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Authors

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THE 1984 JAMES MCCORMICK MITCHELL LECTURE

Feminist Discourse, Moral Values, and the Law—A Conversation*

ISABEL MARCUS,¹ PAUL J. SPIEGELMAN²—MODERATORS

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CATHARINE A. MACKINNON,⁶ CARRIE J. MENKEL-
MEADOW⁷—CONVERSANTS

Spiegelman: In my two years as chairperson of the lecture committee, I have tried to open the law school community to new voices. I am particularly excited about today's program because we have never had a woman before as a James McCormick Mitchell lecturer. Today, five women share that honor. I firmly believe a program of this sort is not a women's program in the sense that it is "for women only." I think feminism is at the cutting edge of positive social change in this country. Accordingly, this is to be a program in which we all will be challenged by new ideas and provoked to reevaluate old ones.

Marcus: I want to tell you a very small story about the origin of this whole enterprise. Two years ago, Carol Gilligan came to this campus during the summer and gave a community lecture. Marjorie Girth and I were sitting next to each other. As Carol began to talk, I turned to Marjorie and said: "Now I understand at a new level why I felt so uncomfortable in law school." At that point, I had the strong impulse to run up to Carol Gilligan and

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say: "Please come back, please come back during the academic year to talk in the law school. Your work demonstrates that you have something terribly important to say about legal education." As I began to think about a discussion concerning the law, and feminism, and politics, and moral values, and consulted with Paul, our horizons expanded. Paul and I began to think that rather than simply have one lecturer in a formal mode, and in a very traditional format, that it would be appropriate to have a series of conversations. Feminist discourse has moved away from the simple, formal presentation of papers. There are very complicated and sophisticated and explosive issues that need to be discussed. There are people who feel very strongly, and are very brave and courageous, on all sides of the issues that feminism has raised. Rather than have a single presentation, it would be more appropriate at this time to have a conversation which would raise some of the complicated issues of equality and difference and would explore the connection between theory and practice.

One of the reasons I have great hopes for this morning's conversation is that we have two people who have been engaged both as theoreticians and in the world of practice. We have Mary Dunlap, coming in from California, who has taught in law schools, and who, as a practitioner, is a founder of one of the first feminist public interest law firms in the United States: Equal Rights Advocates. And we have Catharine MacKinnon, whose official affiliation is with the University of Minnesota Law School. Not only has she written significant pieces of feminist jurisprudential theory, she also has been involved in the drafting of legislation and litigation.

Dunlap: I am delighted to go first. I am delighted to be here at all. I am thrilled by the energy that Paul, Isabel, and others have put into coming together today, and by the devotion of this lecture series to feminist issues. It's exciting. It's exciting to be able to address these issues, and to differ openly about them—which we will be doing today—to air our disagreements, to learn from them, to move on from them, and to work together from them.

The title of this morning's conversation, "Feminist Discourse, Moral Values, and the Law," raises a sundry set of definitional problems which I am going to completely skip over. You have to watch out for that—that's the prerogative of the self-proclaimed

practitioner; when things get really tough in this type of forum they say, "Well, I'm a practitioner." That's one way of standing the heat. The fact of the matter is that while I am a practitioner, I am just absolutely opposed to the distinction between theory and practice that historically has enabled practitioners and theoreticians to hide from each other. I hope that my theories (to the extent that I have them) and my themes will have some integrity in terms of the theoretical models that we will try to work with. But I am not going to spend a lot of time defining them. It raises a question for me: Are there moral values that emerge from or can be defined in the confluence of feminism and law? Are there ways of analyzing the feminist contribution to justice that define themselves morally? And in order to figure out whether there are, I tried to break up or describe the areas in which feminists have been most active in law as a means of trying to determine what is behind that activism, what is beneath it, what is within it, and what part of it is distinctively or even tangentially moral in its content or in its resolve. It seems as if (this is my impression based on about fifteen years of watching and being involved in it) feminist legal activity clusters around certain issues. I'm going to propose four clusters. You will immediately see that these are very fluid walls and that any of the things I put into one of these clusters could readily be attached to another. I offer them not because they are some kind of hard and fast way of analyzing the contribution of feminism in law or of pulling out moral values, but rather as a convenient and descriptive way of (1) taking into account what we have done, and (2) seeing what our priorities are—moral, political, ethical, and personal priorities.

The first cluster I identify is a "physical health" cluster. That cluster would include all of the work that feminists have done and are doing in relation to bodily choices—choices about sexuality and sexual orientation and family and personal partnerships. I did not have to put all that under physical health; I could have as readily put it in one of the following clusters.

Next is the "money" cluster. The money cluster involves feminists' work in matters of equal pay, comparable worth, property, benefits of employment, ownership, and control of the material means to equal opportunity.

Still, that is not enough. These clusters, as sloppy as they are, as capacious as they are, are not yet sufficient; they do not yet take

into account everything we have done. So we add the "violence-empowerment" cluster. I would suggest that to the extent this cluster overlaps with the physical health cluster, it also includes domestic battery, rape, sexual harassment, incest, homicide, and self defense.

Still, we cannot stop there. That is not yet descriptive of all the work the feminists in theory and practice have been doing and are doing and are continuing to do in the name of feminist values, moral and otherwise. So I have a fourth cluster, a "creativity" cluster. (Any resemblance to the miscellaneous docket of the Supreme Court should be set aside because inclusion in that category has always been kind of a "put-down"; if you're in the miscellaneous docket, you do not "fit anywhere else.") This fourth category is as difficult to define as it is because I think all of these issues that I am about to identify sometimes get neglected for one reason or another—issues of educational opportunity, athletics, women in art, women in religion, women in philosophy. Lawyers have to do a little with everything and do everything with a little knowledge, we are told. As one reads, or as one perceives, feminist involvement in law as an agenda, it is plain that such an agenda encompasses every realm of our lives, every aspect of who we are, who we are becoming, and what our experiences are.

Having offered that description, I pondered: "Well, have I helped myself at all in trying to isolate or express or define the moral values that operate in relation to feminist work?" I think I have, but there are some problems, so I want to offer those. Then we are going to come back to what these categories seem to suggest or in some cases spell out about the operating world values.

If you pose the question as, "What have feminists done with, or in, or through law?," right away a tremendous relativity attaches. There are those whose answer is: "Well, isn't Sandra Day O'Connor on the U.S. Supreme Court?" That is their full and sufficient answer. I think such an answer is founded on two erroneous premises—maybe more, but let me offer two. One error is that all women are feminists. Although one would love for that to be true, regrettably it is not. The second error is that to measure the progress of feminists in law one should count how many women rise to the top. I suggest that some of the more popular measures of what feminists have done with and through law are not going to be very useful to us. Some (including people with a

more informed position on the "feminism" of Sandra Day O'Connor) have gone so far as to measure the progress of feminism by the number of women enrolled in law school. I submit that the most telling measure of how feminists have done in law and what we have done in law is how women are treated in the legal system. What happens to the woman client, plaintiff, or criminal defendant? What is the experience of a woman in the court, in the legislature, in those political functions that are related to the creation and perpetuation of law? When I offer that definition of law I think of Aaron Burr. Aaron Burr offered a definition of law that is very hard to get around. He said that law is that which is boldly asserted and plausibly maintained. So with that definition of law in mind, it seems to me that the most satisfactory question for measuring the progress of feminists, and feminism, and feminist values in law is: "What is *happening* to women in law?"

Now, let us go back to these "clusters." I cannot possibly pretend, in the time that I have, to assess, to describe, or for that matter to evaluate, morally or otherwise, all of the changes, progress, regression, and differences between then and now. I cannot pretend to say everything that feminists have done in each of these areas and then say *how* we have done. Instead, I am going to offer some observations about what I believe the operating moral themes are. Then I am going to come back to a few specifics that I think will be illustrative, although not necessarily fully descriptive.

There are moral themes in the physical-health cluster that appear again in the violence-empowerment cluster. It seems to me that at the heart or at least part of the heart of those clusters is the idea that harm and pain and hurt that are gender-correlated must end, must be prevented, must be remedied. For a woman to live in this society is for her to be in danger on account of her sex, in danger from deprivation of procreative choice, in danger from rape, in danger from those environmental hazards that are sex-correlated, whether they be lead battery plants or any other thing. Those kinds of sex-correlated violence, thoughtful and thoughtless alike, must end. That is a moral value. That, I would also suggest, is a moral imperative and it characterizes much of the work that has been done in some of these areas. And another moral value is the idea or notion of equalizing opportunity. (I propose it as a moral value although it is many other things as well.)

It is bitter but it is not embittering that the term "equality" shall have been misused so much and so often in such a way as to mislead and to suggest that a woman who is not being treated equally at work ought to *think* she is being treated equally at work and that happens—and it happens a lot. Nevertheless, I do not think it is sensible to abandon the equality principle. I want to talk about the equality principle as a source of moral directions, if not of moral values, a little bit later on.

Let me go back and say something about numbers. I said rather harshly before that counting heads seemed to be a rather inadequate measure of the progress of feminism and the effects of feminism in law and in life. At the same time, it's clear that our ambitions as feminists in law are very much affected by the realization that a little bit less than ten years ago the enrollment of women in law schools began to increase in a measurable way. In the 1960s, less than two percent of the licensed legal profession was female. When it came to judges, you could divide that percentage in half; when it came to the law professors and legal scholars, you could divide it in thirds. You would find two or three people out there, and you would attach yourself to them; they would be mentors (or womentors). But again, the measure of the progress of feminism is not the number of women in traditionally male fields. However, although not every woman is necessarily a feminist, *there is a substantial correlation*; similarly, and furthermore (and this is more painful), although not every man is a sexist, there is an overwhelming correlation. And, in another way, every man *is* a sexist—in the same way every white person, every Caucasian is a racist. And in that respect I think we have to stay tuned to the proposition that there is going to be another layer of evaluation here. We must not look to the experiences of women in the courts—rather, we must look to the legal system in general (a hang-up of mine is to overlook the fact that the legal system extends far beyond the courts)—to have them describe for us what they have experienced and how they have not been treated equally, and how their suffering with sex related violence has not been prevented, remedied, or otherwise treated. Along with that, we have to do something a little different in evaluation. I propose that we have to suspend the idea that the woman's account of her experiences must be corroborated. If I stand up in any group that is trained in Western objectivity and discuss a woman who has de-

scribed to me that she got “fucked over” in court, the reaction will be: “Well, what do you think?” or “Well, what does so-and-so think?” or “Well, what did the judge think?” But let us put all that aside for a moment (although it is important); let us just listen to *her*. When we do that, we discover that in the last fifteen years, in all these areas or clusters that I have described, we have both succeeded and failed—succeeded and failed, that is, by the measure of the voices of the women who have gone through it, who are going through it, and who are subject to it. In every one of these realms, for every glowing account of a positive experience in the use of the legal system, we certainly (if we are honest) can array many descriptions by women of negative experiences.

If the measure is not equal opportunity, to prevent and remedy the sex-correlated harms, then what have we accomplished? Can we be proud of attaching our sense of our life-worth, our definitions of ourselves to feminism in law? Or is it a contradiction in terms as some propose? Well, I do not accept that, because it would make me so sad to accept it, and I will say that honestly.

There is another reason that I don't accept it. I teach a class at Golden Gate in San Francisco in gay and lesbian rights. We are in about the seventh week of it, and I find that I have brought in all this material and immersed my students in one truly indescribably depressing result after another: criminalization as a norm, the deprivation of every right from thought to breathing. I looked up at them and I said: “I'm doing a lousy job of teaching. You know why? Because I'm telling you everything that is happening out there and I'm conveying it all to you, but there are two things I am not doing. One is I am not pointing out any reason why you should not stay depressed and give up—and there are some. The other is that we are not together trying to figure out how to do something about this. This course is not sufficiently practical.”

In the same way, I am going to be dealing with some of that frustration here. I do intend to give and not to mitigate all the bad news. At the same time, I think we have to look, if only to maintain momentum, at the parts of what we have done with feminism in law that have moved us forward. One is that we are here. This is a first that I am really glad to be a part of. I am only sorry that it did not happen a whole lot earlier. That is the bitter side of firsts.

Just the fact that we have prioritized and gotten as far as we have, just the fact that there is so much vital activity in each of these clusters, just the fact that women are in court and are being heard—sometimes, at least—in a different voice makes a difference. It makes a difference in the same way that I told the students in my gay rights class: “Just the fact that we are here matters.” The fight to get that course in that, or any other, law school was phenomenal. Along with being ruthlessly critical of ourselves (as I think we must be), I think we also have to step back and say we are here and we are asking these questions and we are unlikely to treat the issues that we are raising in the same callous, disregarding way that the system historically, and most men historically, have treated issues of sex and sexuality.

Now, I want to take a position here, clear the air, get the morning going—“jump in.” All the rest of this may be seen as very soft, but now it’s going to get hard. Here is my position. I have to find it in my notes. [Laughter.] No matter how strongly held it is, I want to say it right. It has to do with these clusters, and with enjoying equality in opportunity, ending sexist violence, healing, being freer, and having opportunities that are sometimes not even imagined. Like the Olympics. When you watched the men’s events, did you, from time to time, think that women could be doing that, too? And you sort of said: “Hey, it’s neat watching the Olympics, but what’s this?” Or maybe you even had a World Series wrecked for you by thinking that thought. Maybe somebody sat next to you in front of the television and said: “Well, that’s very fine, a World Series—but where are the women?”

What I want to say is that when we consider redistributing the power and the resources and the strength (materially, physically, spiritually, and every other way you can redistribute resources), there are several options. One is the option of erring in favor of equality over other approaches. One (and a very common option it is) is keeping the status quo, because changing it seems all too hard. Underlying that is the belief which is, if not widespread, at least common enough that it rears its ugly head with some regularity: the belief that men are better. “Tough luck, honey. That’s the way it is, because men are better. Men are stronger, men are smarter, men are this, men are that. Yes, women are this, and let’s say some nice compensatory things about the girls, but society is the way it is because men are bet-

ter.” That is another response to the question of redistribution of resources. It is very real, and I suggest to you that, although we do not like to think so, it has a lot of adherents, both casual and die-hard.

So there is the equality approach to redistribution and there is the “men-are-better” approach. Let me suggest to you that there is the “women-are-better” approach. The “women-are-better” approach commends itself to those of us who want to believe that we are better. This is something we want to think when we look at the stuff that we identify as being correlated with men—and I can talk from cruise missiles on up and down. But people tune us out if we say: “Everything we see tells us women are better. We do not want equal distribution of the resources, we want to be in charge. We merely want our turf. O.K.?”

Now, it’s crucial to remember that whether or not one is loyal to the principle of equality does not necessarily depend on one’s beliefs. Lots of men buy the status quo because they believe they’re better. Other men say in the backs or fronts of their minds: “Well, she is really not going to do that well, but we will give her a chance.” What I am saying is that when all else fails, we should try at least to equalize opportunity. Let us see if we can reduce those instances of wrong that are correlated with gender. This, I suggest, is an integral part of the equality model. And that process is not necessarily precluded by one’s belief that one gender or another is “better.”

I want to offer an illustration. A very popular stereotype is that women are compassionate healers, that we are the ones to fix things and nurture. Now the temptation is to discard the stereotypes. How sad. Some of those very same values—nurturing and compassion and healing—are precisely what is making feminism have its best and greatest impact in a long time. We cannot afford to defy the patriarchy in the same way that one defies an abusive parent—“*everything* you say or do is wrong,” and “*everything* we have said and done that makes you think we are a certain way is wrong.” We cannot permit this. As to the operation of moral values through feminism, I suggest that we, those of us who are feminists, men and women alike, are challenged to choose, from all of the imagery, that which is closest to what we believe, care about, and can move forward through our minds and hearts and everything we have to offer. It is terribly important not to get caught in

the categorizations in either direction. Categorizations are whipsaws. "Oh, women are more emotional than men." This one I always love. The last time I heard somebody say that seriously, the person was a male law professor ripping the microphone cord out of the wall while it was malfunctioning. The problem with that is, if you get offended by it, you are getting offended by emotions. Do not get offended by emotions—we need them all. We need the full range of emotion. In court we need anger (wow, do we need it). We need compassion. We need tenderness. We need all the things that make the legal system, or could make the legal system, more of a healer and less of a slayer. And those values I suggest are feminist. They are not necessarily female, but they are feminist—and I think that the challenge is not to live up or down to anybody's stereotypes. That is a very real challenge.

So I have taken my position on that. I am in favor of equality; I do not favor supremacy even as sweet as the vengeance would seem. No! I confess that. I favor equality because I think it's going to move us all toward a better place for people—for women, who are my first priority, and for men, who are my other priority.

MacKinnon: I am really glad to be here to have what is openly billed as a dialogue within feminism, particularly as it is clearly premised on a rather unusual assumption: All women are not the same.

I want to talk about the terrain of feminism, which has to do with relations between the sexes. I want to speak in particular about this principle of equality that Mary alluded to, and make reference to some particular legal applications in the doctrinal area of sex discrimination, which is (supposedly, at least) one area of law where the equality principle is fielded.

