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## **Carrie Menkel-Meadow: Dispute Resolution in a Feminist Voice**

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# CARRIE MENKEL-MEADOW: DISPUTE RESOLUTION IN A FEMINIST VOICE

by: Andrea Kupfer Schneider\*

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## I. INTRODUCTION

The presence of women in the law has changed the law's substance, practice, and process. Carrie Menkel-Meadow, whose scholarship centers on this theme, is one such revolutionary woman.

Professor Menkel-Meadow, who I am proud to call my colleague, co-author, and friend (hereinafter referred to as Carrie),<sup>1</sup> began her career in 1977 with a series of simple questions that sparked a breathtaking body of work. Carrie probed the depth of male domination in the realm of law and wondered what changes female representation might engender. In particular, she focused her inquiry on the *value orientation* each respective gender might bring to the law:

To what extent are the legal institutions we deal with male-dominated, both in the values they reflect and the manner or means used to express those values? To what extent might the expression of feminine or female values, principles and qualities both in the ends

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1. Carrie and I both decided that I would refer to her as Carrie throughout this Essay given our close relationship. Yet, we are quite aware that women in academia often face the situation where their titles are not used as frequently nor is as much respect given to them. For example, they are called Mrs. or Ms. rather than Professor by students and others.

desired and the means used to express those ends alter our legal institutions? How does the increased participation of women in these legal institutions move us toward or away from the realization of feminine values in the law?<sup>2</sup>

Over 40 years, Carrie elaborated on these questions to develop a thorough and wide-ranging feminist jurisprudence. This Essay attempts to do justice to her work. Part II recapitulates her account of the feminization of the law: the way that feminine values affect the substance of the law; the way that we practice and learn law; and the process of law, especially in the area of Carrie's other love—dispute resolution. In particular, Carrie used a key narrative to illustrate competing approaches to problem-solving. Spurred by Carol Gilligan's re-analysis of psychology studies, Carrie dove into the moral dilemmas used in psychology and recast the story of Amy and Jake (where they wrestle over the dilemma of whether to steal drugs to save a life) as a lesson in problem-solving. Throughout her writings, Carrie advocated for a feminine ethic of care to have equal footing with the more traditional (masculine) ethic of justice that has been hallowed in law.

Part III of this Essay uses a different narrative from Carrie's scholarship to illustrate the application of the feminization of the law. In the case of Ziba—a hypothetical mediation between an underage bride and her controlling husband, Ahmed—we see how Carrie's own passions for feminism and dispute resolution collide in the mediation process she typically champions.<sup>3</sup> Ultimately, Carrie's treatment of the case puts into practice the ethic of care developed within her feminist jurisprudence.

## II. THE FEMINIZATION OF THE LAW

As women entered the legal profession in significant numbers, interest in this phenomenon followed. Carrie noted that this interest was not just about demographics, but also the accompanying potential for substantive change. “[T]he not-so-hidden subtext of reports of women's entrance into previously male-dominated domains is not simply the numbers question,” Carrie wrote, “but curiosity about how having

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2. Carrie Menkel-Meadow, *Women as Law Teachers: Toward the “Feminization” of Legal Education*, in HUMANISTIC EDUCATION IN LAW: ESSAYS ON THE APPLICATION OF A HUMANISTIC PERSPECTIVE TO LAW TEACHING 16, 16 (1981) [hereinafter Menkel-Meadow, *Women as Law Teachers*].

3. Note that Carrie has worried about the increasing adversarialism of mediation. See, e.g., Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996); Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

two genders (and countless ethnic and racial variations) in an institution formerly all male might alter the structures and practices.”<sup>4</sup>

Indeed, as Carrie documented throughout her career, the feminization of the law affected three broad areas—substance, practice, and process.

### A. Substantive Changes in the Law

First, women’s presence in the law changed the law itself. In her work, Carrie tracked substantive changes in the law that occurred as women entered the profession and advanced feminist jurisprudence.

