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Sam Joyner

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REMARKS

A PLANETARY SURVEY OF FEMINIST JURISPRUDENCE: IF MEN ARE FROM MARS AND WOMEN ARE FROM VENUS, WHERE DO LAWYERS COME FROM?*

The Honorable Sam Joyner†

'Tis woman's strongest vindication for speaking that the world needs to hear her voice The world has had to limp along with the wobbling gait and the one-sided hesitancy of a man with one eye. Suddenly the bandage is removed from the other eye and the whole body is filled with light. It sees a circle where before it saw a segment. The darkened eye restored, every member rejoices with it.¹

One can think of the oboe and the clarinet as different. Yet when they play together, there is a sound that's not either one of them, but it doesn't dissolve the identity of either instrument.²

* These remarks were presented at the Oklahoma Bar Association Women in Law Conference in Tulsa, Oklahoma, on August 28, 1997. They are published here substantially as delivered. To aid the reader, footnotes have been added.

† United States Magistrate Judge for the Northern District of Oklahoma. The writer acknowledges with gratitude the editorial assistance of law clerks Tammy D. Barrett and Douglas M. Todd.

1. ANNA JULIA COOPER, *A VOICE FROM THE SOUTH* n.vii (Negro University Press 1969). This United States educator, feminist and author was one of the earliest African American woman to earn a Ph.D. Her teachings and writings disclosed a modern view of racism and sexism in Western civilization.

2. Barbara Dolan and Melissa Ludtke, *Coming From A Different Place*, TIME, Fall 1990, at 66 (quoting Carol Gilligan in a special issue on "Women: The road ahead").

I. INTRODUCTION

John Gray's popular book, *Men are from Mars, Women are from Venus*,³ is about the difficulty men and women have communicating with each other. I have twisted the title a bit to suggest the ambiguity and role-conflict some women suffer when they make the law their chosen profession.

John Gray compares men to Mars, the Roman god of war, and women to Venus, the Roman goddess of love and beauty. The practice of law, especially trial practice, is adversarial and more attuned to Mars than to Venus. If John Gray is right, there is trouble ahead. Must a woman litigator be other than who she wants to be or other than her natural instincts and talents have prepared her to be? Must she "act like a man" to be successful in the courtroom? Are there real differences between men and women which are ignored by judges and which put women at a disadvantage in the courtroom? How has the law been impacted by the large influx of women?

This article will explore these questions through three inquiries:

1. Are men and women different? This is not, in the parlance, a slam dunk—not as obvious and easy to understand as one might think. Men and women are different, but not as different as popular culture suggests.
2. This difference, combined with the large influx of women into the law, has generated a philosophy of law called feminist jurisprudence. What are these contributions that feminist thought brings to the law?
3. Are gender differences properly acknowledged and responded to in the courts? Are women placed at a disadvantage because of their gender? To what extent does gender bias impact our courts?

A quick note on the source of my interest in these issues is appropriate. My Master's study and thesis were directed to the ethical training of students in law school.⁴ I found law school instruction excessively amoral, with insufficient exploration of the ethical impact of legal reasoning and choices. My thesis posited that more humanities in law school would help fill this void and produce a more value-conscious graduate. Literature, poetry, even the visual arts, would produce a wisdom not found in the United States Code or in Circuit case law. Feminist jurisprudence was one of several humane/humanistic avenues I found helpful in making values more central to legal education.

My interest goes beyond the classroom. Feminist thought is not only a women's issue. It impacts men and women equally on many fronts in and out of the law school. Most importantly, as a judge, I want to ensure that our courts, that is, my court, is sensitive to gender differences and pressures.

3. JOHN GRAY, PH.D., *MEN ARE FROM MARS, WOMEN ARE FROM VENUS: A PRACTICAL GUIDE FOR IMPROVING COMMUNICATION AND GETTING WHAT YOU WANT IN YOUR RELATIONSHIPS* (1992).

4. A copy of the thesis, "Moral Development Can Be Enhanced by Liberal Arts and Humanities In Law School" is on file at the Bizzell Library, University of Oklahoma, Norman, Oklahoma. See also Sam A. Joyner, *Law School and Legal Ethics — A Part of the Illness or the Cure*, 60 OKLA. B. J. 743 (1989).

II. MALE/FEMALE DIFFERENCES

A. *Popular Culture*

Popular comment on male/female differences abounds. During an interview on the *Today Show* about the demise of her relationship with Don Johnson, Melanie Griffith proclaimed, "You know, men and women are just from different planets." Browsing a local book store, I encountered a work by Erica Jong, a salacious or savvy writer on women's issues, depending on your point of view. Jong concludes, "Men and Women, Women and Men—no—it will never work." A feminist friend once said to me, "Sam, I have nothing against men—in fact I like men. They can reach the top shelf, carry heavy things and open a jar of pickles." Apparently, men are valuable for some things. The joke (I think it was a joke) points to obvious physical differences. Men are typically taller and bigger, with louder and deeper voices. Do court facilities properly deal with these differences? This question is reserved for later.

Thus, men and women are different. We could stop there and join Maurice Chevalier, the French raconteur and movie star, when he says, "Ces men and ces women are different—but oh la la—vive, la différence!"⁵ But that does little to inform the situation. I will conclude this article in agreement with Chevalier, but not in the same context.

B. *Carl G. Jung*

There are those with more expertise than Melanie Griffith and Maurice Chevalier who confirm that differences exist between men and women beyond the familiar anatomical ones. One of the first and most prominent was Swiss psychologist, Carl Gustave Jung.⁶ If you have heard people at a cocktail party saying their anima or animus is out of balance, or that they are Jungian, C.G. Jung is the fellow that gave them their talk.

Jung found the human mind or psyche⁷ divided into opposites. Each of us has rational, logical capacities expressed through conscious, well thought-out action. Each of us has an intuitive, feeling side which functions most often on an unstructured, subconscious level.⁸ To Jung, these capacities are innate. Some people are well balanced and able to express both attitudes. More often, one is more developed than the other. The extent to which one predominates determines our personality type. One is not better or worse than the other. They are just different.⁹

5. *Gigi*, a 1958 movie directed by Vincente Minnelli and distributed by MGM Home Entertainment.

6. See CARL G. JUNG, C.G. JUNG SPEAKING: INTERVIEWS AND ENCOUNTERS (William McGuire and R.F.C. Hull eds., 1977).

7. In this article, mind, psyche and personality are used interchangeably. This is not to belie Psyche's origin as the lover of Cupid (Eros) in Greek mythology, who ultimately becomes the personification of the soul. See ROBERT E. BELL, WOMEN OF CLASSICAL MYTHOLOGY (1995).

