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# THE DIFFERENT VOICE: JAPANESE NORMS OF CONSENSUS AND “CULTURAL” FEMINISM

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Feminist legal scholarship is a new field, having emerged within the last generation as more women have become lawyers, law professors and legal scholars. As the field developed, women writers began to “say no” to traditional (male) legal theory and search for a perspective and a voice that was uniquely feminine, if not feminist. Scholars have tried to articulate the ways in which women have been left out of the law. They have exposed the “neutral” generic human as male and have tried to define ways that women see things differently and that human/female is different than human/male, that the “reasonable man” is not the same as the “reasonable person” or the “reasonable woman.” “Cultural” feminists adopted the work of psychologist Carol Gilligan<sup>1</sup> to provide them with a context and a justification for a legal theory based on difference.

If cultural feminism recognizes a “different voice,”<sup>2</sup> as identified by Carol Gilligan,<sup>3</sup> and if it were heard it would be better for all of us, and if this is the voice that is universally heard in Japan, then how do we explain that things are not better for women in Japan? Japan’s general population seems to live with a

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† Martha Jean Baker is working on an LL.M. in Human Rights at University College London (University of London). This paper began life under the sympathetic guidance of Gretchen Van Damm at Chicago-Kent College of Law but could not have been completed without the thoughtful criticism of Anita Bernstein who read many versions of this paper and suggested articles to read, reorganization for increased clarity, general editing and other help above and beyond the call of duty. This paper will be read at the conference of the International Federation for Research in Women’s History, “Women and Human Rights, Social Justice and Citizenship,” in Melbourne, Australia in June/July 1998.

1. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (2nd ed. 1993).

2. See, e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988), reprinted in DALE A. NANCE, *LAW AND JUSTICE* 279 (1994) (hereinafter *Jurisprudence and Gender*).

3. GILLIGAN, *supra* note 1.

powerlessness that looks like the powerlessness of women in the U.S.; and human rights abuses, particularly involving women, abound.

First, I will look at Japanese law and society to see if the nature of Japanese decision-making really does resemble the feminist model in the West. I will look at feminist legal scholarship to see how Carol Gilligan's "different voice" is heard and discussed by legal scholars. Then I will look at some problems, particularly those of women, in Japan. Finally, I will try to reconcile what I have found and make some suggestions about what the "different voice" might really mean or imply and what lessons could be useful for legal scholars in both countries.

## I. JAPANESE LAW AND SOCIETY

As Tatsuo Inoue, Associate Professor of Law at the University of Tokyo<sup>4</sup> observes, "community values or 'groupism' is widely regarded as a hallmark of Japanese society."<sup>5</sup> As a result, the foundations of Japanese society are very different from those of Western society.<sup>6</sup> It has remnants of values imported from Chinese law and Confucianism, in particular.<sup>7</sup> Historically, community consensus has played an important role in Japanese law.<sup>8</sup> Japanese society's first real exposure to Roman and Western concepts of law was in the nineteenth century when Japan chose to bring its formal law in harmony with the West and imported the rule-based German Civil Code.<sup>9</sup>

Professor John O. Haley describes the administrative process used in Japan today as one requiring consensus. It looks to the needs and concerns of all involved before reaching any kind of decision, and even then, there may be no power or authority to implement the decision.<sup>10</sup> It is very different from the Western model which is based on autonomy and the individual.

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4. No discussion of Japan is complete without noting that a degree from the University of Tokyo is a ticket into the Japanese elite. University of Tokyo is the premier university in Japan, that provides the self-perpetuating elite for the Japanese system.

5. Tatsuo Inoue, *The Poverty of Rights-Blind Communality: Looking through the Window of Japan*, B.Y.U. L. REV. 517, 518 (1993).

6. See, e.g., JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER LAW AND THE JAPANESE PARADOX* (1991); FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POST-WAR JAPAN* (1987).

7. See HALEY, *supra* note 6, at 28.

8. See, e.g., *id.* at 43, 85.

9. See *id.* at 70. Only recently open to foreigners, Japan found itself under pressure from the West to conform its law and legal system to ones familiar and understood in the West. After "shopping around," Japan decided on the German Code and adopted it largely unaltered.

10. See *id.* at 144.

Japanese bureaucracy does not solve its problems by domination or brute force, but rather, it negotiates.<sup>11</sup> Legal sanctions are very weak in Japan. Courts have the authority to issue judgments but lack the power to enforce them with injunctions, police power or any of the mechanisms available to U.S. courts.<sup>12</sup> As a result, community consensus is paramount for any kind of enforcement. Haley sees it as a "living law," "nearly indistinguishable from non-legal or customary norms."<sup>13</sup> Relationships and a sense of connection are thus essential for the law to work. Submission to the community is not seen as an intrusion on individual autonomy but is a natural outcome of putting the community's interests first. It is not felt as a denial of self or as a sacrifice of individual interests.<sup>14</sup> Psychologist Takie Lebra expands on this at length when she talks about the Japanese concept of *bun*, "meaning 'portion,' 'share,' 'part,' or 'fraction'."<sup>15</sup> "The individual, as a *bun*-holder, cannot be self-reliant but must be dependent on other *bun*-holders."<sup>16</sup>

The Japanese reliance on the importance of relationships is not only found in the personal, individual sphere within the community where one lives, but also carries over into business relationships. Within Japan, contracts are negotiated and understood between the parties. Only the bare bones are usually committed to writing.<sup>17</sup> Parties depend on a relationship for good will and enforcement. It is only when dealing with outsiders and foreigners, that the kind of long detailed contracts common to the Western legal system are used.<sup>18</sup>

Reputations are very important to the Japanese.<sup>19</sup> Business partners know each other and rely on what they know. When asked about problems of foreclosure, one Japanese banker explained, "We don't lend to people who default."<sup>20</sup> This very issue came to light after Japanese banks guaranteed U.S. student

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11. *See id.* at 167.

12. *Id.*

13. *Id.* at 169.