Carrie began with original or equality feminism<sup>5</sup>—the idea that women and men should be treated equally under the law. For example, both women and men should be able to inherit property, get a credit card, have widow and widower benefits, access education and professions, and so forth. Lauded now for her work as a litigator in front of the Supreme Court, Ruth Bader Ginsburg is probably the most popular, well-known feminist who successfully argued for changes in the law where it was not applied equally to men and women.<sup>6</sup> In her general formulation of how women might change the law itself in favor of equality, Carrie wrote: “[W]omen may, out of their memory of being a disenfranchised and unequal group in our society, forge a commitment to make better laws that promote fair and equal treatment of all human beings.”<sup>7</sup>

The next stage, difference feminism, acknowledged that equality is important, but also that men and women both are biologically different and move through society differently.<sup>8</sup> Carrie described how the law, with its claims of objectivity, fails to account for these differences: “Law, in assuming its neutrality and objectivity (which is in fact constructed on an ‘objectivity’ of male experience in law making and in-

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4. Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 L. & SOC. INQUIRY 289, 314 (1989) [hereinafter Menkel-Meadow, *Feminization of the Legal Profession*].

5. See, e.g., Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493 (1992) [hereinafter Menkel-Meadow, *Mainstreaming Feminist Legal Theory*].

6. Kim Elssesser, *Ruth Bader Ginsburg Was a Feminist Rock Star: Here’s Why*, FORBES (Sept. 19, 2020, 2:01 AM), <https://www.forbes.com/sites/kimelssesser/2020/09/19/ruth-bader-ginsburg-was-a-feminist-rock-star-heres-why/?sh=7c732b1c375d> [<https://perma.cc/V5LN-9KKBK>]; see also Carrie Menkel-Meadow, *Feminist Legal Academics: Changing the Epistemology of American Law Through Conflicts, Controversies and Comparisons*, in GENDER AND CAREERS IN THE LEGAL ACADEMY 475, 481 (Ulrike Schultz et al. eds., 2021) [hereinafter Menkel-Meadow, *Feminist Legal Academics*].

7. Carrie Menkel-Meadow, *Women in Law? A Review of Cynthia Fuchs Epstein’s Women in Law*, 1983 AM. BAR FOUND. RSCH. J. 189, 202 (1983) [hereinafter Menkel-Meadow, *Women in Law?*] (book review).

8. Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, *supra* note 5, at 1515–16.

terpretation) may not consider its differential impact upon women.”<sup>9</sup> Accordingly, these feminists argued for differential treatment when needed—such as in pregnancy protections, domestic violence policies, and sexual assault cases.<sup>10</sup> These laws were changed because of the presence of women in the law.

The third expression of feminism—intersectionality—recognizes that race, ethnicity, and other personal identities add yet another dimension to feminist jurisprudence.<sup>11</sup> It is not sufficient to change the laws without recognizing that intersectionality could also impact the interpretation of these laws. For example, individuals may experience both racial and sex discrimination at the same time, and thus, reform was needed so a plaintiff could allege both at the same time.<sup>12</sup>

And the most recent post-modernist feminist jurisprudence attempts to continue changing the laws with all these concerns from earlier stages in mind—acknowledging, among other principles, that equality is not the same as equity, and that laws and rules which might benefit white women might not necessarily work for women of color.<sup>13</sup> Some instances of differential treatment might still be desired and/or required.

Moreover, the presence of women in the law could also change the way we decide about the law. Carrie asked, as others have as well, whether women in positions of decision-making—such as judges, administrators, and arbitrators—would also view the law differently. In writing about her own experience as a Dalkon Shield arbitrator<sup>14</sup> and then in reviewing a study of immigration judges,<sup>15</sup> Carrie concluded that, in some contexts, gender matters.<sup>16</sup> This is neither a blanket statement that women decide differently, nor a dismissal of the fact that differential experiences will lead to different understandings and applications of the law.

Continuing this exploration of the ways women changed the legal profession, Carrie then examined how the substantive changes might impact, or be impacted by, the different ways women practice law.

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9. *Id.*

10. *Id.* at 1518–19.

11. *See id.* at 1511–12.

12. *Id.* at 1511.

13. *See id.* at 1502–03.

14. Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 LOY. L.A. L. REV. 513, 542 (1998).

15. Carrie Menkel-Meadow, *Asylum in a Different Voice? Judging Immigration Claims and Gender*, in REFUGEE ROULETTE 202, 218–19 (Jaya Ramji-Nogales et al. eds., 2009).