8. See generally FRIEDA FORDHAM, AN INTRODUCTION TO JUNG'S PSYCHOLOGY (3rd ed. 1966).

9. See generally CARL G. JUNG, PSYCHOLOGICAL TYPES (1971).

According to Jung, the logical, structured thought process is typically associated with men, and can be impersonal, analytical, and calculating. The opposite mode of processing information is more intuitive and caring, and is typically associated with those born female.¹⁰ However, each of us expresses these male and female psychic properties. The healthiest psyche or personality is one in which these opposites are balanced and complementary. Even though the one is more often dominant in men and the other in women, there are women in whom the "analytical" thought process may be dominant and men who are more feeling and intuitive. The distinction does not always fall along gender lines. Jung does not address whether these distinctions have a cultural or genetic basis.

Whether you accept Jung's science or not, there is allegorical validity in the premise that there is wisdom of the head and wisdom of the heart. Either one, alone, leads to excess—arid intellect from the head or emotions pouring from the heart. Men and women alike should strive to be heart-smart as well as head-smart. Four hundred years ago, Pascal summed it up in one sentence: "The heart has its reasons which reason knows nothing of."¹¹

C. Carol Gilligan

Jung's work was not directed toward the law or women in the law. Developmental psychologist Carol Gilligan did just that in her 1982 book *In a Different Voice*.¹² Gilligan analyzed the different thought processes that men and women use and how those differences impact women in the law. Gilligan worked at Harvard with Lawrence Kohlberg at a time when his cognitive theories of moral development through stages were becoming widely accepted.¹³ Gilligan challenged Kohlberg's all-male studies and his tacit assumption that his male models of moral development applied equally to women.¹⁴ To the contrary, Gilligan's work found moral development to proceed quite differently in women, and, in the process, she provided a major taproot in moral psychology to which many feminist theorists, in and out of the law, quickly attached themselves.¹⁵

From empirical study, Gilligan found men and women to have a different approach to decision-making and problem-solving—that women speak "with a

10. See generally EDWARD F. EDINGER, AN OUTLINE OF ANALYTICAL PSYCHOLOGY 12 (1968).

11. ROBERT C. SOLOMON AND CATHLEEN M. HIGGINS, A SHORT HISTORY OF PHILOSOPHY 187 (1996) (Oxford University Press).

12. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

13. See LAWRENCE KOHLBERG, MORAL STAGES AND MORALIZATION: THE COGNITIVE-DEVELOPMENTAL APPROACH IN MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES contained in MAN, MORALITY, AND SOCIETY (Thomas Lickona, ed., 1976). See also LAWRENCE KOHLBERG, MORAL STAGES: A CURRENT FORMULATION AND A RESPONSE TO CRITICS (1983).

14. See Martha Siegel, *A Practitioner's Guide to Feminist Jurisprudence*, 37 BOSTON B.J., Sept.-Oct. 1993, at 6, 8.

15. See Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1380 (1986); see also Siegel, *supra* note 14, at 7.

different voice."¹⁶ Women use different criteria and modes of reasoning to make moral decisions than men. The feminine decision-making process is based on preserving relationships, nurturing, individual responsibility, and expresses an ethic of caring and compassion that is concerned more with the results of a particular factual situation than with strictly enforcing universal rules.¹⁷ The male process is based more on individually-owned rights and the application of universal rules.¹⁸

According to Gilligan, women have a different way of "knowing" from which they draw conclusions about truth, knowledge, and authority.¹⁹ They rely more on intuition and feelings, while a man may rely more on observable "facts" and universal rules. Women may be more concerned about whether the results are fair in a particular case.²⁰ Men may be more concerned that the rule was followed properly to ensure fairness overall, even though the results in the particular case are a bit skewed.²¹ Gilligan is unclear about whether these differences are biological or social in origin.²²

Few scholars now accept Gilligan's empirical conclusions without question.²³ Social psychologist Carol Tavris considered Gilligan's work in detail and she agrees with psychologist Martha Mednick in finding that Gilligan's "different voice" has little scientific base.

There is much that I admire about Gilligan's work, particularly its expanded vision of the importance of an ethic of care in moral reasoning. But Mednick is right: The popularity of this theory does not rest on its scientific merit. On the contrary, research in recent years casts considerable doubt on the notion that men and women differ appreciably in the moral reasoning, or that women have a permanently different voice because of their early closeness to their mothers.²⁴

Tavris points out that there is danger in the appealing theory that women have a natural capacity to be more loving, are more connected and peaceful, speak in a different voice, and have different ways of knowing and proving things or reaching moral decisions. Now described by many as "cultural feminism,"²⁵

16. GILLIGAN, *supra* note 12, at 2.

17. *See id.* at 29 and 164.

18. *See id.* at 25-51, 164 and 174.

19. *See also* MARY FIELD BELENKY ET. AL., *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* (1986).

20. *See* GILLIGAN, *supra* note 12, at 24.

21. *See id.* at 25-51.

22. *See id.* at 2.

23. *See, e.g.,* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 871 n.174 (listing critics of Gilligan who argue that Gilligan's material does not support her thesis and that she exaggerates the male/female duality).

24. CAROL TAVRIS, *THE MISMEASURE OF WOMAN—WHY WOMEN ARE NOT THE BETTER SEX, THE INFERIOR SEX, OR THE OPPOSITE SEX* 83 (1992).

25. For an excellent article on the rise of cultural feminism, see Alice Echols, *THE TAMING OF THE ID: FEMINIST SEXUAL POLITICS: 1968-1983* in C.S. VANCE (ED.), *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY*. BOSTON: ROUTLEDGE AND KEGAN PAUL (1984). For an excellent overview of the debate over cultural feminism see Linda Lacey, *Mimicking the Words, But Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence*, 35 B.C. L. REV. 1 (1993). For a partial list of critics see *id.* at 4 n.26. Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (including

this is theory, she complains, lets men off the hook in their obligation to share child care and family obligations equally, ignores men's softer side, and supports the old idea that women are best suited to certain kinds of jobs.²⁶ Even if we agree that Gilligan's science is a bit skewed, her work has expanded our awareness of the covert, often unintentional, effect of gender-based factors in the law.

Gilligan confirms John Gray's description of what happens when Mars and Venus try to communicate.