14. *Id.* at 171.

15. TAKIE SUGIYAMA LEBRA, *JAPANESE PATTERNS OF BEHAVIOR* 67 (1976).

16. *Id.* at 68.

17. Members of the legal staff of the large Japanese corporation Matsushita made this point repeatedly during a day of meetings that this author attended in June 1995, in Osaka, Japan [hereinafter Meetings with Matsushita].

18. *See* HALEY, *supra* note 6, at 181. This was confirmed and reinforced during the meetings with Matsushita. *See supra* note 17.

19. *See* Meetings with Matsushita, *supra* note 17. This was also discussed on a visit to the Osaka court, June 1995 [hereinafter Osaka court].

20. HALEY, *supra* note 6, at 181. An earlier draft of this paper was read and critiqued by Professor Mark Ramseyer who said that it did not sound like the Japan he knew. He said that American bankers would also say that they would try not to lend to people who default, that they do not *like* to lend to someone who might be

loans in the 1980's that were later in default.<sup>21</sup> "[A]s the lawyer put it, 'It's all horribly unfamiliar to them. There is no such thing as a student defaulting on a loan in Japan.'"<sup>22</sup> Like in many other countries, students in Japan receive grants, for the most part, so student loans are virtually unknown and default would be an unthinkable disgrace in the community.<sup>23</sup>

A graphic example of the importance of connection and relationships can be seen in the results of the infamous Minamata Bay pollution case.<sup>24</sup> After frustrating and unusual litigation that had gone on for years, numerous victims of mercury poisoning finally won a settlement against the polluting company, Chisso. Not satisfied with the settlement, they continued to fight until the terms of the settlement were broadened and eventually included all victims, whether or not they were plaintiffs or part of the original suit at all. For the enraged, injured community, this was still not enough. They were not satisfied until the head of Chisso got down on his knees to publicly and personally offer a full apology along with a promise to find and compensate any unidentified victims.<sup>25</sup> The original plaintiffs' concerns went far beyond their own personal, independent interests and embraced the entire community. Where another had suffered, so had they.

The clear "winners" and "losers" in most United States court cases contrast with the situation in Japan.<sup>26</sup> Community harmony and care are of such importance to the welfare of Japanese society (as well as individuals) that courts try to fashion decisions where there are no clear winners or losers, but rather there is something for everyone.<sup>27</sup> This theme runs through

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insolvent. Telephone interview with Professor Mark Ramseyer, University of Chicago Law School (June 21, 1996).

21. See Jaye Scholl, *Schools for Scandal: Vocational-Educational Operators Get Poor Marks*, BARRON'S, Jan. 2, 1989, at 16.

22. *Id.* at 17.

23. *See id.*

24. For a comprehensive and fascinating description and treatment of this case, see UPHAM, *supra* note 6, at 30-67.

25. *See id.* at 47.

26. In discussions with the Osaka court, *supra* note 19, the court took pains to emphasize this point as central to Japanese law and society.

27. Frank Upham discusses Burakumin denunciation tactics. The Burakumin are a hereditary untouchable class in Japan. They look like other Japanese and speak the same language. Discrimination is illegal, but nevertheless persists. The Burakumin people have organized to fight discrimination. One tactic they have adopted is "denunciation," particularly in the context of schools. The litigation coming out of one denunciation incident is an example of the court ultimately finding a solution where both sides could claim victory. In that case, the High Court (court of appeals) held that legal redress for discrimination of this kind was extremely limited, and thus victims' demands for explanation, whether called "denunciation" or not, were to be permitted. The activists involved who had physically restrained the teachers were given a minimum sentence, suspended, and excused from paying court costs

Lebra's work, where she points out that there is "strong identification with a collective goal."<sup>28</sup>

As a part of the effort to promote community harmony, Upham sees informality as a main characteristic of Japanese law. The rule centered model of the "modern" legal system Japan sought to embrace by adopting the German civil code is no longer seen as the ideal.<sup>29</sup> "Instead, commentators envision a legal system that preserves the social interconnectiveness which they perceive as Japan's unique cultural foundation and which is immune to the corrupting influence of the same individualistic rights consciousness that previous observers had considered a prerequisite to a modern democracy."<sup>30</sup> Consensus dispute resolution is seen as minimizing the possibility that one person or group will be able to use the system to dominate others.<sup>31</sup>

Even on the level of big industry, compromise and negotiation are central to decision-making.<sup>32</sup> After the principals agree generally, other affected parties are brought in (suppliers, customers, other affected industry, other ministries, etc.) so that the final result is one that everyone can respect.<sup>33</sup>

Haley sees the end result of community care and responsibility as contributing to Japan's competitive edge.<sup>34</sup> He quotes Ronald Dore as saying that "societal interrelationships and processes . . . 'generate a sense of fairness which enables people to work cooperatively, conscientiously, and with a will.'"<sup>35</sup> Law becomes a process of persuasion and bargain leading to consent. Haley sees it as a product of history and cultural development rather than intentional political choice.<sup>36</sup> This, too, is reflected throughout Lebra's work and forms a theme in discussing the way Japanese think and function in society.<sup>37</sup>

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(which would have been the usual recourse in Japan). Both sides claimed victory. For a complete discussion of the Burakumin issue, see *id.* at 78-123.

28. LEBRA, *supra* note 15, at 83.

29. See UPHAM, *supra* note 6, at 206-7.

30. *Id.* at 207.

31. See *id.*

32. *Id.* at 166-204. Frank Upham uses an example involving the formation of industrial policy by the powerful Ministry of Trade and Industry (MITI) in Japan to illustrate this point. Even legislation passed by the Diet is thoroughly negotiated and agreed by all affected before it comes to the floor for a vote.

33. See *id.* at 211.

34. See e.g., HALEY, *supra* note 6, at 191.

35. *Id.* Dore is a prolific legal scholar who has written extensively on Japan. Several times in his book, Haley relies on him as an authority for things he says. This sense of fairness he discusses seems to mirror the ethic of care that is so important to Gilligan and the feminist writers in part I.

