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Gender Dimorphism in the United States Legal System: A "Post-Feminist" and Comparative Critique

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GENDER DIMORPHISM IN THE UNITED STATES LEGAL SYSTEM: A "POST-FEMINIST" AND COMPARATIVE CRITIQUE

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Professor Wilets prepared, at the request of the UN Secretary-General, the first two drafts of a proposal for reforming the human rights functions of the United Nations, which was subsequently incorporated into the U.N.'s *Agenda for Peace.* He worked as an attorney for the International Human Rights Law Group's Rule of Law Project in Romania, specifically addressing ethnic tension in the context of the judiciary and elections. He also represented the National Democratic Institute in a joint mission to Liberia with the Carter Center. Professor Wilets worked in Paris on some of the first negotiations between Israelis and Palestinians for a two-state solution and assisted in drafting a proposed Basic Law for a future Palestinian state. Professor Wilets has written extensively on international law and rule of law, including: *A Unified Theory of International Law, the State, and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization,* 31 U. PA. J. INT'L L. 753 (2010); *The Thin Line Between International Law and Federalism: a Comparative Legal and Historical Perspective on US Federalism and European Union Law,* RIVISTA STUDI SULL'INTEGRAZIONE EUROPEA, Dipartimento Di Diritto Internazionale E Dell 'Unione Europea Dell' Universita Di Bari, Anno V – nn. 1-2 (2010); one chapter in the ENCYCLOPEDIA OF FORENSIC AND LEGAL MEDICINE, *SECTION ON WAR TRIBUNALS* (Elsevier Publishing, winter, 2005); *Introduction: The Building Blocks to Recognition of Human Rights and Democracy: Reconciliation, Rule of Law and Domestic and International Peace, 25 Nova L. Rev. 387 (2001); 7* ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 597 (2001). *The Spanish edition of this article can be found at* 7 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 731 (2001) *(Introduccion: Los Pilares Fundamentales Para El Reconocimiento de los Derechos Humanos y la Democracia: la Reconciliacion, el Estado de Derecho y la Paz Nacional e Internacional); Lessons from Kosovo: Towards a Multiple Track System of Human Rights Protection, 6 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 645 (2000);* and *An International Legal Response to the Demise of the Nation-State: Towards A New Theory of The State,* 17 BERKELEY JOURNAL OF INT'L L. 193 (1999).

I. ABSTRACT

There has been extensive jurisprudential literature positing that the structure, values, and processes of the American legal and educational system, focusing heavily on adversarial battle among parties in court, and competition in law school, are fundamentally "male-centered." This "male-female" construct suggests that there is an essential dichotomy between the two genders with respect to resolving disputes that is reflected in the legal system, and that this "male-female" dichotomy is harmful to all participants and perhaps to justice itself.

This article expands upon this literature by arguing that many of the dysfunctional characteristics of the American legal system labeled "male" in the traditional feminist critiques are, from a comparative and historical perspective, not *essentially* male at all, but simply deviant from the jurisprudential approach of the great bulk of the world's legal systems, most of which are also dominated by men.

II. INTRODUCTION

In the last three decades, there has been extensive jurisprudential literature positing that the structure, values, and processes of the American legal and educational system, focusing heavily on adversarial battle among parties in court, and competition in law school, are fundamentally "male-centered."[1] The "male-centered" adversarial approach to legal education

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1. *See, e.g.*, LANI GUINIER ET AL., BECOMING GENTLEMAN: WOMEN, LAW SCHOOL AND INSTITUTIONAL CHANGE (1997); Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L & POL'Y 119 (Spring 1997); CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (2d ed. 1993); Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 LAW & SOC. INQUIRY 289 (Spring 1989); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculation on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (Fall 1994); Robin

and legal process has also been termed the "gladiatorial" approach.[2] This "male-female" construct suggests that there is an essential dichotomy between the two genders with respect to resolving disputes that is reflected in the legal system,[3] and that this "male-female" dichotomy is harmful to all participants and perhaps to justice itself.[4]

West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (Winter 1988); Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867, 869 (1988); Yxta Maya Murray, *A Jurisprudence of Nonviolence*, 9 CONN. PUB. INT. L.J. 65, 77, (2009) (quoting Carrie Menkel Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKLEY WOMEN'S L.J. 39, 45 (1985) "As Carrie Menkel-Meadow explains: 'Where men see danger in too much connection or intimacy, in being engulfed and losing their own identity, women see danger in the loss of connection, in not having an identity through caring for others and by being abandoned and isolated.'"); Susan D. Carle, Review Essay, *Gender in the Construction of the Lawyer's Persona: Florence Kelley and the Nation's Work: The Rise of the Women's Political Culture*, 1830–1900, 22 HARV. WOMEN'S L.J. 239 (Spring 1999); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (Summer 1983) (arguing that the "objective standard" is simply the male point of view in disguise. Traditional liberal legalism makes male dominance invisible and legitimate by adopting the male point of view in law at the same time as it enforces that view on society.).

2. *See, e.g.*, Sturm, *supra* note 1, at 119; Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 847–48 (2008).

> To be sure, they do not ask students to play the role of warrior litigators, but nor do they ask them to play the role of problem-solving collaborators. In failing to do so, they fail to maximize the chances that tomorrow's lawyers will act to change the adversarial legal culture in which they operate.

3. Murray, *supra* note 1, at 76 (Women's thinking is "contextual" and "informed by a more complex understanding of the psychological dynamics of relationships." She distinguishes this feminine mode of analysis from the masculine, which analyzes moral problems using "abstract[ions]" and "moral absolutes," a style she characterizes as "math[ematical]" and "hierarchical."); *id.* at 65 (This article "celebrates women's 'ethic of care,'" which is a brand of moral reasoning that emphasizes empathy, particulars, and human relationships, as opposed to men's "standard of justice," which stresses individualism, abstraction, and autonomy"); Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357, 362 (2007) ("many of the feminist objections to the adequacy or desirability of economics as a tool for capturing family life can be traced to feminist impulses that tend to entrench the male/female dichotomy in a number of ways.").

4. *See, e.g.*, Sari Bashi & Maryana Iskander, *Why Legal Education is Failing Women*, 18 YALE J.L. & FEMINISM 389, 391–92 (2006).

> As individuals, law school professors treat women differently from men, and as institutions, law schools cultivate and reward patterns of behavior that are more likely to be found among men than among women, even though these behaviors do not necessarily reflect the skills students need to be good lawyers, judges, and legal academics;

Tracy E. Higgins, *Feminism as Liberalism: A Tribute to the Work of Martha Nussbaum*, 19 COLUM J. GENDER & L. 65, 68–69 (2010).

This article expands upon this literature by arguing that many of the dysfunctional characteristics of the American legal system labeled "male" in the traditional feminist critiques are, from a comparative and historical perspective, not *essentially* male at all, but simply deviant from the jurisprudential approach of the great bulk of the world's legal systems. Needless to say, the vast majority of the world's legal systems are dominated by men, and presumably incorporate the value characteristics of those men. Nevertheless, the adversarial approach to resolving disputes is not the method for resolving disputes adopted by the great majority of the world's men. Thus, the most that could be said is that the United States system reflects the approach of *men in the United States* towards dispute resolution. Again, however, if the great majority of the rest of the world's men choose a different manner of dispute resolution than those of United States men, including those legal systems that derived from the gladiatorial approach of the early British common law system, then that difference must be accounted for by something in United States culture, society, and/or history apart from the essential characteristics of maleness. In fact, this article would argue that the sources of the American gladiatorial approach

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> Recognizing that the exercise of individual choice is always constrained by culture and context, feminists have argued that under conditions of gender inequality, assumptions about choice and responsibility are not politically neutral. This critique has at least two distinct but related strands. The first and earlier strand emphasizes women's position in various social relationships--women as providers of care. According to this critique, liberal notions of autonomy posit an unrealistically unencumbered individual or "atomistic man." Beginning from this conception of liberal autonomy, some feminists have argued that liberalism undervalues care and connection and, as a result, is distinctly masculine in its orientation.

Chiwen Bao et al., *Left Learning: Theory and Practice in Teaching from the Left in Law School*, 31 N.Y.U. REV. L. & SOC. CHANGE 479, 487 (2007).