My research suggests that men and women may speak different languages that they assume are the same, using similar words to encode disparate experiences of self and social relationships. They contain a propensity for systematic mistranslation.²⁷

You and your spouse or significant other may have "a propensity for systematic mistranslation."

D. Male/Female Allegories

Another wonderful perspective on male/female differences—not as scientific, but certainly more entertaining—can be found in Mark Twain's *The Complete Diaries of Adam and Eve*.²⁸ Twain has Adam complaining about this long-haired creature that follows him around and never quits talking. Eve describes this man-creature she adores for no reason she can identify, and observes that "he is not bright and he speaks little so that others will not know he is not bright."²⁹

It is not far from Adam and Eve to the tale of Jacob and Sarah, another bible-based man/woman allegory. Ex-Dominican priest Matthew Fox draws a distinction between climbing Jacob's ladder and dancing Sarah's circle.³⁰ Jacob dreamed of "a ladder [which] was set on the earth with its top reaching to heaven; and behold the angels of God were ascending and descending on it."³¹ Good Christians ever since have been singing "We are climbing Jacob's ladder," choosing what Fox describes as a male-created symbol for hierarchy in the church and in society, and the source of many ills in both.³²

Williams' curious call for 'Gilligan in reverse'). For a comprehensive defense of cultural feminism see Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VERT. L. REV. 1 (1990). In her overview of the debate over cultural feminism, Lacey concludes with a partial defense of Gilligan and the cultural feminist. "Cultural feminism has made significant contributions to feminist dialogue and continues to provide a perspective which illuminates at least part of many women's experiences" . . . [and has] "made important contributions to the goal of restructuring our legal system." Lacey, *supra* note 25, at 16, 18.

26. See *id.* TAVRIS, *supra* note 24, at 332.

27. Gilligan, *supra* note 12 at 173.

28. MARK TWAIN, *THE COMPLETE SHORT STORIES OF MARK TWAIN* 273-295 (Charles Neider ed., 1957).

29. *Id.* at 286.

30. MATTHEW FOX, *A SPIRITUALITY CALLED COMPASSION AND THE HEALING OF THE GLOBAL VILLAGE* 36 (1979).

31. *Genesis* 28:12.

32. FOX, *supra* note 30, at 41.

Instead of climbing Jacob's ladder, we should be "dancing Sarah's circle," which Fox finds in the description of Sarah's joy at giving birth at the age of 90, with her 100 year-old husband, Abraham, after having been barren for those 90 years.³³ Fox complains that the ladder-climbing symbol implies a Sisyphean experience of trying to get to the top with the traditional male attributes of competition, elitism, and hierarchy.³⁴ Survival, especially at the top, is precarious and requires ruthless individualism. Sarah's circle emphasizes community and equality, a circle with no up or down, no beginning or end. You can dance, you can talk, you can relate eye-to-eye in Sarah's circle, none of which is possible while climbing Jacob's ladder.³⁵

It was exciting to find this same allegoric duality repeated millennia later in Gilligan's work. This time it is Jake's ladder and Amy's web. Gilligan describes Jake's ladder as representing the hierarchical ordering of individual rights and the male-created justice-ethic that protects that ordering of rights.³⁶ Amy's web represents the ties that bind individuals into relationships governed by an ethic of care that balances reciprocal responsibilities instead of individual rights.³⁷

Feminist scholars find these same tensions at work between Antigone and Creon in Sophocles' tragedy.³⁸ At the risk of death by stoning, Antigone resolves to bury her brother in spite of King Creon's decree that the body not be buried. Fearing anarchy, Creon argues that the king, chosen to govern, must be obeyed in all things, great and small, just and unjust. Antigone, her eyes on a higher law beyond monarchy, stresses relationship and feeling above detachment and objectivity. For Antigone, loyalty to the sibling bond outweighs a justice defined by a bright-line test and deference to absolute legal authority.³⁹ Some see in the Antigone/Creon dispute Gilligan's two ethics in contention—the ethic of caring and the ethic of law and order.⁴⁰

We began with Adam and Eve, proceeded through "historian" Mark Twain, moved to the Old Testament, spent a moment with the Greeks, and concluded with Carol Gilligan's Jake and Amy. The marvelous serendipity is finding the same questions, frustrations, and frictions central to feminist legal thought at work over time. It gives one the perspective to know that these issues will not be resolved in this writing or in any other.

The lesson to be learned is not that men and women are different but that within each of us are "male" and "female" characteristics which should be expressed with intelligence and feeling. In the stories of Jake/Amy and

33. *Genesis* 18:11-15 and 21:1-8.

34. FOX, *supra* note 30, at 41. *See also* Siegel, *supra* note 14, at 6.

35. *See* FOX, *supra* note 30, at 47.

36. GILLIGAN, *supra* note 12, at 26.

37. *See id.* at 28. *See also* Siegel, *supra* note 14, at 8.

38. *See* Siegel, *supra* note 14, at 11. *See, e.g.*, JACK, MORAL VISION AND PROFESSIONAL DECISIONS 2-5 (1989); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1594, 1606-1614 (1991).

39. *See* SOPHOCLES, *ANTIGONE*, Trans. by RICHARD EMIL BRAUN, OXFORD UNIVERSITY PRESS (1973).

40. *See* Siegel, *supra* note 14, at 11.

Antigone/Creon, the feelings-versus-logic conflict has been personified, magnified, and "genderfied" for better viewing. These opposites are compensatory and complementary. The healthiest individual or society expresses both with balance.⁴¹ When imbalance exists in the individual or society, an inevitable disruption and correction occur. The greater the imbalance, the greater the disruption or pain generated by correction.⁴² In the individual, the disruption and correction may range from men trying to get in touch with their softer side to serious psychological pathology and treatment. In society, losses generated by the Western world's male myopia are legion, including the loss of Myra Bradwell's services as an attorney.⁴³ Feminist thought is certainly a part of the correction.

E. Back to Science

In spite of what Carol Gilligan, Carl Jung, and Melanie Griffith have to say, the jury is still very much out on how different men and women really are. Is it really true that female lawyers take a different approach to moral issues? Are women really more caring, nurturing, result-oriented, feeling, and intuitive? Are men more interested in rules, logic, and form over substance? Scholars looking seriously at the question have discovered three positions.

1. Men's Ways Are Better

First-position supporters say there are significant personality/psychological differences between the sexes; the man's way is better for the business or legal world; the woman's way is suited to the home and family. This position's legal zenith was reached in 1869 when the Illinois supreme court rejected Myra Bradwell's application to practice law. The Illinois court proclaimed that "God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws."⁴⁴ The United States Supreme Court affirmed. Mr. Justice Bradley's concurrence has become an anti-manifesto for many feminists.