36. See *id.* at 193.

37. See LEBRA, *supra* note 15.

## II. FEMINIST LEGAL SCHOLARSHIP

### A. THE "DIFFERENT VOICE"

Carol Gilligan, in her psychological study *In a Different Voice*, discusses what she sees as apparent differences in the way men and women approach problem solving.<sup>38</sup> Her most famous case study looks at two bright, articulate eleven year olds, a boy, Jake, and a girl, Amy. She presents them with a classic dilemma that was used in earlier studies to measure moral development.<sup>39</sup> The problem they are asked to solve involves deciding what a man named Heinz is supposed to do when faced with the dilemma of a sick wife, no money to buy medicine to save her life, and a druggist who refuses to give him the medicine. Jake decides that Heinz should steal the medicine because it is more important for him to take personal, independent action to save his wife's life than to let her die. He sees no alternative; life is more important than property. Amy, on the other hand, thinks that Heinz should talk to the druggist and try to work it out some other way. She finds that stealing is wrong and would result in other repercussions.<sup>40</sup> Jake's solution is seen, traditionally, as reflecting a more mature or higher state of moral judgment where autonomy and independence are the benchmarks, while Amy's insights reflect "an ethic of care which is regarded as representative of a less mature state of moral maturity."<sup>41</sup>

It is scarcely possible to read an article of feminist legal scholarship without homage being paid to Carol Gilligan. In her discussion of feminist legal method and whether there should be separate courses, or courses integrating feminist method, Mary Jane Mossman sees the ethical dilemma posed to Amy and Jake as significant.<sup>42</sup> "Essentially, Jake accepted the conceptual framework which dominates our culture. . . . Amy's response was more tentative, with the conceptualization blurred by an unwillingness to abstract the needs of the particular people involved."<sup>43</sup> Mossman quotes Carrie Menkel-Meadow who refers to Amy as "the typical first year law student who resists the dictates of the legal method: she wants more facts, she refuses to exclude some ideas as 'irrelevant' to the decision making process,

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38. See GILLIGAN, *supra* note 1.

39. See *id.* at 25.

40. See *id.* at 26-29.

41. See *id.* at 30.

42. Mary Jane Mossman, *Feminism and Legal Method: The Difference it Makes*, 3 WIS. WOMEN'S L. J. 147, 166 (1987).

43. *Id.*

and she will not accept the need to abstract from the particular circumstances and make an either/or decision."<sup>44</sup>

Feminist legal scholars have adopted Gilligan's work in psychology and have used it as a framework for developing legal theories that recognize the perspective and needs of women. Even those who disagree with her thesis, as applied to women and law, do not ignore her, but rather, engage in discussion and criticism.<sup>45</sup>

### B. THE "CONNECTION THESIS"

Robin West describes women's lives and existential state in terms of the "connection thesis."<sup>46</sup> Women's lives are defined by their connection with others, while for men it is goals of separation and autonomy that are of value.<sup>47</sup> West sees cultural feminism as defined by Gilligan's work as feminism's "official story."<sup>48</sup> "Women have a 'sense' of existential 'connection' to other human life which men do not. That sense of connection in turn entails a way of learning, a path of moral development, an aesthetic sense, and a view of the world and of one's place within it which sharply contrasts with men's . . . [F]or women, connection is 'prior' both epistemologically and, therefore, morally, to the individual."<sup>49</sup> Gilligan observes that a woman's identity stems from the context of relationships, "arising from the experience of connection."<sup>50</sup> As West notes, Gilligan's emphasis on difference is somewhat paradoxical in that it came at a time when feminist activists as well as lawyers "pressed for equal (meaning same) treatment by the law, [while] feminist theorists in non-legal disciplines [like Gilligan] rediscovered women's differences from men."<sup>51</sup> West argues that both liberal and radical feminism see equality as a desirable goal.<sup>52</sup> Liberal-legal feminists want equality recognized by the law and "want women to have more choices,"<sup>53</sup> presumably as equals. Radical-legal feminists see wo-

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44. *Id.*, citing Menkel-Meadow, *Portia in a Different Voice: Speculating on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L. J. 39 (1985).

45. See, e.g., Isabel Marcus et al., *Feminist Discourse, Moral Values and the Law-A Conversation*, 34 BUFF. L. REV. 11 (1985).

46. *Jurisprudence and Gender*, *supra* note 2, at 286.

47. *See id.*

48. *Id.* at 287.

49. *Id.* For an in depth development of this argument, see also NANCY CHODROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978).

50. GILLIGAN, *supra* note 1, at 159.

51. *Jurisprudence and Gender*, *supra* note 2, at 286, citing Gilligan n. 13.

52. Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 83-84 (1978) (hereinafter *Hedonic Lives*).

53. *Id.* at 87.



men as powerless, and equality as a goal to be achieved through the acquisition of more power by women.<sup>54</sup>

West suggests that liberal legal feminists allow women to redefine their lives and create choice by becoming "giving selves" that are not human.<sup>55</sup> Dangerous and fearful situations that are a part of every woman's life are internalized as "other-regarding" so as to eliminate the overt fear and let the woman have the feeling of choice.<sup>56</sup> "A liberal feminist theory of law which presumptively values consensual transactions on the assumption that the giving of consent is motivationally self-regarding, without addressing the fear that molds women's self-definition, runs the risk of missing altogether the real causes of women's misery."<sup>57</sup>

Radical-legal feminists, West says, begin "with a denial of the liberal feminist's starting assumption. Women and men are *not* equally autonomous individuals. Women, unlike men, live in a world with two sovereigns: the state, and men. Women, unlike men, are definitionally submissive twice over—once vis-à-vis the state, and once vis-à-vis the superior power of men. A legal regime which ignores this central reality will simply perpetuate the fundamental underlying inequality."<sup>58</sup>

West asks why women are different in the way Gilligan describes and answers by saying that the cultural feminist finds this difference in the fact that women are the primary caretakers of young children.<sup>59</sup> Girls grow up feeling "connected" with the women who raised them, who are like them, while boys learn their difference from the same caretakers and develop a sense of separation.<sup>60</sup> West maintains that "connection" leads women to think in terms of the needs and rights of others rather than, presumably, putting themselves first.<sup>61</sup> Cultural feminists celebrate difference, but West indicates that even radical feminists, who regret difference, recognize the existence and validity of difference, but find it a source of "women's misery."<sup>62</sup> In her conclusion, West says that women and women's values are left out of the dominant (Western) culture and that women's lives are stunted by male power. She creates what she calls a utopian vision,

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54. See *id.* See also, CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

55. See *Hedonic Lives*, *supra* note 52, at 93.

56. See *id.*

57. *Id.* at 108.

