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THE CARE TO THE ADVERSARIAL PERSPECTIVE IN FAMILY LAW  
PRACTICE

by

Carla Stephanie Hotel  
B.A. (Criminology), Simon Fraser University, 1990

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENTS

FOR THE DEGREE OF  
MASTER OF ARTS (CRIMINOLOGY)

in the School

of

Criminology

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Simon Fraser University

July, 1993

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ISBN 0-315-91239-1

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## ABSTRACT

On one level, the Canadian legal system is adversarial, and is based on concepts of rights, justice, procedural fairness, and equal treatment. It is also arguably androcentric given that, until the turn of the century, it was the exclusive province of men. Consequently, the increasing proportion of women entering the legal profession has generated some concern that the established rules and procedures not only limit achievement opportunities and abilities of women lawyers but also inhibit alternative methods of resolving legal disputes. A major criticism of this male-dominated legal system is that women bring a different perspective to resolving legal disputes. More specifically, it has been suggested that women are more likely than men to have a care-oriented approach while men are more likely to have a rights-oriented approach. This has two major implications for women lawyers: 1) women are "reluctant adversaries" in the legal profession; and 2) women offer a "transformative potential" to the adversarial system.

This thesis explores the implications of a care-rights continuum in family law practice. Eighteen women and eighteen men who practise family law were interviewed about their approaches to their work. The lawyers were questioned about their personal strengths for family law practice, how values influence their work, and how they would approach a hypothetical family law scenario.

This research indicates that the approaches of the respondents to their work fell along a care-rights continuum. While women and men could be found all along the continuum, the women lawyers were more likely to identify with a care orientation while

the men lawyers were more likely to associate with a rights orientation.

The women lawyers were also more likely to be dissatisfied with the results of the adversarial method of resolving family law disputes. The reasons for this dissatisfaction varied, but they shared a common discontent with the settlements achieved for women in family law disputes.

There are strong indications that women lawyers are making unique and important contributions to family law practice. It has yet to be determined if women will transform the existing adversarial system.

## Acknowledgements

There are a number of people who have assisted and supported me throughout this work and period of my life.

I would specifically like to express my sincere appreciation:

To the 36 family law lawyers who took the time to be interviewed and provided the data for this work;

To the Social Sciences and Humanities Research Council for partial funding through a research grant to Joan Brockman for a project entitled "Women Lawyers at Work: Fitting in or Altering the Mould".

To Veda Hotel and Charles Hotel, my mom and brother, who were always supportive and empathetic especially when evil sectors announced their presence on one too many computer disks. And generally for the profound impact they both have had on my life;

To Faye Grant who more than once exercised the computer demons and was always willing to listen to me babble on about my thesis and other large issues;

To Leigh Grant without whose understanding and support I would have long departed this endeavour all together. For sitting up nights, in those revision sessions, with hot coffee and warm words;

To the memory of Mark Adams who would have said you can do it despite the peculiarity of life;

To my friends who were always willing to help me forget my thesis completely when I needed to regain my sanity;

To Mary Jane Mossman for her support and input on a related paper presented at the Learned Societies Conference.

To Dorothy Chunn who taught me the meaning of keeping my focus in sight and ensured that I did not get lost in the "self-imposed bigness" of it all, and who provided encouragement and important input on my thesis and research;

Most of all to my senior supervisor, Joan Brockman, who not only provided support and insight but kept me on track and kept me laughing (nervously at times) throughout this entire process. Who got me to PEI and back without too many jitters. Whom I admire and feel sincerely grateful for having the opportunity to know and work with.



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# CHAPTER ONE

## Introduction

Perhaps [women lawyers and women judges] will succeed in infusing the law with an understanding of what it means to be fully human (Wilson, 1991, p. 522).

This statement by Madame Justice Wilson (1991), a former judge of the Supreme Court of Canada, is theoretically and substantively challenging. In western society, women have been, and still are, attributed with characteristics that are associated with caregiving and nurturing (Gilligan, 1982; Lyons, 1983; Miller, 1976; Noddings, 1984; Ruddick, 1980; Whitebeck, 1984). In the "private sphere", women are responsible for the maintenance of the family, and in the "public sphere" are overrepresented in care-oriented, professional positions such as those of social workers, nurses, and teachers (Baines et al., 1991).<sup>1</sup>

Men, on the other hand, are associated with rights-oriented characteristics, and are overrepresented in high status and power-oriented positions in the public sphere, with minimal domestic responsibility in the private sphere. These facts translate into stereotypical assumptions which continue to limit the career access and achievements of women. Public and private sphere roles reinforce, and consequently perpetuate existing economic and social gender relations (Baines et al., 1991; Foster, 1986).

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<sup>1</sup> Many feminists have suggested that the distinction between the private and public sphere is not unproblematic in that it is more of a reality for white middle class women and men (Pateman, 1989).

Essentially, the body of literature addressing gender-related characteristics is linked to the notion of moral development in women and men (Gilligan, 1982; Lyons, 1983).<sup>2</sup> The theoretical speculations concerning the moral development of women and men are notably diverse and conflicting however, and are only beginning to be examined.

The notion that women have (for whatever reason) a distinct moral orientation has been both theoretically embraced (Gilligan, 1982) and rejected (Kerber et al., 1986; Walker, 1984) with seemingly equal vigour. Moral difference however continues to be an important focus in the pursuit of a unified feminist ethic (Katzenstein and Laitin, 1987; Menkel-Meadow, 1989; Ruddick, 1987).

The legal profession has been and still is male-dominated (Brockman, 1992e, pp. 52-58), and consequently it has been suggested that the legal profession operates by male standards (Mossman, 1988a, p. 568). While on one level a predominantly adversarial method of resolving disputes in North America prevails, the literature indicates that there are varying degrees and styles within the "lawyering" method.<sup>3</sup> A strictly adversarial approach to law may be characterized, for example, by a competitive, aggressive, win-lose, legal technique, while other approaches may reveal a concern for a greater social good or for the best possible solution for all the parties involved in the dispute.

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<sup>2</sup> Much of the research done in this area refers to the work of Gilligan (1982) and her colleague, Lyons (1983). Gilligan's initial research stemmed from a reaction to what she called "male-oriented" theories of moral development constructed by scholars such as Kohlberg and Freud. Gilligan (1982) asserted that the moral development of women cannot be accurately measured by male standards because women speak in a different moral voice.

<sup>3</sup> Mossman and MacLean (1986) suggest that there are two levels in family law, each of which requires a different lawyering method. This thesis however, specifically addresses the level which has been traditionally organized around an adversarial approach.

As the proportion of women entering the legal profession increases<sup>4</sup>, it is possible that women may actually influence the way law is practised and also the substantive law itself (Menkel-Meadow, 1992). A survey of former members of the Law Society of British Columbia found that the "nature of work" was the second most frequently mentioned reason by the women and men who had not renewed their memberships in the Law Society of British Columbia (Brockman, 1992e, pp. 67-68). Some of the comments by the respondents in the survey indicated that there are women and men who are dissatisfied with the adversarial nature of law. In a similar survey of nonpractising members of the Law Society of Alberta, 36.6% of the women and 43.3% of the men identified the adversarial nature of work as a reason for no longer practising law (Brockman, 1992d, p. 16).

Foster (1986) claims that women lawyers are unhappy and frustrated with what they perceive as the male nature of law in western society. The reverberations of the presence of women *on* the once-exclusively male legal profession, along with the implications *for* women in this adversarial, rights-based profession are therefore important foci of study.

The judicial system in North America is based on the notion that disputes can be resolved best by relying on individual rights which are articulated by resorting to abstract principles. Disputes are played out in an adversarial system where each side presents the strongest case with little or no regard for the opposition. Judges are assumed to be

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<sup>4</sup> For example, the number of female members of the Law Society of British Columbia increased 71% from 1986-1991, while the number of male members increased only 15%. During this period, women accounted for 48% of the total growth in membership. In 1986, however, women comprised 16% of the legal profession in B.C., and in 1991, women still represented only 22% (Brockman, 1992e, pp. 54-55).

detached, objective and disinterested in the outcome, and their own values allegedly will not affect their decisions. The right answer is arrived at through "rigorous, logical manipulation" (Williams, 1989, p. 805). As a result, one side wins and the other side loses. The ethic of rights thus leaves little room for the ethic of care, where disputes would be resolved in favour of the best possible solution between the parties.

The relationship between care and rights, when it comes to resolving disputes, is the subject of much controversy. One approach has been that care and rights are dichotomous and that the two cannot be integrated (O'Donovan, 1989, p. 137; Shaughnessy, 1988, p. 23). Some argue that the care approach is essential for effective problem solving (Foster, 1986, p. 288; Gilligan, 1982, p. 5; Menkel-Meadow, 1989, p. 298), while others suggest that the rights framework incorporates care concerns which merely reaffirms existing social relations (Daly, 1989, p. 5; Heidensohn, 1986, p. 289).

A second approach is that care and rights lie at extreme ends of a continuum, so that individuals might incorporate aspects of both (Jack and Jack, 1989, p. 166; Postema, 1980, p. 159). In this instance care does not preclude rights and vice versa, but it is possible to humanize rights by taking what is referred to as a contextualized approach to rights (Cole and McQuinn, 1992, p. 16). A third approach, perhaps a subset of the second, is that a combination of the two creates a totally new approach to resolving disputes (Benhabib, 1986, p. 416; Stocker, 1987, p. 56).

Overall, the purpose of this research project was to explore the existence of a care-rights continuum among members of the legal profession who practise in the family law area. In doing so, it was intended to contribute to the ongoing theoretical debates



regarding the care-rights relationship. The personal experiences and perceptions of female and male lawyers within a traditionally male-dominated occupation were investigated. The research, as a result, critically addressed the adversarial nature of the legal profession in Canadian society.

In order to explore the care-rights phenomenon, the unique context of the legal profession needed to be taken into account. While most of the theoretical literature describes the continuum as care-rights, it was determined in the pretest of the research instrument, the interview schedule, that the terms "care" and "rights" are problematic in the legal context. A lawyer in the pretest argued that all lawyers are concerned with "rights" as they comprise the content of law. Furthermore, it was suggested that the term "care" was an overly nebulous image inconsistent with the more legal term "rights".

Characterizing the continuum as "care-rights" was thus too obscure in this context, and as a result, "conciliatory-adversarial" was adopted to better represent the concept. These terms are not used interchangeably in this thesis but rather were viewed as complements.<sup>5</sup> The continuum was characterized as care-rights in most of the literature review and theoretical discussions, but the phrase conciliatory-adversarial was employed in the interview schedule and applicable discussions.

Further, the research examined the assertions that women may experience more difficulty adopting the traditional role of the lawyer (Foster, 1986), and that they more often attempt to find alternative modes of legal operation as opposed to upholding conventional, adversarial tactics (Gilligan, 1982; Foster, 1986; Jack and Jack, 1989).

---

<sup>5</sup>

The rationale for the use of these terms and their applicability to this research framework are discussed further in Chapter three.

Within the legal profession, the research focused specifically on family law lawyers as the unit of analysis. In narrowing the project to one area of the law, comparisons between the lawyers were made with greater confidence. Lawyers in family law are likely to have similar experiences in the practice of law. Further, family law was chosen because family law lawyers arguably contend with what might be viewed as relatively more "morally-sensitive" work, legal resolution to familial disputes. This suggests that in the family law context the care-rights phenomenon may be more visible than in other, less people-oriented areas of the law.<sup>6</sup>

The importance of this research is in its exploratory nature. As has been stated, gender distinctive notions of moral development are increasingly receiving feminist and other academic attention. As women become increasingly present in the legal profession, extensive research and review from a diversity of perspectives are needed in order to further explore the approaches of women and men to the practice of law and on a larger scale, to evaluate the potential usefulness of moral difference arguments for women in western society.

Chapter two of this thesis contains a review of the current literature concerned with gender and the conciliatory-adversarial continuum, along with other research on women in the legal profession. Chapter three discusses the theoretical appropriateness of moral difference theory and addresses the practical applications. Chapter four discusses the research design, methodology, and the interview schedule. Chapter five presents and

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<sup>6</sup> There is, however, a growing body of feminist legal analysis which claims that women are having an impact on all areas of the law (Menkel-Meadow, 1992).

analyses the results of the research. Finally, chapter six discusses the conclusions and their implications.

## **CHAPTER TWO**

### **Literature Review**

The pursuit of a distinct feminist ethic is interwoven with the notion of morality, an abstract and elusive philosophical construct. Over the past decade, there has been a considerable amount of feminist and other literature concerned with gender distinctions and morality. It is not the intention of this literature review to document the many macro- and micro-philosophical debates concerning the concept of morality; however, it is important to examine the relatively recent addition of women's voices to the theory and study of moral development.

This literature review will first examine some of the theoretical and substantive research concerning moral orientation and gender. This effort involves exploring the assumption that women embody a different, more care-oriented, moral orientation than men. Second, the implications for women in an adversarial, predominantly rights and rules based legal profession will be explored. Additional issues which arise in the literature, such as the potential for an ethic of care to replace or complement the adversarial approach, are also addressed.

Overall, the work of one scholar, Carol Gilligan (1982; 1988; 1990), has been at the forefront of the majority of these academic inquiries into women's different moral development. Consequently, Gilligan's (1982) theory and research will be used as central components in the exploration of different moral perspectives in the examination of women and men as advocates in the legal profession.

## **Moral Orientations - The Ethics of Care and Rights**

In her book, *In a Different Voice*, Gilligan (1982) sets out empirical data gathered in three studies, concerning the moral decision-making strategies of women. She argues that there are two moral codes, feminine and masculine. The feminine code is based on care and the maintenance and interdependence of human relations. The masculine code consists of a "justice" orientation which is characterized by objectivity, rationality, and apathy. While Gilligan (1982, p. 2) asserts that the distinction arises by "theme" rather than gender, she maintains that an ethic of care is characterized by "maternal morality", and that the ethic of justice is correspondingly male (1982, p. 74). In western society, the male model has furthermore been exalted to the universal norm with which current notions of equity and truth have been determined.

Gilligan (1982, pp. 7-9) suggests that psycho-social development during childhood may determine moral distinction between females and males. Through this pattern of development, females learn to view themselves with certain obligations and responsibilities to others, and more often associate morality with self-sacrifice.

Through the analysis of many psychological and literary texts, Gilligan (1982) analyses the characterization of women and scrutinizes the incongruity between their experiences and the representation of human development. Pointing to arguments like those of Kohlberg and Freud, which suggest that women are not as morally mature as men, Gilligan (1982) claims that the problem lies with the interpretation of women's development, not with a gender-specific inadequacy. Women, who clearly do not fit into the masculine images prolific in developmental psychology, have been served a massive

injustice through their unsurprising failure to fully comply with these male conceptions (Gilligan, 1982, p. 49).<sup>7</sup>

Gilligan (1982, pp. 48-49) draws on the work of Miller (1976, p. 83) who asserts that existing psychology does not contain "language to describe the structuring of women's sense of self". She (1982, p. 49) further supports Miller's (1976, p. 86) argument that the structuring of the female psyche has the potential for "more advanced (and) more affiliative ways of living" due to the alleged "connection" orientation of women as opposed to the "aggressive" orientation of men.

In light of these assertions, Gilligan (1982) articulates the dichotomy of responsibilities and rights as delicately balanced in the realm of human development. She ultimately appeals to a maturation of human relations where an appreciation for fairness and care will dictate a more meaningful existence.

Overall, Gilligan (1982) sets out to construct a feminist psychological theory of the development of moral and ethical values in women. She challenges the inference that the male model represents a more reliable form of ethical judgement. She ultimately argues that moral development theory needs to become comprehensive by including women's morality and that the *different voice of women* should be held in the same stead as that of men.

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<sup>7</sup> In non-feminist analysis, similar suggestions regarding moral difference have been articulated. For example, Spacks (1977, p. 29) argues that women tend to exhibit a more care-oriented, moral voice than men. As women's "goodness" in nature has traditionally meant self-suppression, women are more inclined and better suited to uphold high ideals. Because women are expected to be understanding, service-oriented, and always concerned with the needs of others, Spacks (1977, p. 35) speculates that women will tend to harbour a greater fear of rejection and/or disapproval. Women are consequently considered less *able* to develop a morality *comparable* in complexity and rigorous individuality to that of men.

Like Gilligan (1982), Noddings' (1984) work clearly articulates the distinctive moral voice of women. She suggests that an ethic of care be substituted for the current unfulfilling and destructive male ethic. Noddings (1984, p. 1) believes that ethics have inappropriately been conceptualized in the "language of the father" and that "mothers" should no longer be silenced or silent. Noddings (1984, p. 128) suggests that mothering, women, and caring are closely associated, and that the voice of women, especially their voice as mothers, is fraught with tenderness and compassion.

Noddings (1984, pp. 83-85) insists that the existence of female caring is natural, and that natural caring is the foundation of moral life.

A woman who allows her own child to die of neglect is often considered sick rather than immoral; that is, we feel that either she or the situation into which she has been thrust must be pathological. Otherwise, the impulse to respond, to nurture the living infant, is overwhelming (Noddings, 1984, p. 83).

Thus Noddings (1984), like Gilligan (1982), sees the ethic of care as a maternal experience, derived specifically from women's experiences in the nurturing and caring for others.

Both Gilligan (1982) and Noddings (1984) draw on Chodorow's (1978) work in sketching their respective accounts of the ethic of care. According to Chodorow (1978), the reality that women are almost always the primary caregivers is noteworthy as the relationship between the parent and the child has important consequences for ego formation and the identification of gender. Chodorow (1978, p. 24) is of the view that because the association with the same sex parent will invariably be different from that of the opposite sex parent, the path of this development will be quite different for girls than

for boys.

Chodorow (1978, p. 39) concludes that care-oriented morality is distinctively embedded within women's experiences, as women are psychologically readied for caring and nurturing through the physical and social situation in which women mother. For Gilligan (1982) and Noddings (1984), the subconsciously-rooted, psychological processes suggested by Chodorow (1978) offer an appealing explanation for the characteristically feminine display of the virtues, attitudes, commitments, and beliefs that constitute a feminist ethic of care and compassion.