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. [sic]. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.⁴⁵

41. See JUNG, *supra* note 6.

42. See Anthony Storr, *THE ESSENTIAL JUNG—PSYCHOLOGICAL TYPES AND THE SELF-REGULATING PSYCHE* (1983). See also C.G. JUNG, *PSYCHOLOGICAL TYPES* (1971).

43. See discussion of Myra Bradwell's rejected application to practice law, *infra* notes 44-5.

44. *In re Bradwell*, 55 Ill. 535, 539 (1869).

45. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

T. Lang may have brought this first position to its highest (or lowest) point with the following language from a book entitled *The Difference Between a Man and a Woman*:

It must be stated boldly that conceptual thought is exclusive to the masculine intellect. . . . [I]t is no deprecation of a woman to state that she is more sensitive in her emotions and less ruled by her intellect. We are merely stating a difference, a difference which equips her for the special part for which she was cast. . . . Her skull is also smaller than man's; and so, of course, is her brain.⁴⁶

Lang's language might be laughable as a dated attempt at primitive craniology, but for its date of 1971.

2. Women's Ways Are Better

Second-position supporters agree that fundamental differences exist in the way men and women think and speak, but conclude that women's ways are better. Much in vogue in the last 25 years, this position holds that by nature women are more intuitive, feeling, and compassionate; that they experience intimacy in relationships on a deeper level; and that there is wisdom in these women's ways that male leadership has been missing for some 2,000 years.⁴⁷ Carol Gilligan became this position's strongest voice.⁴⁸ Thousands of women saw themselves in Gilligan's articulation of their different voice and identified with the frustrations described by Gilligan at not being listened to at all.⁴⁹ Feminist writer Lindsey Van Gelder proclaimed,

[As] the traditional caretakers, women in this culture easily affiliate and identify with others, value people's feelings, and tend to base moral codes on the good of the entire group. . . . [These] traditionally female values are our best shot at changing consciousness—and saving the world.⁵⁰

From the arts to economics to metaphysics, women's ways seemed to make sense. Matthew Fox articulated a widely felt sentiment:

I am personally convinced that the most important development in American (and possibly in Western) spirituality in the past three years has been the development of women's consciousness and the feminist perspective in responding to life.⁵¹

What used to be viewed as female weaknesses are now viewed as strengths. Men emulate these women's ways and try to get in touch with their own feelings, to hug, to cry, and to relate on a deeper level than the Dallas Cowboys and the newest recipe for homemade beer.⁵²

46. T. LANG, *THE DIFFERENCE BETWEEN A MAN AND A WOMAN* 203-204 (1971).

47. See *supra* note 24, at 82-83.

48. See discussion of Carol Gilligan and cultural feminism *supra* notes 15-31.

49. See *supra* note 24, at 82-83.

50. Lindsey Van Gelder, *It's Not Nice to Mess with Mother Nature*, MS MAGAZINE, Jan.-Feb. 1989, at 60-63.

51. MATTHEW FOX, *ON BECOMING A MAGICAL, MYSTICAL BEAR* n. xx (1972).

52. See generally ROBERT BLY, *IRON JOHN* (1990); SAM KEEN, *FIRE IN THE BELLY — ON BEING A*

3. Men's and Women's Ways Are the Same

The third position is that no intrinsic differences exist in the way men and women think, speak, and relate. Men and women are not, by nature, different at all. Any anecdotal evidence to the contrary is solely the result of the position in which the parties have been placed by cultural pressures or of generalizations that cannot be validated by a closer look.

People enjoy dividing the world into opposites—it makes the world clear and easy to understand.⁵³ Why won't a man stop to ask for directions? Why does my wife do well if you ask her to turn to the left, but disconnects if you ask her to turn north? Why does she so often wonder what I am thinking? What facts cause Erma Bombeck to comment that any man that will watch three football games in a row should be declared legally dead?⁵⁴ Why do my spirits lift as we drive into a hardware store parking lot while my wife's begin to sink? It is tempting to say, "my spouse does weird things and it is because of his or her gender." These generalizations are not confirmed by hard science, however.

Carol Tavris provides that hard science in her 1992 book *The Mismeasure of Woman—Why Women Are Not the Better Sex, the Inferior Sex, or the Opposite Sex*.⁵⁵ Tavris empirically examined the reputed differences between men and women, and found few, if any, are supported by real scientific evidence.⁵⁶ Men are not superior in math and science. Women are not superior in writing and verbal skills.⁵⁷ Women are not more peace-loving and nurturing.⁵⁸ For example, any man or woman placed in a child-rearing role displays the same amount of nurturing, warmth, compassion, and caring.⁵⁹ Men are not more warlike and aggressive.⁶⁰ When making moral decisions, men use care-based or results-oriented reasoning as often as do women, and women rely on rules and regulations as much as men.⁶¹ Men need intimacy and attachment as much as women.⁶² Women do not come from Venus, and Men do not come from Mars. We all come from the "third rock from the sun" and are pretty much chips off the same rock.

Tavris agrees that men and women have different styles of expression but contends that these styles do not indicate different capacities or even real personality differences.⁶³ These styles are caused not by genetic or even learned differences, but rather by the position, or what Tavris calls context, in which women have been traditionally placed—positions with less power and authority

MAN (1991); ROBERT HICKS, *THE MASCULINE JOURNEY* (1993).

53. See *supra* note 14, at 90-92.

54. See CAROLYN WAGNER, *TREASURY OF WOMEN'S QUOTATIONS* 211 (1992).

55. See TAVRIS, *supra* note 24.

56. See *id.* at 95 and 296.

57. See *id.* at 52.

58. See *id.* at 63.

59. See *id.*

60. See *id.* at 66-71.

61. See *Tavris*, *supra* note 24, at 79-85.

62. See *id.* at 296.

63. See *id.*

than those of men.⁶⁴

Reputed gender differences are often created by the amount of authority or power a woman is in a position to assert.⁶⁵ The more power or authority a person has, the more direct, succinct, and clear is that person's language pattern. The less power or authority a person has, the more timid, soft, and indirect are that person's speech patterns—whether a man or a woman. Men and women in the business world who enjoy an equivalent degree of authority display the same kind of assertiveness, competence, and self-confidence.