One question that feminism poses is: "What is the gender question a question of?" I see two answers. The first answer has historically been the politically dominant, legally and conceptually: The gender question is a question of difference. There are two options under it. The first option I call the "male standard": Women can be the *same* as men. In law, it is called gender neutrality. The other option I call the "female standard": You can be *different* from men. In law, it is called special protection. These bear a remarkable parallel resemblance to the masculine and the feminine.

The other answer to the question, a dissident view from the

dominant mainstream legal and political position and discourse, is that gender is a question of dominance. In this answer, the issue of discrimination or inequality is not centrally one of accurate categorization, as it is in the first. It is one of hierarchy, the top and the bottom of a hierarchy are different all right, but that is hardly all. One part of the distinction is dominant, and the other part of the distinction is subordinate.

From this second standpoint—which is my answer to the gender question—we see that the two standards in the first answer are two different versions of the male standard. If you see gender as a hierarchy—in which some people have power and some people are powerless, relatively speaking—you realize that the options of either being the same as men or being different from men are just two ways of having men as your standard. Men are set up as a standard for women by saying either: “You can be the same as men, and *then* you will be equal,” or, “You can be different from men, and then you will be *women*.”

This runs right through sex discrimination law, with a parallel in race discrimination. Just as men set both of those standards according to a standard of masculinity, and just as that standard is the standard of power and the standard of human, as well as the ruling definition of equal treatment (which is to say, “sameness,” “same as,” suppresses the fact that the referent for the “same as” is *men*), white culture sets the standard of racial equality according to a standard of whiteness. That standard too, suppresses its referent; to define racial equality as based on “sameness” is, in a white supremacist society, to establish white as the standard by which one is assessed the “same” or not. Due to the political struggle of Black Americans in this country, people are more used to thinking about equality in terms of race. With race you also either have an implicit sameness standard or you understand that what you are dealing with is white supremacy. Similarly, with sex we either have a difference/sameness approach or we understand that what we are dealing with is male supremacy.

In my opinion, to take the differences approach is to take a moral approach, whereas to criticize hierarchy is to take a political approach. To take a differences view is also to take a liberal view (although that view, of course, includes conservatism as well), and to take the view that we are dealing with a hierarchy is to take a radical approach. I also think that to make issues of gender turn

on the so-called gender difference is, ultimately, to take a male perspective. I therefore call the differences approach masculinist. The position that gender is first a political hierarchy of power is, in my opinion, a feminist position.

Now I am going to talk in some detail about the differences approach: the question of gender as a question of difference. The problem it targets is actually very important—having been entirely hard on it so far. I think its problem is how to value what women are, have been, have achieved, have become—while also demanding that we should get access to everything that we have been excluded from becoming, being, and having. The way this approach works in law is by conforming normative rules to empirical reality. In other words, you try to make your rules track a gender line which is accurate and real in the world. When it asks that we make categorizations that are fair, it means that we should treat likes alike and unlikes unlike. You will hear echoes of Aristotle in both the mainstream Supreme Court sex discrimination doctrines and in the work of most feminists. (In this I include, for instance, Wendy Williams' work. I also think it is a perspective implicit in some of the things Mary has said, although I do not mean to imply that she is necessarily going to want to defend it when I am done.) Legally, this standard runs under the rubric of gender neutrality. The real impulse behind it is: We're as good as you. Whatever you can do, we can do. Just let us do it. I have to say I really feel a lot of affection for this, the impulse behind the single standard. Set your standard; let us meet it. This view expresses a fundamental motive force behind most feminism, particularly in law: Just let us be persons. In athletics, it's: just let us compete. In academic and professional areas, it's: you define what merit is, we will meet it. In non-traditional jobs, in which I include lawyers and blue-collar workers, it's: you want thirty pounds lifted; watch us do it. You see it in the firefighting cases, the police cases, and so on.

This approach also underlies one side of the debate about the draft. Implicit in, "We can fight too," is, "What's the matter—don't you want us to learn to kill?" You see how much women just want to be members of this society when you try these cases. In my practice it really is moving to realize how much women just want to do the work. The draft issue is similar: wanting to pay the full price of citizenship. Imagine having to fight for

that. To be against the draft means going to jail, too; why shouldn't the consequences of my choices count like yours count?

The first drawback of this view has been that it does not deal with what are taken to be real differences. There *are* some. For instance, pregnancy, an ability which some women have and all men do not. They lack it. What this means is that if one enters a world in which the standard is already constructed according to an implicit but suppressed male referent, you have a marketplace structured according to a male biography, a male-based series of social expectations, wherein only those women who are the most like that are the same as that, and therefore have a right to be treated equally by this definition of equality. There is no critique of the standard itself as gender based. Only women who are most *like* the male norm are advanced or advantaged by this notion of equality—as women of the right have tried to point out to those who have been willing to listen. Another disadvantage of the sameness approach, which I will articulate in expressly feminist terms, is that what we get in these cases—the athletic cases, the academic cases, and so on—is the right to pay the price of admission that men are supposed to pay but often do not, simply because they are benefited by that affirmative action plan for white men otherwise known as American society.

There is, however, a deeper critique of this standard: we can play with the boys but we cannot question competition as a measure of merit. We can think but we are not allowed to question objectivity as the measure of what we know. We are allowed to compete but we are not allowed to question competition as the test of accomplishment. Nor do we get to criticize conflict as a peculiarly ejaculatory means of conflict resolution.

I have talked about the sameness standard—what it gets us, what it does not, what we (or I, anyway) feel moved by in it, where it lets us down. When I read women's accounts of struggling with the decision of whether or not to have an abortion, I see how the sameness standard has let women down because there is no moral equivalent to abortion in the life of a man. The sameness standard has also let women down with regard to comparable worth. That is why we are having such trouble with it: There are no men around to compare with. They have other alternatives. How do we determine what equal treatment is if there are no men around to be made equal with? In the comparable worth cases, the strug-

gle is to find men to be comparable with, when, because of sex segregation, men do other things, better things.

The other alternative the differences approach gives you is to ground equality claims *in* difference: "We are different from you." We want this difference equally accommodated. Legally, this has been codified as the special protection rule in sex discrimination law. It does not have to be limited to that. That is what it has meant, however, in men's hands. Women say: "We want to be taken on our own terms." Male-supremacist logic transforms that to: "You want to be treated as a woman," and men define what a woman is.

Having said what the single standard does for us, I would like to say a couple of things about what the double standard has done for us. Well, there were those protective laws that said all those things we could not do and all those stools we had to have to sit on, and how our reproductive organs would be abused if we were to work X number of hours.

Dunlap: Much less, if we were to run free.

MacKinnon: Yes, much less to actually run. But not corsets—not to mention what those did to our reproductive organs—or those shoes. The double standard, however, has obtained three more years for us to work for advancement in the military hierarchy before we had to be booted out or advanced up. It obtained for those women who were able to inherit money from men, in the state of Georgia, a certain percentage tax break to the tune of Justice Douglas waxing eloquent about economic discrimination against all women. In the past it has gotten us the maternal preference in custody of children—no small thing, children being one of the few "things" women have ever taken away from men, from the time when children, with women, were regarded as male property. It got us exclusion from contact prison guard jobs in male-only prisons because we might be raped. I call that looking at women from the standpoint of the reasonable rapist—adopting *that* as the standard for women's employment, as equal protection of the laws.

"Slippery slopes" work if you are liberals and you are in the position of being able to push people down them, right? When something would help us, they say, "You can't have that; that's the start of a slide down the slippery slope." I think women have already slid all the way to the bottom and are trying to crawl up.

The fertility protection gambit is a way to protect women *out of* jobs by making the potential interest of a possible fetus and the fact that that fetus might be legally real enough to sue them, might have some legal rights later, a reason for recognizing no legal rights to jobs for women *now*. This is the kind of thing that the double standard has gotten us. It has helped us, essentially, either to protection or to exclusion, which have amounted to the same thing. We've found out that this protection is a protection racket in which the "protectors" can violate us at will. And exclusion means that the minute you say, "I would appreciate it if you would take my particularities into account," they are very happy to take them into account by making sure that your particularities are nowhere around them.

The double standard is rather beautifully articulated in Carol Gilligan's book, *In a Different Voice*. Again, I do not mean that the only way one can accommodate the perspective that women have something distinctive to offer social life is by a double standard under discrimination law. The importance of the recognition that women are different has had to do with valuing women's experience—not only the experience of relatedness, responsibility, and care virtues, but also the experience reflected in the following insight, which is the impulse behind the discipline of women's history in many respects: "Wait a second. You may have defined history as wars, empires, governments, and so on, but we were there, too." This insight is effective only if you count what we were there *for* and what we were *doing* there, and only if you can see that other things are going on in society besides those things that men have measured as valuable. Women make history. Quilts are art. Those gardens are expression and creativity. A shorthand way of saying this is that, men notwithstanding, man is *not* "the measure of all things."

Up to now I've been talking about one answer to the equality question—the "difference" answer. I have not talked about who has power over whom, although there has been a sensitivity as to who sets the standards. In the view I have just characterized, we saw gender as a *difference* first and as an *inequality* second. In this second view I am suggesting, gender is a question of inequality first. The question is not so much how to make rules fit reality, but rather how to change reality. This perspective, this dissident view, criticizes the empirical world and the standards that are part

of it. It criticizes the standards that set us up to be either the same as men or different from men; it criticizes the requirement that we have to define ourselves in terms of men. Its agenda is one of explaining and criticizing what women have had little choice to become, in order to change it.

Here I should quickly supply some facts. Consider that thirty-eight percent of young girls are sexually abused as children by older men in their dominant family unit with whom they are close. That is true for ten percent of boys. (Gender comparisons of little kids are about the only ones that make sense.) About forty to forty-four percent of women are either raped—in the usual legal sense of the word, not including marital rape—or are victims of an attempted rape. Around eighty-five percent of all women are, or have been, sexually harassed in the workforce at some point.

DuBois: Could you please cite your source?

MacKinnon: The bibliography appears in volume one of *Law and Inequality: A Journal of Theory and Practice*,⁸ my debate with Phyllis Schlafly. One source that does not appear there is Diana Russell's latest article on child sexual abuse, in which she found that thirty-eight percent of all girls are victims of child sexual abuse.⁹ The battery figure for women is between one-fourth and one-third. As for prostitution—as far as we can tell (statistics are hard to get a hold of, for reasons that are obvious)—apparently about twelve to fifteen percent of all American women are, or have been, prostitutes, by which is meant they make or have made their living more-or-less exclusively through the sale of their sexuality. The data on economics is also well known: a woman makes fifty-nine cents for every dollar a man makes, and that gap is widening. The segregation on jobs, too, is well known. And, the pornography industry, an excellent example of the dominance model, makes the sex difference sexy to the tune of \$8 billion a year in entertainment. One manifestation of being a member of a degraded group must be that people call your torture and humiliation entertainment and pay a lot of money to enjoy it.

Few people, I have found, even Phyllis Schlafly, are interested

8. MacKinnon, *Excerpts from MacKinnon/Schlafly Debate*, L. & INEQUALITY: J. OF THEORY & PRAC. 341, 351-53 (1983).

9. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 CHILD ABUSE & NEGLECT 137 (1983).

in calling this picture the sex difference. Is it the sex difference to be targeted for rape, to be sexually molested, to be set up to be bought and sold, and then to be trivialized and humiliated, passed around, patted, put in place, and told to smile about it? None of these issues are traditionally seen as equality issues. Isn't that interesting? I think that is partly because, when these issues are seen at all, they are seen as issues of force, and sex inequality is *not* seen as an issue of force. Racial inequality, by contrast, *is* seen as a question of force, not just as a question of racial differences.

What this all means is that women are a subordinate group. And nothing is being done about it. Really, nothing. This abuse is passing unacknowledged as the sex difference, while the issues that are litigated as sex discrimination issues are seen as differentiation problems against a reality which is fundamentally equal. The practices I just described are that reality. Dominance and submission made into sex, made into the gender difference, constitute the suppressed social content of the gender definitions of men and women.

When you look at that, it makes a lot of sense that women might have a somewhat distinctive perspective on social life. We may or may not speak in a different voice—I think that the voice that we have been said to speak in is in fact in large part the “feminine” voice, the voice of the victim speaking without consciousness. But when we understand that women are forced into this situation of inequality, it makes a lot of sense that we should want to negotiate, since we lose conflicts. It makes a lot of sense that we should want to urge values of care, because it is what we have been valued for. We have had little choice but to be valued this way. It sure would be nice if somebody would care for *us*. Women of the right speak particularly strongly about values of responsibility. They are responsible; it would be nice if men would live up to their end of the bargain. It makes a lot of sense that women should claim our identity in relationships because we have not been allowed to have a social identity on our own terms. As to whether these values are women's, possessive, voice, I think that women's silence—and, for the same reasons, the damage to women's sexuality—goes deeper than the absence of words; it is the absence of life, of the ability to live in security or wholeness—hence, the inability to articulate or to express. This prior absence does affect questions of morality. If the first problem of

inequality is the problem of the subordination of women and not the inaccurate differentiation between people on the basis of sex, it is inappropriate to discuss the reality or proposition of treating women as sub-human as a matter of good versus evil. Appropriate, instead, is an argument and a discussion about empowerment, about power. Gender then becomes a question of how people who do not have power are going to get some, and how people who do not have a voice are going to be able to speak in anything other than a male voice in a higher register. It is about how this romance with gender, elaborately played out as either sameness or difference, is going to be turned into something that is *not* going to look like our freedom to be feminine, which keeps us where we have been placed, but rather like something which values us for what we are without keeping us there; *not* our freedom to be masculine, but our right to have access to everything men have always kept for themselves whether we do with it what they have done with it, or not.

The freedom we have is so small compared to the kind of freedom that we could have if we transformed this society, if we were able to get this foot off our necks. If somebody has got their foot on your neck, what do you do? I don't think you negotiate. I don't think you compromise. I don't think you even address the foot on your neck in your own voice, such as it is, and attempt to persuade it to move off. You try to figure out how to get it up off of you so that you can, among other things, have something to say.

Marcus: We have two choices here: We can have the present conversation continue or we can bring in new people. I would like to be able to carry on a conversation among all of us. Now, in doing that, what I am going to ask is that we talk *with* each other, rather than ask questions simply to expand, increase, or create polarities. I'm not suggesting that we can't debate, but I am asking that questions be asked to *expand* the discourse.

Question from audience: I was really thrilled by the focus of looking at gender as hierarchy. It struck me that there might be a difference between lawyers and other people. What feminism discovered was a way to discuss hierarchy. If we looked at hierarchy in the past, we had to first make analysis between social classes, and then we had to make analysis of minority groups, then nations. Only after we analyzed all the other forms of hierarchy did

we get to talk about gender hierarchy. I felt it was very clearly stated. It put us where we should be. But then I was surprised at the narrowing down of the focus to primarily issues of sex. It seems to me that sexuality is an area of both power for, as well as victimization of, women. I feel also that, at least for many women, the experience of hierarchy is not simply an issue of violence. There are other areas—look at *Good Housekeeping* or *Vogue*—that are as violent to me as the issues that are discussed in the areas of pornography and rape. Every time we deal with hierarchy, must we deal with violence and then right away tie that violence to sexual expression? In my mind, there are problems doing this because I think sexuality can be power for women, though I also think it gets us into trouble. I wondered whether you—since you've narrowed it down so simply—can help us redirect the focus. I'm concerned about this because I think in the long run it represents a very conservative element for the women's movement.

MacKinnon: I don't think that I did exactly the narrowing that you said I did, although in the data that I cited, which is about reality, I did select indications of sexual violence. I think that those indications are not episodic. They are data that structure a world in which women live with the constant possibilities of sexual violence. By violence I mean both the narrow form and the broader form of violation involved in essentially being defined in terms of sex all the time. And so, yes, I did mean to narrow the focus, but I did not mean to make it seem as though the only events that are relevant to the construction of a subordinated gender status have to do with those particular moments in which we can see that delivered in its most forcible form. Consider the data on lynching. The percentages are one thing, but the fact that Black people walk through life knowing that at any point that can happen to them—and that nothing will be done about it—is as crucial and as central a point. It is how racism works as terrorism. All women are also targeted as women. Women deal with this in a lot of different ways. Among the ways that women deal with this is denial—just in order to get through the day. Another way women deal with it is to eroticize it. In fact, one not very pleasant way of looking at what is often described as women's sexuality or female sexuality all the way through the masochism tradition is to suggest that it is the eroticized response to our subordinate status. In

other words, it suggests that part of women's stake in gender is our own sexual pleasure, as that has been socially constructed in us. What if sexually oppressed people sexualize our oppression? I mean to say it that way in order to extend it into its softer forms. And I do think of myself as a feminist first and a lawyer second.

Dunlap: A couple of things. I appreciated your observations, particularly about gender as a hierarchy. The last time that someone attributed the sameness position to me was in a debate with Phyllis Schlafly. Ironically, I have never taken the position, and I believe Wendy Williams has not either, although she can defend herself. (Can she ever!) I have never taken the position that men should define merit and that we then should equal it. Pardon me, but that's crap. I take the position that the values that we are conveying and pursuing are related to gender and at the same time deeper than gender.