16. Carrie Menkel-Meadow, *Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers: What Difference Does “Gender Difference” Make?*, 18 DISP. RESOL. MAG. 4, 7–8 (2012).

### B. *The Practice of the Law*

In her noted article, *Portia in a Different Voice*, Carrie used the female lawyer from Shakespeare's play *The Merchant of Venice* as a parable of how female lawyers might practice law differently from men<sup>17</sup>:

First, women would inhabit the role of lawyer differently than men if they could overcome men's domination of the profession. Second, women will reconstruct the profession and the legal system to be more cooperative, more contextualized, less rule-bound, more responsible to others, as well as clients, and more conscious of socially just ends. Third, women will refuse to capitulate to a "macho" ethic of law and will try to incorporate their own integration of psycho-social health and family balance, into their roles as lawyers.<sup>18</sup>

Carrie speculated that women could change the practice of the law in at least four different ways. First, women might be more focused on understanding the client and their perspective.<sup>19</sup> Second, women might have a different sense of justice and ethics, and strive harder for a more equitable legal system, because they have been outsiders in a system that only recently gave them a voice.<sup>20</sup> Third, women's presence in law firms might change the firm's practice with more focus on relationships and interpersonal skills.<sup>21</sup> Finally, all these possible changes could affect legal education, both *what* is taught and *how* it is taught, with more women as faculty members and law students. In sum, by virtue of their lived experiences, women's perspectives "offer the possibility of reconstructing certain aspects of the legal system and legal practice, beyond the change of doctrine."<sup>22</sup>

#### 1. Focusing on the Client

Carrie suggested that, as compared to male lawyers, female lawyers might value their clients more. She argued for personal experiences and narrative to be used as legitimate modes of communicating in the legal field, noting that focusing only on objective facts misses what is needed for clients to feel valued and heard<sup>23</sup>: "This polarization of

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17. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) [hereinafter Menkel-Meadow, *Portia in a Different Voice*]; see also Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994) [hereinafter Menkel-Meadow, *Portia Redux*].

18. Menkel-Meadow, *Portia Redux*, *supra* note 17, at 103.

19. See Menkel-Meadow, *Portia in a Different Voice*, *supra* note 17, at 57.

20. Menkel-Meadow, *Feminization of the Legal Profession*, *supra* note 4, at 312.

21. See Menkel-Meadow, *Portia in a Different Voice*, *supra* note 17, at 55.

22. Menkel-Meadow, *Feminization of the Legal Profession*, *supra* note 4, at 318.

23. See Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA WOMEN'S L.J. 287, 306-07 (1992) (reviewing PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991)).

intellect and emotion gives us an incomplete picture of human behavior. Developing an awareness of and dealing with one's emotions is a functional requirement of being a lawyer."<sup>24</sup>

Moreover, a narrow focus on rationality could be at the expense of service to clients: "Lawyers must be able to assess the emotional needs of the people with whom they interact—their clients, those who are disputing with their clients, other lawyers, judges, juries, and witnesses."<sup>25</sup> Thus, clients might be better supported by the feminine ethic of care as Carrie outlined.

## 2. Focus on Ethics and Values

The presence of women in the law might also change the field's approach to ethics. Carrie argued that women—coming from an ethic of care, and who are often caretakers—might be less interested in legal correctness and more interested in compassion and the minimization of harm:

If traditional legal ethics regards its source in canons of ethics and right-behavior, an ethic of care is rooted in situational ethics told by narrative, or the "case law." An ethic of care suggests concern for others and reduction of harm. It suggests [that] a shift in focus from converting the negative sum games of law, in which the lawyers benefit, to a more positive sum game, in which the parties benefit, might transform the adversary system.<sup>26</sup>

Carrie queried: What would this look like in practice? She wrote: "The difficult question in analyzing these themes in practical legal ethics is, do they produce different principles or processes for resolving ethical dilemmas?"<sup>27</sup>

We might now consider some possibilities. Would a "feminine" approach to ethics add exceptions to blanket confidentiality in ways that might benefit society? Might lawyers be permitted to reveal confessions that free the innocent? Might the rules that require lawyers to reveal financial fraud (originally proposed in 1981 by the Kutak Commission and not passed until after the Enron scandal in 2001) have been passed much sooner if women had more voice in the profession?<sup>28</sup>

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24. Menkel-Meadow, *Women as Law Teachers*, *supra* note 2, at 19.