A number of empirical reports by researchers such as Lyons (1983), Attanucci (1984), and Johnston (1988) have arguably supported the position of Gilligan (1982), Noddings (1984), and Chodorow (1978). Lyons (1983), for example, presents data from interviews conducted with children, adolescents, and adults which suggest that not only are there two distinct moral codes, the justice-oriented masculine and the care-oriented feminine, but there are also two distinctive ways that people see themselves in relation to others, respectively, separate/objective or connected/responsive (1983, pp. 125-126).

Lyons (1983, p. 127) examines and modifies Gilligan's (1982) work by evaluating the developmental patterns within the morality of care and justice perspectives through their persistence in various relationships. The relationships are dichotomously viewed as responsive and reciprocal. According to Lyons (1983, p. 134), each represents "a set of related ideas". The perspective of the responsive relationship is represented by interdependence and responsibility; while, the perspective of the reciprocal relationship is comprised of impartiality, objectivity and separation of self.



Lyons (1983) claims that while gender differences and developmental consistencies may not be absolute, they are significant. Like Gilligan's (1982), Lyons' (1983) methodologies include modes of self definition. The subjects were asked to describe themselves to themselves. It is through this analysis that she concludes that women consistently tend to view themselves as a connected self while men predominantly rely on characterizations of the separate self.

Essentially, Lyons (1983) generates empirical support for the position of Gilligan (1982), Noddings (1984) and Chodorow (1978), while attempting to expand on the notions of moral development constructed by Kohlberg (1984). The underlying assumption of Lyons' (1983) work is that the concept of morality requires an understanding of relationships.

Other academics also favour gender-based moral difference perspectives. Ruddick (1984, p. 214), for example, articulates a perspective on the moral development of women based on the notion of "maternal thinking".<sup>8</sup> She suggests however, that while natural maternal thinking is cultivated from child rearing experiences, traditionally considered "women's work", it is possible to reshape gender roles to create a "parenting ethic" where both women and men equally participate in the "mothering" process (Ruddick, 1984, pp. 224-227).

In contrast, Whitebeck (1984, pp. 196-197) and Kuykendall (1983, p. 263) suggest

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<sup>8</sup> Maternal responsibility to foster growth requires certain features. These maternal virtues, necessary to understand the child, consist of a separate consciousness based on perceptions and responses for the child to make its own sense of the world, the common humanity of the child's familiar longings and impulses, and the need to give up expectations in order to follow a distinct path of constant change (Ruddick, 1984, pp. 218-220).

that it is women's bodily experiences coupled with emotional experiences that ultimately produce the maternal ethic. Thus, it is argued that this moral orientation may be gender-exclusive. Through the physical experience of child birth and nursing and the mental experience of child rearing, in Whitebeck's (1984) account, women will develop differently; and consequently, the creation of a "parenting ethic" articulated by feminists such as Gilligan (1982), Ruddick (1984), Noddings (1984), and Chodorow (1978) would not be considered a likely alternative.

Whitebeck (1983, p. 65) contends that traditional women's work (such as rearing and teaching the young and nursing the sick and elderly) develops the "core" practice of the "(mutual) realization of people". While Whitebeck (1983, pp. 65-66) notes the often denigrated status women and associated nurturing characteristics and practices have received, she argues that the "fundamental moral notion" for humankind consists of the responsibility for another's welfare arising from one's relationship to that person, the mother-child relationship.

Overall, many scholars in such diverse fields as philosophy, history, sociology, art and anthropology have argued that feminine perspectives are distinct and identifiable. Psychological studies such as Gilligan's work in particular have sparked serious interest across many perspectives.

### **Criticisms of Care and Difference**

Overall, there is a large amount of feminist and other research which has evolved predominantly from, and is supportive of, the work of Gilligan (1982). There is also, a

considerable amount of feminist and other literature which critically questions the gender-related arguments on morality. While Gilligan's (1982) work, the most widely read and interpreted on the subject of women and morality, has been embraced as new feminist revelation and inspiration, it has also been criticized as man-hating separatism, anti-feminism, and methodological incompetence. Davis (1992, pp. 219-220) summarizes these criticisms. It is thus important to review the existing literature which is critical of Gilligan's work, as it holds significant implications for the theoretical underpinnings of this research.

Some scholars have challenged Gilligan's claim of gender difference on a purely methodological basis. Broughton (1983, pp. 603-609) for example, argues that Gilligan's interpretation of her research often requires certain leaps of faith. In examining the contents of Gilligan's interviews, it is asserted that there is little if any difference between men and women in their modes of moral expression. Broughton (1983, p. 609) submits that both women and men articulate certain rights and certain care perspectives throughout the research. It is further suggested that Gilligan's presentation of the data is incomplete and ambiguous, and therefore the validity of her conclusions is in question as "interpretations and paraphrases appear not to do total justice to what her subjects were saying" (Broughton, 1983, p. 609).

Nails (1983) also is sceptical of the extent of gender difference in Gilligan's findings. Specifically, Nails (1983, p. 662) submits that Gilligan (1982) has exaggerated moral differences between women and men by broad generalizations. Generalizations become dangerous not only through the misrepresentation of gender differences, but also

through the creation and perpetuation of various stereotypical behaviours.

Kerber et al. (1986, p. 312) are similarly critical of Gilligan's attempt to distinguish the difference between the voice of women and that of men. In buttressing their argument, they cite Walker's (1984) comprehensive review of sixty-one studies that employed the Kohlberg paradigm to determine the moral orientation of both males and females. This review suggests that there is no trend for males to obtain higher scores than females. Moreover, the only sex differences appear to indicate that education, not gender, may account for the relative positions of men and women on the moral development scale.

Kerber et al. (1986, p. 315) also assert that the qualitative inferences do not disclose a distinctive female morality. The transcribed passages only appeal to traditional stereotypes, and without quantitative data with which to compare *both* male and female characteristics, Gilligan's (1982) conclusions cannot be accepted.

Specific methodological problems with Gilligan's work are also addressed by Kerber et al. (1986, pp. 316-317) who argue that the samples are not generalizable to all males and females. Small and homogeneous samples are used throughout Gilligan's work. Furthermore, Kerber et al. (1986, p. 317) argue that the material garnered from the personal interviews may not have been subjected to objective standards. Detailed coding rules are not provided, and therefore, one cannot be sure that the classifications are accurate. Kerber et al. (1986, p. 318) conclude that Gilligan's work may be adequate for deriving a hypothesis but not for making statements on "proven reality".

On a more theoretical basis, Flanagan and Adler (1983, p. 591) claim that Gilligan

essentially reconstructs Kohlberg's model by describing abstract stages of morality. While subtle discriminations are still made by "contextual relativists", Gilligan's theory does not articulate anything more than a "general cognitive sophistication". Flanagan and Adler (1983, p. 592) ultimately suggest that Gilligan's work does not provide any further knowledge about morality; it merely provides anecdotal situations where people decide upon moral issues. These decisions, which are likely to vary across morally similar situations, cannot be considered to constitute a moral theory.

Furthermore, Kerber et al. (1986, pp. 305-307) assert that Gilligan's research is virtually ahistorical, biologically essentialist, and romantically oversimplified. Kerber et al. (1986) are critical of Gilligan's conclusions as they rely significantly on interviews with women concerning their decisions about abortion. Kerber et al. (1986, p. 305) submit that the themes of responsibility and care are obvious when considering the decision to terminate a pregnancy. Consequently, this moral conflict is inappropriately used to exemplify women's moral development. Furthermore, Gilligan does not attempt to disclose a difference in men when faced with a similar moral dilemma such as the military draft.

It is maintained that Gilligan essentially enters into the ancient discourse about the separation of spheres, the male in the public, and the female in the private. According to Kerber et al. (1986, p. 307), Gilligan reinforces the distinctive sphere of women through her assertions that the unique psychological development of women distinguishes their personalities through relationships of care and nurturance. Gilligan's conclusions intimate that this is biologically normal and is therefore desirable. While Kerber et al.

(1986) agree that the distinctive socialization of females in a patriarchal culture may contribute to the present position of women, they caution that it is dangerous to accept these conclusions because they merely reinforce the popular stereotypes within the hegemonic status quo.

Also focusing on Gilligan's (1982) research with women confronting unwanted pregnancy, O'Loughlin (1983, pp. 570-575) argues that Gilligan's (1982) ideas concerning responsibility and moral maturity are extremely limited. According to O'Loughlin (1983, p. 575), Gilligan (1982) has approached her results with a "badly thought-out theory, which has systematically distorted her interpretation of the data". O'Loughlin's (1983, p. 573) major criticism is that Gilligan has not acknowledged the state of relations between women and men and the consequences of this state for taking responsibility in fertility decisions. Therefore, interpreting a woman's decision to take responsibility for birth control as morally mature is problematic because it counts on women to accept the obligation without considering the circumstances in which women are placed.

Like Kerber et al. (1986) and O'Loughlin (1983), Rhode (1988, p. 43-45) and Dalton (1988, p. 8) are explicitly critical of unwarranted and essentialist assumptions often inferred about the nature of women and men in the research of Gilligan (and like scholars). Rhode (1988, p. 45) suggests that the reductionism of "woman's point of view" to "one single theoretical stance or perspective" ultimately misrepresents women. Dalton (1988, p. 8) agrees, and states that such essentialist claims disregard other important features such as race, class, sexual orientation, or religion which, to some degree, influence how individuals relate to one another.

Nicholson (1983, pp. 530-531) further criticizes Gilligan's (1982) ahistorical account of the female voice. Despite Gilligan's (1982) disclaimer that her results do not transcend culture or time, Nicholson (1983, p. 530) submits that Gilligan (1982) does not indicate "which women and under what circumstances her descriptions might generally be true (which) leads to certain implicit false generalizations".

Likewise, Kerber et al. (1986, p. 321) address the nonexistent issues of class, race, consciousness, and culture in Gilligan's theory. Approaching the theory as a whole, they suggest that it emerges only as a possible model for white, middle class women in the United States. Kerber et al. (1986, pp. 322-323) cite research on third world communities and economically deprived areas which they argue may provide alternative models to that of Gilligan, and demonstrate the necessity of a wider social consciousness in theory construction.

Walker (1983, p. 667) provides a critical *reaction* to Gilligan's (1983) work and describes her theory on female development as "cryptoseparatist". Gilligan's explicit claims of feminine and masculine moral orientations are simply "a disguise for her covertly combative separatism" (Walker, 1983, p. 689). He suggests that the distinctive female voice is not different but perhaps "diffident" and sounds more like "an immature cry from a group of people arrested at an early stage of development" (Walker, 1983, p. 695).

Tronto (1987) also examines Gilligan's theoretical assumptions along with other relevant literature. Essentially, while Tronto (1987, p. 646) acknowledges the possible importance of an ethic of care for feminists, she stresses that the pending debate should

be concerned with the ethic's adequacy as a moral theory rather than the existence of gender difference. She suggests that the association of care with female is not only empirically questionable, but is theoretically deleterious. Suggesting a feminine difference in a social context where male characteristics are the norm consigns female features to an inferior status. The result of such a phenomenon would put feminists into the position of defending women's morality as opposed to examining the positive and negative components of an ethic of care (Tronto, 1987, p. 646).

In reviewing the assertions of Gilligan and Lyons, Tronto (1987, p. 648) furthermore notes a consistently unexamined issue. That is, neither Gilligan nor Lyons have attempted to explain *why* men and women may actually differ in moral orientation. While Tronto (1987, pp. 648-649) does not discuss Gilligan's (1982) reference to psycho-social developmental theory as an explanation for the different voice of women, Tronto (1987) is critical of various psychological theories as possible explications. Tronto (1987, p. 649) suggests that Gilligan's research supports the possibility of an alternative hypothesis; that is, social position may actually provide the causal basis of psychological consequences. In other words, women's subordinate status may ultimately work to create the different voice.

MacKinnon (1987, pp. 38-39) also adopts this perspective. She argues that the different voice heard by Gilligan and others is essentially the voice of the victim. According to MacKinnon (1987, p. 39),

(w)omen value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men. Further, when you are powerless, you don't just speak differently...you don't speak.



Your speech is not just differently articulated, it is silenced. Eliminated, gone....Not being heard is not just a function of lack of recognition, not just so that no one knows how to listen to you...it is also silence of a deep kind, the silence of being prevented from having anything to say....the damage of sexism is real, and reifying that into differences is an insult to our possibilities.

MacKinnon (1987) clearly articulates the perspective that the different voice is not the voice of someone who has chosen to be more interested in preserving relationships than in determining rights, but rather someone who has no rights and of necessity has developed a concern for relationships.

Similarly, Puka (1990, pp. 58-60) suggests that the development of a care orientation may actually be a set of circumscribed coping strategies for women tailored to deal with the patriarchal nature of society. Puka (1990) is critical of Gilligan's inference that a care orientation is morally mature. It is stressed that while this may in fact be accurate, the crippling influences of a sexist socialization within a male-dominated macrostructure on women cannot be overlooked.

The movement in the work of scholars such as Tronto (1987), MacKinnon (1987) and Puka (1990) is to approach the gender-morality issue more from a macro-perspective. In other words, within the feminist debates over the development of an ethic of care, there is an arguable need to address power relations within western society. As the nature of western society is patriarchal, it is often submitted that if there is in fact, a difference between the moral perspectives of men and women, the women's perspective will continue to be regarded as second-class.

Additional critical analyses of Gilligan's work is put forth by Daly (1989), O'Donovan (1989), and Heidensohn (1986) who examine the potential existence and

outcome of an ethic of care in the criminal justice system. Daly (1989, p. 2) claims that Gilligan's conclusions reflect the current ideological debates in criminology, exemplified by the aims and purposes of punishment and deterrence or rehabilitation. Daly (1989, p. 2) argues that the alleged female voice is not absent from criminal court practices, but that the ethic of care perspective exists to perpetuate existing social and power inequities. According to Daly (1989, pp. 3-5), the justice and care associations are not only inaccurate, but also misrepresent possible alternatives for criminal justice and legal reform. In other words, recommending the introduction of an ambiguous female voice (the ethic of care) to the criminal justice system does not provide viable guidelines.

The care model, Daly (1989, pp. 5-6) maintains, is ultimately connected to a personalized form of justice as compared to a justice model which represents depersonalized tactics. Daly (1989) submits that the care orientation may in fact provoke less substantive equality because discrepancies in punishment, such as indeterminate sentencing, are likely to be more frequent under a more individualized justice scheme.

Daly (1989, pp. 7-9) briefly reviews the shifting criminal justice ideologies of the past century. She cites Garland's documentation of the change from the justice to the care model, and highlights the recent movement back to the justice model. Daly (1989) argues, however, that the ethic of care continues to operate, and critically questions its utility in bettering the social reality of women's lives.

It is argued that the criminal justice system tends to concentrate on the defendant in efforts to achieve justice, rather than the victim. The ethic of care arguably comes into play more often when the defendant knows the victim such as in wife assault. Daly

(1989) contends that as a result, this tendency to treat offenders more leniently when there is a relationship to the victim not only may contribute to the further victimization of women, but also presupposes a certain acceptable level of violence within social relationships.

Daly (1989) concludes that while many feminist scholars support the ethic of care as an crucial component of law and of life, it is equally important to analyze and understand its present existence, as well as consider the outcome of a further institutionalized version. It is maintained that this endeavour should address the existing power relations inherent in the macro-structure of social relations.

O'Donovan (1989, pp. 137-138) agrees that an ethic of care cannot simply replace the current perspective of rights and justice. She argues that while the

"formality of existing legal procedures is criticized as ignoring women's perspectives...alternative methods based on conciliation (may) merely reinforce existing inequalities" (O'Donovan, 1989, p. 137).

She suggests that a way to avoid this problem would be to further analyze power structures in personal relationships which would disclose the existence of present, social inequities. In other words, in understanding the substantive realities of the women and men, better measures could be taken to ameliorate the unequal situations (O'Donovan, 1989, p. 138).

Also, Heidensohn (1986, p. 289) suggests that the rights-oriented perspective, referred to as the "Portia model" of justice, should be rejected when dealing with women in the criminal justice system as a result of the double standard working against women. It is suggested that the current endeavour to treat women "fair(ly), open(ly), and

rational(ly)" within the system will not always promote the ideals of a just society as stereotypical assumptions often work against women (Heidensohn, 1986, p. 291).

Heidensohn (1986, pp. 295-296) analyses the potential of Gilligan's care-oriented perspective, referred to as the "Persephone" approach. While Heidensohn's (1986, p. 296) speculations for the most part are inconclusive, she suggests that the application of a more care-oriented model would not necessarily remedy the current problems as men would still be in control of the criminal justice system.

Despite the myriad of sometimes devastating criticism and reinterpretation, Gilligan's work continues to inspire debate. The rights and rules oriented legal profession in western society has increasingly become an area of interest for these assertions.

### **Different Voices in the Legal Profession**

With the relatively recent surge of literature regarding the different voices of women, a new interest has developed which is concerned with the implications of this different voice for traditionally male-oriented professions. One specific area which has received some attention has been the influence of women in the once exclusively male-dominated legal profession. Historically, women were excluded from the legal profession because they were not considered to be persons (Backhouse, 1985; Mossman, 1988a; Smith et al., 1973). Once this barrier was removed<sup>9</sup>, the number of women lawyers slowly increased but equal representation of women in the profession has yet to be achieved (Barnett, 1990; Brockman, 1992e; Mossman, 1988b).

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<sup>9</sup> For example, in Ontario, women were first permitted into the legal profession in 1897; in B.C., it was in 1912, and in Quebec, it was not until 1941.

In western society, the resolution of legal disputes operates within an adversarial paradigm where ultimately there is a winning and a losing side. The adversarial perspective is generally considered to be the best route to objective and value-free outcome (Davis and Elliston, 1986). However, Moulton (1989) suggests that this process customarily requires that opposing claims be made without any agreement on the relevant issues. In other words, it is sufficient to match the competing position's points with unrelated, counter arguments. This does not disprove the original points; it merely provides a number of generally unconnected arguments for each side.