> Today's legal environment demands different skills: negotiation, managing multiple sources of information, and role flexibility are important skills for lawyers. Some skills modern lawyers must possess, such as collaboration with clients and colleagues, correspond to those that feminists ascribe to women more generally; the failure to teach law as to improve those skills, however, may signal that what is learned in law school and what legal practice actually entails may be largely unrelated.

NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION (1984); Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); Martha Minow, The Supreme Court 1986 Term Foreword, *Justice Engendered*, 101 HARV. L. REV. 10, 43, n.155 (1987).

to dispute resolution can be witnessed not just in law, but in the American economic, social, and political system.[5]

For example, all common-law countries share the common history of the British legal system, which incorporated "trial by battle" from its earliest genesis and still relies on an adversarial conflict between the participants. Nevertheless, the jurisprudential approach in the United States is somewhat unique in that it reflects an exaggerated free-market, "gladiatorial" approach to resolving a wide variety of legal and non-legal disputes. Thus, the gladiatorial, or "trial by battle" approach to resolving disputes can be witnessed in the unique United States legal approach to resolving labor disputes, delineating the limits of free speech, as well as, in the more quintessentially legal procedural issues of determining guilt and innocence in a criminal trial or economic liability in a civil trial. Indeed, many legal commentators defend the adversarial system precisely because it reflects the competition that is encouraged in other sectors of American society.[6]

This article is principally concerned with the dysfunctionality of the "gladiator" approach in American law, which is primarily a procedural, or process-oriented, concern. This focus on the *process* by which substantive rules are created should be distinguished from the substantive rules themselves. Thus, a critique of the dysfunctionality of those substantive rules or laws, or the means by which substantive rules in the United States and other countries perpetuate patriarchy, is beyond the scope of this article.[7]

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5. *See* Kutak, *infra* note 6, at 174, and accompanying text.

6. *See* Robert J. Kutak, *The Adversary System and the Practice of Law, in* DAVID LUBAN, THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 172, 174 (1983), in which the author argues that the adversarial system is culturally appropriate for Americans because of their predominantly competitive society. The adversarial system reflects "the same deep- seated values we place on competition among economic suppliers, political parties, and moral and political ideals. It is an individualistic system of judicial process for an individualistic society." *See also* Anatol Rapaport, *Theories of Conflict Resolution and Law, in* M.L. FRIEDMAN, COURTS AND TRIALS: A MULTIDISCIPLINARY APPROACH 22, 29 (1975), in which the author argues that the U.S. adversarial system reflects the emphasis on competition in our society, and is a "direct transplant of competitive economics into the apparatus of justice."

7. This author assumes as proven that the great majority of the world's legal systems contain substantive rules that reflect male dominance. Indeed, a woman lawyer may, as a gross generalization, be arguably more caring and less adversarial oriented in her approach to procedure and yet still share very traditional assumptions about gender roles that would lead her to support substantive legal rules that disproportionately harm women and/or or men or enforce gender stereotyping. This article therefore also assumes as proven the enormous legal literature demonstrating that our legal system has adopted, as a substantive matter, legal norms enforcing male dominance through *de jure* sexual stereotyping. Based upon these assumptions, it would therefore be difficult to argue that this substantive institutionalization of male hegemony is not "essentially" gendered, particularly since, unlike the

This article accepts that the legal system in the United States does reflect "male" values, *at least as far as male values are socially constructed in the United States*. This article also accepts the assumption that many men throughout the world have historically chosen to resolve disputes through violence, and that, as a gross generalization, this mode of dispute resolution may be more typical of males than females. This article merely argues that the vast majority of the world's societies, historically and contemporaneously, have chosen to resolve disputes outside of war or armed struggle through means which are much less aggressive and conflict-driven as that exhibited by the United States (and to some extent the British) system of justice. This article will first discuss the contemporary feminist critique of the United States legal system. It will then expand upon this critique, arguing that the dysfunctions identified by the feminist critique are not essentially male at all, but simply unique to the particular history of Anglo-Saxon legal culture, and particularly that of the United States. The particular approach of the United States towards dispute resolution is reflected in the free-market, "gladiatorial" or adversarial approach to resolving a wide variety of political, economic, social, and legal disputes,[8] which frequently differs even from other *common law* systems. This article will then explore the unique history of the Anglo-American legal system that could explain at least some of its significant deviation from the rest of the world's legal systems. Lastly, the article will discuss how many male-dominated, non-common law systems do not share many of those dysfunctional characteristics labeled "male" in United States society. This article will then explore forms of dispute resolution adopted by other societies. This article will then conclude with a discussion of the implications of this argument for reforming the United States legal system through reforming the manner in which law is created and applied.

III. EXPANDING THE CONTEMPORARY FEMINIST CRITIQUE OF THE UNITED STATES LEGAL SYSTEM

There has been an enormous amount of literature written on the particular ways in which the United States legal system reflects particularly male values in the manner in which it trains lawyers and the ways in which the legal system resolves disputes.[9] Much of this literature has posited that

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procedural differences between the US legal system and the rest of the world's legal systems, this male dominance of substantive legal rules is global, and historically consistent.

8. *See generally* Paul T. Wangerin, *The Political And Economic Roots of The "Adversary System" of Justice And "Alternative Dispute Resolution,"* 9 OHIO ST. J. ON DISP. RESOL. 203 (1994).

9. *See generally* Sturm, *supra* note 1; *See also* Rand Jack & Dana Crowley Jack, *Women Lawyers: Achetype and Alternatives*, 57 FORDHAM L. REV. 933 (1989).

this particularly "male" approach to training lawyers and resolving disputes is problematic for the legal system in general[10] and for the achievement of the legal system's primary goal of justice.[11]

Feminist critiques of the adversary system incorporate numerous elements. The two most salient are a general critique of the adversary system in terms of its negative consequences for achieving justice, and a specifically gender based critique, focusing on the negative consequences for the individuals engaged in the process, and on the system's promulgation of the "male" values of aggression and atomistic individualism.

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10. Nancy A. Welsh, *Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically*, 2008 J. DISP. RESOL. 45, 57–58 (2008).

> I do know, however, that other professional schools are incorporating the development of "emotional intelligence" into their curricula, researchers are exploring the revision of law school *58 admissions practices to include consideration of humanistic factors that predict effective lawyers, and the Carnegie Foundation for the Advancement of Teaching has highlighted the law schools that are trying to assist law students in connecting legal conclusions "with the rich complexity of actual situations that involve full-dimensional people."

Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 517 (2009).

> A pitfalls pedagogy gives law students the vantage point from which to see any topic of professional responsibility both as a quick prod for a lawyer and in all its depth. By talking about problems for lawyers as sources of strategy and strength, and commending vigor in response to a setback, the pedagogy combats a tendency toward anxiety and unhappiness that wafts through law schools.

Id. at 481 (2009).

> This morose assessment, spoken from a locus of relative comfort and ease, appears to be shared at varying levels of privilege within the profession. Whether they choose to address demoralization, depression, dissatisfaction at work and in school, alienation, cynicism, heartlessness, or another pathology that lawyers and law students manifest, commentators on this population are united in their gloom. The empirically inclined among them gather data about lawyers' unhappiness that suggest an intractable problem.

11. *See, e.g.*, Susain Daicoff, *Articles Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997) ("In the last ten to fifteen years, three related crises have emerged with respect to the legal profession: 'professionalism' has declined, public opinion of attorneys and the legal profession has plummeted, and lawyer dissatisfaction and dysfunction have increased. . . ."). *See also* Sturm, *supra* note 1, at 119 ("Dissatisfaction permeates the public and professional discourse about lawyers and legal education. . . .").