Let me see if I can give you an example. One that comes to mind is our relationships with children. Kitty MacKinnon's statistics on child abuse are interesting. Thirty-eight percent of female children are abused and ten percent of males. That by itself ought to tell us that sexist violence does not necessarily focus upon women. Men are raped (I can speak to this, coming from San Francisco and being close to a gay male community that has a facet of violence that goes well beyond rape), men are beaten in the street, called "fags," and killed. This is frequent all over the country. If that is not sexist violence, then I am not quite sure what it is. If the bond among women is based primarily upon opposition to men and a belief that it is only women who can be raped, then, I think, we have missed the boat.

I want to read a couple of quotes that crystallized for me my position with relation to this question about sexuality and the eroticization of exploitive sexuality. The first is from a book called *Understanding Women: A Feminist Psychoanalytic Approach* by Susie Orbach and Luise Eichenbaum. The authors are talking about seeing the future in terms of women and men in relationships: gay, lesbian, heterosexual, bisexual, and friendships. They say about friendships between women: "In friendship perhaps all women will be able to achieve what has begun to be achieved as a result of the women's movement: honest, loving relationships, built not on fear, betrayal, competition, or envy, and not on solidarity in opposition to men, but on sharing contact between

equals, and support for autonomy.”¹⁰

On the specific question of the eroticization of exploitive sexuality or exploitive sexual behavior, I offer a little piece of an introduction to a book that I found tremendously inspiring and well written: *Powers of Desire: The Politics of Sexuality*, edited by Snitow, Stansell, and Thompson. The introduction is I think *apropos* of not just the pornography issue, but, more broadly, the issue of whether we posit narrowly or broadly our reactions to this tremendous factual reality of assault. Do we take care of women as a response? Do we fight back and defend ourselves as a response? Do we make law that affords remedies and options and voices, for example, to victims of incest now seeking restitution and compensation? Do we legislate about pornography? On that subject, or at least anticipating that subject, about a year and a half ago, the editors of this book wrote:

Those who created the modern women’s movement could choose sex because it did not carry the same punitive consequences that it carried for previous generations of women, and we *have*, by and large, chosen sex. This is a victory, one both furthered and truncated by historical circumstance but one, certainly, that we grasped for ourselves, not out of false consciousness but out of desire and the impulse for freedom. This is not to imply that sexual violence does not continue to limit and shape our possibilities. But it is to affirm, at the same time, women’s potential for autonomy and power. We need to do this at every level of feminism, in grassroots organizing as well as in intellectual work. We are on a long march. . . elevating one set of sexual practices over others—from whatever position on the feminist spectrum—as more correct, more fulfilling, or even more sexy only retards this process.¹¹

Here is where I had a concrete problem with Kitty’s position on rape and its relationship to heterosexual sexuality. As I read the articles, and I may have misread them, they take the position (and I see in the pornography ordinances a position close to this) that heterosexual sexuality is most of the time rape, that rape is male, that being raped is female, that women do not rape, men do, and that women are raped and men are not.

The position is then taken (paraphrasing from the “View-

10. S. ORBACH & L. EICHENBAUM, *UNDERSTANDING WOMEN: A FEMINIST PSYCHOANALYTIC APPROACH* 197 (1983).

11. *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 41-42 (A. Snitow, C. Stansell & S. Thompson eds. 1983).

point" article¹²) that, like heterosexuality, in relation to the crime of rape, penetration is not what is wrong with rape. It is not penetration that makes it rape. It is the inequality that goes with the situation that precludes consent that makes it rape. Thus, penetration is not definitive. I then look in the pornography ordinance at the operating definition of pornography and I discover that penetration is at the heart of the definition. Again we may be misattributing views to one another.

Andrea Dworkin has taken the position that the penis is the problem. I want to say something about *The Politics of Desire*, because I don't believe the penis is the problem. I believe that it is very often the source of many problems, but I do not believe the penis is the problem. The phrasing is more than just a semantical problem. Here is an essay entitled "My Mother Liked to Fuck" by Joan Nesley, an activist lesbian. Nesley found herself one afternoon at a workshop on pornography and was thinking of her deceased mother, who loved to fuck:

As Andrea Dworkin's litany against the penis rang out that afternoon, I saw my mother's small figure with her ink-stained calloused hands never without a cigarette held out towards me, I saw her face with a slight smile, so Joan, is this the world you wanted for me, the world you wanted me to have where I should feel shame and guilt for what I like, and what I did for all the years of my life? I fought the rapist and the batterer and I did not give up my knowledge of what I liked. Do not scream penis at me, but help to change the world so no woman feels shame or fear because she likes to fuck, because she likes to fuck men, women, herself, in private, as an adult, (with consent, those are my restrictions).¹³

I agree emphatically with the latter part of what you said. When we narrow our response to these horrendous, hair-raising, important factual descriptions of reality (I will not even contest the percentages—I think, if anything, they are low) to a symbolic attack upon a body of literature and media (some of which is just as sickening as anything can be, some of which is erotic, and not all of which is either), what we do is take on a symbolic situation in which we are by definition *not* directly, taking care of the men and the women who are victims of these phenomena.

Comment from audience: It seems to me that the men that you

12. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda For Theory* (pts. 1 & 2), 7 SIGNS 515 (1982), 8 SIGNS 635, 647 (1983).

13. J. Nesley, *My Mother Liked to Fuck*, in POWERS OF DESIRE, *supra* note 11, at 468-70.

refer to, that were getting raped, were mostly gay men. It seems to me that the issue there is power again—force violence—and that the basis of the inequality in that case may not be gender, but sexual orientation. And, furthermore I suppose that there is a small percentage of straight men that are raped, but then I think we have to ask ourselves who is raping them. If you were to cite statistics that say that the majority of straight men that are raped are raped by women, then I would think we have a problem; but if we can identify that it is straight men that are doing the raping, then I think that the crux of the problem is still the same.

Another comment from audience: More often than not I find myself in a position, at least emotionally, of thinking: “What could be so wrong with female supremacy?” If we are all interested in equality, it seems to me to be really equal, given that men have had power for so many hundreds of thousands of years, that it should be our turn now—let us have our shot at the helm, and then we can talk about equality. For a second “academic” question, which is a little more attuned to the passion that I feel about this issue, I would like to ask Catharine MacKinnon: What do you espouse or what would you advocate in terms of a feminist standard for addressing these inequalities in the law? Are you advocating *one* standard, granting that we have different values, that we have different measures that would obviously characterize the problems at this point? And if you are, are we not going to run into the same sort of problems?

MacKinnon: Some women talk about female supremacy. It is not my position. One of the things you learn by being on the bottom is something that you do not forget: what it feels like to be kicked. So long as your alternatives are only kicking or getting kicked, if you remember what getting kicked was like, kicking may make you sick or it may make you turned on, or you may choose it over the alternative.

I will answer your question, the last one, and I will also talk a little bit about the pornography ordinance which Andrea Dworkin and I wrote and which Mary has taken the occasion to attack. I do urge—as a litigation strategy, as a way of doing briefs, and as a deep implicit as well as explicit argument—that the equality principle can mean that no group should be subordinated to another group on the basis of sex. We could use the term “subordination” *that way*, leaving the gender neutrality glossed the way I just did.

The other possibility is to say straightforwardly (in a sort of “thirteenth amendment” version of what an ERA could look like): “The subordination of women is hereby abolished.” In other words, here we are in this legal system that, essentially, makes differences out of everything, abstract rules out of every substantive thing that it is given. It is an abstraction machine; it splits up and fractures anything. So, for instance, you say to it: “The subordination of women is hereby abolished.” You put it in such affirmative terms that it means *whenever and wherever* such subordination is encountered, something should be done about it; you use the truly forbidden word, the truly obscene word, “women,” in your law. This is not gender-neutral in the abstract sense, for it says the gender-specific word “women.” The initial danger is that it will be interpreted in a way that applies to everything else that looks abstractly like it, raising the question: “If you do anything substantive, how do you keep control?” But we haven’t kept control of the abstract strategies either, and *all* women have gotten very little out of them.

I want to talk now about our pornography ordinance. We made the choice to write a law to give women the ability to take legal action against pornography. It does not empower the state in the direct way that an obscenity law does. In that sense our law does not pose an issue of the state against the people, the way the ACLU would have you believe. It instead concerns people against other people. It attempts to give some people—women in particular, but men, too, who are hurt by pornography on the basis of their sex—a cause of action against the people whom they can prove hurt them. An amazing notion: if there is an injury, there should be a remedy. We decided to define pornography for what it is: something which *subordinates* women. Penetration is not at the heart of the definition, nor is the penis. Pornography is defined as the sexually explicit subordination of women through pictures or words. One of a list of concrete things also has to be there: women finding pleasure in rape, in pain, being humiliated, in postures of submission or display, being tortured or hurt—a long list of particulars. The only reference to penetration actually in there is that of being penetrated by objects or animals. One must also add, however, sexually explicit subordination. This is the pornographers’ definition of pornography. They know what has to be there for it to work. We just described it.

The second part of the definition spells out that men, children, or transsexuals who are used in the place of women also have a cause of action, so that what is made through their use is pornography. This design is actually a new legal approach to the question of inequality in general, and of sexual inequality in particular. It is both sex-specific and gender-neutral. It is sex-specific because it defines pornography as pornography is. It defines pornography in terms of what it does to women, but it acknowledges that what pornography does is make inequality sexy—it reflects an understanding that *whoever* is on the bottom is *the girl*, regardless of whether that person be a woman, a man, a transsexual, or a child. If you look at what happens in gay male rape and talk to those male victims, they know that they have been treated like women. It is part of the insult. If you look at what happens with rape in prison, you know that the one who gets repeatedly raped is the *girl*. You understand that what it is to be female is to be targeted and stigmatized on the basis of your sexuality; you can tell it is a stigma and not just your identity by the fact that when it is transferred to somebody who does not share your biology everybody knows it is an insult. So, the law we drafted defines the harm sex specifically and then says: “If you treat other people that way, that is also an injury.”

I think that anything that functions socially, on an on-going basis, to make inequality sexy can not be dismissed as mere symbolism. To say that this is merely a symbolic attack is to ignore the abuse of women that is directly tied to it. There is nothing symbolic about this abuse or our law's confrontation of it. People are coerced into pornography and assaulted because of it. Pornography is directly forced on people. If the people are children, they develop the same symptoms in later life as if they had had the sex forced on them. To reduce pornography to symbol ignores the documented facts that connect pornography with rape, battery, forced prostitution, child sexual abuse, and sexual harassment. This is not to say that all those things would automatically go away if pornography were eliminated. It is clear we are in a system that needs all of those things and that they are all mutually supportive. But few argue that we should do nothing about rape because it is just symbolic of women's status, and besides it is too hard to distinguish from intercourse, just as pornography is too hard to distinguish from erotica. That is, by the way, the same

line, except with pornography it is easier because you have the real stuff in front of you. With rape, women have to be believed and nobody believes our story about rape because it looks like a story about intercourse. And that is partly because people have been looking at pornography.

Spiegelman: We are now going to have a second conversation between Carol Gilligan and Carrie Menkel-Meadow. It is a great personal pleasure for me to moderate this panel because Carol's research has informed my own work as well as Carrie's. I believe Carol's careful documentation of a different moral voice in the decision-making processes of the individual has profound implications for all of us concerned with the way people relate to each other, to the law, and to society. It gives new meaning to the feminist slogan "the personal is political" because it locates in women's personal experience a morality of care and concern for others which has the potential to transform our polity and its underlying assumptions from the alienated world of atomistic competition to an interconnected world of mutual cooperation.

As the conversation between Carol and Carrie will illustrate, that transformation can begin with a style of discourse different from the adversarial mode which seems to dominate much of our academic and political communication. One of the most illuminating aspects of the interaction between Carol and Carrie is the contrast between its cooperative mode and the more common combative one. Often lost in the heat of conflict and hostile analysis are the opportunities for synthesis generated by the kind of supportive, responsive interchange which characterizes the conversation which follows.

Gilligan: Carrie and I talked about how we wanted to proceed this afternoon, and we thought that we really wanted to have a conversation about the legal implications of different ways of constructing and thinking about resolving conflict situations, moral problems, and so forth. There is a real advantage here for me: My work was not done from a legal perspective, although the law was very present at the beginning stages of my work and raised a question for me which has persisted throughout it. We thought it would be a good idea if I began by presenting a summary of the work that I have done as a psychologist, including recent work which has not been published. We will then have a discussion, in which Carrie (since she is a lawyer) will be centrally involved,

about some of the legal implications of the issues on which I have worked.

I wanted to say at the outset that all of my research in a sense was indebted to the Supreme Court and its 1973 abortion decision. I was a psychologist interested initially in the question of the relationship between judgment and action. I thought that a field that studied conflict—and, specifically, moral conflict—by looking at how people resolve hypothetical dilemmas was fooling itself and that we had to look at how people dealt with real situations of conflict and choice, where people had to live with the consequences of their decisions. It is easy to say what someone should do in some hypothetical place; it is very different if you are *in* the place *at the time*. I was looking for a situation where people were faced with a decision which could have moral implications.

I began by studying Harvard students in the early 1970s who were going to face the Vietnam draft. Then—this should give you an idea of how research goes—Nixon ended the draft. There went my study. I was back at square one waiting for another setting in which to do a study of judgment and action. Then, in 1973, the Supreme Court legalized abortion. The last thing on my mind at the time was the fact that this would bring me into contact with a population of women. Though that question was not at the center of my work at the time, I am certain that my own thinking was very influenced by the resurgence of the women's movement. I began to interview women who were pregnant and for one reason or another were deciding whether or not to have abortions. I did not make any assumptions about whether this was a moral problem or about what the moral problem was, and this was absolutely key to the findings of my work. I did not say, "Well, here you are facing a decision between liberty and life—how do you resolve it?" or, "When do you think life begins and how does that affect your thinking about the morality of your decision?" I simply asked the women: "How did you get pregnant and how have you been thinking about it so far?" As women began to talk about their decision, I picked up moral language. Spontaneously, words appeared like "should," "ought," "right," "wrong," "good," and "bad." And I asked: "When you say, 'This would be the better thing to do,' or when you say, 'This would be wrong,' what do you mean?" As I began to follow the moral language which spontaneously appeared in women's narratives about

decisions that they were actually making, I began to trace the construction of morality implied in this use of moral language. I ended up (I'm shortcutting several steps) calling this "a different voice." I deliberately called it a different voice; I did not call it a woman's voice. I am going to talk later about the whole issue of gender difference as it came into my work and as it appears in the current analysis of findings that my research group has done.

I called the construction of morality I heard a different voice because I was not comparing women with men. Rather, as indicated by my book's¹⁴ subtitle—"Psychological Theory and Women's Development"—I was comparing women with theory. I said this voice is different from the voice that has been described in the psychology of moral development, in moral philosophy, and in the legal and political system which was sitting all around my work. The way in which women were talking about the moral problem in abortion did not fit the public discussion of abortion in this country. In other words, it was *not* construed as an adversary fight between the mother and the fetus. In fact, the whole dilemma arose from the very connection between them. Women perceived that there were two lives that were in fact interconnected. Women who were pregnant talked about the fact that if they took drugs they would hurt the fetus. Here, therefore, were two lives which were by definition interdependent, and connected physically for about nine months. You might ask how long the lives were connected *psychically*. The women sometimes said eighteen years, sometimes twenty years, sometimes forever. They asked, in effect, whether it is responsible or irresponsible, moral or immoral, to sustain and deepen an attachment under circumstances in which you cannot be, for whatever reason, responsible, and in which you cannot exercise care? Where they decided it was not, they sometimes then concluded that abortion might be the better thing to do—it would not necessarily be a good thing to do, nor the right thing to do. There was seen no "right" thing to do in this situation. It might be, however—and I quote from women just picked at random—"the lesser of two evils," "the better of two things," "the more responsible thing." If you are interested in all the kinds of ways in which that has meaning, I provide

14. C. GILLIGAN, IN A DIFFERENT VOICE—PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

a lot of examples in my book of how that construction was worked out and how it changed over time, and of the various things that women meant when they said “care” and “responsibility.” But the main point was that the assumptions that underlie the “justice” approach or the “rights” approach were not being made, and in fact were being seen as a distortion and a deformation of the situation. Women realized that to say that they thought pregnancy meant a life, developing through time—if nothing intervened, accident or biology—into a child, meant that you could not bring the issue into the legal system. To enter the legal system, therefore, women had to act as though they did not know things that they felt they knew, and that they did not in a sense understand issues of connection which could not be represented within the adversarial-rights model which pitted one life against the other. I was therefore talking about a voice literally different from the voice represented in psychology, from the voice represented in moral philosophy (that psychology was wedding itself to), and from the voice that was represented in the legal system. I began to say: “Let us explore this difference.” At this point I noticed that women had been left out of the psychology research samples; the interesting thing is not just the absence but also the fact that neither I nor so many others had noticed it before. It is such an enormous design flaw. How can organizations such as the National Institute of Mental Health and the National Institute of Child Health that pride themselves on reviewing research, have funded, year after year and for incredible amounts of money, studies that had all-male samples and never have seen this as a design problem? While we might not be able to say whether a study *concept* is good or bad, we certainly can identify a bad study *design*. Since I was in the middle of this, I became very interested. I wondered whether the representation of human development within psychology as well as in philosophy and law (since these disciplines are closely related to psychology) was not a distortion of female experience. I wondered further whether it was a distortion of male experience as well; was it a distortion of human experience—a very destructive distortion? When women wanted to speak about what they thought of as the dilemmas presented by a problematic pregnancy, they could not even represent what they wanted to say within these systems. It was negated. Its validity was negated and the system began to shake the reality.