Moreover, the adversarial paradigm, according to Moulton (1989), is reflective of typically male-associated characteristics. For example, aggression is generally considered a normal, positive male trait. The suggestion that the adversarial model is typically a male mode of operation, together with the previous discussions regarding gender and morality, leads to interesting speculations about the nature of women's experiences as adversaries along with the possible implications of women's different voices in this legal model.

The legal profession theoretically operates within professional and ethical parameters. Postema (1980, pp. 158-159) discusses the traditional view that lawyers are obligated to separate their personal and professional personalities. He argues however, that the division of these two personalities while maintaining moral and social responsibility is for the most part, impossible.

Postema (1980, p. 159) asserts that the ethics of the legal profession require a "moral distance" from personal morality. Lawyers are therefore often restricted from

acting and reacting in ways that they feel are morally correct. It is for this reason that Postema (1980, pp. 159-163) argues that the popular conception of lawyers must be rethought and redefined to achieve a fully integrated moral personality, allowing lawyers to include their sense of moral responsibility within the professional role. He suggests that the quality of professional training, coupled with the individual's ability to draw on a wider moral context, is instrumental in determining the extent to which moral responsibility will evolve.

Furthermore, Karst (1984, p. 447) asserts that there is the need to create a more morally responsive constitutional law, and in doing so addresses the ability of women and men to draw on a wider moral context. He reviews recent and past literature concerning the construction of the dominant masculine and the submissive feminine personae (Karst, 1984, pp. 454-455).<sup>10</sup> Karst (1984, p. 461) ultimately refers to Gilligan's (1982) exploration of these gender differences, and concludes that women perceive social reality differently from men.

Karst (1984, p. 484) interprets women's distinctive perceptions, substantiated within Gilligan's (1982) work, to hold immeasurable promise for the future of law and society. By accepting and integrating the feminine perspective, based on a web of care and responsibility, into the present masculine, rights-oriented legal profession, characterized by the abstract and detached nature of the law, Karst (1984) suggests that the courts can play a more direct role in ameliorating inequities inherent in the structure

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<sup>10</sup> He argues that a male-oriented society has continued to create stereotypical assumptions about women, which invariably relegate women to a secondary, private sphere, status. While these stereotypes have evolved historically, they continue to hold traditional assumptions about the nature, and consequent place, of women (Karst, 1984, pp. 449-459).

of western society.

While Karst (1984, p. 484) recognizes different interpretations of Gilligan's (1982) dual moral codes, he is not interested in possible explanations for the distinction between male and female perceptions. He claims that by simply acknowledging these differences, women's traditional role can be changed and the fundamental nature of the law reshaped.

Adopting the gender-based morality hypothesis, Jack and Jack (1989) also focus on the moral world view of lawyers. They assert that the "law is a social construct which reflects dominant cultural beliefs", and that the legal profession is required to act as the usher of this construct (Jack and Jack, 1989, p. 20). Lawyers alone have access to it, how it works, and for whom. The moral orientations, and obligations, of lawyers are therefore extremely important. With the recent influx of women into the legal profession, Jack and Jack (1989) examine the possible ways in which women, who are assumed to have different moral orientations from men, have adapted and are adapting to a legal profession designed for and by men. In doing so, the authors also propose to ascertain the effects of the influx of women on the general values and attitudes in the profession.

Like Postema (1980), Jack and Jack (1989, p. 35) introduce the concept of moral distance which they similarly define as the "gap between the relevant concerns of professional ethics and the relevant concerns of personal morality". They claim that moral distance occurs generally to the extent that the individual lawyers identify with their role in the legal profession apart from their own personal morality. Jack and Jack (1989) attempt to explore how individual lawyers deal with this gap between their personal and professional morality.

Through the discussion of lawyers' roles, Jack and Jack (1989) maintain that the legal system, like the lawyers interviewed, entertains both notions of care and rights. The dominant motif however, is arguably, rights and rules. The concepts of partisanship, neutrality, and moral distance are intricate to their study of the professional legal role. Jack and Jack (1989) set up a continuum on how male and female lawyers orient themselves into this existing set of rules. They conclude that while there is some variation, female lawyers are more likely than male lawyers to exhibit a concern for the wider societal contexts of legal issues. That is, the women interviewed tended to be more at odds with the strict ethical standards of their profession and more willing to involve their personal moral reasoning to find the best solution (Jack and Jack, 1989, pp. 188-195).

There are however, a number of problems associated with this possible feminine reshaping of the professional, legal role which Jack and Jack (1989) note. The existing legal system, for example, remains unchanged. Attempts by lawyers to integrate their personal morality into their professional work may be viewed as incompetent or unprofessional. Additionally, stress may be augmented if advocates become more and more personally involved in their client's cases (Jack and Jack, 1989, p. 149). They ultimately conclude however, that if such integrated activities were more institutionally encouraged and accepted, these issues would not be as problematic for lawyers when incorporating their own morality into their work.

Jack and Jack (1989, p. 166) conclude their research with several recommendations which are essentially designed to produce more "morally responsive advocates". They



claim that a transformation of the heavily rights oriented legal system must begin in the law schools. Instead of the rights oriented, indoctrination process, Jack and Jack (1989, p. 167) contend that law schools should modify teaching methods to include "less alienating forms of instruction". In other words, instead of relying solely on competitive, win/lose situations for education, a more cooperative system is advocated. Furthermore, Jack and Jack (1989, p. 167) suggest that courses on legal ethics should include issues of personal morality, and students should be encouraged to explore their own orientations. Other recommendations encourage more concentration on lawyer-client relationships to create a recognition of differing obligations and moral responsibilities. Jack and Jack (1989, p. 168) maintain that individuals entering the legal profession have a responsibility to develop an understanding of their position regarding moral issues. The conventional rights morality currently inherent in the legal profession arguably needs to be blended with a care morality in order to ultimately develop and reflect a more caring society (Benhabib, 1986; Stocker, 1987).

Like Jack and Jack (1989), Foster (1986, p. 307) correspondingly identifies women as the "reluctant adversaries" of the legal profession. Based on interview data, he suggests that during the indoctrination processes of law school, women adopt one of three "survival strategies" (Foster, 1986, p. 290). In the first strategy, women are co-opted to become one of "the boys", playing the "macho adversarial game". In the second survival option, they abandon the adversarial game and as a result are possibly confronted with the most resistance from within the profession; while they wish to succeed as lawyers, they renounce the existing structure which essentially defines success. Third,

women may opt to "grimace and bear it" (Foster, 1986, p. 290). The majority of the women interviewed by Foster tended to adopt the third position consequently playing the reluctant adversary role.

Foster (1986, pp. 302-306) examines Gilligan's (1982) research, and is critical of the relative absence of any viable solutions. He suggests that while Gilligan (1982) may be accurate in her analysis of human morality, her conclusions burden women with the self-sacrificial responsibility of caring. Foster (1986, p. 306) posits that this approach is dangerous for women, and therefore responsibility should be distributed more evenly among men and women. Moreover, based on the interview data, he suggests that while women may in fact exhibit a distinctive morality, they do not hold a "monopoly over morality" (Foster, 1986, p. 306).

Similarly, Matsuda (1989, p. 9) contends that all individuals regardless of sex, race, or class are capable of attaining a contextually responsive morality. She encourages lawyers to develop a "multiple consciousness". As a new form of jurisprudential method, she argues that both men and women of all races and backgrounds can make a deliberate choice to attempt to see the world from the standpoint of the oppressed.

Furthermore, Menkel-Meadow (1985; 1986; 1989) has written a number of articles concerning women and their arguable impact on the process of lawyering and the nature of the legal profession. In tracing the history of women gaining access to a once exclusively male profession, Menkel-Meadow (1986, p. 913) suggests that close attention should be paid to the phenomenon that she refers to as the "feminization" of the legal profession. As the proportion of women continues to increase in the legal profession,

Menkel-Meadow (1985; 1986; 1989) argues that the profession itself may be open to change and that future research concerning the legal profession and its structure should be concerned with the influence of the increasing presence of women.

Menkel-Meadow (1985, p. 63) however, acknowledges current ambivalence to the idea of "difference".

...how will the "women are different" argument play itself out in current legal disputes? Many of us feel the differences every day. What we deplore is when they are used to oppress or disempower us or when they are used as immutable stereotypes that prevent recognition of individual variations.... My point of view is that while we are observing the differences we might ask if we have something to learn from them (Menkel-Meadow, 1985, p. 63).

According to Menkel-Meadow (1989, p. 298), the sources of influence and innovation might not be found within the traditional sites of legal power, but rather in women who have the capacity to serve as innovators and critics of the profession. Menkel-Meadow (1985) draws on the literature generated by theorists such as Gilligan (1982), Noddings (1984), and Ruddick (1980), in order to maintain that women tend to reason with an ethic of care and responsibility, along with justice, and take relationships and context into account. She suggests that this is a socially constructed difference which may inevitably lead to a restructuring of the legal profession.

Similarly, Sherry (1986, p. 615) argues that the feminine voice of women in the judiciary may ultimately assist in "ameliorating the distortions of an overly individualist paradigm". She analyses the differences between the jurisprudence of a female and male Supreme Court Justice who were "otherwise ideologically similar because they so often vote(d) together" (Sherry, 1986, p. 592). The female Justice's voice was found to be

distinctive because of her reliance on the values of the community rather than individual rights (Sherry, 1986, pp. 592-612). Sherry (1986, p. 601) submits that the beginning of a "communitarian feminine jurisprudence" has been established by this Justice who appeared to "treat the community as a discrete and important judicial entity".

Like Menkel-Meadow (1985; 1986; 1989) and Sherry (1986), Mossman (1988b, p. 261) addresses the arguments pertaining to the possibility of women's distinctive moral orientation. In a historical overview of women in the legal profession however, Mossman (1988b, p. 257) contends that the absence of professional role models for female lawyers has possibly contributed to unique problems for women as lawyers. This results because the role of the female lawyer is new not only to the women who are lawyers but also to male lawyers and society in general (Mossman, 1988b).

Moreover, Mossman (1988b, pp. 257-258) suggests that even as the number of women in the legal profession increases, the notion of equality among men and women within the profession remains relatively unclear. She suggests that there are "invisible structural barriers" and "invisible barriers in ideas" which impede women in the achievement of leadership roles as lawyers (Mossman, 1988a, pp. 589-600). Invisible structural barriers are argued to constrain the advancement opportunities of women within the organizational structure. Invisible barriers in ideas focus on conventional and restrictive conceptions of sex roles. Mossman (1988a, p. 596) asserts that the existing model of leadership is male and therefore women are at an automatic disadvantage in becoming leaders. Not only do women have to "assimilate the male model of leadership" but also prove how different qualities are beneficial. The implications of moral difference

between women and men consequently pose difficult questions for the role of women in the legal profession.

Additionally, Barnett (1990, pp. 212-219) asserts that the legal profession in the United States is still replete with gender bias. Likewise, Brockman (1992b; 1992e) found that the majority of former and existing members of the Law Society of British Columbia who responded to a survey, felt that there was some form of gender bias against women in the legal profession in British Columbia. Of the former members, 94% of the women and 75% of the men (1992e, p. 73) and of the present members, 98% of the women and 83% of the men, were of this view (1992b, p. 91). Barnett (1990) maintains, however, that the increasingly number of women in the legal profession may be capable of changing the competitive and aggressive nature of the profession.

### **The Ethic of Care in the Legal Profession**

With the previous arguments in mind, the implications for the experiences of women in the legal profession are relatively complicated. If, as Jack and Jack (1989, pp. 17-19) contend, the justice system was set up with a stronger focus on caring and social responsibility such as with the Zapote Pueblos in Mexico or the Navajo Indians in the United States, a care oriented approach would be the ideal method of legal protocol and procedure. The legal system in North America however, is rights and rules oriented, and so long as this is the case, women may possibly remain "reluctant adversaries". Further research, as suggested by Menkel-Meadow (1989), is required to determine if the increasing numbers of women in the profession will have any impact on the moral atmosphere.

Moreover, an ethic of care approach in an adversarial system has several implications. Not only may lawyers be disadvantaged by adopting this approach but also the outcome of care-oriented actions may not be as altruistic as originally intended for the parties involved.

With the recent emergence of mediation as an alternative form of legal dispute resolution, questions have been raised over whether there is a feminine quality reflected in such new approaches, and whether mediation represents a positive solution. According to Rifkin (1984, pp. 23-25), it remains unclear whether mediation can be considered a form of feminist jurisprudence different from the traditional male ideology of law. In theory, mediation arises as a new way of thinking about law which places the emphasis on care concerns of responsibility, compromise, and communication (Rifkin, 1984, p. 23). This alternative is fundamentally different from traditional legal pedagogy focused on individual rights and abstract notions of justice.

In practice however, Rifkin (1984, pp. 25-27) asserts that the question of the mediator's role casts an uncertain light on mediation as a new way of thinking about law. A mediator is intended to be a neutral intervener with no personal interest in either side. The role however, inevitably becomes that of a negotiator and, intentionally or not, brings certain ideas, assumptions and knowledge into the process.

Furthermore, the technique of the mediator may reproduce the traditional notion of objectivity currently espoused in the legal profession. Rifkin (1984, p. 26) asserts that:

(i)f neutrality, an important feature of being a mediator, masks the same "objectivist" paradigm of law then mediation, like legalism, reinforces the ideology fundamental to the state as male and further institutionalizes male power.

Rifkin (1984) concludes that the mediation process, in the form of mediated disputes, must be more extensively studied in order to determine if it truly reflects the theory behind the process.

Further, Bailey (1989, p. 61) argues that advocacy claims about family law mediation, for example that family law is better suited to mediation and that mediation empowers individuals to make their own agreement, are contradicted or unsupported by the available evidence. The proponents of family law mediation, she argues, often embody problematic assumptions about women's positions in society such as the equality of women in the private and public spheres.

Similarly, Bottomley (1985, p. 163) asserts that in the present social structure, conciliation, whether a part of the legal process or an alternative to it, is "highly problematic" for women. Bottomley (1985, pp. 183-184) argues that conciliation privatizes family law. By removing family dispute resolution from the public domain, "private ordering" merely perpetuates the economic, social and psychological vulnerability of women. Under the guise of an "equal bargaining situation", Bottomley (1985, p. 179) suggests that existing power relations are disregarded and thus the chances attaining truly mutual agreements are lost.

Thus, the implications for women lawyers and for an ethic of care in the legal profession are of considerable importance. The many perspectives concerning gender and morality and the subsequent speculations about women's experiences and influences in western society provide a complex arena for further theoretical speculations.

## Conclusions

Overall, several diverse and conflicting perspectives have been examined, and as a result, many questions are left unanswered. In examining the broad problem of women and moral theory, the reviewed research opens many new areas of inquiry.

While an ethic of care may ostensibly provide a better vehicle for attaining a more just society, it is important to consider the implications of such an ethic. If there is in fact a gender difference for example, and women are more likely than men to have a care-oriented moral perspective, the consequences of this difference, whether progressive or regressive for women and men, will arguably be evident in all human interaction. Moreover, if an ethic of care is capable of creating a more just system and thereby promoting equality and social harmony, then a considerable amount of caution is appropriate in order to ensure that this approach does not simply reproduce existing social relations.

Associating a care orientation with women is theoretically appealing and often readily accepted because it reinforces stereotypical notions of feminine characteristics. However, the nurturing, caregiving female also strengthens the conception of the second-class domestic labourer as the woman's natural, and thus obligatory, vocation. This observation is not necessarily intended to dispute the research findings that women may actually be more care-oriented than men. It does however, ask the seemingly unanswered questions concerned with why this moral orientation may be gender-related, and more importantly, what consequences it could have on women in the legal profession and also as an alternative or complementary mode of legal relations.



## CHAPTER THREE

### Towards a Feminist Understanding of an Ethic of Care

As has been documented in Chapter Two, the debate unleashed by Gilligan's (1982) work is extremely diverse and often dramatic. For the most part, the debate involves methodological and theoretical discussions. Several scholars provide research supporting the notion that females tend to be more care-oriented in their moral development, while males tend to be more rights-oriented (Noddings, 1984; Lyons, 1983). On the other hand, some scholars argue that there is no significant gender distinction in moral development (Walker, 1984).

Furthermore, reactions to Gilligan's claims of moral difference extend far beyond the scientific debate in moral development theory. For example, Gilligan's (1982) work is lauded as a feminist inspiration and as an important contribution to theories of gender difference. However, Gilligan's work is also criticized for theoretical eclecticism (Broughton, 1983), and reductionism as a result of her reliance on psychological explanations (Kerber et al., 1986; Nicholson, 1983). The number of serious methodological critiques launched against Gilligan's (1982) research further contribute the controversial debate (Nails, 1983; Kerber et al., 1986).

Despite these critiques, Gilligan's (1982) claims continue to fuel debates. This fact suggests that there is something about her work that is "both timely and appealing, but also...frightening and offensive to feminist scholars" (Davis, 1992, p. 225).

As there are some major questions left surrounding the analysis of care and morality in terms of gender, certain theoretical difficulties are posed. That is, when one wishes to explore Gilligan's (1982) claims within a real-life context, how does one explain her research interest? That is, how does one theorize about care as a gender issue without becoming inescapably tangled in the web of scientific and political rhetoric?

An interesting analysis put forth by Davis (1992), questions the productivity of continuing the pattern of this debate in light of the generally tedious and repetitious results. Davis (1992) argues that the rhetoric of the debate is circular and thus counterproductive. She suggests that:

(t)he critics of Gilligan (mount) their attack, first and foremost, because they (do) not *like* her findings....As long as critics have normative and political reasons for dismissing Gilligan's work, they will obviously have a vested interest in poking holes in her methodology or undermining her theoretical framework by finding instances that make it impossible to accept her claims (Davis, 1992, p. 225).

This standpoint is not only interesting but encouraging as it requires a new path of exploration. Instead of demanding simplified, all-encompassing answers to major questions, Davis (1992) challenges researchers to explore the complexities of the issues. She suggests that there is a need to investigate and elaborate "the normative and political significance of a female morality" instead of "forcing controversial items into the straight-jacket of the *correct-line*" (Davis, 1992, p. 228).