Regarding the first element of this critique, the negative effects of the adversary system on justice and society as a whole have been widely discussed in the legal literature, and include such concerns as:

> a) Its non-contextual focus, based on winning with an abstract set of rules rather than achieving a mediated approach with a result more beneficial for both parties;[12]
> b) Its tendency to reward the wealthiest members of society, since they can afford the best lawyers or "gladiators," and are more likely to win, even if "objective" criteria of "justice"[13] would dictate a different outcome;
> c) A focus not just on the economically dominant actors in society and third parties, but also a disregard for the non-dominant economic actors to the dispute itself, as epitomized by the "economic" approach to calculating contracts and torts damages, rather than actual damages;[14]
> d) Its focus on the short-term economic interests of those in power, rather than the longer-term interests on third parties and the community in general;[15]

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12. Jack, *supra* note 9, at 934 ("An attitude of emotional detachment reinforces the idea that law is a game to be played for its own sake; the adversary nature of law makes it easy to maintain personal distance. . . ."). "Women entering the practice of law find that the mores of the game bear the imprint of boys' play rather than that of girls." *Id.* at 935. *See also* West, *supra* note 1, at 1 (There are, of course, other dysfunctional aspects of the adversary system on justice and other nocent consequences of the system on individuals and society of this particular approach. Robin West has been one of the leading advocates of such a position, arguing a "Separation Thesis," which posits that the male-dominated dominant culture has forced us to think of ourselves and the world as separate. Males thus think of themselves as definitionally separate from other human beings. West asserts that women are "connected;" they differ fundamentally from men in that their basic experience is of connection (because of pregnancy and breast-feeding and because women are penetrated, rather than penetrating, in sexual intercourse) rather than of individuality. Women are more likely to view the morality of actions against a standard of responsibility to others, rather than against a standard of rights and autonomy from others. Males are therefore more likely to be more aggressive in litigation and negotiation, and in the manner they construct the legal system itself. Thus, women are more likely to be contextualist in their interpretation of the law, while men are more likely to apply abstract legal principles to issues, disregarding the human connections involved.).

13. The author apologizes for the use of quotations, as it tends to resemble a well-known Saturday Night Live skit, but it is arguable whether objective concepts of justice can actually be absolutely ascertained. Nevertheless, such terms are used in a relativist sense.

14. *See, e.g., Peevyhouse v. Garland Coal & Min. Co.*, 382 P.2d 109 (Okla. 1962), in which the interests of the plaintiffs in seeing their property restored to its original state, pursuant to their contract with the mining company (specific performance), was sacrificed to the economic interests of the mining company in paying only market-level damages for its destruction of the property, which were minimal. *See also* economic approach to calculation of torts and contract damages.

15. Sturm, *supra* note 1, at 119.

> e) Its marginalization of women, people of color and sexual minorities;[16]
> f) Legal education's preoccupation with analysis rather than the "multi-faceted, transactional nature of legal practice[;]"[17]
> g) Whether law schools adequately train lawyers to deal effectively with 21st Century challenges, and whether the models of legal professionalism advanced by those schools are "morally and ethically justifiable;"[18] and finally;
> h) A disregard for non-adversarial means of dispute resolution,[19] reflecting the preferred (and unique) United States conflict-based or "market" approach to resolving disputes.

The second element of the gender-based critique focuses more on the gender-specific aspects of the adversarial system, arguing that the dysfunctional aspects contained in the first element of the critique results from the essentially male characteristics of the system and the system's actors. Heather Elliott, in a critique of the "difference model" of feminist theory, describes that model as follows:

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16. *Id.;* Hon. Deanell Reece Tacha, *Women and Law: Challenging What is Natural and Proper*, 31 NOVA L. REV. 259, 272 (2007) ("Women in the judiciary have certainly had a positive effect on society in general and the legal profession specifically. For example, their presence has encouraged young women to pursue legal careers, and they have raised awareness of gender bias in the court system.").

17. Sturm, *supra* note 1, at 119.

18. *Id.*

19. Andrea Macerollo, *The Power of Masculinity in the Legal Profession: Women Lawyers and Identity Formation*, 25 WINDSOR REV. LEGAL & SOC. ISSUES 121, 125–26 (2008).

> The current state of the adversarial system exerts a disproportionate influence over lawyers' ethics and challenges the contemporary use of alternative dispute resolution and collaborative approaches to problem-solving. This thereby undermines practice styles which may be valuable for women in order to explore new means to validate their professional identities. Thornton found in her interviews of female lawyers that women become more affected by the ethical dilemmas posed by private practice's obsession with profits and the devaluation of family and personal life. These ongoing trends in the legal profession continue to undermine equality goals and render gender issues invisible, which unduly complicate women lawyers' identity formation.

Id. at 138 ("The 'double bind' means that women lawyers must achieve a delicate balance between the expression of masculine qualities and the repression of feminine qualities, with only subtle exposure of characteristics emanating from either side of the gender dichotomy.").

> Many scholars posit that an essentially female point of view affects the decision making of female judges. Women are thought to "contribut[e] a new, and perhaps uniquely female, perspective to lawyering—a more collaborative, cooperative and contextual approach with a preference for non- adversarial modes of dispute resolution over binary, rights-based justice."[20]

The argument is that many of those dysfunctional characteristics of the system can be remedied by incorporating arguably, essentially, "female" values of mediation and cooperation. The vast majority of the literature would argue that the stereotypical male characteristics of the legal profession are not simply a function of the dominance of men in the profession, but rather the institutional embrace and reproduction of those male values, regardless of the gender of the person participating in the system. Indeed, much of the contemporary literature addressing this issue has posited that admitting women into the legal profession has only a limited impact on the profession and legal education since women learn to change themselves to conform to the "male" profession.[21]

For example, it could be argued that the positive law approach in civil law, applying a rather broad general rule to each factual case on a *de novo* basis,[22] permits civil law courts to take context into account in applying law. This stands in opposition to the common law approach of forcing individuals into rigid legal rules, most of which were created with men in mind.[23] As noted above, this article would argue that the contemporary

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20. Heather Elliott, *The Difference Women Judges Make: Stare Decisis, Norms of Collegiality, and "Feminine Jurisprudence:" A Research Proposal*, 16 WIS. WOMEN'S L.J. 41, 41 (2001) (*quoting* Cynthia Grant Bowman, *Bibliographical Essay: Women and the Legal Profession*, 7 AM. U. J. GENDER SOC. POL'Y & L. 149, 172 (1999)).

21. *See* Jack, *supra* note 9, at 935.

> Given that qualities learned by women at home and in play make them vulnerable in a predominantly male profession, one solution women have attempted is to eradicate feminine characteristics. . . . Particularly in the legal profession, which prides itself on objectivity, professionalism, and combativeness, traditional feminine traits are unacceptable.

22. This author acknowledges that while many civil law countries do not technically employ *stare decisis*, in reality, they may frequently employ something akin to *stare decisis* by employing case precedent as very persuasive case authority. As we know in the common law system, a skillful advocate can frequently turn persuasive authority into binding authority and *vice versa*.

23. The author also recognizes that theoretically, the civil law attempts to limit judicial discretion rather than permit it, as the preceding sentence seems to suggest. Nevertheless, in practice, the civil law system arguably permits more judicial discretion in responding to the particular context of

feminist critique of the United States legal system is too limited in its overly narrow focus on only gender-based sexual explanations for these dysfunctions in the United States legal system. This article would itself posit at least seven ways in which the traditional feminist critique is overly narrow.

First, characterizing the debate over the future of our legal system as a debate over essentially male and female values gives our present legal system too much credit. There are aspects of the United States legal system that are not essentially male at all, but simply dysfunctional. As long as the debate over the nature of the American legal system is characterized by an essentially "male-female" dichotomy, there implies a certain equality between the dual perspectives on our legal system. It implicitly also suggests that one variant is appropriate for a male and one for a female. This article would argue that what is characterized as "female" in the present literature may simply be a less dysfunctional legal approach to resolving disputes. The corollary to this argument is that what is characterized as "male" in the present literature may not constitute an appropriate approach to dispute resolution for *either* gender. In support of this argument, this article will demonstrate that the vast majority of the world's legal systems, historically and contemporaneously, have come to a similar conclusion, even though those systems have been overwhelmingly dominated by men. This article would thus take issue with those legal commentators such as Linda Chavez, who would argue that women should stop whining and "get with the program."[24] Those legal commentators assume, in an ethnocentric, sexist, and simplistic fashion, that the present United States legal system is the appropriate yardstick by which to evaluate the functionality of legal systems in general.

Second, the debate over what is male or female risks not only focusing on gender rather than the dysfunction itself, but also risks stereotyping women into an essentialist straightjacket. Indeed, empirical research undertaken by at least one legal commentator has indicated that the United States legal profession attracts both men and women who have a pre-existing tendency to engage in the more unsavory gladiatorial aspects of legal combat than the population at large.[25] Those women who may be

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a case, the incorporation of which is one of the hallmarks of a feminist approach to the law, according to some legal commentators.