I therefore began to look and notice instances of anomaly—where familiar stories were told with a new slant, or where words were being used in ways that were at odds with their usual meanings. Examples of this are taken from a study of high school kids. In 1980, the *Handbook of Adolescent Psychology* came out. The editor, Joseph Adelson, reported that he had asked a leading scholar to write a chapter on female adolescent development. But when she surveyed the literature, she concluded that there was not enough material available to write a chapter.¹⁵ I came to tell you about my field, to warn you about its measures, its methods of assessment. I came to tell you that the standards of identity, standards of morality, notions about what is a “healthy” life are derived from research that has not looked at women’s experience. It has just simply not looked. I thought I would like to look at adolescents to see what had been missed. I was particularly interested in adolescents because I had noticed that while girls at about ten or eleven years of age seemed to be quite outspoken and fairly sure of themselves, by nineteen they had developed an acute tendency toward self-doubt and self-questioning. There was a kind of hesitation among women, and even a kind of disbelief in their own ability to talk about reality, that was very troubling. I once interviewed a woman in her early twenties about a moral dilemma. She said: “Would you like to know what I think, or would you like to know what I *really* think?” I thought that this was very interesting; she had learned to “think” in a way that was very different from the way that she “really thought.” I thought about that when I talked about secondary education and the failure of interpretive schemes to reflect women’s experiences. I thought I would tell you about Amy and Jake, whom I wrote about in my book when they were eleven.¹⁶ When they were interviewed again at the age of fifteen, the interview caught Amy at the moment where you could see the erosion of self-confidence starting to happen. During the re-interview, she was again asked about the Heinz dilemma, which is one of Kohlberg’s standard dilemmas and one of the most frequently used instruments for assessing moral maturity.

In the Heinz dilemma there is a man, Heinz, who cannot af-

15. HANDBOOK OF ADOLESCENT PSYCHOLOGY 114 (J. Adelson ed. 1980).

16. See C. GILLIGAN, *supra* note 14, at 24-39.

ford to buy a drug that will save the life of his wife. The question is: Should he steal the drug? Amy said, "I hated these dilemmas last time as much as I do now," and she elaborated the same reasoning that she had given at eleven: "It all depends. What if the husband got caught? It would not help his wife. And anyway, from everything I know about cancer, it cannot be cured by a single treatment. And, where would this drug be, sitting out on the shelf of a drugstore? The whole situation is unreal."¹⁷ She then said: "Like I had said last time [actually she had not], life comes before property. He should steal the drug."

That, by the way, is the "right" answer. She jumps a full stage in moral development, as measured by Kohlberg's scale—from eleven to fifteen years. But look what she has done now: She is learning that if she enters into a construction of reality which she has identified as unreal and problematic, she will advance in "moral development." In other words, if you equate moral development with justice reasoning, then, in a sense you render her more deeply uncertain, more susceptible to the tension between what she thinks and what she really thinks, less convinced that her voice will be heard.

I wanted to tell you about the re-interview of Jake at fifteen because that is very interesting, too. It tells us how psychological systems of assessment distort male as well as female thinking. Jake is the one who said at age eleven, that moral dilemmas are like "math problems with humans." Anyone who can do math can solve these problems and agree on what the right answer is: that is, that life comes before property. At fifteen, he says (beginning the same way he did at eleven): "Money comes and goes but human life only comes once, so therefore the wife's claim to her life takes precedence over the druggist's claim to his property." But then Jake is asked to comment about the fact that the druggist feels strongly about his profit. Jake responds: "He's got the wrong set of priorities." That's the approach that says there is one logical way to answer and that if you disagree it is because you do not understand or because you have the wrong set of priorities. We say in psychology that it is because you are at a lower stage. But then Jake says something else which is extremely interesting.

17. The comments of Jake and Amy are not direct quotations, but are a summary of the argument presented using the language of the transcribed interview.

He starts to consider the situation and the feelings that would be evoked both by theft and by death and he says: "I think that what the druggist is going to experience is some sorrow and some anger over losing his money, and it is a shame that he has to feel that." Look what Jake is doing now: he is not detaching himself from the druggist. Instead he is moving very close to the druggist to consider how a druggist would feel in that situation. But, he says: "It is not as deplorable a thing as the idea of Heinz—with his wife dying and him having to deal with his wife's dying."

The point I want to make is that, when measured by Kohlberg's scale of moral development, Jake does not show any evidence of moral development between eleven and fifteen because his justice reasoning has not changed. Thus, these interpretative schemes encourage Amy to become more deeply uncertain and Jake to become more simply dogmatic—to take the position that anyone who does not agree with him has "the wrong set of priorities." I want, for the sake of time, simply to talk about the implications of this. Three anomalies can be described very quickly: a new way of looking at an old story; a different way of looking at a familiar word; and two ways of using the word "responsibility" that have very different implications and that create a systematic process of misunderstanding and mistranslation.

A new way of looking at an old story: I am doing research at a girls high school. Because of the study, one of the teachers who was teaching a course called "From Innocence to Experience" noticed that the four books in this class—*Billy Budd*, *Lord of The Flies*, *A Separate Peace*, and *Othello*—had almost no female characters. She raised this issue with the class. First they read *Member of the Wedding*, but the students did not like it. So the next year she started to have them write essays entitled: "If I were Captain Vere (in *Billy Budd*)," or "If I were Abraham in the Abraham and Isaac story." This is an in-class example of these essays. One girl wrote:

Were I in Abraham's position, in a position of choosing between disobedience to God and sacrificing my son, my choice would clearly be disobedience to God. The reason for this is that if God is said to represent such things as love, and life, and truth, [and if God] were to give a command involving killing and making necessary lying . . . as Abraham does to his son, I would not wish to obey him and defy the qualities that I hold as important.

In other words, it is not simply the command involving killing that is problematic; it is also the *necessity for lying*, meaning the

necessity for Abraham's detachment from Isaac. The moral problem identified in this story is one of *detachment*, and the lying, as the sign of detachment, becomes the harbinger of violence. Emphasis on detachment as morally problematic rather than the moral ideal also appears at the end of the essay as the student does not detach herself from Abraham. Note also the vulnerability of this position. Its strength becomes its vulnerability. Look at the final move she makes:

This answer, however, is from a person who probably cannot even understand "fear of God" and who is treating it, the question, symbolically instead of literally. Perhaps if I had lived at the time and felt God's actual power and wrath my decision would be one of obedience.

She locates herself in time, she defines herself as having a perspective, she says there are limits on how much she can understand, and so forth. You see the point.

A different way of looking at a familiar word: A girl is asked how she wants to improve herself, change in the future, and what she might like to change about herself. She says: "I'd like to improve or expand on my compassion." She continues: "I'm sometimes not very understanding. I have a habit of putting myself in another person's place which I have found is not fair." When I talk about anomaly, I talk about saying that what is defined as the essence of fairness is not fair. The girl writes that putting herself in other persons' shoes is not fair. Watch her reasoning. This is the kind of place where girls learn that their answers are "wrong": "That is not what we mean by 'fairness'"; "This is not what we call a 'moral problem'"—that kind of thing.

I have been looking at specifically discrepant data, data that are discrepant with the interpretive schemes. People use these words in ways that seem "wrong", and I ask from what perspective the usage is "right." For example, they feel that things are not "fair" when they would do things differently and think in a different way:

If they get angry I would say: "All right, how can I understand that?" I will put myself in her place, and I will say: "I would not become angry at that; that does not help very much."

Look at the criteria—it is unfair because it does not really *help* very much. Help with what? Help with compassion? Help with understanding? Thus you see that detachment and objectivity, which

are usually valued as ways of solving dilemmas, are now identified as the *problem*, the impediment to working out the problem. You see two modes of thinking that are not just "different," that are not just alternative, but are in fundamental tension. What is valued by one—detachment, impartiality, the ability to stand back, the figure of blind justice—is defined by the other perspective as "the problem."

So you have two ways of "looking" that are in essential tension with each other, a tension that does not resolve itself. Where does this tension come from developmentally in the life cycle? Let me tell you about what happens when you then go back and look at many women trying to see through this double set of lenses. When you have these two ways of seeing, focusing, and highlighting, in a sense revealing the same thing in a different light, you experience a constant blur—almost like astigmatism.

Two ways of using the word "responsibility": One high school girl says: "Responsibility means making a commitment and sticking to it." This is what we usually mean by responsibility: personal commitment and contractual obligation.

Another girl's answer to the same question:

Responsibility is when you are aware of others and you are aware of their feelings. Responsibility is taking charge of yourself by looking at others around you and seeing what they need and seeing what you need, and taking the "initiative," taking the initiative to respond to your perceptions of your own and their needs.

Responsibility in this context means response. The concept of autonomy remains, but it is conveyed by the seemingly paradoxical conjunction of "taking charge of yourself by looking at others around you." It does not mean taking charge of yourself by separating yourself. Rather, it means taking charge of yourself by looking at others around you, seeing what you need, seeing what they need, and taking the initiative to respond. Doing something once you have seen it.

This is what I mean by two voices, two ways of speaking. One voice speaks about equality, reciprocity, fairness, rights; one voice speaks about connection, not hurting, care, and response. My point is that these voices are in tension with each other. In my work I have attempted to ask, "What does it mean to include both voices in defining the domain of morality, of humanity, and so forth?" I want to give one example that illustrates well what I think it means, and what this inclusion implies. I do not think it

implies a simple addition, a kind of separate-but-equal thing or an androgynous solution. I think it implies a transformation in thinking.

The best way I can illustrate this is through an example provided by two four-year-olds who were playing together and wanted to play different games. The girl said: "Let's play next-door neighbors." The boy said: "I want to play pirates." "Okay," said the girl, "then you can be the pirate who lives next door." She has reached what I would call *an inclusive solution* rather than *a fair solution*—the fair solution would be to take turns and play each game for an equal period. "First we will play pirates for ten minutes and then we will play neighbors for ten minutes." Each child would enter the other's imaginative world. The girl would learn about the world of pirates and the boy would learn about the world of neighbors. It is a kind of tourism on a four-year-old's level. Really, it's simple. But the interesting thing is that neither game would change—the pirate game would stay the pirate game, and the neighbor game would stay the neighbor game. Both children would learn both games, hopefully for an equal period of time. It is what is called "androgyny."

Now look what happens in the other solution, what I would call *the inclusive solution*. By bringing a pirate into the neighborhood, both the pirate game and the neighbor game change. In addition, the pirate-neighbor game, the combined game, is a game that *neither* child had separately imagined. In other words, a new game arises through the relationship.

That is basically my point: The inclusion of two voices in moral discourse, in thinking about conflicts, and in making choices, transforms the discourse. It is no longer either simply about justice or simply about caring; rather, it is about bringing them together to transform the domain. We are into a new game whose parameters have not been spelled out, whose values are not very well known. We are at the beginning of a process of inquiry, in which the methods themselves will have to be re-examined because the old methods are from the old game.

I want now to tell you very quickly what you see when you look at both male and female thinking through these lenses. Immediately two things change—two equations that have prevailed and have formed a self-enclosed system.

The first is the equation of human with male. No longer can

we know about human development by studying men. All our definitions of identity, morality, power, and health that have been derived from studies of men's lives are suddenly held in question—they seem to be highly tentative and possibly problematic. We can not even know how problematic they are. We now begin to take the time to look at those lives we have never looked at in defining "power," "identity," "morality," "health," "well-being,"—you name it. There is a sense that once you see and take seriously this problem, everything else becomes provisional—all the categories of judgment and assessment.

The second equation, which has sustained the first, is the equation of virtue for women, or caring by women, with self-sacrifice. Look at how neatly that perpetuates the system. "Human" is male and female virtue or "care" is self-sacrifice. So the good woman who values care would sacrifice herself rather than challenge the equation of human with male. In a sense it is brilliant. That is why women in the name of morality have cooperated with these all-male systems. In psychology women have said: "Let us help you, in the name of care, to build this portrait, of human development"—a portrait, which I will now demonstrate, distorts male experience as well as female experience.

Now to the last part of this presentation: findings. We asked: "What do we learn from looking at women?" What did we learn? The abortion study was the first study that drew moral categories from the analysis of women's language and thought. The first study *ever*. So we said: "Let's take the categories that we have drawn from this—how women in fact empirically define the moral domain, by looking at women's use of moral language." And everybody said: "That's not a moral problem." We said: "Well, we don't know. How can you have a definition of moral problem that excludes this language?" In essence, this language contained a realization that people's lives are interdependent. Therefore, the notion that life is a zero-sum game, that one is egoistic or altruistic, is based on a false premise. It denies the reality of interdependence. If one asks instead, "How does one act with responsibility and care toward oneself and toward others?" the moral problem changes.

Now I will go back to the question of gender differences. A student working with me found that you could systematically differentiate the two voices and the way in which people—(this is

absolutely crucial)—*defined* a “moral” problem. In other words, the voices were manifest in the very definition of the problem, because the definition of the problem sets the answer. (We all say that, but we do not actually think about what it means.) We asked people to describe an experience of moral conflict, a situation in which they had to make a decision when they were not sure what was the “right” thing to do. They would describe the situation and then we asked: “What was the conflict for you in that situation?” We could thus see how the person constructed the conflict. Finally, we asked: “In thinking about what to do, what did you consider? What did you do? Do you think it was the right thing to do? Right just for you, or for anyone?”

You can identify the presence of justice reasoning and care reasoning in the construction, resolution, and evaluation of the problem. What did we find from this analysis? Across six studies, most people, male and female, represent both voices in defining and resolving moral problems. This was true with regard to an average of sixty-five percent, and in no sample less than fifty percent, of the approximately two hundred people in the study, including medical students, college students, high school students, and adults across the life cycle. Of the two hundred people, seventy percent were women, a percentage we thought to be appropriate, given our focus on women’s experience. Nevertheless, most people, both men and women (the percentages were not different) represent both voices in defining moral problems.

The unexpected finding of the study was that there is a very strong tendency to focus on one voice or the other. Let me make this very clear. The presence of both voices suggests that most people know about both inequality and detachment as moral problems. Most people use both voices. As a developmental psychologist, I would argue that this results from the fact that inequality is not just a social event but rather is a life cycle phenomenon. Everyone has been a child, everyone has experienced inequality, everyone knows what it’s like to be less powerful than someone who is more powerful. Since inequality is a fact in the human life cycle, the idea of justice will recur over and over again across every generation. But there is another fact in the human life cycle: that no human child survives unless an adult attaches to that child. What characterizes the human species is its long period of dependence. And attachment has a different dynamic and a dif-

ferent set of moral implications. By virtue of making an attachment to someone, we become vulnerable to him or her. And not only the parent but also the child is powerful: she or he is able to have an effect on others through the attachment. One is not powerless in a situation of attachment, but the nature of the power is different from the power one holds by virtue of inequality. It has nothing to do with domination. Rather, it has to do with efficacy, the ability to move, to have an effect on another person, to elicit a response from others and to respond to them.

Everybody knows about attachment and everybody knows about inequality; my findings basically represent that fact. Everybody thinks that inequality and detachment are moral problems. That notion is built into the life cycle and then of course is constructed in the social context.

The next finding is that most people who use both orientations focus on one orientation and minimally represent the other. About seventy percent of people who use both orientations focus on one, and this finding holds across orientation and gender. This is very key for people in the law. The adversarial system can not easily accommodate two perspectives which are in a fundamental tension with each other. There is a wish to resolve or reduce ambiguity, to arrive at certainty, and that is done by eliminating one perspective or the other.

What is the nature of the focus phenomenon? There is in these samples of advantaged Americans an overwhelming tendency in men to focus on justice and only minimally to represent caring. Only three men from a total of sixty demonstrated a care focus. Among these advantaged American women, some focused on justice, and some on care (about sixty percent). Look at what happens if you start, as psychology did, with samples of men. You will come empirically to the position that moral reasoning is justice reasoning. In a sense you can now hear through these findings the empirical basis for such statements of psychologists as Freud's observations that women have less sense of justice than men and that women have less tendency to focus on justice issues in resolving moral problems or Piaget's observation that girls are less concerned with the elaboration of rules and are "deficient in the legal sense." If you start with all male samples, the inclusion of women becomes problematic because it challenges the very definition of the problem. You have this group that focuses on care and cannot

be accounted for by a theory that equates morality with justice reasoning. The question shifts by virtue of the observation that *both* men and women in fact represent both justice and care considerations in defining moral problems. The question shifts from, "Why are women confusing morality with care or interpersonal relationships?" to, "Why are men not representing in their formal decision-making procedures what in fact is present in their thinking—the realization that there is another dimension to moral problems, a dimension which has to do with issues of care, responsibility, and interdependence?" The question thus really shifts in some ways away from women and toward men, toward a phenomenon within male psychology which permits what is known, seen, and present to be lost or unrepresented. This work (which initially started with taking seriously the discrepant data on women) thus leads to a change in the question.