As a result, Davis (1992, pp. 228-229) suggests a three-fold strategy. First, there is a need to acknowledge a number of unresolvable themes within the Gilligan debate. Second, feminist and other scholars need to take responsibility for their positions. And third, there is a need to take into account the constraints of the situations and issues being

analyzed.

This strategy has been adopted in this thesis in order to successfully theorize within the research framework. In acknowledging dilemmas within this feminist controversy, futile endeavours to uncover an ultimate, all-encompassing "Truth" have been abandoned, and there is a chance to recognize complexities of feminist concerns.

In doing so, there is a need to first mention the debate specifically concerned with Gilligan's (1982) thesis which argues to expand moral development theory to include the moral orientation of both females and males. The focus of many critiques of Gilligan's claims is set within the search for why women may differ in moral orientation from men. This is an important avenue for discussion and analysis and is not without many unresolvable themes. However, the debate must move from gender difference in moral orientation to the implications and significance of this difference within a real-life context. It is these issues that are of concern to this research and are thus the focus of inquiry.

This exploratory research project was designed to explore two main issues: the existence of a care-rights moral continuum in the legal profession and the relationship and implications of gender in the existence of this continuum. Thus, this research takes leave of the debate surrounding moral development theory and concentrates on what Gilligan's (1982) claims of a gender-related moral difference may mean for women and men lawyers in western social reality.

In line with Davis' (1992) three-part strategy, it is necessary to accept responsibility for one's position. Certain feminist analysis of science equates science with

politics.<sup>11</sup> Du Bois (1983) asserts that researchers must engage in "passionate scholarship", and in doing so the rhetoric of their own claims must be acknowledged. It is thus not sufficient to assume the logical priority of one's claims over another's. Davis (1992) argues that it is unproductive when critiques of opposing theories are used to buttress, and often solely support, a preferred line of explanation.

The exploration to be undertaken is therefore explicitly political. To base the analysis of this research within a scientific framework without acknowledging the explicitly political relevance detracts from a further understanding of the substantive issues. A search for a better understanding must explore the complexities and contradictions; that is, there is a need to examine "what it is that attracts and/or repels and why it does so within a specific context" (Davis, 1992, p. 227).

In line with Davis' (1992) final strategic point, the constraints of the situations and issues to be analyzed must be taken into account. Davis (1992, p. 229) submits that the social context in which arguments are forwarded is important. Gender-specific moral difference continues to spur debate but the test put forth by this research is concerned with the progressive usefulness of moral difference theory within the social context. This approach is arguably both "timely and appealing" as a result of the essential impasse regarding moral difference.

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<sup>11</sup> Harding (1991, p. 10) argues that "science is politics". While science does provide reliable information about human variation, she suggests that political struggles have always been the impetus behind science and consequently the reliability of the information has always suited the purpose of one group or another.

## **Defining Care and Rights**

Before undertaking this analysis, it is necessary to discuss the terms care and rights which are two of the principal concepts in this thesis. For the purposes of this research, Gilligan's (1982) conceptions are central and relevant. Gilligan (1982, p. 19) distinguishes an ethic of care from an ethic of rights as follows:

...the moral problem arises from conflicting responsibilities rather than from competing rights and requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract. This conception of morality as concerned with the activity of care centers moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development into rights and rules.

Thus, according to Gilligan (1982), an ethic of care is characterized by three fundamental differences from an ethic of justice or rights. First, an ethic of care focuses on responsibility and relationships, rather than rights and rules. Second, this ethic is based on concrete situations and contexts rather than formal and abstract principles. And third, an ethic of care is characterized by an "activity" among real individuals in real situations as opposed to being grounded in universal standards (as discussed in Tronto, 1987, p. 648).

This characterization is adopted within this research framework. As was briefly addressed in Chapter one however, the terms care and rights are not unproblematic within the legal context. Consequently, the terms conciliatory and adversarial were used in the interview schedule in a number of the questions and arguably provided analogous concepts in language familiar to lawyers.

For instance, Bottomley (1985, p. 163) studies the meaning of conciliation and concludes that it is used by "many different people to cover many different objectives and practices". She asserts however that "images of caring and the welfare of children" are identifiable within the use of this term and perceives the unifying factor in conciliation to be that it is "an alternative to the negative images and experiences in law" (Bottomley, 1985, p. 163). Conversely, the term adversarial arguably characterizes the nature of the practice of law (Foster, 1986, p. 286). According to Jack and Jack (1989) and Foster (1986), this concept is based on abstract and formal principles and is related to images of individual rights and equality. These characterizations are congruous to the ways that care and rights have been conceptualized. Care-rights and conciliatory-adversarial are notably not interchangeable concepts but they are both arguably applicable within the research context.

To treat any of these terms as unitary concepts is extremely problematic. They will likely be addressed differently by different people. It is possible however to identify thematic similarities.<sup>12</sup> Part of the focus of this research therefore is placed on the interpretations of these terms. An understanding of the way such concepts are conceptualized by individuals will provide invaluable information about their perspectives.

In characterizing ethics of care and rights and related concepts within this thesis, it is also important to explore feminist and other academic endeavours to address an ethic of care as an ideal in feminism.

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<sup>12</sup> The data analysis is addressed further in Chapter four.

## **The Pursuit of a Feminist Ethic of Care**

Inspired by the work of Gilligan and like scholars, many feminists (Stacey, 1986) and other academics (Lauritzen, 1989) have expressed notable interest in the notion of a feminist ethic of care. Lauritzen (1989, pp. 31-32), for example, addresses what he terms the rebirth of the romantic ideal in feminism. He suggests that while the feminist movement through the 1960s and 1970s (referred to as "the rationalists") essentially rejected the notion that women are the caring and nurturing sex (referred to as "the romantics"), there has been a recent rejuvenation of a new romantic, feminist ideal.

The term feminist ethic is used to conceptualize the accounts of morality which emphasize care and compassion, argued to be rooted in women's experiences. Lauritzen (1989, p. 32) views this ethic to be an attempt to rekindle a moral opposition to the competitive and atomistic model of moral relations prevalent in the public sphere and in current (male) moral philosophy. Lauritzen (1989, p. 32) examines Gilligan's (1982) and Noddings' (1984) work and suggests that both authors have specifically outlined this new romantic ideal, in contrast to the liberal notions of individualism and objectivity.

He argues that the feminist ethic is inherently connected to "mothering". Both in child rearing and child bearing, an ethic of care is deeply entrenched in women's experiences. Lauritzen (1989, p. 39) is interested in the point at which the ethic of care is formulated by women's experiences. He maintains that by associating this ethic solely with child bearing and nursing, an exclusive ethic is created. If this is the case, he contends that the movement to change women's roles will arguably be ineffective.

Lauritzen (1989, p. 40) suggests that if the relation of caring is associated more

openly with child rearing, and women and men are encouraged to participate, the split between the home and the work place will possibly be less restrictive which would allow care and compassion to extend beyond the domestic (traditionally female) sphere.

In the development of a feminist ethic, Walker (1989, p. 15) likewise argues that one need not be confined by the traditional philosophical conception of moral knowledge.

She suggests that "female voices" are needed to present a more accurate representation of reality. Walker (1989, p. 16) is critical of the abstract, authoritarian, impersonal, universalistic view of moral consciousness. She contends that there is a need to develop a more community responsive view of morality that is based on themes such as personal relations, nurturance and caring, and maternal experience.

Walker (1989, p. 16) suggests that an "alternative moral epistemology" has been constructed by academics such as Gilligan (1982), Ruddick (1984), and Noddings (1984). This alternative view provides a more appropriate and realistic approach to moral issues. Moral problems, like traditional moral philosophy which debates them, require pragmatic evaluation (Walker, 1989, p. 24). She asserts that traditional models which advocate the search for universal, moral solutions are inevitably limiting, in that moral dilemmas are reified beyond the morally significant factors of everyday life. Walker (1989, p. 24) concludes that a "feminist ethic" must include moral understanding which is relevant within social reality.

Similarly, Shapiro and Rosenberg (1989, p. 199) advocate the integration of "other voices" into the consideration of ethics and morality. "Other voices" in this sense connotes:



the voice of the marginal and the disempowered; the voice of those who abjure the values of competition and success and uphold those of cooperation and caring; and the voice of those who value private as well as public issues" (Shapiro and Rosenberg, 1989, p. 199).

This alternative approach is a reaction to traditional, male-dominated ethical theory. Shapiro and Rosenberg (1989, p. 201) emphasize the lack of attention to common social good and the needs of the less fortunate in ethics classes across North America. Instead focus is on the classical liberal notions of individual rights and the use of the law in the protection of those rights. This emphasis is viewed as problematic as it implies formal equality within an unjust society. Shapiro and Rosenberg (1989, p. 210) argue that it is necessary to encourage people to evaluate their own prejudices and consider possible options in ethical dilemmas.

While Shapiro and Rosenberg (1989) do not firmly address the notion of gender differences in ethics, the distinction is implicit in their argument. It is noted that the characteristics of care and responsibility are often equated with the feminine persona. The female students that they have taught tend to exhibit more of a care orientation than the male students who tend to be more rights oriented. Gilligan's (1982) work is cited as an explanation for this feminine tendency.

Further, Benhabib (1986, pp. 402-415) analyses the dichotomy between Kohlberg's "generalized other" and Gilligan's "concrete other" in light of contemporary moral theory. Benhabib (1986, p. 411) argues that the generalized other, characterized by "a rational being entitled to the same rights and duties that (all individuals) would want to ascribe to (them)selves" is considered incompatible in contemporary moral theory with the concrete other, described as "an individual with a concrete history, identity and affective-

emotional constitution".<sup>13</sup>

Benhabib (1986, p. 414) argues that moral situations cannot be individualized without evaluating the context of the situation and history of the agents involved. An "ethic of communicative need interpretations" is offered as an amicable integration of the two standpoints. That is, it is necessary to "recognize the dignity of the generalized other through an acknowledgment of the moral identity of the concrete other" (Benhabib, 1986, p. 416). The concrete other arises then as an integral concept which allows one to think through the limitations and biases that occur in the discourse of universalist morality.

Benhabib (1986, p. 418) interprets Gilligan's (1982) findings as being women's voiced objections to the alien ways in which moral dilemmas are posed. Concrete experience and identity are considered necessary to obtain a complete and realistic image of morality in generalized as well as concrete others.

Arguments concerning a distinct female morality are not of course without limitation. Such suggestions have created a great deal of concern for feminists.

### **Concerns over a Distinct Female Morality**

In order to conduct a meaningfully theoretical inquiry, current controversies in feminist thought about the significance of Gilligan's claims for women explored in the literature review must be considered. There are several themes which are important.

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<sup>13</sup> According to Benhabib (1986, p. 402), Gilligan's work represents a Kuhnian paradigm shift (1970) where a scientific "revolution" has occurred resulting in the break from traditional moral development theory based on rights and justice to create a new model for moral theory which encompasses the additional moral orientation based on care and responsibility.

Interpretations of the female care-oriented morality are based on various feminist concerns. First, there are concerns that associating a feminine morality with a unique care-oriented approach is a form of separatism and often implies superiority which inevitably creates the need to defend women's moral orientations (Tronto, 1987; Walker, 1983). Second, there are arguments which consider female morality to be a relative concept arguing that women value care because this is what men value in women; and it therefore limits women's possibilities (MacKinnon, 1987). Third, there are arguments that a female ethic of care is dangerous as it may simply reflect current power inequities (Auerbach et al., 1985; Daly, 1989; Heidensohn, 1986).

On the other hand, some scholars also argue that an ethic of care is capable of creating a more just social system and thereby promoting equality and social harmony (Gilligan, 1982; Jack and Jack, 1989). Others respond that it is necessary to ensure that an ethic of care is not simply reinforcing, instead of challenging, existing systems of gender stratification in social relations (Katzenstein and Laitin, 1987).

Interpretations such as those mentioned are often tested with questions concerned with whether women who are having a positive political impact can be characterized by a feminine morality (Harding, 1987, p. 297). Further challenges inquire whether a care-oriented morality is limited to women as it is arguably found in different class, racial and ethnic groups within and outside western culture (Harding, 1987; Jack and Jack, 1989; Kerber et al., 1986). Davis (1992, p. 226) also asks an important question: "Is an ethic to be viewed in the light of empowering difference or the powerlessness of sexual inequality?". The complexity of this dispute is phenomenal.

Despite the many critical responses, an ethic of care is ostensibly an appropriate theme for analysis. While a woman's moral standpoint may be shaped by a variety of forces from traditional relegation to the private domain and exploitation and oppression in western society to the notion of maternal essentialism, feminist acknowledgement and critique of women's moral reasoning arguably create the arena for productive and necessary analysis within social reality.

### **Dealing with the Equality/Difference Dilemma**

The claim of difference and creation of a feminist ethic of care have been aligned by many historians and feminist scholars with the equality versus difference debate. This debate originates in the disharmony between feminists who have fought for formal equal rights within political and legal structures and feminists who have explored the notion of gender difference and fought for substantive equality through a recognition that formal rights have a differential impact on women and other disadvantaged groups. The arguments against moral difference between women and men are unmistakably concerned with equality and difference and the potential discriminatory impact of consigning one over the other.

An encouraging analysis of these issues is conducted by Scott (1988, p. 43) who writes,

when equality and difference are paired dichotomously, they structure an impossible choice. If one opts for equality, one is forced to disregard the notion of difference as antithetical. If the choice is difference then equality in the current system is unattainable. ...Feminists cannot give up difference, it has been our most creative analytical tool. We cannot give up equality, at least as long as we want to speak to our political system.

This quotation illustrates why the equality/difference debate is so intense. The issues have been dichotomized, and a choice is therefore necessary. Scott (1988, p. 33) argues that a poststructuralist approach provides the best theoretical avenue for exploration in this debate. While her theoretical framework is not used as a method of analysis in this thesis, Scott's (1988) approach arguably clarifies some of the problems with the debate and sheds new light on difficult concepts. She suggests that the dichotomous pairing of equality and difference misrepresents both terms. In analyzing the meanings of equality and difference, Scott (1988, p. 38) maintains that the opposition created by the polarization of these terms is politically self-defeating. In other words, there is an interdependence between the words equality and difference. Scott (1988, p. 44) asserts that contemporary views of equality rely on the acceptance of different people and groups as equivalent, and further suggests that equality "might well be defined as deliberate indifference to specific differences".

Scott (1988, p. 44) suggests that difference is often misrepresented as a singular identity. This negates the differences among a particular group categorized for example, by female or male sameness. The construction of "sameness" for equality and difference works to mask the existing differences and thus perpetuates their obscurity and renders them insignificant.

It is consequently argued that equality and difference cannot be set in opposition to one another. Scott (1988, p. 46) asserts that the focus must be on "difference as the condition of individual and collective identities", and the examination of "fixed gender categories as normative statements that organize cultural understandings of sexual

difference." An appropriate approach then entails critical analysis of categorical difference to expose exclusions and inclusions in the name of an equality of differences.

The importance of this argument is that women must avoid dichotomizing such concepts. It is equally inappropriate to dichotomize care and rights morality. To do so creates an uncomfortable and unnecessary choice between oppositional sides. The need therefore is to consider and interpret the concepts within an unbroken continuum. To disconnect care and rights poses an unrealistic expectation on moral reasoning.

That is, care-oriented concerns arguably do not suggest that individual rights be undermined, but only that responsibilities to a greater social good be more forthrightly recognized. These principles cohabit within the *Canadian Charter of Rights and Freedoms* which sets out limits to individual freedoms "as can be demonstrably justified in a free and democratic society".

Within Scott's (1988) analysis, equality and difference need not be set apart as oppositional concepts. Despite this, feminist concerns about difference cannot be easily dismissed. However, along with concerns over the care-oriented perspective (difference), various feminists have similarly illustrated problems with the rights-oriented perspective (equality). For instance, Smart (1989, pp. 139-140) contends that while the struggles of first wave feminists must not be forgotten, using abstract rights in law often works to the disadvantage of women.

Presently, the law does not formally deny the rights of women; everyone is considered equal. Substantively, however, this is not the case. Essentially, Smart (1989) asserts that while the early demands for equal legal rights has been for the most part

successful, continuing with this approach may prove to be counterproductive.

While the rhetoric and strategy of rights remain attractive to some feminists, this tactic, arguably works to subjugate women in various ways (Smart, 1989, pp. 144-145). First, Smart (1989) suggests that the issue of rights oversimplifies complex power relations. By creating an adversarial situation, other pertinent elements may be ignored, such as the case where a woman is economically dependent on an abusive husband and is unable to exercise her rights. Second, Smart (1989) asserts that the rights strategy formally establishes everyone with equal, yet individual, rights. This essentially sets up a competition between rights, where legal decisions often must determine the winner and the loser or whose rights are more important. Third, if rights are violated or denied, the onus generally rests on the individual to prove that this is the case. Finally, Smart (1989) argues that while rights are created to protect the powerless from the powerful, the more powerful may actually expropriate these rights.

Smart (1989) acknowledges some of the sensitive issues that may arise with her arguments. She maintains, however, that the rights position is a particularly defensive one; and that in order to overcome this problem, women need to rethink and modify their expectations.

Thus, there are some important reasons not to abandon the notion of difference within feminist concerns. However, a large degree of caution is necessary in proceeding within this framework.

## **Forward Moves on Moral Difference**

How can moral difference be articulated without reinforcing stereotypes of women and the subordinate status attached to them? Katzenstein and Laitin (1987) argue that there are both progressive and regressive potential in political arguments relying on claims of moral difference.

They pose an important question: "Under what formulations are arguments of moral difference likely to serve progressive ends and when are they likely to fulfill counter-progressive or reactionary purposes?" (Katzenstein and Laitin, 1987, p. 265). Thus, the inquiry for feminist political theory must be concerned with how moral difference and an ethic of caring can be combined with a political agenda which challenges existing systems of power instead of reaffirming them.