24. Linda Chavez, *Would-be Women Lawyers Need to Quit Looking for Excuses and Get with the Program*, CHI. TRIB., Apr. 16, 1997, at 23, *available at* http://articles.chicagotribune.com/1997-04-16/news/9704160002_1_lani-guinier-law-students-top-law-firms (last visited Oct. 12, 2011).

25. *See, e.g.*, Daicoff, *supra* note 11, at n.5, and accompanying text.

> Attorneys appear to differ from the general population in the way that they approach problems and make decisions, what they value and respond to, and what motivates them. Some of their personality and

attracted to the legal profession because they exhibit some of the traditionally defined male characteristics are no less essentially "female" than women with more traditionally defined female characteristics. Thus, it may not be men themselves that are the problem, but rather those aggressive characteristics we traditionally associate with men, which are present in both men and women, albeit to arguably different degrees.[26]

It is also possible to argue that we cannot even ascertain what women essentially are since they are the social constructs of a male dominated society. As Catharine MacKinnon argues:

> Women have a history all right, but it is a history both of what was and of what was not allowed to be. So I am critical of affirming what we have been, which necessarily is what we have been permitted, as if it is women's, ours, possessive. As if equality, in spite of everything, already ineluctably exists. [27]

From a different perspective, Justice O'Connor categorically rejects the "difference model" and articulates the viewpoint shared by many people that essentialism can prejudice women who choose to participate in the legal system as presently structured. Her insight is helpful in understanding this position, although this author would argue that her position too facilely dismisses the difference model, and too easily accepts, as a normative matter, the present structure of the legal system:

> [T]he move to ask again the question whether women are different merely by virtue of being women recalls the old myths we have struggled to put behind us. Undaunted by the historical resonances, however, more and more writers have suggested that women practice law differently than men. One author has even concluded that my opinions differ in a peculiarly feminine way from those of my colleagues. . . . The gender differences currently cited are surprisingly similar to stereotypes from years past. Women attorneys are more likely to seek to mediate disputes than litigate them. Women attorneys are more likely to focus on resolving a client's problem than on vindicating a position. Women attorneys are more likely

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cognitive characteristics appear to be present prior to law school, and some appear to be amplified by or inculcated in law school.

26. *Id.* at n.183–188, and accompanying text. This author makes no suggestion as to whether there is any empirical validity to postulations of differences in "aggression" between men and women.

27. CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 39 (1987).

> to sacrifice career advancement for family obligations. Women attorneys are more concerned with public service or fostering community than with individual achievement. Women judges are more likely to emphasize context and de-emphasize general principles. Women judges are more compassionate. And so forth.

This "New Feminism" is interesting, but troubling, precisely because it so nearly echoes the Victorian myth of the "True Woman" that kept women out of law for so long. It is a little chilling to compare these suggestions to Clarence Darrow's assertion that women are too kind and warm-hearted to be shining lights at the bar.[28] From a somewhat different viewpoint, human rights legal commentator Ratna Kapur argues that the essentialization of women as victims is counterproductive in the international human rights context. She writes that:

> My main argument is that the focus on the victim subject in the [violence against women] campaign reinforces gender and cultural essentialism in the international women's human rights arena. It also buttresses claims of some "feminist" positions in India that do not produce an emancipatory politics for women. This focus fails to take advantage of the liberating potential of important feminist insights. These insights have challenged the public/private distinction along which human rights has

28. Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1553 (1991). But that is not, of course, the same as arguing that qualities that are traditionally associated with women are not valuable in the judicial context. It's just that they don't have to be characterized as solely female qualities. *Cf.* Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 17 (2009).

> In the context of judicial decision-making, empathy, which, at its core, involves the ability to understand the life experiences or emotions of another person, need not mean "intuition" nor should it be perceived as injecting the "mystical" into the ordered resolution of disputes. Rather, as Professor Lynne Henderson explains, "empathy enables the decision maker to have an appreciation of the human meanings of a given legal situation," ultimately aiding the judge both in the process of reaching a legal conclusion and in justifying that conclusion "in a way that disembodied reason simply cannot." Moreover, the fact that a judge has the ability to empathize with human beings involved in a legal dispute does not mean that the judge is, thus, unable to decide the case in a fair and impartial manner.

> operated, and traditional understandings of power as emanating exclusively from a sovereign state.[29]

Even assuming the validity of the "difference model" assumptions posited by some feminist theorists, there can be little doubt that there is a tremendous amount of overlap between men and women with respect to these sex differences.[30]

Third, traditionally "male" values of aggression in conflict resolution are so institutionally imbedded in our legal system that women frequently find themselves forced to adapt to that traditionally male model, and thus,

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29. Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 2 (2002). *See also* Darren Rosenblum, *Rethinking International Women's Human Rights Through Eve Sedgwick*, 33 HARV. J. L. & GENDER 349, 353–54 (2010).

> Positing that women are sexualized victims relies on the currency of MacKinnon-style essentialist notions of both sex and culture in the International Women's Human Rights arena. IWHR's emphasis on the victim subject overlooks multi-layered experiences that take into account perspectives of class, race, religion, ethnicity, and/or sexual orientation. This posture marginalizes and disempowers women in the developing world. These women victim subjects need states to protect them, opening the door to their moral regulation. This moral regulation can serve to imprison women in a second wave sexual paradigm. In this recreated attic reverberating with yellow wallpaper, it is not men's perception of women's hysteria that traps them, but women's own obsession with victimhood.

See also Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 611 (2009) ("I argue, however, that the issue of the victim-subject narrative in the dominant discourse on human trafficking is one aspect of a larger problem—the operation of otherness in the conception of the problem of human trafficking and, consequently, the legal strategies developed to combat it."). *See also id.* at 609.

> Othering operates across multiple dimensions, including race, gender, ethnicity, class, caste, culture, and geography. The result is a devaluation of certain individuals, communities, and even nations, and a privileging of those who are members of the dominant group, class, or country. Some populations experience "intersectional othering" because they possess multiple characteristics that are devalued in the current global power structure. For example, poor women of color in developing countries confront othering across potentially all of the above mentioned dimensions, giving them little or no voice in shaping the dominant understanding of human trafficking or appropriate remedies to the problem.

30. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 410–11 (1990) ("The male and female distributions of attributes intersect. Many women are more aggressive and less nurturant than many men, just as many women are taller than many men, although the average man is taller than the average woman.").

women themselves become perpetrators of that system that was, in fact, created by men. Thus, focusing solely on the sex of the perpetrator of "male" values ignores that many of the perpetrators are women, albeit women who have been "co-opted" by a "male" system.

Fourth, as a corollary to the argument immediately above, restricting the debate over reforming the United States' judicial system to a "male-female" debate risks generalizing American concepts of "male" as universally male. As this article will argue, many of the dysfunctional characteristics of the United States legal, political, and economic system labeled male, are not shared by most other legal systems that are as male dominated as the United States system. Thus, the traditional feminist critiques of the United States legal system risk perpetuating the myth that the structure and functioning of United States society is indicative of what the rest of the world is, does, or should do.

Fifth, although the purpose of this article is to suggest a conceptual framework for thinking about our legal system that transcends a rigidly dualist social constructed male-female paradigm, it should be recognized that the dysfunctional consequences of those aspects of the United States legal system that are labeled "male" may, in fact, be experienced by individuals as very gender-specific.[31] In this sense, the essentialist-social constructionist debate may appear largely irrelevant to those experiencing the harmful consequences of male hegemony in their daily lives. Those consequences are, after all, certainly gender based to the extent gender is always socially constructed within a particular society. Nevertheless, it is important to look beyond the United States social construction of gender in order to explore and advance the best means of reforming the legal system without limiting ourselves to the United States experience.

Sixth, from a practical perspective, characterizing the dysfunctional aspects of the United States legal system as essentially "male," encourages the male members of the legal profession to be more resistant to reforming the dysfunctional characteristics of the United States legal system than they might otherwise be.[32] After all, the negative consequences of these

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31. *See, e.g.*, DRUCILLA CORNELL, BEYOND ACCOMMODATION 120 (1991). ("Sexual difference as gender inequality no less 'real' for being socially constructed.").