Women's reputed intuition has developed from their being excluded from positions of power.⁶⁶ Men and women in subservient positions rely on intuitions and feelings to deal with those in power. Men tend to develop more power and authority as they proceed through their careers, whereas most women do not.⁶⁷

Tavris pushes her "context" idea one step further by suggesting that how a person acts depends on the gender of who that person is with. We "do" gender unconsciously, adjusting our behavior depending on the gender of the people with whom we associate.⁶⁸ We also worry about the gender issue when we are the token.⁶⁹ When we worry about it, we tend to overreact one way or the other. As a judicial officer, of concern to me is the suggestion that in a group of men, one or two women will become quiet and reticent, while those same women in a group of women would be bubbling over with ideas and energy. The same is true of men in a group of women: I do not want gender differences to intimidate a member of any group I am a part of, in or out of the courtroom.

The goal for both sexes should be to add new qualities and skills, not to lose old ones. We must resist the temptation to see the world in terms of opposites — the Western inclination to think in dualities and divisions.⁷⁰ Are we rational or emotional? Are we shaped by nature or nurture? Are we masculine or feminine? We should answer yes to all these questions and move on. The real question should be, "What shall we do about us, all of us, so that our relationships, our work, our children, and our planet will flourish?"⁷¹

III. FEMINIST JURISPRUDENCE

Women now account for 45% of students in law school and 23% of the practicing bar.⁷² If this enrollment rate continues, projections are that 40% of

64. See *id.* at 294-295.

65. See *id.* at 297.

66. See *id.* at 65.

67. See Tauris, *supra* note 24, at 312.

68. See *id.* at 292.

69. See *id.*

70. See TAVRIS, *supra* note 24 at 90.

71. See TAVRIS, *supra* note 24.

72. See Kelly Lucas, *Women in the Law: Coming of Age*, 40 RES GESTAE 30, 31 (1996); Amy E. Decker, *Women in Corporate Law: Rewriting the Rules*, 4 AM. U.J. GENDER & L. 511, 511 n.2 (1996); Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the*

all attorneys in the year 2010 will be women.⁷³ "Between 1971 and 1991, the number of men in the profession doubled while the number of women increased sixteen-fold."⁷⁴ This influx of women and the concomitant interest in "women's ways" have generated substantial change in the American legal system—a deep-rooted institution not easily moved.⁷⁵ It is at those roots that the philosophical assumptions of our legal system are being questioned by what is now referred to by most writers as feminist jurisprudence.

Jurisprudence is not an everyday word in the courtroom. It is the philosophy of the law—the underpinnings that explain and support those things that are said in the courtroom every day. Philosophies set their roots in academia and then become the foundation upon which visible and valuable practical applications are based. Feminist jurisprudence is not the first philosophical critique of the traditional rule-orientation of legal formalism or positivism.⁷⁶ Karl Llewellyn's legal realism,⁷⁷ Judge Richard Posner's emphasis on the economic factors at work in the law,⁷⁸ Duncan Kennedy's critical legal studies,⁷⁹ and John Rawls' "Justice as Fairness"⁸⁰ have been effective critiques of traditional formalist roots. Feminist jurisprudence is a philosophy of the law based in feminist thought. It shares the "situation sense" of the realists and of critical legal studies but reflects a greater concern for context and community.⁸¹

As a distinct body of academic inquiry, feminist jurisprudence is said to have originated at a Harvard conference in 1978.⁸² Six years before, a pioneering legal scholar by the name of Ruth Bader Ginsburg had convened at New York University Law School a two-day conference entitled *The Law School Curriculum and the Legal Rights of Women*.⁸³ Feminist jurisprudence is young but just as significant as the major directions of study that preceded it; it is described by one writer as the most powerful of the contemporary movements in legal history.⁸⁴ Every woman lawyer is connected to it by gender, at least,

Legal Profession, 4 DUKE J. GENDER L. & POL'Y 119 (Spring 1997).

73. See Lucas, *supra* note 72, at 31.

74. See *id.* at 30; Scales, *supra* note 15, at 1382.

75. See, Seigel, *supra* note 14, at 6.

76. Positivists, also referred to as objectivists, suggested that the law constituted "science", something neutral, abstract, impersonal and universal to be applied with strict objectivity. For an overview of the major critics of traditional objectivism see ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 5-14 (1983).

77. Legal Realism grew out of the rejection of Positivism, arguing that external factors varying from economics to politics influenced legal doctrine and decisions. See Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

78. See generally RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

79. See UNGER, *supra* note 76.

80. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971); and NORMAN DANIELS, *READING RAWLS, CRITICAL STUDIES OF A THEORY OF JUSTICE* (1975). This highly influential work of moral and political philosophy impacts legal theory on many fronts.

81. See Lanae Holbrook, *Justice Barkett's Feminist Jurisprudence*, 46 U. MIAMI L. REV. 1161, 1185 (1992); Siegel, *supra* note 14, at 6-7; Scales, *supra* note 15, at 1400. See also UNGER, *supra* note 76.

82. See Lisa R. Pruitt, *A Survey of Feminist Jurisprudence*, 16 U. ARK. LITTLE ROCK L.J. 183, 183 (1994).

83. See Grace Ganz Blumberg, *Women and the Law: Taking Stock After Twenty-Five Years*, 6 U.C.L.A. WOMEN'S L.J. 279, 281 (1996).

84. See Cass R. Sunstein, *Feminism and legal Theory*, 101 HARV. L. REV. 826, 826 (1988) (Reviewing

and can take pride in that fact.

One diversion must be dispatched. The mention of "feminism" rankles many men and some women such that the hair on the back of their necks stands on end, their eyes glaze over, and they stop listening.⁸⁵ My goal is to go beyond the excesses and the superficiality of political correctness and to find viable the important contribution that women bring to legal theory. The phrase "militant feminist" is an oxymoron as applied to the law. Feminism is about a caring, results-oriented approach to the law—the opposite of militancy.