To provide a productive analysis, this question is reconceptualized by Katzenstein and Laitin (1987, p. 265) to consider what "conditions" are necessary for claims of moral difference to be progressive. In response, Katzenstein and Laitin (1987, pp. 265-266) set out three possible conditions. First, claims of moral difference must focus on the "expansion of opportunities" and "the enrichment of autonomy". Women's social and political roles must be portrayed as dynamic and therefore cannot simply rest on reiterations of past levels. There is a need to foster caring relations among all members of society, but in doing so women must not be restricted to the primary caretaking role in these relationships (Katzenstein and Laitin, 1987, p. 265).

Second, there is a need to advocate multifarious tastes, interests and cultures in order to express horizontal diversity. To speak of a single voice for all women refuses



to acknowledge the inequality among women and thereby extinguishes efforts for vertical equality. The claims of moral distinctiveness at the onset must to be addressed on the level of the least privileged (Katzenstein and Laitin, 1987, p. 265).

And third, groups claiming moral difference must enter into a political alliance that is committed to the expansion of opportunities and political power for other disadvantaged classes or groups. Forming additional alliances with oppressive groups may be strategically necessary but the autonomy of the original group must not be threatened. Strong progressive ties will support the ability to challenge existing structures (Katzenstein and Laitin, 1987, pp. 265-266).

With these conditions in mind, it is relevant to analyze the theoretical claims based on moral difference that women offer a different moral perspective as lawyers in the western legal profession.

### **Women in the Legal Profession**

At least two consequences flow from moral difference in the legal profession. Assuming care concerns are more prevalent in women lawyers, the first is that they will experience more dissatisfaction and frustration as they face a predominantly rights-oriented profession. The second is that with increased numbers of women lawyers, the legal profession may be altered to incorporate the different moral reasoning present. The arguments here are similarly complex and diverse.

For example, Shaughnessy (1988, p. 23) argues that women encounter severe limitations in their caring capacities as lawyers and judges. It is asserted that

...by its very nature, law is coercive. To some extent, women's inclinations for activities of care will necessarily be frustrated as they encounter the law's limitations. Eventually, women are likely to either feel alienated from their practice or learn to downplay their inclinations for caring activities" (Shaughnessy, 1988, p. 23).

Furthermore, Shaughnessy (1988) questions the appropriateness of an ethic of care as a basis for jurisprudence. The need for general application of the law is stressed in light of complex social relations. Shaughnessy (1988) further questions how lawyers could possibly have the capacity to care for all their clients. This is an insurmountable expectation and the frustrations encountered in such an approach, are intolerable.

Similarly, Hasse (1987) argues that because the legal system is based on a rights perspective it encumbers the introduction of other moral viewpoints. Hasse (1987, p. 289) focuses on judicial and legislative sources of legal change. She asserts that transformative endeavours either come up against historically enshrined precedent in the case law which must be overturned in a "piecemeal, case by case" fashion, or require legislative action which may not sufficiently implement change.

The arguments of Shaughnessy (1988) and Hasse (1987) demonstrate important cautionary critiques of implementing a care orientation into the legal profession, yet they are arguably self-defeating. They imply that because the legal system is for the most part based on rights, and is by nature adversarial, it cannot be transformed or adapted to implement care concerns. As history dictates, any organizational or structural change does not occur instantaneously. Infiltrating firmly entrenched legal doctrines and altering standard protocol within a self-regulating profession will be without question a long and arduous task.

The need overall is to redefine what it means to be a lawyer. This must afford systemic and individual efforts. On the systemic level, relevant legislation might be revised to reflect more care concerns which in time could be further developed by case law. A care-oriented approach also could be introduced as a method of resolving disputes in law schools and law practices. Such changes however will not singlehandedly overcome the dominant standards. Mossman (1988a, pp. 592-593) suggests that "outside intervention" is necessary to break down structural barriers which obstruct the opportunities of women lawyers. That is, it is overly optimistic to rely on the existing hierarchal structures to implement any change other than to reaffirm the existing power arrangements.

On a more individual level, lawyers make decisions about clients and their situations on an ongoing basis. Jack and Jack (1989) argue that with increasing moral diversity, the legal method may become more "morally responsive". This does not mean women, or men, lawyers would spend an insurmountable number of hours "caring" for their clients; it means that more time would be spent on evaluating the situation and aiming through a contextual understanding, to achieve the best possible solution for all parties involved as opposed to solely concentrating on building a "winnable" case for clients.

Thus, the focus of lawyers' work would shift and more time would be spent gaining a clearer picture about their client's situation in order to determine the most reasonable and appropriate outcome. This does not undermine the lawyer's duty to the client; it reinforces the obligation as an officer of the court to recognize potential

outcomes for all parties involved. In essence, it redefines the latter role to be an obligation to society.<sup>14</sup>

Furthermore, Jack and Jack (1989) focus on social perception, human awareness, and societal order and harmony. Jack and Jack (1989) argue that the dual orientations represent opposite perspectives on society and human relationships. The rights outlook views society as a group of individually autonomous people. Societal cohesion is only maintained through the existence of a "hierarchy of rights, rules, and obligations [which] mediate human interactions and help preserve independence" (Jack and Jack, 1989, p. 7). The care perspective, on the other hand, is concerned with the interdependence of people in the societal context. This orientation views the fostering, nurturing and persistence of positive human relations as the key thread to social order and harmony.

As the focus of Jack and Jack's (1989, p. 27) research is the legal profession, the traditional lawyer's role is explored. This role, they argue, is based on partisanship, neutrality, and moral distance which presumably illustrate the personal and professional contradictions inherent in the legal profession's ethical demands. Jack and Jack (1989, p. 32) argue that partisanship and neutrality demand that lawyers uncompromisingly devote their services to the best interests of their clients. However, lawyers are also to remain neutral without passing any moral judgement. The authors are sceptical of *any* individual's ability to assume these traits.

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<sup>14</sup> Additionally, Menkel-Meadow (1989) argues that the intellectual and theoretical legal work of feminist academics should be counted as evidence of changes in legal practices by demonstrating changes in legal doctrine and providing the theoretical rationale and emotional space for different expressions of how to practice law.

In light of this, the ethic of care may well be a solution to these conflicting legal roles. Menkel-Meadow (1985; 1989) argues that an inquiry into the "feminization" of the legal profession must be concerned with "how having two genders (and countless ethnic and racial variations) in an institution formerly all [white] male might alter the structures and practices" (Menkel-Meadow, 1989, p. 30).

Menkel-Meadow (1989, p. 32) refers to Tronto's (1987) work as "the next stage of difference theory". Tronto (1987, p. 646) suggests that subsequent exploration should not expressly celebrate gender difference but should concentrate on the ethic of care's adequacy as a moral theory. Tronto (1987) contends that the gender-specific theoretical avenue creates the need to defend the integrity of women's morality as separate from that of men, rather than, and more importantly, developing an ethic of care as an effective mode of moral relations for all people.

Tronto (1987, p. 663) argues that the most effective approach is to discuss an ethic of care within moral and political theory. An assessment of care is therefore necessary in its relative importance to other values.

Menkel-Meadow (1989, p. 32) asserts that:

an ethic of care in law could mean a number of concrete things. It might mean involving all the parties to a dispute, rather than only formally plaintiffs, defendants, and interveners. It would invoke client participation in decision making. It might alter some of the professional ethics prescriptions under which lawyers currently operate that preclude them from *caring* for the other side or the other side's lawyer. It might alter behaviours within the conventional adversary system to include more trust and altruism and less unnecessary aggressive behaviour.

She (1989, p. 33) further suggests that areas of practice that have already experienced

some form of "feminization" by larger numbers of women lawyers (such as family law) would be an appropriate area within which to commence research. This research should explore how lawyers talk about their work and whether gender has any implications on their approach to the law.

It is arguably important to consider the possible impact of women in the legal profession. In light of Katzenstein and Laitin's (1987) and Tronto's (1987) arguments, moral difference theory will not fare well unless it is dynamic and comprehensive. The scope of this research project aims to shed further light on women in the legal profession, but it does not do so without the acknowledgment of the diverse and far reaching boundaries of moral difference theory.

This chapter has attempted to grapple with a few large questions about the progressive application of moral difference theory. It is important to keep these issues in mind in moving to the research project, data, and results.

## CHAPTER FOUR

### Methodology and Research Design

The purpose of this research was to conduct an exploratory study of conciliatory-adversarial orientations of family law lawyers. The research and subsequent conclusions will contribute to the body of literature concerning women in the legal profession, and provide a detailed picture of differing conventional and non-conventional approaches to family law practice. As this thesis is of an exploratory nature, a snowball sample was used, and therefore the results can not be generalized beyond the sample population.

#### *Research Method*

The research technique in this study was an indepth interview. The interview schedule was developed using Jack and Jack (1989) and Lunneborg's (1990) interview schedules as guidelines. The first questions were intended to be general and unobtrusive, and subsequent questions were designed to explore the respondents' perceptions about the practice of family law, eventually addressing the conciliatory-adversarial continuum and the level of personal satisfaction with the system. A hypothetical situation, based on a vignette developed by Jack and Jack (1989), was designed to place the respondents into their professional roles. The interviews were conducted in an informal style, more of a conversation than a question-answer session.

A "pre-test" interview was conducted with a family law lawyer to clarify various points regarding the practice of family law and aspects of the interview schedule, in order

to ensure that the questions would have meaning in the family law context. This pilot run contributed to the development of additional ideas for the research, and provided an avenue to test the applicability of the questions in the interview.

### *The Sample*

The sample was comprised of thirty-six family law lawyers, defined as those who spent 60% or more of their time practising family law (divorce, maintenance, and child custody) from around the greater Vancouver region. Eighteen women and eighteen men were interviewed.

The research sample was obtained using a snowball technique. Respondents were asked to provide the names of other lawyers whom they considered to be family law practitioners in the greater Vancouver region. The sample began with two lawyers, one from a large firm in downtown Vancouver and the other in a small firm in a neighbouring city in the Lower Mainland. They both practised almost exclusively in the family law area.

An introductory letter was sent out in five waves to forty-one lawyers between December 20, 1991 and February 21, 1992 (See Appendix A). One lawyer declined to be interviewed, one was prepared to be interviewed beyond the time framework of the research, and three lawyers were eventually abandoned as potential interviewees as they could not be contacted. The first interview was conducted on December 14, 1991 and the last on March 12, 1992.



### *Characteristics of the Respondents*

The women respondents were on average younger than the men respondents. The mean age of the women was 38 (median=36), while the mean age of the men was 42 (median=41). The median year of call to the Bar in British Columbia was 1987 for the women and 1981 for the men. The women had practised law for an average of 7.4 years and a median of 4.5 years, and the men for an average of 12.6 years and a median of 9 years. All of the respondents spent 60% or more of their time on family law matters.

### *The Interview*

The interview format included structured and unstructured open-ended questions (See Appendix B). Each respondent was assured of the confidentiality of the interview. The interviews were taped provided that there was no objection from the respondents, and brief notes were taken to ensure an additional source of recorded data. Three respondents objected to the interview being recorded, and therefore more detailed notes were taken during these particular sessions.

The interview questions focused on the perceived differences in legal approaches of family law lawyers. While there is a considerable amount of literature which both supports and refutes the gender distinction in moral development, these questions focused on establishing the existence of a continuum between conciliatory and adversarial orientations.

The first three questions asked the lawyers about their personal strengths for practising family law, why they were practising family law, and if different values held

by family law lawyers affected the way they practised law. After these questions were answered, the continuum was specifically set out for the respondent as follows.

The literature suggests that lawyers vary from extremely adversarial and rights-oriented approaches to the practice of law to extremely care-oriented and conciliatory lawyering methods.

Respondents were then asked to rate the *Divorce Act*, the *Family Relations Act*, and eventually themselves on a continuum of one to seven where one was completely conciliatory and seven was completely adversarial. Respondents were asked to elaborate on their ratings. The purpose of these ratings was to have the lawyers articulate the characteristics which they associated with the points along the continuum. These ratings and comments were compared and analyzed in conjunction with the information obtained in the open-ended component of the interview.

The next portion of the interview presented the respondents with a hypothetical situation designed to require the lawyer to make certain decisions in a family law context, reflecting particular positions on the continuum. Consequently, the responses provided an additional indication of each lawyer's professional, moral approach.

The hypothetical situation was comprised of five parts which began with a minor moral conflict and progressed to a severe moral dilemma. In the interview, the lawyers were presented with the least serious scenario and asked to react in their legal capacity. The lawyers were also told that the client was insistent upon their representation, and that this client was very important to the financial future of the lawyer's firm. The interview then progressed through each scenario. The lawyers were presented with all five legal

situations unless they decided to disclose the information or withdraw from representing the hypothetical client. When this occurred, the interview did not proceed beyond the scenario in question, and the lawyers were asked to comment on their positions.

After the hypothetical situation, two final questions were asked which specifically addressed gender differences. These questions were left until the end to avoid creating an interview bias in the preceding questions. The interview then was completed by obtaining personal background information from the respondents including year of birth, year of call, and the number of years they had practised law.

### ***Data Analysis***

First, the contents of the interviews were transcribed using the tape recordings of the sessions and the notes taken during the interview. Each interview was given an arbitrary case number and the names of the respondents were not on the transcriptions.

In order to provide for a clearer and more consistent, qualitative discussion of the results, the data analysis employed the "Coding Manual" used by Jack and Jack (1989, pp. 172-187) for guidance. While the Manual was not directly applicable, as the questions were different, it provided a pretested resource with which to perform the analysis of the results. The coding was completed blind to all personal information, including the sex and the age of the respondent, in order to avoid researcher bias.

The identification of care and rights morality in the interview was based on three underlying themes derived from Jack and Jack's (1989) Manual. The first theme addresses the way in which people or situations are perceived. According to Jack and

Jack (1989, p. 173), a care orientation is indicated by a more contextual approach. That is, this orientation responds to the person or situation in the specific context rather than concentrating on general principles or issues (Langdale and Gilligan, 1989, p. 57). There is a concern not only for people's rights, but also for people as people. On the other hand, a rights orientation is represented by a more abstract approach. The focus therefore is not on people in their own contexts, but on the conflict or violation of general principles or rights.

The second underlying theme relates to the goals of the action. A care-oriented person acts to avoid hurt and maintain or restore relationships. A rights-oriented person acts to maintain the standards of justice and presumably fairness. This includes the concept that everyone is equal under the eyes of the law and therefore should not be treated differently regardless of the specific context (Jack and Jack, 1989, pp. 174-175).

The third and final theme pertains to the process of decision making and to the evaluation of the act. Care-oriented decisions are based on an individualized response to a particular person in a particular situation. There is a recognition that general rules are not always appropriate in specific contexts. In this orientation, decisions are guided by weighing relative costs with relative harm. The decision is then evaluated in terms of the consequences for the parties involved. Rights-oriented decisions however, are made according to the rules, standards of justice (the law), or role obligations. Decisions are made deductively and logically in order to maintain fairness, uniformity and equality. These decisions are evaluated by the degree that they have upheld general rules, standards, and obligations (Jack and Jack, 1989, pp. 175-178).

As the interviews were completed in a free flowing conversational style, the transcripts were studied for key words, phrases, and comments which were significant in the context of each individual interview. Jack and Jack (1989, p. 172) noted in their analysis of similar interviews however, that words such as "justice", "truth", "obligation", and "fairness" may have been used by lawyers with any type of moral orientation, but that the words may have held different meanings to the respondent based on the underlying moral perceptions. As a result, the coding techniques developed by Jack and Jack (1989) were specifically set out to determine "points of view", not to interpret discrete words, and this approach was adopted for this thesis. Contemporaneous note-taking during each interview regarding the respondent's disposition provided an additional source of information on the respondent's perspective.

After the data were categorized, they were entered into SPSS/PC, a statistical data analysis program, in order to compute simple frequencies and crosstabulations. This procedure was completed in order to provide quantitative data in addition to the qualitative interview analysis.

### ***Research Questions***

The research was designed to examine the conciliatory-adversarial continuum as it manifested itself in the approaches of family law practitioners. The following questions are addressed:

- 1) Is the conciliatory-adversarial continuum detectable among those lawyers interviewed?
- 2) Are there differences between the women and men respondents in what are considered to be personal strengths for practising family law?
- 3) Are the female family law lawyers more likely than the male family law lawyers to view themselves as conciliatory (or adversarial)?
- 4) Are the male family law lawyers more likely than female family law lawyers to view themselves as adversarial (or conciliatory)?
- 5) Do the reasons for entering and practising family law differ significantly between and among the women and men respondents?
- 6) Do differences in values affect the way family law is practised? And if so, are there discrepancies in the ways that these differences are perceived by the female and male lawyers?
- 7) Are there differences between the female and male respondents in levels of satisfaction/dissatisfaction within the adversarial legal system, given the governing family law legislation?

- 8) Are there differences between the female and male respondents in the way they respond to professional ethical dilemmas?
  
- 9) Are women lawyers perceived to have influenced or are they perceived to be influencing the way family law is practised?

## CHAPTER FIVE

### Results and Analysis

This Chapter presents the results from the interviews (See Appendix B) and then examines and compares the results, where applicable, to the findings of Jack and Jack (1989), Gilligan (1982), and Foster (1986).

#### *Personal Strengths for Practising Family Law*

The first question in the interview was: *"What do you consider to be your personal strengths for practising family law?"* This open-ended question asked the respondents to generate their own images of personal strengths. Instead of specifically asking if the respondents were for example, empathetic, they were required to provide the description of what they considered to be their positive attributes in practising family law. This approach avoided leading questions.

When asked to discuss what they considered to be their personal strengths for practising family law, most lawyers premised their responses with descriptions of the emotional climate and tense conflicts which often characterize family law practice. Within these descriptions, most of the respondents discussed various personal traits which were considered to be positive in dealing with family law cases. Generally, there was a distinct difference between the ways in which the women and men described their personal strengths. Eleven of the eighteen women respondents (61%) described themselves as good listeners, and twelve (67%) said that they were empathetic advocates. The men respondents on the other hand, were less likely as a group to describe



themselves as good listeners (two out of eighteen respondents did so, 11%), or empathetic (five out of eighteen respondents did so, 28%). The men were more likely to characterize themselves as able to remain emotionally distant (eight or 44% of the men, compared to three or 17% of the women) and as direct and able to ascertain the important issues while avoiding the emotional baggage of the case (six or 33% of the men, compared to one or 6% of the women).