32. *See generally* Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1038 (1996) ("Feminist legal theorists have paid mild attention to whether men could embrace feminist objectives. . . . This issue is treated as a relatively unimportant one, usually relegated to footnotes."). *See also* Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 204 (2008).

> Men are the dominant casualties and injuries in war. Systemically, men are the dominant victims of violent crime. Men often pay a price for their privilege, a price that many may be unwilling to pay but are blocked from another alternative. In addition, how the price of privilege

dysfunctional aspects of the United States legal system can negatively affect both male and female members of the legal profession and society.[33] As Nancy Levit argues, the traditional discourse between cultural feminists and dominance theorists on the one hand, and men on the other, leads to dialogue as a competition. "The form of the argument—that women's ethics should prevail over men's—sets up a discourse that is at best competitive, at worst combative. Whose values should prevail?"[34] In this battle, unfortunately, society cannot win, particularly when men currently dominate the political, legal, and economic spheres of American society.

This article does not suggest that the comparative critique proffered herein boils down to a simple argument for alternative dispute resolution as the solution for the gladiatorial aspects of the United States legal system. Many leading scholars have proffered just such an alternative as a solution to the problems with the adversarial system,[35] and some legal commentators have suggested that "alternative dispute resolution" (ADR) constitutes, to some extent, the feminist alternative to the "male" adversarial system. Nevertheless, this article limits its scope to suggesting that because many societies have already incorporated ADR techniques as part of their legal procedure, the ADR present in those societies simply evidences that a non-adversarial approach to dispute resolution is more likely to be determined

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can be exacted, even when privilege itself may not be enjoyed, exposes the complex way in which gender hierarchy is sustained.

Id. at 204.

Powerlessness of the individual has to be taken into account but does not remove the reality of power—and maybe advantage or privilege—for the group as a whole. Institutions, structures, and practices that reinforce such arbitrary gender power must be our focus, including where they subordinate and injure boys and men.

33. *See* Levit, *supra* note 32, at 1040, in which the author observes:

The image of masculinity is also formed by legal responses to areas in which men suffer injuries. Laws preventing male plaintiffs from suing for same-sex sexual harassment, and analysts' lack of interest in male rape and spousal battery of men contribute to a climate in which men are taught to suffer in silence. In the areas of parental leave and child custody, men are socially and legally excluded from caring and nurturing roles. Various legal doctrines send distinct messages about what it means to be male. This cumulative legal ideology of masculinity is under-explored.

34. *Id.* at 1047.

35. *See* Landsman, *infra* note 42, and accompanying text (Justice Burger's condemnation of adversarial litigation and endorsement of ADR as a solution to those problems with litigation).

by culture than determined by essentialist concepts of gender.[36] Moreover, ADR may frequently and simply reproduce adversarial values in a new form.[37] ADR may also perpetuate and expand the uniquely aggressive American concept of "freedom of contract," which arguably is one more way of introducing adversarial, gladiatorial values into the structure of social relations.

IV. A HISTORY OF THE COMMON LAW APPROACH TO DISPUTE RESOLUTION

A. "Trial by Battle" in Litigation

It would be helpful to examine the history of that adversarial/gladiatorial approach to understand how this adversarial approach to dispute resolution has been a unique component of common law dispute resolution for over a millennium.

1. A Very Short History of the Common Law

It is easier to understand the unique legal experience of common law countries when one understands the unusual development of dispute resolution in England. "Litigation" in medieval England was frequently characterized by, *inter alia*, a literal battle between the parties, appropriately termed "trial by battle," or, somewhat later, through a kind of metaphorical battle between the defendant and God, exemplified by "trial by ordeal" involving such specific litigation techniques as "trial by fire" and "ordeal of cold water."[38]

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36. *See* Julie Barker, *A Better Alternative for the Resolution of Commercial Disputes: Guidelines for a U.S. Negotiator Involved in an International Commercial Mediation with Mexicans*, 19 LOYOLA INT'L & COMP. L.J. (1996).

37. *See, e.g.*, Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 1 J. INST. STUD. LEG. ETH. 49, 72 (1996).

> I strongly believe that we are on the right track in experimenting with and using a variety of forms of "alternative dispute resolution" – I prefer the new term – "appropriate dispute resolution." Yet, as I have stated elsewhere, I fear many of these forms (mediation, mini-trials, settlement conferences, early neutral evaluations, reg-neg) are becoming corrupted by the persistence of adversarial values.

38. *See, e.g.*, Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 39 (2002) (Civil and criminal disputes in medieval England were decided by primitive trials by battle, wagers of law, and trial by ordeal). *See also* STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND A DEFENSE 8–9 (1984); and Henry Lea, *The Wager of Battle*, *in* LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT 233–53 (Paul Bohannan ed., 1967). For an outstanding statistical analysis and description of medieval English forms of adjudication and their prevalence, *see* Daniel Klerman, *Settlement And The Decline Of Private Prosecution In Thirteenth-Century England*, 19 LAW

Legal historian Theodore F.T. Plucknett gives a description of trial by battle in the context of criminal litigation, observing that battle occurred in criminal cases, "[w]hen a private person brought a criminal charge against another. It was deadly; if the defeated defendant was not already slain in the battle he was immediately hanged on the gallows which stood ready."[39] Legal historian J.H. Baker discusses some of the other adjudication techniques in criminal cases, where the litigation more closely resembled contemporary litigation to the extent society as a whole—or fire, water, etc.— functioned as the arbiter of justice:

> Ordeals involved an appeal to God to reveal the truth in human disputes. . . . In [ordeal by fire], a piece of iron was put into a fire and then in the party's hand; the hand was bound, and inspected a few days later; if the burn had festered, God was taken to have decided against the party. The ordeal of cold water required the party to be trussed and lowered into a pond; if he sank, the water was deemed to have "received him" with God's blessing, and so he was quickly fished out.[40]

English legal historian F.M. Powicke noted the explicit interrelationship between law and force throughout common law legal history:

> Law in a feudal society was inseparable from force, but not obscured by it: they were informed by the theory of contract which informed all feudal relations. . . . Force was never absent, yet was never uncontrolled. In civil procedure we find the elements of war, such as the duel, and the hue and cry; and in war, we find constant applications of legal theory. War was a great lawsuit. The truce was very like an essoin, a treaty drawn up on the lines of a final concord, the hostage a surety, service in the field was the counterpart of suit of court. *The closeness of the analogy between the field of battle and the law court is seen in judicial combat.* Trial by battle

& HIST. REV. 1 (2001); CHRISTOPHER BROOKE, FROM ALFRED TO HENRY III, 871–1272 (1961); GEORGE HOLMES, THE LATER MIDDLE AGES, 1272–1485 (1962).

39. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 105 (1929).

40. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 5 (3d ed., 1990).

> was a possible incident in all negotiations.[41] (Emphasis added).

Some have taken a different viewpoint, arguing that the adversarial system is a relatively new concept, conceptually quite distinct from such systems as "trial-by-battle."[42] A problem with this argument is that it focuses on the modern technical aspects of the adversary system, which certainly did arise later, largely to offset the problematic consequences of the previously existing system. Nevertheless, the adversarial system is fundamentally analogous to the original "trial by battle," even if the mechanisms have changed. Indeed, Chief Justice Warren Burger noted the similarities between the two, and the similarly destructive impact of both means of trial: "For many claims, trial by adversarial contest must, in time, go the way of the ancient trial by battle and blood. Our litigation system is too costly, too painful, too destructive for a truly civilized people."[43]

B. Dispute Resolution in other Male Dominated Societies

1. The Common Law versus the Civil Law

Since this article is an effort at illustrating the implications of the peculiar Anglo-Saxon approach to the legal system, it is useful to think how an adversarial process is central to the common law's approach to *creating* law, as well as its procedural application of law. This is particularly appropriate since the creation and application of law are dialectical: although the creation of law such as statutes and constitutions is an entirely political process, the interpretation and application of that positive law by judges itself creates new law. This dialectic is particularly pronounced in the common law, which itself is sometimes defined as "judge made" law. The intrinsic interrelationship between the creation and application of law thus makes an analysis of the peculiar mode of law creation in the common law countries of particular interest for the purposes of this article.