58. *Id.* at 112.

59. See *Jurisprudence and Gender*, *supra* note 2, at 287.

60. See *id.*

61. See *id.* at 290.

62. *Id.* at 293; see also Catherine Mackinnon's discussion of difference in Isabel Marcus et al., *supra* note 45, at 21-24.

where feminist jurisprudence responds to correct the imbalance of images and power, for the good of everyone.<sup>63</sup>

### C. THE "CHICKEN AND EGG PROBLEM"

Leslie Bender, in her search for unifying factors and feminist solidarity, writes about varying reactions and lessons to be learned from feminist method and difference theory.<sup>64</sup> Bender defines feminist method as "collective knowledge formation based on experience and sharing; power balancing from center to margin; participatory, cooperative endeavors; . . . exposure of invisible norms and biases."<sup>65</sup> Women have been denied political power as well as the other important powers found in social and interpersonal relationships.<sup>66</sup> Bender sees this as a "chicken-and-egg problem" where it is uncertain whether gender differences come from power imbalance or whether the power imbalance comes from gender differences.<sup>67</sup>

In the end, the origins of the problem are not as important as the different reality that has been created for men and women. Some speakers and stories (men's) are privileged, thereby excluding or marginalizing others (women's).<sup>68</sup> Recognizing difference, Bender asserts that "our legal theories ought to take what we learn from gender differences analysis into consideration."<sup>69</sup>

Throughout her book, Gilligan sees the different voice as a relational one where the different voice insists on connection, "so that psychological separations which have been justified in the name of autonomy, selfhood, and freedom no longer appear as the *sine qua non* of human development but as a human problem."<sup>70</sup> In her introduction to the 1993 edition of her book, Gilligan herself observes that as a result of her work and the attention it has received, women's voices "suddenly made new sense and women's approaches to conflict were often deeply instructive because of the constant eye to maintaining relational order and connection."<sup>71</sup> Bender interprets Gilligan as finding that women's primary focus is to maintain relationships and to avoid

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63. See *id.* at 302-3. This seems key to me. Scholars and theorists often appear to get so caught up in a new or good idea that unwittingly they see it as a cure-all and "throw out the baby with the bath water." In trying to incorporate a new idea, they often fail to recognize what needs to be retained to create a proper balance.

64. Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 8 (1990).

65. *Id.* at n. 16.

66. See *id.* at 11.

67. See *id.*

68. See *id.* at 12.

69. *Id.* at 15-16.

70. GILLIGAN, *supra* note 1, at xiii.

71. *Id.* at xiv.

hurting others.<sup>72</sup> Like Gilligan herself, Bender notes that male bias left women out of the original studies of moral development that Gilligan used. Women were left out based on the implicit assumption that male values are human values and to include women would yield no different results.<sup>73</sup>

Observing that gender biases have silenced the voice of care and responsibility while promoting the ethic of rights and justice, Bender suggests that the world should be reconstructed so that both voices are heard and valued.<sup>74</sup> "Careful study of women's ways of knowing and patterns of interrelating can be illustrative for all of us in reformulating law . . . [A]n ethic of care derived from women's cultures is a unique way to solve problems, work with people, locate truths, and foster justice that has been absent from our law."<sup>75</sup> Women's differences have been left out of the law and the clear implication is that we would all be better off if they were included.<sup>76</sup> "The reluctance [of women] to judge may itself be indicative of the care and concern for others that infuse the psychology of women's development and are responsible for what is generally seen as problematic in its nature."<sup>77</sup>

The work of West, Bender and others, demonstrate that the psychological studies reported and analyzed by Carol Gilligan have a wide following in the world of legal scholarship.<sup>78</sup> They present a model of women acting with concern for others, putting their own, individual needs in the background for the greater good of the community.

### III. EFFECT OF THE CONSENSUS NORM IN JAPAN

Professor Tatsuo Inoue finds that Japanese moral language emphasizes collective goals over private ones, common good over individual rights, and civic responsibility over personal freedom and privacy. "In short, the moral world where the Japanese are said to live is very much like Gilligan's concept of an ethic of care."<sup>79</sup> He says that if they knew about Gilligan's work, many Japanese would think that the moral voice she describes when talking about an ethic of care is theirs.<sup>80</sup> "There are no Jakes in

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72. Bender, *supra* note 64, at 16.

73. *See id.* at 18.

74. *See id.* at 19.

75. *Id.* at 45.

76. *See id.* at 47.

77. GILLIGAN, *supra* note 1, at 17.

78. *See generally* West, *supra* notes 2 and 52; Bender, *supra* note 64. *See also*, e.g., Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice"?*, 15 HARV. WOMEN'S L. J. 37 (1992); Wendy W. Williams, *Notes From A First Generation*, U. CHI. LEGAL F. 99 (1989).

79. Inoue, *supra* note 5, at 529.

80. *See id.* at 529.