Differences in the responses are illustrated by the following excerpts from two women lawyers who had been practising law between three and seven years:

Clients often tell me that I am very empathetic. I believe that this is a very strong characteristic as a family law lawyer. It is important to me that my clients know that I am listening to them, that I am hearing them and that I am understanding what they say. In this profession, you need to be able to communicate with your client on a fairly intimate level. As a result, there needs to be a sense of trust and openness so that the lines of communication between you and your client are strong. I believe that I am a very good listener and that coupled with good people skills, I have certain positive attributes crucial to the practice of family law.

I have the ability to talk to my clients and hear what they have to say, and I have empathy for their problems. I want to negotiate a settlement that is fair to everyone. In this line of work, it is important to have a certain duty to family in order to avoid severing all ties between parents and children. I always strive to settle all cases out of court.

Responses from two of the male lawyers, with nine to eleven years of experience, are distinctly different.

Patience has got to be number one. You need it in this business in order to deal with people's emotions. With time, you get so that you can cut through all the emotional baggage and get to the heart of the matter. When dealing with clients, there is often a hidden agenda that you have to try and figure out, and if you miss the point then your cases become rather difficult. I think that I am probably just too good a listener. There always comes a point when you have to say shut-up and go away and I'll work

on it. Sometimes, especially when you are new at the profession, you tend to be too sympathetic because you do not want to offend anybody. People do have to talk when in crisis, you just need to know when to cut them off.

I have the right type of personality for family law because I do not get too emotionally involved or too connected to the client, so I can distance myself and stay objective. Family law is really a paper game, so you need to be organized. I can paper the other side very quickly, and cases are won or lost based on getting your documents to where they have to be, when they need to be there.

Both of the previously quoted male respondents emphasized the need to get straight to the facts without getting caught up in the emotional issues, and to remain objective, while the above quoted female respondents stressed the importance of empathy, communication, and the negotiation of fair settlements.

While the differences expressed in these quotations illustrate a common theme between the women and men interviewed, there may have been other factors operating. For example, personal strengths identified by the respondents varied with years of experience practising family law. There was an interesting difference between women who had been practising for ten years or more and those practising under ten years. The following quotations are from two women who had been practising family law for over ten years.

I am empathetic with a certain amount of life experience which allows me to understand what clients are going through during divorce and separation. I believe that I have the ability to steer clients away from the more emotional aspects toward the business and money concerns of a settlement because in the end, this is what they will need to get them through. Over the years, I have *learned* to distance myself from it (emphasis added).

I have a lot of patience with people. I have the ability to actually hear people, to actually listen beyond the words that they are saying. I also empathize with them while retaining objectivity, not overly identifying

with them. I have *learned* to avoid becoming overly emotionally involved (emphasis added).

In the two previous quotes from women who had been practising family law for over ten years, the word "learned" was used in a similar way. Both respondents indicated that they had in some way adapted to the nature of family law practice; they had learned how to practise family law successfully. Foster (1986) suggested that some female lawyers are co-opted and adapt to the adversarial game. Similarly, it appears that these respondents have carved out ways to practise law within the adversarial system. These female respondents maintained that they needed to be direct, but as the first quote indicated, this was necessary to "get them (the clients) through" the process and on with their lives. At the same time however, care-oriented concerns were present.

Some of the men also expressed care-oriented personal strengths in their practice of family law. Their responses were different however, as their words and characterizations suggest less difficulty with professional distance.

I believe that I have the ability to understand some of the struggles that people are going through with marriages and children and so on. My strengths really lie on more of an emotional level and with my ability to work very hard for my client. I am always able however to maintain a professional distance.

I am fairly empathetic and understanding of other people's problems to a certain degree without ever becoming personally or emotionally involved. I work very hard for my clients and do my best for them.

However as the frequencies indicated, more of the male respondents tended to express an emotionally distant or direct approach. This type of approach arguably illustrates an abstract, more adversarial orientation (Jack and Jack, 1989). A more

obvious example of this orientation was evident in one male lawyer's response who described his personal strengths as follows:

Aggressiveness and the desire to win. I love winning within a set of rules that you play by. I have regard for the fact that I love to win on behalf of my client, but I also know when my client may lose. I have the strength to recognize that possibility and advise my client as to the steps to be taken in order to avoid or minimize possible losses.

Another male respondent clearly articulated adversarial characteristics in his answer.

...It really depends on what the client wants because I do what they want. I am a hired gun; so my attributes would be my ability to adapt to provide my client whatever he or she wants in a legal capacity.

It is also interesting to note, as exemplified in the two previous quotes, that eight (44%) of the eighteen male respondents referred to their ability to "win" cases while none of the female respondents alluded to this issue in discussing their personal strengths. This suggests that the male respondents were more likely to view their ability to attain the best possible result for their clients, as opposed to finding the best possible solution for all parties involved, as a positive attribute. The female respondents however did not indicate that their ability to win their cases was a personal strength.

This is significant because the notion of winning or losing essentially reflects the adversarial nature of the legal profession. Success in the legal profession is arguably defined by the "winning" of cases. The suggestion that the ability to win cases is a strength for practising family law implies an unyielding acceptance of the adversarial nature of the system and thereby indicates a more abstract rights-oriented approach to this area of practice.

Overall, while there were clearly exceptions, the frequencies indicate that the women tended to respond more contextually, while the men tended to respond more abstractly. Arguably, these differences may reflect the ways in which women and men have learned to express themselves. Men are supposed to be emotionally distant, objective, and rational, while women are supposed to be sensitive, empathetic and caring. There is little argument against the fact that stereotypical notions of female and male characteristics are deeply ingrained in western society and thus in the social and moral fabric of this society. Hence, the willingness to describe oneself in accordance with these stereotypes, might be expected. These descriptions then are arguably reproduced not only in everyday actions but also in professional life.

### ***Decisions to Enter Family Law Practice***

Lawyers rank family law practice behind tax, corporate and commercial, civil, administrative, labour, patent and estate law when rating the prestige of various areas of practice (Hagan et al., 1988, pp. 25-27). Family law practice has often been referred to as low-status legal work. In light of this, Brockman et al. (1992, p. 51) ask, "Why is commercial work more prestigious than work involving relationships between people, and the welfare of their children?"

According to Brockman (1991, pp. 20-21; 1992c, pp. 22-23), women practise family law in greater proportion than men in British Columbia and Alberta. Family law lawyers deal with people in crisis, failing relationships and the welfare of children. Based on the content and subject matter of family law practice, it could be suggested that family

law may be a more care-oriented area of the law. It could be further speculated that those with this orientation might be more inclined to enter this area of practice. On the other hand, it has been argued that the personal goals of female lawyers in particular, are not necessarily related to the area of practice. For example, Baron (1983, pp. 335-336) suggests that the overrepresentation of women in low ranking areas of legal practice must be critically assessed, not casually assumed to be a result of personal choice. Baron (1983, p. 336) argues that the "emphasis on self-selection" ignores the realities of the patriarchal legal structure. These speculations are important to this thesis and therefore need to be explored.

Thus, the second question in the interview was: *"What factors have influenced your decision to practise family law?"* This question was intended to further explore the respondent's rationale and perception of family law practice. A number of different responses were received.<sup>15</sup>

Eleven (61%) of the eighteen female respondents indicated that they had always been interested in family law and that this area of the law was a natural progression, while eight (44%) of the eighteen male respondents provided a similar response. Further, seven (39%) of the eighteen female respondents also said that they were people-oriented and wanted to work in a people-oriented area of law; of the male eighteen respondents only three (17%) indicated the same.

In addition, eight (44%) of eighteen the female respondents stated that they were "pushed or channelled into it", while four (22%) of the male respondents indicated this

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<sup>15</sup> Some respondents provided more than one answer for this question and therefore the combined results exceed 100%.

response.<sup>16</sup> These respondents stated that they had not planned to practise family law, but they had articulated with or joined law firms where they were asked to take or were given family law cases. They ultimately began to specialize in family law.

Five (28%) of the male respondents and four (22%) of the female respondents indicated that it was the ease of access, as a sole practitioner and/or litigator, that caused them to specialize in family law.

While the responses to this question do not reveal an absolute difference between the decisions of the female and male respondents, the majority of the female respondents had been interested in this type of law, and several emphasized the positive results which could be obtained for people. The responses by the men were more varied and did not reflect the same care-oriented concerns. This may indicate that the women lawyers were more likely to be drawn into family law based on more care-oriented perspectives.

Interestingly, each of the eight female lawyers who indicated they were pushed or channelled into family law suggested that it was a natural progression for women to enter this area of practice. Six of these lawyers had been specifically told by their firms that a woman was needed to practise family law. The remaining two female respondents who had both been practising family law for over 15 years stated that when they became lawyers, family law was the only area that they were able to find work, and it was "expected" that women lawyers would enter family law.

Conversely, the four male lawyers who indicated that they had been pushed or channelled into family law suggested that it had been early successes with family law

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<sup>16</sup> Four of the eight females and two of the four males were unhappy with this fact.

cases which had "labelled" them, and as a result they developed lucrative family law practices. The difference between the experiences of these female and male lawyers was quite distinct. This also may indicate certain trends in the reasons why women enter family law practice in greater numbers than men.

### *The Effects of Values on Family Law Practice*

The third question in the interview asked: *"Do you think that differences in values held by lawyers who practise family law affect how they practise law?" "If so, how?"* This question was intended to provide an indication of the respondents' view of the way in which family law is practised. According to Jack and Jack (1989), the conciliatory-adversarial continuum has been characterized by certain thematic perceptions from for example, contextual to abstract notions. Thus, contextual thinking arguably was dictated more by values while abstract thinking relied more on objective notions of the law (Jack and Jack, 1989, pp. 6-11).<sup>17</sup> These speculations were not rigidly applied to the research data, but were instead used to provide further insight into the respondents' perceptions of themselves and of family law lawyers.

Of the eighteen female respondents, fourteen (78%) suggested that differences in values do influence the way that family law is practised. The remaining four (22%) said that differences in values do, to some extent or on certain types of lawyers, have an influence. Eleven (61%) of the eighteen male respondents were of the view that differences in values influence the way family law is practised, while five (28%) said that

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<sup>17</sup> The assumption for the purposes of this thesis is that values are more, or less overt influences on the practice of family law which are based on the perspective of the lawyer.



there was an influence to some extent or on certain types of lawyers. The remaining two (11%) male respondents indicated that differences in values did not affect the way that family law was practised, or that it did not affect them personally and that they could not comment on other lawyers.

Many lawyers discussed opposing values in family law practice. On the whole, there were two identifiable stances outlined; one promoted "objectivity" and had a notable disregard for those who let values influence their professional role, and the other reasoned that it was unavoidable and necessary to inject personal values into their legal responsibilities.

Two male respondents, who exemplified the first position, indicated that they had little difficulty separating personal values from professional roles.

You need to remain objective. It is difficult sometimes. I do not have a problem separating my personal values from my professional obligations. If my client wants something and it has legal merit, I will go for it.

...It isn't difficult to distance yourself because your personal experience and knowledge will come into play, but you have to keep the best interests of your client in mind regardless of how you personally feel about the situation.

Two female respondents, illustrating the second position, made the following comments:

Your values are brought to bear on everything that you do. For example, someone comes in and admits that he batters his wife. You need to make a value judgement. Sometimes, I choose to not take a case. This is somewhat of a failing for me as a lawyer because we are taught to represent all cases and that everyone is entitled to the best defense. But when a spouse is for example refusing to pay maintenance, this is just not reasonable and I won't do it.

Values definitely influence lawyers. In family law, sometimes what your client wants is simply not realistic and is often not in the best interests of the children or the settlement. You have some choices to make; you can do what they say or try to bring your client's expectations into reality.

As evident from the above quotations, a notable difference in the two positions concerned either representing the best interests of the client or obtaining a reasonable or just result. While an adversarial position was emphasized by the first two quotations, a conciliatory-oriented perspective was illustrated in the second two comments.

Twelve of the eighteen (67%) female respondents stated that their values assisted them in negotiating reasonable settlements. Common themes included a recognition of unrealistic goals from clients, an evaluation of the potential outcomes for all involved parties, and an unwillingness to represent clients who were not reasonable. None of the male respondents indicated that values influenced or assisted lawyers in these ways.

The common themes indicated by eleven male respondents (61%) were not attributed to themselves, but rather to family law lawyers generally. For example, five of these eleven respondents (45%) stated that some lawyers advocated a "feminist" or "self-righteous" approach and thus became overly involved in their cases. While these male respondents indicated that values generally affected the way that lawyers practised family law, there was a consistent, cautionary emphasis concerning the problems with losing "objectivity". That is, while these male respondents acknowledged the potential influence of personal values, they saw the influence as negative and maintained the need to avoid becoming personally involved.

The differences in responses between the female and male respondents were evidently quite distinct. While the female respondents interpreted the question on a

personal level and discussed the influence of values on their work, the male respondents were more general and noted the dangers of family law lawyers injecting personal values.

This indicated that the female respondents did not conform to the same extent as the male respondents to the objective standards and abstract reasoning of the legal profession. All of the female respondents suggested that their values influenced their decisions in cases and provided further background for legal action. These results further indicated differences in the ways that the female and male respondents practised family law.

### ***The Conciliatory-Adversarial Continuum***

The conciliatory-adversarial continuum was specifically set out for the respondents as previously described. The rating scale was defined as follows: 1 = extremely conciliatory; 2 = conciliatory; 3 = moderately conciliatory; 4 = middle/dependant on different factors; 5 = moderately adversarial; 6 = adversarial; and 7 = extremely adversarial.

The questions which followed (questions four and six) (See Appendix B) directly addressed the continuum and asked the respondents to use it to rate the *Divorce Act* and the *Family Relations Act*. The respondents were also asked to rate their degree of satisfaction with these two pieces of legislation (questions five and seven) (See Appendix B). After each of these questions, the respondent was asked to elaborate on the rating.

There was a diverse range of responses to the questions asking the respondents to rate the legislation. A general rating of the entire *Divorce Act* and *Family Relations Act*

was for several respondents, problematic. In fact, sixteen of the thirty-six respondents (44%) indicated that the continuum could not be applied to the *Divorce Act* or to the *Family Relations Act*. These lawyers reasoned that the legislation did not specifically dictate the way that family law was to be practised and that it depended on other factors such as the clients, the situation, the lawyers, and the judges. These respondents suggested that both pieces of legislation contained provisions which created the opportunity for more conciliatory or more adversarial action and procedure, but that the method of implementation of the legislation was relatively discretionary as it depended on the various factors mentioned.

This information added further support to the existence of a continuum of approaches in family law practice which was articulated in response to question three. The notion that the existing legislation guided, but did not dictate, the approaches of family law lawyers allows room for a variety of approaches.

Many of the respondents who provided ratings for the legislation had difficulty in doing so. They relied on specific provisions which appeared to promote either more conciliatory or more adversarial action. As a result, both the *Divorce Act* and the *Family Relations Act* were perceived to embody provisions for both approaches, but it was often noted that the legal system was adversarial in nature thereby encouraging more adversarial approaches.

Of the respondents who did provide ratings for the legislation, the *Divorce Act* was rated as moderately to extremely adversarial by nine female and ten male respondents; one female rated it as moderately conciliatory. Likewise, the *Family Relations Act* was

rated as moderately to extremely adversarial by thirteen female and six male respondents; one male respondent rated it as conciliatory.

In rating levels of satisfaction with the *Divorce Act*, seven (39%) of the female respondents were satisfied to moderately satisfied, seven (39%) were moderately to extremely dissatisfied, and four (22%) were neutral. With the *Family Relations Act*, however, four (22%) females indicated that they were moderately satisfied, ten (56%) were moderately to extremely dissatisfied, and four were neutral.

The ratings for levels of satisfaction provided by the male respondents were significantly different. For the *Divorce Act*, thirteen (72%) males indicated that they were extremely to moderately satisfied, three (17%) were moderately dissatisfied to dissatisfied, and two (11%) were neutral. Similarly, for the *Family Relations Act*, thirteen (72%) males were extremely to moderately satisfied, four (22%) were moderately dissatisfied to dissatisfied, and one (6%) was neutral.

The results indicate that both pieces of legislation for the most part were considered relatively adversarial. An interesting point however was in the levels of satisfaction with the legislation. While the majority of the males expressed relative levels of satisfaction, the majority of females were less than satisfied expressing dissatisfaction or neutrality with the legislation.

Common themes of dissatisfaction expressed by the female respondents were that the legislation still did not take inherent power imbalances between women and men into account, the resulting process was slow, costly and alienating, and lawyers' tactics were often unnecessarily aggressive. While many specific provisions were singled out, and

responses differed, these issues suggested underlying dissatisfaction with the adversarial nature of the law and its impact on their practice and their clients.

The few male respondents who indicated a dissatisfaction with the legislation stated issues involving vagueness or ambiguity of the acts which allowed wide judicial discretion, time-consuming technicalities which slowed legal action, and the prohibitive cost of legal action.

Question eight was set out as follows: *"On a scale from one (conciliatory) to seven (adversarial), how would you describe the way that you practise family law? Please elaborate on this rating."* As Table 1 shows thirteen of the eighteen female respondents (72%) rated themselves between extremely to moderately conciliatory (one to three on the scale), four (22%) indicated the middle of the scale (four) arguing that it depended on different factors such as the clients, the other lawyer(s), and the situation, and the remaining one (6%) said that she was adversarial (six on the scale) (See Table 1).

Of the eighteen male respondents, seven (39%) rated themselves conciliatory or moderately conciliatory, six (33%) maintained that they were in the middle and that it depended on different factors such as noted above, and five (28%) rated themselves from moderately to extremely adversarial (See Table 1).