What has feminist jurisprudence brought to the law? What is the difference between the law as it is (or as it was before women arrived) and as the feminine perspective would have it be?⁸⁶ Professor Katharine Bartlett responds:

When feminists 'do law,' they do what other lawyers do: they examine the facts of a legal issue or dispute, they identify the essential features of those facts, they determine what legal principles should guide resolution of the dispute, and they apply those principles to the facts. This process unfolds not in a linear, sequential, or strictly logical manner, but rather in a pragmatic, interactive manner.⁸⁷

Bartlett adds that feminists go one or two steps further and seek "to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups."⁸⁸ Catherine MacKinnon concurs: "Simply by treating the status quo as 'the standard,' it invisibly and uncritically accepts the arrangements under male supremacy."⁸⁹

Context is important. "[F]eminist jurisprudence [does not] reject the Rule of Law; [it] simply places more emphasis on personal experience, which is accessed through empathy. Instead of using universal rules as a starting point for analysis, [it] analyzes human experience to determine the applicability of rules."⁹⁰

Feminism may help us see that what the universal aspirations are attempting to achieve may vary from context to context from small community to large urban setting, from trial court to appellate court, from single judge to collective judges, from commercial to constitutional law. If we understand feminist skepticism not as rejecting all levels of generality but rather

CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)). For the view that the project of mainstreaming feminist issues has been largely neglected, if not abandoned in legal academe see Blumberg, *supra* note 83, at 282. "Although the occupants of this corner tend to be quite vociferous, even feisty, they largely preach to the already converted in ghettoized small courses and seminars and do little or nothing to alter the fabric of the traditional legal subject matter that deeply affects women's lives." *Id.* at 282.

85. Holbrook, *supra* note 81, at 1168. See generally ROBERT HUGHES, *CULTURE OF COMPLAINT* (1993). Hughes discusses the excesses related to politically correct feminism with insight and humor.

86. For general discussions of feminist legal theory and jurisprudence, see, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]; CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* (1989); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1 (1992); Elizabeth M. Schneider et al., *Feminist Jurisprudence: The 1990 Myra Bradwell Day Panel*, 1 COLUM. J. GENDER & L. 5 (1991).

87. Bartlett, *supra* note 23, at 836.

88. *Id.*

89. See MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 86, at 43.

90. Holbrook, *supra* note 81, at 1183.

as reminding us of the limits and risks of such generalizing, we gain in our ability to press beyond the talisman-like phrases.⁹¹

The good lawyer does not limit inquiry to whether or not the defendant signed the contract. The good lawyer inquires further. What are the relationships of the parties? How will one solution harm that relationship and another not? Rules and rights are not more important than the results and the specific facts of the case.⁹² Substance, not form, should tip the scales of justice.

Feminist jurisprudence expresses a frustration with the tunnel vision that results from excessive devotion to past and precedent, rule and regulation. Law professor Ann Scales suggests this frustration as she borrows the words of Dorothy Dinnerstein from *The Mermaid and the Minotaur*.⁹³ Professor Scales describes traditional male-created jurisprudence as a "compulsive concentration on what can be predicted, controlled, manipulated, possessed and preserved, piled up and counted."⁹⁴ Scales discusses the "male" concept of abstract universality, the inflexible application of the rule, and contends that it constructs a "dark tunnel to its tainted delusion."⁹⁵

It made maleness the norm of what is human, and did so sub rosa, all in the name of neutrality. By this subterranean system, the 'relevant' differences have been and always will be those which keep women in their place.⁹⁶

Traditional jurisprudence is objective, rights-based, rational, process-oriented (if the process was followed, the result must be okay), and too often ignores context and result. Feminist jurisprudence is relational, care-based, results-oriented, and accepts inexactness.⁹⁷

IV. THINKING LIKE A LAWYER

Feminist perspective is suspect of legal inquiry based in the traditional process of "thinking like a lawyer."⁹⁸

Law schools traditionally reward male-style linear thinking, and women, who adopt it in order to survive and succeed, have begun to protest.⁹⁹

When law schools teach us "to think like a lawyer," they may really teach us to "think like a man."¹⁰⁰

91. Judith Resnik, *On the Bias: Feminist Reconsideration of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877, 1911 (1988).

92. See Pruitt, *supra* note 82, at 183.

93. See Scales, *supra* note 15, at 1403 n.63 (citing DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR* (1977)).

94. *Id.* at 1390-91.

95. *Id.* at 1337.

96. *Id.* at 1378.

97. See *id.* at 1382-83.

98. See Pruitt, *supra* note 82, at 183.

99. Siegel, *supra* note 14, at 10.

100. *Id.* at 8.

One writer calls for "critical attention to the nature of legal reasoning . . . and the extent to which it is male defined, and the extent to which its language and its process of reasoning are built on male conceptions of problems and of harms—and on male . . . methods of analysis."¹⁰¹

My strongest recollection of the first days of law school is the repeated instruction that I must learn "to think like a lawyer," described as the ability to distinguish a legal from a nonlegal issue, to see the various sides of a problem, to reason formally and logically, and to express ourselves clearly, concisely, and unemotionally. The benefits of dispassionate analysis have been the bedrock of legal education from its inception. Negative consequences became apparent, however, as legal educators searched for a solution to the Watergate-induced credibility crisis, generating much commentary in the 1970's on the emotional aridity of law school instruction.¹⁰² Cornell Law School Dean, Roger Cramton, confirmed:

The law teacher must stress cognitive rationality along with 'hard' facts and 'cold' logic and 'concrete' realities. Emotion, imagination, sentiments of affection and trust, a sense of wonder or awe at the inexplicable—these soft and mushy domains of the 'tender minded' are off limits for law school students and lawyers.¹⁰³

Having been told that "you can't be a duck until you learn to quack," Scott Turow complained of his first year at Harvard Law School that students were "being limited, harmed, by the education, forced to substitute dry reason for emotion to cultivate opinions which were 'rational' but which had no roots in the experience, the life, they'd had before."¹⁰⁴ Little mainstream change or response resulted from this cry of the 1970's. Feminists have taken up the call.

Feminist jurisprudence endorses a broader, value-based process of legal reasoning, with expanded definitions of justice and standards of care.¹⁰⁵ The literature on creativity and aesthetic perception has long recognized the superior efficiency of a less structured, less directed method of inquiry.¹⁰⁶ Feminist jurisprudence suggests that lawyers would do well to listen more often to voices

101. Lucinda M. Finley, *Breaking the Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989).

102. See H. PACKER AND T. EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 30 (1972); Savoy, *Toward A New Politics of Legal Education*, 79 YALE L.J. 444, 461 (1970); Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 432 (1971). For the negative effects of "thinking like a lawyer," see Thomas E. Willging & Thomas G. Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306, 335 (1982); B. Boyer & Roger C. Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 270 (1974); Erlanger & Klegon, *Socialization Effects of Professional School*, 13 LAW & SOC'Y REV. 11, 30 (1978); John O. Mudd, *Thinking Critically About Thinking Like a Lawyer*, 33 J. LEGAL EDUC. 704, 705 (1983). See also Bellow & Johnson, *Reflections on the University of Southern California Clinical Semester*, 44 S. CAL. L. REV. 664 (1971); THOMAS L. SHAFFER AND ROBERT S. REDMOUNT, LAWYERS, LAW STUDENTS, AND PEOPLE 129 (1977); KARL LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1951).

