Portia Redux: Another Look at Gender, Feminism, and Legal Ethics

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In 1985, I wrote an article entitled, “Portia in a Different Voice: Speculations on a Women’s Lawyering Process.” In that article I attempted to explore how gender differences might affect the ways in which lawyers performed their tasks, structured their work, made ethical decisions, and interpreted and enforced the law. The article was a speculation on, and application of, the then very popular theories of a noted educational psychologist, Carol Gilligan. Gilligan’s book, In a Different Voice: Psychological Theory and Women’s Development, was at that time both soundly embraced and criticized by American, British, and Australian feminists. Her argument posited a male mode of moral reasoning referred to as the “logic of the ladder” because of its vertical hierarchy of values. This male mode of reasoning was based on abstracted, universalistic principles applied to problematic situations to create an “ethic of justice.” Opposed to male moral reasoning was the female “ethic of care,” based on the structure of the “web.” This female ethic was grounded in a relational, connected, contextual form of reasoning that focused on people, as well as the substance of a problem.

Carol Gilligan and I used the character of Portia from Shakespeare’s The Merchant of Venice to illustrate the oppositional ethics that exist in any problem of justice or moral reasoning. Both of us inscribed in our reading of Portia—disguised as a male jurist and alternately interpreted to be a lawyer, judge, legal envoy, or law clerk—a lawyer who appealed to the equitable, contextual, merciful sides of law, rather than to the draconian certainty of rules and universal principles.

A great deal has happened since 1985, and I welcome this opportunity
to reexamine the arguments that I and others have made in our claims of feminist ethics based on an ethic of care.

Empirical research seeking to assess these differences in women’s lawyering is quite mixed and often depends on the frame of reference of the researcher. Thus, sociologist Cynthia Fuchs Epstein, after a full career of studying women lawyers, suggests that those seeking difference will find it, while those who seek to establish women’s “equality” to men may be more likely to find more overlap in behavior than difference. 4 In short, Epstein maintains there may be more variation among individuals within a particular gender in their legal behavior, than differences across gender. While some studies support the notion that women may have different motives for studying and practicing law, other studies report that whatever differences were previously present are diminishing over time, either because the greater number of women entering law reduces the stark motivational differences or because students in general have become more conservative over time. Still other studies report that there are no gender differences in motivation to study or practice law at all.

Contributions to the development of law go beyond some of the process claims about practice referred to above, and suggest areas where women or other excluded groups in the profession have had or will have an impact on the substantive law. Women lawyers have adopted a variety of strategies or patterns of arguments in advocating legal and doctrinal change. These arguments range from utilizing conventional categories to protect women’s interests, such as claims for privacy and equality, to re-crafting old categories, such as the defense of consent in rape. Women lawyers are also creating new categories of analysis, such as sexual harassment and pornography, and exposing male and white bias. They challenge assumptions of male experience in defining legal categories, such as freedom from connection in defining liberty, and they argue that women’s difference will produce different legal theories and constructions thereof, such as the recognition of additional compensable wrongs in the tort arena. Finally, feminist scholars and lawyers are exposing how law disadvantages women, even when framed in “neutral” terms, and exposing how arguing from a woman’s perspective may transform the legal emphasis from one of rights to one of needs. Like critical race theorists, feminists argue that their position as outsiders, and as the “acted upon” in law, allows them to see other possibilities of legal regulation and definition. Recently, women theorists and lawyers have moved from analyzing “traditional” women’s issues to more conventional legal doctrinal areas. This
move is an attempt to illuminate how corporations, labor unions, organizations, and bankruptcy proceedings might be reconfigured to include women actors.

Claims that women might begin to think of legal categories in different ways do not require adherence to an essentialist position about women's natures. If only a few women think of legal categories in different ways or shift the perspective from which the larger community analyzes legal problems, then women will have contributed to a broadening of our thinking about law. Just as "two heads are better than one," the inclusion of both genders will increase the number and quality of ideas available to solve legal problems and to revise conventional, and often taken-for-granted, categories. In my view, this analysis also provides a forceful argument for the inclusion of other groups traditionally excluded from the law, including visible and invisible minorities, the physically challenged, gays, and racial and ethnic minorities. Any disruption of conventional and dominant group thinking must improve the quality of legal decision-making.

As noted by my constitutional law colleague, Kenneth Karst, the key to an ethic of justice is a rights consciousness that is located in the right not to be interfered with, in other words, personal and individual liberty. From this we can see the foundational aspects of the Anglo-adversary system: "I take care of my side and you take care of yours and almost anything we do to win our 'rights' is justified."

Juxtaposed against this philosophy of liberal individualism is the ethic of care that struggles with rules, prefers to make decisions in contexts, tries to keep the parties in relation, and conceives of a responsibility to others. An ethic of care suggests concern for others and reduction of harm. It suggests a shift in focus from converting the negative sum games of law, in which the lawyers benefit, to a more positive sum game, in which the parties benefit, might transform the adversary system. The difficult question in analyzing these themes in practical legal ethics is, do they produce different principles or processes for resolving ethical dilemmas?