**Table 1****Responses to Personal Rating Scale**

<b>Rating</b>	<b>Women</b>	<b>Men</b>
<b>Extremely Conciliatory</b>	<b>1</b>	<b>0</b>
<b>Conciliatory</b>	<b>5</b>	<b>3</b>
<b>Moderately Conciliatory</b>	<b>7</b>	<b>4</b>
<b>Middle/Dependant</b>	<b>4</b>	<b>6</b>
<b>Moderately Adversarial</b>	<b>0</b>	<b>2</b>
<b>Adversarial</b>	<b>1</b>	<b>2</b>
<b>Extremely Adversarial</b>	<b>0</b>	<b>1</b>
<b>Total Number of Respondents</b>	<b>18</b>	<b>18</b>

## ***Resolving Conflicts***

The respondents were presented with a hypothetical situation which was designed to make them discuss how they would deal with a client who instructed them to proceed in a manner which was in conflict with the welfare of his child:

*You have been retained by a client in a custody case. Your client is a thirty-seven year old male who owns his own business and has an annual net income exceeding \$100,000. He was married for twelve years and has two preschool aged children. He is obtaining a divorce from his wife, and the interim custody arrangement, which is not a court order but an informal agreement between the two, provides a joint custody agreement where the children spend two weeks at a time with each parent. He is unsatisfied with this arrangement which has been in effect for a month, and now wishes to obtain full custody.*

*During one of your meetings with him, he provides you with a bundle of documents which inadvertently contains a letter that bears on the fitness of your client to have custody of the children. The letter is not addressed to you but is an open confessional. This information is not known and is not likely to become known to the other side. This client further provides approximately 30% of your firm's income through his business. Although he has not said it, you know that he will take his business elsewhere if you do not proceed as he has instructed. Given the following, how do you handle the case?*

As the interview proceeded, the hypothetical situation was changed to make the conflict more arduous. The following series of alternatives were presented until the interviewees said they would no longer follow their client's instructions.

*A. The letter discloses that on occasion, your client has had a problem with alcohol. He admits that his job is very stressful, and that once in awhile, he needs to have a couple of drinks to calm his nerves. However, the letter describes two isolated incidents where while under the influence of alcohol, your client has become somewhat violent resulting in some notable bruises and scrapes on his children. He swears it only happened twice, and that he is currently seeking help from a local Alcoholics Anonymous group.*



*B. The letter discloses that on occasion, your client has had a problem with alcohol. There have been two violent episodes where the children have been beaten resulting in notable bruises and scrapes. Your client refuses to seek professional help, arguing that it may damage his business reputation if discovered by the wrong people. He says that he is dealing with his problem on his own and that everything is under control.*

*C. The letter discloses that your client has a problem with alcohol. There have been several violent episodes where the children have been beaten resulting in a few trips to the family doctor for medical treatment. There have also been reports from the children's school teachers claiming that their school work has been suffering and their appearances often suggest extreme fatigue and even physical strife. Your client refuses to seek professional help, assuring you that he can handle the problem on his own.*

*D. The letter discloses that your client has a serious problem with alcohol. On many occasions, he has become very violent with the children. A number of these times, the children have ended up in the hospital with broken bones and external abrasions. While there has been some suspicious doctors, no formal investigation has been undertaken, and therefore there is no proof, aside from the letter, that he has physically abused the children. He refuses to seek professional help, and argues that the letter has made the problem sound much worse than it actually is.*

*E. The letter discloses that your client has a serious drinking problem. On many occasions, he has become extremely abusive with the children. This abuse has been both physical and sexual. While your client's disposition is consistently professional and demure, it is apparent to you that his problem with alcohol is severe, and a custody decision in his favour would be extremely dangerous for the children. Your client refuses to acknowledge that there is a problem, and instructs you to disregard the letter and get on with your work.*

Four main perspectives identified by Jack and Jack (1989, pp. 99-129) became evident in the lawyers' responses and were used to categorize their responses to the hypothetical situation. These perspectives ranged from a maximum role identification where personal and professional morality did not appear in conflict and the respondents fully identified with their legal role to minimum role identification where personal and professional obligations were distinct and often conflicting.

Position One, maximum role identification (coded by Jack and Jack, 1989) results in no moral conflict as the respondents identify fully with the professional role and there are no moral obligations apart from the duty to the client. This first position was articulated clearly by a male respondent in the present study. In response to Part A, he said:

I wouldn't have any difficulty or problem with this at all. I have no obligation to disclose the information to the other side. I would confront him with the contents of the letter to let him know that all skeletons in his closet have the potential to lose the custody case for him if they are bad enough. If he is in counselling, he is obviously taking positive steps toward becoming a good parent.

As the scenario became more and more serious (Parts B,C,D,E) the respondent commented that:

You have to take your client at face value; if he says that he is taking care of the problems then you have to believe him. I would be doing what I could in an adversarial setting to put the best forth for my client without any hint of lying or directly lying about the facts. If he decides to lie in court, then I would not back him, but so long as he is honest with me, I will represent him.

Position Two, the subjugation of personal morality, is similar to Position One except that these respondents acknowledged the disharmony between personal and professional obligations. These lawyers thus maintained that their single foremost duty was to the client, but also acknowledged that in order to fulfill this role it was necessary to suppress certain personal values. For Position Two, the following woman respondent maintained a duty to her client, but as the situation grew worse she recognized the conflicting obligations yet remained in her professional role.

I certainly wouldn't send him out of the office. Everyone deserves representation whether they are abusive or not. I would advise him that it is too early to throw out the joint custody arrangement. But, if he insisted, I would proceed with the motion. He cannot deny that he is seeing someone for the alcohol problem if he is asked in court. I might suggest that he see a simple counsellor as opposed to someone specifically for the alcohol problem, so that he could avoid disclosing the alcohol problem if it is actually a secret.

As the scenario became more severe, she asserted that:

It really begins to depend on my comfort level with him; if I feel that he is being untruthful with me that's where I draw the line in representing someone. I wouldn't tell anyone about the situation, but I do believe and would tell him that he should really think about his children, and that he should be honest with himself and it will work to his detriment if he doesn't come to terms with it.

In Position Three, the recognition of moral cost, personal morality plays an active role in professional duty. This position is likely to cause the most internal tension and stress as there are two competing value sets, personal and professional. The respondents who adopted this perspective refused to let their professional role dictate and thus justified their actions. While they may have still continued to act for a client, the professional distance/hired gun approach of Positions One and Two no longer existed; these respondents took on a more morally responsive approach and thus set limits on their availability.

In Position Three, one male respondent indicated that:

I would fully discuss the letter with my client and find out the whole story. While I would be under no obligation to disclose the letter or the information about his problem, but I would not want to deceive the court in any way.

Later he said:

I would not act for him, if he was not seeking help from counsellors for his problems. While I am not obligated to the children (the court is), I would not be able to take a case where the client is in denial of his own problems and is unwilling to commence activities to help himself and his family.

A woman respondent outlined her position clearly:

I always try to do the right thing. I have a duty to my client, not to disclose privileged information, but I am also an officer of the court. I have a general concern for the welfare of the children, and I don't want to be a party to an abusive person gaining custody of his children. I have a problem with this case and would tell him that it will come out in court. I cannot tell on him because it would be unethical. I would not turn him away but I would not want to keep the pertinent information a secret. So I would encourage him to disclose, if he wouldn't then he would have to go somewhere else. He could disclose the information to assist in access to the kids so long as he is not a danger to them.

Finally, Position Four is minimum role identification. With this approach the lawyer does not internalize the professional role. Instead, there is a certain personal standard which is maintained, and conflicting professional obligations are inevitably a serious source of tension and risk. These respondents only extended their professional obligation to the client when it would not result in harm to anyone else. For example, in this study, one female lawyer was very adamant about her position after hearing only the first part (A) of the vignette. She said,

He can go to another lawyer; I won't take this case. This client wants me to go to court and fight for custody for him when he is clearly not the best parent and is a possible danger to the children. With the business client issue, I would go to the firm and tell them that I would simply not do it. I could not in good conscience try to get custody for someone who could possibly harm the children at a later time.

Another woman lawyer went a step further in addressing the problems of the client

going to another lawyer even if she refused to represent him.

I would have a real problem with this case. There is an obligation not to misrepresent or mislead the court. You really should be working in the best interests of the children in a custody case, and while you really aren't supposed to be the judge of that, I feel that lawyers can be put into very difficult situations. It doesn't really help to just withdraw from the case because he'll just go to another lawyer and probably not disclose the information. I would find this really irresponsible so I would not be able to just pass the buck.

This respondent ultimately suggested that she would report him but was uncomfortable with the idea and would talk to someone more experienced in these matters.

These two lawyers have made personal decisions based on their own values despite what might be their traditional obligations. They both expressed the tension that this type of situation would cause them.

Overall, the more difficult the situation became, all of the respondents tended to react in one of two ways. They either become more identified with their legal roles as the scenario became more difficult, or they became more aware of the personal conflict and consequently expressed more care concerns.

For example, one respondent began the scenario with more care-oriented comments regarding the client's welfare and he reverted to his professional obligations as the fact pattern worsened. In response to Part A, he stressed the importance of determining the client's motives for wanting custody and assessing his parenting ability.

When Part C was read, however, he responded:

My approach is that if those are his instructions, even though I don't believe or agree with him, it is not my job to ask questions. This is why we have this system. The judge makes the decisions and sometimes it is

difficult but we (lawyers) must remain the adversaries and not become the judges of our clients. So regardless, I will follow my client's instructions. It is not my job to question his motives or actions. It is my job however, to do my best for them (clients) under all possible fact patterns. My ultimate duty is to my client.

Conversely, another respondent relied initially on rules of disclosure to deal with the letter and felt that she would accept the case in response to Part A, addressed her personal feelings in Part C:

I feel that as a lawyer, I have an obligation to the children and personally, I would not be able to continue acting for someone who I knew was abusing his children. My personal feelings would make it extremely difficult to proceed.

The differences between the values of the lawyers as expressed in the discussion of personal strengths varied in comparison to the legal values expressed in the hypothetical situation. Some respondents who initially described themselves as more concerned advocates became less visibly so in their response to the hypothetical vignette. The more the interview placed the respondents into their legal/professional capacities the more the respondents became role-oriented and the less care concerns were present. Jack and Jack (1989, p. 54) reported similar results indicating that a care orientation was detectable more in values than in the hypothetical situation which required legal thinking.

Table 2 shows that ten of the eighteen male respondents occupied Position One, as compared to only one of the eighteen women respondents, and four of the men and three of the women fell into Position Two. These respondents more often advocated the duty to the client and maintained their professional role. Conversely, eight of the women and only one man expressed minimum role identification (Position Four) and six women

and three men fell into Position Three. These respondents felt that there was a personal conflict with their professional obligation to the client, and that the welfare of the children was a serious consideration.

**Table 2**

**Responses to Hypothetical Situation by Gender**

<b>Position</b>	<b>Women</b>	<b>Men</b>
<b>Position One: Maximum Role Identification</b>	<b>1</b>	<b>10</b>
<b>Position Two: Subjugation of Personal Morality</b>	<b>3</b>	<b>4</b>
<b>Position Three: Recognition of Moral Conflict</b>	<b>6</b>	<b>3</b>
<b>Position Four: Minimum Role Identification</b>	<b>8</b>	<b>1</b>
<b>Total Number of Respondents</b>	<b>18</b>	<b>18</b>



The number of years of experience practising family law was thought to be of importance concerning the positions taken in the hypothetical situation.<sup>18</sup> The one female respondent who occupied Position One had been practising family law for over fifteen years. It was suggested that her position may have been influenced by her years of experience.

According to the frequencies however, the three women who occupied Position Two had been practising for seven years and under. Additionally, three other women who had been practising for over fifteen years occupied Position Four. This indicated that years of experience was not a determining factor for the respondents in the position taken in the hypothetical situation. It is possible that some of the female respondents have maintained initial orientations without conforming to the traditional legal standard.

### ***Gender Differences in the Practice of Family Law***

The final two questions in the interview dealt specifically with gender. The respondents were asked if they felt that they approached their job any differently from their colleagues of the opposite sex who practised family law. Thirteen (72%) of the eighteen female respondents and eleven (61%) of the eighteen male respondents said that there was a difference. When asked to elaborate, most of these respondents indicated that there were always exceptions and that it was very difficult to generalize about women and men. However, there were two distinct trends in the answers.

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<sup>18</sup> This possibility was suggested in response to an earlier paper on aspects of this data, "The care versus the adversarial approach in family law practice" by Carla Hotel and Joan Brockman, delivered at the Learned Societies Conference in Charlottetown, PEI, 1992.

Of the thirteen female respondents who were of the view that there was a difference, eight (62%) felt that women lawyers were not as adversarial and aggressive as men but more conciliatory in their approaches; and four (31%) felt that women were more able to relate to or connect with their clients on a more responsive level. Six (55%) of the eleven male respondents who felt that there was a difference however, indicated that many women lawyers were more adversarial and aggressive than men; and two (18%) felt that women were more likely to be self-righteous in their approaches and thus willing to take up their clients' causes.

These differences in perceptions were interestingly in conflict. In light of this, it is appropriate to consider the existing stereotypes of female and male conduct in these responses. While women are arguably assumed to be more gentle and conciliatory by nature, they are working in an adversarial system which endorses the opposite characteristics. They may consequently be perceived as even more adversarial, by men in particular, when they act in accordance with male-defined conduct.

Mossman (1988a, pp. 595-596) suggests that women face a "double bind" in becoming successful leaders, and lawyers. She argues that women confront a major conflict "between expectations based on their roles as women and those related to male models of leadership" (Mossman, 1988a, p. 595). Thus, if women lawyers are too conciliatory, they are regarded as indecisive or weak, and if they are too adversarial, they are thought to be unfeminine.

Women may be more inclined to describe themselves as conciliatory based on self-perceptions and expected roles, especially in comparison to the adversarial legal

system. Further, female lawyers may have a different experience in relating to other female lawyers than they do with male lawyers. Four of the eight female respondents (50%) who felt that women were more conciliatory than men, suggested that they preferred to deal with women lawyers as opposed to men because more women lawyers were willing to work to solve problems in more amicable approaches. These perceptions added further support to the notion of difference in the approaches of women and men family law lawyers.

The final question asked whether the respondent felt that the increasing number of women in the legal profession had changed or was currently changing the practice of family law. This question received an interesting assortment of responses. Of the eighteen women respondents, ten (56%) felt that the gradual influx of women into the legal profession had changed or was changing the practice of family law. A larger proportion of men, thirteen out of the eighteen (72%), indicated that the increase in the number of women practising family law had changed or was changing the practice.

It is also worth noting that five (28%) of the women and two (11%) of the men were unsure or did not know if women were having an impact on the practice of family law. Of the respondents who indicated that they were unsure three of the women and both of the men felt they had not been practising long enough to know. All had practised for under five years. The other two women (who had practised for over ten years) were not sure that the changes they had seen were due solely to the influx of women and consequently did not want to provide a definite response.

The content of the responses to this question illustrate some interesting themes.

The most common, 53% (ten females and nine males; nineteen out of thirty-six) was that women lawyers were better able to empathize with the systemic discrimination faced by women and were consequently better able to articulate these concerns. According to these respondents, the presence of women in the practice of family law had served to create a more rounded sense of reality for women and men in our society. These comments lend support to Menkel-Meadow's (1989) description of the feminization of the legal profession and further supports Madame Justice Bertha Wilson's (1991, p. 522) comment that women lawyers might better "infuse the law with an understanding of what it means to be fully human".

One woman who had been practising for under five years stated:

Women have definitely brought different perspectives, and often different agendas, to the practice of family law. It is not that women cannot be just as tough, but there is a different atmosphere when dealing with women lawyers. It is like there is a common ground and understanding of social realities. I think that the practice of family law can only benefit from women bringing different perspectives; overall, I would say that women bring a less adversarial perspective and this is better for all the people that need to go through this process.

Two other women who had been practising family law for over ten years said:

There are a number of women that are extremely unpleasant and unreasonable just like many men. However, the increasing number of women in the profession seem to have had an effect on the law. Maintenance, for example, has become a lot better for women, and it seems that women have created a better awareness of the realities of women in this society.

Women are definitely changing the practice of family law. I enjoy working with female lawyers a lot more than with male lawyers because women tend to want to take a problem and solve it. The attitude is like there has been an accident here and instead of worrying about who caused the accident, let's take care of the victims. Usually, my discussions with female lawyers are productive, we get a lot of things sorted out without a

lot of unnecessary correspondence, court applications and so on. I don't feel that women lock themselves into positions like men often do. Women appear to be more reasonable and flexible. Women gravitate towards family law and tend to be less adversarial; women seem to have a personal understanding which enhances this area of law. Men appear to gravitate towards family law more for business reasons rather than for an affinity to the practice. Traditionally, it has been a field that has been underrepresented and thus is less competitive.

Some men respondents made similar comments:

Women are coming into a position that they have been denied for a long time. This is having an impact on the amount of maintenance women receive as women are usually the ones stuck with the children. With more and more female lawyers, past and present inequities are being brought to the attention of the judges. Not only the amount of child maintenance, but also attention is being brought to the handicap which women suffer in divorce especially when these women have been out of the work force for twenty some years and thus have very little skill, increasing numbers of female lawyers have succeeded in revealing unjust assumptions of equality.

Yes, women have changed the practice. Female family law lawyers tend to suggest and try to work toward mediation much more often. They seem to be more in favour of working out a settlement and then if it doesn't work out, they will litigate. It used to be the other way around when the practice was comprised of more male lawyers; it was very adversarial with a slight but eventual movement towards mediation, so it is interesting to think about the effects that women have had on the practice. I don't mind trying different routes but some cases just cannot be mediated.

Women have brought a degree of sensitivity to the practice of family law. They have especially sharpened the awareness of the inequities faced women in today's society. I think that women tend to react in a less conditioned adversarial way; the female family law lawyers that I know are extremely perceptive and seem to have an ability to identify the issues quickly with depth.

Interestingly, three female and three male respondents (six out of thirty-six, 17%), felt that women did not have any effect on the nature of the practice of family law. These responses were based on examples of women who were "unnaturally" adversarial.