Japan.”<sup>81</sup> Gilligan would agree that her purpose was not to attribute a (different) voice to gender as many of her feminist followers would imply, but rather to use it as a theme with applications beyond the scope of her studies.<sup>82</sup>

In contrast to the expectations of many feminist scholars,<sup>83</sup> the mere giving of a public voice to the ethic of care, by itself, does not mean that women, or people in general are better off. Inoue tells us that in promoting the primacy of group loyalty, universal principles like human rights are sacrificed.<sup>84</sup> “There is a saying in Japan about women, ‘If you’re single and over 25 years old, you are leftover cake.’ There is another saying just as famous, which applies to men and women; ‘The nail that sticks out get (sic) hammered down.’”<sup>85</sup>

The consensus and community voice discussed above assumes, on the surface, that everyone is included in society and that all are equally heard, as feminists would advocate, and that people have choices. This clearly is not the case. Women in Japanese society have few options and little or no redress if they are not satisfied with their lot in life.<sup>86</sup> In addition, the concept of lifetime employment, the Japanese work ethic, leaves many men with little or no control over their options.<sup>87</sup> Lebra talks in terms of mutual obligations of loyalty and “total protection,” particularly in the employment context, “reinforced by collectivism and conformism, call[ing] for the individual’s total commitment and loyalty to his group.”<sup>88</sup> She, too, points out that lifetime employment is one of the characteristics of the system.<sup>89</sup>

In response to the Japanese government’s second periodic report to the Committee to Eliminate All Kinds of Discrimination Against Women,<sup>90</sup> a counter-report was written.<sup>91</sup> The

81. Telephone Interview with professor Frank Upham, New York University Law School (Sept. 13, 1995).

82. See GILLIGAN, *supra* note 1, at 2.

83. See *supra* part II.

84. See Inoue, *supra* note 5, at 527.

85. Sachiko Kaneyoshi, Japanese Women’s “Ripe Age for Marriage”—The Japanese Hierarchy Structure (July 1995) (on file with the author).

86. See generally, Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Opportunity Law*, 18 HARV. WOMEN’S L. J. 83 (1995).

87. See Inoue, *supra* note 5.

88. LEBRA, *supra* note 15, at 31.

89. See *id.*

90. COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW), CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 18 OF THE CONVENTION, SECOND PERIODIC REPORTS OF STATES PARTIES, CEDAW/c/JPN/2 (1992).

91. “A LETTER FROM JAPANESE WOMEN” CIRCLE, COUNTER-REPORT TO THE JAPANESE GOVERNMENT’S SECOND PERIODIC REPORT AS A STATE PARTY TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (9 JULY 1992) (1994) [hereinafter WOMEN’S CIRCLE].

grassroots group of women workers and lawyers who authored the report began by saying that the official report did not adequately reflect the true situation in Japan. The pervasiveness of discrimination against women in Japan continues, notwithstanding the Equal Employment Opportunity Law.<sup>92</sup>

The Women's Circle began their discussion by looking at prostitution in Japan.<sup>93</sup> They maintain that the sex industry is booming in Japan. When the government points to a decrease in arrests, it is not because prostitution is decreasing, but rather that government efforts to eliminate prostitution have relaxed.<sup>94</sup> In any case, the women observe, the Prostitution Prevention Law dictates and the world wide trend is not to prosecute prostitutes, but rather to take measures to try to rehabilitate them, so arrests would naturally decrease where this policy is followed, even where prostitution remained static. The more serious problem, where enforcement is seriously lacking, is exploitation of women by the sex industry.<sup>95</sup> Although the law allows for legal sanctions, there was no prosecution or punishment against the banking interests that support prostitution and have continued to import women to work in the private bath industry for 30 years.<sup>96</sup> In this author's own experience, prostitution in Japan is far more open, prevalent and accepted than it is in the U.S. Women in Japan seem to expect that their husbands and other men they know will visit prostitutes. The customers of prostitutes are not prosecuted. Yet men themselves report that "after soliciting a prostitute, the men feel like 'kicking the whore,' and feel 'disgusted with [them]sel[ves].'"<sup>97</sup>

Flagrant human rights abuses for women as well as men are found in the Japanese job market. For women, the Equal Employment Opportunity Law (EEO) <sup>98</sup> passed in 1985 at the end of the United Nations Decade for Women has made little real difference in the serious employment discrimination and other problems women face in the workplace. In the 1960s, it was common for companies to have a formal requirement that women retire when they marry. As a result of litigation, supplemented

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92. *Id.* at 7.

93. *Id.* at 8-13.

94. *Id.* at 8.

95. *Id.* at 9.

96. *See id.*

97. *Id.* at 10.

98. The official title of the law is *Koyo no Bunya ni Okeru Danjo no Kinto na Kikai Oyobi Taigu na Kokuho nado Joshi Rodosha no Fukushi no Zoshin ni Kansuru Horitsu* [Law Respecting the Improvement of the Welfare of Women Workers, Including the Guarantee of Equal Opportunity and Treatment Between Men and Women in Employment] [Hereinafter EEO]. The law was passed on May 17, 1985 and went into effect on April 1, 1986.

by the EEOL, this is no longer technically allowed.<sup>99</sup> It is still assumed that young women will get married and upon getting married will stop working. If they do not do so voluntarily, both formal and informal pressure will be exerted to try to force the issue. It is felt that women cannot handle all the responsibilities of marriage, a home, and full-time work.<sup>100</sup> Women are often hired for a "decorative role" at work and blatantly biased standards are used. Unmarried women who do not live with their parents are seen as morally suspect and are thus passed over for jobs for which they are otherwise qualified. Physical appearance is a frequent enough criterion that some women have had plastic surgery to enhance their career opportunities.<sup>101</sup> Sexual harassment, a recognized form of violence against women, is prevalent in the work place, particularly for unmarried women.<sup>102</sup>

As is done with most legislation in Japan, consensus was sought before the EEOL was passed. One woman lawyer reported, "They asked us if we wanted equality or protection. We said we wanted equality, so they removed all protection and did not provide for equality."<sup>103</sup> The two major clauses<sup>104</sup> in the EEOL, regarding recruitment, hiring and job assignments, provide that employers shall *endeavor* to provide women equal opportunity and to treat women equally with men.<sup>105</sup> There are no objective standards supplied and the term "endeavor" allows employers to justify discrimination. A violation occurs only if they discriminate against women while hiring both genders.<sup>106</sup> The EEOL provides no private cause of action or criminal sanctions for violation. Dispute resolution is administrative, informal and non-binding.<sup>107</sup> Where employers refuse to cooperate, nothing can be done.<sup>108</sup>

The passage of the EEOL encouraged many employers, particularly large corporations, to get around the law by adopting a

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99. Upham provides a close look at the litigation and the events leading up to the passage of the EEOL, *see generally*, UPHAM, *supra* note 6, at 124-165.