103. Roger Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 250 (1978).

104. SCOTT TUROW, ONE L 55, 81 (Warner Books 1988) (1977).

105. See Siegel, *supra* note 14, at 10. See, e.g., Bender, *supra* note 95, at 23.

106. See BREWSTER GHISELIN, *THE CREATIVE PROCESS* 222 (1952); JOHN DEWEY, *ART AS EXPERIENCE* (1934). See also ANTON EHRENZWEIG, *THE HIDDEN ORDER OF ART* xii (1967).

not their own—in this case, those of artists and psychologists.

Psychology says that in ordinary analysis we quickly select the most simple and coherent pattern or answer that has good form and seems right, as judged by our trained, habituated taste.¹⁰⁷ The law (or law professor) says we should focus quickly on the pith of the problem and find the answer dictated by code or case law. Both describe the process of “learning to think like a lawyer.” Like a horse with blinders, we race other horses with similar focus and restriction, unable to see a different, possibly shorter and better path along the way.

In contrast, one author, whose background combines the law, psychology, and art, recommends a different way of thinking. Anton Ehrenzweig, a former law magistrate in his native Vienna and a lecturer in art education at the University of London, describes an ability to perceive and digest the whole picture or concept without too quickly reducing it to a “pinned down” answer, pattern, or “gestalt.”¹⁰⁸ In *The Hidden Order of Art*, Ehrenzweig recommends a syncretistic thought process that melds the conscious and the subconscious, preventing the conscious answer from crystallizing too quickly.¹⁰⁹ Ehrenzweig says we should permit our intuitions and feelings to incubate in the murky morass of the subconscious. He warns that too much structure and control of the thought process may block creative thought and moral sense.¹¹⁰

Precise visualization or, worse still, a straining of one’s attention to see crystal clearness where there is in fact none, will only produce wrong or unusable results.¹¹¹

Feminist jurisprudence agrees that less thinking “like a lawyer” and more sensitivity to feelings and intuition will produce more usable results, a higher moral sense, and original, creative solutions.¹¹²

This ability to search without having the answer, to perceive without dissection, and to achieve resolution or synthesis without lawyer-like precision or precedent is a capacity to be developed. If we are able to yield control from conscious-focusing to unconscious-scanning, and if we are open to the wisdom of our subconscious thought processes, our creative, intuitive capacities can emerge with original insight. Such “peripheral thinking” can improve the performance of lawyers in the courtroom and in the office. If, however, surface faculties react with defensive rigidity (what some would call male stubbornness), original insight and moral sense from the subconscious are lost.¹¹³ Large corporations spend much time and money training their M.B.A.s and J.D.s to be more creative in their thinking. Feminists say legal education should do the same.

From within our own ranks, former Michigan Law School Dean Terrance

107. EHRENZWEIG, *supra* note 106, at 32.

108. EHRENZWEIG, *supra* note 106, at 11.

109. *Id.* at 9.

110. *Id.* at 39.

111. *Id.* at 42.

112. See Siegel, *supra* note 14, at 10.

113. See EHRENZWEIG, *supra* note 106, at 35, 38.

Sandalow agrees that law schools have harmed lawyers' thought processes by "excessive reliance on familiar categories of thought; and inability to tolerate uncertainty; and sentimentality."¹¹⁴ Columbia law professor Jack Himmelstein talks about "becoming a lawyer" in a book by that name.¹¹⁵

Asking these questions without being diverted by the need to have 'the answer' proved crucial. . . . [I]n legal education and practice, the rush to find answers and the priority we put on having the answer can so limit the breadth, depth and meaning of what we are doing that we lose sight of who we are or what we are working toward.¹¹⁶

In summary, these artists, psychologists, and lawyers are saying that the traditional, analytical, answer-oriented process of legal inquiry may miss the forest for the trees. Creative solutions surface more readily when an individual is not constrained by a totally linear thought process and is not blinded by past and precedent. Feminist jurisprudence agrees and reminds us that in a law office the imagination should be used for more than looking for loopholes. William Butler Yeats encapsulates the same sentiment:

God guard me from those thoughts men think
In the mind alone;
He that sings a lasting song
Thinks in a marrow-bone.¹¹⁷

Feminist perspective emphasizes conciliation and negotiation to resolve disputes.¹¹⁸ This may be nothing more than a difference in attitude. The goal is to facilitate resolution of the dispute as quickly and cheaply as possible with the least damage to the parties and the community—not to throw down the gauntlet and prepare for battle. A specific product of the feminist perspective is the dramatic growth of Alternative Dispute Resolution and the settlement process.

The feminist perspective is not limited to women and is shared by many men. Some women reject feminist thoughts, motives, and agendas wholesale.¹¹⁹ Others adopt them with widely diverse interpretations.¹²⁰ Some femi-

114. Sandalow, *Legal Education: Reflections from the Academy, the Bench and the Bar*, 37 *RUTGERS. L. REV.* 579, 596 (1985).

115. See generally ELIZABETH DVORKIN, JACK HIMMELSTEIN, AND HOWARD LESNICK, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* (1981).

116. Jack Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 *N.Y.U. L. REV.* 514, 515 (1978). See also ARTHUR KOESTLER, *THE ACT OF CREATION* 173 (1964).

117. William Butler Yeats, *A Prayer for Old Age*, in *THE POEMS OF W.B. YEATS* 282 (Richard J. Finneran ed., 1983).

118. See Siegel, *supra* note 14, at 30.

119. See Holbrook, *supra* note 81, at 1167 n.30.

120. See Bartlett, *supra* note 23, at 833-36 (discussing problems with the label "feminist" and arguing that "use of the label 'feminist' has contributed to a tendency within feminism to assume a definition of 'woman' or a standard for 'women's experiences' that is fixed, exclusionary, homogenizing, and oppositional, a tendency that feminists have criticized in others"). Accord ELIZABETH SPELMAN, *INESSENTIAL WOMAN* (1990). See also Deborah R. Rhode, *The Woman's Point of View*, 38 *J. LEGAL EDUC.* 39, 41 (1988) ("To assume that feminism offers one theoretical stance is to miss a central point of recent feminist theory. . . . [C]ontemporary feminists stress the inability of any single overarching framework, including a feminist one, to provide an adequate account of social experience.").

nists claim that women's experiences are essential to being a feminist, restricting the perspective to those born female.¹²¹ Admittedly, most of the work focusing on the feminist perspective has been done by women, especially early on; the perspective is also steeped in characteristics traditionally described as female. However, most writers include men as well as women.¹²² Feminist jurisprudence is simply the name given to describe a positive contribution to legal thought that can be and is shared by both men and women.¹²³

Feminist perspective is not only changing the law; it is changing things about the way we physically practice law. The hard line between home and work has been blurred. Part-time and flexible work hours are more accepted. Work from the home and children at the office are more common—a healthy change in attitude.¹²⁴

V. GENDER BIAS

If men and women have different styles of expression, for whatever reason, are those differences being properly acknowledged and responded to in the courts? Are there situations in which a woman is disadvantaged because of her gender?