25. *Id.*

26. Menkel-Meadow, *Portia Redux*, *supra* note 17, at 94 (footnote omitted).

27. *Id.* at 94–95.

28. See MODEL RULES OF PRO. CONDUCT r. 1.6(b)(2) (AM. BAR ASS'N, Proposed Final Draft 1981); Andrea Kupfer Schneider, *What's Sex Got to Do With It: Questioning Research on Gender & Negotiation*, 19 NEV. L.J. 919, 939–40 (2019). *But see* Art Hinshaw & Jess K. Alberts, *Gender and Attorney Negotiation Ethics*, 39 WASH. U. J.L. & POL'Y 145, 186 (2012); Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 851–53 (2004).

### 3. Changing the Law Firm

A key question Carrie grappled with in the *Portia* article was whether the presence of women might *meaningfully change* the legal profession: “Will it be simply that more lawyers are women, or will the legal profession be transformed by the women who practice law?”<sup>29</sup>

Over the course of many subsequent articles, Carrie envisioned a feminized practice of law that centered not just on work, but prioritized lawyers’ outside lives, too: “Women may force us to have a more sincere concern for the quality of our work, our personal lives, and their relationship to each other so that unnecessary hard work will not interfere with important human relationships,” she wrote.<sup>30</sup>

Greater representation of women in the legal profession might also have a humanizing effect, she suggested: “Women may remind us to pay more sincere attention to those with whom we work; if we cannot have a truly egalitarian workplace, then we should at least treat our fellow workers as human beings and not as mere instrumentalities for the accomplishment of our work.”<sup>31</sup>

Further, she raised the possibility that the practice of law with more women might become more mediational and less adversarial: “Women lawyers may provide us with ways of practicing law that are less combative and dehumanizing, less damaging to others and ourselves.”<sup>32</sup>

Carrie’s goals for what the practice of law could look like would require leadership that believed in these changes. And while the 1990s saw a dramatic increase in the number of women in law schools and then at law firms, the number of women at the leadership level has remained stagnant.<sup>33</sup> Therefore, any change more women might be able to bring about is yet to be realized, since the majority of practice decisions are still made by the men at the management and practice group leader levels.

### 4. Focus on Teaching and Law Schools

Finally, we could ask whether the presence of women in the law would change law schools and the way we teach. In terms of substance, Carrie suggested that a “more fully integrated study of law

29. Menkel-Meadow, *Portia in a Different Voice*, *supra* note 17, at 39.

30. Menkel-Meadow, *Women in Law?*, *supra* note 7, at 202 (footnote omitted).

31. *Id.*

32. *Id.*

33. *Women as Lawyers and Leaders: The Rise of Women in the Legal Profession*, PRACTICE (May/June 2015), <https://thepractice.law.harvard.edu/article/women-as-lawyers-and-as-leaders/> [<https://perma.cc/GN25-E39F>]; *Representation of Women and People of Color in U.S. Law Firms in 2020*, NALP (June 2021) <https://www.nalp.org/0621research> [<https://perma.cc/3QJV-RC7U>]; PEW RSCH. CTR., *WOMEN AND LEADERSHIP: PUBLIC SAYS WOMEN ARE EQUALLY QUALIFIED, BUT BARRIERS PERSIST 11–15* (2015), <https://www.pewresearch.org/social-trends/2015/01/14/women-and-leadership/> [<https://perma.cc/RH6T-WNQR>].



would look not only at the concrete idea or logical form that describes a rule, but would explore the implication and impact of the rules on the people affected."<sup>34</sup> In other words, she urged us to learn more about the parties to a case, and not just about the writer of the legal opinion. She continued, "[F]or example, the study of a particular case would include not only the principles of decision of the opinion writer, but would explore what happened to the plaintiffs and defendants before and after they came to court, what motivated them in bringing their lawsuit, what was accomplished for them and what was not."<sup>35</sup>

In terms of methods, Carrie similarly argued for a "more humane" approach:

As new individuals join the ranks of the white, middle-aged male profession of law teacher the challenge will be to *expand* our notion of what is appropriate law teaching, developing a repertoire of masculine and feminine qualities for all—not to require the new entrants to the profession to conform to the old and outmoded conceptions of law teaching and lawyering. The possibility of ending discrimination is not just the "liberation" of women but the diversification and liberation of legal education, the lawyering profession and all of the human beings affected by the legal system, producing a more humane system for all.<sup>36</sup>

The dominant teaching method of "stand and recite," which can foment fear and shame in students, is rooted in the past practice of weeding out law students. Moreover, as Carrie has explained, the Socratic method still used by so many law schools is not even the way Socrates taught (which was in small groups to encourage dialogue). Might women demand other methodologies of teaching that are less competitive and more "caring"?