100. *See* Knapp, *supra* note 86, at 93.

101. *See id.* at 89.

102. Kaneyoshi, *supra* note 85, at 2.

103. Private interview with Yoko Yoshida as translated by Kumiko Uryu (June, 1995).

104. "Article 7. With regard to the recruitment and hiring of workers, employers shall *endeavor* to provide women equal opportunity with men. Article 8. With regard to the assignment and promotion of workers, employers shall *endeavor* to treat women equally with men." Knapp, *supra* note 86, at 115.

105. *See id.*

106. *See id.* at 116-17.

107. *See id.* at 117-18.

108. *See id.* at 120.

two track hiring policy.<sup>109</sup> The management track accepts few women; even female university graduates are channeled into clerical positions on the "standard" track, which offers lower pay, fewer benefits, and where virtually no men are found.<sup>110</sup> It is still assumed that women will leave their jobs when they get married, so women are reluctant to get a four year degree (just as employers are still reluctant to hire them).<sup>111</sup> It is culturally viewed as a waste for someone who will, in the end, just stay home and care for a family.<sup>112</sup> The *New York Times* noted that "[f]ewer than one in ten Japanese managers are women—a ratio that is one of the lowest in the world."<sup>113</sup> Women who marry while working are pressured into quitting (and possibly returning "part time" to the same job at lower pay).<sup>114</sup>

In recent years *karoshi*, death from overwork, has emerged as a serious problem in Japan.<sup>115</sup> One forty-three-year-old male victim, Toshitsugu Yagi, described his feeling in his diary found after his death.

Let's think about slavery, then and now.

In the past, slaves were loaded onto slave ships and carried off to the new world. But in some ways, aren't our daily commuter trains packed to overflowing even more inhumane? And can't it be said that today's armies of corporate workers are in fact slaves in almost every sense of the word? They are bought for money. Their worth is measured in working hours.<sup>116</sup>

Victims of *karoshi* are increasing now among women as well as men.<sup>117</sup> Inoue finds the fact of its existence, as a "classless death," affecting management as much as manual labor, reveals more about Japanese society than the actual frequency does; workers of all kinds are victims.<sup>118</sup> Inoue quotes Yagi as saying "corporate slaves . . . don't even share the simplest of pleasures those forced laborers of ages past enjoyed: the right to sit down

109. For another view, see Ramseyer, *supra* note 20. Professor Ramseyer seems to think that gender tracking has been abolished and that companies are now hiring women on the "fast track," with no statistics available at the moment because it is either too new or no one is keeping track as yet.

110. See Knapp, *supra* note 86, at 123-24. For an in depth look at employment statistics and the obstacles women face, see also WOMEN'S CIRCLE, *supra* note 91, at 14-45.

111. Professor Ramseyer disputes this point. See Ramseyer, *supra* note 20.

112. See Kaneyoshi, *supra* note 85, at 2-3.

113. Nicholas D. Kristof, *Japan is a Women's World Once the Front Door is Shut*, N.Y. TIMES, June 19, 1996, at A1, A8.

114. See, e.g., Knapp, *supra* note 86, at n.238.

115. See, e.g., *id.* at 133-35; Inoue, *supra* note 5, at 532, part B.

116. Knapp, *supra* note 86, at 134.

117. Professor Ramseyer sees *karoshi* as little different from Westerners who die from cardiac arrest. See Ramseyer, *supra* note 20.

118. See Inoue, *supra* note 5, at 533.

at the dinner table with their families.”<sup>119</sup> Japanese courts have refused to curb overtime abuses.<sup>120</sup> Japanese workers who are victims of *karoshi* are rarely compensated by worker’s compensation and unions have failed to zealously address the problem.<sup>121</sup> “The collective interests of the *kaisha* [company] community take precedence over an individual worker’s right to lead the kind of life that enables him to situate his identity and seek self-fulfillment outside his *kaisha*.”<sup>122</sup>

It would appear that the community takes over the individual in Japan, that the harmony and consensus that is so valued contains unequal community values and assumptions.<sup>123</sup> Society is structured around relationships of dependency and interdependency, both in the workplace and at home. Where the wife is dependent on her husband for a roof and support as well as status in the community, “[a] step inside the house, the dependency role is reversed.”<sup>124</sup> Married women may appear to have power and freedom behind the closed doors of their autonomous homes,<sup>125</sup> but if they are unmarried or have ambitions beyond the home, the system has no tolerance for them<sup>126</sup>. Where individuals, particularly women, are involved, human rights are submerged beneath the community assumptions where there is absolutely no room for individuals and little room, at present, for change. It is as if the mere thought of discussing human rights is subversive. The community consensus prescribes roles for everyone, and women, near the bottom, have even less opportunity to live as individuals.

#### IV. THE ETHIC OF CARE—A RESPONSE TO POWERLESSNESS?

Feminist legal scholars look to the ethic of care and the voice it represents. Many assume that it is a gender-based, female voice and that Westerners would do well to listen to this voice and write law that responds to it.<sup>127</sup> Japanese law and society seem to function using a voice very much like the one Gilligan describes, the ethic of care that feminists rely on for positive change in Western society.<sup>128</sup> Yet it is clear from this survey that

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119. *Id.* at 533-34.

120. *See id.* at 535.

121. *See id.* at 536.

122. *Id.* at 537.

123. *See* LEBRA, *supra* note 15, at 31.