At the same time that the English were attempting to adjudicate by beating each other to death, or drowning each other, in an effort to

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41. MATTHEW STRICKLAND, WAR AND CHIVALRY: THE CONDUCT AND PERCEPTION OF WAR IN ENGLAND AND NORMANDY, 1066–1217, at 45 (1996) (*citing* F.M. POWICKE, THE LOSS OF NORMANDY, 1189–1204, at 242 (2d rev. ed., 1961)).

42. *See, e.g.*, Wangerin, *supra* note 8, at 206–08. *See also* STEPHEN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE (1984); ROSCOE POUND, JURISPRUDENCE 696–703 (1959); Stephan Landsman, *The Decline of the Adversary System and the Changing Role of the Advocate in That System*, 18 SAN DIEGO L. REV. 25 (1981).

43. Barbara Dawson & Michele L. Stevenson, *Getting Help with ADR: A Guide to the Main Players*, 10 BUS. L. TODAY 51, 54 (Jan.–Feb. 2001).

determine God's will,[44] other civilizations, even at this early date, were creating more rational means of creating law.[45] This is not to say that the barbaric forms of trial and legal procedure employed by the medieval British were unique to the British. Nevertheless, at a much earlier date, other European societies employed more rational, logical means of creating law and, to a much lesser extent, resolving disputes.[46] Of course, "rational" does not always mean "good," as evidenced by the variant of the civil law used during the Inquisition. Indeed, the common term for the Continental European approach to judicial dispute resolution is frequently termed the "Inquisitorial System," which does not readily conjure images of impartial justice.

The development of a more "rational" or "civilized" approach to law was more pronounced in the more Romanized areas of the former Roman Empire, and weaker in the Germanic and Anglo-Saxon areas of Europe.[47] For example, in the context of bankruptcy, one legal commentator has noted that:

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44. *See, e.g.*, PAUL R. HYAMS, "TRIAL BY ORDEAL: THE KEY TO PROOF IN THE EARLY COMMON LAW," ON THE LAWS AND CUSTOMS OF ENGLAND 90–126 (1981).

45. To avoid oversimplification, it is important to note that English theories and philosophy of law shared a great deal with their continental counterparts, even though the actual procedure of dispute resolution may have differed substantially. *See* Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1656–57 (1994).

> It is conventional wisdom that distinctively English conceptions of the nature, sources, and purposes of law can be traced back to the early history of the English common law in the twelfth to fifteenth centuries. In fact, however, there is little in the legal literature of those centuries that distinguishes English philosophy from that of other peoples of Western Christendom.

46. *See, e.g.*, Remigius N. Nwabueze, *Historical and Comparative Contexts for the Evolution of Conflict of Laws in Nigeria*, 8 ILSA J. INT'L & COMP. L. 31, 31 (2001) ("It was in the Italian city-states in the Middle Ages that a scientific approach was adopted toward the solution of disputes arising from transactions and intercourse with foreigners. They had separate courts, laws and magistrates for that purpose."). *See also* KENNETH PENNINGTON, "Law, Procedure of, 1000–1500," Dictionary of the Middle Ages, 7 (1986) at 502–06; Evan R. Seamone, *When Wishing on a Star Just Won't Do: The Legal Basis for International Cooperation in the Mitigation of Asteroid Impacts and Similar Transboundary Disasters*, 87 IOWA L. REV. 1091, 1139 n.167 (2002), and accompanying text (*citing* RONALD W. CARSTENS, THE MEDIEVAL ANTECEDENTS OF CONSTITUTIONALISM 55 (1992)) (in turn, crediting John of Paris (1250/4–1304) for articulating the ideal of "stewardship as an authorization to use or to distribute goods," and the idea that "the community determines jurisdiction over the use of common things"). RONALD W. CARSTENS, THE MEDIEVAL ANTECEDENTS OF CONSTITUTIONALISM 81 (1992) (*citing* Marsilio of Padua (1275/80–1342), based on the Aristotelian notion that "[t]he utility of government is measured by the degree to which it can provide the conditions necessary for a 'sufficient life.'").

47. *See generally* Katherine Fischer Drew, *Public vs. Private Enforcement of the Law in the Early Middle Ages: Fifth to Twelfth Centuries*, 70 CHI. KENT L. REV. 1583, 1587 (1995).

> [T]he innovation of discharge seems much more ordinary if the comparison is not with a brutal system such as the medieval English one, which was not even rivaled by the German one in this count, but with other legal systems which also had greater experience with commerce. The cessio bonorum of later Roman Law was followed by Italian city-states of commercial success such as Padua or Venice. Cessio bonorum did retreat with the adoption of the civil codes that substituted Roman law in continental Europe, but it was not replaced by anything like the English debtors' prison.[48]

Much of the historical reason for this divergent development resides in the particularly historically focused development of the civil law, based in the longstanding Roman and even earlier legal jurisprudential traditions. To simplify matters, the civil law created law through the conscious, rational application of human thought to systematically create rules for human conduct. The civil law, first of all, approaches law as a logical, deliberate, formulation of rules to cover every potential factual circumstance that may arrive. An analogy can be made to a hotel reception area with its set of cubbyholes in which keys and mail are placed. The law is structured as a set of cubbyholes of legal rules, into which every factual exigency can be placed.

Richard B. Cappalli, a comparative legal scholar who is a critic of the civil law system, nevertheless describes the civil law's creation of law as follows:

> [The Civil Law's] centerpiece is the civil code, a vast elaboration of legal concepts, definitions, institutions, principles, and rules stated at a high level of generality and purporting to cover the entire realm of private relations: persons and the family, adoption, succession, property rights, contractual obligations, agency, surety, unlawful harm-causing acts, labor, companies, prescription of actions, evidence, creditor preferences, and others. The goal of the civil code is to state in a general, orderly, integrated, and complete way the rules of private law needed to regulate private relations.[49]

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48. Nicholas L. Georgakopoulos, *Bankruptcy Law for Productivity*, 37 WAKE FOREST L. REV. 51, 57 (2002).

49. Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage Over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87, 93–94 (1998).

This elaborate process has been termed "legal science" by legal commentators in the sense that rational thought has been employed by legal scholars to create a logical legal structure, and deductive logic is then used to deduce the law that should be applied to a particular set of factual circumstances.[50] Cappalli further observes that:

> The civilian codes, substantive and procedural, are structured as magnificent exercises in logic, starting with the most general purposes, propositions, and definitions, and logically elaborating their implications and interactions in a network of increasingly detailed rules. Once launched, the codes form the premises for case solutions. Through logical reasoning, deductive and analogic, the civilian lawyers and judges extract the code's solutions to a myriad of human conflicts.[51]

The common law, unlike the civil law, is created in piecemeal fashion, based on a line of cases, or conflicts, between parties. In the common law, sense is made of these series of cases through a process of synthesis, an analytically complex process by which facts of one case are distinguished or analogized to those of other cases. This process is, however, not perfect, and an argument can be made that any case can be differentiated from another, depending upon the ultimate goal of the judge. One has only to observe the number of closely split decisions by justices of the United States Supreme Court to detect that the common law process of synthesis is less than scientifically precise. Moreover, the almost perfect correlation between the Justices' decisions, and their pre-existing ideological inclinations, suggests that the inconsistencies in this less than perfect process are not random, but rather quite deliberate. In contrast, in the civil law, each decision is based on the facts before it, and must rise and fall on the merits of the application of the law to the specific facts of the case before the judges. That is not to say that civil law judges are always impartial—far from it. Nevertheless, a civil law judge is not bound by precedents that may require a certain result as a matter of law, but be inequitable in a particular set of circumstances. This view of the civil law is, of course, in tension with the common shibboleth that the civil law does not permit discretion on the part of judges. In theory, a civil law judge cannot exercise discretion since she is strictly bound by the positive law. In practice, however, the absence of *stare decisis* gives her considerably more latitude in how she applies the words of the fixed law to a particular set of

50. *Id.* at 94.

51. *Id.* at 89.

facts. For example, in the United States Constitution, the words of the equal protection clause have remained constant, but women were not originally considered sufficiently "persons" under that clause to give them the right to vote. Now, such a reading of the clause would be unthinkable. This process of adapting to new realities and different contexts is facilitated in the civil law.