### C. *The Process of the Law*

Unsurprisingly, if the presence of women lawyers changes the substance of the law, the practice of the law, the way lawyers counsel and value clients, and legal ethics, then we would expect that the presence of women could also change the process of law.

Carrie had already started exploring the importance of legal problem-solving with *Toward Another View of Legal Negotiation* in 1984.<sup>37</sup> With *Portia in a Different Voice*, published in 1985, Carrie dove into the moral dilemmas used in psychology as a lesson in legal problem-solving.

In *Portia*, Carrie drew upon Carol Gilligan's 1982 book, *In a Different Voice*, focusing in particular on the hypothetical problem of

34. Menkel-Meadow, *Women as Law Teachers*, *supra* note 2, at 19.

35. *Id.*

36. *Id.* at 32.

37. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

“Amy” and “Jake,” both children representing the typical voices of 11-year-olds in a study of moral development.<sup>38</sup>

The problem goes as follows: Heinz is debating whether to steal life-saving drugs for his wife.<sup>39</sup> Without the drugs she will die.<sup>40</sup> But he and his wife (who is unnamed, as is the pharmacist) cannot afford to buy them.<sup>41</sup> So . . . should he steal the drugs? Jake argues that saving a life is worth more than obeying the law and that it is okay for Heinz to steal the drugs.<sup>42</sup> Jake is seen as taking the high moral ground, understanding the hierarchy of values that puts saving a life ahead of following the rules.<sup>43</sup> Amy, on the other hand (and like many law students), “fights the hypo.”<sup>44</sup> Has Heinz tried to negotiate with the pharmacist? Perhaps they can work out a payment plan? Perhaps the pharmacist would be willing to give a discount once he learns of the situation? In conclusion, what would happen if we tried to problem solve rather than condone breaking the law? Moreover, as Amy notes, what happens if Heinz gets caught stealing?<sup>45</sup> He won’t be able to take care of his sick wife anyway.

Carrie takes Gilligan’s analysis and pushes it into legal processes:

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?<sup>46</sup> • • • Amy then does another thing with the problem. She asks, as Carol reports in her book, 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,

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38. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 25–32 (1982).

39. *Id.* at 25.

40. *Id.*

41. *Id.*

42. Menkel-Meadow, *Portia in a Different Voice*, *supra* note 17, at 46.

43. *Id.*

44. *Id.*

45. *Id.* at 47.

46. Ellen C. DuBois et al., Transcription, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 51 (1985) (Carrie Menkel-Meadow as a conversant in a lecture series discussing her thoughts on Amy and Jake’s responses to the Heinz dilemma); *see also* Ian Gallacher, *My Grandmother Was Mrs. Palsgraf: Ways to Rethink Legal Education to Help Students Become Lawyers, Rather than Just Thinking like Them*, 46 CAP. U. L. REV. 241, 269–71 (2018) (arguing that law schools should spend more time analyzing the facts of cases and develop a better understanding of the people behind the cases they are studying).

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.<sup>47</sup>

Extrapolating Gilligan's example into the realm of law, Amy's clarification call to change the process—to include problem-solving—resonates. In her *Portia* article, and then in her following articles, Carrie continues to point out that Amy is the one who tries to figure out how to meet both parties' interests.<sup>48</sup>

Carrie already noted how women might approach client counseling and ethics differently. Incorporating the examples that Gilligan used to teach about moral decision-making raised the key question of whether an integrative approach to negotiation and a desire to consult with parties to find a more creative solution was, in fact, gendered. "Is caring itself gendered?" Carrie wrote, "[W]hat are the gendered aspects of the theory and practice of care, and does gender have different influences in each sphere?"<sup>49</sup>

Cutting to the heart of the matter, Carrie asked whether certain processes of legal problem-solving were gendered: "[S]everal scholars have argued that feminist sensibilities might affect the processes we bring to bear on solving legal problems . . . . Are clear rules male and discretionarily flexible rules female?"<sup>50</sup> Or, put differently, is dispute resolution a girl?