For example, one of the women said:

While more women than men seem to practise law in a reasonable way and are more willing to work for a settlement, I don't think that women have had such a strong impact on the practice of family law as a result of the women who adopt a masculine way of practising. It surprises me that these women are so litigious and aggressive which is essentially the male way to practise law.

A male respondent similarly indicated:

There is this group of aggressive female lawyers that I believe are changing the dynamics of the practice of family law. It seems that people are just less courteous and the practice has become very aggressive and adversarial.

As it is arguably assumed that women are naturally caring and gentle in their approaches to all facets of life, it is not unexpected then to hear women described as "surprisingly aggressive".

### ***Discussion of Results***

The research questions set out in Chapter Four were used as a guide in analyzing the interview data. Based on this analysis of the data, certain conclusions can be drawn.

Generally, the conciliatory-adversarial continuum was detectable among those lawyers interviewed. There were distinct perceptions and approaches to the practice of family law noted in the responses which varied from conciliatory and contextual to adversarial and abstract. That is, there were respondents who in varying degrees, advocated a care-oriented approach which went beyond the duty to the client and extended to all parties involved. Other respondents varied in terms of a rights-oriented approach which upheld entrenched legal principles and standards. These respondents

focused predominantly on their duty to the client and stressed the importance of obtaining results desired by their client within the confines of the legal structure.

Furthermore, there were differences between the women and men respondents in what were considered to be their personal strengths for practising family law. The female respondents more often described themselves as good listeners, empathetic and responsive while the male respondents more often described themselves as emotionally distant and capable of directly addressing the relevant issues. The female respondents were also more likely to view themselves as conciliatory and the male respondents were more likely to view themselves as adversarial.

Slight differences between the female and male respondents were also noted in the reasons for entering and practising family law. The female respondents were more likely to indicate that they were interested in the area of practice and were people-oriented. Smaller numbers of the male respondents indicated these same reasons, but in general, were more business-oriented in their responses indicating that it was the ease of access and demand that encouraged them to specialize in family law.

Additionally, the majority of the female and male respondents indicated that values affected the way that family law was practised. The difference between the perceptions of the female and male respondents however, was fairly distinct. The female respondents were more likely to indicate that values affected the ways that they dealt with clients in decisions regarding reasonable courses of legal action. The male respondents on the other hand, were more likely to suggest that values in general could affect the way family law was practised, but stressed the dangers of allowing this to occur.

Also, the satisfaction/dissatisfaction levels with the governing family law legislation differed between male and female respondents. While the majority of the male respondents indicated relative levels of satisfaction with the legislation, more of the female respondents expressed relative levels of dissatisfaction. The reasons for this varied to a degree, but the general indication was a discontent with the inequality in resulting settlements for women.

Further differences between the female and male respondents were noted in the ways that they responded to ethical dilemmas. The female respondent more often disassociated themselves from traditional legal standards and injected care-oriented concerns into their legal responsibilities. The male respondents however, were more likely to uphold traditional legal standards without allowing care-oriented concerns to interfere with their professional roles.

Finally, the majority of female and male respondents indicated that the gradual influx of women into the legal profession had changed or was changing the practice of family law. The most common response was that women lawyers were more aware of the discrimination and inequality faced by women and were therefore able to bring this reality into light in the legal system.

### ***Conclusions***

Overall, the results from the interview data suggest certain differences between the female and male respondents in the ways that they practise family law. As an exploratory study, these results are intended to promote further research and discussion and are not



intended to argue that care/conciliatory and rights/adversarial thinking are imprisoned by gender. Lawyers with a strong care orientation are more likely to reflect contextually on the possibility of harmful consequences as a result of professional acts. Those with a strong rights perspective are more likely to identify with the neutrality of the professional role and the fundamental rights of the individual.

Jack and Jack (1989, p. 158) argue, however, that care-oriented reasoning "holds the potential for a corrective shift from unbridled advocacy which has little regard for the social and individual consequences of professional acts". While the coexistence of care and rights thinking within the current legal structure may be precarious, several legal and academic scholars, such as Postema (1980) and Karst (1984) as documented in Chapter Two, have envisioned a new integrative role for lawyers. These positions suggest the lawyer's role is multi-faceted. In this sense, the current adversarial system is not undermined but enhanced by the integration of personal responsibility.

Jack and Jack (1989, p. 158) argue that while women have traditionally represented care orientations resulting from cultural relegation to the private sphere, women *and* men need to produce and maintain these values in the public sphere. These values can be cultivated and are arguably arising in the public sphere of law.

It is perhaps appropriate to assert that care and rights personify a "quality of justice" (Jack and Jack, 1989, p. 171). Both approaches work toward a just society and each possibly protects from the weakness of excess in the other. Both orientations represent important considerations and the maintenance of human justice and welfare requires the existence of each.

## CHAPTER SIX

### Conclusions

The "transformative potential" of women in the legal profession has been the impetus for this research inquiry. As the proportion of women entering the legal profession increases, scholars have speculated that women may "change the adversarial system into a more cooperative, less war-like system" (Menkel-Meadow, 1985, pp. 54-55). This thesis has garnered research on women and men in family law practice in efforts to explore this argument.

Essentially, the existence of a care-rights continuum of approaches in family law and the significance of gender on this continuum have been examined. In light of such conclusions by Jack and Jack (1989), Foster (1986) and Gilligan (1982; 1988; 1990), this research is important as it further examines the notion of a gender distinctive morality and the implications that this may hold for women lawyers and for the legal profession.

Feminist and other academic writers have explored gender distinctive notions of morality. Some of this literature was examined in Chapters two and three, and questions with regard to the productiveness of this theoretical pursuit were raised. Davis (1992) suggests that such research should pursue more pragmatic goals. As a result, this research focusses on the substantive realities for women in the legal profession.

The results of this research indicate that the women and men lawyers ranged on a continuum of perspectives between care/conciliatory orientations and rights/adversarial orientations in the practice of family law. The perspectives were diverse and it was evident that the lawyers each had unique ideas regarding their professional roles.

It is not accurate nor is it appropriate to dichotomize the differences found and attribute them to women and men lawyers respectively. There is no evident single care orientation or single rights orientation which is exclusively female or male. The diversity of responses is important as it essentially sets out the continuum. Further, it is not accurate to count a single voice for all women or for all men; each voice regardless of gender is arguably tempered by other variables such as age, race, or experience. This research has determined that the lawyers interviewed, regardless of gender, fall on a theoretical continuum which spans from care to adversarial orientations. While it is important to stress the diversity of responses among all respondents, there are clear patterns which emerge along gender lines. The majority of female respondents tended to provide a more care-oriented perspective while the majority of the male respondents tended to reflect a more rights-oriented perspective.

Generally, the female respondents were more likely to associate personal strengths for practising family law with empathy and contextual responsiveness while the male respondents focussed on emotional distance and directness in their approach. The women lawyers were more likely to communicate care concerns and reflect on the care context of their work, while the men lawyers were more likely to focus on abstract, rights-oriented principles.

When asked about values in the practice of family law, the female respondents were more likely to discuss the positive influence their personal values had on their professional role. The male respondents on the other hand, more often suggested that if values were permitted to influence their decisions they would become personally involved

in cases, and the result was generally negative.

The women lawyers were also more likely to disassociate themselves from strict interpretations of their professional roles. When faced with an ethical dilemma in the family law context, the female respondents more often injected care concerns into their decisions while the male respondents were more likely to identify with their profession obligations.

The implications of these results further buttress the conclusions of Jack and Jack (1989) and Foster (1986). Two of the main implications resulting from the notion of gender distinctive morality explored in the literature are: 1) women will experience greater levels of dissatisfaction with the nature of the practice of law and; 2) women will bring new approaches and perspectives to the practice of law, perhaps changing the way that the legal profession operates.

The results of this thesis indicate that the women lawyers did experience greater levels of dissatisfaction than the men lawyers, with the legislation in family law primarily because it did not provide an accurate reflection of power relations between women and men. The women respondents were more likely to note the unsatisfactory outcomes which result for women and children. This is interesting as it suggests that it is not necessarily the action of being adversarial that these women did not like, but rather the potential outcome for the parties involved.

This research further indicates that women have made unique and important contributions to family law practice. Women family law lawyers have contributed an increased understanding of difficulties for women. Some examples from the research

results were that women lawyers have created a greater awareness of the plight of the custodial parent and primary caregiver. Increased awareness of social and economic inequities in family law issues articulates perspectives that have arguably been silent. By doing so, women lawyers have possibly been successful in bringing approaches which enrich family law practice.

It is apparent that the entrance of women into a once exclusively male profession has implications for women and men lawyers, and for the profession. While the relationship between women and care may or may not be theoretically attractive, substantive issues have been examined in family law practice. Family law is an interesting area to explore because it addresses one area of the law in which women participate to the same extent as men.

The suggestion that women may bring new and effective approaches to the practice of law is however, more difficult to establish. While almost half (eight) of female respondents believed that women lawyers were much more conciliatory in their approach to the practice of family law, the same number of the male respondents felt that women lawyers were much more adversarial and often self-righteous in their causes. This might be a result of the "double bind" that women may face in the conflict between their expected roles as women and the professional legal roles established by male models (Mossman, 1988a, p. 595). If women lawyers are in fact bringing new perspectives to family law, these results suggest that some difficulty may be encountered in the interpretations of their unfamiliar voices.

Women have overcome major barriers in gaining entrance into the legal profession

and acquiring formal acceptance as lawyers. Some scholars have pointed out that it will take more than just increasing the numbers of women lawyers to have an impact on the legal profession (Menkel-Meadows, 1986; Mossman, 1988a). Systemic and individual efforts are arguably the requirements for further change. Mossman (1988a, p. 597) suggests that structural change requires "outside intervention" which will create strategies to increase the number of women in leadership roles without having to assimilate with male models. With more women in such roles, new models can be created and complement existing standards. Individually, women lawyers have an opportunity to change past notions of female professional roles. Education and awareness regarding stereotyping and the need for positive role models are two potential strategies (Mossman, 1988a, p. 598).

Overall, in the adversarial legal forum, family law disputes are addressed as win-lose situations. However, when the entire context and outcome are considered, it seems more appropriate to view such disputes as lose-lose cases where there is never a visible winner. Jack and Jack (1989, p. 164) argue there are areas of legal work, such as in family law, that require contextual concern for the needs of the parties involved and for the continuity of positive relationships.

The need for more "morally responsive advocates" is evident as legal dispute resolution becomes increasingly expensive and time consuming. An ethic of care is possible and appropriate in family law dispute resolution. This ethic enables legal advocates to go beyond a duty to client and abstract notions of justice. A contextually-oriented outcome speaks to a greater social good. Jack and Jack (1989, p. 164) stress the

need for the legal profession to reassess the effectiveness of the adversarial method in light of the broad spectrum of legal work. The usefulness of care orientations is to be found in the potential they create for balance between the abstract and the contextual. Care concerns are often based on the notion of reasonableness which takes the context into account. And, family law is an area of practice where a care-orientation might be more easily introduced, and is arguably most appropriate.

Overall, Tronto (1987, p. 646) submits that an ethic of care need not be the sole responsibility of women. Both women and men, she asserts, are capable of promoting such an ethic. Eliminating the need to defend an ethic of care as an exclusively female one, holds immense potential for a gentler world.

Different perspectives must be acknowledged without the threat of an opposition. An ethic of care need not replace the ethics of rights. These need not be viewed as duelling orientations; they can arguably coexist. Many accounts reflect on the importance of the contribution of both care and rights to social justice (Jack and Jack, 1989; Benhabib, 1986; Stocker, 1987). The coexistence and recognition of such perspectives within increasingly complex social relations are capable of permitting a balanced harmony of voices.

Janis Joplin in concert once asked the rhetorical question, "What are we ladies but waitresses at the banquet of life". Some now have a seat at the table and the question now is what value will be placed on the voices. Whether women offer an alternative method of moral reasoning becomes irrelevant if it is not heard, and consequently held, in the same stead as conventional male standards.

In future research, other areas of practice should be studied to further determine the extent to which care orientations exist and effect lawyers and the practice of law. However, in light of the subject matter, family law practice appears to be a suitable forum to open the door to the acceptance of alternative methods of resolving legal disputes.



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Name of Firm  
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Postal Code

Dear Ms./Mr. Lawyer:

One of our M.A. students, Carla Hotel, is currently working on her thesis at Simon Fraser University under my supervision. Her thesis research is part of a larger project of mine which is being supported by a grant from the Social Sciences and Humanities Research Council.

Carla's research is concerned with the perceptions of family law lawyers regarding the practice of family law. She would like to interview you regarding your perceptions on this topic.

Would you be so kind as to participate in a short interview with her? The interviews are approximately thirty to sixty minutes in length and are being conducted with family law lawyers throughout the greater Vancouver region. We would be very grateful for your participation in this project.

While Carla will be using material from the interviews in her thesis and other academic work, she will not identify those lawyers whom she is interviewing. In this way your responses will be anonymous.

Carla will contact you by phone within the next few weeks with regard to your participation. The time and place of the interviews will be scheduled at your convenience.

If you have any questions, please give me a call.

Sincerely,

Joan Brockman  
Member of the Law Societies of British Columbia and Alberta

## APPENDIX B

### Interview Schedule

- 1.) What do you see as your personal strengths for practising family law?  
Please elaborate.
- 2.) What other factors have influenced your decision to practise family law?
- 3.) Do you think that differences in the values held by lawyers who practise family law affect how they practise law? If so, how?

At this time, the continuum is specifically set out for the family law lawyer as follows. The literature suggests that lawyers vary from extremely conciliatory approaches to the practice of law to extremely adversarial lawyering methods.

- 4.) On a scale from one to seven (one = conciliatory and seven = adversarial), how would you describe the way the *Divorce Act* is set up to practise family law as it is implemented in British Columbia? Please elaborate on this rating.
- 5.) On a scale of one to seven (one = very satisfied to seven = very dissatisfied), how satisfied are you with this legislation? Please elaborate on this rating.

- 6.) On a scale from one to seven (one = conciliatory and seven = adversarial), how would you describe the way the *Family Relations Act* is set up to practise family law in British Columbia? Please elaborate on this rating.
  
- 7.) On a scale of one to seven (one = very satisfied to seven = very dissatisfied), how satisfied are you with this legislation? Please elaborate on this rating.
  
- 8.) On a scale from one (extremely conciliatory) to seven (extremely adversarial), how would you describe the way that you practise family law? Please elaborate on this rating.
  
- 9.) Would this description vary depending on if you were in Provincial court as opposed to B.C. Supreme court?
  
- 10.) Could you name some other lawyers whom you would consider to be family law practitioners (that is, lawyers who spend 60% or more of their time practising family law)?

***Introduction to Lawyer:***

I would now like to present you with a hypothetical case within the family law context. I will read you a short passage which places you, as a family law lawyer, in your professional capacity. Please respond as you believe that you would in a real-life situation.

***Vignette:***

You have been retained by a client in a custody case. Your client is a thirty-seven year old male who owns his own business and has an annual net income exceeding \$100,000. He was married for twelve years and has two preschool aged children. He is obtaining a divorce from his wife, and the interim custody arrangement, which is not a court order but an informal agreement between the two, provides a joint custody agreement where the children spend two weeks at a time with each parent. He is unsatisfied with this arrangement which has been in effect for a month, and now wishes to obtain full custody.

During one of your meetings with him, he provides you with a bundle of documents which inadvertently contains a letter that bears on the fitness of your client to have custody of the children. The letter is not addressed to you but is an open confessional which appears to be intended for his wife. This information is not known and is not likely to become known by the other side. This client furthermore provides approximately 30% of your firm's income through his business. Although he has not said it, you know that he will take his business elsewhere if you do not proceed as he has instructed. Given the following, how do you handle the case?

A) The letter discloses that on occasion, your client has had a problem with alcohol. He admits that his job is very stressful, and that once in awhile, he needs to have a couple of drinks to calm his nerves. However, the letter describes two isolated incidents where while under the influence of alcohol, your client has become somewhat violent resulting in some notable bruises and scrapes on his children. He swears that it has only happened twice, and that he is currently seeking help from a local Alcoholics Anonymous group.

B) The letter discloses that on occasion, your client has a problem with alcohol. There have been two violent episodes where the children have been beaten resulting in notable bruises and scrapes. Your client refuses to seek professional help, arguing that it may damage his business reputation if discovered by the wrong people. He says that he is dealing with his problem on his own and that everything is under control.

C) The letter discloses that your client has a problem with alcohol. There have been several violent episodes where the children have been beaten resulting in a few trips to the family doctor for medical treatment. There have also been reports from the children's school teachers claiming that their school work has been suffering and their appearances often suggest extreme fatigue and even physical strife. Your client refuses to seek professional help, assuring you that he can handle the problem on his own.

D) The letter discloses that your client has a serious problem with alcohol. On many occasions, he has become very violent with the children. A number of these times, the children have ended up in the hospital with broken bones and external abrasions. While there has been some suspicious doctors, no formal investigation has been undertaken, and therefore there is no proof, aside from the letter, that he has physically abused the children. He refuses to seek professional help, and argues that the letter has made the problem sound much worse than it actually is.

E) The letter discloses that your client has a serious drinking problem. On many occasions, he has become extremely abusive with the children. This abuse has been both physical and sexual. While your client's disposition is consistently professional and demure, it is apparent to you that his problem with alcohol is severe, and a custody decision in his favour would be extremely dangerous for the children. Your client refuses to acknowledge that there is a problem, and instructs you to disregard the letter and get on with your work.

***Final Questions:***

Generally, do you think you approach your job any differently from your male/female colleagues who practise family law?

Do you think that the increasing number of women who practise family law has/is changed/changing your job? If yes, how?

***Personal Information:***

Year of Birth

Year called to the bar in British Columbia

Number of years practising as a lawyer

Size of firm/Sole practitioner

Percentage of time practising law that is spent on family law.

Percentage of time spent practising family law on provincial court matters.

Percentage of time spent practising family law on B.C. Supreme court matters.

Undergraduate degree, major, minor.

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