The civil law not only benefited from a rich history of rational analysis of legal problems, it responded rapidly to the Enlightenment's struggle between the Church and more traditional rational approaches to law. Charles Reid notes that in the twelfth Century, European continental law, or civil law, responded rapidly to the developments of the Enlightenment by developing a system of canon law. At the same time, the legal scholars and rulers in Western Europe re-examined the Roman Law of Justinian. Schools of law were established expressly for the teaching, and a "Digest was reintroduced to a Western readership in the late eleventh century."[52]

It should also be noted that there are aspects of the common law system that can promote justice and fairness. For example, the use of juries as independent fact-finders clearly helps avoid sole reliance on potentially biased judges. The adversary system between lawyers engaged in adversarial combat also arguably permits a greater exposition of every possible fact of relevance. That the common law may have some, or even many, features that promote justice better than a less-adversarial system only supports the central thesis of this article that the development of the particular American approach to dispute resolution is not *simply* a bizarre, male approach to dispute resolution, but rather an approach that reflects a very particular philosophical approach to dispute resolution in general. Having discussed the historical basis for the unique approach of the common law towards dispute resolution, it is helpful to take a comparative approach to dispute resolution to avoid drawing sweeping conclusions from a narrow comparison of the common and civil law systems.

2. Indigenous Methods of Dispute Resolution

Indigenous societies frequently employ forms of dispute resolution that one might expect in relatively tight knit communities where social harmony is a critical value. Although it is difficult to generalize about such disparate societies, it is helpful to discuss some general aspects of dispute resolution that are common, although certainly not universal, in indigenous

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52. Charles Reid, *"Am I, by Law, the Lord of the World?" How the Juristic Response to Frederick Barbarossa's Curiosity Helped Shape Western Constitutionalism*, 92 MICH. L. REV. 1646, 1647 (1994); KENNETH PENNINGTON, THE PRINCE AND THE LAW, 1200–1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION (1993).

societies. Dispute resolution is usually focused on restoring harmony among the members of the group, healing wounded pride and feelings. To that end, the focus of the process tends to be on resolving the dispute so that all members feel that justice has been served. Although there may be "punishment," that is not the primary focus of the process: rather it may be a means towards achieving a generally understood community based concept of "justice." This contrasts with Western styles of adjudication, where the focus is almost entirely on satisfaction of abstract notions of justice, with clear winners and losers.[53] Common to most of these indigenous methods of dispute resolution are formalized rituals to solemnify the acts of apology, forgiveness, or retribution. The case studies below of indigenous dispute resolution are but a very small snapshot of indigenous systems of dispute resolution. These case studies are simply intended to illustrate how other, male dominated societies that are neither civil law nor common law based, have approached dispute resolution.

It also must be recognized that indigenous societies frequently have unique social conditions that permit a less adversarial system of dispute resolution than that found in the common law, or even civil law systems. The close community, tight relationships among the parties, and relatively homogenous values and religious beliefs are conditions that simply cannot be replicated in larger societies.[54] Nevertheless, regardless of the means employed to accomplish the particular goals of each indigenous system of dispute resolution, these systems illustrate that male dominated societies other than the civil law system have effectuated dispute resolution systems that are radically at odds with the supposedly essentially male common law dispute resolution system.

a. Case Study: The Navajo Justice System of Dispute Resolution

The Code of Indian Offenses of 1938 and the Indian Reorganization Act of 1934 set forth the structure of the Indian Courts.[55] As a result of forced migration and assimilation, few tribes had recollection of the traditional dispute resolution processes.[56] Today, tribes make effort to

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53. Carole E. Goldberg, *Symposium: Indian Law into the Twenty-First Century: Overextended Borrowing: Tribal Peacemaking in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1005–06 (1997).

54. *Id.*

55. Gretchen Ulrich, *Current Public Law and Policy Issues: Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 HAMLINE J. PUB. L. & POL'Y 419, 432 (1999).

56. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (Fall 1997).

include "traditional tribal values, symbols, and customs into their courtrooms and decisions."[57]

The Navajo Nation Peacemaker Court uses the adversarial system. Nevertheless, the Navajo legal system is distinguished from the state model of adjudication, in that, it is "horizontal" as opposed to "vertical."[58] A vertical system relies on hierarchy, using rank and coercive power to address conflicts. Parties have limited control over the process and a judge or jury makes the final decision. In contrast, a horizontal legal system uses a line to portray equality. The Navajo Nation uses the circle to analogize, explaining that in a circle there is no right or left, nor is there a beginning or end, and that every point—person—on a line of the circle looks to the same center as the focus. Further, it conveys the image of people gathering together for discussion. The Navajo Nation makes this alternative to vertical justice work by favoring methods which use solidarity to restore good relations among people and with one's self. It employs a system of egalitarian relationships, replacing force and coercion with group solidarity, having no ranks or status classifications. The process is referred to as "peacemaking."[59]

The use of the clan as a tool fosters deeply emotional feelings, which create solidarity; this is referred to as *k'e*.[60] "Navajo Justice uses *k'e* to achieve restorative justice. When there is a dispute the procedure, which [they] call 'talking things out,'" includes providing notice to every person concerned or affected by the dispute to a gathering to discuss the matter.[61] The gathering is in a relaxed atmosphere where every member of the community affected by the case, even indirectly, "has the opportunity to be heard."[62] The "zone of dispute" is wider than that of the vertical system, in that, it includes not only the parties to the dispute but also relatives that the problem affects.[63] The Navajo Justice system has no formal rules of procedure or evidence.[64] Free communication is encouraged until a consensus is reached.[65] "The process has been described as a ceremony."[66]

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57. *Id.* at 2.

58. Robert Yazzie, *"Life Comes From It:" Navajo Justice Concepts*, 24 N.M. L. REV. 175, 177 (1994).

59. *Id.* at 181.

60. *Id.*

61. *Id.*

62. *Id.* at 182–83.

63. Yazzie, *supra* note 58, at 183.

64. *Id.*

65. *Id.*

66. *Id.* at 184.

Navajo tort law, an example of restorative justice, is based on the theory of *nalyeeh*, a demand to be made whole by an injured party.[67] The injured party does not seek answers regarding intent, causation, fault, or negligence.[68] The underlying premise for *nalyeeh* is compensation for the injured party so there are no bad feelings within the tribe.[69] In addition, the Navajo employ the concept of distributive justice to address the well being of the community.[70] Distributive justice does not address fault or adequate compensation; instead, distributive justice is concerned with the well being of the community. The injured party's feelings and the defendant's ability to pay are considered in the award of compensation.[71]

The Navajo Peacemaker Court allows judges to refer cases to local communities so that issues can be resolved in a free-form gathering instead of taking the case to court.[72] The Court uses a *naat'aanii*, a peacemaker, who is selected by the community to act as a civil leader.[73] The *naat'aanii* is a guide who helps implement distributive justice by sharing knowledge with the disputants in order to help them achieve consensus.[74] Additionally, the *naat'aanii* has personal knowledge of the parties and dispute and is not impartial or neutral like Western mediators.[75] The desired outcome of the process is to restore harmony between the parties and within the tribe.

b. Case Study: The Rotuman System of Dispute Resolution

The Rotumans are a minority ethnic group in the Republic of Fiji. The Rotumans bear a closer cultural resemblance to other Polynesian ethnic groups, such as the Samoans, than the other ethnic groups in Fiji.[76] In his book, *Dispute Management in Rotuma*, Alan Howard notes that disputes may be as heated as any in the United States. Nevertheless, they are frequently prevented from escalating into violence through dispute resolution techniques such as mediation by local chiefs and ritualized apology.[77]

Again, this indigenous dispute resolution system is aided by:

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67. *Id.*
68. Yazzie, *supra* note 58, at 184.
69. *Id.* at 185.
70. *Id.*
71. *Id.*
72. *Id.* at 186.
73. Yazzie, *supra* note 58, at 186.
74. *Id.* at 186–87.
75. Ulrich, *supra* note 55, at 432.
76. Alan Howard, *Dispute Management in Rotuma*, 46 J. ANTHRO. RES. 263, 263 (1990).
77. *Id.* at 271.