### III. FEMINIZATION OF THE LAW APPLIED

To understand how these three elements of the feminization of the law play out, we turn to the Ziba example (also outlined in Professor Lela Love's essay<sup>51</sup> for this symposium). The case of Ziba was first outlined in a book on mediator ethics.<sup>52</sup> Professors Menkel-Meadow and Hal Abramson gave their responses to a dilemma that asked each professor to consider how that neutrality would be affected in this case and whether they would (or should) mediate the case.

Framed as a question of whether one should serve as a mediator in a divorce between a couple with two small children, the story considered mediating a case that is fraught with problems.<sup>53</sup> The marriage

47. DuBois et al., *supra* note 46, at 52 (footnote omitted).

48. See, e.g., Menkel-Meadow, *Portia in a Different Voice*, *supra* note 17, at 46–47.

49. Carrie Menkel-Meadow, *What's Gender Got to Do with It?: The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 265, 267 (1996) [hereinafter Menkel-Meadow, *Ethic of Care*].

50. Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, *supra* note 5, at 1521.

51. Lela Porter Love, *The Amazing Carrie Menkel-Meadow and What Wins When Passions Collide*, 10 TEX. A&M L. REV. 43 (2022).

52. *Mediating Multiculturally: Culture and the Ethical Mediator*, in *MEDIATION ETHICS: CASES AND COMMENTARIES* 305, 318–19 (Ellen Waldman ed., 2011) [hereinafter *Mediating Multiculturally*].

53. *Id.*

occurred when Ziba was 13.<sup>54</sup> Her husband, Ahmed, could be liable for statutory rape (perhaps a useful bargaining chip in the divorce), and moreover, any contract signed by Ziba could be voided (perhaps problematic in terms of their marriage contract that provides her at least \$40,000 upon divorce).<sup>55</sup> Even more troubling is the fact that both parties seem to want to follow the norms<sup>56</sup> of their community.<sup>57</sup> But, by so doing, Ziba would have far fewer rights regarding custody and marital support than what she would have under U.S. family law. Following the community practice, she would only receive child support while her children were under seven years old, at which point she would be required to hand them over, and would receive limited marital support afterward.<sup>58</sup> (Under typical U.S. law, we would expect 50/50 custody and child support to extend until the children are 18, and perhaps more money for marital support depending on the income of the husband.)

What happens when we are asked to choose between ideals of neutrality and ideals of feminism? The story of Ziba highlights the collision between a particular principle of dispute resolution (mediator neutrality) and principles of feminism. Moreover, it also raises questions of conflicting norms within feminist jurisprudence. In the next Section, I turn to Ziba's case to understand how Carrie would have applied the various stages of feminism in considering the case.<sup>59</sup>

#### A. *Substantive Changes to the Law (that Protect Ziba)*

First, in the original stage of feminism, we would have considered whether men and women were treated equally and had equal rights with regard to inheritance, taxes, custody, and the like.<sup>60</sup> Ironically, unequal family law—in which the mother would have been assumed to gain primary custody—might have given Ziba more rights than her husband, but here, equality under the law and 50/50 custody still protect her more than the norms that would apply in her own community. So . . . first stage feminism would have demanded more rights for Ziba.

As we move to the second stage—difference feminism—this analysis becomes more interesting in two ways.<sup>61</sup> To reiterate, difference feminism argues that women's differences—biologically and so-

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54. *Id.* at 318.

55. *See id.* at 318–19.

56. *See, e.g.,* Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997); Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687 (1997).

57. *Mediating Multiculturally*, *supra* note 52, at 318–19.

58. *Id.* at 319.

59. *See* Menkel-Meadow, *Feminist Legal Academics*, *supra* note 6.

60. *See id.* at 481.