Before I return to the question of what women lawyers' legal ethics might be, let us consider how the character of Portia in The Merchant of Venice illuminates both the complexities of the rule and morality of law and the ambiguities of gender in legal role-playing. The Merchant of Venice places discussions of ethics, morality, and right-doing at its center. Complicated for modern readers by the controversial aspects of its anti-Semi-
tism, the play still deals with important modern moral and legal ethical dilemmas—contracts, commercial bonds, fidelity, marriage, friendship, loyalty, justice, the spirit versus the letter of the law, legal remedies, and choice. Portia has become an evocative figure primarily because of the “mercy speech” she delivers in Act IV, and it is her role upon which I will focus. Nonetheless, the deeper meaning of Portia's character must be derived from her behavior in other scenes of the play as well.

During the trial scene of The Merchant of Venice, Portia, disguised as a male jurist, comes to “save” the fate of her lover Bassanio’s friend, Antonio, against the demands of enforcement of the bond of Shylock the Jew. The recompense is a “pound of flesh” for failure to honor a debt. Over the years, many literary critics and legal commentators have read this scene as central to one of the major themes of the play, that “mercy should season justice.” Portia is seen as the symbol of mercy and Shylock the symbol of “justice, judgment and Law.” The source of much of this commentary is Portia’s first main speech in the scene where she sets the stage by asking Shylock to consider the virtues of mercy:

The quality of mercy is not strain’d,
It droppeth as the gentle rain from heaven
Upon the place beneath: it is twice blest,
It blesseth him that gives, and him that takes,
'Tis mightiest in the mightiest, it becomes
The throned monarch better than his crown.
His sceptre shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings:
But mercy is above his sceptred sway,
It is enthroned in the hearts of kings,
It is an attribute to God himself: . . .

In this passage, which is evoked by feminists and others seeking the feminine side of mercy and justice, Portia tries to persuade Shylock that power is the possession of earthly kings who inspire fear and dread, rather than the attribute—mercy—that brings kings closer to God by feeling it in their hearts. Portia is appealing to Shylock to give up his legal claim, with a powerful reference to the contrast between state and earthly power and religion. In the context of the play, such a reference is distinctly ironic.
Shylock’s God is not Portia’s God, and Shylock sees the law as a source of equal treatment in Venice—at least until other Venetian laws are conveniently uncovered—even if he is an outsider Jew. In addition to her appeal to the sacred, Portia asks Shylock to be empathetic, to recognize that only when others impose the law upon us are we likely to ask for mercy. When we are the actor imposing the law or demanding justice of others, we want the law to operate exactly according to text. By reminding Shylock that we all want salvation, she asks him, in effect, to “do unto others as you would have them do unto you.” It is from this famous and evocative speech that Gilligan and I have argued that Portia represents a feminine, mediating force in law, calling for the tempering of justice with mercy and appealing to hearts as well as scepters.

Yet it is important to examine the rest of the scene to fully understand the complexity of Portia’s role as lawyer. Shylock rejects Portia’s pleas. “I crave the law,” he says, “the penalty and forfeit of my bond.” At that moment, Portia becomes an extraordinary, albeit conventional, lawyer. She recognizes that the law must be followed and the bond enforced because precedents must be obeyed or “many an error by the same example will rush into the state,—it cannot be.”

Having decided that the law must be enforced, Portia demands to see the document, the contract of debt. She gives Shylock his judgment—a pound of flesh, closest to the heart of Antonio. Then, in an act of clever lawyering and language manipulation, Portia proceeds to read the text of the law quite literally. She reports that Shylock had better find a skilled surgeon, for the bond grants him a pound of flesh, but “this bond doth give thee here no jot of blood, The words expressly are ‘a pound of flesh.’ Take then thy bond, take thou thy pound of flesh, But in the cutting it, if thou dost shed One drop of Christian blood, thy lands and goods Are (by the laws of Venice) confiscate Unto the state of Venice.” Portia shows Shylock the law and tells him that if he urges justice, he shall have justice and, thus, must live by the law himself. Shylock capitulates and asks for the previously offered “settlement” of three times the money owed. Yet, Portia, the masterful lawyer, recounts still another Venetian law in response. Because Shylock will have “justice,” interpreted as the letter of the law, he must contemplate how those laws affect him as well; according to the law, any alien—Jew—who seeks to tamper with the life of a citizen shall lose his property, half to the citizen harmed and half to the state. Furthermore, his life shall be at the discretion of the Duke. The Duke and Antonio, however, show Shylock their mercy. They allow him to live, but only as a
Christian, forcing him to give up his faith and identity. They condition their mercy on Shylock’s promise to leave his property to his Christian son-in-law.

Has mercy triumphed over justice? No. Portia has played a clever lawyer’s game and shown that she can be as manipulative of language and the law as any of her brethren. Can we, as others have argued in their commentaries, try to read the feminine back into her plea for mercy because she is dressed as a male when she plays the judge? Does Portia demonstrate the need for women to conform to conventional legal rules when they become lawyers, in a sort of professional form of cross-dressing? In this argument we have to see her plea for mercy, also made while disguised, as expressing her real, more female self. We must also acknowledge that the actual acts of “mercy” in this act are committed by men, Antonio and the Duke.