124. *Id.* at 61.

125. *See* Kristof, *supra* note 113, at A8.

126. *See* Kaneyoshi, *supra* note 85.

127. *See, supra* part II.

128. *See, supra* part I.



women are no better off in Japan than in the U.S., that discrimination against women and other human rights abuses abound, albeit different ones, in different forms, than we find in the U.S.<sup>129</sup>

Inoue says that individual rights are necessary for the individual to enjoy the community.<sup>130</sup> He says that Japan is impoverished by the communal structure.<sup>131</sup> Unlike Gilligan, who he says sees the ethic of care as the opposite of the ethic of rights, Inoue says that in reality the former presupposes the latter. "An ethic of care requires sensitivity to conflicts of responsibilities."<sup>132</sup> Just as feminists are calling for an increase in the value of caring and community, the Japanese are looking to place a stronger influence on individualism.<sup>133</sup>

It may be that the voice found by Carol Gilligan is not only not a female voice as we have seen some scholars suggest, but rather it is a voice that emerges in response to systematic, long term oppression. Where people are kept down and powerless, perhaps they develop a community need or spirit, a kind of "comrades in arms" mentality where, in the face of adversity, individual needs become submerged in the face of the (perhaps unacknowledged) struggle, and become suppressed for the greater good. Karel van Wolferen allows for just this conclusion in his book *The Enigma of Japanese Power*.<sup>134</sup>

Leslie Bender sees women as caregivers, responding to the needs of others, with little voice in society because little value is invested in the ethic of care.<sup>135</sup> She says that many who are attracted to the ethic of care do not see it as gender-based, but rather as humanist, but she goes on to say that to move "women" to "human" "seems to dupe us into an even worse co-option of being reabsorbed, resilenced, and resubmerged into a newly invisible system of male dominance."<sup>136</sup> In Japan, where the Japanese mother is legendary, of far larger proportions and dominance in her children's lives than the "Jewish mother" of stage and screen, the ethic of care has done just that. Married women, particularly those with children have even fewer options than the general Japanese population. "The mother remains the lifelong object of attachment, not only because she is the source of all kinds of gratification, but also because she symbolizes the

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129. See, *supra* part III.

130. See Inoue, *supra* note 5, at 545.

131. See *id.* at 546.

132. *Id.* at 547.

133. See *id.* at 520.

134. KAREL VAN WOLFEREN, *THE ENIGMA OF JAPANESE POWER* (1989).

135. See Bender, *supra* note 64, at 39.

136. *Id.* at 40.

weakness and inferiority of the female sex in a male-dominated society."<sup>137</sup> The consensus that confines women to the home has made Japanese women particularly invisible, powerless, and largely unemployable.<sup>138</sup>

We could look at the source of power in Japan as analogous to the male power that has kept U.S. women in their place and created the "feminine mystique."<sup>139</sup> In discussing her own work, Gilligan points out that Jake has the "right" answer.<sup>140</sup> "If Jake chooses not to listen to Amy, he can win."<sup>141</sup>

The myth surrounding the emperor and the self-perpetuating power structure of the Japanese system as van Wolferen describes it leaves the ordinary Japanese person in a similarly powerless position.<sup>142</sup> Robin West's argument that the different voice is a female voice that arises because women are caretakers of children and that it is the vehicle that leads to the development of a sense of connection sounds convincing until we look at other cultures. As we have seen, women assert an equal or greater influence as caretakers of children in Japan, but the different voice cultural feminists observe and attribute to women is more universal and gender difference takes a different form. "The male world gives orders and expects obedience; the female world threatens and pleads, but can always be made to yield if the male is sufficiently strong and persistent in his aggression. The female is loved, ill-treated, and 'despised.'"<sup>143</sup>

Japanese people are expected to know their place and fill their predetermined roles, just as women in the U.S. traditionally had limited opportunities that were available without "bucking the system." It would seem that much feminist theory is in reaction to earlier limited options and that Japanese scholars like Inoue are reacting to similar stress arising from predetermined roles offering limited options to the bulk of the Japanese population. And within the "feminized" society of Japan, women are near the bottom, with even more limited options than the public at large. Perhaps women in Japan are like black, poverty-stricken women in the U.S. who are even worse off than the majority of women. What voice do the lowest of the low use? Do they have

137. LEBRA, *supra* note 15, at 59.

138. Professor Ramseyer disagrees and finds this no longer true. See Ramseyer, *supra* note 20.

139. See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

140. See Marcus, *supra* note 45, at 41.

141. *Id.* at 62.

142. See VAN WOLFEREN, *supra* note 134.

143. LEBRA, *supra* note 15, at 59, citing Geoffrey Gorer, *Themes in Japanese Culture*, in *JAPANESE CHARACTER AND CULTURE* 320 (Bernard S. Silberman ed. 1962).

an even stronger need to submerge themselves in a effort to find power in powerlessness?

In her essay "Marooned on Gilligan's Island,"<sup>144</sup> Katha Pollitt refers her readers to Carol Tavris's work *In the Mismeasure of Women*. "[Tavris] points out that much of what can be said of women applies as well to poor people, who also tend to focus more on family and relationships and less on work and self advancement . . . and to appear to others more emotional and 'intuitive' than rational and logical in their thinking."<sup>145</sup> The different voice would appear to emerge as the voice of the powerless, but it is equally possible that it is a voice used to oppress; a voice the powerless are encouraged to use in desperation, to forge a group identity that leaves the illusion of being heard.<sup>146</sup> "Indeed, the difference in Amy's response might itself derive from women's relative powerlessness (or invisibility) within the social structures, including law."<sup>147</sup> Carrie Menkel-Meadow's first year law student mentioned supra section II.A., "who resists the dictates of the legal method. . ." fits the description of just such a powerless group.