61. *See id.* at 484–89.

cially—should be honored and protected when necessary.<sup>62</sup> In Ziba’s case, we see two elements where difference feminism could apply—her underage marriage and her ability to make informed choices when there appears to be some emotional abuse. Though underage marriage was once permitted in some states across the United States, the American feminist movement pushed hard to end the practice,<sup>63</sup> to the point where marriage to a 13-year-old is now illegal in the vast majority of states.<sup>64</sup> In this context, not only would Ziba be able to get out of any marriage contract, but her husband could be found guilty of statutory rape. This should definitely give her a bargaining chip.

In addition, Ahmed’s “second” marriage (it is unclear from the facts if that occurred in the United States or elsewhere, and whether it was an actual marriage or an arrangement) would also give her a set of persuasive facts with which to ask for the court’s protection. Difference feminism also has been crucial in recognizing the impact of domestic violence, including emotional abuse, and creating understanding in the legal system as to why women leave, or do not leave, toxic relationships.<sup>65</sup> The combination of all these factors—underage marriage, a second (illegal) marriage, and emotional control—would seem to create a clear situation where Ziba has strong legal rights that should not be bargained away.

Yet the third stage of feminism—intersectionality—might initially appear to contradict those earlier feminist norms. Recognizing that women have multiple identities in the law,<sup>66</sup> one might argue that Ziba’s choice to recognize and honor her community norms should be respected. If she values her identity as a loyal adherent to Shari’a law, or chooses to stay within the norms of the Iranian community in which she lives, intersectional feminism might argue that we should honor those values or choices and go along with the mediation. I think this is the hardest challenge for us because it involves a clash between the rules of neutrality and feminist ideals, and creates a question of which identity—Ziba the woman or Ziba the Muslim—should prevail. In this case, I think that Ziba’s youth weighs against letting her choose her community norms, but it would be hard to argue that a slightly older Ziba—for example, Ziba at 22—should not have her choices followed even if we would abhor the outcome.

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62. *See id.* at 488.

63. Anjali Tsui, *In Fight over Child Marriage Laws, States Resist Calls for a Total Ban*, PBS (July 6, 2017), <https://www.pbs.org/wgbh/frontline/article/in-fight-over-child-marriage-laws-states-resist-calls-for-a-total-ban/> [<https://perma.cc/FW3R-PYE9>].

64. *Marriage Laws of the Fifty States, District of Columbia and Puerto Rico*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/table\\_marriage](https://www.law.cornell.edu/wex/table_marriage) [<https://perma.cc/GKK7-RZ32>].

65. *See* Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, *supra* note 5, at 1505–08.

66. *See* Menkel-Meadow, *Feminist Legal Academics*, *supra* note 6, at 489–90.

### B. *Dispute Resolution Is a Girl*

Let's turn to the procedural questions presented in the Ziba case and consider whether the presence of women in the legal field will also change the legal process. Is dispute resolution a gendered process? Or is it a fuller process that encompasses both perspectives?

Gilligan pointed out in her book that Jake has an ethic of justice while Amy has an ethic of care.<sup>67</sup> Her conclusion has spawned much discussion, suggesting that since women "care" more, they will be taken advantage of more.<sup>68</sup> Yet Amy's approach could encourage all of us to think differently about our administration of justice and our methods of problem-solving.<sup>69</sup> Ultimately, Carrie suggests that this ethic of care is meaningfully gendered:

The significance of an ethic of care for law practice is itself a difficult and important question, which could be explored independent of its connection to gender. Yet, I persist in my views that care is gendered in our culture and that its expression in the law and legal ethics will continue to be disproportionately, but not exclusively, expressed by women and other "subordinated" people.<sup>70</sup>

So how does an ethic of care and Amy's voice play out in the case of Ziba? Informed by Carrie's scholarship on dispute resolution, we can envision a process that includes creative and integrative bargaining. This process could focus on the client's needs, could result in a neutral and fair outcome, and could provide justice. With a client-centered and empathetic perspective, we'd interview Ziba (as either the mediator or her lawyer) and ask: Does she really want to accept the proposed mediation, or is she feeling pressured to do so? Would she regret following the community rules? Does she feel she fits in with the community she is in? Where are her own parents? What does the future look like for her? And is she being taken advantage of because she cares too much?

An interest-focused approach would not only look at Ziba's interests, but also those of the children. Does she believe her children will be better served without their mother, being raised instead by their stepmother? Perhaps the mediator (and the court) would want a

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67. GILLIGAN, *supra* note 38, at 30.