> 1) a cultural belief system that teaches that vengeance may be effected by ancestors if justice is not done in the present;
> 2) a social conditioning to take into account the interests of the larger community, as opposed to solely individual interests; and
> 3) a belief that an apology is frequently more important than restitution and/or retribution.[78]

The Rotumans have five ritualized versions of the formal apology.[79] When performed correctly, acceptance of the formal apology, *faksoro*, is virtually mandatory, and is considered an honorable act.[80] The Rotumans are more typical than not of dispute resolution techniques in Polynesia and Melanesia. Jim Dator, in his Report to the State Justice Institute,[81] documents the use of ADR techniques of dispute resolution in cultures such as Polynesia, Micronesia, and Japan. In his Report, Dator notes, *inter alia*, the importance of "apology," and the involvement of community figures in resolving the dispute.

c. Case Study: The Minority Iban System of Dispute Resolution in the Malaysian Sultanate of Brunei

While the government of Brunei implements the national ideology of Melayu Islam Baeraja (MIB), which enforces Islamic principles, the Iban tribe does not follow the dispute resolution methods set forth by the MIB. Instead, religious law does not have any effect on the dispute resolution process of the Iban. Historically, all members of the Iban tribe lived collectively in an elevated longhouse, a house built on high stilts. The high construction of the house made it easier to defend the dwelling against attack as ladders were drawn up and the house defended by all members of the community.[82] Today, the longhouse still survives as the communal dwelling although it no longer serves the purpose of protection against the enemy. Given that multiple families—sometimes up to twenty-five—share one roof, it is imperative to preserve the peace among the members of the community. The longhouse, therefore, serves as the site of dispute

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78. *Id.* at 268.

79. *Id.* at 272.

80. *Id.* at 274.

81. Jim Dator, Culturally-Appropriate Dispute Resolution Techniques and the Formal Judicial System in Hawaii, Aug. 1991: *available at* http://www.futures.hawaii.edu/publications/courts/CultApproAD1991.pdf (last visited Oct. 9, 2011).

82. Ann Black, *Survival or Extinction? Animistic Dispute Resolution in the Sultanate of Brunei*, 13 WILLAMETTE J. INT'L L. & DISP. RESOL.1, 8 (2005).

resolution. Two sets of rituals guide the process: adat— customary system of beliefs and practices that guide all behavior— and augury— rules for the magic-religious requirements of the participants.[83] A headman guides the dispute resolution process, acting similarly to a mediator in Western dispute resolution.[84] The headman is the member of the longhouse who has the greatest knowledge of adat and augury.[85] Unlike a western mediator, the headman does not stay impartial and neutral.[86] Instead, the headman knows the parties in the dispute and their history in the community.[87] The headman conducts a hearing in the longhouse in which all members of the house can participate.[88] The hearing allows the community to openly discuss the dispute and reach a settlement that would return harmony to the longhouse.[89] A settlement can include restitution, apology, or even ritualistic practices such as spell-casting and performing ceremonies to return good-fortune to the longhouse.[90] Further, the general principles of adat and augury are followed in the resolution of a dispute between members of different longhouses and members of the Iban with non-Iban.[91]

d. China

In pre-revolutionary China, the cultural aspects of conflict resolution are mainly dictated by Confucian values and ethics, such as harmony and compromise. *Li*, rules of conduct governing relations between men and patterns of behavior, are keyed to a person's status or social context.[92] *Fa* is enacted law designed to maintain order through the fear of punishment.[93] Mediation, an integral part of Chinese dispute resolution since the 17th century, continues to fulfill the needs of several levels of society.[94] In addition to *li* and *fa*, there are several other principles that promote mediation instead of adversarial conflict resolution.[95] Honor is very

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83. *Id.* at 9.
84. *Id.* at 11.
85. *Id.*
86. *Id.* at 12.
87. Black, *supra* note 82, at 12.
88. *Id.* at 14.
89. *Id.* at 13.
90. *Id.* at 15.
91. *Id.* at 17.
92. Carlos de Vera, *Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 150, 163 (2004). *See also* JOHN H. BARTON ET AL., LAW IN RADICALLY DIFFERENT CULTURES 108 (1983).
93. Vera, *supra* note 92, at 163.
94. *Id.* at 168.
95. *See id.* at 166.

important in the Chinese system of dispute resolution.[96] Thus, in order to maintain good relations, *ganqing*, the Chinese use mediation to preserve *guanxi*, special relationships in which parties can make unlimited demands of the other.[97] *Renqing*, personal goodwill, and *rang*, willingness to compromise, make the dispute resolution process flow more smoothly.[98] Mediators are elected by the government or local committees. Chinese mediators often educate the disputants, advising how they should think or act and argue for concessions, and therefore, differ in their role from Western mediators who are neutral and impartial.

e. Case Study: African Systems of Dispute Resolution

In Africa, there are numerous examples of indigenous, non-adversarial forms of dispute resolution. Josiah Osamba, for example, has documented examples of indigenous conflict resolution and reconciliation among societies in Eastern Africa.[99] In fact, Osamba argues that the marginalization of indigenous conflict resolution practices is a significant factor to violence in the pastoral regions.[100] In East Africa, as elsewhere in indigenous societies, dispute resolution traditionally involves the whole society, solemn rituals, and agreements. The focus of dispute resolution is on overall justice and respect for each other.

In South Africa, traditional indigenous courts mediate rather than adjudicate. Tribal chiefs or headmen, who are frequently familiar with the participants, often participate in the proceedings. The focus of the proceedings is on restoring harmony and relationships, thereby preventing disruption within and among the tribes.[101]

In the context of Africa, Louise Vincent makes the argument that it is inappropriate in the context of Africa to make an essentialist distinction between men and women.[102] She would therefore argue that it is a

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96. *Id.*

97. *Id.* at 167.

98. Vera, *supra* note 92, at 167.

99. *See generally* Josiah Osamba, *Peace Building and Transformation from Below: Indigenous Approaches to Conflict Resolution and Reconciliation Among the Pastoral Societies In The Borderlands Of Eastern Africa*, 2 AFR. J. CONFLICT RESOL. (2001), *available at* http://www.accord.org.za/downloads/ajcr/ajcr_2001_1.pdf (last visited Oct. 9, 2011).

100. *Id.*

101. *See generally* R.B.G. Choudree, *Traditions of Conflict Resolution in South Africa*, 1 AFR. J. CONFLICT RESOL. (1999), *available at* http://www.accord.org.za/ajcr/1999-1/accordr_v1_n1_a2.pdf (last visited Oct. 9, 2011).

102. *See generally* Louise Vincent, *Entering Peace in Africa: A Critical Inquiry into Some Current thinking on the Role of African Men in Peace-building*, 2 AFR. J. CONFLICT RESOL. (2001) *available at* http://www.accord.org.za/downloads/ajcr/ajcr_2001_1.pdf (last visited Oct. 9, 2011)[hereinafter *Vincent*].

questionable assumption that women possess essential qualities that make them particularly effective peacemakers.[103] Engaging in such essentialist categorization prevents them from obtaining advantages primarily available to men and ignores the substantial differences among women. Moreover, doing so forgets women who contribute directly or indirectly to violence.

On a practical level, many post-war reconstruction social programs attempt to "empower" women to take active roles but actually focus solely on these roles—attention to which is drawn by the same persons who pigeon-hole in the first place—and focuses women on empowering themselves in these limited capacities without consideration of issues which are the actual bases of war and violence. Peace and roles of women are marginalized by socially constructed gender stereotypes and unequal gender relationships. The vulnerability of women in times of crises comes not from their sensitive natures but from the constrictions placed on them by social structures forcing them to be victims.[104]

IV. CONCLUSION

The Common Law approach to dispute resolution, with its focus on a battle between the participants, is a result of the unique history of the common law rather than male domination of the process *per se*. The present system of dispute resolution employed in common law countries, while containing certain attributes that are certainly functional with respect to adjudicating disputes, is nevertheless based upon a long tradition ultimately rooted in ritualized gladiatorial combat having little to do with contemporary notions of justice. Understanding this history allows society to change the debate over legal reform from an essentialist battle over gender to a battle over functionality and a focus on the values that we, as a society, wish to see implemented in our system of dispute resolution.

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103. *See also* Rosenblum, *supra* note 29, and accompanying text.

104. Vincent, *supra* note 102.