I want to say one final thing. If you want to support what has been in the Western tradition since Plato—that is, the notion of a unitary truth, that virtue is one, that its name is justice, that it is part of the sense of one right answer upon which we all, in the end, can agree—then you will select an all-male sample. It is a very interesting thing. The inclusion of women will challenge this tradition and make it impossible to sustain a unitary view. In that sense this inclusion brings in the question of difference, of two perspectives. It offers the possibility of a more adequate representation of human experience by including what formerly was ruled out by definition and then sustained by a major flaw in research.

Menkel-Meadow: Let me start by telling you a little bit about how Carol's work related to work that I was doing as a lawyer. As feminists have said, the personal is the political. So let me start with my personal story so that you can see how it has been affected on many different levels by some of the things that Carol has just been speaking to us about. As a practicing lawyer, for some years engaged in quite difficult battles, I was struck by a number of ways in which I felt that I didn't belong in that particular structure or system. There were disturbing things about it. I was unable to explain to myself and to others what in particular caused me to have some difficulty with it.

The first level from which I approach this is my individual, personalistic, experiential level. This level, I think, represents another element of the feminist contribution to law. Our individual

experience has something to tell us about the way in which we know the world and the way in which we know the law. When I came to be a law teacher, I had to begin to explain this world with which I had some difficulties to other people. I had increasing difficulty describing the structure of what I saw in a way in which I felt comfortable. I increasingly wanted to bring people into it as I started to talk about what I did not like about it. So as a teacher, I was struck by the fact that I was speaking in two voices: the voice that I *had* to speak in, in order to be a teacher in a predominantly male institution, and the voice which attempted to tell my students what I really thought. This latter voice attempted to convey that there were a number of values or possibilities in the legal system that were not expressed in the world as I knew it, both in practice and in law school. On a third level, I began as a scholar to look at what it is that creates the legal structure in which I had this difficulty. Just as I finished a major piece of work on what is problematic about legal negotiations as I perceived it, I read about Amy and Jake.

I would like to do a speculative meditation on Amy and Jake, if I might, and use Carol's example to tell you what Amy and Jake said to me about the legal system. I'd like to use that example to explore further how we might look at the legal system with that double lens or double vision Carol describes. First, let's look at Amy and Jake when they were originally studied, at eleven years of age, and then maybe we'll have a few words to say about them at fifteen. One of the interesting things about the Amy and Jake description is the different way in which they approach the problem. As Carol says, the way in which the problem is defined frequently suggests the solution.

One of the things that Amy does that might be of interest to law students is typical of a "bad" law student: Amy "fought the hypo." When asked whether or not Heinz should steal the drug, Amy asked a lot of questions about the situation. At fifteen, she is still fighting the hypo. "Look," she says to the researchers, "you have given me a totally silly situation that I do not think really exists in the world. Or if it did, I would know a whole lot more about it." She asks for what has come to be known in academic circles as "a greater feeling for the context." Law students, when faced with hypotheticals that seem to be missing something (perhaps facts about the particular people in the situation, or about

the political context in which the case is found, or—to use the legal realist phrase—about what the judge had for breakfast that morning), usually behave the same way Amy did. They feel that the problems are disembodied and disemboweled from the way in which they occur in the world.

When I thought about Amy's response, I thought that we in the legal system may be focusing our problems too narrowly. Through her use of a different voice, Amy tells us that we may need to know a great deal more about facts and about situations before we can make decisions about them. What would those other facts be? What else would we want to know about the Heinz dilemma before we would be satisfied, as law students and lawyers, that we could solve the problem? Take that a step further. Amy not only fights the hypo, she approaches it in a different way. As Carol has pointed out in her book and this afternoon, Jake saw the problem as an algebraic equation with people; there is the druggist, and there is Heinz with Heinz's wife. How do we balance those equities? How do we decide between those two people? Jake "gets it right." He says: "Life is more important than property, so life wins." Amy says: "I see two people with a problem here: the druggist, whose goal in life is to make a profit; and Heinz, who would like to save his wife's life. Is there not some way of holding the needs of both of those parties constant, and trying to work out another solution?" Like the "pirate-next-door game," Amy begins to think about other sorts of solutions to the problem. She does not say (at least in that earlier part of the study): "I think Heinz should or should not necessarily steal the drug." Have Heinz and the druggist talked about some other ways to solve this problem? How about an installment contract? How about payments over time? Has Heinz explored other ways to raise the money? Has the druggist thought about ways of providing a drug and perhaps getting payment in some other way?

Amy doesn't see the problem as presenting, by necessity, a bipolar choice. Amy's approach to the problem is in direct contradiction, I think, to the way we typically solve problems in the legal system: in a bipolar, win-lose way. The drug is either stolen or it is not, and it is either right or wrong to steal. Thus, if Heinz steals the drug, and is later prosecuted for it, he will be exonerated if he can come up with a series of legally recognized justifications for stealing it. Amy tells us that if we learn more facts and we take the

needs of the parties and hold them constant, perhaps we can come up with some other solutions—solutions, as Carol pointed out, which might not have been thought about if we looked at the problem from the perspective of only one party in the problem, either Heinz or the druggist. Amy is trying to remember everybody as she tries to solve the problem.

Amy then does another thing with the problem. She asks, as Carol reports in her book,¹⁸ whether Heinz and the druggist ever sit down and talk about this. She wants to know why *she* has to solve the problem. She uses “I” as a third person looking at this problem from the outside. Maybe, she muses, if they sat down and talked to each other, they would come up with yet a whole bunch of other solutions that I, sitting here as a third person, could not think about. Perhaps the act of dialogue itself might produce some other solutions. Amy thus suggests not only different kinds of substantive solutions, she also thinks of a whole different sort of process: dialogue between the parties. Now, I think that has obvious implications for our adversary culture and our adversary system. Our Anglo-American culture and adversary system require, for the most part, that two parties talk to a judge. Amy and Jake are asked to play judge for Heinz and the druggist; they are asked to decide whether Heinz is right to steal the drug or not. Perhaps there are other forms that might encourage the parties to come up with other solutions.

I want to come back to yet another dimension of how Amy and Jake reform the way in which we might look at legal decision making and problem solving. This is something that is evident during both of Amy’s interviews. She says: “Well, suppose Heinz steals the drug and then he goes to jail. That is not going to do his wife any good because in addition to the drug she also needs the relationship with her husband to get her through this difficult time of what may turn out to be terminal cancer.” Amy is thus concerned with preserving the relationship of the parties and looking at the situation in which they are imbedded. She looks both at the past and at the future, considering the effect on the parties of a certain decision.

Maybe I have taken too much out of the Amy and Jake problem. It is, nevertheless, an interesting meditation on the legal sys-

18. See C. GILLIGAN, *supra* note 14, at 29.

tem because what we see in Jake's description is pretty much how the Heinz dilemma would get solved if it wound up either in court or if the parties attempted to negotiate something between themselves. It was from that work, in looking at how to be a practicing lawyer—in a courtroom, as a negotiator, or as a legal problem solver—that I began to rethink the theory of legal structure. My re-examination could well have been inspired by how Amy looked at the problem.

I should add here that I have noticed, as did Carol in psychology, how many of our conceptions of what the legal system ought to be and ought to do were derived exclusively from male practitioners and male scholars. The law may thus represent an embodiment of Jake's voice, the male voice. As a double footnote,¹⁹ I, like Carol, want to say that although I am speaking of male and female voices, I am simply using those terms as a code for what she observed to exist empirically in those two genders. All of us have elements of both of those voices. Those men who see themselves fitting the description of the female voice should know that that is probably who they are, and vice versa for women. I use that as an easy way to talk about this material, but one that is not necessarily accurate for each one of you individually.

What would the legal system look like if Amy had devised it, either alone or with Jake's help? As I said, Amy might use different forms or different processes. To do this, let's look at the way the Anglo-American court system is in fact structured. We have basically a one-way communication, adverse parties talking to a judge. There may be a witness or, in more complicated form, a jury. But all of this communication is directed at somebody else. There is very little direct communication between the parties. Picking up on Amy's process notion that the parties might talk to each other, we can imagine a structure in which the parties might be asked to sit down and talk about whether the drug should be stolen or financed in some other way. One form that is beginning to emerge, which in some sense is a reaction to this adversary structure, is alternative dispute resolution or mediation.

I do not have time today to talk about a number of other important problems which may arise out of that alternative form, which attempts to get parties talking to one another. I think, how-

19. See *supra* p.27.

ever, that it is no accident that that particular form of dispute resolution is arising in the legal culture at this time. It comes with the kind of dissatisfaction that we see with that one-way communication and with the requirement that somebody outside of the problem must make the decision for the people who are in it.

If the parties are not in accord, they will do what most parties do when they are in dispute—they will probably arrive at a solution by negotiation. Typically, a plaintiff and a defendant—Heinz and the druggist—will start arguing with each other. Heinz might say: “I can’t pay you anything.” The druggist would respond: “I want one hundred dollars.” At some point, they will split the difference, settling on paying perhaps half of what the druggist wanted.

What’s wrong with that? What’s wrong, according to some people, is that it reflects one form of the female voice—it is compromise, it is a combination, it is meeting somewhere in the middle, and it may leave both parties unhappy. What Amy was trying to do was to hold both parties’ needs constant and to meet both sets of needs at the same time. Having the parties meet each other’s needs does not necessarily result in compromise or accommodation, which is the way in which the female voice is frequently and inaccurately seen—as conciliatory, accommodating, giving up. As Carol’s example of the “pirate-neighbor” game illustrates, by searching for other solutions we might meet both parties’ needs without having to compromise. A new synergistic solution might emerge simply from having them talk to each other directly about their needs. If we learn to listen to the “Amys” of the world, we might begin to imagine different kinds of constructions and different ways of looking at our legal system in solving our legal problems.

That is just a very brief introduction to the kinds of things that you can do with this. One thing I always like to tell my “Jake” students is to try to think of themselves as “Amys.” Similarly, “Amys” ought to look at the world from a “Jake” perspective; there is, after all, great value in the current system. The key, as Carol has indicated, is to try to imagine a legal system that might include both.

What are some other implications of this? I liked another

character in Carol's book, Hilary,²⁰ very much. Hilary was a subject of one of the studies, and, interestingly for our purposes, Hilary was a lawyer. Hilary talked about one of the dilemmas of the courtroom which most trial lawyers occasionally encounter. She perceived that the opposing lawyer had failed to make use of a document that would have been helpful to that lawyer's case. Hilary sat there and thought: "What should I do? The lawyer is doing a lousy job." Hilary is faced with the dilemma of the two voices, of the two ways in which she has been trained. That ethic of care which is within her prompts her to see the needs of the other lawyer's client, and some part of her wants to reach out and help. The more traditional critique of that problem is to point out that our legal system suppresses the truth and that Hilary wants the truth to come out so that a better decision can be reached. But I think that Hilary takes it a step further. It is not just the truth that matters to her. It is the fact that she experiences some care for the plight of the party on the other side. She is imprisoned in the role of an advocate who has been told that her role is to be a zealous advocate for her client and that she would be stepping beyond that role if she were to reach out and help the party on the other side by either telling the lawyer about that document or herself submitting the document. Hilary, if I remember correctly, decides to listen to the lawyer's voice. She says nothing about the document.

Hilary's account led me to speculate on what our code of ethics as lawyers might look like if Hilary herself had created it. Would Hilary have something to say about the way in which we construct our ethical rules, which represent the lawyer's effort to cope with moral problems by embodying principles for their resolution in an increasingly conflicting and confusing set of rules? Here's where we might begin to see the kind of things that Carol talked about: response with a sense of autonomy, concern, care for the other side, coupled with some appreciation of the fact that the parties may have different interests and that there might be a need for some rules. But I wonder whether the rules would be as protective of the profession as they currently are, or whether they might pay a little bit more attention to the relationship, not of lawyer-to-client or lawyer-to-lawyer, but rather client-to-client and

20. See C. GILLIGAN, *supra* note 14, at 134-35.

perhaps lawyer-to-other-client.

These are some of the kinds of questions that you can think about as you speculate—those of you who are going to be Amys and Hilarys in our legislature someday—as to how you might build a legal system with that voice. It is very clear to me that certain ethics or rules of behavior or notions of what is morally and ethically correct behavior are derived from a male image of what is appropriate within the legal system.

It is no accident, it seems to me, that that little drawing I put up there to illustrate the structure of legal negotiation looks like a football field. It is no accident, I think, that our court imagery is frequently described in battle terms. “Well, on this motion we won the battle, but who knows how the war will go?” We have a conception, as we frequently do in war, that one party must win and the other party must lose. The court is very limited in the remedies that it can award, and people begin to think in those kinds of limited, winless ways.

What would the practice of law look like if Amy and Hilary had a greater voice?²¹ On this question, I think it is important to take note of at least one of the issues that Mary alluded to this morning: the numbers of women in a profession. As a lot of sociological research tells us, to the extent that women are tokens in a profession, and to the extent to which Amy and Hilary live in a world in which they are surrounded by people speaking in different voices and looking through different lenses, they may not feel free to express alternative ways of practicing law or looking at the legal system. It is, therefore, important to look at the numbers of both men and women who have this different voice and have begun to develop some support for expressing it and different ways of being able to practice law.

When I was speaking to a group of practicing lawyers about some of these subjects a few months ago in Los Angeles, a very experienced district attorney began to talk to the audience about how she viewed the trial process as one of creating a relationship with the other participants in the courtroom. She had been trained, as most of us are, in the ethic of persuasion and argument and intimidation of the decisionmaker (especially if the deci-

21. See Menkel-Meadow, *Portia in a Different Voice: Speculations On A Women's Lawyering Process*, to be published in 1 BERKELY W.L.J. (1985).

sionmaker is a jury of lay people as opposed to a judge). Like me, when she began to operate in that mode, it did not feel comfortable to her; it did not feel like “who she was” or “what she wanted to express.” Over time she began to express herself as who she *really* was in the trial court. She realized that she set a completely different tone in the courtroom. Her goal was not to persuade the jurors or judge to see it her way, but to have a quiet conversation with them that created an intimate relationship in which she would ask them to examine their own views and values and sense of the facts in a way that she thought attempted to appreciate their reality as well as her own. At least from her reports, she has been no more or less successful than anybody using the other mode. One might take heart from Carol’s work, realizing that the different voice might inform the way in which one both thinks about solving legal problems and practicing law.

One final thing before I close. Kitty made reference this morning to the fact that much of this notion of “how we see ourselves in gender terms” is socially and politically constructed for us. One view that someone might have of all this is that all I have just described as “the woman’s way of being” is not indigenous to women. This has occurred because it has developed in the shadow of the man’s world. We have needed to develop our sense of relationship because historically the only way a woman has amounted to anything in this world has been through her relationship to some man. My own view on that topic is that while others look at the origins of these differences and begin to unpack the social and political constructs in which they originated, the differences reflect reality at the present time. Furthermore, I think it is useful to ask—even if one’s sense of care and of relationship has developed out of the necessity for survival in the world in which one has been powerless—if those values are intrinsically important and have something to say about the way in which we look at ourselves. I think it is important to use them as a way of reconstructing all the institutions in which we live at the same time that we reconstruct ourselves. It seems to me that one of the wonderful things that feminist discourse has done to the law has been to make us look at the *method* by which we make a new world at the same time that we argue about the *substance* of what that new world should be. I hope that some day there will be unity between the substance and the method.

Gilligan: I would like to take a couple of the things that Carrie just said a step further. What really is so interesting to me is that the concept of gender has three dimensions: a biological, a psychological, and a cultural dimension. Also, the concept of gender does not fit the assumption that the opposite of the one is the many, since there is neither one nor many genders, but rather two.

Gender is a dimension of physiology, but it is also a dimension of identity—a psychological construct. We define ourselves as gendered. We cannot speak this language and use its pronouns without identifying ourselves as either male or female. Children, by the age of three, identify themselves as either male or female. With very few exceptions, gender identity remains constant across the life cycle. It's one of the few things that do. Identity can change in all kinds of other ways, but gender tends to remain constant. Gender is thus a component of biology and it is a component of identity; it has a physiological and it has a psychological dimension.

But gender also has a cultural dimension. It is socially constructed. We have gender-based norms and gender values. My sense is that it is like the nature-nurture argument—it is absurd to reduce it in either direction. Human personality and experiences are shaped neither simply by nature nor simply by nurture. In fact, that dichotomy ignores completely the psychological dimension—the dimension of identity and interpretation.

Gender, obviously, is a dimension of biology. It is also a dimension of identity and a dimension of social roles and values. But the experiences of inequality and attachment are not cultural constructions, although in different cultures they may take on different meanings. Inequality and attachment are facts of the human life cycle. Every person in this room has experienced inequality by virtue of having been a small child. Everyone has experienced attachment; if someone had not taken care of you, you would not be here. As I indicated before, there have been social deformations of both equality and attachment. The deformation of equality appears in the equation of human with male, and the deformation of attachment in the equation of care with self-sacrifice. And this equation leads to the sense that caring is the same as pleasing others or effacing oneself. Thus, both moral ideals, justice and care, basically have been deformed. Both have to be reconstructed

in different ways. That, it seems, is what's so forward-looking about the subject of today's debate. How do we reform it? What is the nature of the transformations?