I think Portia’s “disguise” is an important metaphor. Portia’s judge’s robes are those of the professional role and “mantle” she must take on. She tries to use non-rule-based measures of morality and justice—mercy, heart, feeling, concern for others—to appeal to Shylock, but when forced to resort to law and rules, she shows herself as capable as any male lawyer. Perhaps it is Shylock’s unwillingness to accept her offer of mercy that pushes Portia into the literal reading of the contract—demonstrating how hard it is, even for judges, to dislodge the desire of litigants from their self-interested “justice.” Disentangling implications of gender in this play is further complicated by the fact that Portia, in Shakespeare’s time, was actually played by a male disguised as a female while playing Portia. Of course, all the words were written by a male. And, as some commentators have suggested, Portia’s “justice” is correct—Shylock would, after all, be a murderer or at least have murderous intent. Should punishment be meted out for the consequences it would deter or should punishment be sensitive to the rehabilitative possibilities of particular wrongdoers?

Portia is a complex character, able to slip back and forth between both gender and professional roles; she demonstrates what sociologists term “role virtuosity” and flexibility. Sophisticated feminists now know that we cannot make claims for “women” based on a universalistic attribution of generalized characteristics of womanhood. Thus, Portia’s variegated behavior demonstrates that not all women act from some essentialist place called “womanhood.” Indeed, the treatment of Jews as cruel, usurious, and evil in Shakespeare’s essentialist world should remind us of the danger of attributing individual qualities to whole groups of people.
Yet Portia’s role in The Merchant of Venice is not without purpose: she comes to save her husband’s friend. Thus, posed as a judge, she is not impartial—she has a purpose. Consider the difficulties of partiality and purpose in the roles of judges and lawyers as they seek both to represent and rule on particular clients, parties, and laws. As judges, would women play their roles with more emotional partiality or concern for the Other? Portia’s effort is to save someone, a noble goal. But, she “disguises” herself as an impartial judge and clearly, in a modern context, would be disciplined for her bias and lack of disclosure in the case. Are those who represent good causes to be forgiven the means that they employ? This remains a heated issue in legal ethics, as elsewhere in moral philosophy, and there is no clear answer.

What are we to make of Portia’s brilliant lawyering to save her husband’s friend whose debt in fact helped finance her marriage? What are we to make of the fact that Portia, like any advocate, has taken the short-term, immediate gratification approach, rather than the long-term view? Are we concerned that Portia, like others in the play, is racist and does not see the humanity of the Jew, while nonetheless asking him to see the humanity of Antonio? Hell hath no fury like a woman advocate advancing her own cause! Portia’s behavior warrants the frequent criticism that accompanies “strident” feminist law reformers who blindly see all men as the enemy.

Yet Portia’s actions in Act IV must be read together with her action in Act V, as well as with her prior big scenes—scenes in Acts I and II in which she comes to terms with the patriarchal “rules” established for the choice of her mate. Ultimately, Portia is a learner and a harmonizer. She accepts the rules of her father, and she teaches her husband a lesson or two about marital fidelity and loyalty in the concluding “rings” scene, while still making room for her husband’s friend. Thus, Portia adopts the rules and ways of men, yet simultaneously extracts promises of love and fidelity, and suggests other roles for law and justice by stressing our connections to one another as members of humanity.

Asking students and lawyers to think about the effects of their work on others and on themselves, the wear and tear of conventional adversary practice, and working through legal ethical hypotheticals together with collective, multi-personed groups are some of the ways that the conventional justice system modeled on individual autonomy could be affected by women’s and other voices in the law. Collective grappling with ethical problems as they are happening has always seemed far more enriching to me than resolving difficult problems through a priori rules that one can then argue do not apply or can be distinguished. I know we will have to
agree on some first principles for our legal communities, but it seems to me that before we finalize our rules we need to hear more conversations with more Portias and others who have new, if complex, suggestions for how we should determine legal morality.

Thus, broadly defined "legal ethics"—leading our lives as lawyers, making decisions about our clients, our opponents, ourselves, and our families, searching to be "good lawyers" as well as "good people"—in my view is enhanced by taking account of the values of "others," those previously outside the profession. Whether the character Portia, or the real Portias who currently practice law, are actually the representatives of alternative values, we cannot yet say. But it seems to me that both legal education and law practice should look for ways to allow a broader range of values to be expressed, while acknowledging that debate and discussion will be difficult. We are at the first stage, acknowledging and arguing about whether mercy has a place in a rule-bound system of justice, trying to figure out what it means to be a caring lawyer. The second stage will seek to define these terms more rigorously, to apply them to particular situations, and to let the moral philosophers and legal ethicists debate their validity. We will try to educate new lawyers to be sensitive to these additional values, and then we will have to measure if they are, and if it makes any difference in what they do. For me, Portia may have more value as a symbol than as a reality. But, as a foil, or as an alternative to a rigid system of rules and justice, she provides a metaphor for at least one critique of law that I look forward to following in the years to come.