I would suggest that the lesson to be learned is that it is very dangerous to study models and apply them generally, as if the model provided a panacea. Pollitt maintains that "[a]lthough it is couched in the language of praise, difference feminism is demeaning to women."<sup>148</sup> Difference feminism is also used to keep women down with comments like, "[s]he is really happier in the home; it's what she wants. She has no interest in a serious career." Christine Littleton makes this point when she discusses how Sears, successfully defending itself in an EEOC sex discrimination suit, found a feminist historian to support their hiring practices.<sup>149</sup> There is always more than meets the eye. Just as Japanese law is impenetrable to most Westerners who try to explain it in Western terms, using Western models,<sup>150</sup> feminist legal scholars demand to be heard and understood and go to great lengths to try to define their position in terms that the general (male) legal community might understand.<sup>151</sup> Christine Littleton echoes Catherine MacKinnon's main points when she observes that the rules of the game are defined in male terms and with

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144. See KATHA POLLITT, *REASONABLE CREATURES* 42-62 (1995).

145. *Id.* at 49.

146. For a discussion of this point see MACKINNON, *supra* note 54, at 51.

147. Mossman, *supra* note 42, at 167.

148. POLLITT, *supra* note 144, at 61.

149. Christine A. Littleton, *Equality Across Difference: A Place for Rights Discourse?*, 3 *WIS. WOMEN'S L. J.* 189, 205 (1987).

150. See generally, Kenneth Port, *The Case for Teaching Japanese Law at American Law Schools*, 43 *DEPAUL L. REV.* 643 (Spring, 1994).

151. See generally, *Jurisprudence and Gender*, *supra* note 2.

male biases. Discrimination is built into the social institutions and without redefining the game there can be no equality.<sup>152</sup>

What Catherine MacKinnon said about women might equally apply to the general population of Japan, with "the system" substituted for "men" and "Japanese" exchanged for "women":

I do not think that the way women reason morally is 'morality in a different voice.' I think it is morality in a different register. Women value care because men have valued us because of the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men. Similarly, I think that when you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just a (sic) differently articulated, it is silenced. Eliminated, gone. You aren't just deprived of a language within which to articulate your distinctiveness, you are deprived of a life out of which articulation might come.<sup>153</sup>

Takie Lebra would support that view.<sup>154</sup>

Western scholars of Japanese law (or presumably any other non-Western legal system) and feminist legal scholars adopt the language and values of the dominant (Western, male) establishment in an effort to explain themselves and the relevance of their work and to be "heard." It is what is expected. Other voices continue to be trivialized or dismissed, just as trade negotiator Mickey Kantor did during the automobile trade crisis in the 1995 when he said, in effect, that the Japanese needed to learn to do business our (*i.e.* the American) way, with no thought that maybe U.S. companies trying to do business in Japan should learn the Japanese way.<sup>155</sup> After all, Japanese businesses have learned to use U.S. practices to their advantage when doing business in the U.S., the best we can probably do is to try to understand other systems and other voices, and explore the assumptions that are beneath the surface so we can learn from them.

Small pieces from other models can be borrowed to see how they work for us, just as a good cook will try an ingredient from another cuisine to see how it will taste in a familiar recipe. Carol Gilligan says that we can learn from studies like hers that look at women but that most people use both voices.<sup>156</sup> She observes

152. Littleton, *supra* note 149, at 192.

153. Mossman, *supra* note 42, citing MacKinnon, *Difference and Dominance: On Sex Discrimination*, (Spring 1984) (unpublished manuscript, on file with Harvard Law School).

154. See generally, LEBRA, *supra* note 15.

155. See, e.g., *U.S. Slaps Japan Over Auto Trade*, ST. LOUIS POST-DISPATCH, May 11, 1995, at 3A; *U.S. Fires Opening Shots as Tokyo Trade War Looms*, THE GUARDIAN, May 11, 1995; *The U.S.-Japan Trade Flap/ What's behind the tariff, what comes next*, USA TODAY, May 12, 1995, at 8B.

156. See Marcus, *supra* note 45, at 47.

that in equating caring as a virtue with self-sacrifice, the system is perpetuated: " 'Human' is male and female virtue or 'care' is self-sacrifice. So the good woman who values care would sacrifice herself rather than challenge the equation of human with male."<sup>157</sup> Maybe scholars can sort through what is learned and create a balance for Western needs as the Japanese seem to have done by adopting the German civil code without adhering to its rule-based model providing sanctions and enforcement.<sup>158</sup>

## V. CONCLUSION

In this paper, we began by looking at the the way Japanese law and society function and seem to reflect the "ethic of care" as the general voice of that culture. In part II, we looked at the work of Carol Gilligan through the lens of feminist legal scholarship. We saw that the "different voice" she discusses is one based on the "ethic of care." Feminist scholars identify this voice based on gender; they see it as the unheard voice of women in our society. Professor Haley is clear on this point: "There is no question that the [feminist] description fits [to describe Japan]."<sup>159</sup>

We then looked at Japan from the perspective of human rights, particularly where they involve women, in a society that hears the voice some Western feminists have described as a woman's voice. It is a society that is described as "benevolent maternalism."<sup>160</sup> In spite of that, we saw that human rights problems abound, that women in Japan are certainly no better off than in the U.S. where the ethic of care is not heard or valued.

Just as feminist scholars in the West suggest that we would be better off if both voices were represented in decision making, Japanese scholars suggest that more individuality is essential and that people are dying, literally, for community. As things are now, "the community is understood to require mutual dependency."<sup>161</sup>

Perhaps the best answer lies in the need for balance. One voice is not better for society than the other. Both voices have their place, their strengths and a truly equal and just society needs to value both. What may be more important is for scholars and critics to try to understand what is really behind "the different voice". If it is a voice that emerges as a self protective measure in the face of systematic oppression, we need to learn how

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157. *Id.* at 46.

158. *See* HALEY, *supra* note 6, at 70.

159. Personal interview with John O. Haley, University of Washington Law School (June 11, 1996).

160. *Id.*

161. *Id.*

we can retain the perceived value of caring while empowering all people; without destroying the unique character of any particular group, without creating “female men” or Westernized Japanese.