I think two of my findings are helpful for this discussion. One is the presence of both orientations in most people—probably in all people. Everybody knows about inequality and thinks oppression is a moral problem, and everybody knows about attachment and thinks that detachment is morally problematic, the turning away from someone in need. The other useful finding is the “focus phenomenon”: that people tend to focus on justice or care in defining and resolving moral problems. All the men in our sample except three focused on justice. Thus, men who knew about care and detachment as morally problematic turned away from this knowledge when describing an actual problem. I think a lot of history demonstrates this. It may be a vicious cycle; forgetting has been encouraged and celebrated in terms of stereotypes of masculinity.

Among the women, the focus was divided. Some focused on justice, some on care. In a sense, we saw that with Amy. I think of these as “the women.” Carrie, your reading of Amy is not exaggerated. It is very well supported by the text. At fifteen, Amy can now see in both ways; she can see these two ways of thinking. How could she not? Justice reasoning *must* correlate with educational attainment in society. The problem is that if one voice is celebrated, Amy is going to let go of the other one, at least as an articulated public voice. She will learn to speak in the voice which everybody hears and understands. These two findings seem to be in tension, but it is important not to simplify them.

Let me tell you two lawyers' responses to questions about moral conflicts in legal practice. They're interesting. Watch how these lawyers portray two ways of looking at a single image—the image of the game. (This picks up on Carrie's way of saying: “Look at this, does this not look like a football game?”) The lawyer who focuses on the justice orientation resolves the dilemmas he faces by saying: “I have moral dilemmas all the time but I usually have no problems solving them.” You would not have a problem solving them *if* you took the “algebraic” approach because everyone would agree.

He says: “I usually resolve the dilemmas according to my internal morality. The more important, publicly, your office is, the

more important it is that you play by the rules.” I want to focus on this: the game imagery. “You play by the rules because society hangs together by these rules. And, in my view, if you cheat on them, even for a laudatory purpose, eventually you break down the rules because it is impossible to draw fine lines.”

Contrast this view with the view of a lawyer who focuses on care: “I have to preside over these decisions and I try to make them as non-disastrous as possible for the people who are most vulnerable. The fewer games you play, the better.” Same image, turned around. We are really dealing with issues that are the very basis of people’s day-to-day well-being: people’s feelings, people’s children, people’s potential for growth. One should do everything in one’s power to protect vulnerability and avoid hurt.

Statement from the justice-oriented male lawyer: “Once you, as an attorney, step out of the role of adversary, which is what you do if you start helping the other side,”—we are talking now about Hilary’s dilemma—“then you are not being true to your role. You are changing your function, and that destroys the system.”

The care orientation, on the same issue: “I am dealing with a legal system and dealing with something it does not know how to deal with very well. I become very distressed because it is hard for me to put together exactly what my role is supposed to be. You are presiding over some pretty emotional moments in people’s lives and I never know whether I should say, ‘Here is the law book,’ and not do anything, or try to give whatever kind of counseling, whatever kind of support, one might provide for people without costing them a fortune. I think people need something like this.”

Spiegelman: I would like to ask two questions. First, is “the different voice” a “better voice”—are you saying that things would be better if all people heard and acted on that voice? Second, what happens when people start articulating those feelings within the legal system? Does the legal system turn the feminine voice into a masculine voice, or would the feminine voice transform the legal system? To put it another way, what happens when Jake negotiates with Amy?

Gilligan: Both are very good questions. “Isn’t the ‘different voice’ the better voice?” It is better than not representing it. To think about issues of care and responsibility is much better than to ignore them. To see detachment as morally problematic is better

than not to see it as problematic at all. There is no question in my mind about that. "Is it a better voice than the voice that speaks about inequality?" I do not think that is the right question. I do not think highly of inequality. I think inequality is the condition for oppression. I think inequality is the condition for violence. I think that detachment also leads to violence. I say that if you include both voices you will transform the very nature of the conversation. The problems of detachment and attachment will be seen in a different way. One can trace this empirically by looking at male and female development over time. It tends to start from different premises and have different emphases. Women come to understand that the conventions of feminine care in this society involve the silencing of women. "Whatever you want, I will do it for you. I have no needs." That is neither a relationship, nor care, nor attachment.

If you bring the two voices together, you transform your understanding of what attachment is. It's not these empty hollow social forms. "I have this wonderful relationship, family, and children, yet I feel totally alone, isolated, out of touch with everybody because I do everything for everybody else and I have no needs. I have no life." Who wouldn't feel isolated and depressed in this situation? The key to the way out for women is to say: "This is no relationship." It's called "relationship" according to the conventions of this society, but it isn't a real relationship. It doesn't come out of females' life experiences—of girls' experiences with their mothers and with their female friends.

This transforms the definition of equality. In terms of equality, you start to look at what has been the celebration of detachment in the name of fairness, at what has allowed the equation of "human" with "male." It's mind-boggling what has been sustained under the name of "equality." My argument, therefore, about better voice/different voice, is that you really are going to have a new understanding of both attachment *and* equality. They're both vitally important. Attachment and inequality will always be with us. They're built into human experience. The way this society has constructed them has been a deformation of both equality and attachment. The two have played into each other in a sort of ongoing cycle, where equality is defined as "human is male" (and women are invited in if they want) and care is defined as "self-sacrifice." People then ask: "Why aren't you happy in

your relationships?" It evolves into our identity: self, care, attachment, equality—all across the board. I really think that's precise. That's why I think this is a forward-looking moment.

Menkel-Meadow: I would like to pick up on the second question, the one that is always asked. "What happens when Amy negotiates with Jake?" Let me play "Amy" for that one. If Amy and Jake were negotiating just alone, the two of them, not embedded in the society, my hope would be that they could have the kind of transformative conversation that Carol is talking about. Chances are, at age fifteen, they will not be able to because of what Carol just told us. Amy is beginning to realize that she has got to be bilingual to exist in this world and that the male voice—or the Jake voice—will predominate. My concern is that Amy's voice will not be heard by Jake. If their negotiation doesn't work, they'll have to then go back within the larger system—and in that case Jake's voice will prevail. That's why the question of Amy and Jake has to be looked at in its contextual complexity—as a sign of the political environment in which it's located. That's why Amy's voice needs to get stronger: so that Amy and Jake can have the kind of conversation that will then transform the whole negotiation dialogue.

Gilligan: I think the other point to add is that there is a differential-vulnerability theory. If Jake chooses not to listen to Amy, he can win. Consider the way in which a high school girl answered the question, "What's the worst thing that can happen in a relationship?": "That people are on different levels and don't communicate at all." She then elaborated: "If one person doesn't want to listen to the other, they can block them out totally and achieve their objective. They'll win. They simply won't listen." I think that is where the power issue comes in. If you have power, you can opt not to listen. And you do so with impunity. On the other hand, the notion that you can go through the world not listening to Amy's voice and still maintain a sense of psychic well-being is a sham. The notion that men, in a society that silences women, live in a state of contentment, security, and psychological well-being is absurd. In my own work, I became attuned to the cost of not listening when I asked about moral conflicts in people's lives. I heard it a lot from men who described how relationships fell apart suddenly, in ways that were totally unexpected, totally unexplained. They had no sense that anything was wrong, because they

had not been listening.

Spiegelman: Is it “not listening,” Carol, or is it just that the words are different?

Gilligan: It’s not listening. I think this is where the “power trip” comes in. I think this was Kitty’s point this morning. The subservient individual is more likely to listen. In other words, if you have an unequal power situation, the people with greater power know less. Secretaries know more about their bosses than bosses know about their secretaries. That’s my point. That’s clearly true. On the other hand, if you think that you are going to be the boss, you may never develop the skills to listen because you think you will go through the world never having to listen. But then you feel very isolated and lonely. In this society at this moment, it’s not clear who has the edge on psychic well-being.

There is, however, a differential vulnerability. The vulnerability for Amy is that no one will ever bother to listen to her, or to figure out what she needs or to recognize that her way of talking is not so weird. I wrote my book in part to amplify and explicate this voice. No one had been listening to it. Everyone dismissed it as naive, irrelevant, underdeveloped, sick, and so forth. But the vulnerability on Jake’s part is that at fifteen, he is attuned to *and* listening to that other voice. At fifteen, both of these kids are bilingual—although their respective “second languages” seem to be different. Imagine them in an educational system that explores the implications of this dialogue, representing both sides, moving away from a simple “right” answer or an easy consensus. Jake no longer would be so likely to say that anyone who disagreed with him had the wrong set of priorities. I want to emphasize what Jake was saying: “I am going to enter into the druggist’s situation. How would a man feel? He would feel sorrow and he would feel anger if someone came into his store and took his property.” That’s exactly the refusal of detachment. It’s knowing “how a man would feel if his wife was dying and he had to watch her dying and then he had to deal with her dying.” In this situation, they lead Jake to the same conclusions so he does not have a problem. But we can imagine situations in which these two ways of thinking would lead to opposite conclusions. Are we training ourselves and our children to look at this conflict? The answer is no.

Marcus: We thought we’d invite a new person to join our conversation: Ellen DuBois, a professor of history at Buffalo. Her spe-

cialty is women's history. She has written several important works on the history of women's suffrage and the women's movement at the turn of the century. We felt very strongly that there should be a historical dimension. All too often we talk about our experiences in contemporary terms; the trained eyes and ears of historians are lost to us. The historian can suggest the patterns and identify the re-emergence of issues which may have been cast in a slightly different form in the past.

I have asked Ellen to talk about two issues. First, does she hear the themes of the past in this discourse? Second, does she have any predictions for the future?

DuBois: This disarray of papers before me suggests the lack of clarity of my thought at this moment. I think that there is an almost religious faith in the ability of history to make everything coherent. I understand that my role here is to give a background in the history of nineteenth-century feminism to two themes at the core of today's presentations: the debate as to the similarity versus the difference between the sexes; and the kind of sexual politics that comes out of feminism. I'm going to try and do that. But I'm going to leave it to other people to suggest the link between the two. I'm also going to try to put in historical perspective a third element, beyond the similarity/difference question and the sexuality questions: the role of politics in establishing the status of women. As an historian of the women's suffrage movement, my understanding is that nineteenth-century feminism was brought into existence as a social movement to effect the entry of women as a class into the realms of political power. That was the way to emancipation.

There has been a change in the emphasis of feminist thought. In the last ten or fifteen years, modern feminist thought began by identifying the problem as one of overemphasis in social, political, and economic life on distinctions of gender; it defined the liberation of women as the elimination of gender as a social structure. This emphasis was followed by its "reverse": an increasing emphasis on discovering what women's true powers might be, thus, not eliminating gender but winning for women the power to elaborate and articulate gender freely.

From the late eighteenth century on, in the early decades of feminism, there were two distinct arguments for women's emancipation which sort of parallel these two modern approaches. One I

call the “egalitarian-feminist argument.” This premises women’s emancipation on the belief that men and women basically have the same human character, and that the denial to women of their common humanity with men has kept them out of various privileges and resources monopolized by men. The other position was one which historians have called the “domestic-feminist position.” This argued for elevating women not on the basis of their common humanity with men, but rather on the basis of what distinguishes them from men. In other words, women needed rights because they were *different* from men, because men could not, in fact, represent women. The domestic-feminist position also held that the introduction of women into political and social areas from which they had been excluded would change those areas because women would inject them with different characteristics. Although individual thinkers often drew on both positions, they remained fairly distinct. Let me read, for instance, a quote from Elizabeth Cady Stanton, who was the foremost American representative of egalitarian feminism. She believed that the best future for women lay in narrowing the distinction between them and men. In a debate with Stanton in 1853, another feminist, Antoinette Brown Blackwell, took the domestic-feminist position. Blackwell argued that as soon as you insist on women being the same as men, then inevitably they keep on being regarded as inferior versions of men. She argued that it was far better for women to admit the irreducible difference of sex and not try to compare the two categories. Stanton defended the egalitarian-feminist position:

Man eats and drinks and sleeps and so does woman. He runs and walks, laughs and cries, feels joy and sorrow, pleasure and pain, and so does woman. He loves, hates, is angry, sorry, impatient, unreasonable, tyrannical, and so is woman. He is religious, penitent, prayerful, dependent, and so is woman. He is ambitious, loves glory, fame, power, and so does woman. He loves to think, reason, write, speak, debate, declaim, and so does woman. In fact what has man ever done, that woman has not done also—what does he like, that she does not like too? Are not our hopes and fears for time and eternity the same?²²

Let me try to clarify one element in the thought of this great egalitarian feminist. I think that what Stanton was pushing for in arguing that men and women are “the same” was to free us all to be individuals and to be different! By calling for the elimination of

22. Stanton, *Rev. Sydney Smith v. Rev. Antoinette L. Brown*, 3 THE UNA 69, 69 (1855).

the categorical difference of gender, she imagined a world of infinite difference, not one of no difference. She imagined a world in which people are no longer held to the two possibilities of masculine and feminine but are open to an infinity of possibilities. This seems to me to be a particularly important issue when it comes to sexuality because sexual expression has the potential for infinite individual variation.

Until about 1860 or 1870 the egalitarian position was advocated by the most radical feminists. Its representatives not only included Stanton but also Mary Wollstonecraft.²³ The demands that came out of egalitarian feminism focused on equality of rights, especially in the public sphere: equality of education, equality of suffrage, equality of political participation. Later, the domestic-feminist position—I'd be happy to use any other term, such as woman-centered—became ascendent in the Anglo-American feminist movement, and continued to dominate the women's movement up to the victory of the vote. Indeed, the predominant arguments for getting the vote after 1900 had to do with the different values that women would bring into the political arena. Jane Addams argued that women had to be enfranchised because they would do what she called "municipal housekeeping." She was saying that women would bring to the political arena the same kind of orderly sanitary values that they bring to their homes.

I want to point out a couple of the programmatic consequences of that position. Let me say first that the ascendancy of this woman-centered feminist approach has a lot to do with feminism becoming a mass women's movement around the turn of the century. The earlier egalitarian-feminist line helped to bring forth feminism's most spectacular break-through insights. It challenged the whole structure of what we call gender and what the nineteenth century called sexual spheres. But once feminism began to be a mass women's movement, the distinction of sex which the movement originally called into question now became its avenue for affecting history. The way that feminism was going to affect

23. Wollstonecraft was born in London in 1759. A pioneer of the women's rights movement, she published her first book, *Thoughts on the Education of Daughters*, in 1787. In 1792 her most noted work, *A Vindication of the Rights of Women*, was published. In it, she proposed opening the professions up to women. The underlying theme of all her work was that the male-female relationship should be a "rational fellowship" rather than a relationship of "slavish obedience." Wollstonecraft died in 1797, immediately after giving birth.

history was by becoming a mass movement and this involved increasing the identity of women with their sex. Feminism increased women's awareness of gender and may well have exaggerated the differences between the sexes in some areas. The sexual program that grew out of this late nineteenth and early twentieth century woman-centered feminism bears certain similarities to the anti-pornography feminist politics of today. I am a critic of both, in part, because of the hindsight history allows us. The early twentieth-century feminist movement concentrated on raising the age of consent for girls from between four and eight where it was in the nineteenth century, to sixteen or eighteen or twenty-one as it is now. That victory was a very mixed bag. Age-of-consent laws are the same as statutory-rape laws. Consent laws—a feminist program—made it legally impossible for young women to consent to sexual intercourse. On the one hand, these laws protect children from sexual assault. On the other hand, they have resulted in an increased number of young women going to jail for sex crimes. A six-year old may not be able to consent but can the same be said of an eighteen, a seventeen, a sixteen, a fifteen, or a fourteen-year old?

The late nineteenth-century women's movement also began a campaign against obscene literature. The Women's Christian Temperance Union, which was the largest late-nineteenth century feminist organization, had a department of obscene literature. It gave political support to Anthony Comstock,²⁴ the author of the basic obscenity laws in the United States. The major impact of Anthony Comstock on American women's history is that the laws he developed explicitly prohibited the spread of contraceptive knowledge and devices. Margaret Sanger²⁵ was indicted under the Comstock laws.

24. Anthony Comstock (1844-1915) was a New York postal inspector and a leading member of the New York Society for the Suppression of Vice. In these capacities he was able to initiate the successful prosecutions of 3,670 violators of the obscenity laws and destroy 160 tons of "obscene" literature and pictures. He was also the author of several books on vice, including *Frauds Exposed* (1880), *Gambling Outrages* (1887), *Morals and Art* (1888), and *Traps for the Young* (1890).

25. Margaret Sanger was born in Corning, New York in 1883. For her efforts to remove legal barriers to dissemination of information about contraception, she is credited with founding the birth control movement in the United States. Though she never went to jail under an obscenity statute, she was indicted in 1914 for mailing pamphlets which advocated birth control (her case was dismissed in 1916), and in 1917 she served 30 days in a workhouse for operating a birth control clinic in Brooklyn.

This early-twentieth-century feminist movement also took a position *against* divorce law reform on the ground that divorce was something that men used against women. There was an argument to be made for its position, but it was an historically short-sighted one. In fact, it was not true. In the long run freedom of divorce benefited women at least as much as it benefited men.

I also want to talk about some other programs which flowed from this late-nineteenth century woman-centered feminist politics, for instance, protective labor legislation. I really feel I have to correct Kitty on this. Protective labor legislation, the labor legislation that dates from the early twentieth century and specifies that women cannot work night work, cannot work certain jobs, cannot work certain hours, cannot lift certain stuff, was a *feminist* program.

MacKinnon: I did not say it was not.

