictates of personal care morality. Attorneys in Position 3 may occasionally take marginal steps to ameliorate the consequences of rights reasoning,<sup>111</sup> and may try to head off moral dilemmas by limiting their practices<sup>112</sup> or influencing their clients.<sup>113</sup> For the most part, however, it seems that they will simply agonize more over demands of professional role,<sup>114</sup> a posture whose benefits are expressed in wholly metaphorical terms. The two moralities will form “two parts of a whole,”<sup>115</sup> or will offer a “dual perspective,”<sup>116</sup> or will “temper” one another,<sup>117</sup> or will affect the “hue and shade” of what the attorney sees.<sup>118</sup> In contrast, those for whom the two moralities are not in balance experience “the loss of one eye,” and hence

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108. P. 12.

109. P. 120.

110. P. 41.

111. P. 111.

112. P. 150.

113. *See, e.g.*, pp. 118-20.

114. *See, e.g.*, p. 111.

115. P. 171.

116. P. 111.

117. P. 41.

118. P. 5.



“the loss of perception in depth.”<sup>119</sup> Following through on this last image, the authors note correctly that “the danger of having partial vision for a long time is that we cease to see what we cannot see.”<sup>120</sup> The question remains, however, how merely seeing the demands of another moral perspective, without acting on them, will improve anything.

It is also difficult to imagine how, even assuming the value of this dual perspective, it is to be inculcated in the profession. Here, too, the book ends rather vaguely. It poses a promising series of concrete questions: “How can we legitimize feeling bad about beating the widow on behalf of the insurance company, even while recognizing the importance of doing it?”<sup>121</sup> Where do we start to train lawyers to be actively responsible for the consequences of their professional conduct? Where do we begin teaching lawyers to be engaged moral agents? How do we elevate the virtues of morality of care while protecting individual rights and social equality? By what changes can we balance both the scales of justice and the ecology of relationships?”<sup>122</sup> These questions, however, while gratifyingly compelling and concrete, are simply avoided with the observation that “the answers to these questions are a lengthy agenda which far outstrips our enterprise.”<sup>123</sup> The authors go on to suggest that law schools should reexamine their methodologies, atmospheres, curricula, and legal ethics pedagogies,<sup>124</sup> but note that “[the] substantive changes [that] might be kindled by infusion of care thinking into the moral world of law is difficult to predict.”<sup>125</sup> Perhaps, but one wishes that they had undertaken at least a modest effort, such as teasing out the implications of Position 3 for their two hypothetical dilemmas.

The most troubling aspect of this aspirational formulation, however, is not the answers it avoids but the answer it parenthetically supplies. Whatever is to be done, it will be women’s work: “Attorneys with a strong moral orientation of care [read women] will have the primary responsibility for instituting change.”<sup>126</sup> While it is not necessary that women “alone

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119. P. 168.

120. *Id.*

121. This is an especially telling formulation of the agonizing referred to *supra* note 114, and accompanying text.

122. Pp. 165-66.

123. P. 166.

124. Pp. 166-67.

125. P. 167.

126. P. 157.

must embody [care values] in the future,<sup>127</sup> they have historically “nurtured those values and assumptions in the private sphere to which they were culturally relegated,”<sup>128</sup> and are now in a position to “make those values available in the public sphere, particularly the public sphere of law.”<sup>129</sup> While women have surely been excluded from the public sphere, it is not so clear, as our earlier discussion suggested, that care values have therefore been unavailable in that sphere. It may rather be the case that they have simply been unwelcome, a possibility with radically different implications for the transformative enterprise.

#### CONCLUSION

While this book describes valuable empirical work, raises important questions, and offers useful insights, there is something missing at its core, and the omission affects its description of the way things are, perhaps accounts for its failure to address issues of causation, and seriously clouds its vision of the future. The thing that is missing is the agency of men. The moral stance associated with the male perspective is quickly reified, with the result that men are implicitly pictured as prisoners in a professional institution from which only women can free them. In fact, however, men—like women—both act and are acted upon. They create and are created by social arrangements and institutions. Indeed, given the historical hegemony of patriarchal power, they enjoy a far greater role in creating than do women. It is therefore both ironic and unrealistic to argue that women, because their banishment from public life has necessitated the cultivation of values which public life has now discovered it needs, should bear the burden of restoring those values to public life.

Viewed in this light, this book contributes significantly to the larger project, both because what it says is valuable, and because what it doesn't say marks the spot where additional inquiry might usefully begin.

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127. P. 158.

128. *Id.*

129. *Id.*