There are those who say gender bias does occur in the courtroom and the only way for a woman to overcome it is to work longer and harder and be better than her male counterpart.¹²⁵ When Ginger Rogers was asked whether Fred Astaire was truly the better dancer of the two, she responded by pointing out that she had to do everything Astaire did, except she had to do it backwards and in high heels.

Several courts have conducted surveys to examine the extent of gender bias.¹²⁶ In one such survey, 2,700 questionnaires were sent to lawyers in the District of Columbia.¹²⁷ Sixty-four percent of the surveys were returned. Thirty-seven percent of the women who responded reported being addressed by judges or other counsel as "honey," "dear," "young lady," or by their first

121. See Bartlett, *supra* note 23, at 833 n.7 (citing Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1294 n.91 (1987)).

122. See Scales, *supra* note 15, at 1373 n.2; LINDA GORDON, *WHAT'S NEW IN WOMEN'S HISTORY IN FEMINIST STUDIES/CRITICAL STUDIES* 20, 30 (T. de Lauretis ed., 1986); Holbrook, *supra* note 83, at 1167 n.32; Blumberg, *supra* note 83, at 283.

123. See, e.g., William J. Brennan, *Reason, Passion, and The Progress of the Law*; The Forty-Second Annual Benjamin N. Cardozo Lecture, 10 CARD. L. REV. 3 (1988) (suggesting that "[s]ensitivity to one's intuitive and passionate responses, and awareness of the range of human experience, is therefore not only an inevitable but desirable part of the judicial process . . ."); Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1547 (1989); JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (1976) (asserting that judges emphasize rules too much and people too little).

124. See TAVRIS, *supra* note 24, at 128; Eve B. Burton, *More Glass Ceilings Than Open Doors: Women as Outsiders in the Legal Profession*, 65 FORDHAM L. REV. 565, 566 (1996). See also Lucas, *supra* note 74, at 34.

125. See Lucas, *supra* note 72, at 30.

126. See Laura Gatland, *Courts Behaving Badly: Task Forces Say Some Judges Impatient With Job Bias Cases*, 80 A.B.A. J. 30 (1997).

127. Vicki C. Jackson, *Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias*, 84 GEO. L.J. 1657, 1668 (1996).

names; twenty-nine percent reported having their physical appearance commented upon in a way that they perceived to be inappropriate; seventeen percent claimed to have been exposed to unwanted sexual advances from clients, eleven percent from co-workers, nine percent from supervisors, nine percent from opposing counsel, and one percent from judges.¹²⁸

Women also consistently reported feeling that they had been disproportionately interrupted by men in courtroom arguments, during in-chambers discussions with the judge, and in depositions or negotiations with other lawyers.¹²⁹ Fifty-eight percent of the women, as compared to only four percent of the men, felt they had been unfairly treated in this regard.¹³⁰ Women also reported a disproportionate experience of not being recognized in the courthouse as a lawyer by court personnel. Judges of the United States Court of Appeal for the District of Columbia Circuit have applauded¹³¹ and condemned¹³² the survey.

As a judge, I want to know if influences in any courtroom make a man or woman lawyer feel intimidated or disadvantaged. Small situations or irritants, if they exist, should be acknowledged and resolved. Podiums are too tall for some women, and microphones do not properly amplify softer voices. In chambers, idle conversation about sports may make a man or woman lawyer who is not interested in sports feel less a part of the process.

In or out of the courtroom, women need not adopt the traditional male role model in dress or demeanor. If your natural personality is assertive—go with it. If your natural personality is softer—stay with that. The quieter approach may be the stronger for men or women. A superb example was provided by Supreme Court Justice Ruth Bader Ginsburg in her comments at the Oklahoma Bar Association's 1997 Women In Law Conference.¹³³ Her restrained, soft-hued presentation of well-chosen words conveyed considerable strength and power. Anna Julia Cooper provided the words to begin this article, and it is appropriate that she should assist in its close.

[W]omen are more quiet. They don't feel called to mount a barrel and harangue by the hour every time they imagine they have produced an idea.¹³⁴

128. *See id.*

129. *See id.* at 1709.

130. *See id.* at 1727.

131. *See* Patricia Wald, *Glass Ceilings and Open Doors: A Reaction*, 65 *FORDHAM L. REV.* 603, 613 (1996).

132. *See* Laurence Silberman, *The D.C. Circuit Task Force on Gender, Race and Ethnic Bias: Political Correctness Rebuffed*, 19 *HARV. L.J. & PUB. POL'Y* 759 (1996).

133. *Women in Law Conference*, sponsored by the Oklahoma Bar Association, August 28, 1997.

134. Creative Quotations from Anna Julia Cooper <http://128.100.124.81/library/new_acqu/emmanuel/circ/baker.html>.

VI. CONCLUSION

I close with the words of the two women on the United States Supreme Court. In the comments of Ruth Bader Ginsburg at her investiture as a Supreme Court Justice at the White House, she noted that Justice Sandra Day O'Connor had recently quoted Minnesota Supreme Court Justice Jeanne Coyne, who had been asked: Do women judges decide cases differently by virtue of being women? Justice Coyne responded that "a wise old man and a wise old woman reach the same conclusion."¹³⁵ Justice Ginsburg agreed and added that "women . . . contribute . . . a distinctive medley of views influenced by differences in biology, cultural impact, and life experience. A system of justice will be the richer for diversity of background and experience. It will be poorer . . . if all of its members are cast from the same mold."¹³⁶

Justice Ginsburg and Maurice Chevalier agree—"Vive, la différence."¹³⁷

135. Ruth Bader Ginsburg, *Investiture of United States Supreme Court Justice Ruth Bader Ginsburg*, 28 VAL. U. L. REV. 1161, 1174 (1993) (remarks by Justice Ginsburg at her August 10, 1993 investiture at the White House).

136. *Id.*

137. See Gigi, *supra* note 5.



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