DuBois: Well, you called it a male program.

MacKinnon: What I meant to suggest is that it comes out of precisely what you are saying it comes out of: the affirmation of differences, which produces special benefits, rules, protectionism, for women.

DuBois: Right. I think you have a tautological definition of male and female in there. What does it mean to call protective labor legislation "male"? It was a program put forward by a movement that by any historical measurement you would have to call "feminist." It was put forward by progressive women pushing for women's suffrage who saw that women's motherhood and their role in the labor force were coming into conflict. The problem wasn't that it was "male." It was that it took an historically backward perspective on how to solve that problem.

At the turn of the century there was a kind of natural political identity among women based on their common femaleness. The organized women's movement believed that the female political perspective was an obvious one. At the core of this was the common conviction among feminists that women were naturally more pacifistic than men. This was an illusion and a delusion which the first world war exploded. As soon as the first world war developed, the women's movement—like every other political movement of the time—split right down the middle. I think this helps to explain why the massive women's movement that won the vote could go no further—because the premise of female unity on

which it had been won was historically exploded: the idea that women by virtue of being women automatically had the same politics.

I came here to talk about a similar movement from a focus on obliteration of gender to an elaboration of gender in modern feminist thought. Instead I want to say something else. I was struck by something in both MacKinnon's and Gilligan's presentations. The essence of what each had to say was reminiscent of the first revelations of feminism a decade and a half ago. Catharine presented this in her exposition of the rage that discovering women's abused and degraded status initially produces. For me, that was the way radical feminism appeared to me when I first found it in 1969. Carol presented this in her scholarly indignation that women had been in fact totally ignored by scholars and that the ignoring of women distorted all subsequent intellectual discoveries. Both are first premises of modern feminism. However, we are not now at the beginning of feminism; we are right in the thick of it. In fact, as this panel suggests, there are by this time many feminisms. Women are no longer ignored in the political scene. *Au contraire*, the issues that the women's movement has raised are at the very center of this historical moment. I am talking about abortion, and I am talking about the question of a female vice president. I could never have imagined that these issues would have reached the level of historical significance that they have with the rapidity that they did.

This raises the question about where, in fact, historical change in the condition of women is going to come from. In some ways Carol Gilligan is too optimistic about change and Catharine MacKinnon is too pessimistic about it.

MacKinnon: That's why I'm doing this work on pornography, right?

DuBois: I think that I am more convinced that Catharine MacKinnon is too pessimistic than I am that Carol Gilligan is too optimistic. What Carol Gilligan is saying is that the introduction of women and the recognition of them is going to change the moral discourse. We have to face the existence of Sandra Day O'Connor—I mean, there are women, and there are women. Do not get me wrong: she is going to change the political discourse. I just do not want it to change in the direction that she is going to change it. I guess this leads to my second point: I see a tautology

in Catharine MacKinnon's insistence (which I certainly do not disagree with and I do not think any substantial feminist would disagree with) that the issue is subordination and domination. The question is: What constitutes subordination and domination? Hers is a circular definition. To be dominant is to be male and to be subordinate is to be female. Who is a male? Anyone who is dominant. What is dominance? Whatever males do. So it goes around in circles. Consider "lesbian sadomasochism." If there's a woman on top, she is a male—she functions as if she were a male. That seems to me to be circular.

At one point MacKinnon talked about how male domination is an *almost* metaphysically perfect system. It seems to me what she presents is a metaphysically perfect system and therefore one that is unreal. By definition, it defines women as having no power, and if by definition women are those without power, then go home and lock the door because there is no possibility for change. It seems to me that history proves that is not the case. That, it seems to me, is what Mary was trying to say when she said, "Look, we are sitting here talking about gay and lesbian rights in a law school." Something has *happened*.

The basic discovery of the discipline of women's history is that women *act* in history: They create history and that includes their own oppression as well as their own liberation. If they don't create history, then there is no possibility for change in their position.

Marcus: I would like to open up the conversation again and ask the audience to participate.

Question from audience: Could you explain what you mean when you say that women create their own oppression?

DuBois: Women are not just the objects of historical action which only men make. I gave you some examples. An organized women's movement was basically responsible for protective labor legislation and for age-of-consent laws. Whatever the intent, which I am not calling into question, the historical result was a new kind of oppression of women. I think that when we act in history we basically have very little control over the impact of our actions. Women act in order to remedy those oppressions which they experience, and as a result they sometimes contribute to the creation of new forms of oppression. That is sort of the nature of history. You remedy one inequality and sometimes as a result you

help to create a new form.

MacKinnon: I think that people who are powerless have particularly little control over the consequences of their own actions, but that people seeking to act in history with a consciousness of the past, together with what little power we have (if any), have a choice. We can either say: "All right, we cannot do anything about this because as a matter of fact nearly every attempt that women have made in history to change our status has not done so." Women in fact *have* fought against our status in the entire history that we know about and in point of fact we are still subordinate . . .

DuBois: But our status is not the same; for instance, we are enfranchised now.

MacKinnon: Yes, but what I am saying is that the fact that there are changes is not to me the crucial thing to look at, at this point. You can look at all the modifications in the status of women—and it really does mean something different to be a woman now than it has meant in other times, just as it means a different thing to be a woman of a different race or class now or sexual preference now. The varieties do matter. It means a different thing to be a feudal slave than to be a wage slave, right? There have been alterations in that and I am not saying there have not. But if you look at instead whether women have ever not been subordinate to men, putting aside those few examples (that people like to make the most of, and which I myself am not convinced by) that suggest either a female supremacist situation or one of "relative" inequality, as I see it, if bottom is bottom then look on the bottom, and there is where women will be.

I do not agree with the parallel being made here between the anti-pornography legislation proposed by Andrea Dworkin and me, and the four specific examples that were laid out, which come out of what I take to be, and criticize as, the "differences" approach. I do not agree that what we are doing is like statutory rape laws and raising the age of consent. I think that giving children power to do something about people who abuse them might be more like what we are doing; we're not having the state act as "daddy." I don't agree that what we are doing is like the W.C.T.U.'s department of obscene literature. However, I would really like to see somebody look at what they *were* trying to do in light of what we *are* trying to do, and see if there are some com-

monalities that have been obscured by historians looking to see if what they and we are doing is "moralistic." I also do not agree with the parallel to the protective labor legislation. All three of those examples empower the state. We are looking to empower women. We have the audacity to think that we might be able to use the state to help do it. It is either going to do something real for us or it is not. We can decide that the state is not an arena to use; we can also decide that it is not an arena to use in this case. Or, we can decide that there is nothing that we can do, because really we're trying to turn straw into gold; you know, turn powerlessness into power. If we are looking for an Archimedian point, a place to stand outside the world of sex inequality to put a lever to move it, I think our search is futile. There is no such place for the status of women. People who are looking at women's current situation and calling it "power" are looking for that, and it is not there.

DuBois: I am just struck that although you see a kind of seamless historical unity in the oppression of women, so much so that there is no significant change, you see absolutely no historical unity in the efforts to combat that oppression.

MacKinnon: I do not agree with your characterization of my position. I also think that "change/no-change" is a really sterile way to construct the problem we face.

DuBois: I believe that I was accurately repeating what you said. You said that if you look at the past of women, there has been no change in women's status. I said that there *has been* change: for instance women have become enfranchised. You see a kind of endless historical background to women's oppression, but not a single historical antecedent of our own efforts to change.

Comment from audience: This seems to be an example to me of part of the problem in the history and the present-day development of how women divide among themselves and therefore cannot go forward in a position of strength and unity to progress and indeed to come to power and change their world.

DuBois: I *do* think that women divide among themselves; that is the inevitable consequence of empowering and moving us ahead. We are different. We have different politics. There are right-wing women and left-wing women; Republican women and Democrat women and anarchist women.

Comment from audience: And feminist women!

DuBois: And feminists—exactly. That's the dilemma. When we get a voice, we don't all say the same thing. And then we have to fight among ourselves to discover what position we will unify behind; it is not automatic. And we have reached that point of struggling in history.

MacKinnon: I do see some basis in the past for change, and I see a basis throughout the society for it now. Women fight against subordination. What I particularly see, though, is that when women fight against sexual force through law, they are interpreted essentially as trying to engage the state in repression or to get special protection by the use of state power. I feel a lot in common with feminists of the past, and also with women who are not identified as feminist, who have fought against sexual subordination. However, my standard for change is really rather major. That is the reason that I do not see that past changes have been all that significant. Consider rape: No more rape. That, to me, would be a significant change, change dealing with the context of sexual force. Rape has been a constant condition in that it is and has been *de facto* legitimized and allowed. Granted, if lunatics were to still commit rape on occasion even after this change, I would still say there had been change. As it is now, rape can occur at any time and nothing is done about it. We're walking targets for it. Until this changes, I say we are in a subordinate circumstance.

Question from audience: What do you think about the discovery and elaboration of the women's voice as a different voice (as articulated by Carol Gilligan in psychology) as a political development? She seems to imply that we are going to start to talk to each other differently now that we understand this voice, and that this will force a change.

MacKinnon: I didn't think she predicted that that would happen. Rather, I thought she said that *if* the voice were listened to, the discourse would be transformed. I am—it will shock you to hear—ambivalent about it. On the one hand, I feel excited by the strong and elegant sensitivity in the work. There is something deeply feminist there: the impulse to listen to women. I also think the data is right. I don't think the attributes she advanced are biological but I do think that accurate social regularities were found—and for me gender is a social regularity. On the other hand, what is infuriating about it (which is a very heavy thing to say about a book that is so cool and graceful and gentle in its emo-

tional touch), and this is a political infuriation, is that it neglects the explanatory level. *Why* do women become these people, more than men, who represent *these* values? This is really very important. For me, the answer is clear: the answer is the subordination of women. That does not mean that I throw out those values. Those are nice values; everyone should have them. I'm not saying that taking these values seriously would not transform discourse, which would be a good thing under any circumstance of gender. She also has found the voice of the victim—yes, women are a victimized group. The articulation of the voice of the victim is crucial because laws about victimization typically are made by people with power, and come from the perspective with power. I think the interjection of that perspective has important possibilities.

What bothers me is identifying women with it. I'm not saying that Carol does this expressly in her book. But I am troubled by the possibility of women identifying with what is a positively valued feminine stereotype. It is "the feminine." It is actually called "the feminine" in the middle chapter of the book. Given existing male dominance, those values amount to a set-up to be shafted. I am particularly worried about the legal impact of this. Take what Carrie said. If Jake and Amy converse, what happens? Well, we heard if Jake does not listen to Amy, he wins. There is something gendered about that. What happens if Amy doesn't listen to Jake? She loses. You see what I mean? The reason I put it out like that is because I think the power issues are crucial and unignorable. If it is male dominance which has created people in these images, then *recognizing that* really matters for the applications. So I think the explanation part is crucial on its own, but also for the applications. Power is socially constructed such that if Jake simply chooses not to listen to Amy, he wins; but if Amy simply chooses not to listen to Jake, she loses. In other words, Jake still wins because that is the system. And I am trying to work out how to change that system, not just how to make people be more fully human within it.

Gilligan: Your definition of power is his definition.

MacKinnon: That is because the society *is* that way, it operates on his definition, and I am trying to change it.

Gilligan: To have her definition come in?

MacKinnon: That would be part of it, but more to have a definition that she would articulate that she cannot now, because his

foot is on her throat.

Gilligan: She's saying it.

MacKinnon: I know, but she is articulating the feminine. And you are calling it hers. That's what I find infuriating.

Gilligan: No, I am saying she is articulating a set of values which are very positive.

MacKinnon: Right, and I am saying they are feminine. And calling them hers is infuriating to me because we have never had the power to develop what ours really would be.

Dunlap: I am speaking out of turn. I am also standing, which I am told by some is a male thing to do. But I am still a woman—standing.

I am not subordinate to any man! I find myself very often contesting efforts at my subordination—both standing and lying down and sitting and in various other positions—but I am not subordinate to any man! And I have been told by Kitty MacKinnon that women have never *not* been subordinate to men. So I stand here an exception and invite all other women here to be an exception and stand.

Everyone who believes it is true that we have never *not* been subordinate to men, remain seated. Everyone who believes that you do not have to be subordinate to men, stand if you can.

Today we have been subordinated to a definition of who is radical, who is feminist, what sex is good, and who gets to talk. I think all those things are very subordinating and also very male. I also think such things happen in these kinds of environments and I'm not going to make a big deal out of it. I want to say something more positive. I want to talk about soccer. The most priceless thing I have done lately is play soccer with women. Very few of us have ever played before; thank goodness we have a female coach who did. We differ all the time about whether the purpose of the team is to win or to get to play. I have come to be fully sure that both are true and that something else is true. There is a woman, a friend of one of the women on the team, who cannot play because she is disabled. She cannot play—there is no equal opportunity for her, indeed no opportunity for her. She said to us at the game last week: "Just being out here with you, getting to watch you, lets me play." Now, as a disabled person, she is subordinate to everyone who gets to play soccer. And she has done something with that subordination which has turned it into a kind of love that

gets her past that reality. I do not submit, by that example, that her disability in its immutability is like gender, which I believe is mutable in many ways, our self-definitions being part of it. What I am trying to say is that the idea that any of us here, or any of you there, should decide for all of us who is a good feminist, who is a good radical, what sex is good, and who gets to talk is taking advantage of the rest of us. I am not going to take such advantage of people.²⁶

Question from audience (to Gilligan): If instead of breaking your subjects down into male and female, you had broken them into rich and poor, white and black, children of employed and unemployed parents, would you have found different things?

Gilligan: That is a terrific question. That is exactly my question and that is what I am doing now. I started my work on adolescents in a girls' school, of advantaged girls, and now I am working in the inner city so that I *can* answer your question. But let me give you some preliminary information; let me tell you why I did what I did and some preliminary answers that suggest it is not that simple, that you cannot assimilate the discussion of gender into the discussion of social inequality. There are elements and dimensions to questions of gender that do not fit that model. Basically, I am in disagreement with Kitty MacKinnon. Trying to make gender fit the inequality model is the most traditional way to deal with gender, and it will not work. Gender is not exactly like social class. It is not simply a matter of dominance and subordination. There is no way to envision gender disappearing as one envisions, in utopian visions of society, class disappearing or race becoming a difference that makes no difference. The fact that gender is a difference that one cannot envision disappearing is why it makes so many people so angry. It does not fit their schemes of analysis. It is always a thorn in their side.

Let me present one of my most interesting, intriguing, "findings in process." I have black women in my studies. I did not explain that explicitly in my book; I realize that was a serious omission: since I said nothing, everybody assumed my subjects were all white, which is a reasonable assumption. If you are not told the gender of subjects of psychological research and you assume they

26. Catharine A. MacKinnon had to leave at this point, by pre-arrangement, to catch a plane.

are male, you're probably right. If I had said to people that there were black women in my studies, people would assume, because of the way blacks have been portrayed in the social science literature, that the black women exemplify the lower stages of the various kinds of care that I wrote about in the middle chapters of my book. (There I focused on how women are what Kitty calls "the feminine"; I studied different ways that women conceptualize femininity—from oppressive ways to nonoppressive ways.) In fact, the opposite is true. Without having any particular criterion, I just picked women. I found that I was using the voices of black women to represent the integration of justice and care. I can explain that in my own terms by noting that black women are exactly in a position to know most acutely about both inequality and attachment—both experiences have been heightened for them in this racist society. I was thus very intrigued that the voices I picked to best illustrate the struggle to integrate justice and caring belong to black women.

I then did a study of medical students. I found a group of women within that study who seemed to be atypical of the rest of the women in the strength of their justice focus. They were black women. And these women were different from black women in my other studies, so I didn't even have a uniform finding about "black women vs. white women." I began to wonder: What was it about the medical school context that was heightening this issue? I then noticed that this group of black women, the medical students, had been interviewed by a white male. I realized it would certainly heighten all the elements of inequality, to have a white man interviewing black female medical students—there is a whole dominance issue right there. The strongest justice-focus women in my study were the black female medical students. One might think that the doubly oppressed groups should speak doubly strongly about care. It is not so simple. Perhaps the victims of violence are the proponents of care. Still, the victims of violence, most often male, are the perpetrators of violence.

It's a complicated set of problems. My own sense is that we shouldn't reach for all the familiar categories of analysis which have never been able to deal very well with these problems. I see an opening now. The source of my optimism is that opening. I don't think oppression will miraculously end and that things will change, but I see at this moment an opening. I think this opening

is enlarged by the increasing presence of women in positions of some influence and power—this discussion is an example. I think there's a possibility for change. That is all.

In the next phase of my own work, working with adolescents in the inner city, I hope to begin to look at the interplay between social class and gender, between different cultures and gender. I hope to begin to see, but I am a big skeptic. The social class literature indicates that there is a correlation between high moral development and high social class. But ask yourself: If that's true, how come the people in power are perpetrating inequality or making wars?

Question from audience: I'd like to focus on pornography and, in general, on the implications of the speakers' ideas about sexuality. Why is this issue so important and so divisive within the women's movement and between the women's movement and the gay and lesbian activists in this country?