68. *See, e.g.*, Carol M. Rose, *Bargaining and Gender*, 18 HARV. J.L. & PUB. POL'Y 547, 549–50 (1995).

69. Carrie Menkel-Meadow, *And Now a Word About Secular Humanism, Spirituality, and the Practice of Justice and Conflict Resolution*, 28 FORDHAM URB. L.J. 1073, 1079–81 (2001). Yet Carrie has argued that an ethic of care need not be gendered at all. *See, e.g.*, Menkel-Meadow, *Ethic of Care*, *supra* note 49, at 266–67; Menkel-Meadow, *Portia in a Different Voice*, *supra* note 17, at 41 ("Attributing behavior characteristics to a particular gender is problematic, because even as we observe such generalizations to be valid in many cases, we risk perpetuating the conventional stereotypes that prevent us from seeing the qualities as qualities without their gendered context.")

70. Menkel-Meadow, *Portia Redux*, *supra* note 17, at 77 (footnote omitted).

guardian *ad litem* to ensure that the children have their interests protected here. Most consistent with dispute resolution, would there be a solution that is more integrative? Could the parties work out a more creative way to balance the needs of the children, their finances, and the community values without Ziba losing all financial support and custody of her children? Dispute resolution is imbued with all these ideas, and family law is filled with examples of this type of creativity.

Yet, in this case, perhaps adjudication would be needed to ensure fairness for Ziba and better protection of her rights. In fact, would a 17-year-old Ziba be entitled to her own guardian *ad litem* to protect her interests as she herself is a child? Given that we already have concerns about her lack of informed consent and ability to truly exercise self-determination, perhaps this voluntary process cannot be a fair one for her.

The case of Ziba asks us to think about how we would balance competing concerns—neutrality of the mediator versus informed self-determination for the parties; party self-determination versus gender fairness; respect for cultural values and identity versus our outside view of fairness and rights; and a mediator's responsibility to carry out the parties' wishes versus a mediator's responsibility for the fairness of the outcome. Do the guidelines on mediator neutrality rules present an overly narrow, perhaps masculine version of dispute resolution in which neutrality is heralded above other values (harkening back to feminist theory where equal treatment or neutrality of the law does not actually serve women)?<sup>71</sup> And should this narrow view of neutrality be held over and above other values of dispute resolution that are important, including informed consent, justice, and fairness?

As Carrie herself notes in her study of Ziba, there is also the issue of mediator self-determination, whereby the mediator should not automatically take on all cases, but rather should choose for herself which cases fit within her values and expertise.<sup>72</sup>

At the end of the day, Carrie declined to mediate this case, placing her feminist ideals above that of dispute resolution neutrality.<sup>73</sup> One could argue that this case—neutrality versus fairness—is a redux of the Heinz dilemma analyzed by Carol Gilligan where the ostensible neutral law is unjust—and Amy fights that hypothetical. Carrie, as she did 40 years ago, fights the hypothetical and argues to amplify Amy's voice—taking a different path altogether—in Ziba's case. As Carrie herself has noted, context matters. Here, the ethic of care should prevail.

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71. See Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, *supra* note 5.

72. Carrie Menkel-Meadow, *Comments on Case 12.2*, in *Mediating Multiculturally*, *supra* note 52, at 320, 323.

73. *Id.* at 326–27.

## IV. CONCLUSION: GIVE AMY MORE VOICE

The opportunity to reflect on a colleague's body of work is no small undertaking, particularly when that colleague has been as prolific as Carrie. Her remarkable and steady stream of outstanding articles and book chapters has created a drumbeat of continual focus on her key question posed more than 40 years ago—How will the presence of women in the law change the law? Indeed, her writings, considered together, serve as a master class in the history of feminist jurisprudence.

When bringing the threads of Carrie's scholarship together, consistent themes emerge. Listen to the needs of clients; empathize with them and your colleagues as you practice law; be creative and integrative where possible; and use your voice to change the substance, practice, and process of the law.

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.<sup>74</sup>

Carrie's career-long commitment to feminism and the law has certainly strengthened Amy's voice. And, crucially, Carrie's own voice has transformed the dialogue.

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74. DuBois et al., *supra* note 46, at 62.