Menkel-Meadow: I'd like to answer that question in part because I find myself in the middle of this issue frequently. That is (to use all the labels Mary alluded to), I always like to think of myself as a radical feminist—until someone out-radicalizes me, and then I find myself sitting on the liberal fence again. Let me try to answer the question by saying that the problem is very complicated. One reason that the tension develops around it is that in the effort to unify, we keep seeking some basic principle that will bring us all together. Every time we think we have found one of those, we discover some of the exceptions to it and some people attach themselves to the exceptions and we become very troubled and very sad that we cannot get behind a particular principle. The first time I heard Kitty talking about her notion that what unifies us all as women is that we are oppressed, that we are oppressed by the particular condition that men view us primarily and exclusively as sexual objects, I thought: That has a tremendous ring of truth to it. But the more I thought about it, the more I thought that although I could get behind that principle, I could probably formulate some other principles that would also attempt to unify people.

I think that if you take a look at any male stereotypic statement of who women are, it includes not only the sexual-object notion but the mother notion also. We are also the mother of their children and we are their mothers when they are children. There

has been a lot of important work in psychology about how men's perception of women is influenced by the way in which they have been mothered by women. I suspect there are several other people out there in the audience who can pick other principles that might explain the difference between men and women in efforts to unify all women behind them.

The truth of the matter is, as Carol mentioned in her work, all of these relationships are very complicated. Being viewed as a sexual object may be the most important one, but I prefer to be agnostic on that at the moment, in part because I think there are other principles that may have just as much explanatory force. The hard thing, the thing that tears us apart in meetings like this, is that we keep seeking a reductionist explanation behind which we can all unify. However, I think we are beginning to grasp the human complexity of it all.

I am pleased by and I will support Kitty's efforts at trying to get the pornography statute passed despite the fact that as a lawyer I see a whole lot of first amendment problems with it. I think it is an important field to be laboring in, though for me it is not the only field. It is important that we have many other voices up here trying to explore a lot of different fields.

I want to react to something Ellen said earlier as another effort to somehow reduce those variables that explain ourselves to each other and to the outside world. Whenever we have these discussions, there is much talk about whether they are sufficiently political or not. At the risk of yet another redundancy in our arguments, let me say that one of the powers of feminism is that the political arena, as we commonly conceive of it, is not the only place to be having these arguments and discussions. Talking about women in psychology is important, as is talking about domestic history, talking about women in architecture, looking at women in medicine, women in law, women at home, and in quilting (to use the image from this morning)—all of these things are different aspects of life. What the feminist movement has done has been to bring different spheres of the way we live into the discourse. That makes it far more complicated, because then we cannot agree on any one sphere as being the one that explains it all.

DuBois: I think it's a very hard question. Dorothy McCarrick²⁷

27. Lecturer in Law, State University of New York at Buffalo.

made an historical analogy with which I agree. The way that the issue of protective labor legislation versus the ERA was unresolvable in 1920 and splintered the women's movement, has certain analogies to the question of pornography in feminism today. Most feminists I know are in the position you, Carrie, are; they kind of sit on one seat and then they have to go over and sit on the other one because they cannot take one side or the other.

I cannot say why pornography has become the brick wall up against which feminism has come. One thing I would point out is that it is a sexual issue. Much of the feelings people have about it have to do with the fact that it is sexual. I actually think that there is a kind of pornophobia; in some ways we are more afraid of pornography than we need to be. I want to read an article by Lisa Duggan. She answers this question in this way:

Pornography is made to stand for all misogyny, all discrimination, all exploitation of women, in the view of the feminist anti-pornography campaign. It not only causes but constitutes the subordination of women. The commodification and objectification of women's bodies is believed to reside more centrally in pornography than in mainstream media. This society's cultural violence against women is said to radiate from, rather than be reflected in, pornography. The campaign against pornography is thus a symbolic substitute for more diffuse but more necessary campaign against the myriad forms of male domination in economic life and political life and sexual life. Pornography serves as a condensed metaphor for female degradation.²⁸

Pornography is far easier to fight politically than other feminist issues in the conservative climate of the Reagan years. I think that's extremely important. I am not implying any motive, but the political context of the pornography issue cannot be ignored. It is an issue which, I believe the right wing has controlled. That cannot just be ignored or considered incidental. While the issue of pornography is more complicated than simply the fact that it is a right-wing issue, we cannot ignore that it is a central tenet of the right-wing program. I find it disturbing that at this time in history we should focus on the issue of pornography instead of the issue of, say, abortion, which is the issue that is going to be determined politically and is directly related to the lives and deaths of women. I don't know why pornography draws fire.

28. Duggan, *Censorship in the Name of Feminism*, Village Voice, Oct. 16, 1984, at 11 (one in a series of three articles in a symposium on feminism and the first amendment entitled *Forbidden Fantasies: A Special Issue on Pornography*).

Dunlap: I am going to try to be very brief. Keeping a close mind to human reality—the reality for women particularly—and considering the statistics that Kitty MacKinnon presented this morning about incest, child abuse, rape, sexual harassment, and all of the sexist violence, I find the anti-pornography approach very distracting, very diffusing. I work as a lawyer, among other things, representing people in novel causes of action. More often than not, I represent women. I represent, in a case that is as yet unfiled and anonymous, a woman who is the victim of tremendous, repeated, frequent, phenomenal—phenomenal in the sense that she survived—sexual and physical victimization by her father. I know that her anger is indispensable to her recovery. I also know that her anger is insufficient—in the same way I know that our anger about pornography, and all of our differences about it, is very valuable yet insufficient to respond to the needs of that client. Where are the attorneys in court representing the victims in rape cases? There is a problem of priorities, there is a problem of finitude of resources.

Here we have a ballot; let us vote on what things we are going to put our bodies, monies, minds, and anything else we have to offer, behind. I will not personally check on that ballot anti-pornography campaigns because I know how desperate the needs of women who are survivors of various crimes of sexual violence are—for attorneys in various stages, for psychologists, for therapists, for scholars, for you, for all of us. For me it is a question of priorities. I do take a position. I do not care if I am called liberal, radical, or whatever. I have been called everything and it really does not matter to me.

What I want (and this is not self-sacrificing—it's caring; that's a crucial distinction) is to be able to make the difference that Kitty MacKinnon also wants to be able to make. Let us end rape. I know that that is not "just going to happen." I also think that if we take on pornography as the image of rape, and we destroy it, we will have destroyed, I suspect, nothing more than the image of rape. I don't believe this as a sociological conclusion; I don't buy the idea that pornography is a primary cause of sexist violence. I do believe that it is very much reflective of it, and that it can lend an atmosphere of permission of violence, sexist or otherwise. I nevertheless don't buy that pornography is a primary cause of sexist violence.

My problem is thus prioritizing. My response is to prioritize boldly, whatever mistakes are involved. To go forward and not, having said that, to put down what is being done by others. However, I do want to put down a part of it, and I want to be clear about this. I have read, in these articles and elsewhere, that many people ask: "What is so good about the first amendment? Who needs it? This primacy of the first amendment is really male." *But wait a minute!* When you say that, you're overlooking ninety-seven percent of all the human rights movements—call it anti-nuke, call it pro-labor, call it pro-victims of McCarthyism. There's a lot more to expression than pornography. As soon as we cast out and throw aside first amendment protections in favor of vanquishing what I believe is primarily the image of sexist violence (and I am not excusing pornography; it makes me sick), as soon as we toss aside the right of expression in favor of that, we are going to lose. Speaking concretely, the U.S. Supreme Court took an appeal two weeks ago in a case called *National Gay Task Force v. Oklahoma City Board of Education*.²⁹ The issue is whether Oklahoma can, in effect, ban anyone who supports gay rights from teaching in the Oklahoma schools. But they have written it very cleverly. When you read that statute, you think what it has to do with is public sex acts for which people are criminalized and arrested. You think: All they are doing is getting rid of any teacher who has that particular crime record. That passes muster with a lot of people. But in fact what they are doing in that ordinance, and what they tried to do with the Briggs Initiative in California,³⁰ is to say: "Certain kinds of communication about sex are unacceptable and we are going to ban them." Does that sound familiar? There is a frightening parallel here. There is a parallel at least as frightening as the authors in the *Village Voice* article say.³¹ The parallel is be-

29. 729 F.2d 1270 (10th Cir. 1984), *aff'd mem.* 105 S. Ct. 1858 (1985).

30. The Briggs Initiative was a referendum to prohibit school teachers from publicly giving their views on homosexuality. Specifically, the initiative provided for the filing of charges against teachers, teachers' aides, school administrators, or counselors either for advocating, promoting, encouraging, or soliciting private or public homosexual activities in a manner likely to come to the attention of other employees or students, or for publicly and indiscreetly engaging in such actions. See N.Y. Times, Aug. 30, 1978, at 107 (supplementary material). The referendum was defeated. Herben, *Tax Limits Passed in Several States*, N.Y. Times, Nov. 8, 1978, at A1, col. 1, A19, col.3.

31. See generally Duggan, *supra* note 28; Hentoff, *Is the First Amendment Dangerous to Women?*, *Village Voice*, Oct. 16, 1984, at 14; Goldstein, *Pornography and Its Discontents*, *Village Voice*, Oct. 16, 1984, at 19.

tween saying, "The only kind of sex that is good is the kind that I say is good, and my name is Kitty MacKinnon," and "The only sex that is good is the kind that I say is good, and my name is Jerry Falwell." I am sorry, but there is a terribly frightening parallel there. With all that I have in common with *her* that I will never have in common with *him*, that parallel frightens me.

DuBois: Let me say one other thing about why pornography becomes so central. At this point in history feminism and the oppression of women have an ambivalent relationship to the question of sexuality: that we have had too much of it not under our own control and not enough of it under our own control. Pornography captures that. We have both been the victims—having sexuality impressed on us against our will—and we have been deprived of our own sexual expression. The debate over pornography gets caught in that.

Question from audience: I would like to go back to the central proposals that were made by the speakers throughout the course of the day. We seem to be heading in a somewhat anti-feminist direction. My reasons, briefly, for feeling this way: First of all, Carol Gilligan did not spend a lot of time elaborating on her assertion that an androgynous ideal is not out of the question as a long range goal of feminist strategies and reforms. Mary Dunlap seems to have suggested that she would back the ideal of equality, which even the softest feminist might agree is flawed by what male domination has done to the contents of that notion. We are told by Ellen DuBois that the whole notion of moralism can be somewhat of a co-opting trap for feminism. I guess that I am troubled by attempts, on a theoretical level, to characterize a largely more powerful and exciting movement, attempts that have led to the articulation of feminist theory. The tragedy is that such attempts really could be total dead-ends for feminism. I do not see androgyny as being an ideal that I am particularly interested in, but until "feminist values" (whatever those are) have been looked at a lot more carefully, I cannot back the ideal of equality. Nor can I do so until I see, in more detail, just what that ideal can produce for men rather than for women.

My real problem is that while everybody is happy to dump on Catharine MacKinnon's campaign against pornography, at the same time they ignore her very clearly stated position that the state is now a tool of patriarchal oppression. They seem to be

holding her accountable for the problems that women experience at the hands of the state and trashing her for attempting to get around that. They are, in fact, misrepresenting her statement, so I do not really expect a complete answer to that. I would, however, like to raise the possibility that the trend in feminist thought is very much an anti-feminist one—if one looks back to the literature of the late sixties and early seventies.

Menkel-Meadow: Would you help me by defining what you mean by “anti-feminist” in that context?

Response from questioner: Setting up a set of tactics which are more likely to place you in the hands of male hegemony than continuing the line of analysis that Catharine MacKinnon, for example, has tried to take. Trying to identify those sources of oppression and come up with specific tactics which deal with particular kinds of problems instead of trying to sketch out theoretical norms like equality or androgyny.

Gilligan: I just want to say one thing: I held up the androgyny solution in using the pirate-and-the-neighbor game as the solution that I rejected—the implication that we can have two games that can fit happily alongside each other. When I gave the example, using that as the shorthand illustration of the combination of the games, it was not an illustration of androgyny. It was precisely the opposite. It was an illustration of how to listen seriously and take seriously women’s experience. It implied a transformation, a change, in both old games, in both the old masculine game and the old feminine game. I then illustrated exactly what I meant because the old masculine game had said “equality” for (you can correct me about how many years) a hundred years while sustaining inequality. The old feminine game had said “attachment and care” while silencing women. I was really suggesting that the androgyny model sustains both that definition of equality and that definition of attachment or care, both of which I reject. It also suggested that, in fact, if you include women’s experience (my definition of feminism is to see in women’s experience human experience) if you take it seriously, attend to it, explore it, that would be transformative.

Question from audience: I guess that I did not hear the example of what you described as being transformative.

Gilligan: You do not think that is a new notion of care—a notion that is not destructive to women? Or a new notion of

equality that does not co-exist with, as Kitty said, fifty-nine cents to the dollar? What does the word "equality" mean?

Comment from audience: Getting back to the point on androgyny: I interpreted the resolution which the children arrived at as more a recognition that even at the age of four years, the young woman in the scenario knew quite well that she would not be able to influence the pirate's game and had decided instead to settle for as much of her own space as possible. This was to simply say: "Well, let's be neighbors."

Gilligan: That is very interesting and very illuminating because you assume there are two choices: either she dominates or she is subordinate. I say that her solution is transformative because it creates a game that is neither the neighbor game nor the pirate game but a new game—the pirate-neighbor game—which is different from the one that either imagined. How it works out in practice is one thing. But one sees this, as a matter of fact, in studies of small children. They do not resort to aggression as their first means of resolving conflict. Contrary to the image psychologists have created, they in fact play out solutions that are creative and cooperative, like the solution of a pirate-neighbor game. She says, basically: "Instead of my losing and your winning, let's invent a new game." I identify that as the creative solution.

Comment from audience: I guess I would be interested in the cultural content in the game of the four-year-old girl.

Gilligan: That's a very good question. If you observe the pirate-neighbor game, is it a concealed form of domination and subordination or is it in fact a kind of creative adventure for both kids?

DuBois: To return to I cannot see any purpose in calling any position in the debate between different feminist positions "anti-feminist." We often face clear and unambiguous anti-feminist opposition. These anti-feminists are easy to pick out. We are also at a point at which feminists have no political unity. We are at a crucial point. But I cannot understand why in the world we should call dissenting feminisms "anti-feminist." Do you mean to obscure the difference between feminists who disagree on that position and Phyllis Schlafly or Ronald Reagan?

Response from audience: No, but I do want to draw out connections between some of the more disparaging aspects of the analysis. I think that there are connections which could become dis-

empowering to the women's movement. That is what concerns me. We ourselves, by our own theorizing, by the structure of our theorizing, might be too easily co-opted into reconstructing male methods of analysis or male forms which could make us abandon the kinds of positions that Catharine MacKinnon, for example, has been arguing.

Menkel-Meadow: I do not think it is that simple. I think a lot of what we are doing is really part of a much larger dialectical process where we begin with a reform, be it liberal, radical, or in some cases even conservative, and some of us unite behind it while others do not. We then watch it played out like protective labor legislation, which was a very good thing when it happened. The same thing is true of a lot of the concrete issues that we are talking about.

I would like to respond to another part of your earlier question, regarding the way I and others view the state. It is simplistic to the point of being incorrect to say that we want to avoid using the state at all costs to fight our battles. The use of the state in fighting feminist battles has been a mixed bag. In that bag have come some very good things. Feminists have fought very hard for laws that protect battered women and a number of other things. For those who have not read it, I recommend Fran Olsen's article in the *Harvard Law Review*,³² in which she outlines beautifully and exhaustively the mixed-bag nature of reforms that have occurred through law and through the use of the state to try to ameliorate some of these problems. It would be incorrect for us all to abandon the state, as it would be for us to totally embrace the state. There are times that it helps us and times that it hurts us. We are not going to find an answer today that will settle these questions for ever and for always. We have to keep working. When something turns out not to be helpful to us, we try to change it.

Marcus: I think that is precisely one of the reasons for my raising that question this morning and thank you for addressing it. The extent to which the state can be used to further feminist goals obviously is an issue that surfaces in the pornography debate. I am sorry that Kitty had to leave early. In her *Signs* arti-

32. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

cle,³³ she identifies the state with male domination, and yet the prescription is that feminists, who are concerned about images of sexual violence, try to use the state in order to eliminate or suppress those images.³⁴

One theme which emerges in these conversations is anger. What else are we besides our anger? Another theme which emerges is frustration. We have no way of knowing in advance whether the use of the state for a particular program over time will not lead to a reform being turned on its head. Perhaps the best example of that may be what has happened in the abortion debate. To hear the major presidential and vice-presidential candidates in 1984 talking about issues which we all thought were resolved in 1972 leaves one with the most extraordinary sense of anger and frustration. What we have heard in this conversation, the pitch of which rose at times, is a reflection of how complex we perceive the issues to be and how emotionally engaged we are.

I hope this will inspire you to continue the conversation.

33. MacKinnon, *supra* note 12.

34. At the request of the *Buffalo Law Review*, MacKinnon responded to this statement. In *Signs*, the state was analyzed as "male," not in its eternal essence (in the liberal mode), but in the interests it embodies and expresses. The point of the analysis is, therefore, not passively to contemplate the nature of the state, or to resignedly acquiesce in its operation but actively to criticize it, in order to develop a strategy for change. Both the *Signs* analysis and the pornography ordinances are parts of that theory and practice for change.

